OBITER

Published by the Faculty of Law
Nelson Mandela University
Uitgegee deur die Fakulteit Regte
Nelson Mandela Universiteit
Port Elizabeth

Obiter is a peer-reviewed journal and is approved by the Department of Education for SAPSE purposes.

ISSN 1682-5853

O B I T E R
2022 Vol 43 3

Articles/ Artikels

"Something Old, Something New" – Aspects of Personality Rights in the United States and South Africa *by Karabo Mangope and Wim Alberts* 416-435

Does the Prescription Act Apply to Claims Under the Labour Relations Act? *by Chuks Okpaluba and M Budeli-Nemakonde* 436-466

Fighting Food Insecurity, Hunger, and Poverty: The Content and Context of the Socio-Economic Right of Access to Sufficient Food in South Africa *by Duduzile G Mbajiorgu and Kola O Odeku* 467-488

The Role of the Magistrate in Extradition Proceedings in South Africa: Meaning of "Fair Trial" and "Competent Court" in a Requesting State *by Jamil Ddamulira Mujuzi* 489-508

Determining "Permanent Establishment" in the Digital Economy Epoch: A Case for South Africa *By Mzwandile Ngidi* 509-535

The Convergence of Legislation on Cybercrime and Data Protection in South Africa: *A Practical Approach to the Cybercrimes Act 19 of 2020 and the Protection of Personal Information Act 4 of 2013 by Sizwe Snail ka Mtuze* 536-569

Social Insurance Coverage for SADC Migrant Workers in South Africa: A Regional and International Framework Compliance Analysis *by Bongani Khumalo* 570-587

Motivating Law Students to Write Like Lawyers: Contextualising Learning in the "Write it like a Lawyer" Case Study *by A Crocker* 588-604

O B I T E R
2022 Vol 43 3

Cases/ Vonnisse

Protest Action Within the Ambit of the Labour Relations Act 66 of 1995 – *COSATU v Business Unity of South Africa* (2021) 42 *ILJ* 490 (LAC) *by ME Manamela* 605-616

When are Personal Rights Too Personal to be Ceded? – *University of Johannesburg v Auckland Park Theological Seminary* 2021 JDR 1151 (CC) *by Sfiso Benard Nxumalo* 617-629

The Impact of the *Komape* Judgment on the South African Common Law of Delict: An Analytical Review *Komape v Minister of Basic Education* [2020] 1 All SA 651 (SCA); 2020 (2) SA 347 (SCA) *by Michael C Buthelezi* 630-640

The Legalities of Mandatory Covid-19 Vaccination at Universities: Lessons to be Learnt from *Klaasen v Trustees of Indiana University (No. 1:21-CV-238 DRL, N.D. Ind.) by Desan Iyer* 641-648

"SOMETHING OLD, SOMETHING NEW" – ASPECTS OF PERSONALITY RIGHTS IN THE UNITED STATES AND SOUTH AFRICA*

Karabo Mangope
BCom LLB LLM
Candidate Attorney, Spoor & Fisher

Wim Alberts
BIur LLB LLM LLD
Professor, University of Johannesburg

SUMMARY

Advances in technology have made it possible for the least talented person to become an Internet sensation. This has created challenges related to personality or image rights, data protection, privacy, and the right to be forgotten. The position in the United States of America is dealt with first. Individuals can rely on either federal law or state law. Section 43(a) of the Lanham Act prohibits conduct that causes confusion or false representations or deception. The right to publicity is very prominent. The author Prosser divided the right to privacy by reference to four categories of tort: the intrusion of physical solitude; public disclosure of private facts; representations in a false light; and the appropriation of a person's name and appearance. Richards and Solove believe that the right to publicity is often combined with an individual's appearance or name. The difference between appropriation and the right to publicity is that the former is traditionally focused on the damage to a person's right to privacy, while the latter focuses on the person's right to make money from their image. In South Africa, Cornelius is of the opinion that the approach here is more advanced than in other countries as the right to dignity is protected by the right to identity. Exclusions from liability in America would include newsworthy information and parody. In South Africa, the exclusions are press privilege and parody. The legal position of social media service providers in the United States is such that a high degree of immunity is provided to networks by the Communications Decency Act. Section 230 of the Act was aimed at promoting the free exchange of information and ideas over the Internet and at the control of offensive material. The right to be forgotten occurs in both systems.

---

* Based on Mangope *Multiple Personality Disorder: A Comparative Analysis of the Dissociative Application of Personality Rights in the Age of Social Media* (LLM dissertation, University of Johannesburg) 2020.

1 INTRODUCTION

Advances in the field of technology have made it possible for the least talented of individuals to become Internet sensations. A quick snapshot of an unknown person could easily go viral. Fame used to be reserved for the few and favoured but has become accessible to all of us. This has resulted in challenges when addressing legal questions pertaining to the association of personality or image rights, data protection, privacy, and the right to be forgotten, as well as the subject of liability in cases involving the alleged infringement of the aforesaid rights.[1] Some perspectives on the issue are given from the United States (US) and South Africa (and, at times, the European Union (EU)).

2 BASIS OF PROTECTION

While the phrases "personality rights", "image rights" and "publicity rights" are often used, their applications are varied.[2] The terms "right to publicity" and "personality rights" are also used interchangeably but have different applications across jurisdictions.[3] The underlying rationale of these rights is the protection of the right of the individual to control his or her name, image, likeness or similar indicators, as well as to control the commercial use of a person's identity.[4]

Publicity rights serve to protect an individual's image and likeness from being commercially exploited without authorisation where fame is sought after.[5] Publicity rights can also be extended to those who desire to protect their privacy and image from being shared publicly in an unauthorised manner, thus resulting in unintended and eschewed fame.[6]

2 1 The American approach

The legal system of the US consists of two parts – federal law and state law. Federal law applies to all 50 states, whereas state law applies to a specific state. Publicity rights are "an assignable property interest in a person's image",[7] and their foundations are built on privacy and economic exploitation.[8] In the US, individuals have the option of protecting and controlling the commercial use of their name, image, and/or likeness by

1 Martínez and Meccinas "Old Wine in a New Bottle? Right of Publicity and Right to be Forgotten in the Internet Era" 2018 *Journal of Information Policy* 373.

2 Martínez and Meccinas 2018 *Journal of Information Policy* 376.

3 Neethling "Personality Rights: A Comparative Overview" 2005 38 *Comparative and International Law Journal of Southern Africa* 220.

4 *Ibid*.

5 Gervais and Holmes "Fame, Property and Identity: The Scope and Purpose of the Right to Publicity" 2014 25 *Fordham Intellectual Property, Media and Entertainment Law Journal* 195.

6 *Ibid*.

7 Heise "Reclaiming the Right to Publicity in the Internet Age" 2018 *Charleston Law Review* 363.

8 *Ibid*.

means of either the federal law (in the form of the Lanham Act) or state-based publicity rights.[9]

2 1 1 The Lanham Act of 1946

Section 43(*a*) provides:

> "(1) Any person who, on or in connection with any goods or services, or any container for goods, uses in commerce any word, term, name, symbol, or device, or any combination thereof, or any false designation of origin, false or misleading description of fact, or false or misleading representation of fact, which–
>
> (A) is likely to cause confusion, or to cause mistake, or to deceive as to the affiliation, connection, or association of such person with another person, or as to the origin, sponsorship, or approval of his or her goods, services, or commercial activities by another person, or
>
> (B) in commercial advertising or promotion, misrepresents the nature, characteristics, qualities, or geographic origin of his or her or another person's goods, services, or commercial activities,
>
> shall be liable in a civil action."

Some celebrities have succeeded with false endorsement claims under the Lanham Act. However, state publicity rights have also been relied upon.[10] One such example can be found in the case of *Waits v Frito-lay and Tracy Locke, Inc*,[11] where Tom Waits successfully won a claim based on the action of false endorsement. The distinctive feature of his voice was used in a parody commercial for Salsa Rio Doritos.[12] The Ninth Circuit Court agreed with Waits that consumers were likely to be misled.[13]

2 1 2 Publicity rights

Publicity rights differ from those rights recognised in section 43(*a*) of the Lanham Act, and are applied differently from state to state.[14] The right to publicity stems from the right to privacy and the right to exploit one's own image.[15] The recognition of the right to privacy can be traced back to the late 1800s; the first concept of such a right originated in an article published in the *Harvard Law Review* by Samuel D Warren and Louis D Brandeis JJ.[16] The right was theorised as an infraction on human dignity through the public release of information that brings an individual's reputation into disrepute.[17] The right to privacy was first recognised judicially in *Pavesich v New*

---

9 *Ibid*.

10 For the requirements, see *Toth v 59 Murray Enterprises, Inc* 15 Civ. 8028 Southern District of New York (2019).

11 978 F.2d 1093 (1992).

12 *Waits v Frito-Lay, Inc supra* 1106–1107.

13 *Waits v Frito-Lay, Inc supra* 1111.

14 Solomon "Can the Lanham Act Protect Tiger Woods? An Analysis of Whether the Lanham Act is a Proper Substitute for a Federal Right of Publicity" 2004 *Trademark Report* 1202 and 1205.

15 Heise 2018 *Charleston Law Review* 363.

16 Warren and Brandeis "The Right to Privacy" 1890 4 *Harvard Law Review* 205.

17 Warren and Brandeis 1890 *Harvard Law Review* 197.

England Life Insurance Company.[18] In this case, Paolo Pavesich claimed that New England Mutual Life Insurance Company (NEMLIC) had violated his privacy by using a picture of his likeness, without his consent, to advertise life insurance.[19] Pavesich also claimed that the words used alongside the picture appeared to endorse NEMLIC's insurance.[20] The court held that the use of the image, without consent and for commercial gain, amounted to an invasion of Pavesich's privacy.[21]

The writer Prosser went on to develop the right to privacy by referring to four distinct torts: intrusion upon physical solitude; public disclosure of private facts; depiction in a false light; and appropriation of name and likeness.[22] The basis of the appropriation of name and likeness sub-category was given context through an individual's claim of embarrassment or reputational harm.[23] The 1950s coincided with golden-age Hollywood when there were calls to develop the appropriation tort to consider the economic rights a person would have in his or her image, thereby placing the person in a position to bring a claim against an infringement of the said right.

Today's publicity rights stem from the appropriation tort.[24] Publicity rights gained official recognition in the US in the landmark case of *Haelan Laboratories v Topps Chewing Gum Inc*,[25] where Jerome Frank J conceived the term "publicity rights".[26] The case involved two manufacturers that produced gum and packaged baseball cards with their gum. Haelan Laboratories had exclusive contracts with several baseball players for the use of their images. However, these baseball players signed similar contracts with Topps.[27] Haelan then approached the Second Circuit Court with a claim for breach of contract.[28] The Second Circuit Court held that a person has an assignable right in his image and can give exclusive publishing rights in the "publicity value of his photograph".[29] The court went on to describe the essence of the right to publicity and stated that it was not about publicising information about a person that may be humiliating or offensive, but rather that there exists an economic aspect capable of being exploited.[30]

The Second Circuit Court also recognised the commercial value of being a celebrity[31] and held that baseball players could sell the exclusive right to

---

18 122 Ga 190 50 SE 68 (1905).

19 Rice "The Right to Privacy" 1920 *University of Pennsylvania Law Review* 285.

20 *Ibid*.

21 Rice 1920 *University of Pennsylvania Law Review* 286.

22 Prosser "Privacy" 1960 48 *California Law Review* 391.

23 Heise 2018 *Charleston Law Review* 363.

24 *Ibid*.

25 202 F.2d 866 (2d Cir 1953).

26 Hylton "Baseball Cards and the Birth of the Right of Publicity: The Curious Case of *Haelan Laboratories v Topps Chewing Gum*" 2001 12 *Marquette Sports Law Review* 274.

27 *Haelan Laboratories v Topps Chewing Gum Inc supra* 867.

28 *Haelan Laboratories v Topps Chewing Gum Inc supra* 869.

29 *Haelan Laboratories v Topps Chewing Gum Inc supra* 868.

30 *Ibid*.

31 Johnson "Disentangling the Right of Publicity" 2017 111 *Northwestern University Law Review* 897.

the use of their images to third parties.[32] This decision shifted publicity rights theory from the submission by Warren and Brandeis that infringement occurs only where a person's dignity is harmed, and recognised that such legal rights can be enforced based on their commercial viability.

Although an overlap exists between the right to publicity and the principles of trade marks, the former is not recognised under the law of trade marks.[33] The rationales behind the right to publicity and the law of trade marks respectively is important as they determine the proper demarcation of each right.[34] The protection of the consumer from deception is the basis of the law of trade marks. However, such protection serves merely as an incentive in the case of publicity rights.[35] In alleging infringement, the owner of a trade mark must prove that the use of the trade mark would confuse or be likely to confuse the consumer.[36] An individual claiming infringement of the right to his or her image and likeness has a right to his or her identity.[37] This rationale may be derived from the Lanham Act, as interpreted in the Third Restatement of Unfair Competition.[38] It can be said, then, that publicity rights protect the "commercial use of non-deceptive, non-private references of an individual".[39]

With the rise in online fame, the right to privacy is constantly being challenged and opportunities for commercial gain are on the increase. Fame has now become a commodity that any individual can gain, whether or not it is desired. Therefore, publicity rights should be interpreted in such a manner that they benefit any individual who has a substantive commercial asset embodied in their identity.[40] This notion is supported by Armstrong who states that judges tend to expand their interpretation of *persona* to keep away from arbitrarily determining who may or may not rely on the right to publicity.[41]

Richards and Solove opine that the right to publicity is often combined with an individual's right not to have his or her name or likeness misappropriated.[42] Causes of action based on each of these rights rely on the unauthorised use of another person's name or likeness for a commercial

---

32 *Haelan Laboratories v Topps Chewing Gum Inc supra* 867.

33 Gervais and Holmes 2014 *Fordham Intellectual Property, Media and Entertainment Law Journal* 182.

34 Gervais and Holmes 2014 *Fordham Intellectual Property, Media and Entertainment Law Journal* 183.

35 *Ibid*.

36 *Ibid*.

37 *Ibid.*

38 *Restatement (Third) of Unfair Competition* s 46 1995. This Code deals with protection against the use of a mark in a confusing, false and deceptive way and to prevent people from being misled when purchasing goods that are seemingly endorsed by a particular celebrity or social media personality.

39 Gervais and Holmes 2014 *Fordham Intellectual Property, Media and Entertainment Law Journal* 185.

40 Schlegelmilch "Publicity Rights in the UK and the USA: It Is Time for the United Kingdom to Follow America's Lead" 2016 *Gonzaga Law Review Online* 110.

41 Armstrong "The Reification of Celebrity: Persona as Property" 1991 51 *Louisiana Law Review* 466.

42 Richards and Solove "Prosser's Privacy Law: A Mixed Legacy" 2010 98 *California Law Review* 1888–1890.

purpose.[43] The difference between the right not to be misappropriated and the right to publicity is that the former is traditionally centred on the harm done to a person's privacy right, whereas the latter focuses on the harm done to a person's right to make money from the use of their likeness.[44] The courts have applied these legal principles interchangeably and this has caused confusion as to whether celebrities may claim for misappropriation owing to the relinquishment of their privacy as a result of achieving "celebrity status", and whether the layman may rely on his or her right to publicity despite his or her image not being "profitable".[45] It is therefore uncertain whether publicity rights protect individuals' economic interest in their image, their privacy, or both.[46]

2 2 The South African approach

Personality rights in South Africa are protected under the common law of delict and by the Bill of Rights contained in chapter 2 of the Constitution.[47] The remedy where a personality interest has been affected is known as the *actio iniuriarum*. The *actio iniuriarum* protects a person's right to physical integrity, the right to a good name, and the right to *dignitas*.[48] *Dignitas* includes an individual's honour, privacy and identity.[49]

2 2 1 Personality rights

It seems that South Africa protects image rights under the umbrella of personality rights, but it has been said that the lack of a clear point of departure indicates that the law needs to be developed in this area of law.[50] There have been instances where the law has been adapted to accommodate publicity rights without adopting foreign principles,[51] and a definition of publicity rights has been given in a South African context. Michau states that publicity rights involve "the control and associated benefit that an individual, especially a celebrity, derives from the exploitation of the commercial value embodied in his name, photograph, statue, display, and other personality traits".[52] In South Africa, the unauthorised use of a person's photograph in an advertisement was first considered as a ground to institute the *actio iniuriarum* in the case of *O'Keefe v Argus Printing & Publishing Co Ltd*.[53] This case was the first to recognise the right of identity as a

43 *Ibid*.
44 Messenger "Rethinking the Right of Publicity in the Context of Social Media" 2018 24 *Widener Law Review* 261.
45 Richards and Solove 2010 *California Law Review* 1890.
46 Messenger 2018 *Widener Law Review* 261.
47 Constitution of the Republic of South Africa, 1996.
48 Michau "Publicity Rights" 1994 2 *Juta's Business Law* 186.
49 *Ibid*.
50 Van der Merwe, Geyer, Kelbrick, Klopper, Koornhof, Pistorius, Sutherland, Tong and Van der Spuy *Law of Intellectual Property in South Africa* (2016) 43.
51 *Ibid*.
52 Michau 1994 *Juta's Business Law* 187.
53 1954 (3) SA 244 (C).

protectable interest that is violated where advertising involves the unauthorised use of a person's image for commercial purposes.

The Supreme Court of Appeal in *Grütter v Lombard*[54] recognised that a person's right to identity is infringed when a part of that identity is used without consent and for commercial exploitation.[55] The court had to determine whether the use of the appellant's name, even though he no longer was a part of the firm, was permissible. Nugent J held that the right to privacy is a part of a person's personality and must be protected as part of their personality.[56] Another aspect that the court had to determine was whether a person's identity is a protectable right.[57] Nugent J relied on the principles laid out in *O'Keefe* where it was held that the publication of a person's name and likeness for commercial purposes without consent could constitute an infringement of the person's dignity,[58] as such publication does not reflect the true representation of the individual.[59] The infringement, therefore, is based on the illegitimate use of the person's name, a misrepresentation that the person endorses a particular product or service, and the violation of their human dignity.[60] With regard to the use of a person's identity for commercial gain, the plaintiff's claim would be founded on the violation of his or her right to association and commercial exploitation.[61]

In *Wells v Atoll Media (Pty) Ltd*,[62] the photograph of a minor was used in a surfing magazine, which was then displayed on television for an advertisement of the magazine.[63] This caused a commotion in the minor's community and offensive remarks were made about her on online platforms and in text messages.[64] The judgment restated the position in *Grütter v Lombard*[65] that the unauthorised use of a person's image constitutes an unjustifiable invasion of privacy,[66] and where the image is published in a magazine, it evidently is for commercial gain and violates the plaintiff's rights to a good name, privacy and identity.[67] In the earlier case of *Kumalo v Cycle Lab*,[68] former Miss Soweto and Miss Black South Africa title holder, Basetsana Kumalo, instituted proceedings against a bicycle retailer. The plaintiff's picture had been taken without her consent and the shop used the image in its shop and advertisements.[69] The court in *Kumalo v Cycle Lab*

54 2007 (4) SA 89 SCA.
55 Cornelius "Commercial Appropriation of a Person's Image: *Wells v Atoll Media (Pty) Ltd* (unreported 11961/2006) [2009] ZAWCHC 173 (9 November 2009)" 2011 14 *PER* 194.
56 *Grütter v Lombard supra* par 12.
57 *Grütter v Lombard supra* par 8.
58 *Grütter v Lombard supra* par 11.
59 Cornelius 2011 *PER* 195.
60 Cornelius 2011 *PER* 196; Neethling *Persoonlikheidsreg* (1998) 44.
61 Cornelius 2011 *PER* 196.
62 (Unreported 11961/2006) [2009] ZAWCHC 173 (2009-11-09) 2011.
63 *Wells v Atoll Media (Pty) Ltd supra* par 1–6.
64 *Wells v Atoll Media (Pty) Ltd supra* par 9.
65 *Grütter v Lombard supra*.
66 *Grütter v Lombard supra* par 48.
67 *Grütter v Lombard supra* par 49.
68 (31871/2008) [2011] ZAGPJHC 56 (2011-06-17).
69 *Kumalo v Cycle Lab supra* par 3–4.

restated that the unauthorised use of someone's image in a manner that falsely misrepresents the endorsement of a product or service for commercial gain constitutes an infringement of the plaintiff's personality rights, particularly his or her right to identity and privacy.[70]

2 2 2 The actio iniuriarum

The South African law concerning personality rights is based on the *actio iniuriarum* of Roman law.[71] The *actio iniuriarum* recognises that persons can claim for infringements to their *corpus*,[72] *fama*[73] and *dignitas*.[74] The right to dignity is entrenched in the Bill of Rights[75] and lies at the heart of Roman and Roman-Dutch personality law.[76]

Cornelius submits that the *actio iniuriarum* is wide enough to cover any transgression against a person's dignity and/or commercial exploitation with respect to the individual's public image and persona,[77] and argues that applying the current law to any new developments in society would provide sufficient protection.[78] This was further echoed in *Khumalo v Holomisa*[79] where it was stated that defamation actions in respect of someone's public image[80] are protected by constitutional provisions, specifically freedom of expression and dignity.[81] The Constitutional Court emphasised the importance of dignity in *Harksen v Lane.*[82]

Cornelius further opines that the South African approach is more advanced than other legal systems because the right to identity is protected under the right to dignity.[83] Despite the lack of a concrete determination from the court in *Grütter* on whether an individual has a patrimonial interest in his or her identity that is worth protecting, enough indication exists in the common law that patrimonial damages can be awarded where personality rights have been infringed.[84] The South African approach does not consider fame to be a requirement, but fame may affect the quantum of damages awarded.[85]

---

70 *Kumalo v Cycle Lab supra* par 22–23.

71 Burchell "The Legal Protection of Privacy in South Africa: A Transplantable Hybrid" 2009 13 *Electronic Journal of Comparative Law* 3.

72 S 12(2) of the Constitution of the Republic of South Africa, 1996.

73 S 10 of the Constitution of the Republic of South Africa, 1996.

74 *Ibid*.

75 Ch 2 of the Constitution of the Republic of South Africa, 1996.

76 Burchell "Beyond the Glass Bead Game: Human Dignity in the Law of Delict" 1988 4 *South African Journal of Human Rights* 1.

77 Cornelius "Image Rights in South Africa" 2008 *The International Sports Law Journal* https://www.thefreelibrary.com/Image+rights+in+South+Africa.-a0212546227 (accessed 2020-11-10).

78 Cornelius https://www.thefreelibrary.com/Image+rights+in+South+Africa.-a0212546227.

79 2002 (5) SA 401 (CC).

80 *Khumalo v Holomisa supra* par 4 and 17.

81 Burchell 2009 *EJCL* 5.

82 1998 (1) SA 300 (CC).

83 Cornelius 2008 *The International Sports Law Journal* 74.

84 *Ibid*.

85 Cornelius 2008 *The International Sports Law Journal* 75.

2 3 Other remedies

It is possible to register a person's name or likeness as a trade mark.[86] The Code of the Advertising Regulatory Board, which specifically deals with social media, could also be relevant.[87]

2 4 Conclusion

This section has highlighted that a standard of protection exists, but none of the instances above has been considered in the context of social media. However, had these cases found their way into social media in circumstances where someone has posted another individual's image as that person's own (for instance, on Instagram), and uses it for commercial benefit without consent and an element of misrepresentation is present, it can be deduced that such circumstances would found a claim of infringement against the publisher.

3 LIMITATIONS TO PUBLICITY RIGHTS

Publicity rights do not exist in a vacuum and stand in direct conflict with other rights – for example, where an image of an individual is used satirically or where the information conveyed is newsworthy. This section discusses how the right to control and exploit the commercial use of one's image is limited in the US and South Africa.

3 1 The American approach

Tensions exist between the right to publicity and the First Amendment. A balance must be struck between a person's exclusive right to exploit the commercial value of his or her own image, and freedom of speech.[88] The Supreme Court attempted to address this conflict in *Zacchini v Scripps-Howard Broadcasting Co*.[89] In this case, Zacchini filed a suit against a reporter who recorded his cannonball act and publicised it.[90] The court held that although the broadcasting network would be liable for appropriating someone's name, performance or likeness, it has the privilege to report on matters that are of public interest even if doing so encroaches on the individual's publicity rights, unless the infringement causes injury to the individual or was for private use.[91] The court had to determine whether an exception existed with regard to the First Amendment. The court held that the broadcast of the entire performance negatively impacted the commercial interest he gained from performing his act[92] and, as a result, the

86 See Trade Marks Act 194 of 1993.

87 Code of Advertising Practice Appendix K.

88 Georgescu "Two Tests Unite to Resolve the Tensions Between the First Amendment and the Right to Publicity" 2014 83 *Fordham Law Review* 917.

89 433 US 562 (1977).

90 *Zacchini v Scripps-Howard Broadcasting Co supra* par 563–564.

91 *Zacchini v Scripps-Howard Broadcasting Co supra* par 565–569.

92 *Zacchini v Scripps-Howard Broadcasting Co supra* par 575–576.

broadcasting company was ordered to pay for Zacchini's performance.[93] The court further decided that protecting a performer's economic interest incentivises creativity, which in turn advances the First Amendment freedom-of-speech provision.[94]

The case was the first to attempt to obtain a balance between the right to freedom of speech, and publicity rights. The judgment given was specifically tailored to the facts of the case, primarily focusing on the broadcasting of a performance and not the appropriation of a person's name. In doing so, the *Zacchini* case did not set a precedent for other courts to follow with regard to the balance to be struck when the rights to a person's name and freedom of speech are in conflict.[95]

3 1 1 Commercial versus expressive use

American courts have a duty to balance conflicting interests and must determine if the use of a personality's likeness is protectable under the First Amendment and whether such use is expressive or commercial.[96] Expressive use occurs where a person conveys a message or idea through creative means.[97] Commercial use, on the other hand, occurs where the use of the expression is motivated by its economic value.[98] The First Amendment will only protect commercial expression when it is not believed to amount to an endorsement and when the expression is performed or published lawfully.[99]

Some commentators are of the opinion that commercial speech carries with it expressive constituents.[100] In *Hoepker v Kruger*,[101] the plaintiff – a German photographer – took a picture of Charlotte Dabney in 1960.[102] The defendant, Barbara Kruger, years later created a collage that included the plaintiff's photograph of Dabney.[103] This collage was sold to the Museum of Contemporary Art in California. Dabney filed a suit of infringement of her privacy.[104] The court found that the model's right to privacy had not been violated.[105]

---

93 *Zacchini v Scripps-Howard Broadcasting Co supra* par 578.
94 *Zacchini v Scripps-Howard Broadcasting Co supra* par 575–576.
95 Georgescu 2014 *Fordham Law Review* 926.
96 *Doe v TCI Cablevision* 110 S.W.3d 363 2003 373.
97 Georgescu 2014 *Fordham Law Review* 918.
98 Georgescu 2014 *Fordham Law Review* 919.
99 *Ibid*.
100 Georgescu 2014 *Fordham Law Review* 920.
101 200 F Supp 2d 340 (SDNY 2002).
102 *Hoepker v Kruger supra* 342.
103 *Ibid*.
104 *Ibid*.
105 *Hoepker v Kruger supra* 347–348.

3 1 2 Newsworthiness doctrine

In *Fraley v Facebook, Inc*,[106] the plaintiffs brought a claim against Facebook for the use of their image and likeness in "Sponsored Stories" stating that the use violated their right to publicity.[107] The plaintiffs argued that, to their Facebook friends, they were celebrities and the use of their images by Facebook without their consent deprived them of their economic value.[108] Facebook argued that the stories were newsworthy and although the plaintiffs are public figures to their friends, "expressions of consumer opinion are generally newsworthy".[109] The court ruled in favour of the plaintiffs and denied Facebook's motion to dismiss.[110]

The court redefined what it means to be a celebrity as the plaintiffs were described as public figures among their online friends, suggesting that to a certain degree, everyone is a celebrity and can control the commercial value of their image, especially in instances where the individual has a substantial following on a social media platform or is considered a peer-to-peer influencer.[111] The court's decision paves the way for the future interpretation of the right to publicity insofar as it applies to activity on social media sites.[112]

3 1 3 Parody and jest

Non-commercial speech receives the highest level of constitutional protection in the US, and thus the courts have historically ruled in favour of satirical speech.[113] In *White v Samsung Electronics America, Inc*,[114] Samsung featured a robot that resembled Vanna White, an American television personality famous for hosting the show "Wheel of Fortune".[115] The majority decision stated that advertising relying on the image of a celebrity must evoke the celebrity's identity in order for the humour to be understood, and secondly, where works of parody rely on the identity of a famous person, the First Amendment will overrule a right-to-publicity claim.[116] It is submitted that there is still a need for development to ensure that each right is neither underprotected nor overprotected, while ensuring that individuals remain incentivised to create artistic works.

---

106 830 F Supp 2d 785 (2011).
107 *Fraley v Facebook supra* 790.
108 *Fraley v Facebook supra* 792.
109 *Fraley v Facebook supra* 804–805.
110 *Fraley v Facebook supra* 812.
111 *Ibid*.
112 Koehler "*Fraley v Facebook*: The Right of Publicity in Online Social Networks" 2013 28 *Berkeley Technology Law Journal* 1000.
113 Grady, McKelvey and Clement "A New Twist for the Home Run Guys: An Analysis of the Right of Publicity Versus Parody" 2005 15 *Journal of Legal Aspects of Sport* 283.
114 971 F 2d 1395 (9th Cir 1992).
115 *White v Samsung Electronics America supra* 1396.
116 *White v Samsung Electronics America supra* 1401.

3 2 The South African approach

When regard is had to personality rights (including the rights to image, identity, dignity and freedom of association), a balance must be struck between third parties' rights to freedom of expression, and freedom of the media.[117] The otherwise unlawful use of a person's image may be justified on certain grounds where the violation can be considered lawful.

The grounds of media privilege and jest could constitute a defence.[118]

3 2 1 Media privilege

News broadcasters used to be the primary sources of public information, but wider Internet access and social media have made it possible for anyone to serve as a source of newsworthy content that is in the public interest. If a defendant can prove that allegedly defamatory statements can be supported by evidence of the truth of the statements, he or she can escape liability for defamation.[119] This principle was established in *Times Media Ltd v Niselow*.[120] The *boni mores* test is used to determine what would qualify as being in the interests of the public. The type of allegation and reliability of the source is also important in considering the necessity and justification for the allegation made.[121]

In *National Media Limited v Bogoshi*, it was held that strict liability for media defendants should not exist because the publication of defamatory statements could, in the circumstances, be reasonable and therefore not unlawful.[122] The case also distinguished between media and non-media defendants. The rule for non-media defendants would not be applied to the media as, unlike non-media defendants, media defendants could not evade liability by proving that they had not intended to defame. Media defendants would have to prove that they were not negligent in defaming.[123] The term "media defendant" was explained in *NM v Smith*[124] where it was stated that the defendant must have some professionalism obtained through a code of conduct or editorial code; the defendant must gain commercial value from sharing the information; and the information must be disseminated to a large audience and routinely.[125]

It is submitted that in the context of social media, the differentiation between media and non-media persons should fall away, and that liability should carry the same consequences when defamatory statements are published online. Social media is uniquely characterised by the speed at which information is communicated. Information should be regulated based

---

117 Cornelius 2008 *The International Sports Law Journal* 197.
118 Cornelius 2008 *The International Sports Law Journal* 198.
119 *National Media Ltd v Bogoshi* 1998 (4) SA 1196 (SCA).
120 [2005] 1 All SA 567 (SCA).
121 *National Media Ltd v Bogoshi supra* par 11, 23 and 30.
122 *National Media Ltd v Bogoshi supra* par 19–21.
123 *National Media Ltd v Bogoshi supra* par 12.
124 2007 (5) SA 250.
125 *National Media Ltd v Bogoshi supra* par 98–99.

on what is said, not how it is disseminated – that is, not on whether dissemination is through print or online publication.

3 2 2 Parody and humour

Social media interactions thrive on shared feelings and emotions in reaction to common scenarios to create engagement with other social media users, thus forming a community. To this end, we live in the age of the "meme", which is a concept or idea that spreads virally from one person to the next via the Internet. Memes could be anything from an image, video, or email, but the most common memes involve a person or animal coupled with a witty caption.[126] These are widely shared as they are a source of humour and relatability among Internet users.

In *Laugh It Off Promotions CC v South African Breweries International (Finance) BV t/a Sabmark International*, the case was mainly concerned with balancing freedom of expression with protecting a trade mark.[127] Sachs J said that blocking free speech could be more detrimental than positive to big companies because if "parody does not prickle, it does not work".[128] The test to determine whether a defamatory statement is made in jest and not intended to be defamatory would be whether the reasonable man would interpret it as a joke, thereby escaping *animus iniuriandi*.[129] The scope of protection in South Africa is that the unauthorised use of a person's identity will be permitted in cases of public interest, newsworthiness and jest.

The number of likes and followers has become the new advertising market, so that big brands target social media accounts to promote and sell products on their pages in order to reach larger target groups that relate with the social media account holder; the account holder's reputation thus becomes a commodity. The likelihood of criticism increases as a person's social media presence grows. A prominent figure on social media is likely to want to avoid the possibility of having his or her reputation tainted and "*#cancelled*" on various social platforms. "Cancel culture" can operate as a backlash to a person saying or doing something controversial on social media and can transform a brand or person into a pariah.[130] In order to avoid third-party infringement on social media, it has been suggested that persons should control their brands and make their social media accounts private, and should regulate who has access to their social media pages because a "public" account affords a degree of fame, thereby limiting what is deemed private.

---

126 Dykes "Internet Meme Meaning and Definition" 2020 https://www.webopedia.com/definitions/internet-meme/ (accessed 2020-10-16).

127 *Laugh It Off Promotions CC v South African Breweries International (Finance) BV t/a Sabmark International* 2006 (1) SA 144 (CC) par 1.

128 *Laugh It Off Promotions supra* par 76.

129 *Laugh It Off Promotions supra* par 77.

130 Brito "Cancel Culture Seems to Have Started as an Internet Joke. Now it's Anything But" (2020) https://www.cbsnews.com/news/cancel-culture-internet-joke-anything-but/ (accessed 2020-08-30).

4 THE LEGAL POSITION OF SOCIAL NETWORK SITES

The nature and scope of the Internet must be considered when it comes to the protection of publicity rights and personality rights. From Twitter to WhatsApp, Instagram to Snapchat, all these platforms create opportunities for violations of personality rights to occur. Internet service providers (ISPs) offer their customers access to the Internet,[131] but ISPs also filter the content that is offered on the Internet. Although social network sites have better access to users, it is not suggested that they be held liable where infringement of personality or publicity rights takes place or is alleged.[132] ISPs are major role players in regulating what content makes its way to the public through the Internet and, finally, onto social media. In some cases, anonymous third parties post content making use of the likeness and image of someone else, using so-called "ghost accounts". This begs the question whether ISPs should be held liable for infringing content that makes its way to the public.

Legislation has not been developed to regulate social network sites, even though there have been numerous instances where third parties on social media platforms have infringed on the personality or publicity rights of a public figure. This section discusses the protection of personality and publicity rights on social media in the US and South Africa.

4 1 Scope of the Internet and social media

Social media platforms are categorised based on their functions as follows: content-oriented such as Instagram; entertainment or virtual world experiences such as YouTube; and relationship-oriented functions such as personal blogs, Instagram and Twitter.[133] Social media platforms are divided into commercial and non-commercial platforms. Non-commercial platforms owe a certain loyalty to their users, and depend on donations to maintain their presence.[134] Social media platforms can be recognised as a means of communication for journalistic communications or influencing the public's purchasing behaviour.[135] Commercial media platforms use models such as subscription fees and advertising. Advertisements are adapted according to what a user is attracted to, based on the information provided in the user's profile.[136]

A number of risks are posed by social media platforms. For example, information and opinions may be abused. Information used and shared among users could also have detrimental effects on celebrities and ordinary

---

131 Monaghan "Social Networking Website Liability for the Illegal Action of Its Users" 2011 21 *Seton Hall Journal of Sports and Entertainment* 1.

132 *Ibid*.

133 Swiss Federal Council *Legal Basis for Social Media: Report of the Federal Council in Fulfilment of the Amherd Postulate 11.3912 of 29 September 2011* (2013) 8.

134 Swiss Federal Council 9.

135 Swiss Federal Council 7.

136 *Ibid*.

individuals.[137] What is more, software on social media platforms usually regulates and limits the control that users have over their personal information. Some of the information used reveals personal information of the user and permits third parties to access a user's personal information without the need for prior consent.[138]

4 2 The American approach

A substantial degree of immunity is given to social network sites through the Communications Decency Act.[139] This Act was enacted in 1996 under the Telecommunications Act.[140] Section 230 of the Act was meant to promote the free exchange of information and ideas over the Internet and to encourage voluntary monitoring for offensive or obscene material. The Communications Decency Act went further to state that interactive computer services would not be held liable as publishers of the unauthorised information.[141] In *Zeran v America Online Inc*, it was stated that a publisher is a person or entity that exercises editorial control by attempting to screen content.[142] In *Religious Technology Center v Netcom On-Line Communication*, it was held that the operator of a computer bulletin board system was not liable for the storage of copyright-protected work on its computer that had been uploaded by an infringing third party and shared with users of the system.[143]

In *Cubby Inc v CompuServe Inc*, a claim against CompuServe for defamatory comments posted by a user on its forum was brought to court.[144] The court held that CompuServe was a distributor and not a publisher and that the lack of involvement equated to non-liability. In *Stratton Oakmont v Prodigy Services Co*, Prodigy, a bulletin board system, was sued for defamatory comments posted on its bulletin.[145] The court held that Prodigy was liable as a publisher and not as a distributor of content.

As a result of this decision, ISPs are more inclined to refrain from screening online content to avoid being viewed as publishers.[146] For immunity to succeed under section 230(*c*)(1) of the Telecommunications Act, the following criteria must be met: the defendant must be a provider or user of the interactive computer service; the ISP must not be identified as the publisher of the information; and the information must emanate from a third party. It is submitted that legislation must be clarified in terms of the scope section 230. Social network sites must screen more strictly, and content requirements must be set that prevent the use and exploitation of another's

137 Swiss Federal Council 15.
138 Swiss Federal Council 18.
139 47 USC 1996.
140 *Ibid*.
141 S 230 of the Telecommunications Act.
142 *Zeran v America Online Inc* 129 F 3d 327 (4th Cir 1997) 330.
143 *Religious Technology Center v Netcom On-Line Communication* 907 F Supp 1361 (ND Cal 1995) 1368.
144 *Cubby, Inc v CompuServe, Inc* 776 F Supp 135 (SDNY 1991) 140.
145 *Stratton Oakmont v Prodigy Services Co* 1995 WL 323710 (NY Sup Ct 1995) par 1–82.
146 Monaghan 2011 *Seton Hall Journal of Sports and Entertainment* 4.

image or likeness, but without limiting the constitutionally recognised free-speech provision conferred by the First Amendment. US courts have not addressed the application and effect of section 230 in relation to publicity rights.[147]

A further remedy that must be considered are the safe harbour provisions contained in section 512 of the Digital Millennium Copyright Act,[148] in terms of which a service provider shall not be liable for monetary relief, and other damages, for transmitting, routing or providing connections for material through a system or network, as further described.

4 3 The South African approach

Social media has become the primary source for information and expression,[149] with particular reference to entertainment, political activism and public opinion. However, owing to its unpredictable nature, social media harbours risks such as online defamation. "Trolling" on social media, especially involving public figures, often occurs. The growing number of defamation cases indicates that social media is not well regulated in South Africa and is in need of development. Anonymity on social media remains an ongoing issue worldwide, as it encourages uninhibited speech.[150] In *Rath v Rees*,[151] the court had to determine whether an Anton Piller application would be effective in obtaining the identity of an anonymous poster of defamatory content. To retrieve such information, it is necessary for ISPs to assist in identifying the user.[152] Rath sought the Anton Piller order as he believed it would assist in identifying the person making defamatory statements as well as to preserve the data identified by the ISP.[153] The court held that such an order would be granted only in exceptional circumstances as it infringes on the other party's privacy.[154]

No further case law exists on the topic in South African law. Nel suggests that the provisions of sections 7 and 50 of the Promotion of Access to Information Act[155] (PAIA) incentivise ISPs to assist in identifying publishers of defamatory information to avoid finding themselves as joint publishers of the defamatory content.[156] The liability of ISPs is limited through section 2(1) of the Electronic Communications and Transactions Act[157] (ECTA), which states that its purpose is "to enable and facilitate electronic communications and transactions in the public interest". This provision limits liability because an ISP is not responsible for the activities of its users and the main duty of

147 See for e.g., *Perfect 10, Inc v CC Bill LLC* 488 F 3d 1102 (9th Cir 2007).
148 USC 17.
149 Swiss Federal Council 14.
150 Nel "*Rath v Rees* 2006 CLR 429 (C): An Anton Piller Order Challenged on the Grounds That Its Execution Will Infringe the Right to Privacy" 2009 *De Jure* 341.
151 2006 CLR 429 (C).
152 Nel 2009 *De Jure* 341.
153 Nel 2009 *De Jure* 344.
154 *Rath v supra* par 34–35.
155 2 of 2000.
156 Nel 2009 *De Jure* 350.
157 25 of 2002.

ISPs is to grant access to users in terms of the ECTA, regardless of whether or not the identity of the wrongdoer can be ascertained.[158]

Section 78 of ECTA provides that ISPs have no obligation to monitor data that they transmit or store, nor do they have actively to seek facts or circumstances that indicate unlawful activity. However, section 78(2) provides that, in terms of section 14, the Minister can prescribe procedures for service providers to inform the competent public authorities of illegal activities, and to communicate to the authorities, at their request, information enabling the identification of recipients of their services.

From the definitions provided by the Act, liability can be evaded by ISPs if they fall under the definitions that give protection from third-person liability. Sections 73 to 76 of ECTA provide express exemptions from liability for ISPs. Exemptions apply differently depending on the purpose the ISP serves in the digital sphere. ECTA distinguishes four situations where an ISP can escape liability – namely, when the ISP's role constitutes a conduit, system caching, hosting and linking. For an ISP to escape liability, it must adhere to further provisions of the Act in that it must be a member of the representative body that enforces a code of conduct[159] and have adopted and implemented the code of conduct.[160]

South Africa addresses online defamation cases by applying existing defamation-law principles.[161] In *Isparta v Richter*, the court awarded damages for defamatory statements made on Facebook where the defendant "tagged" the second defendant in a post about the plaintiff.[162] The court held that the statements made individually and collectively by the first and second defendant involved the plaintiff and, therefore, all the statements were defamatory.[163] The court reiterated the trite principle that when attention is drawn to a defamatory statement, confirmed or repeated by another, both parties will be held liable for its publication.[164] More recently, in *Manuel v Economic Freedom Fighters*,[165] the court applied existing defamation-law principles to a case of online defamation. Mbuyiseni Mdlozi and Julius Malema of the Economic Freedom Fighters (EFF) had made defamatory statements on Twitter about former Minister of Finance Trevor Manuel, attacking his good name and reputation.[166] The case formulated guidelines on how to apply existing common-law principles to defamatory statements made on social media. Courts must consider the following when deliberating who is responsible for the defamatory statements on social media:

---

158 Skosana *The Right to Privacy and Identity on Social Network Sites: A Comparative Legal Perspective* (LLM dissertation, UNISA) 2016 76.

159 S 71 of 25 of 2002.

160 S 72 of 25 of 2002.

161 Iyer "An Analytical Look Into the Concept of Online Defamation In South Africa" 2018 32 *Speculum Juris* 126.

162 *Isparta v Richter* 2013 6 SA 529 (GP) par 12.

163 *Isparta v Richter supra* par 28.

164 Roos and Slabbert "Defamation on Facebook: Isparta v Richter 2013 6 SA 529 (GP)" 2015 17(6) *Potchefstroom Electronic Law Journal* 2855.

165 [2019] ZAGPJHC 157.

166 *Manuel v Economic Freedom Fighters supra* par 3.

(i) The ordinary social media user must be part of the platform and online community where the statements were made, must follow the publisher on the social media platform, and must show shared interests with the publisher;[167]
(ii) Application of the "repetition rule" should not impair freedom of expression. The context of a defamatory statement shared by others must be considered in relation to the support of the initial statement, without assuming that all users who share the statement are liable for defamation;[168]
(iii) The reasonable publication defence is extended to all members of the public who would want to rely on it, and the principles of reasonableness will apply regardless of whether the defamation took place online or offline, the nature of the information, the reliability of the source, the steps taken to verify the information and whether the other party was offered the right to reply;[169]
(iv) The court must consider the seriousness of the defamatory statement, the nature of the statement, the extent of the publication, and the reputation, character and conduct of the parties;[170] and
(v) The respondents must publish a statement on all social media platforms, retracting and apologising for the allegations made.[171]

5 THE RIGHT TO BE FORGOTTEN

The right to be forgotten, also known as the "right to erasure", originates from the case of *Google Spain SL, Google Inc v Agencia Española de Protección de Datos, Mario Costeja González*.[172] The right to be forgotten entitles an individual to the removal of personal data from the Internet to prevent Internet users from searching and tracking them.[173] It must be noted that the right to be forgotten is not the same as the right to privacy as it involves the removal of content that was previously known, and then subsequently not allowing third parties further access to the content.[174] The US does not recognise a right to be forgotten because of its constitutional entrenchment of the rights to free speech and freedom of the press.[175] In South Africa, section 24(1)(*a*) of the Protection of Personal Information Act,[176] for instance, provides for the deletion of personal data.

[167] *Manuel v Economic Freedom Fighters supra* par 49.
[168] *Manuel v Economic Freedom Fighters supra* par 63–65.
[169] *Manuel v Economic Freedom Fighters supra* par 61–68.
[170] *Manuel v Economic Freedom Fighters supra* par 69.
[171] *Manuel v Economic Freedom Fighters supra* par 72 sub-par 4.
[172] (Case C-131/12) Judgment of the Court (Grand Chamber) 13 May 2014.
[173] Bennet "The 'Right to be Forgotten': Reconciling EU and US perspectives" 2012 *Berkeley Journal of International Law* 162.
[174] Bennet 2012 *Berkeley Journal of International Law* 163.
[175] Bennet 2012 *Berkeley Journal of International Law* 165.
[176] 4 of 2013.

6 CONCLUSION

It was noted that the US has responded to the infringement of publicity and personality rights by developing a patchwork of legal principles to protect such rights – a decision that has led to arbitrary application across states. In South Africa, the *actio iniuriarum* rests on the same principles as the American tort. The application of the common law in South Africa has made it amenable to the protection of personality rights – more pertinently, the rights to identity and privacy in the age of social media. Although the economic impact of the exploitation of personality rights is not overtly addressed, it may be deduced that it would be a factor when determining the likelihood of success of the action.[177] To this end, Cornelius correctly states that South Africa has a very advanced system compared to others as it includes non-economic harm.[178]

With respect to the limitation of publicity rights, it can be seen that the approach is generally similar in the jurisdictions discussed. A constant balance needs to be struck where competing rights are at play and no right can enjoy pre-eminence over others. It is apparent that the right to freedom of expression will limit the right to publicity in certain circumstances. The Internet is a medium of escapism, creativity, relatability and information on current affairs as evinced by the myriad memes and GIFs[179] that are found on various digital platforms. The imposition of publicity rights must always be determined in a reasonable manner so as to maintain the micro-society the Internet creates, allowing people from all over the world to interact with content relevant to them.

It is observed that significant immunity is provided to social network sites and ISPs, which has contributed to the rise of online defamation cases. Anonymous users pose major risks, and modification of ISP liability is therefore imperative.[180] It is not the rate at which information is passed on that provides justification for added protection, but rather characteristics such as low-entry account-registration barriers, the long shelf-life of posted content, and the wide reach of social media platforms.[181] The right to publicity continues to be tested where online use of celebrities' images[182] affects their right to privacy as well as their desire to monetise their identities.[183]

In conclusion, it is evident that a legal tug of war exists regarding publicity rights because, arguably, they are designed to protect certain interests without the flexibility of adapting to the realities of life. The Internet is

---

177 Cornelius 2008 *The International Sports Law Journal* 75.

178 *Ibid*.

179 Graphics Interchange Format (bitmap image format).

180 Adeyemi "Liability and Exemptions of Internet Service Providers (ISPs): Assessing the EU Electronic Commerce Legal Regime" 2018 *SSRN Electronic Journal* 18–19.

181 Carter "Outlaw Speech on the Internet: Examining the Link Between Unique Characteristics of Online Media and Criminal Libel Prosecutions" 2005 21 *Santa Clara High Technology Law Journal* 292.

182 Gervais and Holmes 2014 *Fordham Intellectual Property, Media and Entertainment Law Journal* 183.

183 Messenger 2018 *Widener Law Review* 262.

borderless and yet image rights are treated as being territorial in nature. Many have access to the Internet and legislators have insisted on applying the law differently instead of creating a uniform, international standard governing Internet and social media interactions. Therefore, the question arises as to whether existing laws should be adapted and interpreted broadly, or altogether rewritten. It is submitted that whichever path is taken, the effect of the laws should be anticipatory and not reactive.

DOES THE PRESCRIPTION ACT APPLY TO CLAIMS UNDER THE LABOUR RELATIONS ACT?

Chuks Okpaluba
PhD
Research Fellow, Centre for Human Rights
University of the Free State

M Budeli-Nemakonde
LLB LLM PhD
Professor of Labour Law, Director, School of Law, College of Law, UNISA

SUMMARY

The applicability or otherwise of the Prescription Act 68 of 1969 to claims under the Labour Relations Act 66 of 1995 (LRA) is a hot topic in contemporary labour law. In particular, questions as to whether an arbitration award, an unfairly dismissed employee's claim, an order of reinstatement, or a claim for arrear wages could be thrown out of court for having prescribed have been encountered in at least four recent decisions of the Constitutional Court of South Africa – *Myathaza v JHB Metropolitan Bus Service (SOC) Ltd t/a Bus Metrobus* 2018 (1) SA 38 (CC); *Mogaila v Coca-Cola Fortune (Pty) Ltd* 2018 (1) SA 82 (CC); *FAWU obo Gaoshubelwe v Pieman's Pantry (Pty) Ltd* (2018) 39 *ILJ* 1213 (CC); and *NUMSA obo Fohlisa v Hendor Mining Supplies (A Division of Marschalk Beleggings) (Pty) Ltd* (2017) 38 *ILJ* 1560 (CC). Given the environment in which labour disputes take place, and that expedition is of the essence in a regulated dispute resolution process, one could conceive of a reinstatement claim arising from a labour dispute being caught by the general limitation on lodging civil claims after three years. The rationale for limiting the period during which civil claims may be made ought, *mutatis mutandis*, also to apply to matters arising from employment claims – especially if it is borne in mind that expedition is at the heart of the settlement of labour disputes. In the absence of any mention of a time-bar for laying reinstatement claims under the LRA (except for the 30 days for referring a dispute of unfair dismissal or 90 days for unfair labour practice to a bargaining council or the Commission for Conciliation, Mediation and Arbitration (CCMA) (s 191)), it is not surprising that the applicability or otherwise of the prescription period of three years has been in issue in a number of reinstatement claims.

1 INTRODUCTION

Since claims for unfair dismissal, reinstatement and accompanying arrear wages are matters regulated by the Labour Relations Act 66 of 1995 (LRA), one might, at first blush, consider them to be outside the range of

the prescription legislation.[1] On further reflection, the question becomes whether such a claim could linger indefinitely. Could the dismissed employee leave the issue of his or her unfair dismissal claim and return to make a claim only several years later? Or is there a civil claim arising from a contractual relationship that can be allowed to remain outside the prescription period? Or are labour matters, regulated as they are by the LRA, exceptions to the law of general prescription? Given the environment in which labour disputes take place, and the time frames in which parties to such disputes are meant to act in a literally regimented process where expedition is of the essence, should one immediately conceive of an unfair dismissal claim or an order of reinstatement being in a class of its own and outside the general limitation in lodging civil claims? Or could it be argued that since labour disputes are *par excellence* civil claims, the rationale for limiting the period during which civil claims can be made ought, *mutatis mutandis*, to apply to matters arising from employment – especially if it is borne in mind that expedition is at the heart of the settlement of employment matters. Or are there reasons that labour relations matters are not covered by the prescription legislation?

Except for the 30-day requirement for referring a dispute of unfair dismissal (or 90 days for unfair labour practice) to a bargaining council or the CCMA,[2] there is no stipulated time-bar[3] for laying unfair dismissal claims under the LRA as one would find in the Prescription Act. It is therefore not surprising that the applicability or otherwise of the prescription period of three years has been raised in a number of unfair dismissal, reinstatement and other claims that have reached the Labour Court, the Labour Appeal Court, the Supreme Court of Appeal and, recently, the Constitutional Court of South Africa. Quite apart from dealing with the question whether a claim for reinstatement is subject to the Prescription Act,[4] the Constitutional Court has also been called upon to determine whether the applicant could enforce an arbitration award issued in his favour in terms of the LRA and whether the enforcement of the award was excluded by the intervention of the Prescription Act. The Constitutional Court not only ruled on that issue; it also delivered what was thought to be its last word on the subject.[5] However, the recent litigation in *FAWU obo Gaoshubelwe v Pieman's Pantry (Pty) Ltd*[6] (raising the question whether the Prescription Act applied to unfair dismissal claims under section 191 of the LRA) has shown that the last word on the issue might not have been heard. Accompanying the foregoing is the question whether arrear wages can be recovered as a judgment debt – that is, whether back pay arising

1 See the Prescription Act 68 of 1969.

2 S 191 of the LRA.

3 Except that s 145(9) of the LRA was enacted in January 2015 to provide that an "application to set aside an arbitration award in terms of this section interrupts the running of prescription in terms of the Prescription Act, 1969 (Act 68 of 1969), in respect of that award".

4 *Myathaza v JHB Metropolitan Bus Service (SOC) Ltd t/a Metrobus Bus* 2018 (1) SA 38 (CC) (*Myathaza v Metrobus*).

5 *Mogaila v Coca-Cola Fortune (Pty) Ltd* (2017) 38 *ILJ* 1273 (CC) (*Mogaila*).

6 [2018] ZACC 7.

from reinstatement constitutes a judgment debt that will only prescribe after 30 years in terms of section 11(*a*)(ii) of the Prescription Act?[7]

The discussion that follows is therefore based on four questions. First, is a claim for reinstatement subject to the Prescription Act? Of relevance here are the seven questions concerning the relationship between the Prescription Act and the LRA answered by the Labour Appeal Court in *Myathaza v JHB Metropolitan Bus Service Soc Ltd t/a Metrobus*,[8] despite the subsequent judgment of the Constitutional Court, which arrived at a contrary conclusion. Secondly, does the Prescription Act trump an arbitration award? Here, although the Constitutional Court delivered three separate opinions on the question posed in *Myathaza v JHB Metropolitan Bus Service (SOC) Ltd t/a Metrobus,*[9] all three judgments agreed on the final order made in the lead judgment. Thirdly, and this arose in the most recent case of *FAWU obo Gaoshubelwe v Pieman's Pantry (Pty) Ltd*,[10] does the Prescription Act apply to unfair dismissal claims under the LRA? Lastly, the question that the courts had to answer in *NUMSA obo Fohlisa v Hendor Mining Supplies (A Division of Marschalk Beleggings) (Pty) Ltd*[11] was whether arrear wages could be recovered as a judgment debt. In order to make for a clear understanding of the discussion and the answers to the questions posed, it is important to engage first and foremost in a brief discussion of the relevant provisions of the Prescription Act.

2 A BRIEF NOTE ON THE PRESCRIPTION ACT

It is clear from the Preamble to the Institution of Legal Proceedings Against Certain Organs of State Act 40 of 2002 that this Act would operate side by side with the Prescription Act, and that in considering an application for condonation under the 2002 Act, the court must be satisfied that the debt has not been extinguished in terms of the Prescription Act.[12] There is no such provision in the LRA, hence the debate on whether the provisions of the Prescription Act are applicable to claims under the LRA. While debate about the relationship between the Prescription Act and the LRA is at the centre of this enquiry, it is necessary to raise at least three preliminary issues that often arise in relation to the application of the Prescription Act, and which are inevitably encountered in further investigation of the question posed in this enquiry. The first is when the debt is due and payable, while the second question (which is literally inseparable from the first) is when the claimant become aware of the debt. Incidentally, these issues arise from the provisions of section 12(1), (2) and (3) of the Prescription Act and whenever a condonation application is made before a court in the face of an argument that the cause of action has prescribed.

---

7 *NUMSA obo Fohlisa v Hendor Mining Supplies (A Division of Marschalk Beleggings) (Pty) Ltd* [2017] ZACC 9 par 51–52 (*NUMSA v Hendor Mining Supplies*).

8 2016 (3) SA 74 (LAC).

9 2018 (1) SA 38 (CC) (*Myathaza v Metrobus*).

10 [2018] ZACC 7.

11 [2017] 6 BLLR 539 (CC).

12 See Okpaluba "State Liability, Statutory Timeframe and Service of Process: A Decade of Reform" 2013 76(3) *THRHR* 339 345 par 4.

2 1 When is the debt "due and payable"?[13]

The meaning of "debt", "debtor" and "creditor" as used in section 3 of the Institution of Legal Proceedings Against Certain Organs of State Act 40 of 2002 (which is similar to the present context) has been discussed elsewhere.[14] Suffice it to mention the recent case of *Vembe District Municipality v Stewards and Lloyds Trading (Booysens) (Pty) Ltd*[15] to illustrate the meaning of "debt" in the context of this discussion. Relying on a number of previous cases,[16] the High Court held in *Vembe District Municipality* that the first respondent's claim was not a "debt" as envisaged in the 2002 Act, and so it was not required to give notice in terms of section 3 of the 2002. In effect, the claim did not arise from a delictual, contractual or any other liability, nor from any act performed under or in terms of any law, or from any failure to do anything that should have been done under or in terms of any law and for which an organ of state is liable for payment of damages.

On the other hand, the claim in *Links v MEC, Department of Health, Northern Cape Province*[17] was clearly a delictual action based on medical negligence, which no doubt qualified as a debt. The question was whether the applicant's claim had prescribed, and the answer turned on when the appellant became aware of the facts upon which he sought to rely or at what point he would be deemed to have known of the facts for prescription to begin to run.[18] This raised the question of the correct interpretation of section 12(3) of the Prescription Act. The applicant had gone to hospital with a dislocated left thumb in June 2006 and came out with not only an amputated thumb but also permanent loss of the use of his whole arm after several operations. The applicant claimed he was never informed as to why his thumb had to be amputated, nor the cause of his problems; he was also not informed of the reason he lost the use of his left arm. Although the applicant consulted Legal Aid SA in December 2006, the summons for his claim was only served on 6 August 2009. The MEC pleaded that the applicant's claim had prescribed in terms of the Prescription Act. The Constitutional Court held that the respondent had to prove: (a) what facts Mr Links was required to know before prescription would commence; and

---

13 The issue in *Trinity Asset Management (Pty) Ltd v Grindstone Investments 132 (Pty) Ltd* 2018 (1) SA 94 (CC) did not concern a labour relations matter; rather, it concerned when a loan agreement debt became due, thus triggering the running of prescription for the purposes of the Act. Was it the date on which the loan was advanced (in which case, the debt would have prescribed), or was it the date on which a demand was made? It was held that without stipulation as to the time of repayment, a loan was "repayable on demand". Unless the parties agree otherwise, such a loan was repayable from the moment the advance was made and no specific demand for repayment needed to be made for the loan to be immediately due and payable.

14 Okpaluba 2013 *THRHR* 339 esp. fn 18–20.

15 [2014] 3 All SA 675 (SCA).

16 *NICOR IT Consulting (Pty) Ltd v North-West Housing Corporation* 2010 (3) SA 90 (NWM); *D-G, Department of Works v Kovac Investments* 2010 (6) SA 646 (GNP); *Thabani Zulu & Co (Pty) Ltd v Minister of Water Affairs* 2012 (4) SA 91 (KZD).

17 2016 (4) SA 414 (CC) (*Links v MEC*).

18 In his article, "The Sands of Time: Prescription and the LRA" 2015 31(1) *Employment Law* 4, Grogan J reviews the divergent opinions of the Labour Court on the issue whether prescription applies to the LRA.

(b) that he had knowledge of those facts on or before 5 August 2006.[19] What he might have known thereafter – that is, by the time he was discharged in August 2006 – was irrelevant to prescription.[20] The Constitutional Court held that in cases involving professional negligence, such as the *Links* case*,* a defendant had to show that the plaintiff was in possession of sufficient facts to cause him or her to seek further advice.[21] But Mr Links's ability to acquire the requisite knowledge was hampered by the fact that he remained in hospital until the end of August 2006, which restricted his sources of information to hospital personnel.[22] The respondent's failure to deny Mr Links's contention that he lacked knowledge of the cause of his condition before the end of August 2006 meant that the court was entitled to accept it.[23] Moreover, Mr Links could realistically only have acquired such knowledge when he was able to consult independent medical professionals – that is, after he was discharged at the end of August 2006.[24] His ignorance, prior to 5 August 2006, of the material facts required to institute legal proceedings meant that his claim was still alive when summons was served on 6 August 2009.[25]

Links v MEC was distinguished from the facts of the subsequent professional negligence case of *Loni v MEC, Department of Health, Eastern Cape Province*[26] on the grounds that in *Links* the claimant plainly required expert medical opinion in order to establish that the treatment he received was negligent; and in order to draw the causative link between the harm suffered and the negligent treatment.[27] While the allegations relied upon by the applicant in *Loni v MEC, EC* refer pertinently to alleged negligent acts, these allegations in essence amount to an allegation that the MEC's employees acted in breach of the contract by failing to afford the applicant appropriate treatment and care, this plainly being a term of the admitted contract.[28] In the judgment of the Constitutional Court, the debt claimed by the applicant arose from the breach of the contract by the employees of the MEC with regard to his care and treatment and upon his having suffered harm as a result. The focus by the applicant on his lack of knowledge of the development of osteitis was not the correct focus of the investigation in regard to this issue. The applicant, on his own evidence, had received substandard care and treatment, had suffered harm as a result and this case was, on an appropriate assessment of his evidence, plainly apparent to him long before the issue of osteitis arose and the link to such substandard care, treatment and harm being dealt with by expert medical opinion. It is not necessary for the extent of the harm to be known;

19 *Links v MEC supra* par 24.
20 *Links v MEC supra* par 41.
21 *Links v MEC supra* par 42 and 45.
22 *Links v MEC supra* par 29.
23 *Links v MEC supra* par 46.
24 *Links v MEC supra* par 42, 47 and 49.
25 *Links v MEC supra* par 49.
26 [2018] ZACC 2 (*Loni v MEC, EC*).
27 *Loni v MEC, EC supra* par 26.
28 *Loni v MEC, EC supra* par 29.

the debt arises once harm has indeed been suffered.[29] The Constitutional Court further held:

> "When the principle in *Links* is applied to the present facts, the applicant should have over time suspected fault on the part of the hospital staff. There were sufficient indicators that the medical staff had failed to provide him with proper care and treatment, as he still experienced pain and the wound was infected and oozing pus. With that experience, he could not have thought or believed that he had received adequate medical treatment. Furthermore, since he had been given his medical file, he could have sought advice at that stage. There was no basis for him to wait more than seven years to do so. His explanation that he could not take action as he did not have access to independent medical practitioners who could explain to him why he was limping or why he continued to experience pain in his leg, does not help him either. The applicant had all the necessary facts, being his personal knowledge of his maltreatment and a full record of his treatment in his hospital file, which gave rise to his claim. This knowledge was sufficient for him to act. This is the same information that caused him to ultimately seek further advice in 2011. It is clear, that long before the applicant's discharge from hospital in 2001 and certainly thereafter, the applicant had knowledge of the facts upon which his claim was based. He had knowledge of his treatment and the quality (or lack thereof) from his first day in hospital and had suffered pain on a continuous basis subsequent thereto. The fact that he was not aware that he was disabled or had developed osteitis is not the relevant consideration."[30]

2 2 Knowledge of the debt[31]

Section 11(*d*) of the Prescription Act provides that a debt prescribes after three years, while section 12(1) provides that prescription shall begin to run as soon as the debt is due.[32] In terms of section 12(3), a debt shall not be deemed to be due until the creditor has knowledge of the identity of the debtor and the facts from which the debt arises – provided that a creditor is deemed to have that knowledge if he could have acquired it by exercising due care. In *Mtokonya v Minister of Police,*[33] the plaintiff did not institute an action within three years as he was enjoined to do in terms of section 11(*d*). In July 2013, he was advised by his attorney that he had a cause of action against the defendant but summons was filed only on 23 April 2014 – whereas his arrest and detention (wherefor he filed the claim for damages) took place in September 2010. The plaintiff's argument was that even though he did know the identity of the debtor and the material facts giving rise to the debt at the time he was released from detention in September 2010, he did not know that he had a legal remedy against the defendant. The question for determination turned on whether knowledge of a legal remedy was required for prescription to run.

---

29 *Loni v MEC, EC supra* par 30. See also *Harker v Fussell* 2002 (1) SA 170 (T) 173E–174B.

30 *Loni v MEC, EC supra* par 34–35.

31 It was held in *Yarona Healthcare Network v Medshield* [2017] ZASCA 116 par 61–62 that actual or constructive knowledge is necessary for prescription to start running.

32 In *Frieslaar NO v Ackerman* [2018] ZASCA 3 par 27, it was held that the obligation of the respondents to pay transfer costs and other related costs in the sale agreements, constitutes a debt as contemplated in s 10(1) of the Prescription Act, and as a general principle, prescription commences running once the creditor has acquired the right to claim the debt as contemplated in s 12(1) of the Act.

33 [2015] ZAECMHC 67.

The courts have all along tried to distinguish between innocence and negligence as the test for a plaintiff's inaction and have focused on the reasonableness of the plaintiff's conduct having regard to the peculiar circumstances in which the plaintiff finds him or herself.[34] For instance, in *MEC for Education, KZN v Shange,*[35] although a rural learner who was injured by his teacher in school had knowledge of the material facts from which the cause of action arose, he did not know the identity of the debtor, nor was he reasonably expected to know the debtor, until sometime later. In *McCleod v Kweyiya*,[36] a minor injured in 1988 could not have obtained the knowledge that her claim against the Road Accident Fund (RAF) had been settled by her attorney for a significantly low amount of damages until 2009 when she was 25 years of age. It was held in both cases that a three-year period of prescription was delayed by the fact that the plaintiffs were ignorant of the identity of the debtor. In addition, the plaintiff in *McCleod* was also ignorant of the fact that the attorney who settled her claim was liable towards her to the extent of the damages not recovered from the RAF. In the case of *Mtokonya*, the plaintiff's case turned to be determined on whether knowledge of a legal remedy was required for prescription to run. The plaintiff did acquire knowledge that the defendant was the arrestor as well as that the arrest and detention were not justified but did nothing about it. The legal advice he later obtained to the effect that he had a right to institute a claim for damages against the defendant was a legal conclusion drawn in July 2014 based on the facts already in existence in September 2010. In these circumstances, held Nhlangulela ADJP, it was a negligent, rather than innocent, inaction on the part of the plaintiff to allow prescription of his claim to run. It follows, therefore, that the answer to the question posed is that knowledge of a legal remedy or conclusion does not affect prescription.[37]

The question presented before the Constitutional Court in *Mtokonya v Minister of Police*[38] was whether section 12(3) of the Prescription Act requires a creditor to have knowledge that the conduct of the debtor giving rise to the debt was wrongful and actionable before prescription may start running against the creditor.[39] In the majority judgment read by Zondo J (now CJ), it was clearly stated that section 12(3) does not require the creditor to have knowledge of any right to sue the debtor nor does it require him or her to have knowledge of legal conclusions that may be drawn from "the facts from which the debt arises". The established law is that the facts

---

34 Cf the situation in *Makhele v Commander, Lesotho Defence Force* [2017] LSHC 10 par 29 where Mahase J held that the plaintiff's delay in instituting proceedings in 1999 was not due to any delay on his part but as a result of the non-availability of the proceedings of the court martial that was initiated in September 1997 and were kept by the defendant's officers. So, the plaintiff's action for unlawful dismissal or termination of his commission from the LDF had not prescribed.

35 2012 (5) SA 313 (SCA).

36 2013 (6) SA 1 (SCA).

37 *Mtokonya v Minister of Police supra* par 14. See also *Claasen v Bester* 2012 (2) SA 404 (SCA); *Yellow Star Properties v MEC, Department of Planning and LG* [2009] 3 All SA 475 (SCA) par 37; *Van Staden v Fourie* 1989 (3) SA 200 (A) 216E; *Truter v Deysel* 2006 (4) SA 168 (SCA) par 20.

38 2017 (11) BCLR 1443 (CC) (*Mtokonya CC*).

39 *Mtokonya CC supra* par 1.

from which the debt arises are the facts that a creditor would need to prove in order to establish the liability of the debtor.[40] Requiring "the facts from which the debt arises" is not a requirement for knowledge of a legal opinion, or of legal conclusions or that the creditor has a legal remedy.[41] By referring to knowledge of the facts, the subsection is distinguishing what is required from a question of law or a value judgement.[42] The majority declined the invitation by the applicant's counsel to hold that the meaning of section 12(3) (a debt … shall not be deemed to be due until the creditor has knowledge of … the facts from which the debt arises) includes that the creditor must have knowledge of legal conclusions – that is, knowledge that the conduct of the debtor was wrongful and actionable. Section 12(3) does not support that proposition because, first, it refers to knowledge of the facts from which the debt arises, which is apart from knowledge of identity of the debtor. Secondly, to hold otherwise would render the law of prescription wholly ineffective.[43]

3 DOES THE PRESCRIPTION ACT APPLY TO LABOUR DISPUTES?

It was held in *Fredericks v Grobler NO*[44] that the extinctive prescription envisaged in the Prescription Act applies to employment issues[45] and that a debt would, in the context of an unfair dismissal claim, mean that the respondent had an obligation not to dismiss the applicant unfairly. The applicant in this case had referred a dispute to the bargaining council 10 years after he learnt that he had been recommended for promotion, but that nothing was done about it. The respondent contended that the applicant's claim was due at the latest by September 2001 when the commissioner issued the certificate that it had not been able to settle the dispute. To that extent, it was argued, the debt that was due had become prescribed, as prescription began to run as soon as the applicant acquired the right to institute proceedings against the respondent in terms of section 191(1) of the LRA.[46] In deciding the question whether the claim of the

40 *Mtokonya CC supra* par 36; *Links v MEC supra* par 39; *Truter v Deysel supra* par 16–19.

41 *Mtokonya CC supra* par 37.

42 *Mtokonya CC supra* par 38.

43 *Mtokonya CC supra* par 62–63. In *Mmangweni* v *Minister of Police* [2018] ZAECMHC 7 par 5, 9–11, 14–15, the Minister had argued that the plaintiff knew about the existence of the debt; the identity of the debtor; and the facts giving rise to the debt. The Minister argued further that ignorance of a right to claim compensation against the defendant does not stop the prescription period from running; and that s 11(*d*) of the Act was not unconstitutional as contested by the plaintiff. It was held that lack of a legal remedy, as in the present case, does not stop the prescription period from running. The court in *Mmangweni* distinguished *MEC for Education, KZN v Shange* 2012 (5) SA 313 (SCA) on the facts and, it was held that the facts proved on a preponderance of probabilities that the plaintiff's delay in instituting his claim was unreasonable. The advice the plaintiff relied upon was the equivalent of what the Constitutional Court held did not fit into either the first or the second part of s 12(3) in *Mtokonya CC.*

44 [2010] 6 BLLR 644 (LC) par 22.

45 *Uitenhage Municipality v Molloy* 1998 (2) SA 735 (SCA); *Mpanzama v Fidelity Guards Holding (Pty) Ltd* [2000] 12 BLLR 1459 (LC); *Cape Town Municipality v Allie NO* 1981 (2) SA 1 (C).

46 *Fredericks v Grobler NO supra* par 18.

applicant had already prescribed, Mohahlehi J referred to the judgment of Khampepe AJA in the Labour Appeal Court in *Solidarity v Eskom Holdings (Pty) Ltd*,[47] which replicated that of the SCA in *Truter v Deysel*[48] to the following effect:

> "A debt is due in this sense, when the creditor acquires a complete cause of action for the recovery of debt, that is, when the entire set of facts which the creditor must prove in order to succeed with his or her claim against the debtor is in place or in other words when everything has happened which would entitle the creditor to institute action and to pursue his or her claim."[49]

It was held that available evidence indicated that the applicant was aware that he had a claim all along or, at most, ought reasonably to have been aware of it, but he failed to institute a claim within the period prescribed by the Prescription Act.[50]

In another case, *FAWU v Country Bird*,[51] Steenkamp J had to consider whether the union's claim had prescribed owing to the union's excessive delay in prosecuting the claim as it brought the unfair dismissal claims consequent upon an unprotected strike that took place almost six years previously. The Labour Court judge endorsed the previous ruling of the court in *Mpanzama v Fidelity Guards*[52] where, applying the provisions of section 11(*d*) of the Prescription Act, Pillay J held that the Prescription Act applied to the disputes arising from the LRA. In that case, it was held that section 143, read with section 158(1)(*c*) of the LRA, and whatever the rationale for the doctrine of prescription or limitation of actions might be, the LRA compels the effective resolution of disputes in its section 1(*d*)(iv); and that this implies that labour disputes must be resolved or finalised expeditiously and that it would not be inconsistent to apply the Prescription Act to sections 143 and 158(1)(*c*) of the LRA.[53] Referring to the provisions of section 15 of the Prescription Act, Steenkamp J further held:

> "The phrase 'any document whereby legal proceedings are commenced' must surely include the delivery of a statement of claim in terms of rule 6 (read with s 191 of the LRA). And a claim for reinstatement or compensation in terms of the LRA must also be envisaged under the meaning of 'debt' in the Prescription Act. As Prof Max Loubser[54] has pointed out, the term 'debt' has a wide and general meaning and the three-year prescription period in terms of section 11(*d*) of the Prescription Act applies to any liability of whatsoever kind, whether contractual, delictual or otherwise. Therefore, by referring the matter to the Labour Court and delivering a statement of claim in terms of rule 6, extinctive prescription of the union's claim was clearly interrupted."[55]

---

47 (2008) 29 *ILJ* 1450 (LAC).
48 2006 (4) SA 168 (SCA) par 15.
49 *Solidarity v Eskom Holdings (Pty) Ltd supra* par 26.
50 *Fredericks v Grobler NO supra* par 36 and 38.
51 (2012) 33 *ILJ* 865 (LC).
52 [2010] 12 BLLR 1459 (LC) par 9–10.
53 *FAWU v Country Bird supra* par 6–7.
54 See Loubser *Extinctive Prescription* (1996) 43.
55 *FAWU v Country Bird supra* par 9.

4 IS A CLAIM FOR REINSTATEMENT SUBJECT TO THE PRESCRIPTION ACT?

Prior to the case of *Myathaza v JHB Metropolitan Bus Service Soc Ltd t/a Bus Metrobus*,[56] in which at least seven questions concerning the relationship between the law of prescription and the LRA were raised, the LAC had dealt with prescription claims under the LRA in at least three earlier instances: (a) *Solidarity v Eskom Holdings*;[57] (b) *SA Post Office Ltd v CWU*;[58] and (c) *Sondorp v Ekurhuleni Metropolitan Municipality*.[59] In both the *Solidarity* and *SA Post Office* cases, it was held that the employees' claims brought in terms of the LRA had prescribed in terms of the Prescription Act. These cases did not deal with arbitration awards or specifically with the situation where prescription was raised as a defence to defeat an employee's attempt to enforce an arbitration award after review had been brought to have it set aside.

However, in *Sondorp*, the question was whether the claim for reinstatement had prescribed in terms of the relevant provisions of the Prescription Act. Relying on the Labour Court judgment in *Gaoshubelwe v Pie Man's Pantry (Pty),*[60] it was held that any claim of unfair dismissal is a debt contemplated by the Prescription Act. However, it was argued that the Labour Court was wrong to have held as it did in *Gaoshubelwe* that prescription was interrupted by the initiation of the process through the referral to the CCMA, in that the Labour Court had failed to take into consideration the provisions of section 15 of the Prescription Act, which dealt with the interruption of prescription under certain conditions.[61] Ndlovu JA (Zondi and Musi AJJA concurring) held that the issue before the court was about the application for an amendment of the original statement of claim, and not whether the claim for reinstatement had become prescribed, or whether the running of prescription would have been interrupted in terms of section 15 of the Prescription Act. Like the allegation of discrimination raised by the appellants in the proposed amendments, the defence of prescription raised by the municipality is a triable issue that also deserved a proper ventilation and consideration at trial; it was thus premature to deal with it at that stage.[62] Even so, the additional facts proposed to be introduced in terms of the amendments were part and parcel of the original cause of action and merely represent a fresh quantification of the original claim.[63] It followed that the amendments would not render the appellants' claim a new right of action and, thus, the defence of prescription would

---

56 2016 (3) SA 74 (LAC) (*Myathaza*).

57 *Supra*.

58 [2013] 12 BLLR 1203 (LAC).

59 [2013] ZALAC 13.

60 (2009) 30 *ILJ* 347 (LC) par 17.

61 *Sondorp v Ekurhuleni Metropolitan Municipality supra* par 67–68.

62 *Sondorp v Ekurhuleni Metropolitan Municipality supra* par 70–71.

63 Per Corbett JA, *Evins v Shield Insurance Co Ltd* 1980 (2) SA 814 (A) 836D–E; *Dladla v President Insurance Co Ltd* 1982 (3) SA 198 (A) 199E–G. See also *Wigan v British Traders Insurance Co Ltd* 1963 (3) SA 151 (W); *Schnellen v Rondalia Assurance Corporation of SA Ltd* 1969 (1) SA 517 (W); *Lampert-Zakiewicz v Marine and Trade Insurance Co Ltd* 1975 (4) SA 597 (C).

probably not succeed.[64] In effect, the running of prescription would have been interrupted because the right of action sought to be enforced by the appellants in the proposed amended statement of case is recognisable as the same or substantially the same right of action as that disclosed in the original statement of case.[65] Since the amendments were mere elaboration of allegations in the original statement of case, the appellants had demonstrated that they had something deserving of consideration[66] such that the court *a quo* was in error not to have allowed their proposed amendments.[67]

4 1 *Myathaza v JHB Metrobus* (LAC)[68]

This case was a consolidation of three appeals from the Labour Court, all of which were arbitration awards[69] made before 1 January 2015 and were decided on the LRA as it was before section 145 was amended by the insertion of subsection (9) into that section and which only applies to arbitration awards made after that date. Three issues were common to all three cases, namely: (a) whether the Prescription Act applied to arbitration awards made in terms of the LRA; (b) what period of prescription was applicable to such arbitration awards; and (c) whether an application brought to review and set aside an arbitration award interrupts the running of prescription, or otherwise constitutes an impediment to the running of prescription as contemplated in section 13(1) of the Prescription Act. In respect of two of the matters, further issues arise – that is, whether the certification of an award as contemplated in section 143(3) of the LRA has an effect on the running of prescription; and whether the issue of a warrant of execution on the strength of a certified arbitration award has an effect on the running of prescription. The last issue to be determined by the court was whether, having regard to the respective facts of each matter, the appeals ought to be upheld.

---

64 *Sondorp v Ekurhuleni Metropolitan Municipality supra* par 73.

65 *Sondorp v Ekurhuleni Metropolitan Municipality supra* par 74. See also *FirstRand Bank Ltd v Nedbank (Swaziland) Ltd* 2004 (6) SA 317 (SCA) par 4; *Churchill v Standard General Insurance Co Ltd* 1977 (1) SA 506 (A) 517B–C; *CGU Insurance Ltd v Rumdel Construction (Pty) Ltd* 2004 (2) SA 622 (SCA) 26H–27B; *Mntambo v RAF* 2008 (1) SA 313 (W).

66 *Ciba-Geigy (Pty) Ltd v Lushof Farms (Pty) Ltd* 2002 (2) SA 447 (A) 462J–463B, 464E–F/G.

67 *Sondorp v Ekurhuleni Metropolitan Municipality supra* par 75–76.

68 *Supra.*

69 *Myathaza v JHB Metropolitan Bus Service (SOC) Ltd t/a Bus Metrobus supra*; *Mazibuko v Concor Holdings (Pty) Ltd supra; Cellucity (Pty) Ltd v Communication Workers Union obo Peters* 2016 (3) SA 74 (LAC). In other words, the LAC considered the appeal together with two matters that concerned the same issue, but which had reached different conclusions. For instance, in *Concor Holdings (Pty) Ltd v Mazibuko* (2014) 35 *ILJ* 477 (LC) par 29, it was held that the Prescription Act was applicable and that the award in favour of the employee had prescribed after three years. In *Cellucity (Pty) Ltd v Communication Workers Union obo Peters* [2014] 2 BLLR 172 (LC) par 21, the Labour Court held that the Prescription Act was inconsistent with the LRA and that its application thereof would create inequalities between litigants using different routes for their disputes and furthermore would be unworkable where disputes moved between tribunal and court and *vice versa*.

In a judgment delivered by Coppin JA, the LAC extensively deliberated upon the issues and questions raised and responded as follows:

(i) In terms of section 16(1) of the Prescription Act, its provisions applied to "any debt" unless they were inconsistent with the provisions of another Act. Generally, arbitration awards pertaining to unfair dismissals, in which compensation and/or reinstatement with or without back pay are awarded, should constitute "debts" as contemplated in the Prescription Act. Since the LRA made no provisions regarding the imposition of a prescriptive period in respect of the execution or enforcement of arbitration awards, there were no inconsistences between the LRA and the Prescription Act in this regard. It follows that on a proper construction of section 16(1) of the Prescription Act, the provisions of that Act applied to the LRA arbitration awards.[70]

(ii) The prescription period applicable to the LRA arbitration awards was dependent on whether an arbitration award constituted "a judgment debt" (in which case a 30-year prescription period would be applicable) or a simple "debt" (in which case a three-year prescriptive period would be applicable). To give the term "judgment debt" in the Prescription Act a meaning that included "arbitration awards" made under the LRA would unduly strain the language of the Prescription Act. Arbitration awards made under the LRA differ in significant respects from orders or judgments of the Labour Court. The latter clearly fell within the meaning "judgment debt", while generally an arbitration award under the LRA did not, but satisfied the definitional criteria of a mere "debt" under that Act. The other categories of "debt" in the Prescription Act were clearly not applicable. Accordingly, a three-year prescriptive period was generally applicable to such arbitration awards (that is, the debts embodied in them).[71]

(iii) The lack of certification of an award in terms of section 143(3) of the LRA did not mean that the award, or more specifically the "debt" embodied in the award, was not due. Certification had nothing to do with whether the award was due or not but was part of the process of executing an award as if it were an order of the Labour Court. Compliance with the award was not delayed pending certification. Performance by the debtor of the obligation(s) embodied in the award was not dependent upon or subject to the certification contemplated in section 143 of the LRA.[72]

(iv) Although obtaining a warrant of execution may be a necessary step to obtain satisfaction of the award, it did not interrupt the running of the prescription in respect of the award because it was not a "process" as envisaged in section 15 of the Prescription Act (which dealt with the judicial interruption of prescription).[73]

---

70 *Myathaza supra* par 22, 42–44.
71 *Myathaza supra* par 46, 53–54.
72 *Myathaza supra* par 61–63.
73 *Myathaza supra* par 64.

(v) The reliance on section 13*(f)* of the Prescription Act – that there would be a delay in the case where "the debt is the object of a dispute subjected to arbitration" – was misplaced. This is because an arbitration award itself was a debt but was not the object of the dispute subjected to arbitration.[74]

(vi) A review to set aside an award was not a "process whereby the creditor claims payment of the debt", which in terms of section 15 of the Prescription Act would interrupt the running of prescription. On the contrary, it was a process whereby the debtor sought to set aside the debt. Such a review, therefore, would not interrupt prescription but for the amendment of section 145 of the LRA (effective from 1 January 2015), which inserted a subsection providing that "an application to set aside an arbitration award in terms of this section interrupts the running of prescription … in respect of that award". This, however, only applied to arbitration awards made after the commencement date of the amendment. [75]

(vii) An application to make an arbitration award an order of court could be construed as a "process whereby the creditor claims payment of the debt" as contemplated by section 15(1) of the Prescription Act. By bringing such an application, the creditor was in effect asking the court to order the debtor to pay the debt (represented by the award). An application to make an award an order of court would therefore interrupt prescription by its service on the debtor. But, for it to actually and effectively interrupt prescription, the creditor would have to prosecute the claim under that process to final judgment.[76]

Soon after the Labour Appeal Court judgment in *Myathaza* but before the Constitutional Court judgment on appeal from that same case (discussed below), the Labour Appeal Court was urged in *FAWU obo Gaoshubelwe v Pieman's Pantry (Pty) Ltd*[77] to decide whether *Myathaza* was correctly decided and to overrule that judgment, an invitation which it declined. After an exhaustive analysis of the arguments presented before it by both parties to the case, Sutherland JA (Ndlovu JA and Murphy AJA concurring), held that the Prescription Act does indeed apply to all litigation under the LRA, not least of all, litigation prosecuted in terms of section 191. So, where a dismissed employee refers an unfair dismissal dispute to the Labour Court more than three years after dismissal, that claim is prescribed since the periods set for prescription of debts by the Prescription Act are not in conflict with the LRA and the three-year time limit for claiming debt applies to all claims under the LRA.

---

74 *Myathaza supra* par 65.
75 *Myathaza supra* par 73–74.
76 *Myathaza supra* par 76–77.
77 (2017) 38 *ILJ* 132 (LAC).

4 2 *Myathaza v Metrobus* (CC)[78]

In the subsequent appeal to the Constitutional Court in *Myathaza v JHB Metropolitan Bus Service (SOC) Ltd t/a Metrobus,* the court had to determine two issues of fundamental importance – namely, whether the applicant could enforce an arbitration award issued in his favour in terms of the LRA and whether the application of the LRA to enforce the award was excluded by the intervention of the Prescription Act. Arising from the latter question are two subsidiary issues: (i) whether the arbitration award constitutes a "debt" as envisaged by section 10 of the Prescription Act; and (ii) whether the running of prescription was interrupted.[79] The employer was made to reinstate the employee, Sizwe Myathaza, who had been fired more than six years before, after it had failed to review an arbitration award that was in the employee's favour. The arbitration award issued on 17 September 2009 also ordered that the employee be reinstated with back pay. This was now made an order of the Labour Court. It was held that the Prescription Act did not apply to Myathaza's matter. While all three judgments came to the conclusion that the appeal should succeed and that the judgments of the LC and LAC should be set aside, each judgment gave a different reason for reaching that conclusion.

4 2 1 The first judgment in Myathaza (CC)

In the lead judgment of Jafta J (with which Nkabinde ADCJ, Khampepe and Zondo JJ concurred), it was held that an award issued at the conclusion of arbitration represents the resolution of the dispute.[80] Jafta J found the Prescription Act to be inconsistent with the provisions of the LRA having regard to section 16(1), which delineates the reach of the prescription regime established by the Act. Bearing in mind the judicial obligation in section 39(2) of the Constitution, the word "inconsistent" must be ascribed a meaning that avoids limiting the right of access to dispute resolution forums established by the LRA to give effect to the fair-labour-practice rights guaranteed in section 23 of the Constitution.[81] Jafta J stated:

---

78 2018 (1) SA 38 (CC); (2017) 38 *ILJ* 527 (CC) (*Myathaza v Metrobus*).

79 *Myathaza v Metrobus supra* par 21.

80 *Myathaza v Metrobus supra* par 24.

81 See *NUMSA v Hendor Mining Supplies (A Division of Marschalk Beleggings) (Pty) Ltd* (2017) 38 *ILJ* 1560 (CC) par 8 where the court was considering whether it had jurisdiction to grant leave to appeal in circumstances not totally dissimilar to the present. Madlanga J held that holding that a claim has prescribed implicates the right of access to court in terms of s 34 and that, quintessentially, is a constitutional issue – *RAF v Mdeyide* 2011 (2) SA 26 (CC) par 6; *Links v MEC, Department of Health, Northern Cape Province* 2016 (4) SA 414 (CC) par 22; *Makate v Vodacom (Pty) Ltd* 2016 (4) SA 121 (CC) par 90–91; *Mtokonya v Minister of Police* [2017] ZACC 33 par 9; *Myathaza v Metrobus supra* par 18. Further, an application such as the present that requires the court to determine the effect of retrospective reinstatement in terms of s 193(1)(*a*) of the LRA and the resultant need to pay arrear remuneration is also a constitutional issue – *TAWU of SA v PUTCO Ltd* 2016 (4) SA 39 (CC) par 28; *City Power (Pty) Ltd v Grinpal Energy Management Services (Pty) Ltd* (2015) 36 *ILJ* 1423 (CC) par 14 – because the LRA was promulgated to give effect to the constitutional right to fair labour practices.

> "But if 'inconsistent' is reasonably capable of an interpretation which over and above that promotes those guarantees, we are duty bound to choose the latter construction. In the context of the Constitution, inconsistency is given a wider meaning which goes beyond contradiction or conflict. Legislation or conduct is taken to be inconsistent with a provision in the Constitution if it differs with a constitutional provision. Sometimes this arises from the overbroad language of a statute."[82]

Relying on *RAF v Mdeyide,*[83] where the court had held that the differences between the Prescription Act and the Road Accident Fund Act 56 of 1996 established the inconsistency that excluded the application of the Prescription Act to claims under the RAF Act, the court in *Myathaza* held that it is enough if there were material differences between the two pieces of legislation. It held further that the meaning of inconsistency adopted in *Mdeyide* imposes less restriction on the guarantee to have access to cheaper and expeditious dispute resolution forums established specifically for settling labour disputes in a manner that promotes the object of the Bill of Rights.[84] The Prescription Act does not cater for a situation where a claim or dispute has been adjudicated and an outcome binding on parties has been reached but before that outcome is made an order of the court. Since an award was a final and binding remedy, it was difficult to determine a prescription period applicable to it under the Prescription Act. The three-year period is meant for claims or disputes that are yet to be determined and in respect of which evidence and witnesses may be lost if there is a long delay.[85] Even if the Prescription Act were to apply, the main award granted in favour of the applicant could not prescribe because it is not an obligation to pay money or deliver goods or render services by Metrobus to the applicant.[86] Metrobus was obliged to apply for a date for the review of the arbitration within six months of lodging the review. Metrobus's delay was unduly long and undermined the LRA's object of speedy resolutions of disputes. This affected Myathaza as he had been without income since his unfair dismissal in 2009.[87]

4 2 2 The second judgment in Myathaza (CC)

In his judgment, Froneman J (Madlanga, Mhlantla JJ and Mbha AJ concurring),[88] agreed with the orders made by Jafta J that the Prescription Act must be reinterpreted in order to give proper constitutional effect to,

---

82 *Myathaza v Metrobus supra* par 39.

83 2011 (2) SA 26 (CC).

84 *Myathaza v Metrobus supra* par 42.

85 *Myathaza v Metrobus supra* par 44.

86 *Myathaza v Metrobus supra* par 59. It was also noted that *Desai NO v Desai NO* 1996 (1) SA 141 (SCA), on which the LAC relied for holding that "debt" means an obligation to do something or refrain from doing something, was overruled by the Constitutional Court in *Makate v Vodacom (Pty) Ltd* 2016 (4) SA 121 (CC) par 93, where it was held that there was nothing in the *Electricity Supply Commission v Stewarts and Lloyds of SA (Pty) Ltd* 1981 (3) SA 340 (A) that remotely suggests that "debt" includes every obligation to do something or refrain from doing something, other than payment or delivery. The trial court had therefore attached an incorrect meaning to the word "debt" which, as contemplated in s 10 of the Prescription Act, did not cover the present claim.

87 *Myathaza v Metrobus supra* par 62.

88 *Myathaza v Metrobus supra* par 66.

among others, the right of access to justice. He, however, disagreed with the proposition that this necessitates a finding that its provisions are inconsistent with the provisions of the LRA since the relevant provisions of the two Acts are capable of complementing each other in a way that best protects the fundamental right of access to justice while at the same time preserving the speedy resolution of disputes under the LRA. After finding the two statutes consistent with each other, Froneman J examined the meaning of "process" and "debt" in section 15 of the Prescription Act and held that commencing proceedings before the CCMA interrupted prescription in accordance with section 15(1) of the Prescription Act.[89] In determining whether a claim for unfair dismissal under the LRA constituted a "debt", Froneman J held that only a claim for the enforcement of legal obligations should qualify as a "debt" under the Prescription Act.[90] An unfair dismissal claim is designed to enforce three possible kinds of legal obligation – namely, reinstatement, re-employment and compensation. Each one of them enjoins the employer "to do something positive". In the case of reinstatement, which was ordered in the present case,

> "it means the resuscitation of the employment agreement with all the attendant reciprocal rights and obligations. The employer must provide employment and pay remuneration. Both fall within the meaning of a 'debt' under the Prescription Act, however narrowly interpreted."[91]

Since the service of the process initiating the CCMA dispute resolution process interrupted prescription, prescription remained interrupted until any review proceedings seeking to nullify the CCMA outcome were finalised. In effect, the restriction to review only provides a cogent and compelling reason for reinterpreting the Prescription Act to include statutory reviews under section 145 of the LRA as included in the judicial process that interrupts prescription until finality is reached under section 15 of the Prescription Act. The restriction infringes the right of access to courts more severely than where a right is allowed. An interpretation that best protects the right of access should be preferred. This can be achieved by allowing the right of review to play the same role of finality as the right of appeal does in ordinary matters.[92] Since the referral of the dispute to the CCMA interrupted prescription until finalisation of the review process, the arbitration award in question had not prescribed and therefore the appeal succeeded.[93] The appeal was upheld on the basis that until the review was finalised, Myathaza's claim would not prescribe.[94]

4 2 3 The third judgment in Myathaza (CC)

While concurring with Jafta J's lead judgment that the Prescription Act was not applicable, Zondo J added that, even assuming that it was applicable to the matter dealt with under the LRA, the provisions of the Prescription Act

---

89 *Myathaza v Metrobus supra* par 75 and 82.
90 *Myathaza v Metrobus supra* par 78.
91 *Myathaza v Metrobus supra* par 79.
92 *Myathaza v Metrobus supra* par 86.
93 *Myathaza v Metrobus supra* par 88.
94 *Myathaza v Metrobus supra* par 90.

relied upon for the conclusion that the arbitration award had prescribed had no application to the arbitration award.[95] Zondo J disagreed that the referral of a dismissal dispute to the CCMA interrupted prescription since that could occur only by service on the debtor of the process contemplated in section 15(1) read with subsection (6) of the Prescription Act.[96] The Justice of the Constitutional Court then proceeded to deal with the question whether an arbitration award such as the one involved in his present case constituted a "debt" for the purposes of the Prescription Act and concluded that it did not.[97] Zondo J concluded that section 145(9) of the LRA enacted in January 2015 did not apply to the present case and as Jafta J had correctly observed, this provision was Parliament's response to various judgments of the Labour Court and Labour Appeal Court, which were to the effect that the Prescription Act applied to the LRA dispute resolution system concerning dismissal disputes.[98]

4 3 The *Mogaila* judgment

In a direct access application in *Mogaila v Coca-Cola Fortune (Pty) Ltd,*[99] the Constitutional Court was called upon to determine issues not dissimilar to those in *Myathaza v Metropolitan Bus* – namely, whether: (a) the Prescription Act was inconsistent with the LRA; and (b) whether an order of reinstatement granted in the applicant's favour constituted a "debt" for the purposes of the Prescription Act 1969. In addition, the applicant sought an order of the court directing the employer to reinstate her to her previous employment position.[100] The court had the *Myathaza v Metrobus* judgment (decided some two and a half months earlier) as a point of reference but, as already shown, there was no majority in terms of the reasoning despite a unanimous outcome. Fortunately for the applicant in *Mogaila,* the three approaches in *Myathaza v Metrobus* would all lead to an outcome similar to that in *Myathaza v Metrobus* – that is, that Ms Mogaila would be entitled to an order declaring that the arbitration award ordering her reinstatement had not prescribed. She was entitled to secure its certification under section 143(3) of the LRA, and its enforcement under section 143(1).[101] Ms Mogaila must succeed either because the arbitration award in her favour had not prescribed because the Prescription Act did not apply at all to LRA matters, or, as the Jafta and Zondo JJ judgments held, even if that statute were applicable, the order of reinstatement was not an obligation to pay money, deliver goods or services,[102] or because, as Froneman J held, the CCMA referral interrupted prescription, and the interruption persisted until the finalisation of the review proceedings in October 2013.[103] Finally, on the basis of Froneman J's approach, the arbitration award would have

95 *Myathaza v Metrobus supra* par 104, 131–139.
96 *Myathaza v Metrobus supra* par 140–141.
97 *Myathaza v Metrobus supra* par 119.
98 *Myathaza v Metrobus supra* par 145.
99 2018 (1) SA 82 (CC) (*Mogaila*).
100 *Mogaila supra* par 1.
101 *Mogaila supra* par 27.
102 *Myathaza v Metropolitan Bus supra* par 59.
103 *Mogaila supra* par 28.

prescribed only in October 2016. Ms Mogaila however filed her application timeously, in April 2016. Prescription was therefore interrupted, again, pending the finalisation of these proceedings. On the basis of whichever approach adopted in *Myathaza v Metrobus*, she was entitled to proceed with the certification of the award under section 143 of the LRA.[104] In the end, the court declared that the order of reinstatement made in favour of Ms Mogaila by the arbitrator had not prescribed in terms of the Prescription Act.[105]

4 4 The *FAWU v Pieman's Pantry* decision

The issues canvassed in the Constitutional Court in the recent case of *FAWU obo Gaoshubelwe v Pieman's Pantry (Pty) Ltd*[106] clearly show that the *Mogaila* case was far from being the last the Constitutional Court would pronounce on issues involving unfair dismissal claims under section 191 of the LRA and the application of the Prescription Act. The first of the two questions for determination in this case was whether the Prescription Act applied to such claims, and the second was whether the unfair dismissal dispute referred by the applicant to the Labour Court on behalf of its members employed by the respondent had prescribed.[107] FAWU argued that the Prescription Act does not apply to unfair dismissals in terms of section 191 of the LRA, which is designed to ensure effective resolution of labour disputes and, in any event, if the Prescription Act applies, prescription was interrupted by the initial referral of the dispute to the CCMA for conciliation.[108] Pieman's Pantry contended that the Prescription Act applies to the LRA because an unfair dismissal claim under the LRA is a "debt" for the purposes of the Prescription Act. It rejected the contention that there is an inconsistency between the two Acts, and argued they were complementary. The time-bar imposed by section 191 is not an alternative to the prescription regime. It further argued that FAWU's unfair dismissal claims had prescribed as the statement of claim had been filed in the Labour Court more than three years after the certificate of non-resolution of the dispute was issued. Pieman's final submission was that the service of a referral for conciliation by the CCMA does not amount to "any process" capable of disrupting prescription in terms of section 15(1) of the Prescription Act. In line with the foregoing argument, it follows that prescription started running after a certificate of non-resolution was issued.[109] The Constitutional Court was unanimous in upholding the appeal

---

104 *Mogaila supra* par 29.

105 *Mogaila supra* par 31. In *Compass Group SA (Pty) Ltd v Van Tonder* (2016) 37 *ILJ* 1413 (LC), the LC held that it was bound by the LAC judgment in *Myathaza* and had no option but to find that the arbitration award in this matter had prescribed, thereby depriving the employee of a compensation award. By the time the matter was heard by the LAC in *Van Tonder v Compass Group SA (Pty) Ltd* (2017) 38 *ILJ* 2329 (LAC), the CC had overruled that decision in *Myathaza v Metrobus* and the court found that, whichever of the approaches set out by the CC was adopted, the compensation order contained in the arbitration award had not prescribed.

106 [2018] ZACC 7; (2018) 39 *ILJ* 1213 (CC).

107 *FAWU v Pieman's Pantry supra* par 1, 30, 77 and 138.

108 *FAWU v Pieman's Pantry supra* par 22 and 24.

109 *FAWU v Pieman's Pantry supra* par 25.

and setting aside the orders of the Labour Appeal Court and the Labour Court, but in what is becoming a pattern in these cases, the court was split into three, with each judgment delivering a different reason for upholding the appeal.

4 4 1 The minority judgment of Zondi AJ

In answering the question whether the Prescription Act applies to litigation under the LRA, Zondi AJ, who delivered the minority opinion, held that the answer must be informed by a critical analysis of the provisions of section 210 of the LRA as well as of section 16 of the Prescription Act so as to ascertain whether there was any inconsistency between those provisions.[110] Zondi AJ referred to the court's judgment in *Mdeyide* where it held that the Road Accident Fund Act (which included provisions dealing with prescription) was ostensibly enacted to cover that field since the Prescription Act was not appropriate in that area, meaning that there was no consistency in that context;[111] and to *Myathaza v Metrobus* where none of the three judgments was conclusive in its individual answer, although each led to the same result.[112] It was the learned judge's conclusion that the provisions of the Prescription Act are inconsistent with those of section 191 of the LRA to the extent that there are material differences between the two Acts.

According to the acting judge, the inconsistency arises as a result of the different time periods that are stipulated in the Acts; thus the Prescription Act would not apply to litigation conducted in terms of section 191 of the LRA.[113] Under the prescription regime, a creditor must claim the debt within the specified time period as he or she cannot seek condonation of non-compliance with the statutory prescription.[114] On the other hand, section 191(11) prescribes time limits within which the dispute should be referred to the Labour Court, and it also provides for condonation for late referral upon good cause shown. In other words, although the LRA requires expedition in litigation, "it is not intolerant of the delay. It condones delays for which there is a satisfactory explanation".[115] Under the LRA regime, an employee dismissed for operational requirements could discover three years later that the employer, contrary to section 189 of the LRA, did not observe the rules of consultation and could apply simultaneously for condonation in his claim for unfair dismissal because he acquired the knowledge of the unfairness three years later. Under the prescription regime, unless an employee places him or herself within the provisions of sections 13, 14 or 15 of the Act, his or her claim for unfair dismissal would have prescribed and become unenforceable because prescription begins to run as soon as the debt is due – that is, when the creditor acquires knowledge of the identity of the debtor.[116] In the final analysis, Zondi AJ

[110] *FAWU v Pieman's Pantry supra* par 38–42.
[111] *RAF v Mdeyide* 2011 (2) SA 26 (CC) par 50.
[112] *FAWU v Pieman's Pantry supra* par 45–48.
[113] *FAWU v Pieman's Pantry supra* par 49.
[114] *FAWU v Pieman's Pantry supra* par 59.
[115] *FAWU v Pieman's Pantry supra* par 62.
[116] *FAWU v Pieman's Pantry supra* par 72–73.

held that the provisions of the Prescription Act are incapable of importation into the LRA, and that they do not apply to litigation under that regime. In effect:

> "To try to apply the Prescription Act to the litigation under the LRA is just like trying to fit square pegs into round holes, ignoring clear structural differences between the two Acts. Legal consequences flowing from failure to comply with the time periods which each legislation respectively stipulates, are not the same. Failure to comply with the time periods stipulated by the LRA is not fatal as such failure may be condoned on good cause shown. Under the Prescription Act a creditor loses a right to enforce its claim once the claim has prescribed. It does not provide a mechanism through which the lost right may be reclaimed. These differences between the two statutes are, in my view, sufficiently material to constitute inconsistency as contemplated in section 16(1) of the Prescription Act."[117]

4 4 2 The concurring judgment of Zondo DCJ

The Deputy Chief Justice (as he then was) agreed with the judgment of Zondi AJ (the first judgment) that leave to appeal be granted and that the appeal be upheld, but he proceeded to proffer additional reasons for the conclusion that the Prescription Act does not apply to unfair dismissal claims.[118] First, there is no indication whatsoever in section 191(11)(*b*) that the power conferred upon the Labour Court is limited in any way or that it is subject to the Prescription Act.[119] Second, the provisions of the LRA sought to do things differently and were aware of the existence of the Prescription Act in the statute books. If, indeed, the drafters of the LRA had intended it to incorporate the Prescription Act, they would have done so expressly. Not having done so means that they did not intend the prescription statute to play any role vis-à-vis the LRA.[120] Thirdly, the provisions of section 191(2) allow the employee to show good cause "at any time", so, it does not limit the employee to showing good cause within a three-year period in accordance with the Prescription Act. That means that the employee could show good cause outside the three-year prescription period.[121] Lastly, even after three years, the CCMA, a bargaining council or the Labour Court does have jurisdiction to condone late unfair dismissal referrals where good cause is shown for such lateness.[122]

One of the cases cited[123] to illustrate where employees had waited over three years to refer their unfair dismissal disputes to conciliation and showed *bona fide* error of law or other good cause includes the recent Constitutional Court judgment in *September v CMI Business Enterprises*

---

117 *FAWU v Pieman's Pantry supra* par 74.

118 *FAWU v Pieman's Pantry supra* par 78.

119 *FAWU v Pieman's Pantry supra* par 91.

120 *FAWU v Pieman's Pantry supra* par 92–93.

121 *FAWU v Pieman's Pantry supra* par 94.

122 *FAWU v Pieman's Pantry supra* par 96.

123 See also *Steenkamp v Edcon Ltd* 2016 (3) SA 251 (CC) par 193; *Chirwa v Transnet Ltd* 2008 (4) SA 367 (CC) par 77; *Fredricks v MEC for Education & Training, EC* 2002 (2) SA 693 (CC); *Gcaba v Minister of Safety and Security* 2010 (1) SA 238 (CC); *NUMSA v Intervale (Pty) Ltd* (2015) 36 ILJ 363 (CC) par 71–72.

CC.[124] After discussing these cases, Zondo DCJ expressed the following view:

> "Bringing the Prescription Act into the unfair dismissal claims under the LRA gives employers two 'sledgehammers' capable of 'killing' an employee's unfair dismissal claim in circumstances where the 'deal' reached at NEDLAC among all the stakeholders was that the employer would have only one 'sledgehammer', namely the LRA 'sledgehammers'. In other words, that an employer could 'kill' an employee's unfair dismissal claim for delay in referring it by showing that the employee had no good cause. If an employee referred a dismissal dispute to the relevant forum outside the stipulated period but before the expiry of three years, the employer would use an LRA 'sledgehammer' to try to 'kill' the claim by taking the point that there was no good cause for the delay. If the claim was referred after the expiry of the three-year period provided for in the Prescription Act, the employer could invoke the Prescription Act 'sledgehammer' and take the point that the claim has prescribed and, with or without good cause, the claim is 'dead'."[125]

In considering whether the Prescription Act applies to unfair dismissal claims under section 191 of the LRA, Zondo DCJ stated that the court should adopt a similar approach to the one adopted in deciding whether the Promotion of Administrative Justice Act[126] (PAJA) would apply to the review of CCMA arbitration awards, which was to say that the LRA is specialised national legislation designed to give effect to the right to fair labour practices whose dispute resolution mechanism contains specialised provisions while the Prescription Act contains general provisions. Thus, as the court said in *Sidumo v Rustenburg Platinum Mines Ltd*[127] in relation to PAJA, the specialised provisions of the LRA "trump general provisions".[128] Furthermore, the judge expressed the view that applying the Prescription Act to unfair dismissal claims imposes on employees a burden or disadvantage without giving them any benefit such as those the Act gives to creditors and debtors under the prescription regime.[129] Finally, it was because the Prescription Act is not meant to be applied to unfair dismissal claims or disputes under the LRA that one experiences difficulties in any attempt to find consistency in the two different statutory regimes.[130]

4 4 3 Kollapen AJ's majority judgment

Although Kollapen AJ, delivering the judgment of the majority, agreed that the appeal should succeed, he disagreed that the provisions of the Prescription Act were inconsistent with those of the LRA such that the former is not applicable to litigation under the latter Act.[131] Kollapen AJ entertained no doubt as to whether there was compatibility and consistency between the two Acts even though they deal with different aspects of time

[124] [2018] ZACC 4 (27 February 2018).
[125] *FAWU v Pieman's Pantry supra* par 119.
[126] 3 of 2000.
[127] 2008 (2) SA 24 (CC).
[128] *FAWU v Pieman's Pantry supra* par 127.
[129] *FAWU v Pieman's Pantry supra* par 136.
[130] *FAWU v Pieman's Pantry supra* par 137.
[131] *FAWU v Pieman's Pantry supra* par 139.

periods in the process of litigation. The LRA is concerned with time periods that do not necessarily result in the extinction of the claim in the event of non-compliance, whereas the object of the Prescription Act is to achieve extinction in the event of non-compliance. Even in the face of their differences (between a time-bar and a true prescription time period),[132] they are consistent with each other.[133] The judgment of Kollapen AJ (with Cameron, Froneman, Madlanga, Mhlantla and Theron JJ and Kathree-Setiloane AJ, concurring) could be summarised in line with the subheading under which they were considered in the judgment, as follows:

(i) The different character of time periods

The provisions of section 16(1) of the Prescription Act and section 210 of the LRA, which set the respective time frames, each seek to enhance the quality of justice and adjudication, which must be the hallmark of a system of constitutional justice in a democratic state such as South Africa; they are equally consistent with the imperatives of the Constitution and in particular its section 34. To the extent that the Prescription Act would apply to actions for the recovery of debts, the question arises as to whether, given the admittedly unique and context-sensitive nature of the LRA, there is an in-principle incompatibility in seeking to interpret the Prescription Act in a manner that renders it applicable to the LRA dispute-resolution process. However, that is not the case with the inclusion of labour rights in the Bill of Rights, which signalled a significant and seismic development in the recognition of the rights of workers.[134]

(ii) Is the claim a "debt" under the Prescription Act?[135]

If regard is had to the jurisprudence embedded in such cases as *Makate*[136] and *Escom*[137] and the literal meaning of "debt", then, it must follow that a claim for unfair dismissal seeks to enforce three kinds of employer obligations, namely: reinstatement, re-employment and compensation.[138] In other words, an unfair dismissal claim activates proceedings for the recovering of a debt as contemplated in section 16(1) of the Prescription Act, hence the first part of the enquiry is answered in the affirmative.[139]

(iii) Inconsistency versus difference[140]

The judgment referred to the approach of the court in *Mdeyide*, which considered whether the Prescription Act was consistent with the Road Accident Fund Act and held that it was "a quest bound to fail". This was a

---

132 *Myathaza v Metropolitan Bus supra* par 94.
133 *FAWU v Pieman's Pantry supra* par 140.
134 *FAWU v Pieman's Pantry supra* par 149–150.
135 *FAWU v Pieman's Pantry supra* par 152–157.
136 *Makate supra* par 90.
137 *Electricity Supply Commission v Stewarts and Lloyds of SA (Pty) Ltd* 1981 (3) SA 340 (A) 344F.
138 *Myathaza v Metropolitan Bus supra* par 79.
139 *FAWU v Pieman's Pantry supra* par 156–157.
140 *FAWU v Pieman's Pantry supra* par 158–167.

case where a difference resulted in clear inconsistency. If one had regard, in the present case, to the wording of section 210 of the LRA (which provides that the provisions of the LRA will apply in the event of conflict between it and the provisions of any other law), the meaning of the word "conflict" must also assume the meaning ordinarily assigned to it and difference in itself will not constitute conflict unless such difference leads to conflict.[141]

(iv) The consistency evaluation[142]

On the question whether the time periods provided for in section 210 of the LRA were inconsistent with the provisions of the Prescription Act, it was emphasised that while both Acts deal with time periods, they do so for different reasons and to achieve different objectives. There is no doubt that the time periods in each Act regulate different features of the litigation process, but that they are not only reconcilable but can exist in harmony side by side. So, having regard to section 210 of the LRA, the provisions of the LRA are not in conflict the provisions of the Prescription Act. Accordingly, the existence of any conflict between the two statutes has not been shown in these proceedings.[143]

(v) The good cause "at any time" argument[144]

The language of section 191(2) and the context of the phrase "at any time" clearly show that it was used in the context of good cause, which is supported by section 191(11)(*b*). It follows that the phrase "at any time" does not have the effect of extending the mandatory time frame of 30 and 90 days set out in section 191(2) of the LRA and, therefore, does not provide the basis for an inconsistency argument in relation to the Prescription Act.[145]

(vi) Was the running of prescription interrupted by the referral of the matter to conciliation?[146]

Given the mandatory nature of conciliation as a requirement for arbitration or referral to the Labour Court, it follows that the proceedings for the recovery of a debt arising from an unfair dismissal claim commences when the dispute is referred to conciliation. However, a process that initiates proceedings for enforcement of payment of debt interrupts prescription.[147] Although prescription began to run when the debt became due (in this case, on 1 August 2001), it was interrupted by the referral of the dispute to the CCMA on 7 August 2001 and continued to be interrupted until the

141 *FAWU v Pieman's Pantry supra* par 166–167.
142 *FAWU v Pieman's Pantry supra* par 168–181.
143 *FAWU v Pieman's Pantry supra* par 177, 179, and 180–181.
144 *FAWU v Pieman's Pantry supra* par 182–193.
145 *FAWU v Pieman's Pantry supra* par 192–193.
146 *FAWU v Pieman's Pantry supra* par 194–204.
147 *FAWU v Pieman's Pantry supra* par 202. See also *Cape Town Municipality v Allianz Insurance Co Ltd* 1990 (1) SA 311 (C) 334H–J.

dismissal of the review proceedings by the Labour Court on 9 December 2003. So, when the dispute was referred to the Labour Court for adjudication on 16 March 2005, it clearly had not prescribed.[148]

(vii) Fairness and flexibility[149]

While prescription has been broadly identified as limiting the right of access to courts,[150] the operation of the provisions of section 12 has been described as striking the necessary balance between certainty and fairness by introducing the necessary flexibility when a debt becomes due and when such debt has prescribed.[151] But, it must be borne in mind that flexibility in the LRA is not of the open-ended kind. Failure by a party to comply with time frames requires an application of condonation that would be granted if good cause is shown for the lateness. The principle of fairness to both sides encapsulated in the "good cause" exercise is similar to the approach taken by the court in *Links v MEC*[152] in the interpretation of the Prescription Act: "I would say no more than that the consciousness that is brought to bear on these two different but reconcilable pieces of legislation evidences the same golden thread – fairness to both sides and certainty in the process".[153]

(viii) Conclusion

Finally, Kollapen AJ held that both the Prescription Act and the LRA seek to achieve objectives that are compatible with each other, which is, the efficient and timely resolution of disputes within a specific time frame within their respective spheres. They do not advance different and inconsistent litigation imperatives – rather, they can, and have coexisted with each other in an integrated fashion.[154]

4 5 The recent LAC case of *NUMSA obo E Masana*

In *NUMSA obo E Masana v Gili Pipe Irrigation (Pty) Ltd,*[155] Sutherland JA recognised the period during which the litigation was being conducted as "an era of great uncertainty about the application in Labour Relations litigation of the principles of prescription as encapsulated in the Prescription Act 68 of 1969".[156] The court *a quo* had adopted the approach of the Labour Court in *PSA obo Khaya v CCMA*[157] to the effect that the Prescription Act applied to the LRA and that section 13(1)(*f*) of the

148 *FAWU v Pieman's Pantry supra* par 204.
149 *FAWU v Pieman's Pantry supra* par 205–213.
150 *Makate supra* par 90.
151 *FAWU v Pieman's Pantry supra* par 206; *Links v MEC supra* par 26.
152 *Supra.*
153 *FAWU v Pieman's Pantry supra* par 212–213.
154 *FAWU v Pieman's Pantry supra* par 214.
155 (2019) 40 *ILJ* 813 (LAC).
156 *NUMSA obo E Masana supra* par 5.
157 (2008) 29 *ILJ* 1546 (LC).

Prescription Act envisaged a three-year period of prescription to apply to an award. Accordingly, Cele J dismissed the rescission application at the court *a quo.*[158] Meanwhile, the Constitutional Court handed down its judgment in *Myathaza v Metrobus*, which unfortunately provided a deadlock rather than a clear road ahead; the court was evenly split on both sides of the divide, one half holding that the Prescription Act applied to the LRA while the other half held that it did not. It was not until the subsequent case of *FAWU v Pieman's Pantry* that a clear majority emerged, deciding that the Prescription Act applied to LRA litigation.[159] Without necessarily repeating the discussion of the decisions of Froneman J in *Myathaza v Metrobus* and that of the majority in *FAWU v Pieman's Pantry*, which the LAC counselled must be read together,[160] it suffices to say that Sutherland JA relied on certain passages in the two cases,[161] and held that once it was accepted that the Prescription Act applies to all litigation under the aegis of the LRA, there is no rational basis to conclude that any aspect or stage of such litigation, including an award, is not subject to prescription. Sutherland JA added:

> "In *Metrobus*, Froneman J held that prescription applies specifically to awards. In the light of *Pieman's Pantry,* the view of one half of the Constitutional Court in *Metrobus* to that effect, must now be accepted as a definitive statement of the law. This Court endorses that view."[162]

Having found that as at the date that Cele J heard the matter, a total of 19 months could be counted as periods during which prescription was running in relation to Masana's right(s); the matter was thus sent back to the Labour Court to deal with the merits of the rescission application.[163]

5 CAN ARREAR WAGES BE RECOVERED AS A JUDGMENT DEBT?

The issue of prescription in a claim for arrear wages also arises when an employer fails to reinstate employees in terms of a court order. Since an obligation to pay emanating from a court order is a judgment debt and prescribes only after 30 years, the question then arises whether arrear wages are included in the judgment debt. These issues were considered in a series of hearings concerning a matter between NUMSA and Hendor Mining Supplies.[164]

---

158 *NUMSA obo E Masana supra* par 6.

159 *NUMSA obo E Masana supra* par 7 and 8.

160 *NUMSA obo E Masana supra* par 10.

161 *Myathaza v Metrobus supra* par 85–88; *FAWU v Pieman's Pantry supra* par 202–204.

162 *NUMSA obo E Masana supra* par 11.

163 *NUMSA obo E Masana supra* par 13 and 15–16.

164 See *NUMSA obo Fohlisa v Hendor Mining Supplies (A Division of Marschalk Beleggings) (Pty) Ltd* [2017] ZACC 9.

5 1 *Hendor Mining Supplies* (LC and LAC)

The employer had failed to reinstate its employees and pay their remuneration in the intervening period before eventually reinstating them. The reinstatement was meant to take place in terms of an order made on 16 April 2007 by Cele AJ of the Labour Court. By that order, the employees were to be reinstated with effect from 1 January 2007, whereas they were to report for duty on 23 April 2007. However, when the employees reported for duty on the day in question, the employer did not take them back. Rather, the employer engaged in attempts to have the order of the Labour Court overturned through the appeal processes. It was only after these attempts had failed that the employees were allowed to return to work on 29 September 2009. Having failed to pay the employees their remuneration for the period 1 January 2007 to 28 September 2009, the employees instituted the present litigation. The employer set up the defence of prescription. Thus, the issue for determination turned on whether the prescription period in respect of unpaid wages was, in this case, three or 30 years. In other words, was the employees' claim a "judgment debt" in terms of section 11(*d*) of the Prescription Act? The employees sought a declarator from the Labour Court that the employer was liable to pay their remuneration from 1 January 2007 to 28 September 2009. Before the Labour Appeal Court in *Hendor Mining Supplies (A Division of Marschalk Beleggings) (Pty) Ltd v NUMSA,*[165] the employer argued that the claims for arrear wages from 23 April 2007 until 28 September 2009 did not relate to a judgment debt but were claims in contract that accrued weekly under the contract of employment; and that such claims were a "debt due" within the meaning of section 11(*d*) of the Prescription Act and, therefore, subject to a three-year prescription period. The employer conceded that the claims for arrear wages from 23 April 2007 until 28 September 2009 were new claims in contract and not a continuation of the unfair dismissal dispute that had existed between the parties.[166]

The Labour Court rejected the appellant's reliance on prescription as "incongruous, if not illogical" and held that the appellant bore

> "the risk of additional financial obligations which become fully executable at the date of the order of the highest court that pronounces on it, as a judgment debt rather than a contractual claim."[167]

With regard to the Constitutional Court's judgment in *Billiton Aluminium SA Ltd t/a Hillside Aluminium v Khanyile*[168] and *Equity Aviation Services (Pty) Ltd v CCMA*,[169] the Labour Court rejected as "not only odd but perverse" the appellant's contention that the claim for unpaid wages from 23 April 2007 was one in contract in that the employees were entitled to back pay until 28 September 2009. Consequently, the respondents' claims were

---

165 [2016] 2 BLLR 115 (LAC) (*Hendor Mining Supplies*).
166 *Hendor Mining Supplies supra* par 5–6.
167 *Hendor Mining Supplies supra* par 7.
168 (2010) 31 *ILJ* 273 (CC).
169 2009 (1) SA 390 (CC).

found not to have prescribed and the appellant was ordered to pay back pay for the period 1 January 2007 to 28 September 2009, with interest at the prescribed rate with costs.[170] On the other hand, the Labour Appeal Court held that where an employee, after the reinstatement order and during the time that the employer exercises its review and appeal remedies to exhaustion, tenders his or her labour, he or she does so in terms of the employment contract. The employee is therefore entitled to payment in terms of the contract of employment. The claim is therefore a contractual one wherein the employee would have to set out sufficient facts to justify the right or entitlement to judicial process. The employee would *inter alia* have to prove that the contract of employment was extant; that he or she tendered his or her labour in terms thereof and that the employer refused or was unwilling to pay him or her in terms of that contract. The employer on the other hand would have all the contractual defences at his or her disposal. The Labour Appeal Court reasoned that the claim for back pay for 1 January 2007 to 22 April 2007 was a judgment debt.[171] Yet, in its order, it dismissed the declaratory order sought by NUMSA and the employees in its entirety. That dismissal must be inclusive of back pay due in respect of the period 1 January to 22 April 2007. However, according to the Labour Appeal Court, the prescription period in respect of the claims for arrear wages for the period 23 April 2007 to 28 September 2009 was three years. In other words, as from 15 September 2012 (three years after the appellant's petition for leave to appeal was refused), that period had elapsed, such that these claims had prescribed. These claims, the Labour Appeal Court reasoned, did not arise from Cele's order, but from the employment contract that had been reinstated. Having thus held, it did not find it necessary to decide the question of substitution.

5 2 *NUMSA v Hendor Mining Supplies* (CC)

The workers took the matter of the employer's refusal to pay them their arrear wages from 1 January 2007 to 29 September 2009 to the Constitutional Court in *NUMSA obo Fohlisa v Hendor Mining Supplies (A Division of Marschalk Beleggings) (Pty) Ltd*,[172] the employer contending that the claim had prescribed. For the workers, NUMSA argued in support of the Labour Court's holding that the back pay arising from reinstatement constitutes a judgment debt and will only prescribe after 30 years in terms of section 11(*a*)(ii) of the Prescription Act. In the alternative, the workers argued that the earliest they could reasonably have come to know that Hendor would not pay the back-dated remuneration was 29 September 2009 when they reported for duty.[173] The main issue for determination was whether the prescription period in respect of the unpaid remuneration was three or 30 years and the answer turned on whether the employee's claim was a judgment debt.[174] In other words, did the obligation to pay arrear remuneration for the period 1 January 2007 to 28 September 2009

[170] *Hendor Mining Supplies supra* par 7.
[171] *Hendor Mining Supplies supra* par 11.
[172] [2017] ZACC 9 (*NUMSA v Hendor Mining Supplies*).
[173] *NUMSA v Hendor Mining Supplies supra* par 6.
[174] *NUMSA v Hendor Mining Supplies supra* par 1.

constitute a judgment debt; and if not, did prescription only start running from 29 September 2009?[175] Incidentally, the judgments of Madlanga J for the majority and Zondo J for the minority differed as to whether there was only one period (the majority view), or as the minority believed, there were two separate periods, one being for back pay under the first period (which is the judgment debt that prescribed after thirty years), and the other for back pay for the other period (which prescribes after three years). For the majority, there was no differentiation in such periods; there was only the period of 1 January 2007 to 28 September 2009 during which Hendor did not reinstate the employees in compliance with the order of Cele AJ. In effect, the injunction to reinstate contained in that order continued to exist for the entire period until complied with.[176]

5 2 1 First judgment

The most acceptable definition of "reinstatement", the primary statutory remedy in unfair dismissal disputes,[177] was provided by the Constitutional Court in *Equity Aviation.*[178] It means "to put the employee back into the same job or position he or she occupied before the dismissal, on the same terms and conditions". In other words, it is aimed at "placing an employee in the position he or she would have been but for the unfair dismissal". It has the effect of safeguarding

> "workers' employment by restoring the employment contract. Differently put, if employees are reinstated, they resume employment on the same terms and conditions that prevailed at the time of their dismissal."[179]

---

[175] *NUMSA v Hendor Mining Supplies supra* par 7.

[176] *NUMSA v Hendor Mining Supplies supra* par 31.

[177] The situation under the UK Employment Rights Act 1996 is similar to that of South Africa where, if the dismissed employee so wishes, reinstatement is the primary remedy for unfair dismissal, or, at least, a presumption in their favour, followed by re-engagement, rather than compensation. In terms of s 116 of the Act, it is provided that reinstatement or re-engagement should be considered first by the tribunal having taken into consideration some other listed factors – *Oasis Community Learning v Wolff* [2013] UKEAT 0364 (17 May 2013) par 10. But it was said in *British Airways Plc. v Valencia* [2014] UKEAT 0056 (26 June 2014) par 8 that the statute requires consideration of reinstatement first and it is only if a decision is made not to order reinstatement will the question of re-engagement arise. Quite recently, the UK Supreme Court offered further clarification of the issue when, in *McBride v Scottish Police Authority* [2016] ICR 788 (UKSC) par 32, Lord Hodge said: "If the complainant wishes such an order, the tribunal is required first to consider whether to make an order of reinstatement, and if it decided not to make such an order, then, secondly, to consider whether to make an order for re-engagement (s 112(2), (3) and 116(1), (3)). If neither order is made, the tribunal may make an award of compensation for unfair dismissal (s 112(4)." This may be compared with the situation in Namibia where reinstatement is lumped together with other "appropriate awards" the arbitrator could make under s 86(15) of the Labour Act 11 of 2007. Thus, in the exercise of the discretion whether or not to award reinstatement or compensation the arbitrator must also bear in mind that reinstatement is not a primary remedy of unfair dismissal in Namibia. An award of compensation is equally just as important. This point was made in *Paulo v Shoprite Namibia (Pty) Ltd* 2013 (1) NR 78 (LC) par 18–19 by Damaseb JP; and quite recently by Geier J, *Negonga v Secretary to Cabinet* 2016 (3) NR 670 (LC) par 66.

[178] *Supra.*

[179] *Equity Aviation supra* par 36. Cf per McNally JA of the Zimbabwe Supreme Court who, in *Chegutu Municipality v Manyora* 1997 (1) SA 662 (ZS) 665H, defined reinstatement thus: "I conclude therefore that 'reinstatement' in the employment context means no more than

According to Madlanga J in *NUMSA v Hendor Mining Supplies,* if that meaning were to become a reality, outstanding remuneration could not but accumulate for as long as the order was not complied with. The reason is that for the entire intervening period before reinstatement, the obligation to reinstate and the effect of concomitant payment could only have been a judgment debt; it is not the order that reinstates, but Hendor that was supposed to have done so.[180] "On principle", held the Justice of the Constitutional Court,

> [w]hen reinstatement eventually took place with effect from 1 January 2007 as directed in Cele AJ's order, the accumulated remuneration was also reinstated. The practical, and indeed, legal reality dictated that it had to be paid as back pay. On a proper reading, that is the import of the *Equity Aviation* principle.[181] In the context of this type of order, I do not see why 16 April 2007 should alter this position. The relevance of this date is merely that it is the date of the order. Nowhere does the order say that the employees must be remunerated retrospectively from 1 January 2007 to 15 April 2007.[182]

Madlanga J could not conceive of a situation where an employee would be entitled to payment of remuneration in terms of an employment contract that was still in review or appeal processes and was yet to be resuscitated. Until there has been reinstatement, there is no contract of employment and until reinstatement, one cannot talk of an "extant" contract of employment. The point must however be made that remuneration is only payable after reinstatement. In conclusion, it was held that the obligation to settle the outstanding debt for back pay for the entire period 1 January 2007 to 28 September 2009 is a judgment debt that prescribes after 30 years in terms of section 11(*a*)(ii) of the Prescription Act; thus, the applicants were entitled to relief.[183] Finally, the conclusion that the employees' claims constitute a judgment debt made it unnecessary to consider the applicants' alternative argument that prescription started running on 29 September 2009.[184]

---

putting a person again into his previous job. You cannot put him back into his job yesterday or last year. You can only do it with immediate effect or from some future date. You can, however, remedy the effect of previous injustice by awarding back pay and/or compensation. But mere reinstatement does not necessarily imply that back pay and/or compensation automatically follows." This interpretation accords with the definition adopted by the Supreme Court of Namibia interpreting 'reinstatement' in the context of the Labour Act 1992 in *Transnamib Holdings Ltd v Engelbrecht* 2005 NR 372 (SC) 381E–G to the effect that the mere use of the words "in the position which he or she would have been had he or she not been so dismissed" does not necessarily mean that reinstatement in that "position" runs from the date of dismissal. So, too, Damaseb JP reiterated in *Paulo v Shoprite Namibia (Pty) Ltd* 2013 (1) NR 78 (LC) par 10 that, save for the difference that reinstatement is a primary remedy in South Africa while it is not in Namibia and Zimbabwe, nothing in the interpretation of the word "reinstatement" by the highest courts in the three jurisdictions recognises the right of an employee who has been found to have been unfairly dismissed to be automatically entitled to back pay and/or compensation.

180 *NUMSA v Hendor Mining Supplies supra* par 32.

181 *Equity Aviation supra* par 36.

182 *NUMSA v Hendor Mining Supplies supra* par 33.

183 *NUMSA v Hendor Mining Supplies supra* par 51–52.

184 *NUMSA v Hendor Mining Supplies supra* par 53.

5 2 2 The second judgment

Zondo J disagreed with Madlanga J's judgment that the whole claim is a judgment debt. Per Zondo J, one part of the claim from 1 January 2007 to 15 April 2007 is a judgment debt whereas the other part – that is, the claim for wages from 16 April 2007 to 28 September 2009 – is a contractual debt and not a judgment debt. However, the claim in either case had not prescribed. Since the first part of the claim was a judgment debt, the prescription period applicable to it was 30 years. Although the second part of the claim was a contractual claim, it had also not prescribed. The reasons given for so holding are quite different from those in the first judgment.[185] Insofar as the second period was concerned, the applicants' claims were debts under the Prescription Act but could only become due when the contracts of employment on which they were based were restored. Reinstatement is about restoration of the employment contract.[186] Since the applicants involved were reinstated on 29 September 2009, that was the day their contracts were restored. Their remuneration could not have been due before that date. Therefore, prescription could not have started running before the date of the restoration of their contracts. Accordingly, they could not have instituted legal proceedings for the payment of their remuneration before the date their contracts were restored. In other words, they could not have instituted legal proceedings to enforce contracts that were not in place while the order reinstating them was suspended as the employer was pursuing appeals.[187] The Labour Court, therefore erred in dealing with the matter on the basis that the debts in relation to 23 April 2007 to 15 September 2009 became due on 15 September 2009 and had therefore prescribed by 19 September 2012 when the applicants instituted the relevant proceedings.[188]

6 CONCLUSION

As this article has shown, the two main questions that the Constitutional Court was called upon to determine in *Myathaza v Metrobus*[189] were: (a) whether the Prescription Act was consistent with the LRA; and (b) whether an arbitration award under the LRA constituted a "debt" for the purposes of the Prescription Act. This produced a three-pronged answer. While the first and third judgments answered both questions in the negative, the second judgment answered the questions in the affirmative. Notwithstanding the split in this case, the Constitutional Court upheld Mr Myathaza's appeal and set aside the order of the Labour Appeal Court. Fortunately, the full bench of the Constitutional Court resolved the matter in *Mogaila*[190] by holding that whichever of the approaches was adopted – whether the arbitration award in the employee's favour could not have prescribed because the Prescription Act did not apply; or the referral of her

185 *NUMSA v Hendor Mining Supplies supra* par 62 and 81–82.
186 *Equity Aviation supra* par 36.
187 *NUMSA v Hendor Mining Supplies supra* par 177–178.
188 *NUMSA v Hendor Mining Supplies supra* par 179–180.
189 *Supra.*
190 *Supra*.

claim for reinstatement to the CCMA had interrupted prescription until the finalisation of the review proceedings – Ms Mogaila was entitled to an order declaring that the arbitration award ordering her reinstatement had not prescribed.[191]

What appears to be a replay of the Constitutional Court's tape in *Myathaza v Metrobus* was on show in *FAWU v Pieman's Pantry*[192] in the sense that all three judgments – the minority, concurring minority and majority judgments delivered in that order – produced the same result of upholding the appeal and agreeing with the order made in the minority (first) judgment[193] but differing on the reasons advanced in support of each line of reasoning. This unity of purpose, if one could so describe it, is notwithstanding that the first minority judgment likened applying the Prescription Act to the litigation under the LRA as equivalent to trying to fit square pegs into round holes, while ignoring the structural differences between the two Acts. For the concurring minority judgment, to bring the Prescription Act into the unfair dismissal claims under the LRA was like giving the employers two "sledgehammers" capable of "killing" an employee's unfair dismissal claim in circumstances where the "deal" reached at NEDLAC among all the stakeholders was that the employer would have only one "sledgehammer", namely the LRA "sledgehammers".[194] However, the majority was not prepared to accept that the provisions of the Prescription Act were inconsistent with those of the LRA such that the former is not applicable to litigation under the latter Act. Rather, the majority held that the LRA and the Prescription Act both seek to achieve objectives that are compatible with each other and that can function alongside each other.[195] It is clear from the *NUMSA v Hendor Mining Supplies* case that an employer cannot, through the appeal process, wriggle out of the obligation to reinstate unfairly dismissed employee by pleading technical prescription; nor could a process of appeal accompanied by the employer's refusal to comply with the arbitrator or court's order of reinstatement alleviate the employer's burden of paying the unfairly dismissed employees their back pay or remuneration upon reinstatement.

191 *Mogaila supra* par 27–29.
192 *Supra*.
193 *FAWU v Pieman's Pantry supra* par 75–76, 137 and 214–215.
194 *FAWU v Pieman's Pantry supra* par 119.
195 *FAWU v Pieman's Pantry supra* par 139 and 214.

FIGHTING FOOD INSECURITY, HUNGER, AND POVERTY: THE CONTENT AND CONTEXT OF THE SOCIO-ECONOMIC RIGHT OF ACCESS TO SUFFICIENT FOOD IN SOUTH AFRICA

Duduzile G Mbajiorgu
LLB LLM LLD
Senior Lecturer, School of Law, Faculty of Management and Law, University of Limpopo

Kola O Odeku
LLB LLM MBA LLD
Professor, School of Law, Faculty of Management and Law, University of Limpopo

SUMMARY

Poverty, lack of access to food, low income, hunger, unemployment and malnutrition are all interrelated because they undermine fundamental human rights and are a blatant affront to human dignity and section 27 of the South African Constitution. These factors have a direct impact on the realisation of the right to have access to sufficient food and poverty alleviation. Against this backdrop, this article examines major causes of food insecurity in South African rural households. Using an in-depth analysis of literature, previous studies, government reports, and policies aimed at poverty alleviation, this article examines some of the various poverty-alleviation strategies that the government has adopted in promoting rural food security. In this instance, the importance of social grants and land-based livelihood strategies – specifically subsistence farming – are analysed to determine the extent to which these strategies promote household food security and combat poverty and hunger in rural households.

1 INTRODUCTION

South Africa, a developing country, has a high poverty rate. The Poverty Trends Report, 2017, revealed that an estimated 30.3 million people in South Africa live below the Upper Bound Poverty Line (UBPL), with almost two-thirds (64.2 per cent) of the black African population living below the

UBPL.[1] Of note, poverty is linked with being food insecure and hungry, and with rural households and female-headed households.[2] The General Household Survey of 2019 (GHS 2019)[3] indicates that rural households were largely dependent on social grants as their main source of income.[4] The 2020 report, "Child Poverty in South Africa: A Multiple Overlapping Deprivation Analysis", showed that children in rural provinces were multidimensionally poor, and thus more susceptible to experiencing food insecurity.[5] Evidently, there is a positive association between poverty and food insecurity.

To address food insecurity, the government needs to take progressive steps by introducing and implementing both short-term and long-term interventions aimed at poverty alleviation within the broader framework of food security strategies as required by section 27(1)(*b*) and (2) of the Constitution of the Republic of South Africa, 1996. Section 27(1)(*b*) of the Constitution provides that everyone has the right of access to sufficient food. Section 27(2) provides that the State must take reasonable legislative steps and other measures, within its available resources, to achieve the progressive realisation of these rights. Based on this premise, poverty-alleviation strategies are essential in the realisation of the right of access to food. To fulfil this constitutional obligation, the government is enjoined to adopt reasonable and efficient strategies aimed at promoting and protecting the right of access to food.

Furthermore, government policies must be all-encompassing and holistic in their approach, promoting not only the right of access to food but also countering threats that affect the realisation of this right. For instance, poverty-alleviation strategies aimed at realising the right of access to food should deal with factors such as income and gender inequality, low income, and unemployment. This is important, as food insecurity is an outcome of social and economic processes that lead to deprivation and lack of access to food. Therefore, it is pertinent to point out that hunger and lack of access to sufficient food stems from disempowerment, marginalisation, poverty, and lack of economic access.[6] This means that human rights, including the right to food, place an obligation on states to enact policies that advance both civil and socio-economic rights. Such policies should sufficiently address the social well-being of individuals. To this end, such a measure will give effect to the recognition of the right to have access to sufficient food as a socio-economic right and promote sustainable and long-term food security.

In South Africa, in terms of section 27(1)(*b*) of the Constitution, the right of access to sufficient food is one of the constitutionally entrenched socio-

---

1 Statistics South Africa "Poverty Trends in South Africa: An Examination of Absolute Poverty Between 2006 and 2015" (2017) http://www.statssa.gov.za/?p=10341 (accessed 2020-09-16) 69.

2 Stats SA http://www.statssa.gov.za/?p=10341 78–91.

3 Statistics South Africa "General Household Survey" (2019) http://www.statssa.gov.za/publications/P0318/P03182019.pdf (accessed 2021-01-21).

4 Stats SA GHS (2019) 57–58.

5 Statistics South Africa "Child Poverty in South Africa: A Multiple Overlapping Deprivation Analysis" (2020) http://www.statssa.gov.za/publications/03-10-22/03-10-22June2020.pdf (accessed 2021-03-27).

6 Shepherd "Thinking Critically About Food Security" 2012 *Security Dialogue* 195–212.

economic rights.[7] The aim of the right is not only to promote human survival but also to ensure that the government enacts policies aimed at promoting access to sufficient nutritious food.[8] Consequently, the right of access to sufficient food provides a benchmark by which the success of short-term and long-term poverty-alleviation strategies can be measured. The right of access to sufficient food, like all socio-economic rights, is more than a "paper" right. It requires the government to be proactive in providing, securing, fulfilling, and maintaining the well-being of its citizens.[9] States should take adequate and effective measures for the progressive realisation of the socio-economic rights of their citizens, especially the resource-poor.[10] In South Africa, this duty emanates from section 7(1) of the Constitution, which provides that the Bill of Rights is a cornerstone of democracy in South Africa. The duty imposed by section 7 entails that the State must take reasonable legislative measures to promote the realisation of the right to have access to sufficient food.[11] Most importantly, these measures should conform to a certain acceptable standard. According to Liebenberg and Goldblatt,

> "[a]n approach to the interpretation of equality and socio-economic rights that acknowledges the interrelationship between these rights is also more likely to be responsive to the reality that the most severe forms of disadvantage are usually experienced as a result of an intersection between group-based forms of discrimination and socio-economic marginalisation."[12]

The argument advanced by Liebenberg and Goldblatt is critical to realising the right to have access to sufficient food, as the claimants to socio-economic rights have an interest that deserves protection.[13] Such interest requires that the government adopt legislative standards and other measures to fulfil the required protection, Liebenberg and Quinot[14] argue that the urgency and intensity of the interest determine whether the policy and its implementation are appropriate and reasonable under the circumstances. This reasonableness lies in the appropriateness of the response by the government, considering the socio-economic interest concerned. Using the reasonableness test as set out in *Government of the*

---

7 Brand "Food Security, Social Security and Grootboom" 2002 *ESR Review: Economic and Social Rights in South Africa* 16–17.

8 Brand 2002 *ESR Review* 16–17.

9 Wiles "Aspirational Principles or Enforceable Rights: The Future for Socio-Economic Rights in National Law" 2006 *American University International Law Review* 22–35.

10 Al Faruque "From Basic Need to Basic Right: Right to Food in Context" A study prepared for National Human Rights Commission of Bangladesh (June 2014) http://nhrc.portal.gov.bd/sites/default/files/files/nhrc.portal.gov.bd/page/348ec5eb_22f8_4754_bb62_6a0d15ba1513/From%20Basic%20Need%20to%20Basic%20Right_%20Right%20to%20Food%20in%20Context.pdf (accessed 2020-03-27) 1–37.

11 Khoza (ed) *Socio-Economic Rights in South Africa: A Resource Book* (2007) 30–42.

12 Liebenberg and Goldblatt "The Interrelationship Between Equality and Socio-Economic Rights Under South Africa's Transformative Constitution" 2007 *SAJHR* 339.

13 Liebenberg and Quinot *Law and Poverty: Perspectives From South Africa and Beyond* (2012) 231.

14 Liebenberg and Quinot *Law and Poverty* 231–232.

Republic of South Africa v Grootboom,[15] a court would determine whether the government policy is appropriate; if it is appropriate, then it is reasonable and if not, it infringes on the socio-economic right in question. Such an approach to the interpretation of socio-economic rights acknowledges both the negative and positive duties that such rights impose on the State to create a conducive environment for their progressive realisation.

Liebenberg[16] observes that the holistic framework as entrenched in section 7(2) of the Constitution brings about a substantive and contextual approach in realising socio-economic rights, and requires a combination of both negative and positive duties in protecting, promoting, and fulfilling such rights. Brand[17] argues that the duties imposed by socio-economic rights emanate from their formulation, especially where such rights are qualified, hence the need for the reasonableness test to determine whether the State's response in realising such rights is constitutionally valid.[18] Furthermore, the issue of availability of resources requires that the State indicate that its efforts to realise socio-economic rights are constrained by budgetary issues. Therefore, it suffices to argue that the standard set out also applies to the realisation of the right to have access to sufficient food.

The United Nations Principles and Guidelines on Poverty Interventions provide that poverty is the denial of a person's rights to a range of basic capabilities, such as the capability to be adequately nourished and to live in good health.[19] In this context, the right of access to sufficient food plays an important role in poverty alleviation and food-security interventions with a direct impact on food-specific policies. Such interventions will also take account of the fact that people living in poverty not only have needs but also have rights, one of which is the right to food.

At the international level, the duty of states to ensure the progressive realisation of socio-economic rights is derived from the International Covenant on Economic, Social, and Cultural Rights (ICESCR).[20] The ICESCR provides in its Preamble that human beings should enjoy freedom from fear and want. However, this right can only be achieved if conducive conditions are created to enjoy this right. Consequently, states are obligated to develop targeted, legally consistent, and sufficiently progressive policies toward securing these rights.[21] The basis for enacting targeted policies aimed at realising socio-economic rights is that these rights require states to

---

15 See *Government of the Republic of South Africa v Grootboom* [2000] ZACC 19; 2001 (1) SA 46; 2000 (11) BCLR 1169.

16 Liebenberg *Socio-Economic Rights: Adjudication Under a Transformative Constitution* (2010) 82–87.

17 Brand "Introduction to the Socio-Economic Rights in the South African Constitution" in Brand and Heyns (eds) *Socio-Economic Rights in South Africa* (2005) 3–4.

18 Brand in Brand and Heyns *Socio-Economic Rights in South Africa* 26–30.

19 UN Office of the High Commissioner for Human Rights (OHCHR) "Principles and Guidelines for a Human Rights Approach to Poverty Reduction Strategies" (2006) HR/PUB/06/12 https://www.refworld.org/docid/46ceaef92.html (accessed 2022-08-06) par 7.

20 UN General Assembly *International Covenant on Economic, Social and Cultural Rights* 993 UNTS 3 (1966). Adopted: 16 December 1966; EIF: 3/1/1976. See art 2(1) of the ICESCR.

21 Art 11(2) of the ICESCR.

ensure that individuals and communities enjoy a dignified existence.[22] Socio-economic rights are essential for the overall improvement of societal well-being. Thus, socio-economic rights have as their aim the (re)distribution of wealth in an equitable way, and as their fundamental premise, the understanding that all human beings are equal with equal entitlements.

To achieve this equality, governments must take targeted measures to enable individuals to lay claim and demand on states to fulfil their obligations in respect of socio-economic rights. Social rights are justiciable, at least to the extent that they impose a duty of non-interference, in that the State may not effectively hinder their realisation.[23] This article analyses the importance of the right to adequate food and poverty alleviation against a backdrop concerned with the realisation of socio-economic rights with specific reference to the right of access to sufficient food as entrenched in section 27(1)(*b*) of the Constitution and its role in promoting poverty alleviation. Poverty is often a precondition to lack of access to food. It hampers an individual's or a household's access to basic needs, including material well-being such as basic resources (land and income).

Undoubtedly, the relationship between poverty and lack of access to food is well established. Although the right to food is an independent right, a holistic approach should consider the right to food within the wider framework of other socio-economic rights. The realisation of the right to food is affected by factors such as the economic, political, and cultural contexts, access to land, employment opportunities, technological advancement, poverty, and educational opportunities.[24] Consequently, the realisation of the right to food requires an enforcement of an interdependence of rights to ensure the effective implementation of poverty-alleviation strategies.

Poverty is a condition that causes an individual or a household to be unable to meet the normal standard of living. In addition, poverty leads to food insecurity because poverty entails being deprived of a decent quality of life. In Mubangizi's words, "poverty is a state of being poor or the state of one who lacks the usual or acceptable amount of money or material possessions".[25] Poverty is also defined as a human condition characterised by sustained or chronic deprivation of resources, capabilities, choices, security, and power necessary for the enjoyment of an adequate standard of living and other civil, cultural, economic, political, and social rights.[26]

For effective implementation, government policies aimed at poverty alleviation should address social justice that promotes sustainability. Sustainability requires an integration of economic, environmental, and social

---

22 McCrudden "Human Dignity and Judicial Interpretation of Human Rights" 2008 *European Journal of International Law* 655–724.

23 S 7(2) of the Constitution.

24 Chirwa *Child Poverty and Children's Rights of Access to Food and Basic Nutrition in South Africa: A Contextual, Jurisprudential and Policy Analysis* Socio-Economic Rights Project, Community Law Centre, University of the Western Cape, Cape Town (2009) 6.

25 Mubangizi "Poverty Production and Human Rights in the African Context" 2007 *Law, Democracy & Development* 1–14.

26 Phogole "Issues of Increasing Levels of Poverty and Hunger in Africa, With Specific Reference to South Africa" 2010 *AISA Policy Brief* 1–8.

viability in poverty-alleviation strategies. According to article 13 of the 1996 World Food Summit Plan of Action,[27] a sustainable approach will ensure that states develop a peaceful, stable, and enabling political, social, and economic environment that is an essential foundation to give adequate priority to food security, poverty eradication, sustainable agriculture, and rural development. Furthermore, such an approach will propel states to promoting good governance as an essential factor for sustained economic growth, sustainable development, poverty and hunger eradication, and the realisation of all human rights, including the progressive realisation of the right to adequate food.

General Comment 12 of the United Nations Committee on Economic Social Cultural Rights[28] (General Comment 12) provides that the right to adequate food is realised when every man, woman, and child, alone or in community with others, has physical and economic access at all times to adequate food or means for its procurement. General Comment 12 on the right to food refers to three essential elements – namely, availability, accessibility, and adequacy. Furthermore, according to the Office of the United Nations High Commissioner for Human Rights (OHCHR), the right to food is described as the right:[29]

- to have regular, permanent, and free access to food, either directly or using financial purchases;
- to quantitatively and qualitatively adequate food corresponding to the cultural traditions of the people to which the consumer belongs; and
- that ensures a physical and mental, individual and collective, fulfilling and dignified life free of fear.

Thus, the right to food is realised when food is sufficiently available and accessible to meet the day-to-day needs and dietary requirements of individuals and households. The right to food is sufficiently realised when these elements exist, which consequently leads to food security. According to the definition coined at the 1996 World Food Summit in Rome, food security "exists when all people, at all times, have physical and economic access to sufficient, safe, and nutritious food that meets their dietary needs and food preferences for an active and healthy life".[30] At the household level, food security is generally perceived as "access by all household members to sufficient and nutritious food that is safe to eat as a prerequisite for sufficient dietary intake and meeting of food preferences for an active and healthy life".[31] An important link between the right to food and the concept of food security is evident because when individuals, households, and communities are food-secure, the right to food is protected and respected. Furthermore, the relationship between the right to food and food security is clearly set out in the elements that form the concept of food security. Food security is characterised in this context by the following:

---

27 UN Food and Agriculture Organisation *Rome Declaration on World Food Security* (1996).

28 UN CESCR Comment No 12: The Right to Adequate Food (Art 11 of the Covenant) (1999).

29 UN OHCHR Factsheet No 34 (2010) 2.

30 Par 1 of 1996 *Rome Declaration on World Food Security*.

31 Oldewage-Theron, Duvenage and Egal "Situation Analysis as Indicator of Food Security in Low-Income Rural Communities" 2012 *Journal of Consumer Sciences* 38–58.

- food availability (referring to the availability of sufficient quantities of food of appropriate quality, supplied through domestic production or imports (including food aid)); and
- food access (referring to access by individuals to adequate resources (entitlements) for acquiring appropriate foods for a nutritious diet). Entitlements are defined as the set of all commodity bundles over which a person can establish command given the legal, political, economic, and social arrangements of the community in which they live (including traditional rights such as access to common resources).

In South Africa, poverty and food insecurity are among the greatest challenges. According to the Living Conditions Survey 2014/15 published in 2017, approximately half (49,2 per cent) of the adult population lived below the UBPL and 16.6 million people were dependent on social grants as a major source of income.[32] Furthermore, it was revealed that in 2019, 11,1 per cent of individuals were vulnerable to hunger and 19,5 per cent had difficulty in accessing food.[33] These high levels of poverty make it difficult to tackle food insecurity; hence the need for government to adopt holistic food security strategies not only to address food insecurity but also the prevalence of poverty. The GHS 2019 states that livelihood diversification is a vital strategy in reducing poverty and improving the livelihoods of households.

Against this background, this article has two aims:[34]

- to show that poverty is the main contributor to food insecurity, especially in rural households; and
- to indicate the significance of both short-term and long-term food security strategies in improving food security at the household level, especially in rural areas.

First, the article examines the factors that negate the realisation of the right of access to food in rural areas. Secondly, the article analyses the relationship between the right of access to food and food-security strategies. Thirdly, the role of social grants and subsistence farming as viable food-security strategies in rural South Africa is examined. Lastly, a conclusion is drawn, highlighting the importance of both short-term and long-term food-security strategies in promoting access to food in rural households.

2 FACTORS THAT NEGATE THE REALISATION OF THE RIGHT OF ACCESS TO FOOD IN RURAL SOUTH AFRICA

Poverty is a major contributory factor in household food insecurity and has a direct impact on the realisation of the right to food. General factors such as economic and trading conditions, poor governance, conflicts, illiteracy, and diseases that lead to poverty are multidimensional and prevalent in different

32 Stats SA http://www.statssa.gov.za/?p=10341.
33 Stats SA GHS (2019).
34 Stats SA GHS (2019) 57–58.

African countries[35] These general causes of poverty require that government policies reflect a vivid human-rights protection stance that will enable citizens to lay claim to their entitlements. Such an approach takes into account structural and underlying causes of poverty and further recognises that development is not about charity and welfare but an issue of rights and entitlements.[36] To realise the right to food and to ensure food security, it is important to consider a holistic approach that views human rights as interdependent and mutually reinforcing.

This is the rights-based approach reflected in the Millennium Development Goals (MDGs) that required states to fulfil their duty in realising the right to food and at the same time empower individuals to assert their claims against governments for the non-realisation of this right.[37] The MDGs created an expectation that rights, specifically the right to have access to food, should be protected, respected, promoted, and fulfilled by state parties. Similarly, paragraphs 17 and 24 of the United Nations 2030 Agenda for Sustainable Development[38] (2030 Agenda) provide that ending hunger and achieving food security is of paramount importance, and that state parties are required to commit resources to develop subsistence agriculture and provide support to smallholder farmers. These provisions reflect the vital role of a rights-based approach in addressing food insecurity as it allows individuals to take legal steps to compel governments to take reasonable measures to realise socio-economic rights progressively.[39] In other words, government policies should be geared towards the advancement of human rights rather than be restrictive. For instance, countries that have human-rights-centred legislative frameworks in place are more likely to establish a favourable environment for the realisation of socio-economic rights.

In South Africa, the major causes of poverty relate to discriminatory policies pre-independence, the geographical location of households, unemployment, and inequality. According to Lalthapersad-Pillay,[40] factors that contribute to poverty include isolation from the community, food insecurity, overcrowding in homes, reliance on dangerous energy sources, poorly paid jobs, splintered families, a lack of power to influence change, and the discriminatory legacy of apartheid that has led to high levels of adult illiteracy, homelessness, and joblessness; apartheid stripped people of their assets (especially land), distorted the economic markets and social institutions through racial discrimination, and resulted in violence and destabilisation.[41] Moreover, factors such as government policies that are

35 Nwonwu *The Millennium Development Goals, Achievements, and Prospects of Meeting the Targets in Africa* (2008) 12–19.

36 Shetty "Can a Rights-Based Approach Help in Achieving the Millennium Development Goals?" 2005 36(1) *IDS Bulletin* 74.

37 Cohen and Brown "Access to Justice and the Right to Adequate Food: Implementing Millennium Development Goal One" 2005 *Sustainable Development: Law and Policy* 54.

38 UN General Assembly "Transforming Our World: The 2030 Agenda for Sustainable Development" Resolution adopted by UNGA at its 70th Session (25 September 2015) A/RES/70/1.

39 Cohen and Brown 2005 *Sustainable Development: Law and Policy* 56.

40 Lalthapersad-Pillay "The Poverty Alleviation Impetus of the Social Security System in South Africa" 2008 *Africa Insight* 18.

41 Par 2.4.1 of the White Paper on Reconstruction and Development Gazette 16085, Notice 1954 of 1994-11-23 states that apartheid policies pushed millions of black South Africans

biased towards urban development, the geographical location of rural settlements, and dependence by rural households on agricultural production, exacerbate high incidences of poverty in rural areas.[42] These factors have led to socio-economic disparities that have plunged people, especially rural households, into abject poverty and food insecurity. In this section, some aspects of the unique causes of poverty in South Africa such as the geographical location of rural areas, gender inequality, unemployment, and the large number of people in households are thoroughly examined and discussed.

2 1 Geographical location as an incidence of the high poverty level

In South Africa, poverty and geographical location are closely associated. According to Mears and Blaauw, the rural provinces of South Africa, notably Limpopo, KwaZulu-Natal, and the Eastern Cape,[43] have the highest prevalence of poverty-stricken communities. This has resulted in social and economic disparities where people in rural areas (when compared to their counterparts in urban and peri-urban areas) lack the most basic necessities of life, one of which is food.[44] As most rural households depend on land-based livelihoods, any constraints on these livelihoods have dire consequences in the fight against food insecurity. In rural households, the size of farms, access to irrigation water, and the literacy level of the household head determine a household's welfare and improvements in these areas as possible pathway to reducing food insecurity.[45] In the absence of non-farm activities, most households became vulnerable to food insecurity and hunger. This results in the unequal distribution of resources, with rural households being more prone to food insecurity than households in other settlements.[46]

The high prevalence of poverty in rural areas may be due to factors such as geographical location, which makes it difficult for rural people to find employment. Lilenstein, Woolard, and Leibbrandt[47] assert that rural areas suffer from poor economic opportunities as a result of their isolation.[48] At the

into overcrowded and impoverished reserves, homelands, and townships. In addition, capital-intensive agricultural policies led to the large-scale eviction of farm dwellers from their land and homes.

42 Anyanwu "Accounting for Poverty in Africa: Illustration with Survey Data from Nigeria" 2012 *ADBG Working Paper Series* 14–18.

43 Mears and Blaauw "Socio-Economic and Demographic Characteristics of Selected Rural Villages in the Nwanedi River Basin" 2011 *Africanus* 78–95.

44 *Ibid*.

45 Valipour "Land Use Policy and Agricultural Water Management of the Previous Half Century in Africa" 2015 *Applied Water Science* 368.

46 Statistics SA "Poverty Trends in South Africa: An Examination of Absolute Poverty Between 2006 and 2011" (2014) https://www.gov.za/sites/default/files/gcis_document/201409/povertytrends03april2014.pdf (accessed 2021-11-05) 27–28.

47 Lilenstein, Woolard and Leibbrandt "In-Work Poverty in South Africa: The Impact of Income Sharing in the Presence of High Unemployment" 2016 (193) *Southern Africa Labour and Development Research Unit Working Papers* 7.

48 Lilenstein *et al* 2016 *SALDRU Working Papers* 1–26.

same time, rural households that engage in land-based livelihood strategies are less prone to food insecurity and have adequate access to food. The 2017 statistics on food security indicate that 63,4 per cent of urban households experienced hunger and inadequate access to food compared to rural households that participate in subsistence farming, as they are more likely to have the necessary skills, tools, and access to land for such activities.[49]

As rural households depend on land-based livelihoods, any constraints that affect these livelihoods would have dire consequences in the fight against poverty and limit access to food.

2 2 Gender inequality

Rural household poverty is made worse by the fact that many households in rural areas are headed by women, who are more prone to poverty because females are generally unemployed, have few economic opportunities, and encounter gender discrimination in wage levels in rural provinces.[50] Flatø, Muttarak and Pelser posit three reasons that make female-headed households more vulnerable to poverty: (a) women have lower average earnings, fewer assets, and less access to productive resources such as land, financial capital, and technology than men; (b) in the absence of a male provider, female household heads are often single earners and carry a higher dependency burden; and (c) women who are heads of households with no other adult help have to carry a "double-day burden" where they fulfil both domestic duties and the breadwinner role.[51] Furthermore, women in rural areas also lack access to productive resources. These factors negatively impact the right of access to food, which rests on three main elements, namely availability, accessibility, and adequacy.[52] According to Quisumbing, Brown, Feldstein, Haddad and Peña,[53] sustainable food production is the first pillar of food security. However, in rural households, women often lack access to natural resources such as land that are central to sustainable food production. Land plays an important role in rural livelihoods for agricultural production, homestead cultivation, and practices of natural resource harvesting; as a result, its availability is crucial for households.[54] Female-headed households also often lack access to capital

---

49 Statistics South Africa "Towards Measuring the Extent of Food Security in South Africa: An Examination of Hunger and Food Adequacy" (2019) http://www.statssa.gov.za/publications/03-00-14/03-00-142017.pdf (accessed 2021-11-05) 14–19.

50 Aliber "Overview of the Incidence of Poverty in South Africa for the 10-Year Review" (2002) https://sarpn.org/documents/d0000875/docs/OverviewOfTheIncidenceOfPovertyInSAforThe10yearReview.pdf (accessed 2022-06-21) 1–21.

51 Flatø, Muttarak and Pelser "Women, Weather, and Woes: The Triangular Dynamics of Female-Headed Households, Economic Vulnerability, and Climate Variability in South Africa" 2017 *World Development* 41–62.

52 See par 6–13 of General Comment 12.

53 Quisumbing, Brown, Feldstein, Haddad and Peña "Women: The Key to Food Security" 1996 17(1) *Food and Nutrition Bulletin* 1.

54 Neves and Du Toit "Rural Livelihoods in South Africa: Complexity, Vulnerability and Differentiation" 2013 *Journal of Agrarian Change* 102–103; see also Kepe and Tessaro "Trading Off: Rural Food Security and Land Rights in South Africa" 2014 *Land Use Policy* 268–273.

and credit to cater to their food needs. To this end, these households are often constrained from buying and producing food owing to lack of income.[55] Access to food also goes beyond the availability and accessibility of food; constraints such as lack of access to land and income affect women's food choices and provision of an acceptable diet.[56] Finally, migration of young and middle-aged male household members to urban areas for employment opportunities cause rural households to face challenges of food insecurity. Dungumaro[57] observes that the tradition of leaving responsibilities to the mother leads to an increased number of female-headed households. The female members that are charged with family upkeep often struggle to cater to the households' food needs. These factors make female-headed households experience high incidences of poverty and vulnerability.[58]

2 3 Unemployment

A comparison of the Poverty Trends Reports of 2014 and 2017 reveal a disturbing poverty pattern.[59] Despite a drop in the number of people living below the poverty line, black South Africans continue to be the most impoverished. The high poverty rate among Black people may be attributed to high unemployment rates in rural provinces. According to Baulch, labour is one of the assets that assist the chronically poor to escape poverty, and the availability of employment opportunities is vital in poverty alleviation.[60] To this end, Phogole provides that poverty-reduction strategies go beyond the provision of food and include the context of employment, rural development, and infrastructure development, among others.[61] This entails that poverty reduction strategies should be all-encompassing and include both off-farm and on-farm activities to ensure a holistic approach in the realisation of the right of access to food. However, in South Africa, unemployment has reached soaring levels over the years, making it nearly impossible to escape the poverty trap for some households without direct government interventions.

In 2015,[62] about 13.7 million people (25 per cent) were unemployed. The 2018 Quarterly Labour Force Survey indicates that by the third quarter (Q3) of 2018 the unemployment rate was at 27,5 per cent nationally.[63] At least 31,6 per cent of the youth were not in employment, education, or training

55 Stats SA http://www.statssa.gov.za/publications/03-00-14/03-00-142017.pdf 4–6.

56 Quisumbing *et al* 1996 *Food and Nutrition Bulletin* 2.

57 Dungumaro "Gender Differentials in Household Structure and Socioeconomic Characteristics in South Africa" 2008 39(4) *Journal of Comparative Family Studies* 436.

58 Schotte, Zizzamia and Leibbrandt "A Poverty Dynamics Approach to Social Stratification: The South African Case" 2018 *World Development* 88–103.

59 Stats SA https://www.gov.za/sites/default/files/gcis_document/ 201409/povertytrends03april 2014.pdf 16 and Statistics South Africa "Poverty Trends in South Africa: An Examination of Absolute Poverty Between 2006 and 2015" (2017) https://www.statssa.gov.za/ publications/Report-03-10-06/Report-03-10-062015.pdf 44.

60 Baulch *Why Poverty Persists, Poverty Dynamics in Asia and Africa* (2011) 256–260.

61 Phogole 2010 *AISA Policy Brief* 1–8.

62 Statistics South Africa "Mid-year Population Estimates" (2015) http://www.statssa.gov.za/ publications/P0302/P03022015.pdf (accessed 2020-04-24).

63 Statistics South Africa *Quarterly Labour Force Survey (Q3:2018)* (2018) 1.

(NEET).[64] The 2021 Quarterly Labour Force Survey[65] indicates that in the first quarter of 2021 the unemployment rate stood at 32,6 per cent. This high prevalence of unemployment has made social grants an important livelihood strategy in rural households. These statistics indicate the negative impact of unemployment at the household level and its impact on perpetuating poverty and food insecurity.[66]

At the same time, the high rate of unemployment might be a reflection of past institutionalised racial discrimination in South Africa. The White Paper on the Reconstruction and Development Programme of 1994 (RDP) provides that segregation in education, health, welfare, transport, and employment left deep scars of inequality and economic inefficiency for Black South Africans, and cheap labour policies concentrated skills in White hands.[67] This meant that the majority of the Black populace lacked the requisite skills to enter formal labour markets.[68] Furthermore, apartheid policies restricted the movement of Black labourers and families and their chance to reside closer to areas with better employment opportunities.[69] These factors exacerbated unemployment among Black South Africans and the youth, plunging households deep into poverty and food insecurity.

2 4 Large families

Large households are more likely to be poor and increase pressure on household income in terms of the number of people it is required to feed.[70] According to Baulch, households that have many members are more likely to remain poverty-stricken, especially where members are dependent on social grants.[71] Aliber and Hart point out in their study that although social grants provide a major and regular income to rural households and aid in alleviating poverty, the amounts are relatively small, especially as an average household in South Africa has five members.[72] Against the backdrop of the discussion above, it is clear that the drivers of poverty are numerous. Drivers such as unemployment, gender inequality, and poor policy formulation emanated from the discriminatory past of the apartheid

64 Stats SA *Quarterly Labour Force Survey (Q3:2018)* 6–8.

65 Stats SA *Quarterly Labour Force Survey (Q1:2021)* (2021) 12–14

66 Granlund and Hochfeld "That Child Support Grant Gives Me Powers: Exploring Social and Relational Aspects of Cash Transfers in South Africa in Times of Livelihood Change" 2020 *The Journal of Development Studies* 1230–1244.

67 Par 1.2.3 of the White Paper on Reconstruction and Development Gazette 16085, Notice 1954 of 1994-11-23.

68 Dias and Posel "Unemployment, Education, and Skills Constraints" 2007 *Post-Apartheid South Africa Development Policy Research Unit Working Paper* 3–5.

69 Storme, De Lannoy, Leibbrandt, De Boeck, and Mudiriza "Developing a Multidimensional Youth Employability Index to Unpack Vulnerabilities in the Lived Realities of Youth in Post-Apartheid South Africa" 2019 *SALDRU Working Paper Number 255 University of Cape Town* 3–4.

70 Ngema, Sibanda and Musemwa "Household Food Security Status and Its Determinants in Maphumulo Local Municipality in South Africa" 2018 *Sustainability* 3307.

71 Baulch *Why Poverty Persists: Poverty Dynamics in Asia and Africa* 199.

72 Aliber and Hart "Should Subsistence Agriculture Be Supported as a Strategy to Address Rural Food Insecurity?" 2009 *Agrekon* 434–458.

system that alienated natural and capital resources from the Black majority. However, after 27 years of democracy, the government should have devised short-term and long-term poverty-alleviation strategies to address household poverty and food insecurity effectively, especially among the Black population and female-headed households. The government should comply with its national and international commitments as envisaged in section 27(1)(*b*) of the Constitution and principle 3 of the 2009 Declaration of the World Summit on Food Security[73] (Rome Declaration, 2009) by adopting short-term and long-term poverty-alleviation strategies that enable households to enjoy the right to food sovereignty. Finally, the government should devise a strategy that will ensure that rural households, especially those headed by women, are integrated into the existing agrarian reform programmes to enable them to become active participants in food security strategies.

3 NEXUS BETWEEN THE RIGHT OF ACCESS TO SUFFICIENT FOOD AND POVERTY-ALLEVIATION STRATEGIES

Section 27(2) of the Constitution sets the foundation upon which legislative and other measures should be adopted to give effect to the right of access to sufficient food. As a result, in South Africa, the government's approach to the realisation of the right to food can be termed dualistic as it consists of short-term interventions such as social assistance and long-term interventions such as agrarian reform. This is consistent with principle 3 of the Rome Declaration of 2009, which provides for a comprehensive twin-track approach to food security. This approach consists of direct action to tackle hunger immediately for the most vulnerable, using medium- and long-term sustainable agricultural, food security, and nutrition and rural development programmes to eliminate the root causes of hunger and poverty. According to the Integrated Food Security Strategy for South Africa (IFSS 2002), its prominent goal is to eradicate hunger, malnutrition, and food insecurity. The vision is "to attain universal physical, social and economic access to sufficient, safe and nutritious food by all South Africans at all times to meet their dietary and food preferences for an active and healthy life". Therefore, the objectives of the IFSS are to increase household food production and trading, to improve income generation and job-creation opportunities, to improve nutrition and food safety, and to increase safety nets and food emergency management systems.

To achieve these objectives, the IFSS has adopted a developmental approach to poverty alleviation. This entails that the realisation of the right of access to sufficient food will be based on both interceptive and empowerment interventions, where households are capable of accessing production resources on their own as the intervention will be made available to support access to such production resources (empowerment). This

[73] Food and Agriculture Organization of the United Nations "Declaration of the World Summit on Food Security" *World Summit on Food Security* (Rome, 16–18 November 2009) WSFS 2009/2.

developmental approach proposed by the IFSS adopts a holistic approach to poverty alleviation by classifying poverty as a social problem that all social development programmes should address. Such an approach not only assesses the needs of people living in poverty but also recognises that such people have entitlements such as the right of access to food. On the other hand, in severe cases where households are unable to access sufficient food, intervention is appropriate and short- to medium-term relief measures will be made available. A good example of an intervention strategy is the Zero Hunger Programme.[74] The Zero Hunger Programme's vision combines short-term responses to emergencies with medium- and long-term responses that help create the necessary conditions for people to improve their food security.[75] The Zero Hunger Programme gives effect to strategic goal one of the IFSS, which aims to eradicate hunger, malnutrition, and food insecurity by increasing household food production and trading.

To ensure compliance with its international and regional mandate, the government enacted the National Policy on Food and Nutrition Security for the Republic of South Africa in 2013[76] (Food Security Policy). The overall purpose of this policy is to ensure the availability, accessibility, and affordability of safe and nutritious food at national and household levels. Paragraph 4 of the Food Security Policy adopts a holistic approach to food security and provides that food and nutrition security requires well-managed inter-sectoral coordination and the genuine integration of existing policies and programmes in health, education, and environmental protection, as well as in agrarian reform and agricultural development. To this end, the Food Security Policy provides that South Africa has as one of its food challenges, the under-utilisation of productive land for food production owing to lack of finance, equipment, and water, among other factors.

Interventions should thus be taken to ensure that the agricultural sector, including household and subsistence producers, have access to natural resources, which should be used optimally to be profitable. This is consistent with the Food Security Policy's goal, which is to ensure the availability, accessibility, and affordability of safe and nutritious food at national and household levels. As a result, this policy gives effect to section 27(1)(*b*) of the Constitution and enables the State to fulfil its obligation in terms of section 27(2) of the Constitution. In discharging its duties in respect of ensuring the right of access to food, the South African government has adopted both short-term and long-term poverty-alleviation interventions.

4 POVERTY-ALLEVIATION STRATEGIES IN RURAL SOUTH AFRICA

The most prominent poverty-alleviation strategies that have proved successful in poverty reduction and in promoting access to food in rural

---

74 The Framework for the Zero Hunger Programme: Actuating the Integrated Food Security Strategy for South Africa, Department of Agriculture, Forestry and Fisheries (2012).

75 The Framework for the Zero Hunger Programme: Actuating the Integrated Food Security Strategy for South Africa, Department of Agriculture, Forestry and Fisheries (2012) par 5.

76 National Policy on Food and Nutrition Security for the Republic of South Africa, Department of Agriculture, Forestry and Fisheries (2013) No 637, 22 August 2014.

households are social grants and land-based livelihood strategies, such as subsistence farming.

4 1 Social grants as a means of poverty alleviation

Section 27(1)(c) of the Constitution provides that everyone has the right to have access to social security, including, if they are unable to support themselves and their dependants, appropriate social assistance. The right to social security encompasses the right to social insurance and social assistance. Social assistance refers to a form of social welfare that is made available to destitute persons and households based on a means test in South Africa. Devereux and Sabates-Wheeler describe social protection as:

> "[a]ll public and private initiatives that provide income or consumption transfers to the poor, protect the vulnerable against livelihood risks, and enhance the social status and rights of the marginalised; with the overall objective of reducing the economic and social vulnerability of poor, vulnerable and marginalised groups."[77]

Social protection in the form of social grants is a pathway that ensures not only that the most vulnerable households enjoy a minimum level of food access but that poor households live a dignified life. The provision in the Constitution entails that the right to social security is an entrenched right and should be afforded full recognition and measures should be adopted to ensure its effective realisation. For instance, Pienaar and Von Fintel observe that within farming communities in former homelands, grants have become a vital strategy to combat socio-economic disparities.[78] Furthermore, these grants also perpetuate a reliance on resources outside of the labour market.[79] The Constitutional Court, in granting direct access in the case of *Black Sash Trust v Minister of Social Development*,[80] held as follows:

> "The constitutional right to social assistance that for many, especially children, the elderly and the indigent, provide the bare bones of a life of dignity, equality, and freedom is directly involved, across the land."[81]

Battersby notes that social protection is seen as a means to reduce food insecurity. Social grants provide an important source of income for poor households.[82]

---

77 Devereux and Sabates-Wheeler "Transformative Social Protection" 2004 *IDS Working Paper* 9.

78 Pienaar and Von Fintel "Hunger in the Former Apartheid Homelands: Determinants of Converging Food Security 100 Years After the 1913 Land Act" 2013 *Stellenbosch Economic Working Papers* 20.

79 Pienaar and Von Fintel 2013 *Stellenbosch Economic Working Papers* 21.

80 [2017] ZACC 8.

81 [2017] ZACC 36.

82 Battersby "The State of Urban Food Insecurity in Cape Town" 2011 *Urban Food Security Series* 1–31.

4 2 Role of social grants in household poverty alleviation in South Africa

Social grants play a crucial role in providing a source of income to poor households and in lifting such households out of the poorest poverty bracket. Van der Berg, Siebrits and Lekezwa state that 76 per cent of government spending on social grants accrues to roughly 50 per cent of individuals who constitute the poorest two quintiles of households, with rural households being the significant beneficiaries.[83] Similarly, Woolard, Harttgen and Klasen observe that although social grants do not affect headcount poverty significantly, they affect the severity of poverty that households could suffer in the absence of social assistance.[84] There is no doubt that social grants are a formidable short-term poverty-alleviation strategy.

Social grants play an integral role in increasing overall welfare in African rural households, especially in the former homeland areas of South Africa.[85] In this instance, well-targeted social grants can be extremely pro-poor and play a critical role in reducing income poverty and inequality. Before the breakout of the COVID-19 pandemic in South Africa, over 60 per cent of the population nationally received social grants, and 80 per cent of those residing in rural areas lived in a grant-receiving household.[86] According to Brand, social grants are important for the following reasons:

(a) Social security grants are logistically more manageable than the direct provision of food to the disadvantaged.
(b) Social security grants are more sensitive to individual choice and consequently better meet the requirements of human dignity and freedom than other forms of direct transfers of food.
(c) Social security grants can contribute not only to improving food security but also other aspects that impact a person's quality of life, such as clothing and transport costs.
(d) Social grants can facilitate development by providing a basic income to enable job seeking and participation in developmental programmes.[87]

Social-grant interventions address immediate poverty needs that affect the most vulnerable population in the community, such as children, women, and the elderly. Social grants are meant for those living in dire poverty and who require immediate relief. Such interventions are protective in character and are meant to prevent poverty-stricken individuals and households from falling into deeper poverty (by reducing household poverty and ensuring

---

83 Van der Berg, Siebrits and Lekezwa "Efficiency and Equity Effects of Social Grants in South Africa" 2010 *Stellenbosch Economic Working Papers* 1–58.

84 Woolard, Harttgen and Klasen "The Evolution and Impact of Social Security in South Africa" (2010) http://erd.eui.eu/media/BackgroundPapers/Woolard-Harttgen-Klasen.pdf (accessed 2020-04-21).

85 Armstrong and Burger "Poverty, Inequality and the Role of Social Grants: An Analysis Using Decomposition Techniques" 2010 *Stellenbosch Economic Working Papers* 1–20.

86 Wills, Van der Berg, Patel and Mpeta "Household Resource Flows and Food Poverty During South Africa's Lockdown: Short-Term Policy Implications for Three Channels of Social Protection" 2020 *Stellenbosch Economic Working Papers* 1–43.

87 Brand 2002 *ESR Review* 16–17.

minimal food security).[88] To illustrate the importance of social grants, the 2014/15 First Quarter Statistical Report on Social Grants[89] states that grants in aid increased from 83 059 to 88 666 from the beginning of April 2014 to the end of June 2014, indicating that the target group of those in need received the requisite assistance. To indicate that social grants are the most utilised pro-poor form of social assistance to meet immediate food needs and to relieve poor individuals and households from deep poverty, the total number of grant beneficiaries increased from 11.31 million at the end of April 2020 to 11.45 million at the end of March 2021.[90] The different social grants available for children, women, and the elderly and their benefits are discussed below.

4 2 1 Children grants

In South Africa, the effectiveness of social protection measures is apparent, especially concerning destitute children. For instance, there are three kinds of social grant targeting the alleviation of poverty among children, namely the child support grant (CSG), care dependency grant, and foster care grant.[91] This wide range of grants for children ensures that children do not fall beneath the acceptable quintile of the living standard; it ensures that children have access to education and also enables parents to buy food, school uniforms, and other necessities.[92] Moreover, women benefit most from CSGs as they are often children's primary caregivers. This means that female-headed households are likely to enjoy a minimal level of food security.[93] In addition to the CSG, the care dependency grant aims to ensure that children suffering from severe mental or physical disability and in permanent home care do not suffer financial hardships. The grant is payable to the caregivers of these minors.[94] This enables the legal guardian to supplement his or her household income for the benefit of the child, thus reducing incidences of poverty and food insecurity within the household.[95]

---

88 Devereux and Sabates-Wheeler 2004 *IDS Working Paper* No 232 10.

89 Statistics South Africa "2014/15 First Quarter Statistical Report on Social Grants" http://www.statssa.gov.za/wp-content/uploads/2015/10/Annual_Report_2015_Book_1.pdf (accessed 2020-04-24).

90 Parliamentary Budget Office "Social Grant Performance as at end March 20/21" (March 2021) https://www.parliament.gov.za/storage/app/media/PBO/National_Development_Plan_Analysis/2021/june/03-06-2021/May_2021_Social_Grant_fact_sheet.pdf (accessed 2022-01-15).

91 Satumba, Bayat and Mohamed "The Impact of Social Grants on Poverty Reduction in South Africa" 2017 *Journal of Economics* 33–49.

92 Samson "Social Cash Transfers and Employment: A Note on Empirical Linkages in Developing Countries in OECD Promoting Pro-Poor Growth Employment" (2009) https://www.oecd.org/greengrowth/green-development/43514554.pdf (accessed 2020-01-16) 179–191.

93 Martin "Children's Rights to Social Assistance: A Review of South Africa's Child Support Grant" in Proudlock (ed) *South Africa's Progress in Realising Children's Rights: A Law Review* (2014) 58–83.

94 Satumba, Bayat and Mohamed 2017 *Journal of Economics* 33–49.

95 Granlund and Hochfeld 2020 *The Journal of Development Studies* 230–1244.

4 2 2 Old age grants

Apart from children's grants, old age grants (OAGs) also play a role in ensuring that households are food secure by contributing to household income. High unemployment levels lead to OAG recipients often being the only contributors to household income and supporting entire families. Aliber observes that the so-called "granny households" bear the largest brunt of having to rely on OAGs because grandmothers use their state pensions to support their grandchildren.[96] According to Granlund and Hochfeld, the CSG and OAG create a form of "reversed dependency" with male family members also benefiting from these grants owing to scarcity of employment.[97] The OAG is also critical because it is used as a buffer against household food insecurity. Waidler and Devereux observe that in poor households, the OAG is associated with food security.[98] Furthermore, pension income is shown to improve household food security.[99]

5 PROMOTING AGRICULTURE PRODUCTION: SUBSISTENCE FARMING AS A LAND-BASED LIVELIHOOD TO ALLEVIATE POVERTY

The existence of poverty, low-income levels, lack of access to land, unequal distribution of land ownership, disparity, lack of the necessary assets, lack of access to credit and rising food prices, among other factors, leave many people in South Africa deprived of basic needs.[100] The agricultural sector in South Africa is crucial to reducing food prices, creating employment, increasing real wages, and improving farm income, especially in rural areas.[101] Consequently, long-term poverty-alleviation strategies, particularly agricultural-related ones, are important in advancing the standard of living of the rural poor.[102] As such, the government should adopt strategies that are aimed at promoting access to sufficient, safe, and nutritious food in rural households.

In this current article, we examine the significance of subsistence farming in poverty alleviation. "Subsistence farming" refers to farming and associated activities where the main output is for household consumption and the

96 Aliber "Overview of the Incidence of Poverty in South Africa for the 10-Year Review" (2002) https://sarpn.org/documents/d0000875/docs/OverviewOfTheIncidenceOfPovertyInSA forThe10yearReview.pdf 1–21.

97 Granlund and Hochfeld 2020 *The Journal of Development Studies* 230–1244.

98 Waidler and Devereux "Social Grants, Remittances, and Food Security: Does the Source of Income Matter?" 2019 11(3) *Food Security* 687.

99 Waidler and Devereux 2019 *Food Security* 689.

100 Beretta and Balestri "Poverty Eradication, Access to Land, Access to Food" (2015) https://publicatt.unicatt.it/retrieve/handle/10807/69572/112830/%5beBook-pdf%5dPoverty-Eradication.pdf (accessed 2020-07-26).

101 Machethe *Agriculture and Poverty in South Africa: Can Agriculture Reduce Poverty?* Paper presented at the Overcoming Underdevelopment Conference, Pretoria, (28–29 October 2004) https://sarpn.org/documents/d0001005/P1125-Agriculture-Poverty_Machethe_2004.pdf 3.

102 Machethe paper presented at the Overcoming Underdevelopment Conference 10.

remaining output, if any, is marketed for extra income.[103] According to Aliber and Hart, households engage in subsistence farming for two main reasons: first, to supplement a household's food supply; and secondly, as an extra source of income.[104] It is clear that subsistence farming is a useful poverty-alleviation intervention. Unlike social grants, subsistence farming presents a more sustainable strategy for ensuring that households stay above the higher poverty margin.

This is because subsistence farming presents a food-supply strategy that enables households not only to have access to food at all times but also to have access to food that meets their dietary requirements in a culturally acceptable manner. The IFSS in South Africa borrows the definition of the Food and Agricultural Organisation (FAO) in outlining its vision for attaining physical, social, and economic access to sufficient, safe, and nutritious food by all South Africans at all times to meet their dietary and food preferences for an active and healthy life. In discharging this objective, the government seeks to increase food production both at national and household levels, including by increasing its national food safety nets and household food production through productive agriculture including small-scale farming.

To achieve adequate household food production and alleviate poverty at household level, the government has enacted various policies such as the Integrated Sustainable Rural Development Strategy (ISRDS), and the Comprehensive Rural Development Programme Framework (CRDP) that have as their aim the promotion of agricultural production as a poverty-alleviation intervention. The ISRDS provides that agriculture and related activities provide a formidable basis for rural livelihoods to increase their food supply.[105] As a result of the beneficial impact of agriculture on rural households, agrarian reform aims to promote rural livelihoods by making available valuable agricultural land.[106] It also entails that land reform programmes will in the future make provision for landless households, including those seeking land for subsistence farm production and other subsistence purposes. In South Africa, the importance and scarcity of agricultural land are reflected in the White Paper on Agriculture of 1995, which provides that economic development and national food security depend on the availability of land and that the use of such land for other purposes should be minimised.[107]

Literature indicates that access to land serves as a valuable resource in poverty alleviation. Holden and Otsuka argue that access to land is integral to promoting rural livelihoods, especially farming because of limited

---

[103] Morton "The Impact of Climate Change on Smallholder and Subsistence Agriculture" 2007 *PNAS (Proceedings of the National Academy of Sciences of the United States of America)* 19680–19685.

[104] Aliber and Hart 2009 *Agrekon* 434–458.

[105] Altman, Hart and Jacobs "Household Food Security Status in South Africa" 2009 *Agrekon* 352–353.

[106] Altman *et al* 2009 *Agrekon* 345–361.

[107] Department of Agriculture *White Paper on Agriculture* (1995) par 4.3.

livelihood opportunities.[108] In rural households, large farm sizes, access to irrigation water, and literacy levels of the household head usually determine a household's welfare and are a possible pathway for poverty reduction.[109] To this end, access to assets such as finance, land, and natural resources has the potential to promote rural livelihoods.[110] Fan, Hazell and Haque also observed that rural infrastructure can lead to improved opportunities for both on-farm and off-farm employment.[111] According to the Africa Agriculture Status Report of 2013, lack of sufficient infrastructure in Africa, such as access to roads, irrigation, and land management capabilities, has resulted in under-utilisation of the small amount of land available. This entails that agrarian transformation should be viewed holistically within the ambit of rural development. Such an approach is vital because poor rural development has a negative effect on agrarian transformation. Furthermore, land is essential to ensuring food availability and access to food, as food can only be achieved through the efficient use and management of natural resources, including land.

This therefore calls for policies that promote land distribution, especially in economies where there exist limited off-farm employment opportunities.[112] Hence, the Declaration of the Forum for Food Sovereignty of 2007, which states that food sovereignty entails that the right to use and manage lands should be in the control of those who produce food. Agrarian reforms should also guarantee subsistence farmers full land rights.[113] The concern presented in the Nyéléni Declaration is shared by Moyo who argues that agrarian transformation in Africa tends to move towards modernisation of farming and favours medium and large-scale farming by allocating more land to such farms.[114] This results in rural households having smaller landholdings.[115] Of note, institutional investors acquired about 40 million hectares of land for large-scale agriculture in sub-Saharan Africa in the period 2008–2009.[116] This may seem like a great gain for national economic growth, but it defeats one of the main objectives of agrarian transformation, which is to strengthen rural livelihoods for vibrant local economic development.

Kepe and Tessaro observe that the development of large-scale farming through displacement based on land acquisitions and leasing from

---

[108] Holden and Otsuka "The Roles of Land Tenure Reforms and Land Markets in the Context of Population Growth and Land Use Intensification in Africa" 2014 *Food Policy* 88–97.

[109] Valipour 2015 *Applied Water Science* 367–395.

[110] Adams, Sibanda and Turner "Land Reform and Rural Livelihoods in Southern Africa, Overseas Development" (1999) https://www.odi.org/publications/2113 (accessed 2020-01-10).

[111] Fan, Hazell and Haque "Targeting Public Investments by Agro-Ecological Zone to Achieve Growth and Poverty Alleviation Goals in Rural India" 2000 *Food Policy* 411–428.

[112] Holden and Ghebr "Land Tenure Reforms, Tenure Security and Food Security in Poor Agrarian Economies: Causal Linkages and Research Gaps" 2016 *Global Food Security* 21–28.

[113] Forum for Food Sovereignty *Declaration of Nyéléni* (2007) par 2.

[114] Moyo "Land Reform, Small Scale Farming and Poverty Eradication Lessons from Africa" 2010 *AISA Policy Brief* 1–9.

[115] *Ibid*.

[116] Li "What is Land? Assembling a Resource for Global Investment" 2014 *Transactions of the Institute of British Geographers* 592.

governments makes subsistence farmers vulnerable to food insecurity.[117] This negates the role of agriculture as a poverty-alleviation intervention in rural households.[118] Pienaar and Von Fintel indicate that South African households that had access to land and engage in farming were less likely to face severe hunger than non-farming households.[119] The importance of access to land in poverty alleviation is also recognised in the NDP 2030, which provides that strategies that promote the efficient use of agricultural land should also promote access to land and social equity and recognise the important economic role of subsistence agriculture in some rural communities. The above discussion indicates that land is a vital asset in poverty alleviation for rural households; land-based livelihoods should thus be sustainably promoted, especially in subsistence agriculture to counter land constraints.[120]

6 THE BENEFITS OF SUBSISTENCE FARMING IN SOUTH AFRICA

According to Mathebula, Molokomme, Jonas and Nhemachena, activity and income diversification form the basis of livelihood strategies of many rural communities in sub-Saharan Africa. Hence, subsistence farming as a poverty-alleviation strategy can increase a household's food supply and income if properly implemented.[121] In South Africa, the importance of this intervention is stressed by the fact that the government has adopted the Rome Declaration, 2009. The Declaration provides for state parties to implement medium and long-term sustainable agriculture, food security and nutrition, and rural development programmes aimed at alleviating poverty, enhancing food security, and ensuring the progressive realisation of the right to adequate food.[122]

To this end, the objective of the Rome Declaration, 2009 is to ensure that governments enact policies and legislative frameworks that promote agriculture, including small-scale farming as a poverty-alleviation strategy aimed at increasing the household food supply for vulnerable populations such as the rural poor and women. To enhance food security, the government should thus ensure an increase in agricultural output by supporting emerging farmers and households, fencing off agricultural areas, making agricultural loans accessible, and ensuring agricultural extension services of high quality.

---

117 Kepe and Tessaro "Integrating Food Security with Land Reform, A More Effective Policy for South Africa" 2012 *Land Use Policy* 267–274.

118 Pienaar and Von Fintel 2013 *Stellenbosch Economic Working Papers* 2–3.

119 Pienaar and Von Fintel 2013 *Stellenbosch Economic Working Papers* 19.

120 Heady and Jayne "Adaptation to Land Constraints: Is Africa Different?" 2014 *Food Policy* 18–33.

121 Mathebula, Molokomme, Jonas and Nhemachena "Estimation of Household Income Diversification in South Africa: A Case Study of Three Provinces" 2017 *South African Journal of Science* 1–9.

122 Principle 3 of the Rome Declaration, 2009.

In achieving these objectives, South Africa would be a step closer to discharging its regional and international commitments to halving poverty and enhancing food security. This, in turn, will entail that households enjoy food sovereignty. According to the Nyéléni Declaration, food sovereignty is the right of peoples to healthy and culturally appropriate food produced through ecologically sound and sustainable methods, and their right to define their food and agriculture systems.[123]

Rural provinces have over the years increased the intensity of their subsistence farming, indicating the importance of subsistence agriculture in alleviating poverty and enhancing food security.[124] The benefits of subsistence farming are centred on ensuring food stability, reducing poverty and unemployment.[125] However, despite these benefits, subsistence farming is not an easy poverty-alleviation strategy to implement owing to external factors that hamper the efficiency of subsistence farming – such as availability of natural resources (mainly land and water), extension services and market access for subsistence farmers.[126]

7 CONCLUSION

This article highlights the importance of adopting targeted and efficient strategies that promote the right of access to sufficient food in rural households. Strategies that give effect to the right of access to sufficient food play a vital role in reducing overall household poverty. Therefore, in addressing the lack of access to food, there is a need to take progressive steps to introduce and implement both short-term and long-term interventions aimed at poverty alleviation within the broader framework of food-security strategies as required by the Constitution. The Constitution emphatically provides that everyone has the right to have access to sufficient food. The State has a duty to ensure the progressive realisation of the socio-economic right to food because human beings should enjoy freedom from fear and want. Fighting poverty and hunger entails providing robust interventions and leadership that will ensure that the poor have access to means of production, particularly land. Land should be put to productive use by farming, producing food, and other beneficial socio-economic activities that would produce abundant food, both for domestic and commercial purposes. This would enhance food availability and access to sufficient food, generate income for the people, reduce poverty and improve the standard of living of the people.

123 Nyéléni Declaration (2007) 1.

124 Maziya, Mudhara and Chitja "What Factors Determine Household Food Security Among Smallholder Farmers? Insights From Msinga, KwaZulu-Natal, South Africa" 2017 *Agrekon* 40–52.

125 Irz, Lin, Thirtle and Wiggins "Agricultural Productivity Growth and Poverty Alleviation" 2001 *Development Policy Review* 449–466.

126 *Ibid*.

THE ROLE OF THE MAGISTRATE IN EXTRADITION PROCEEDINGS IN SOUTH AFRICA: MEANING OF "FAIR TRIAL" AND "COMPETENT COURT" IN A REQUESTING STATE

Jamil Ddamulira Mujuzi
LLB LLM LLD
Professor of Law, Faculty of Law
University of the Western Cape

SUMMARY

The Extradition Act provides for two general modes of extradition: extradition to foreign states and extradition to associated states. In both cases, a magistrate has to issue a warrant of arrest for the person-to-be-extradited to be brought before him or her to conduct an enquiry to determine whether the person should be extradited. In the case of extradition to foreign states, the Minister responsible for justice has the final say on whether a person should be extradited. The magistrate's role stops at authorising the detention of the person for the purposes of extradition. However, in the case of extradition to associated states, the magistrate has the final say on whether the person should be surrendered for extradition. In both cases, the magistrate plays a role – he or she has to issue a warrant for the arrest of the person in question. He or she also has to conduct an enquiry. The Constitutional Court held that before issuing a warrant of arrest, the magistrate must be satisfied that the person sought to be extradited has been convicted by a competent court. However, the Constitutional Court does not define or describe a "competent court". The Constitutional Court also held that a person may not be extradited if his or her trial was unfair. However, it does not stipulate the yardstick that should be used to measure the fairness of the trial in a foreign or associated state. In this article, the author relies on international human rights law and on jurisprudence from South African courts to explain the meaning of "competent court". The author also relies on international human rights law and jurisprudence from different countries to suggest the criteria that could be adopted by the Constitutional Court to determine whether a trial in a foreign or associated state was fair.

1 INTRODUCTION

In South Africa, extradition is governed by the Extradition Act[1] and the bilateral and multilateral treaties that South Africa has signed or ratified. The multilateral treaties are the European Convention on Extradition[2] and the

[1] 67 of 1962.
[2] European Treaty Series No 24 (1957).

SADC Protocol on Extradition.[3] These treaties have been invoked in numerous extradition cases in South Africa.[4] As is illustrated below, the Extradition Act provides for two general modes of extradition: extradition to foreign states and extradition to associated states.[5] In both cases, a magistrate has to issue a warrant of arrest for the person-to-be-extradited to be brought before him or her to conduct an enquiry and determine whether the person should be extradited. In the case of extradition to foreign states, the Minister responsible for justice (the Minister) has the final say on whether a person should be extradited. The magistrate's role stops at authorising the detention of the person for the purposes of extradition. However, in the case of extradition to associated states, the magistrate has the final say on whether the person should be surrendered for extradition. In both cases, the magistrate plays a role – he or she has to issue a warrant for the arrest of the person in question. He or she also has to conduct an enquiry. As will be discussed below, over the years, courts (especially the Constitutional Court) have explained the role of the magistrate in extradition proceedings.[6] The Constitutional Court has clarified the factors that a magistrate has to consider before deciding whether to issue a warrant for the arrest of the person to be extradited, and before ordering the detention of such a person for the purpose of extradition. These factors are not provided for in the Extradition Act. With regard to the first issue, the court has held that a magistrate should only be concerned with whether the warrant of arrest was issued by a competent court. With regard to the second issue, the court has held, *inter alia*, that in cases of extradition to foreign states, the magistrate does not have to be concerned with the fairness of the trial in a requesting state. However, the fairness of the trial is an issue that the Minister (in cases of extradition to foreign states) and the magistrate (in cases of extradition to associated states) have to consider before authorising an extradition. With regard to the first issue (whether a competent court issued the warrant of arrest), the Constitutional Court does not explain what amounts to a "competent court". The author relies on South African law and international human rights law to explain this concept. Likewise, the Constitutional Court does not explain what amounts to a fair trial for the purpose of allowing or

---

3 SADC Protocol on Extradition (2002).

4 For some of the cases in which these treaties have been invoked, see Mujuzi "Extradition Between European and African Countries: Overcoming the Challenges" 2021 11(3) *European Criminal Law Review* 288–319. See also *Republic of Mozambique v Forum De Monitoria Do Orcamento* [2022] ZAGPJHC 495 (dealing with concurrent extradition requests).

5 According to s 6 of the Extradition Act, an associated state is any state in Africa with which South Africa has an extradition agreement that "provides for the endorsement for execution of warrants of arrest on a reciprocal basis". The opposite is true with a foreign state. The drafting history of the Act does not clearly explain the differences between a foreign state and an associated state. It is stated: "It is interesting to note that there is still retained a distinction between those states which have judicial systems very similar to our own and others who do not fall into that category, designated in this Bill as foreign states and associated states." See submission by Mr Cadman, Debates of the House of Assembly (Hansard) (First Session: Second Parliament) (14 May 1962) 5558. For a discussion of the distinction between a "foreign state" and an "associated state", see *S v Khanyisile* [2012] ZANWHC 35; *Director of Public Prosecutions, Western Cape v Kouwenhoven; Kouwenhoven v Director of Public Prosecutions, Western Cape* [2021] 1 All SA 843 (WCC); 2021 (1) SACR 579 (WCC).

6 See discussion below on "the role of magistrates in extradition proceedings".

denying the extradition of a person. The author relies on international human rights law (article 14 of the International Covenant on Civil and Political Rights (ICCPR)) and jurisprudence from the European Court of Human Rights and different countries to suggest what fairness of a trial means for the purpose of deciding whether a person should be extradited. It is hoped this jurisprudence will be relied on by South African courts in clarifying what a fair trial is for the purposes of extradition. The author first highlights the role of a magistrate in extradition proceedings as explained by the Constitutional Court.

2 THE ROLE OF THE MAGISTRATE IN EXTRADITION PROCEEDINGS: ISSUING A WARRANT OF ARREST

A warrant of arrest has to be issued for a person who is subject to extradition. Thus, section 5(1) of the Extradition Act provides:

> "Any magistrate may, irrespective of the whereabouts or suspected whereabouts of the person to be arrested, issue a warrant for the arrest of any person – (*a*) upon receipt of a notification from the Minister to the effect that a request for the surrender of such person to a foreign State has been received by the Minister; or (*b*) upon such information of his or her being a person accused or convicted of an extraditable offence committed within the jurisdiction of a foreign State, as would in the opinion of the magistrate justify the issue of a warrant for the arrest of such person, had it been alleged that he or she committed an offence in the Republic."

For many years, magistrates relied on section 5(1)(*a*) to issue warrants of arrest and courts, including the Constitutional Court, held that those warrants had been issued validly.[7] However, in *Smit v Minister of Justice and Correctional Services*,[8] the Constitutional Court held, by majority, that section 5(1)(*a*) was inconsistent with the Constitution because it deprived the magistrate of the discretion to determine whether or not a warrant of arrest should be issued. In effect, the magistrate was required to issue a warrant once he or she received a notification from the Minister. According to the majority judgment, this meant that the provision violated the principle of the separation of powers. Secondly, the provision required the magistrate to issue a warrant of arrest whether or not there were reasonable grounds to believe that the person to be arrested had committed an offence. In holding that section 5(1)(*b*) was consistent with the Constitution, the court made the following observation:

> "Section 5(1)(*b*) of the Extradition Act imports the section 43(1)(*c*) of the CPA [Criminal Procedure Act] requirement. The result is that under section 5(1)(*b*) the Magistrate must bring her or his own independent mind to bear on

---

7 See, for example, *Geuking v President of the Republic of South Africa* 2003 (3) SA 34 (CC); 2004 (9) BCLR 895 (CC); *Harksen v President of the Republic of South Africa* 2000 (2) SA 825 (CC); 2000 (1) SACR 300; 2000 (5) BCLR 478; *Marsland v Additional District Court Magistrate, Kempton Park* [2019] ZAGPJHC 545; *Saliu v S* [2015] ZAGPJHC 179. Apart from issuing warrants of arrest, the magistrate may also release on bail a person facing extradition, see generally *Osagiede v S* [2022] ZAWCHC 166; *Otubu v Director of Public Prosecutions, Western Cape* [2022] ZAWCHC 79.

8 2021 (3) BCLR 219 (CC).

> whether, in the case where the person concerned is accused of an extraditable offence, there are reasonable grounds to suspect that the person has committed the offence. In the case where the information before the Magistrate is that the person concerned is convicted of an offence, all that the Magistrate is required to do is to satisfy her- or himself that the person has indeed been convicted. For it to be a conviction, it must be by a competent court. The Magistrate must be satisfied that this is so. She or he is not expected to play the role of a review or appellate arbiter on the legal correctness of the conviction; not even at the level whether there are reasonable grounds to believe that the conviction is legally correct. To use an Americanism, the Magistrate must not second-guess the conviction by the foreign court. To do so, would be to undermine the judicial system of the requesting State. That, in turn, would be inconsonant with the idea of comity between South Africa and those nations it owes extradition obligations."[9]

Here, the court raises two important issues. First, before a magistrate issues a warrant of arrest under section 5(1)(*b*), he or she must be satisfied that that person was convicted, and that the conviction was by a competent court. Secondly, the magistrate is not required to question the validity of the conviction. In other words, his or her assessment should focus on the court that convicted the person and not the conviction itself. This would mean that in effect the magistrate is permitted to order the detention of a person for extradition even if there is evidence that the trial was not fair. However, the Constitutional Court does not explain what amounts to a "competent court". If a court is considered to be competent in the laws of the requesting state for the purposes of convicting the person who is being sought for extradition, how can its competency be questioned by a South African court? In other words, what amounts to a competent court? This is a question that the Constitutional Court does not explain in its judgment. However, this is an issue that requires further clarification because South African courts will grapple with it soon or later. This takes us to the question of how the concept of a competent court is understood or defined by South African courts and in international human rights law and in particular under article 14 of the ICCPR. Based on jurisprudence, it is argued that a competent court means one that has jurisdiction over the offender and the offence.

2 1 A competent court as understood in South African law

The Constitution of South Africa refers to the role of a "competent court" in two instances.[10] However, the Constitution does not provide expressly that an accused has a right to be tried before a competent court. It could be

---

9 *Smit v Minister of Justice and Correctional Services supra* par 111.

10 Section 38(1) of the Constitution provides: "Anyone listed in this section has the right to approach a competent court, alleging that a right in the Bill of Rights has been infringed or threatened, and the court may grant appropriate relief, including a declaration of rights. The persons who may approach a court are– (*a*) anyone acting in their own interest; (*b*) anyone acting on behalf of another person who cannot act in their own name; (*c*) anyone acting as a member of, or in the interest of, a group or class of persons; (*d*) anyone acting in the public interest; and (*e*) an association acting in the interest of its members." Likewise, section 37(3) of the Constitution provides: "Any competent court may decide on the validity of– (*a*) a declaration of a state of emergency; (*b*) any extension of a declaration of a state of emergency; or (*c*) any legislation enacted, or other action taken, in consequence of a declaration of a state of emergency."

argued that the drafters of the Constitution deliberately decided not to include this right in the Constitution.[11] Apart from the Constitution, there are other pieces of legislation that provide for a "competent court" to try a matter.[12] However, neither the Constitution nor many of these pieces of legislation define or describe what amounts to a "competent court". Some pieces of legislation hold "competent court" to mean one with jurisdiction over the matter.[13]

There are many cases in which the Constitutional Court,[14] the Supreme Court of Appeal and the High Court[15] have referred to the relevant constitutional or legislative provisions requiring a competent court. However, most of these decisions concern section 38 of the Constitution and none of these courts has expressly defined or described this concept. However, this jurisprudence shows that courts have understood the concept of a competent court, in both civil and criminal cases, to be one that has jurisdiction over the subject matter and the person. For example, in *S v F*,[16] the High Court explained the meaning of "competent court" within the context of section 18(5) of the Children's Act:

---

11 In *Bernstein v Bester NO* 1996 (4) BCLR 449; 1996 (2) SA 751 par 106, the Constitutional Court held: "A provision cannot ordinarily be implied if all the surrounding circumstances point to the fact that it was deliberately omitted. That the framers of the Constitution were alert to issues of constitutionalising rules of procedural law and justice is evident from the detailed criminal fair trial provisions in section 25(3) [of the interim Constitution]. The internal evidence of the Constitution itself suggests that the drafters were well informed regarding provisions in international, regional and domestic human and fundamental rights instruments. Section [sic] 6 of the European Convention on Human Rights explicitly confers the right to a fair and public hearing, not only in a criminal trial, but also in regard to the determination of civil rights and obligations. Nearer home, article 12(1)(*a*) of the Namibian Constitution expressly provides that "[i]n the determination of their civil rights and obligations ... all persons shall be entitled to a fair and public hearing by an independent, impartial and competent Court or Tribunal established by law ...". In these circumstances an argument could be made out that the framers deliberately elected not to constitutionalise the right to a fair civil trial."

12 See, for example, ss 41 and 43 of the Postal Services Act 124 of 1998; ss 12(3) and 103(2) of the Securities Services Act 36 of 2004; s 26B of the Unemployment Insurance Act 2001.

13 See, for example, s 47 of the Magistrates' Courts Act 32 of 1944 which provides: "(1) When in answer to a claim within the jurisdiction the defendant sets up a counterclaim exceeding the jurisdiction, the claim shall not on that account be dismissed; but the court may, if satisfied that the defendant has *prima facie* a reasonable prospect on his counterclaim of obtaining a judgment in excess of its jurisdiction, stay the action for a reasonable period in order to enable him to institute an action in a competent court. The plaintiff in the magistrate's court may (notwithstanding his action therein) counterclaim in such competent court and in that event all questions as to costs incurred in the magistrate's court shall be decided by that competent court."

14 See, for example, *Fose v Minister of Safety and Security* 1997 (7) BCLR 851; 1997 (3) SA 786 (on the provision in the Constitution); *Centre for Child Law v Media 24 Limited* 2020 (3) BCLR 24 (5 (CC); 2020 (1) SACR 469 (CC); 2020 (4) SA 319 (CC) (on s 154(3) of the Criminal Procedure Act).

15 *Octagon Chartered Accounts v Additional Magistrate, Johannesburg* [2015] ZAGPJHC 89 (s 47 of the Magistrates' Courts Act 32 of 1944); *Bestuursliggaam van Gene Louw Laerskool v J D Roodtman* [2000] ZAWCHC 2 (on s 102A(1) of the Education Affairs Act (House of Assembly) 70 of 1988); *Rathabeng Properties (Pty) Ltd v Mohlaoli* [2021] ZAGPJHC 8 (dealing with COVID-19 regulations issued in terms of s 27(2) of the Disaster Management Act 57 of 2002).

16 [2020] ZAGPPHC 350.

> "[T]he Court within whose area of jurisdiction the minor children was [sic] ordinarily resident at the time when the application was instituted, as well as the Court within whose area of jurisdiction the respondent resided, had the necessary jurisdiction to entertain the relocation application, and were 'competent courts'."[17]

There are other civil cases in which the High Court has understood a competent court to be one having jurisdiction over the matter.[18] In the context of criminal proceedings, the High Court also understands a competent court to be one with jurisdiction over the offender and the offence.[19] Likewise, the Constitutional Court has, in many of its judgments (dealing with civil issues),[20] explained that a competent court means a court with jurisdiction over the matter. It has taken the same approach in criminal cases.[21] This explains why in some instances the Constitutional Court has used the words "competent court" and "court of competent jurisdiction" interchangeably.[22] The Supreme Court of Appeal has also followed a similar approach.[23] The competence of a court is not limited to jurisdiction over the offender and the offence. It also extends to jurisdiction as to sentence. A court can only impose a sentence that the law allows it to impose.[24] However, the mere fact that the accused has been wrongly convicted does not mean that the court that convicted him was not competent. For example, in *S v Sema*,[25] the accused was convicted of rape when he should have been convicted of the offence of having unlawful carnal intercourse with an under-aged girl. The High Court held:

> "The learned regional magistrate erred when she convicted the appellant of rape. Nevertheless the appellant was convicted by a competent court and the convictions were to stand until set aside by a competent higher court. Thus, when the appellant was, albeit wrongly, convicted by the regional court on the

---

17 *S v F supra* par 40.

18 *Rahube v Rahube* 2018 (1) SA 638 (GP) par 91; *Sizani Primary School v MEC for Education, Mpumalanga* [2015] ZAGPPHC 851 par 9; *N v N; In re: N* [2017] ZAECPEHC 61 par 29.

19 *S v Tshotshoza* 2010 (2) SACR 274 (GNP) par 9; *S v Viljoen* [2006] ZANCHC 117 par 13; *Seoe v Deputy Director of Public Prosecutions of Free State* [2015] ZAFSHC 131 par 19.

20 *Association of Mineworkers and Construction v Royal Bafokeng Platinum Limited* 2020 (4) BCLR 373 (CC); [2020] 5 BLLR 441 (CC); 2020 (3) SA 1 (CC) par 206–209; *Thint (Pty) Ltd v National Director of Public Prosecutions, Zuma v National Director of Public Prosecutions* 2008 (2) SACR 421 (CC); 2009 (1) SA 1 (CC) par 242; *Mukaddam v Pioneer Foods (Pty) Ltd* 2013 (5) SA 89 (CC); 2013 (10) BCLR 1135 (CC) par 1; *Social Justice Coalition v Minister of Police* [2022] ZACC 27 par 139.

21 *Van der Walt v S* 2020 (2) SACR 371 (CC); 2020 (11) BCLR 1337 (CC) par 18; *Molaudzi v S* 2015 (8) BCLR 904 (CC); 2015 (2) SACR 341 (CC) par 15.

22 *National Coalition for Gay and Lesbian Equality v Minister of Justice* 1999 (1) SA 6; 1998 (12) BCLR 1517.

23 *Laden v MV "Dimitris"* [1989] 2 All SA 436 (A); *Polokwane Local and Long Distance Taxi Association v Limpopo Permissions Board* [2017] ZASCA 44 par 23; *KLVC v SDI* [2015] 1 All SA 532 (SCA) par 37; *Ndou v S* 2019 (2) SACR 243 (SCA) par 17; *Director of Public Prosecutions, Limpopo v Mokgotho* [2017] ZASCA 159 par 26; *Director of Public Prosecutions, Gauteng v Pistorius* [2016] 1 All SA 346 (SCA); 2016 (2) SA 317 (SCA); 2016 (1) SACR 431 (SCA) par 22.

24 *Seedat v S* 2017 (1) SACR 141 (SCA); *Veldman v Director of Public Prosecutions (Witwatersrand Local Division)* 2007 (3) SA 210 (CC); 2007 (9) BCLR 929 (CC); *S v Nxumalo* [2015] ZAGPPHC 660 par 2; *Mangisi v S* [2015] ZAGPPHC 554 par 15.

25 *S v Sema* [2008] ZAGPHC 223.

> rape of a girl under the age of 16, the regional court was obliged to commit the appellant to the High Court for sentence."[26]

The High Court held that, in extradition cases, the person is surrendered to the requesting state to stand trial before a competent court.[27] The above jurisprudence from the High Court, the Supreme Court of Appeal and the Constitutional Court shows that South African courts understand a competent court to be one with jurisdiction over the offender and the offence, and also with jurisdiction to impose the sentence in question. In the extradition context, before a magistrate issues a warrant of arrest under section 5(1) of the Extradition Act, he or she is required to be satisfied that the following three things were in place in the court that convicted the person-to-be-extradited (if his extradition is sought to enforce a sentence): (1) the court that convicted the offender had jurisdiction over him or her – for example, that he or she committed the offence within its area of jurisdiction; (2) the court had jurisdiction over the offence[28] – for example, if it was a military court and the person in question is a civilian, it has to be shown that the court had jurisdiction over him or her; (3) the court had the jurisdiction to impose the sentence on the offender – for example, if the offender is being sought to serve a sentence of life imprisonment, it has to be shown that the court had jurisdiction to impose this sentence. Answering all these questions clearly requires the magistrate to get as much information as possible before issuing a warrant of arrest. If any of the above questions is not answered to the satisfaction of the magistrate, he or she will not issue a warrant of arrest. This is likely to delay the process, something that was not contemplated by the drafters of section 5(1) of the Extradition Act. The above discussion shows the courts' understanding of what a competent court is in South African law. However, South African law is not of universal application. In other words, the court's understanding is applicable to South Africa. This raises the question of the international yardstick that a court may have to rely on to determine whether a court in question is competent. This question takes us to discussion of the concept of a competent court in international human rights law.

2 2 A competent court in international human rights law

The right to be tried before a competent court is one of the elements of the right to a fair trial in international human rights law. Article 14(1) of the ICCPR provides:

> "All persons shall be equal before the courts and tribunals. In the determination of any criminal charge against him, or of his rights and obligations in a suit at law, everyone shall be entitled to a fair and public hearing by a competent, independent and impartial tribunal established by law."

---

[26] *S v Sema supra* 4.
[27] *Makwakwa v S* [2011] ZAFSHC 27 par 23.
[28] For a discussion of what amounts to "jurisdiction" for the purpose of extradition in the Extradition Act, see *Kouwenhoven v DPP (Western Cape)* [2021] 4 All SA 619 (SCA).

The ICCPR does not define or describe a competent court. In its General Comment on article 14,[29] the Human Rights Committee explained that "[t]he requirement of competence, independence and impartiality of a tribunal in the sense of article 14, paragraph 1, is an absolute right that is not subject to any exception."[30] The Committee explains the meaning of an independent and impartial tribunal within the meaning of article 14(1).[31] However, it does not explain the meaning of "competent tribunal". It would appear that it understands a competent tribunal or court to mean one that is independent and impartial. The Human Rights Committee's jurisprudence does not define or describe a competent court. This means that one has to resort to the drafting history of article 14 to know why the word "competent" was included in this provision.

The initial draft of article 14(1) did not include the word "competent". It provided:

> "In the determination of any criminal charge against him, or of his rights and obligations in a suit at law, everyone shall be entitled to a fair and public hearing, by an independent and impartial tribunal established by law."[32]

It was the Yugoslav delegate who suggested that the word "competent" should be inserted before the word "independent" for the draft provision to read as follows: "[b]y a competent, independent and impartial tribunal established by law."[33] This amendment was adopted by ten votes to two, with five abstentions.[34] The word "competent" is therefore not redundant. As the Secretary-General's report on the draft ICCPR shows in the context of article 6:

> "There was agreement that the death penalty should be imposed by a 'competent court'. A suggestion that the court should also be 'independent' was opposed on the ground that the 'independence' of tribunals was already provided for in another article of the covenant."[35]

More specifically, the Secretary-General's Report explains the drafting history of article 14(1):

> "The use of the word 'competent' before 'independent and impartial tribunal' in paragraph 1 was intended to ensure that all persons were tried in courts whose jurisdiction had been previously established by law, and arbitrary action so avoided."[36]

The drafting history of article 14 of ICCPR makes it clear a competent court means a court with jurisdiction over the person who has appeared before it.

---

29 UN Human Rights Committee *General Comment No 32 – Article 14: Right to Equality Before Courts and Tribunals and to Fair Trial* (23 August 2007) CCPR/C/GC/32.

30 Par 19 of General Comment No 32.

31 Par 19–21 of General Comment No 32.

32 UN Commission on Human Rights *Report to the Economic and Social Council on the Seventh Session of the Commission, Held at the Palais des Nations, Geneva, From 16 April to 19 May 1951* (24 May 1951) E-1992, E-CN_4-640 21.

33 *Report on the Seventh Session of the Commission* 31.

34 UN Commission on Human Rights *Commission on Human Rights: Report of the 8th Session, 14 April to 14 June 1952* (1952) E/2556/ E/CN.4/669 31.

35 UN Secretary-General *Annotations on the Text of the Draft International Covenants on Human Rights* (1 July 1955) A/2929 84.

36 *Annotations on the Text of the Draft International Covenants on Human Rights* 120.

This jurisdiction should also cover the offence in question. Therefore, in deciding whether or not the court that sentenced the person to be extradited was competent, the magistrate has to ask only one question: did the court have jurisdiction over the offender and the offence? Whether or not the court was independent or impartial are not questions with which the magistrate should be concerned according to the Constitutional Court.

This then requires us to deal with the place of a fair trial in extradition proceedings. The next section deals with the role of the magistrate in the extradition enquiry and how he or she is expected to deal with the issue of whether, in the case of an extradition to serve a sentence, the trial of the person (who is the subject of the enquiry) was fair, or, in the case of an extradition to stand trial, whether it is likely to be fair.

3 THE ROLE OF THE MAGISTRATE AT AN ENQUIRY

Once a warrant of arrest has been issued, the magistrate must conduct an enquiry to determine whether a person should be extradited. Thus, section 9(1) of the Extradition Act provides:

> "Any person detained under a warrant of arrest or a warrant for his further detention, shall, as soon as possible be brought before a magistrate in whose area of jurisdiction he has been arrested, whereupon such magistrate shall hold an enquiry with a view to the surrender of such person to the foreign State concerned."

Section 9(2) provides that the enquiry in question "shall proceed in the manner in which a preparatory examination is to be held in the case of a person charged with having committed an offence in the Republic".[37] According to section 9(3) of the Act, at the enquiry, the magistrate is empowered to receive any evidence from a foreign state that would help determine whether the person should be surrendered for extradition. On the basis of that evidence, the magistrate may order the detention of the person for the Minister to decide whether he or she should be extradited (s 10) or issue an order for surrender of the detainee to any person authorised by an associated state to receive him or her for the purpose of extradition (s 12). In the case of extradition to associated states, the magistrate may decline to order the surrender of a person for extradition on several grounds. Thus, section 12(2) of the Act provides that the magistrate may order that the person brought before him or her shall not be surrendered–

> "(*a*) where criminal proceedings against such person are pending in the Republic, until such proceedings are concluded and where such proceedings result in a sentence of a term of imprisonment, until such sentence has been served; (*b*) where such person is serving, or is about to serve a sentence of a term of imprisonment, until such sentence has been completed; (*c*) at all, or before the expiration of a period fixed by the Minister, if he or she is satisfied that (i) by reason of the trivial nature of the offence or by reason of the surrender not being required in good faith or in the interests of justice, or that

[37] In *Kouwenhoven v DPP (Western Cape)* [2021] 4 All SA 619 (SCA) par 6, the court held that in terms of the Criminal Procedure Act 51 of 1977, "preparatory examinations have now largely, if not entirely, fallen into disuse".

> for any other reason it would, having regard to the distance, the facilities for communication and to all the circumstances of the case, be unjust or unreasonable or too severe a punishment to surrender the person concerned; or (ii) the person concerned will be prosecuted or punished or prejudiced at his or her trial in the associated State by reason of his or her gender, race, religion, nationality or political opinion."

Likewise, section 11(*b*) of the Act provides for similar circumstances (to those under section 12(*b*)) in which the Minister may decline to order the extradition of a person to a foreign state.

On the basis of section 12(2)(*c*)(i), the magistrate may not order the surrender of a person if he or she thinks that it would not be "in the interests of justice" for the person to be extradited. Of great importance to this discussion is section 12(2)(*c*)(ii). Its effect is that the magistrate may decline to order the surrender of the person for extradition if one of three grounds exists: first, if the person will be prosecuted in the associated state by reason of his or her gender, race, religion, nationality or political opinion; secondly, if the person will be punished in the associated state by reason of his or her gender, race, religion, nationality or political opinion; and thirdly, if the person will be prejudiced at his or her trial in the associated state by reason of his or her gender, race, religion, nationality or political opinion. The first ground above relates to the manner in which the prosecution will be conducted, and in particular the offences for which the person will be prosecuted. If it is clear that the prosecution will be based on any of the listed grounds, the magistrate must not order the extradition of the person. This is irrespective of whether the court that will preside over the case will be competent. The second ground relates to the sentence that will be imposed on the person in the event of a conviction.[38] In this case, the enquiry does not focus on the prosecution or on the fairness of the trial process before conviction. The focus is on the sentence that will be imposed on the person upon conviction. And finally, the third ground focuses on the trial process itself. How will the trial be conducted? In simple terms, will the extradited person get a fair trial? However, in all cases, the word "may" is used. This implies that the magistrate has a discretion whether or not to order the extradition of the person in question. However, a person against whom an order has been made has a right of appeal.[39] The purpose of section 12(2)(*c*)(ii) is to protect the person in question against persecution in the requesting state.[40]

There are several decisions in which courts, including the Constitutional Court, have explained the role of a magistrate in extradition proceedings. For example, in *Director of Public Prosecutions: Cape of Good Hope v Robinson*,[41] the Constitutional Court held that in cases of extradition to a foreign state, the magistrate is obliged to commit the person in question for extradition if the evidence at the enquiry shows that "(a) he has been

---

38 The Constitution of South Africa, 1996 draws a distinction between sentence and punishment. See generally, *Phaahla v Minister of Justice and Correctional Services (Tlhakanye Intervening)* 2019 (2) SACR 88 (CC); 2019 (7) BCLR 795 (CC).

39 S 13 of the Extradition Act.

40 *Mail and Guardian Media Ltd v Chipu NO* 2013 (11) BCLR 1259 (CC); 2013 (6) SA 367 (CC) par 84 (the court was dealing with s 11(*b*)(iv) of the Extradition Act, which is the same as s 12(2)(*c*)(ii)).

41 2005 (4) SA 1 (CC); 2005 (2) BCLR 103 (CC).

convicted of an extraditable offence that is mentioned in the extradition agreement; and (b) there is nothing in the Act or in the extradition agreement read subject to the Act that warrants a finding that the … [person in question] is not liable for extradition."[42] The court added:

> "The magistrate is therefore required to determine these two matters only. Issue (a) does not entail a consideration of whether the respondent will be subject to an unfair trial if extradited. It remains necessary to consider whether issue (b) requires the magistrate to consider this aspect. In other words, is there anything in the Act or the extradition agreement which requires the magistrate to ensure that the respondent will not be subject to an unfair trial before concluding that the respondent is liable to be surrendered?"[43]

The court added that in extraditions to foreign states,

> "we must remind ourselves that a decision by an extradition magistrate in terms of section 10(1) of the Act that the person sought is liable to be surrendered does not result in the extradition of that person. We must not forget that the decision to extradite is made by the Minister in terms of section 11 of the Act."[44]

The court explained the role of the magistrate in both modes of extradition (to a foreign state and to an associated state). It stated:

> "[T]he magistrate conducting a section 10 enquiry, as distinct from the magistrate conducting an enquiry mandated by section 12 of the Act makes no order to surrender. Section 11 of the Act does not oblige the Minister to order extradition. She may order extradition if she chooses and is expressly permitted not to order extradition in certain defined circumstances. A finding that the person is liable to be surrendered in terms of section 10(1) obliges nobody to do anything; the decision places no obligation whatsoever whether directly or indirectly upon the Minister or any other organ of state for that matter."[45]

The court added that in extradition to foreign states, "it is the Minister who is empowered to consider whether it will be unjust or unreasonable, having regard to all the circumstances of the case to surrender the person concerned".[46] In other words, "the magistrate is not authorised to make that decision under section 10(1)".[47] However, the court emphasised that the Minister's decision to order the surrender of the person for extradition is "subject to judicial control" although on the facts of the case it was "not appropriate to determine … the principles that would govern a challenge to a decision by the Minister to extradite".[48] The court added:

> "[T]he magistrate conducting the section 12 enquiry is expressly empowered not to make an order of surrender if this is not in the interests of justice or if it would be unjust or unreasonable in all the circumstances of the case. The scheme of the Act makes it quite clear that the question whether a person sought to be extradited will become the victim of an unfair trial as a result of

---

42 *Director of Public Prosecutions: Cape of Good Hope v Robinson supra* par 49.
43 *Director of Public Prosecutions: Cape of Good Hope v Robinson supra* par 49.
44 *Director of Public Prosecutions: Cape of Good Hope v Robinson supra* par 50.
45 *Director of Public Prosecutions: Cape of Good Hope v Robinson supra* par 51.
46 *Director of Public Prosecutions: Cape of Good Hope v Robinson supra* par 52.
47 *Ibid*.
48 *Director of Public Prosecutions: Cape of Good Hope v Robinson supra* par 55.

> the extradition must be weighed in the equation at the time when consideration is being given to whether there should be a surrender."[49]

In *Mochebelele v Director of Public Prosecutions, Gauteng*,[50] the appellant was convicted of bribery in Lesotho and sentenced to five years' imprisonment.[51] However, "[b]y the time he was sentenced, the appellant had fled to South Africa, and he was sentenced in his absence".[52] He applied for refugee status on the ground that "his trial and conviction in Lesotho amounted to political persecution".[53] Although the magistrate found that he was liable for extradition, he discharged him on the ground that he had applied for refugee status. However, his application was unsuccessful. The Supreme Court of Appeal held that the provisions of section 35(3) of the Constitution (on the right to a fair trial) "bear no relevance to an extradition enquiry in terms of s 10".[54] The court added that it is

> "not within the magistrate's remit to determine whether it would be unjust or unreasonable to extradite the appellant. The magistrate's power to discharge the person is limited to only two instances in terms of s 10(3): if he or she finds that the evidence does not warrant the issue of an order of committal or that the required evidence is not forthcoming within a reasonable time."[55]

The court concluded that it is the Minister, under section 11 of the Act, who has the powers to determine whether or not it would be unjust to extradite the applicant.[56] Even if there is a real risk that the applicant's rights will be violated upon extradition, the magistrate would have to commit the applicant to prison to wait the Minister's decision on whether he or she should be extradited. As the High Court held in *Tucker v S*:[57]

> "Even if it was found that the applicant faced infringement of his right to equality, more specifically his right not to be discriminated against on the basis of his sexual orientation, and there was a real risk that he could face punishment which is inconsistent with the provisions of the Constitution if he was to be extradited, this right is not absolute. The Minister might still request the UK to provide the necessary assurances. The real risk of infringement, even if it was found to exist, was no bar for the magistrate to order his committal to prison to await the Minister's decision with regard to his surrender."[58]

The Supreme Court of Appeal held:

> "[I]t is clearly appropriate that the person whose surrender to the foreign state making the request is sought should be entitled to place material before the magistrate holding the enquiry in the hope of persuading the magistrate to include material in a report to be submitted to the Minister which may induce

---

49 *Director of Public Prosecutions: Cape of Good Hope v Robinson supra* par 52.
50 *Mochebelele v Director of Public Prosecutions, Gauteng* 2019 (2) SACR 231 (SCA).
51 *Mochebelele v Director of Public Prosecutions, Gauteng* par 2.
52 *Ibid*.
53 *Mochebelele v Director of Public Prosecutions, Gauteng* par 6.
54 *Mochebelele v Director of Public Prosecutions, Gauteng* par 19.
55 *Mochebelele v Director of Public Prosecutions, Gauteng* par 23.
56 *Mochebelele v Director of Public Prosecutions, Gauteng* par 24.
57 *Tucker v S* [2018] 2 All SA 566 (WCC).
58 *Tucker v S supra* par 29.

> the Minister to order that the person concerned not be surrendered on one or other of the grounds set forth in s 11(b)."[59]

In *Director of Public Prosecutions, Western Cape v Tucker*,[60] the Constitutional Court held:

> "Allowing a sought person to lead evidence relating to surrender promotes their right to a fair hearing. It affords them the liberty to raise pertinent evidence that they feel might be relevant to the Minister's decision from the start of their extradition proceedings and have that evidence recorded in open court. It does so without prejudicing or disadvantaging the prosecuting authorities or the requesting State, and ensures that the sought person's concerns relating to surrender are recorded in the transcript of proceedings and the possible report forwarded to the Minister in terms of section 10(4)."[61]

The court added that the "magistrate is obliged to admit evidence that is relevant to the Minister's surrender during committal proceedings, notwithstanding the fact that the enquiry is solely concerned with the committal of the sought person".[62] The High Court held that in deciding whether a person should be detained awaiting the Minister's decision to determine whether or not he or she should be extradited to a foreign state, it is "not concerned" with the question of the fairness or otherwise of his trial in the foreign state.[63] The above jurisprudence shows that in an enquiry for the purpose of extradition to a foreign state, the magistrate does not have the power to determine whether the trial of the person to be extradited was fair (if extradition is sought to serve a sentence) or will be fair (if extradition is sought for the purpose of standing a trial). However, the evidence relating to the fairness or otherwise of the trial has to be included in a report that the magistrate submits to the Minister.[64] It is for the Minister to consider that question and his or her decision is not beyond scrutiny.[65] However, in the case of extradition to associated states, the magistrate is empowered to enquire into the fairness of the trial. If he or she is of the view that the trial will not be fair or was not fair, he or she may decline to make the extradition order. The question that has to be answered is: what yardstick should be used to measure the fairness of the trial in question? Should the magistrate or Minister rely on the meaning of the fairness of a trial in the South African Constitution? Because the South African Constitution does not apply extraterritorially,[66] it is argued that the question of whether the trial was fair in

---

59 *Garrido v Director of Public Prosecutions, Witwatersrand Local Division* [2007] 4 All SA 1100 (SCA) par 25.

60 *Director of Public Prosecutions, Western Cape v Tucker* 2021 (12) BCLR 1345 (CC).

61 *Director of Public Prosecutions, Western Cape v Tucker supra* par 105.

62 *Director of Public Prosecutions, Western Cape v Tucker supra* par 117.

63 *Director of Public Prosecutions, Western Cape v Kouwenhoven; Kouwenhoven v Director of Public Prosecutions, Western Cape* [2021] 1 All SA 843 (WCC) par 4.

64 The legislators emphasised the significance of this report during the making of the Extradition Act. See *Debates of the House of Assembly (Hansard)* (First Session: Second Parliament) (14 May 1962) 5558–5561.

65 For example, in *Forum De Monitoria Do Orcamento v Chang* [2021] ZAGPJHC 808, the High Court held that the Minister's decision to extradite the respondent to Mozambique where he enjoyed immunity from prosecution was irrational. The court held that if extradited to the USA, the respondent would be prosecuted for the alleged corruption.

66 See generally, *Kaunda v President of the Republic of South Africa* 2005 (4) SA 235 (CC); 2004 (10) BCLR 1009 (CC).

a foreign state has to be assessed against minimum standards set by international law. This requires one to refer to article 14 of the ICCPR.

Article 14 also provides for other elements of the right to a fair trial. It is to the effect that:

> "(1) All persons shall be equal before the courts and tribunals. In the determination of any criminal charge against him, or of his rights and obligations in a suit at law, everyone shall be entitled to a fair and public hearing by a competent, independent and impartial tribunal established by law. The press and the public may be excluded from all or part of a trial for reasons of morals, public order (ordre public) or national security in a democratic society, or when the interest of the private lives of the parties so requires, or to the extent strictly necessary in the opinion of the court in special circumstances where publicity would prejudice the interests of justice; but any judgement rendered in a criminal case or in a suit at law shall be made public except where the interest of juvenile persons otherwise requires or the proceedings concern matrimonial disputes or the guardianship of children.
> (2) Everyone charged with a criminal offence shall have the right to be presumed innocent until proved guilty according to law.
> (3) In the determination of any criminal charge against him, everyone shall be entitled to the following minimum guarantees, in full equality: (a) To be informed promptly and in detail in a language which he understands of the nature and cause of the charge against him; (b) To have adequate time and facilities for the preparation of his defence and to communicate with counsel of his own choosing; (c) To be tried without undue delay; (d) To be tried in his presence, and to defend himself in person or through legal assistance of his own choosing; to be informed, if he does not have legal assistance, of this right; and to have legal assistance assigned to him, in any case where the interests of justice so require, and without payment by him in any such case if he does not have sufficient means to pay for it; (e) To examine, or have examined, the witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him; (f) To have the free assistance of an interpreter if he cannot understand or speak the language used in court; (g) Not to be compelled to testify against himself or to confess guilt.
> (4) In the case of juvenile persons, the procedure shall be such as will take account of their age and the desirability of promoting their rehabilitation.
> (5) Everyone convicted of a crime shall have the right to his conviction and sentence being reviewed by a higher tribunal according to law.
> (6) …
> (7) No one shall be liable to be tried or punished again for an offence for which he has already been finally convicted or acquitted in accordance with the law and penal procedure of each country."

The fact that the accused was convicted by a competent court – that is, a court with jurisdiction over the offence and the accused – does not mean that his or her trial was fair. There are innumerable examples from South Africa where appeal courts, including the Constitutional Court and the Supreme Court of Appeal, have acquitted appellants on the basis that their trials were unfair.[67] However, the mere fact that the person who is subject to the extradition enquiry alleges that his or her trial was not fair or is likely to

[67] See for example, *Ofarah v S* [2013] ZAGPJHC 216; *Magwaza v S* [2015] 2 All SA 280 (SCA); 2016 (1) SACR 53 (SCA); *Makwakwa v S* [2014] ZAGPJHC 185; *Van der Walt v S supra*.

be unfair does not mean that he or she should not be extradited. For the court to rule against extradition, evidence should show that the trial did not comply with the minimum international standards of a fair trial. In other words, the fairness or otherwise of the trial should be assessed against international standards and not against the standards of a fair trial in the South African Constitution. The ICCPR has been ratified by most countries.[68] The Constitutional Court has explained the importance of the ICCPR. For example, it held that by acceding to the ICCPR, the Republic of South Africa has an international obligation to give effect to its provisions.[69] The court has also held that South Africa's accession to the ICCPR and other human rights treaties shows its "commitment to the advancement and protection of fundamental human rights".[70] However, like any other treaty, the ICCPR does "not create rights and obligations automatically enforceable within the domestic legal system" of South Africa.[71] For it to be "directly applicable on the domestic front", it has first to be domesticated.[72] Otherwise its provisions "cannot form the basis of a justiciable claim" in any South African court.[73]

Much as the ICCPR provides for a right to a fair trial, not every violation of one or more of the elements of this right under article 14 nullifies the trial; and the fact that the trial was unfair does not mean that the person in question should not be extradited. Relying on the jurisprudence of the European Court of Human Rights and from other countries, it is argued that there are two approaches from which the Constitutional Court may choose in deciding whether the trial in the country to which the person is to be extradited was so unfair or likely to be so unfair as to be the basis to block the extradition of the person in question. The first approach has been adopted by the European Court of Human Rights and many other countries. It is to the effect that a court or Minister should not authorise the extradition of a person if the evidence before it shows that there was or there is likely to be a flagrant denial of justice. The second approach, which has been adopted by the New Zealand High Court, rejects the concept of flagrant denial of justice. It is to the effect that extradition should not take place if there is a real risk that the trial will not comply with the minimum standards under article 14 of the ICCPR. This then raises the issue of what amounts to a flagrant denial of justice.

The jurisprudence of the European Court of Human Rights shows there is a flagrant denial of justice where there is an "impairment of the essence of the right to a fair trial".[74] In other words, as Judges Pinto De Albuquerque

---

68 See UN Treaty Collection *Depositary: Status of Treaties* Ch IV "4. International Covenant on Civil and Political Rights" https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY &mtdsg_no=IV-4&chapter =4&clang=_en.

69 *Zealand v Minister for Justice and Constitutional Development* 2008 (4) SA 458 (CC) par 30.

70 *Kaunda v President of the Republic of South Africa supra* par 158.

71 *Zuma v Secretary of the Judicial Commission of Inquiry Into Allegations of State Capture, Corruption and Fraud in the Public Sector Including Organs of State* 2021 (11) BCLR 1263 (CC) par 108.

72 *Zuma v Secretary of the Judicial Commission of Inquiry supra* par 108.

73 *Zuma v Secretary of the Judicial Commission of Inquiry supra* par 113.

74 *Muhammad and Muhammad v Romania* [GC] no. 80982/12 § 27 ECHR 2020.

and Elósegui put in their concurring opinion in the Grand Chamber case of *Muhammad and Muhammad v Romania*:[75]

> "a flagrant denial of justice, in other words, a violation of the essence of the fair trial right, goes beyond mere irregularities in the pre-trial and trial procedures, it warrants a breach so fundamental as to amount to a nullification (or destruction) of the right guaranteed by article 6 [of the European Convention on Human Rights]."[76]

As the High Court of the Republic of Ireland held, "[t]he term 'flagrant denial of justice' is synonymous with a trial which is manifestly contrary to the provisions of article 6 or the principles embodied therein".[77] It is a very high threshold which will be "met only in the most exceptional and clear circumstances".[78]

Relying on the jurisprudence of the European Court of Human Rights, the Court of Justice of the European Union has summarised examples that the European Court of Human Rights has given and which amount to a flagrant denial of justice. In *Minister for Justice and Equality v LM (Defaillances du système judiciaire)*,[79] the Advocate General observed that the

> "European Court of Human Rights considers that, in order for a Contracting State to be required not to expel or extradite a person, he must risk suffering in the requesting Member State not just a breach of Article 6 of the ECHR, but a 'flagrant denial' of justice or of a fair trial."[80]

He added:

> "According to the European Court of Human Rights, the following may thus constitute a flagrant denial of justice preventing the person concerned from being extradited or expelled: a conviction in absentia without the possibility of obtaining a re-examination of the merits of the charge; a trial that is summary in nature and conducted in total disregard of the rights of the defence; detention whose lawfulness is not open to examination by an independent and impartial tribunal; and a deliberate and systematic refusal to allow an individual, in particular an individual detained in a foreign country, to communicate with a lawyer. The European Court of Human Rights also attaches importance to the fact that a civilian has to appear before a court composed, even if only in part, of members of the armed forces who take orders from the executive."[81]

This test has been followed by courts in some European countries. For example, the Irish High Court will not order the extradition of a person to a country where there is evidence led by the person challenging the extradition that his or her trial would amount to a flagrant denial of justice.[82] It has also been followed in jurisdictions outside Europe. For example, in *Ibrahim v Simon Russell, Esq*,[83] the applicant contested his extradition from Hong

---

75 *Muhammad and Muhammad v Romania supra*.
76 *Muhammad and Muhammad v Romania supra* par 28.
77 *Attorney General v Damache* [2015] IEHC 339 par 6.4.4.
78 *The Attorney General v Marques* [2016] IECA 374 (12 December 2016) par 52.
79 *Minister for Justice and Equality v LM (Defaillances du système judiciaire)* [2018] EUECJ C-216/18PPU_O (28 June 2018).
80 *Minister for Justice and Equality v LM supra* par 79.
81 *Minister for Justice and Equality v LM supra* par 82 (references omitted).
82 *Attorney General v Damache supra* par 10.4–10.5.
83 [2020] HKCA 514.

Kong to serve his sentence in Bangladesh on the ground that the trial leading to his conviction had taken place in his absence and was therefore a flagrant denial of justice. The Hong Kong Court of Appeal held that "to make good a case on flagrant denial of justice, he should also provide some evidence on Bangladeshi law" under which he was convicted to show that his trial was a nullity.[84] The test has been followed in extradition proceedings in other countries outside Europe such as Australia,[85] Barbados,[86] and Belize.[87] It has also been included in the Guidelines of the Committee of Ministers of the Council of Europe on human rights and the fight against terrorism[88] and has been adopted by the Privy Council.[89] It is also an approach that the South African High Court is prepared to follow. For example, in *Tucker v Additional Magistrate, Cape Town; Tucker v S*,[90] the court held that South African courts should not impose "our constitutionally compliant fair trial standards on another country".[91] The court added:

> "[W]hereas it might offend the standards by which we measure fairness in our criminal trials, for an accused to be convicted and sentenced in his absence, this does not mean that it is necessarily unfair if this is the case in another legal system, especially where the accused is a fugitive from justice, who has absconded instead of making use of the opportunity to exercise his rights to take part in the proceedings and to challenge the evidence which is admitted during them. Just because we have a particular 'fair trial' constitutional provision in our Bill of Rights which is not mirrored in the constitutional dispensation of a foreign state which requests the extradition of a person does not mean that if he/she were to be extradited to that state the trial or punishment they would have to face would be in breach of their constitutional rights, at least not insofar as that system is concerned. And it is before that system that they are required to account for their criminal offences, which have usually been committed in that state, and not ours. In this regard both the European Court of Human Rights as well as the UK Supreme Court have cautioned Courts dealing with extradition matters not to seek to impose their constitutional standards or international treaty or convention standards on states that are not party thereto, and which may have different requirements or standards pertaining to fair trial issues in criminal matters. Obviously, where the extradition of an offender might only offend a fair trial right in the requesting, as opposed to the requested, state we are not talking about imposing the standards of the latter on the former. But in keeping with the principle of comity in this regard international jurisprudence seems to suggest that the alleged denial or breach of a fair trial right, in the event of extradition

---

84 *Ibrahim v Simon Russell, Esq supra* par 12.

85 *FUD18 v Minister for Home Affairs* [2020] FCA 48 par 30.

86 *John Scantlebury et al v AG* [2009] BBCA 7 (8 June 2009) par 73–83. At par 83, the Court of Appeal allowed the extradition of the applicant to the USA because it had "no doubt that, at the trial, the appellants will be accorded the plenitude of rights including the right to cross-examine witnesses and the deponents to the affidavits, to ensure that they have a fair trial in the U.S.A.".

87 *Rhett Allen Fuller and the Minister of Foreign Affairs* [2013] BZCA 5 par 29.

88 Adopted by the Committee of Ministers of the Council of Europe, on 15 July 2002, at its 804th meeting. Guideline XIII (4) provides that "[w]hen the person whose extradition has been requested makes out an arguable case that he/she has suffered or risks suffering a flagrant denial of justice in the requesting State, the requested State must consider the well-foundedness of that argument before deciding whether to grant extradition".

89 *Heath v United States of America (St. Christopher and Nevis)* [2005] UKPC 45 par 26.

90 *Tucker v Additional Magistrate, Cape Town; Tucker v S* [2019] 2 All SA 852 (WCC); 2019 (2) SACR 166 (WCC).

91 *Tucker v Additional Magistrate, Cape Town; Tucker v S supra* par 45.

> in such a case, is only to be entertained exceptionally, where there is a risk of a 'flagrant denial' of fairness."[92]

At the core of this principle is the view that courts in the requested state should not second-guess the competence of the courts in the requesting state to ensure that the extradited person's right to a fair trial is guaranteed.

However, the test has been questioned in some jurisdictions. For example, in New Zealand, a court will set aside the Minister's order to extradite a person if the requesting state does not assure the Minister (through diplomatic assurances) that the person in question will get a fair trial as provided for under article 14 of the ICCPR. Courts will not use the test of flagrant denial of justice. For example, in *Kim v Minister of Justice of New Zealand*,[93] the Minister authorised the extradition of the appellant to China to be prosecuted for murder. The appellant argued, *inter alia*, that there was a real risk that he would not get a fair trial as stipulated in article 14 of the ICCPR. The Minister argued that he "was obliged to consider whether Mr Kim was at a real risk of a trial that would constitute a 'flagrant denial of justice' [as defined by the European Court of Human Rights]".[94] The court held:

> "[T]he word 'flagrant' may also tend to confuse, because 'flagrant' is a word usually denoting high-handed, brazen or scandalous conduct. Its use may suggest the applicant must show high-handed, brazen o[r] scandalous conduct to make out a case that surrender should be refused on fair trial grounds."[95]

The court also took issue with the European Court of Human Right's definition of flagrant denial of justice. It held:

> "We also have reservations as to the explanation of the test offered [by the European Court of Human Rights] in *Othman*, that a 'flagrant denial of justice' involves such a departure from standards so as to amount to a nullification or destruction of the right guaranteed by art 14 (in this case). It is true that … the threshold permits some degree of difference between countries' legal systems, appropriate in light of the public interest in extradition. But the language of nullification or destruction expresses the matter in such absolute terms that it errs on the side of setting the threshold too high. We consider that the appropriate threshold is whether there is a real risk of a departure from the standard such as to deprive the defendant of a key benefit of the right in question."[96]

The court added:

> "'Real risk' does not mean proof on the balance of probabilities. It means a risk which is real and not merely fanciful; so that it may be established by something less than a 51 per cent probability. The prospect of unfairness may arise in respect of an individual or categories of individual – for example, political dissidents or those charged with certain offences, or if the unfairness is systemic can arise for every individual. Once the person can show that

92 *Tucker v Additional Magistrate, Cape Town; Tucker v S supra* par 45 (footnotes omitted).
93 *Kim v Minister of Justice of New Zealand* [2019] NZCA 209.
94 *Kim v Minister of Justice of New Zealand supra* par 168.
95 *Kim v Minister of Justice of New Zealand supra* par 178.
96 *Kim v Minister of Justice of New Zealand supra* par 179.

> there is a real risk of a trial that might be unfair in this sense, it is for the requesting state to "dispel any doubts" about that risk."[97]

The Court of Appeal concluded:

> "When addressing the issue of the risk that Mr Kim will not receive a fair trial in the PRC [China] should he be surrendered, the Minister should: (i) seek further information in connection with the extent to which the judiciary is subject to political control, and the extent to which tribunals that did not hear persons, or groups, or tribunals that did not hear the case, control or influence decisions of guilt or innocence; (ii) seek further information as to the position of the defence bar in the PRC, the right the defence has to disclosure of the case to be met, and the right to examine witnesses; and (iii) seek further assurances that Mr Kim will be entitled to disclosure of the case against him (detailed as to timing and content), that he will have the right, through counsel, to question all witnesses, and the right to the presence of effective defence counsel during all interrogation."[98]

In other words, the diplomatic assurances must stipulate that the accused's right under article 14 of the ICCPR as interpreted by the Human Rights Committee will be guaranteed and also put in place a mechanism to monitor the requesting state's compliance with the commitments it made in the diplomatic assurances.[99] This is irrespective of whether the requesting state has ratified the ICCPR. This is so because the ICCPR imposes duties on the extraditing state.[100] The Working Group on Arbitrary Detention has held that

> "the non-observance of the international norms relating to the right to a fair trial established in articles 9, 10 and 11 of the Universal Declaration of Human Rights and articles 9 and 14 of the Covenant [ICCPR] is of such gravity as to amount to a flagrant denial of justice."[101]

Verifying whether the person's trial was fair before allowing extradition to serve a sentence would not be the only instance in which a South African magistrate would be assessing the correctness of the law and procedure that was followed in the requesting state. Before a magistrate endorses a foreign warrant for the arrest of the person to be extradited, the Extradition Act empowers the magistrate first to verify that the warrant in question was indeed issued in accordance with the law of the foreign state. Thus section 6 of the Act provides:

> "Whenever an extradition agreement with any foreign State in Africa provides for the endorsement for execution of warrants of arrest on a reciprocal basis,

---

97 *Kim v Minister of Justice of New Zealand supra* par 180.

98 *Kim v Minister of Justice of New Zealand supra* par 278.

99 The Human Rights Committee interprets the relevant provisions of the ICCPR through, *inter alia*, its case law (communications) and General Comments. For the work of the Human Rights Committee, see https://www.ohchr.org/en/hrbodies/ccpr/pages/ccprindex.aspx (accessed 2022-01-06).

100 *Kim v Minister of Justice of New Zealand supra* par 169–172. South African courts also require requesting states to issue diplomatic assurances in cases where there is a possibility that the person to be extradited will be sentenced to death. The requesting state has to make it clear that the extradited person will not be sentenced to death, or if sentenced to death, will not be executed. See, for example, *Minister of Home Affairs v Tsebe, Minister of Justice and Constitutional Development v Tsebe* 2012 (5) SA 467 (CC); 2012 (10) BCLR 1017 (CC).

101 UN Human Rights Council (Working Group on Arbitrary Detention) *Opinion No. 91/2017 concerning Imran Abdullah (Maldives)* A/HRC/WGAD/2017/91 (22 January 2018) par 95.

> any magistrate to whom is produced a warrant issued in such State for the arrest of any person alleged to be a person liable to be surrendered to such State, may, irrespective of the whereabouts or suspected whereabouts of the person to be arrested, endorse such warrant for execution in the Republic, if he is satisfied that it was lawfully issued, whereupon it shall be executed in the same manner as a warrant issued under section five."

In other words, the magistrate can only endorse such a warrant if he or she "is satisfied that it was lawfully issued". For the court to verify that such a warrant was lawfully issued, it may have first to examine the law of the requesting state relating to the validity of a warrant of arrest. If the magistrate concludes that the warrant was issued contrary to the laws of the requesting state, he or she will not endorse it. In the author's opinion, the approach adopted by the New Zealand High Court is preferable. This is so because it ensures that the accused's right to a fair trial is protected by not requiring the accused to meet the very high threshold of proving a flagrant denial of justice.

4 CONCLUSION

In this article, the author has highlighted the decisions in which the Constitutional Court and other courts have clarified the role of magistrates in extradition proceedings. It has been argued that the Constitutional Court will have to clarify the meaning of "competent court" for the purpose of issuing a warrant of arrest under section 5 of the Extradition Act. The author has relied on South African case law and legislation and international human rights law to argue that a competent court is one that has jurisdiction over the offender and the offence. It has also been argued that in deciding whether to extradite a person on the basis that his or her trial was unfair (or is likely to be unfair), courts should use the minimum guarantees under article 14 of the ICCPR as the yardstick.

DETERMINING "PERMANENT ESTABLISHMENT" IN THE DIGITAL ECONOMY EPOCH: A CASE FOR SOUTH AFRICA

Mzwandile Ngidi*
LLB MPhil
PhD Candidate (Taxation)
Research Assistant, African Tax Institute,
Department of Economics, University of Pretoria

SUMMARY

This contribution analyses the concept of a "permanent establishment" in South Africa in light of the digital economy, and intends to inspire law reform. The analysis critically analyses the meaning of "permanent establishment" as found in sections 1 and 9 of the South African Income Tax Act[1] and in double-tax treaties concluded between South Africa and other countries.

The article analyses whether the South African permanent establishment is sufficiently robust to deal with a virtual permanent establishment. The analysis found that the South African concept of a permanent establishment falls short of capturing permanent establishments created through digital means as a result of digital transformation. This is because the current permanent establishment definition requires that the entity be physically present in the market country for tax purposes. In the digital age, foreign entities require no physical presence to transact in a market country. Foreign entities transact with customers all over the world on a remote basis. While this may be good for trade purposes, it is argued that this seriously erodes the tax bases of market countries (including South Africa) since these foreign entities circumvent paying taxes in market countries where substantial economic activity occurs. The inability to impose a tax on a virtual permanent establishment arguably deprives market countries of substantial revenues.

In light of this gap, the article provides instructive proposals on how South Africa could effect the necessary legislative reforms to impose effective taxes on virtual permanent establishments.

* The author's thanks and gratitude go to Prof SP van Zyl (UP) who assisted endlessly with all comments and editing this paper. All necessary precautions were taken to ensure the accuracy of the content but where there is an error, the author will be solely responsible.

1 58 of 1968.

1 INTRODUCTION

The rise of the digital economy (DE) has, among other things, improved worldwide productivity and exposure of multinational companies to new ideas, technologies and new management, as well as new business models.[2] In essence, the DE is a result of the interaction between information and communication technology (ICT), which has "made technologies cheaper, more powerful, and widely standardised, improving business processes and bolstering innovation across all sectors of the economy".[3] It follows that international transactions between businesses and consumers and between businesses are concluded with little or no physical presence in the market (or source country). While worldwide trade appears to have gained momentum under the DE, there seem to be challenges accompanying the DE era. Among other issues is the design of tax policy and administration systems capable of keeping up with these rapid developments.

The question that arises is how to design a tax system suitable to deal with the taxation of corporations that do not have a physical presence in a particular jurisdiction? For international tax purposes, the concept of "physical presence" has played (and still does play) a significant role in establishing taxing rights.[4] Some multinational enterprises (MNEs) conduct trade in jurisdictions through a dependent agent that carries on a trade on behalf of the non-resident MNE.[5] The dependent agent scheme has become a breeding ground for tax avoidance schemes. This is especially evident where the MNE manipulates the agency agreement by formally finalising substantial contracts outside the market country.[6] In the DE context, MNEs

---

2 Notably, most of these digital transformations are driven by the 4th industrial revolution (4IR). There is no single definition of 4IR. The consensus is that 4IR is seen as a combination of numerous innovations that sought to blur the boundaries between the physical, computerised, and organic circles. 4IR grows at a rapid pace, and with this tenacity, it will probably keep policymakers, business specialists, and scholastics busy for considerable years to come. See generally on 4IR, Oke and Fernandes "Innovations in Teaching and Learning: Exploring the Perceptions of the Education Sector on the 4th Industrial Revolution (4IR)" 2020 6(2) *Journal of Open Innovation: Technology, Market, & Complexity* 31; World Economic Forum (WEF) *The Future of Jobs Report 2018* (17 September 2018) https://www.weforum.org/reports/the-future-of-jobs-report-2018 (accessed 2022-04-15).

3 OECD/G20 Base Erosion and Profit Shifting Project *Addressing the Tax Challenges of the Digital Economy, Action 1: 2015 Final Report* (2015) https://www.oecd-ilibrary.org/docserver/9789264241046-en.pdf?expires=1662632490&id=id&accname =guest&checksum=5AA213B72FB7AD48B20EED64776EB899 (accessed 2020-03-13).

4 Art 7(1) of Organisation for Economic Co-operation and Development Model Tax Convention "The 2017 Update to the OECD Model Tax Convention" (2 November 2017) http://www.oecd.org/ctp/treaties/2017-update-model-tax-convention.pdf (accessed 12 March 2020-03-12) 16; Art 7(1) of United Nations Model Taxation Convention Between Developed and Developing Countries 2017 (2017).

5 Art 5(5) of the OECD Model TC and UN Model TC; Rohatgi *Basic International Taxation* (2002) 77.

6 OECD/G20 Base Erosion and Profit Shifting Project *Preventing the Artificial Avoidance of Permanent Establishment Status, Action 7: 2015 Final Report* 15 https://www.oecd-ilibrary.org/docserver/9789264241220-en.pdf?expires=1662633359&id=id&accname

require no "physical presence" to trade in foreign countries that are required to impose tax where "substantial economic activity" is created. Therefore, the DE poses a risk for the market country, which may lose its taxation right to the country of residence owing to the absence of physical presence. It is worthwhile noting that South Africa is among countries that subscribe to the traditional permanent establishment principle that requires "physical presence" for the purpose of interjurisdictional direct taxes. It is for this reason that this article analyses whether this approach to international taxation is still sound.

There are two recognised international tax conventions, namely the Organisation for Economic Co-operation and Development Model Tax Convention (OECD Model TC) and the United Nations Model Taxation Convention Between Developed and Developing Countries (UN Model TC). The focal discussion evolves around the meaning of permanent establishment (PE) as defined in the OECD Model TC, which forms the basis of the South African definition of PE in section 1 of the Income Tax Act[7] (ITA) and in section 9, which provides for the source rules. For illustrative purposes, reference is also made to the UN Model TC.

It is worthwhile noting that the DE impacts not only corporate income tax (CIT) but it also poses challenges for other forms of tax, such as indirect taxes and value-added tax. One of the challenges with value-added tax is that it is difficult to impose indirect taxes on the goods or services acquired through an electronic domain, particularly when the goods or services are supplied to a private consumer.[8] However, for purposes of this discourse, the focus is on the challenges posed by the DE on CIT and, in particular, with the PE definition.

This contribution analyses the South African PE definition as found in the ITA. As previously mentioned, the DE has improved current technological advances and economic productivity. While this is good, it is important to evaluate the implications that the DE has for the PE definition in South Africa. This is essential because the DE relies heavily on digital platforms that do not require the physical presence that is currently needed for tax purposes. This article used content analysis to assess qualitatively the current definition of PE as provided in the ITA, the OECD Model TC and double-tax agreements (DTA). During this analysis, the definition of PE as stated in the ITA is critically examined in light of the DE, which enables MNEs to operate remotely. The aim is to determine whether the South African PE definition needs to be expanded to capture PEs created through remote operations.

The discussion of the article proceeds as follows: heading 2 briefly discusses the PE definition and its elements; heading 3 outlines the features and characteristics of the DE; heading 4 provides an overview of the issues posed by the DE for international tax principles, accompanied by current

=guest&checksum=EE11C90E6627EFF327CE45B47733DA1C (accessed 2020-03-13) 10, 15 par 7.

7 58 of 1968.

8 OECD/G20 BEPS Project *Action 7: 2015 Final Report* 120 par 8.1.

case law indicating shortcomings of the traditional definition of PE; heading 5 analyses the OECD response to the DE challenges; heading 6 comments on the traditional definition of PE; and heading 7 sets out recommendations to remedy the shortcomings.

2 DISCUSSION ON PERMANENT ESTABLISHMENT

2 1 The traditional permanent establishment concept

Before discussing the shortcomings of the traditional PE concept, it is instructive to illustrate its meaning and importance. What is a PE, and why is it so important? Articles 5(1) of both the OECD Model TC and UN Model TC define PE as a "fixed place of business through which the business of an enterprise is wholly or partly carried on".[9] Under this definition, PE entails three essentials: a *place of business* that must be *fixed*, and *through which the business* is conducted, wholly or partially.

Wide research has been conducted that critically analyses each of these PE essentials.[10] For purposes of understanding, it is sufficient to note that a "place of business" refers to space that is available at the disposal of the enterprise,[11] irrespective of whether it is owned or rented.[12] The term "fixed" suggests that there must be a "link between the place of business and a specific geographical point".[13] It follows that the business place should have a degree of permanence at a certain place; this requirement should not be interpreted to suggest that the fixed place must be rigidly immovable, or that the location must be at the exact physical geographic point during the course of business activities.[14] As long as one can establish that there is a nexus between the location and the business activities, as well as some degree of permanence, this might be sufficient to qualify as "fixed". This requirement is usually established using location and duration tests.[15] Lastly, "through which business is carried on" means that the place must be a place on which the business enterprise is carried on wholly or partially. The words "carried on through" denote that the business activities are conducted at that

9 Art 5(1) of the OECD Model TC and UN Model TC.

10 Ceballos "The Permanent Establishment Definition" in Brugger and Plansky *Permanent Establishments in International and EU Tax Law* (2011) 63–68; Oguttu and Tladi "E-Commerce: A Critique on the Determination of a 'Permanent Establishment' for Income Tax Purposes from a South African Perspective" 2009 1 *Stellenbosch Law Review* 74–96 78–78; Olivier "The Permanent Establishment Requirement in an International and Domestic Taxation Context: An Overview" 2002 *South African Law Journal* 866–883 873.

11 *AB LLC and BD Holdings LLC v Commissioner of the South African Revenue Services* (SARS) 2015 ZATC 2 par 42.

12 Commentaries on the Articles of the OECD Model Tax Convention "Commentary on Article 5 Concerning the Definition of Permanent Establishment" (OECD Model TC Commentary) (2010) http://www.oecd.org/berlin/publikationen/43324465.pdf (accessed 2020-03-12) 82 par 10.

13 OECD Model TC Commentary 84 par 21.

14 Ceballos in Brugger and Plansky *Permanent Establishments in International and EU Tax Law* 65.

15 Oguttu and Tladi 2009 *Stell LR* 77.

particular fixed place.[16] It appears therefore that there must be a link between the business's economic activity and the place of business. It should be stressed that determining whether a PE exists will be a factual analysis guided by the above requirements.

The traditional PE definition contains specific inclusions as well as exclusions. Article 5(2), (3) and (4) of the OECD Model TC enunciate inclusions and exclusions, respectively as follows:

Inclusions:	***Exclusions:***
Art 5(2)	Art 5(4)
a) a place of management	a) the use of facilities solely for the purpose of storage
b) a branch	b) the maintenance of a stock of goods or merchandise solely for storage purposes
c) an office	c) the maintenance of a stock of goods or merchandise solely for processing by another enterprise
d) a factory	d) maintenance of a fixed place of business solely for purchasing goods or merchandise or of collecting information purposes
e) a workshop	e) the maintenance of a fixed place of business solely for the purpose of carrying on, for the enterprise, any other activity
f) a mine, an oil or gas well, a quarry or any other place of extraction of natural resources	f) the maintenance of a fixed place of business solely for *a*) to *e*), provided that such activity or, in the case of sub-paragraph f, the overall activity if the fixed place of business, is of preparatory or auxiliary character.
Art 5(3)	
A building site or construction installation only if the project lasts more than twelve months.[17]	

The above is the general rule on PE for international tax purposes as enunciated in article 5 of the OECD Model TC. Notably, there is an exception to this, namely that a PE may be created through a dependent agent in terms of article 5(5). According to this provision, where a dependent

[16] Levouchkina "Relevance of Permanent Establishment for Taxation of Business Profits and Business Property" in Hans-Jörgen and Züger (eds) *Permanent Establishments in International Tax Law* (2003) 20–21.

[17] Practice has shown that this twelve-months threshold has given rise to abuse, sometimes MNEs (mainly contractors or subcontractors) split up one contract into several parts, each consists of the period less than twelve month to avoid meeting the PE. As such, anti-abuse rules will be introduced to counter the splitting up of contract, see *OECD Model Tax Convention on Income and on Capital* Vol I & II (Updated 21 November 2017) 21 para 52.

agent habitually concludes contracts (binding a foreign company) without material modification by the non-resident, the latter is deemed to have created a PE. In that case, the foreign company is deemed to have a physical presence through its dependent agent.

2 2 South African definition of permanent establishment

South Africa subscribes to the PE definition as defined in the OECD Model TC. Section 1 of the ITA describes a PE as one defined from time to time in article 5 of the Model TC. Section 9(2) of the ITA enunciates the source rules. In terms of these rules, an amount that is received or accrued to a person from a source within the country is taxable in the Republic. The amount may be received or accrued to the person in the form of a dividend, interest, royalties, a lump sum, the disposal of assets from a source located within the country. The rationale is that a source of income, being within the country, constitutes a PE that is the necessary legal nexus for tax purposes. Therefore, where a PE is created because the source of income is within the Republic or as defined in terms of article 5 of the OECD Model TC, then the amount so generated is taxable in the country.

This article refers to this approach as traditional. It is traditional since its applicability depends on the physical presence of the source of income within the borders of a market country. By analogy, where the source of income is located outside the borders, a PE cannot be identified.

2 3 The relevance of a permanent establishment

If a non-resident meets one or more of the above PE general rules, it is deemed to have a "physical presence" in the country. Conversely, if none of the above rules is met, arguably, there cannot be a physical presence. Accordingly, no taxing rights accrue to the market country. It follows, therefore, that identifying PEs is relevant for international tax purposes as it allocates taxing rights to the state where business economic activities occur subject to the distributive rules agreed upon by the contracting states. These allocative taxing rules largely depend on the nature of the income generated.[18] Accordingly, identifying PEs is essential because it enables the source or market country to impose taxes on the income generated within its boundaries.

3 FEATURES OF THE DIGITAL ECONOMY

The rise of the DE poses no unique Base Erosion and Profit Shifting Project (BEPS Project) issues. Rather, some of its key features exacerbate BEPS risks or tax challenges.[19] The DE is characterised by its unique features,

[18] Olivier and Honiball *International Tax: A South African Perspective* 5ed (2011) 279; Olivier 2002 *SALJ* 869.

[19] OECD/G20 BEPS Project *Action 1: 2015 Final Report* 144, 54, 78.

which include, among others, information technology equipment, cloud services, standardised software for various purposes, web and device applications, and e-commerce and other platforms that are subject to digital commoditisation.[20] The DE also offers significant competitive and productivity-boosting opportunities related to access to *digital products and services* that help optimise processes and production, while it reduces transaction costs, and transforms supply chains.[21] Furthermore, companies such as Google, Amazon, Apple, Microsoft, Baidu, Alibaba, SAP, PayPal, Cisco and others further develop digital services and platforms in which third-party enterprises operate using predefined standards within a given framework.[22] Most of these entities are big, reputable and financially stable. By implication, this intensifies market competition and results in the "winner-takes-all" model in which bigger agents maintain a competitive advantage, keeping them well ahead of digital commodity users. Arguably, this results in their making more profits, the source of which is in various parts of the world. Of course, this triggers taxing rights of the jurisdictions where the profits are generated. Whether taxing rights are in fact attributed to the jurisdictions where the profits originate is another question.

The DE is rightfully characterised by its mobility of intangibles,[23] mobility of users and customers,[24] and mobility of business functions.[25] The MNEs enter market countries through virtual or digital establishments, which render the traditional PE superfluous or vulnerable. Thus it is necessary either to expand the traditional PE concept or introduce a new approach to capturing the virtual PE regime.

---

20 Arbache "Seizing the Benefits of the Digital Economy for Development" (28 September 2018) *VOX CEPR Policy Portal* https://voxeu.org/print/63359 (accessed 2020-03-30).

21 Arbache https://voxeu.org/print/63359.

22 *Ibid*.

23 OECD/G20 BEPS Project *Action 1: 2015 Final Report* 65 par 4.3.1.1 states that "investment in and development of intangibles is a core contributor to value creation and economic growth for companies in the digital economy". For example, digital companies often rely heavily on software and will expend substantial resources on research and development to upgrade existing software or to develop new software products.

24 OECD/G20 BEPS Project *Action 1: 2015 Final Report* 65 par 65 4.3.1.2 provides that "[a]dvances in ICT and the increased connectivity that characterises the digital economy mean that users are increasingly able to carry on commercial activities remotely while travelling across borders". For example, a user can reside in one country, purchase an application while staying in a second country, and use the application from a third country.

25 As noted, ICT makes technologies cheaper, more powerful, and widely standardised, improving business processes and bolstering innovation across all sectors of the economy. As a result, corporations increasingly rely on ICT, which allows them to centrally operate their business a location remotely from both "the locations in which the operations are carried out and the locations in which their suppliers or customers are located"; OECD/G20 BEPS Project *Action 1: 2015 Final Report* 65 par 4.3.1.3.

4 THE EFFECT OF THE DIGITAL ECONOMY ON INTERNATIONAL TAX POLICY

4 1 Violation of the permanent establishment principle

The article analyses challenges posed by the DE in the international tax system. Among other challenges is that goods and services can easily be supplied to market countries in which the supplier has no physical presence. Under the current tax system, the market country has no taxing rights over the profits derived in that state. Why is this a problem? This is a problem because the equity principle (one among other underlying tax principles) may be threatened by the DE. Equity in the international tax context aims to ensure that each country receives an equitable share of tax revenues from cross-border transactions.[26] Also, a taxpayer in a similar position should be subject to the same level of taxation.[27] This principle is still applicable and relevant in the context of virtual presence. Thus, to uphold and preserve these principles requires that the existing PE concept be expanded or a new tax policy reflecting a fair revenue-sharing among nations be invented. This argument is justified on the ground that companies also enjoy the public services offered in the market countries, which include stable judicial and economic systems,[28] access to the market, intellectual property protection and the use of other infrastructure. It appears, therefore, that international trade in the absence of a physical presence undermines the fundamental principles currently underpinning international tax policy.

The following case law manifests the shortcoming of the traditional PE concept.

4 1 1 TA, Paris N 1505165/1-1, July 2017, *Société Google Ireland Limited*[29]

(1) Facts

Google LLC is a company resident in the United States (Google US). Google US is a global group providing technology services. Google US generates most of its revenue by delivering relevant online products and services. These products include Android, Chrome, Shopping, Double Click, Google Analytics, Google Cloud, Google Maps, Hardware, Search, Waze and YouTube (Google Ads).

---

[26] OECD/G20 BEPS Project *Action 1: 2015 Final Report* 21 par 11–12.

[27] OECD "Implementation of the Ottawa Taxation Framework Conditions: The 2003 Report" (2003) https://www.oecd.org/tax/administration/20499630.pdf (accessed 2020-03-31) 12.

[28] Goel and Goel "Has the Permanent Establishment Rule Outlived Its Utility in a Digitalized World" 2018 11 *NUJS L Rev* 25–47 43.

[29] Tribunal Administratif De Paris "The Irish Company Google Ireland Limited (GIL) is not Taxable in France for the Period 2005 to 2010" https://paris.tribunal-administratif/Media/TACAA/Paris/00communiques_de_presse/1505113 (accessed 2020-03-31).

Google Ireland Ltd is a company resident in Ireland, having its registered office in Dublin (GIL Dublin). GIL Dublin is an affiliate of Google Ireland Holdings, which is an affiliate of Google US. Google France is a company incorporated under French law having its registered office in Paris (Google Paris). Google Paris is also an affiliate of Google US.

GIL Dublin sold google advertising online directly to its customers in Europe, the Middle East and Africa (EMEA market). The google advertisements are delivered directly to the customers in France using internet services.

On 16 May 2002, a marketing and services agreement (MSA) was concluded between Google US and Google Paris. Under the MSA, Google Paris employees had to provide marketing and sales support to GIL Dublin’s teams. In other words, Google Paris provided commercial assistance and advice to GIL Dublin customers in France. Thus, from 2004 onwards, the services sold by the Google group to French customers were subject to the Irish tax rate on commercial companies, which is lower than the French one.

On 12 November 2012, the French tax authority (FTA) raised the tax reassessment arguing that GIL Dublin carried on professional activities through Google Paris, which were taxable in France. FTA investigated and concluded that GIL Dublin was liable for taxes (corporate income tax, value-added tax, withholding taxes) and penalties in the total amount of USD 1.3 billion.

On the other hand, GIL Dublin’s defence focused on the PE definition as provided in the French-Irish tax treaty, and was based on two cumulative conditions, namely:

1. the dependence of Google Paris on GIL Dublin; and
2. the power of Google Paris to enter habitually into legally binding commercial contracts on behalf of GIL Dublin.

(ii) Legal question

The question before the court was whether GIL Dublin had a PE in France as the FTA alleged.

(iii) Judgment

After a careful analysis of all the facts and the tax treaty between France and Ireland, the tribunal ruled in favour of GIL Dublin.

First, the tribunal had to consider whether Google Paris acted as a dependent agent that habitually contracted on behalf of GIL Dublin to bind the latter. As for this consideration, the tribunal ruled that Google Paris did not act as a dependent agent on behalf of GIL Dublin. This was especially so because Google Paris did not have the necessary human resources or technical means to carry out the sales and marketing on its own. As such, Google Paris could not be the dependent agent that could bind GIL Dublin.

Secondly, the tribunal continued to consider the powers of Google Paris to bind GIL Dublin. On this point, it was ruled that Google Paris employees did not have the necessary authority to conclude contracts that were legally

binding between GIL Dublin and French customers. Furthermore, even if the employees had the authority to enter into contracts with clients, the ultimate approvals of the contracts vested with GIL Dublin, which was effectively managed outside France. In addition, according to the tribunal, French clients purchased google advertisements directly from GIL Dublin, which had its PE in Ireland. As such, Google Paris could not legally bind GIL Dublin when concluding contracts in this respect.

For these reasons, the tribunal ruled that GIL Dublin did not have a PE in France. Accordingly, GIL Dublin was not liable to pay these taxes.

(iv) Discussion

It should be mentioned that although the tax treaty is based on the traditional PE concept as stipulated in the OECD Model TC, the FTA relied heavily on the extended PE definition introduced by the BEPS Project Action 7,[30] which prevents the artificial avoidance of PE status. As noted above, Action 7 prevents the use of certain common tax-avoidance strategies to circumvent the traditional PE concept – for example, an arrangement through which a taxpayer replaces a subsidiary that normally acted as a distributor with a *commissionaire* arrangement.

In casu, the FTA argued that GIL Dublin had a PE in France as provided for in the new BEPS proposal. The tax tribunal rejected the argument that Action 7 was incorporated into the treaty in question. As such, the FTA could not rely on Action 7. The tribunal ruled that if the FTA intended to reply on the provisions of Action 7, the French government must first amend the definition of PE in the treaty to reflect such intention.

GIL Dublin had no physical presence in France in terms of the treaty PE definition at the time. Although the court found that GIL did not have a PE in France, this did not suggest that GIL generated no income in France. GIL Dublin generated some of its revenue from the EMEA market, which includes the French market. Therefore, it does not follow that GIL Dublin was not liable for the tax. Unfortunately, under the PE definition at the time, one could not hold MNEs such as GIL liable for income taxes since the required legal nexus was absent. Although this may seem unjust, it is argued that in principle it is correct. In the absence of a legal basis, to hold otherwise would arguably have diluted international tax principles and possibly created uncertainty. The uncertainty could negatively affect international trade and investment since MNEs would be paying taxes without the necessary legal justification.

It is accordingly submitted that serious unintended repercussions could arise if the court interprets the tax treaty provisions as occurred in *ABB FZ LLC v Deputy Commissioner of Income Tax*.[31] Such interpretation may amount to indirectly amending the tax treaty, since the court interprets it in a manner that the lawmaker did not envisage. An example of such

---

30 OECD/G20 BEPS Project *Action 7: 2015 Final Report.*

31 *ABB FZ LLC, C/o. ABB India Ltd v Deputy Commissioner of Income Tax* (29 November 2017) IT (TP) A.2102/Bang/2016 https://indiakanoon.org/doc/34689739 (accessed 2020-04-01).

interpretation is where the court read certain words into the treaty or when it interpreted treaty provisions in a manner that contradicts the main international tax object.[32] Among other repercussions, it creates instability in the generally accepted international tax principles, especially regarding those tax treaties concluded with a country in which the MNEs are resident. It is trite that tax treaties are concluded based on the principle of good faith. When a court interferes and misinterprets the law, this amounts to a breach of the good-faith principle, which is likely to create dissatisfaction. This displeasure leads to the "proliferation of uncoordinated and unilateral"[33] measures between contracting states. As a result, this will not only undermine the relevance and sustainability of international taxation for cross-border business activities, but will also more broadly adversely impact global investment and growth.[34]

Furthermore, if a court has ruled that a PE exists, this will potentially create two parallel international tax systems – one under the provisions of the tax treaty and the other under legal precedents. It is submitted that the parallel system deviates from the certainty and simplicity principle that still underpins international tax law. Certainty and simplicity principles require that international tax rules be clear and simple to understand to enable a taxpayer to anticipate the tax consequences of a transaction in advance.[35] It can, therefore, be argued that this principle is still applicable and should apply equally to both the traditional and the virtual PE regime.

The traditional PE approach levies tax on MNEs with a physical establishment in the market country. The rationale for this is that these entities must contribute their fair share to the state in which they operate because they benefit from the public services offered. Conducting business through a virtual PE defeats this purpose since MNEs can operate in a market country remotely. As a result, paying taxes in these countries is successfully avoided since the entities do not have the required physical presence. To achieve equal treatment, taxing the income derived from PEs, both traditional and virtual, it is necessary to expand the existing PE rules or develop new rules to capture PEs that are created virtually.

---

[32] For example, the international tax objective is to levy corporate income tax on MNEs with a sufficient nexus to the market country, which is currently established through the PE concept. It follows that in the absence of PEs, MNEs cannot be said to have the required nexus. Therefore, if the court interprets the treaty provisions and concludes that a PE exists, clearly this interpretation contradicts the main purport or spirit of international tax principles. See, for example, *ABB FZ LLC v DCIT supra* and the discussion below.

[33] OECD/G20 Inclusive Framework on BEPS "Programme of Work to Develop a Consensus Solution to the Tax Challenges Arising From the Digitalisation of the Economy" (2019) 7 https://www.oecd.org/tax/beps (accessed 2020-04-02) 7 par 11.

[34] OECD/G20 Inclusive Framework on BEPS https://www.oecd.org/tax/beps 7 par 11.

[35] Vaca-Bohórquez "Virtual Permanent Establishment: An Approach to the Taxation of Electronic Commerce Transactions" 2016 *Revista de Derecho Fiscal n° 8 enro-junio de* 89–102 93.

4 1 2 ABB FZ LLC, C/o. ABB India Ltd v DCIT[36]

On 21 June 2017, in India, the Income Tax Appellate Tribunal (Tribunal) delivered an important ruling on a service PE in the *ABB FZ LLC v DCIT* case.

(i) Facts

In this case, a non-resident company incorporated in the United Arab Emirates (UAE), the ABB FZ LLC (ABB UAE), rendered commercial services to the value of INR 1.78 billion to an affiliate Indian-resident company, ABB India Ltd (ABB India). The services were intended, among other objectives, to enhance the business and sales performance of ABB India.

ABB UAE offered commercial services such as visits, telephone calls, emails and video-conferences. For purposes of rendering the service, ABB UAE employees visited India for a maximum of 25 days a year. The remaining part of the service was rendered by ABB UAE to ABB India through the Internet from a location outside India.

The UAE has a tax treaty with India. Under the treaty, the relevant provision states that a non-resident has a service PE in the source country (that is, India) if the non-resident furnishes a consultancy service through the presence of its employees or the dependent agent therein. In addition, the provision requires that while rendering the consultancy service, employees need to be present in India for a period exceeding nine months within any twelve-month period. Furthermore, the treaty provides that the source country cannot levy a tax unless the non-resident has a PE either through a fixed place of business (that includes the specific inclusions as noted above under the meaning of PE) or through the presence of the foreign entity's employees rendering consultancy services to the recipient located in India.

As a result of the presence of ABB UAE employees in India, as well as the commercial service offered to ABB India through the Internet, the Assessing Officer (AO) raised an additional tax assessment for the assessment year 2012–13. The AO argued that ABB UAE had a fixed place of business in India. As a consequence, ABB UAE was liable to pay tax on the amount of INR 1.78 billion generated in India.

(ii) Legal question

The tax tribunal had to determine if ABB UAE had a PE as contended by the AO.

(iii) Judgment

Interestingly, after careful consideration of facts and the definition of a fixed place of business, the court found that ABB UAE had a service PE in India. This decision has been criticised and (it is submitted) for good reason.[37]

---

[36] *ABB FZ LLC, C/o. ABB India Ltd v DCIT supra*.

(iv) Discussion

It is worth mentioning that this case touches upon many relevant international tax issues, such as the tax on royalties, and the availability of tax benefits for treaty purposes. However, this discussion limits itself to commercial services rendered by ABB UAE through the Internet to ABB India.

The court conceded that the visits by ABB UAE employees could not amount to a PE in India as they fell below the minimum number of days required. It was further noted that a substantial part of the commercial service was rendered online from outside India. Therefore, this could not amount to a PE.

At issue was whether the INR 1.78 billion consideration was taxable in India in the absence of a fixed place of business. The point of departure was to consider whether this consideration fell within the taxable forms of income that were covered by the treaty. The court correctly analysed the INR 1.78 billion consideration and classified it as a technical service fee (TSF), which was not provided for, or covered by, the treaty. The court continued to consider the legal position where the treaty provided no answers.

The legal position in India in the absence of a TSF provision in the treaty is that the default position applies (regarding taxation of non-residents) as provided for in the domestic Income Tax Act, 1961 (IT Act). In terms of Explanation 2 of section 9(1)(i) of the IT Act, a non-resident will be taxable in India if it has a "business connection"[38] therein. The business connection definition mirrors the traditional PE definition discussed above. According to the business connection requirement, ABB UAE could not have a PE in India. Therefore, whether one applies the PE as provided for in the treaty or through the business connection requirement, ABB UAE could not have a fixed place of business in India.

Despite the absence of a fixed place of business by ABB UAE, the court nevertheless concluded that ABB UAE had a PE in India. The taxpayer correctly argued that in the absence of a fixed place of business, both in terms of the treaty and the IT Act, the consideration generated in India could not be taxed. After an extensive analysis of the PE rules, surprisingly, the court held that what is required under the law is that the non-resident employees needed to render the service within the minimum nine-month period, not that the employees had physically to stay in India for a period of more than nine months. The fact that the ABB UAE personnel provided the service within the minimum period required to establish a PE was sufficient to create the nexus, as opposed to staying for nine months in the country.

---

[37] Goel "Addressing Tax Challenges of the Digital Economy: Fair Play or Foul Play" *Kluwer International Tax Blog* (18 August 2017) http://kluwertaxblog.com/2017/08/18/addressingtax-challenges-digital-economyfair-play-foul-play/ (accessed 2020-04-01).

[38] According to Explanation 2, "business connection" includes business activities carried out through a person who, acting on behalf of the non-resident, habitually exercises an authority to conclude contracts on behalf of the non-resident in India, or habitually maintains in India a stock of goods or merchandise, or habitually secures orders in India for the non-resident. See also Goel and Goel 2018 *NUJS L Rev* 38.

It is argued that the interpretation adopted by the court in the *ABB UAE* case is incorrect; on a proper reading and interpretation of the traditional PE concept, without a physical presence it cannot be said that there is a PE. The reading of the court singled out a sub-article of the entire treaty and twisted it to yield what the court deemed just, equitable and necessary. This judgment has far-reaching international tax consequences, especially between companies resident in the UAE and India. As noted above, the judgment amounts to an indirect amendment of the tax treaty provision, although the wording remains unchanged. This decision might exacerbate the risk of an incompatible and uncoordinated approach between the UAE and India.

It is not surprising that the courts found themselves in this difficult position. The tribunal is not the first court to come to conclusions with far-reaching implications. The Spanish Tribunal, in the *Dell Products* case,[39] was confronted with similar facts and it reached exactly the same conclusion. Both the *ABB FZ* and *Dell Products* cases have been correctly criticised in that the court's approach amounts to rewriting the provision of the law.[40]

There are two important principles that the Indian courts have emphasised in different cases. First, in *Electrical Materials Center Co Ltd v DIT*,[41] the court held that the stay in India of the taxpayer "was only 90 days and since it is less than 182 days as required under art 5(3)(b) of the India-Saudi Arabia tax treaty, there is no [service] PE". Secondly, in *Booz & Co (ME) FZ-LLC v DDIT*,[42] the court held that there was no dispute that the taxpayer had generated the consideration in India. However, such business receipts are taxable in India only if the taxpayer has a PE in India. These principles ensure that MNEs with a PE are taxable in the market country. This is justifiable since there is a nexus between the income generated and the market country. In addition, the equity principle requires that taxpayers on the same footing be subject to the same tax treatment. Therefore, the above two principles are aligned with the internationally accepted tax rules. Accordingly, in the absence of physical presence, the source country cannot exercise its right to tax.

Importantly, the *ABB UAE* and *Google Ireland* cases highlight huge challenges with the current PE definition at the time of writing. In some

---

39 *Dell Products Ltd v General State Administration, Tribunal Supremo, Sala de lo Contencioso,* 20 June 2016, STS 2861/2016, Recurso No: 255/2015, 19 ITLR *633*; *In casu*, an Irish company, Dell Production Limited (DPL) sold its goods in Spain via the Internet with its affiliated Spanish company facilitating the online sales. The court invoked the virtual PE theory to hold that DPL had a PE in Spain (even though it did not have a physical presence in Spain and the server on which the website was hosted was located outside Spain). See also *Dell Products v Staten v/Skatt øst, Norges Høyesterett*, HR-2011-2245-A (sak nr 2011/755), (2 December 2011) for further discussion.

40 Sprague "Spanish Court Imposes Tax Nexus by Finding a Virtual PE" *Bloomberg BNA* https://www.bna.com/spanish-court-imposes-n17179871765 (accessed 2020-04-10); Goel http://kluwertaxblog.com/2017/08/18/addressing-tax-challenges-digital-economy-fair-play-foul-play/ 39–40.

41 (2017) 167 ITD 248 Income Tax Appellate Tribunal (Bangalore Bench) (International Taxation) (28 September 2017). See Also *Income Tax Appellate Tribunal (Mumbai Bench) Linklaters LLP v ITO* (2011) 9 ITR 217.

42 ITA No 4063/Mum/2015 A.Y: 2011–12.

instances, the courts are even prepared simply to disregard the traditional PE requirement when dealing with the cases involving "substantial economic activity" owing to its limited application. For instance, the Madras High Court opined in the *Verizon Communication Singapore Ltd* case[43] that in a "virtual world, the physical presence of an entity has today become insignificant". According to the court, a tax obligation ought to be imputed to a foreign entity to the extent of its virtual presence in the market country. As much as this is a good suggestion, it is submitted that in principle it is incorrect since it amounts effectively to redrafting the treaty provisions while the substantive part of the law remains unchanged. Moreover, this is likely to trigger a reprisal through uncoordinated and unilateral actions from the other jurisdiction. The best approach is one adopted by the court in *Azadi Bachao Andolan*,[44] namely that this situation ought to be left to the discretion of the government of India as it is dependent upon several economic and political considerations.

The conclusion to be drawn from the above discussion is twofold. First, the *Google Ireland* case shows the limitation of the current PE rules when they are applied in the absence of physical presence. Secondly, while there are limitations to the current PE rules, the *ABB UAE* case reflects an unprecedented and controversial approach to the treatment of the virtual PE regime.

As noted, the South African PE definition and the source rules in section 9 of the ITA are based on the traditional approach. Therefore, the PE definition and source rules must be developed effectively to deal with the taxation of MNEs that have little or no physical presence in the Republic, yet where a "significant economic presence" is created.

4 2 Arm's-length principle challenges

The absence of physical presence not only affects the traditional PE definition currently required under the international tax system, but also affects the arm's-length principle (ALP). The ALP is universally accepted and internationally employed as a mechanism to "curb[…] tax avoidance through transfer pricing".[45] Essentially, the ALP sets prices of goods, services and intangible assets when sold between and within related MNEs.[46] In other words, it ensures that business revenues are properly shared among the MNE's affiliated entities thereby ensuring that tax authorities within the jurisdictions of affected corporations receive their fair share of tax revenues. Accordingly, the ALP principle is defined as the price negotiated by a willing

---

43 *Verizon Communication Singapore Pte Ltd (formerly MCI WorldCom Asia Pte Ltd) v The Income Tax Officer, International Taxation I* (Tax Case (Appeal)) Nos 147–149 2011 par 101; Vaca-Bohórquez 2016 *Revista de Derecho Fiscal n° 8 enro-junio de* 89–102 98; Butina and Jain "Permanent Establishment Concept: An Indian Perspective" 2014 *IBDF Asia-Pacific Bulletin* 251.

44 *Union of India v Azadi Bachao Andolan* (2004) 10 SCC 1.

45 Oguttu "Transfer Pricing and Tax Avoidance: Is the Arm's-Length Principle Still Relevant in the E-Commerce Era?" 2006 18 *South African Mercantile Law Journal* 138–158 138.

46 Kamdar "Acceptable Methods for Determining an Arm's Length Price for Transfer Pricing" 2018 *International Tax* 18–27 19.

purchaser and a willing seller under market conditions. Contracting parties are at arm's length if the prices or conditions agreed upon by the related entities would be on the same conditions upon which unrelated or independent entities would agree.[47] Therefore, the ALP principle requires that the price and conditions set between related entities be substantially the same as the price that independent buyers and sellers would agree upon for the same goods or services.

How then does the DE affect the ALP? As noted above, the DE heavily relies on digital intangible assets that are easily moved from one jurisdiction to another. For instance, pharmaceutical corporations often have valuable, significant and hard-to-value intangibles.[48] Since intangible assets are movable, the ALP principle is weakened in that rights to intangibles and their related returns could be assigned or transferred among related associations for less than the arm's-length price, or to an affiliate in a jurisdiction where income subsequently earned from those intangibles is subject to unduly low or no tax owing to the application of a preferential regime.[49] Therefore, if the allocations of functions, assets, and risks do not correspond to actual allocations, or if less-than-arm's-length compensation is provided for intangibles of a principal company, these structures present BEPS concerns.[50]

5 OECD REACTION TO THE TRADITIONAL PERMANENT ESTABLISHMENT DEFINITION AND THE DIGITAL ECONOMY

As a result of the DE, the OECD has reconsidered the traditional PE definition as provided in article 5 of the OECD Model TC. In this regard, Action 7 of the BEPS Project[51] was introduced to improve the traditional PE definition. Action 7 of BEPS proposes the following:[52]:

- that the foreign entity will be considered to be a taxable presence in the market country through its agent that regularly concludes contracts unless the agent performs these activities in the course of an independent business;

---

47 The term "related" or "associated enterprises" refers to enterprises that are related to each other directly or indirectly. The associated enterprise is found in art 9(1) of the OECD Model TC. In terms of this provision, an associated enterprise means an enterprise of a contracting state that participates directly or indirectly in the management, control, or capital of an enterprise of the contracting state, or that the same persons participate directly or indirectly in the management, control or capital of an enterprise of a contracting state and an enterprise of the other contracting state […]. See also Oguttu *International Tax Law: Offshore Tax Avoidance in South Africa* (2015) 235.

48 International Monetary Fund (IMF) "Corporation Taxation in the Global Economy" *Policy Paper* (2019) https://www.imf.org/external/pp/ppindex.aspx (accessed 2020-03-31) 13 par 18.

49 OECD/G20 BEPS Project *Action 1: 2015 Final Report* 81 par 193.

50 OECD/G20 BEPS Project *Action 1: 2015 Final Report* 80 par 188.

51 OECD/G20 BEPS Project *Action 7: 2015 Final-Report.*

52 OECD/G20 BEPS Project *Action 7: 2015 Final-Report* 39–45.

- the introduction of an anti-fragmentation rule to the exceptions of the PE definition which relate to operations that are preparatory or of an ancillary nature so that it is not possible to derive tax benefits by fragmenting the cohesive business operation into several small schemes;
- addressing a situation where the exception applicable to a construction project or building site is circumvented through the splitting up of contracts between closely related entities; and
- further proposals regarding the business profits attributable in terms of the rules under article 7 and whether the rules should entirely be changed to reflect the proposals under Action 7 of BEPS.

These proposals are discussed below.

5 1 Artificial avoidance of permanent establishment status through *commissionaire* arrangements

The first change relaxes the rules in article 5(5) relating to a *commissionaire* arrangement. A *commissionaire* arrangement is an agreement through which an individual sells items in a given country in its name, while a foreign company remains the owner of such items. Through the *commissionaire* arrangement, the foreign company can sell these items and make profits without forming a PE to which sales may be attributed for tax purposes. This is because the person who concludes and sells such items is not the owner. Therefore, the profits derived from such sales cannot be taxed, only the portion that the person receives as remuneration – that is, the commission fee.

The old position deemed the foreign company to have a PE in the market country if it had an agent acting on its behalf, habitually concluding contracts to bind the latter without material modifications by the foreign company. According to the OECD, practice has shown that foreign entities circumvented this dependent PE simply by not formally concluding substantial contracts in market countries but finalising them abroad, or by using an independent agent, which is an exception to a deemed PE in article 5(6). This means that foreign entities could avoid paying taxes in the market country since no PE would be created.

To remedy this gap, the new article 5(5) provides as follows:

> "… where a person is acting in a Contracting State on behalf of [foreign entity] and, in doing so, habitually concludes contracts, or habitually plays the *principal role* leading to the conclusion of contracts that are routinely concluded without material modification by the enterprise, and these contracts are a) in the name of [foreign entity]; or (b) for the transfer of the ownership of, or for the granting of the right to use, property owned by [foreign entity] or that [it] has the right to use, or c) for the provision of services by [foreign entity], that foreign entity shall be deemed to have a permanent establishment in that State."[53]

[53] Art 5(5) of OECD Model TC (as they read on 21 November 2017); OECD/G20 BEPS Project *Action 7: 2015 Final Report* 15 (own emphasis added).

A person referred to can either be an individual or an entity. The person does not have to be a resident or have a place of business in the market country. The individual can be an employee of the foreign entity or not. The term *principal role* is defined in neither the *Action 7: 2015 Final Report* nor in the OECD Model TC. The *Action 7: Final Report* provides the nucleus of the new article 5(5). The premise of article 5 is that where a person concluding contracts on behalf of the foreign entity does so, not in the ordinary course of carrying on a business as an independent agent specifically excluded under sub-paragraph 6, such entity creates a PE in the market country. Under the new position, a foreign entity creates a PE when a person habitually concludes contracts that are in the name of the foreign entity or that are to be performed by the foreign entity, or habitually plays the principal role leading to the conclusion of such contracts, which are routinely concluded without material modification by the enterprise. Such a foreign entity creates a PE through the presence of a person, since the person's actions result in the conclusion of contracts and go beyond mere promotion or advertising.[54] According to the OECD, the actions of the person are sufficient to conclude that a foreign entity engages in business activities in the market country.

Therefore, these policy changes intend to confer taxing rights to the market source country, where there are intermediary activities that result in the regular conclusion of contracts to be performed by the foreign entity. In that case, the foreign entity will be considered to have a sufficient taxable-presence nexus in the market country unless the intermediary performs these activities as an independent agent.

5 2 Artificial avoidance of permanent establishment status through article 5(4) exclusions

The old position generally excluded the "preparatory or ancillary" service from being seen as a PE. In other words, the foreign company was deemed not to have a PE in each of these exceptions since it merely conducted preparatory or related services. However, the practice has shown that MNEs may alter their structures to obtain tax benefits by fragmenting a cohesive business operation into several small schemes that appear to be ancillary in nature.

Therefore, the new position introduces the so-called anti-fragmentation rule between related entities. This rule expressly prohibits the piecemeal practice that claims that preparatory services cannot be taxed. Under the new position, a foreign company may be deemed to have a "fixed place of business" in the market country unless the services supplied are strictly preparatory in nature. For example, consider a foreign company (FC) that supplies its affiliated resident company (RC) with certain goods. The FC also has a small warehouse where it keeps and sells similar goods in the RC's country. Customers order directly online from the FC. RC employees fetch these goods from the warehouse and deliver them to customers. The ownership of the items passes from the FC to the RC as soon as they leave

[54] OECD/G20 BEPS Project *Action 7: 2015 Final Report* 17.

the warehouse. According to the new proposed rules, the exclusion in article 5(4) cannot apply since:[55]

- the FC and RC are closely related entities;
- the FC's warehouse constitutes a PE since the definition of PE is now extended to include using or maintaining a fixed place of business in that same country; and
- the business activities carried on by the RC at its warehouse and by the FC at its warehouse constitute complementary functions that are part of a cohesive business operation – that is, keeping goods in a storeroom for purposes of delivering these goods as part of the obligations resulting from the sale of these goods through another place in the same country.[56]

5 3 Anti-fragmentation in construction projects (article 5(3))

Under the old position, building sites and construction projects that last more than 12 months are deemed to be PEs. However, practice has shown that entities abuse this rule by splitting up contracts among related enterprises to circumvent the 12-month rule. The new position introduces the Principal Purpose Test (PPT) rule.[57] This rule prohibits granting treaty benefits in inappropriate circumstances where the construction project is split for the sole purpose of avoiding the PE rules. Determining whether activities are connected as provided in article 9(1) of the OECD Model TC, will, of course, depend on the particular facts of each case. However, the guiding factors are:[58]

- whether the contract dealing with different activities was initially concluded with the same entity or closely related entities;
- whether the additional contract between these entities is a logical consequence of a previous contract concluded with that entity or related entities;
- whether the split of the activities would have been covered by a single contract in the absence of tax-planning considerations;
- whether the nature of the contract split is the same or similar; and
- whether the same workers are fulfilling or performing the activities under the contract split.

What happens to those countries that are unable to introduce the PPT rule in their treaties and where domestic anti-abuse rules do not solve the issue of splitting up contracts? In such cases, an automatic rule will be crafted in the OECD commentaries that should be used in tax treaties that do not include

55 OECD/G20 BEPS Project *Action 7: 2015 Final Report* 41.
56 *Ibid*.
57 OECD/G20 BEPS Project *Action 7: 2015 Final Report* 44 par C1.
58 OECD/G20 BEPS Project *Action 7: 2015 Final Report* 43–44.

the PPT rule, or such a rule may be used as an alternative provision by jurisdictions specifically concerned with avoidance by splitting up contracts.[59]

5 4 The existing profit-attribution rules: article 7 of the OECD Model TC

Article 7 of the OECD Model TC provides for the allocation of taxing rights, ordinarily to the state where the MNE has a PE through physical presence. After the changes (anti-fragmentation in construction projects, and the prevention of artificial avoidance of PE status through article 5(4) exclusions and *commissionaire* arrangements), it was necessary for the OECD to consider whether the changes would have an effect on article 7 rules – that is, on the allocation of taxing rights. It was important to assess whether the new changes would require the rules under article 7 to be expanded to accommodate the changes.

The analysis concluded that there was no need for substantial modifications to the existing article 7 rules. However, more guidance was needed to determine how the newly proposed changes would affect PEs outside the financial sector, and in relation to intangibles, risk and capital.[60]

The OECD's changes need to be applauded because they represent positive steps toward curtailing tax avoidance by MNEs. However, their application has minimal effect. These changes merely broaden the traditional PE concept to cover avoidances that were not previously covered. The changes have minimal effect because their main focus is still on the PE requirement that requires physical presence. As discussed above, the traditional PE concept falls short of effectively capturing a PE created through digital transformation (a virtual PE) as is popular in the DE era. It can be argued that these new rules are an ineffective response to the *Société Google Ireland Limited* or *ABB FZ LLC, C/o. ABB India Ltd v DCIT* case loopholes where MNEs create significant economic presence through a virtual PE and pay no taxes. As such, MNEs that conduct their business largely through the use of digital services with a virtual PE in the market country will still circumvent the physical presence test and source rule. It is therefore submitted that there is still a need for a more robust normative remedy to cover the virtual PE. Such rules are needed now more than ever, since most MNEs thrive with digital transformation. It can be argued that this is partially due to the gap in tax rules taxing a virtual PE.

6 COMMENTS ON THE TRADITIONAL PERMANENT ESTABLISHMENT DEFINITION

As appears above, the traditional PE definition fails to deal with a virtual PE. To remedy the traditional PE shortcomings, courts have adopted undesirable measures such as reading certain wording into existing tax treaties' PE

[59] OECD/G20 BEPS Project *Action 7: 2015 Final Report* 42.
[60] OECD/G20 BEPS Project *Action 7: 2015 Final Report* 45 par 19.

provisions,[61] or by applying the so-called virtual PE theory,[62] or by simply disregarding the traditional PE provision when dealing with a virtual PE where a significant economic presence is created[63] in order to create a nexus to the income derived from the source country where no physical presence exists.

The best way to deal with this shortcoming is by changing the traditional PE definition in DTAs or the national tax law. In this regard, the OECD in its ongoing work on the Inclusive Framework intended to release the final report on Pillars One and Two by the end of 2020. Pillar One focuses on the allocation of taxing rights and seeks to undertake a coherent and concurrent review of the profit allocation and nexus rules.[64] On the other hand, Pillar Two seeks to deal with the remaining tax issues, including a "tax back" right if one jurisdiction has not exercised its taxing right or taxes minimally.[65] Pillar One and Pillar Two are discussed below.

6 1 Unified approach: Pillar One

After the risks posed by the DE had been identified (namely, the mobility of intangibles, of users and customers, and of business functions), proposals were made in the form of Pillar One. In this discourse, the proposals are summarised, recognising that this still forms part of the ongoing work of the OECD.

The key features of the solution sought by Pillar One include:[66]

- *Scope*: this aspect covers highly digital business models and goes as far as to include consumer-facing businesses with further work to be carried out on scope and carve-outs, but excludes extractive industries.
- *New nexus*: since the DE relies heavily on virtual or digital establishments resulting in the generation of substantial profits, the new nexus focuses on the requirement of an establishment that requires no "physical presence" but is largely based on sales such as specific sale thresholds. This new nexus could also be designed to benefit market countries with smaller economies. This clause will be included as a new self-standing treaty provision.

---

61 *ABB FZ LLC, C/o. ABB India Ltd v DCIT supra*.

62 *Dell Products Ltd v General State Administration Dell supra*.

63 *Verizon Communication Singapore Pte Ltd supra* par 101. Chitra Venkataraman J stated: "In any event, in a virtual world, the physical presence of an entity has today become an insignificant one; the presence of the equipment of the assessee, its rights and the responsibilities of the assessee, vis-a-vis the customer and the customers' responsibilities clearly show the extent of the virtual presence of the assessee which operates through its equipment placed in the customer's premises through which the customer has access to data on the speed and delivery of the data and voice sent from one end to the other."

64 OECD/G20 Inclusive Framework on BEPS https://www.oecd.org/tax/beps 6.

65 *Ibid*.

66 OECD *Public Consultation Document: Secretariat Proposal for a "Unified Approach" under Pillar One* (12 November 2019) www.oecd.org/tax/oecd-invites-public-input-on-the-secretariat-proposal-for-a-unified-approach-under-pillar-one.htm (accessed 2020-04-09) 6–10.

- *New profit allocation rule going beyond the ALP*: this rule creates a new revenue allocation measure applicable to taxpayers within the scope, and irrespective of whether they have an in-country marketing or distribution presence (PE or separate subsidiary) or sell via unrelated distributors. Simultaneously, the new approach retains the current transfer pricing rules based on the ALP,[67] but balances these rules with formula-based solutions in areas where tensions in the current system are the highest.
- *Increased tax certainty delivered via a three-tier mechanism*: this new approach ensures tax certainty for both taxpayers and revenue authorities and consists of three profit allocation mechanisms:
  - Amount A – a share of deemed residual profit allocated to the market country using a formulaic approach (in other words, the new taxing right);
  - Amount B – a fixed remuneration for baseline marketing and distribution functions that occur in the market country and;
  - Amount C – binding and effective dispute prevention and resolution mechanisms relating to all elements of the proposal, including any additional profit where in-country functions exceed the baseline activity compensated under Amount B.

Consider the following illustration in the context of Pillar One proposals:

- Group DE is an MNE group that provides advertising and promotion (A&P) services as its sole source of revenue to thousands of clients located all over the world. The group is performing very well, earning non-routine revenue, and generating significant revenue above the level of competitors in the market.
- D Co (resident in Country A) is the parent company of Group DE. D Co owns all the valuable intangible assets exploited in the group's A&P services enterprise. Thus, D Co is entitled to all the non-routine profits earned by DE Group.
- E Co, a subsidiary of D Co and resident in Country B, is responsible for the marketing and distribution of Group DE's A&P services.
- E Co sells A&P services directly to customers in Country B. E Co has also recently started selling A&P services remotely to customers in Country C, where it does not have any form of taxable presence under current taxation rules.

Applying Pillar One where Group DE has a taxable presence in the market country (Country B):

---

[67] SARS Practice Note 7 Determination of Taxable Income of Certain Persons from International Taxation: Transfer (06 August 1999) par 2.1 defines transfer pricing as the process by which related entities set prices at which they transfer goods or services between each other. Furthermore, Oguttu *International Tax Law: Offshore Tax Avoidance in South Africa* 213 also describes transfer pricing as a systematic manipulation of prices to reduce profits or increase profits artificially or cause losses and circumvent taxes in a specific country; Ware and Roper *Offshore Insight* (2001) 178.

- In country B, Group DE has a taxable presence through the presence of E Co, which is already contracting with and making sales to local clients.
- Under Amount A (the new taxing rights), it will be necessary to determine if Group DE has a new non-physical nexus in Country B. For purposes of this example, assume that E Co makes sufficient sales in Country B to meet the revenue threshold. Consequently, this will give country B a right to tax a portion of the deemed non-routine revenue of Group DE (Amount A). Therefore, Country B may tax that income directly from the entity that is treated as owning the deemed non-routine revenue (in the example, D Co), with the possibility that E Co will be held jointly liable for the tax due to facilitate administration. The relief from double taxation would be provided once D Co claims a foreign tax credit or an exemption in Country A.
- E Co would be the taxpayer for the only applicable fixed return for baseline marketing and distribution activities (Amount B). Transfer pricing adjustments would be made to transactions between D Co and E Co to eliminate double taxation.
- Lastly, if Country B considers that E Co should have additional profits taxed under the ALP because its activities go beyond the baseline activity assumed in the fixed return arrangement for marketing and distribution activities (Amount C), Country B would be subject to robust measures to resolve disputes and prevent double taxation.

Applying Pillar One where Group DE does not have a taxable presence in the market country (Country C):

- As far as the traditional PE rules are concerned, Group DE does not have a taxable presence in Country C. However, E Co is making remote sales in Country C.
- Under Amount A (the new taxing right), it will be necessary to determine whether Group DE has a non-physical nexus to Country C. Assume, for purpose of this example, that Group DE makes sufficient sales in Country C to meet the revenue threshold.
- This will give Country C the right to tax a portion of the deemed non-routine profits of Group DE (Amount A). Country C may tax that income directly from the entity that is treated as owning the non-routine profit (that is, D Co), with D Co being held to have a taxable presence in Country C under the new nexus rules.
- Since, under current rules, Group DE does not have an in-country presence in Country C (branch or subsidiary), Amount B would not apply.

6 2 Global Anti-Base-Erosion Proposal (GloBE): Pillar Two

As part of the ongoing Inclusive Framework, Pillar Two also calls for a coordinated set of rules to address the risks imposed by the DE that allow MNEs to assign or transfer revenues to jurisdictions with low or no taxation at all. Pillar Two focuses on the challenges that are not covered under Pillar One. Pillar Two comprises four parts.

The four parts of the GloBE proposal are:[68]

i) An "income inclusion" rule (IIR)

An IIR taxes the income of a foreign branch or a controlled entity if that income is subject to tax at an effective rate that is below a minimum rate. Accordingly, the IIR intends to operate as a minimum tax by requiring a shareholder in a corporation to bring into account a proportionate share of the income of that corporation if that income was not subject to an effective rate of tax above a minimum rate.[69] This rule is likely to supplement a country's controlled foreign corporation (CFC) rules. As a rule, a CFC is characterised as a foreign entity that is either directly or indirectly controlled by a resident taxpayer. Jurisdictions apply different approaches in determining the resident taxpayer's control. In South Africa, in terms of section 9D of the ITA, CFC rules will apply if the resident directly or indirectly holds more than 50 per cent of the total participating shares and/or voting rights in the foreign entity.

ii) An "undertaxed payments" rule

This rule operates by way of a denial of a deduction or imposition of source-based taxation (including withholding tax) for a payment to a related party if that payment is not subject to tax at or above a minimum rate. In other words, the undertaxed payments rule prohibits a deduction or a proportionate amount of any deduction for certain payments made to an associated entity unless those payments were subject to a minimum effective rate of tax.

iii) A "switch-over" rule

The switch-over rule will be introduced into tax treaties that would permit a residence jurisdiction to switch from an exemption to a credit method where the profits attributable to a PE or derived from immovable property (that is not part of a PE) are subject to an effective rate below the minimum rate.

iv) A "subject to tax" rule

The subject to tax rule complements the undertaxed payments rule by subjecting a payment to withholding or other taxes at the source and adjusting eligibility for treaty benefits on certain items of income where the payment is not subject to tax at a minimum rate.

In summary, Pillar One addresses the allocation of taxing rights between jurisdictions and describes proposals for new profit allocation and nexus rules based on the concepts of "substantial economic presence" and the exploitation of "user participation" and "marketing intangibles" in a jurisdiction. Pillar Two (also referred to as the "GloBE" proposal) requires further development of a coordinated set of rules to address ongoing risks from structures that allow MNEs to shift profit to jurisdictions where they are subject to no or very low taxation.

---

[68] OECD *Public Consultation Document: Global Anti-Base Erosion Proposal ("GLoBE") – Pillar Two* (2 December 2019) www.oecd.org/tax/beps/public-consultation-document-global-anti-base-erosion-proposal-pillar-two.pdf.pdf (accessed 2020-04-09) 6 par 5–6.

[69] OECD *Public Consultation Document: Pillar Two* 29 par 10.

Owing to the absence of a comprehensive approach to the virtual PE concept, South Africa may consider dealing with the traditional PE shortcomings in terms of the proposals below. At present, it is worthwhile mentioning that this does not imply that South Africa should take uncoordinated unilateral measures to deal with the issue. This should be done in a manner that does not undermine or hamper international investments. It follows that economic and political aspects will play a crucial role in implementing these recommendations.

7 RECOMMENDATIONS

It is noted that the issues raised above affect not only South Africa but also international tax policy worldwide. While conceding that the DE is part of modern life and that it is difficult, if not impossible, to "ring-fence" the digitalised economy from the remainder of the economy for tax purposes, it is instructive to suggest and implement measures to align with the OECD recommendations.

7 1 Traditional permanent establishment definition: double tax agreements

As of 21 November 2017, the OECD made some changes to the existing PE definition. It is submitted that South Africa should also expand its "physical presence" requirement to reflect these changes. Since a treaty overrides the national law in a case of conflict between the two,[70] perhaps South Africa should prioritise re-signing its existing treaties. This means South Africa will have to renegotiate its tax treaties, especially those that are based on the OECD Model TC. Some African countries have started renegotiating tax treaties previously signed with developed countries that appeared to confer inappropriate taxing rights (such as low or zero withholding tax rates).[71] In 2015, South Africa renegotiated its 1997 DTA with Mauritius, it is submitted that South Africa should accelerate this process and renegotiate other tax treaties.

7 2 Digital Economy: "substantial economic presence"

With regard to MNEs with a substantial economic presence but little or no physical presence, the appropriate measure would be to introduce a new

---

70 Arnold "The Interpretation of Tax Treaties: Myth and Reality" 2020 *Bulletin for International Taxation* 667; Du Plessis "Double Taxation Treaty (DTT) Interpretation: Lessons from A Case Down Under" 2020 23 *Potchefstroom Electronic Law Journal* 2–22; Du Plessis "Some Thoughts on the Interpretation of Tax Treaties in South Africa" 2012 1 *SA Mer LJ* 31–52; Olivier and Honiball *International Tax: A South African Perspective* 315.

71 Oguttu "A Critique of International Tax Measures and the OECD BEPS Project in Addressing Fair Treaty Allocation of Taxing Rights Between Residence and Source Countries: The Case of Tax Base Eroding Interest, Royalties and Service Fees from an African Perspective" 2018 *STELL LR* 314–346 324 and 335.

rule that specifically deals with a "digital establishment". For instance, in the SA-USA tax treaty, the new rule could be crafted as follows:

> 2. The term permanent establishment includes especially:
>
> *a)* a place of management;
> *b)* a branch;
> *c)* an office;
> *d)* a factory;
> *e)* a workshop;
> *f)* a mine, an oil or gas well, a quarry or any other place of extraction of natural resources;

The new rule may be inserted and read as follows;

> 2A *A digital establishment*
>
> Notwithstanding anything contained in [Article 5(1), Article 5(2)(*a*) to (*k*) above],
>
> an enterprise of a Contracting State shall be deemed to have a digital establishment in the other Contracting State for the purpose of this provision [being Article 5(2A)] if the enterprise carries on business activities in the other Contracting State through digital or electronic means, and the total revenue of the enterprise from such business activities exceeds **[******]** in a financial year, or if the enterprise habitually enters into contracts with residents of the other Contracting State […].[72]

This provision will not only assist in creating a PE but will also combat tax avoidance where foreign company employees do not meet the minimum number of days required in treaties.[73]

7 3 Section 1 of the PE definition and the section 9 source rule of the ITA

Finally, the definition of the traditional permanent establishment, as well as the source rules in section 9, will have to be suitably expanded to reflect both the OECD extended PE scope and to incorporate the concept of a digital establishment with a "substantial economic presence".

8 CONCLUSION

It is evident in the discussion above that the current South African PE definition is unlikely to tax all business models effectively, particularly those that lack a physical presence in the source country. It is noted that in the DE era, various international businesses transact almost all of their transactions

[72] Goel and Goel 2018 *NUJS L Rev* 45.
[73] See *ABB FZ LLC, C/o. ABB India Ltd v. DCIT supra*.

on the digital platform. These businesses no longer pass the physical presence tests. Rather, they rely heavily on virtual PEs. Virtual PEs allow these entities to transact in the market country in a digitally transformed way; as a consequence, they can circumvent the physical presence requirement needed for tax purposes. This seriously erodes the tax base of market countries, particularly developing countries with constrained tax administrations, including South Africa.

It is submitted that South Africa will have to make the necessary changes to keep up with the ever-changing computerised economy. The changes may include renegotiating existing tax treaties to include digital establishments, and to introduce the new OECD rules, especially those relating to taxing MNEs where a substantial economic presence has been created.

It is further noted that some of the above recommendations are subject to the upcoming OECD final report on the taxation of corporations conducting business activities through digital establishments.[74] It is also essential to bear in mind that changing the provisions in treaties might not be an easy task. However, an attempt to change the rules is always better than nothing. What is important when it comes to treaty renegotiation is that it should be done in a manner that does not lead to an "unparallel, uncoordinated and unilateral" reaction that will negatively affect international investment.

[74] See generally on the progress made thus far, OECD/G20 *Inclusive Framework on BEPS*: *Progress Report July 2020–September 2021* (2021) https://www.oecd.org/tax/beps/oecd-g20-inclusive-framework-on-beps-progress-report-july-2020-september-2021.htm (accessed 2021-07-02); and OECD/G20 *Inclusive Framework on BEPS: Progress Report July 2019–July 2020* (2020) www.oecd.org/tax/beps-oecd-g20-inclusive-framework-on-beps-progress-report-july-2019-july-2020.htm (accessed 2020-08-09).

THE CONVERGENCE OF LEGISLATION ON CYBERCRIME AND DATA PROTECTION IN SOUTH AFRICA:

A Practical Approach to the Cybercrimes Act 19 of 2020 and the Protection of Personal Information Act 4 of 2013

Sizwe Snail ka Mtuze*
Adjunct Professor in Cyberlaw / ICT Law, Nelson Mandela University and Visiting Professor, The Center for Technology & Society (CTS), FGV School of Law

SUMMARY

This article seeks to give a historical background to the development of cybercrime laws in South Africa. It commences with a discussion on the common-law position regarding cyber-criminality then the article goes on to discuss the Electronic Communications Transactions Act (ECT) and the new Cybercrimes Act. This is followed by a discussion on Protection of Personal Information Act (POPIA) and same converges with the Cybercrimes Act, as well as the POPIA.

* LLB(UP), LLM (SA), Admitted Attorney - South African High Court, is an author and co-editor of the published *Cyberlaw @ SA III: The Law of the Internet in South Africa* (2012), as well as *Cyberlaw @ SA IV* published in January 2022. Sizwe was also a part-time Member of the Information Regulator (2016–2022) and also formed part of the Ministerial Advisory Group that assisted the Department of Justice and Constitutional Development in drafting and amending the Cybercrimes Act through its different stages of drafting. The author wishes to thank Mr Vilimile Gumede (Snail Attorneys) who has assisted with the technical editing of this article.

1 INTRODUCTION: BRIEF HISTORY OF LEGISLATION ON CYBERCRIME AND DATA PROTECTION

This article is a continuation of an article published by the writer in 2009.[1] The previous article was a discussion of the South African legal position *vis-à-vis* cybercrime and cybersecurity. It provided the common-law position prior to the enactment of the Electronic Communications and Transactions Act (ECTA),[2] and gave an exposition of the law's solution to the most pressing cybersecurity concerns at the time, which included hacking, cracking and phishing, among various other unlawful activities.[3]

At least 54 cyber-incidents were reported in the period between 1994 and 2016.[4] These included: hacking of the South African Police Service, which resulted in the release of details of thousands of whistle-blowers and victims; vulnerabilities on the portals of Vodacom and Cell C (mobile telephone network operators); a compromise of the State's Government Communication and Information System (GCIS); targeted hacks on Absa Bank resulting in the loss of R500 000.00; the duplication of Vodacom SIM cards for the purpose of intercepting One-Time-Pins (OTP) through phishing, which resulted in the theft of more than R7 000 000.00; and many more well-publicised cyber-attacks.[5]

Increased internet activity on social networks, e-governance, commercial services and the Internet of Things (IOT) has amplified the vulnerability of persons, as well as that of countries to cybercriminal activities.[6]

Offences that were created and regulated in terms of the common law and ECTA have now been codified in the Cybercrimes Act.[7] The legal framework regulating cybercrimes sets out the manner in which the different offences are dealt with in terms of the law.[8] The sentences imposed for the commission of cybercrimes are also set out in the Act.[9]

---

1 Snail "Cyber Crime in South Africa: Hacking, Cracking, and Other Unlawful Online Activities" 2009 1 *Journal of Information, Law & Technology* (*JILT*), http://go.warwick.ac.uk/jilt/2009_1/snail (accessed 2021-06-22).

2 25 of 2002.

3 Hayes "Computer Security Threats: Small Business Professionals' Confidence in Their Knowledge of Common Computer Threats" 2012 3 *Advances in Business Research* 107. In this paper, viruses, Trojans, spyware, malware and phishing were identified as the most common computer threats to businesses at the time.

4 Van Niekerk "An Analysis of Cyber-Incidents in South Africa" 2017 20 *African Journal of Information and Communication* https://doi.org/10.23962/10539/23573 (accessed 2021-06-22) 113–132.

5 Van Niekerk 2017 *AJIC* 118.

6 *Ibid.*

7 19 of 2020.

8 Dlamini "Understanding Policing of Cybercrime in South Africa: The Phenomena, Challenges and Effective Responses" 2019 5 *Cogent Social Sciences* https://doi.org/10.1080/23311886.2019.1675404 (accessed 2021-06-22).

9 S 19 of ECTA.

This article aims to achieve two objectives, the first of which is to provide a succinct update on recent developments in cybercrime law in South Africa. The second objective is to point out the convergence of cybercrime laws and data protection laws. The reason for this contribution is based on the critical claim that vulnerability is the common denominator between cybersecurity and data protection.[10]

The legal basis for data protection in South Africa is the protection of the right to privacy in terms of the Constitution.[11] This right has found application and interpretation in the courts.[12] The right to privacy, and more specifically the right to the protection of personal information, finds legislative protection in the Protection of Personal Information Act (POPIA).[13] This Act is appropriately discussed owing to the reality that cyberactivity raises concerns for the safety and security of personal information on the Internet.[14]

The legislature has acknowledged the need to protect personal information by including this piece of legislation in the country's laws on privacy. In doing so, there have been seven crucial acknowledgments. The first is that there is a need for regulation of how public and private bodies process personal information.[15] It is acknowledged that there is a need for the introduction of minimum conditions for the lawful processing of personal information.[16]

It is acknowledged that a data protection authority such as the Information Regulator serving as a custodian of the Act is an important instrument through which to achieve the Act's purpose,[17] as well as that of the Promotion of Access to Information Act (PAIA).[18] POPIA also acknowledges that there is a need for codes of conduct to be established in specialised industry sectors to ensure adequate and appropriate data protection measures.[19] The right of consumers not to be unlawfully targeted with unsolicited electronic communications and automated decision-making is also acknowledged,[20] as protected in terms of the Consumer Protection Act (CPA).[21]

It is acknowledged that there is a need to regulate the flow of personal information across the borders of the country;[22] and to lay a legal/legislative basis for regulating matters connected with all the aforementioned

---

10 Snail "Legal Intersections Between the Protection of Personal Information Act 4 of 2013 (POPIA) and the Cybercrimes Act 19 of 2020" (2021) CyberBrics Publications https://cyberbrics.info/legal-intersections-between-the-protection-of-personal-information-act-4-of-2013-popia-and-the-cyber-crimes-act-19-of-2020-2/ (accessed 2021-06-22).

11 Constitution of the Republic of South Africa, 1996.

12 *Black Sash Trust v Minister of Social Development* 2017 (3) SA 335 (CC).

13 4 of 2013.

14 Kshetri "Cybercrime and Cybersecurity in Africa" 2019 *Journal of Global Information Technology Management* 22 77.

15 Ss 8–25 of POPIA.

16 *Ibid*.

17 Ss 39 and 40 of POPIA.

18 2 of 2000.

19 Ss 60 and 61 of POPIA.

20 Ss 69 and 71 of POPIA.

21 68 of 2008.

22 S 72 of POPIA.

concerns.[23] In light of these important acknowledgements, a discussion on data protection is pertinent. The reason for such a discussion in this article alongside a discussion on cybercrime is that, while these are two distinct areas of information communications technology (ICT) law, they are indeed related in that they present the law with an opportunity to remedy situations of vulnerability.

Vulnerability in the cybercrimes area takes various forms, such as fraud, forgery and uttering, whereas in the area of data protection, it may take the form of data breaches. This article therefore also intends to interrogate the current laws along this vein of vulnerability.

Activities that occur in the context of technology usage largely entail the sharing of data. The accessing, dissemination, transmission and processing of data often entail the reality that the nature of the data itself may often be private. This is to say that it may involve the processing of information such as: a person's identification number; symbol; email address; physical address; telephone number; location information; online identifier; information relating to the race, 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; and other forms of personal data.[24]

The common-law position on cybercrimes was given in the previous article by highlighting the fact that at common law it is not a cumbersome exercise to prove defamation, indecency, theft, forgery, and malicious damage to property in the form of malicious code such as viruses, worms and Trojan Horses, as well as unlawful monitoring and interception of data messages.[25] Case law has certainly developed since the enactment of ECTA.[26]

Prior to a detailed discussion, it is of value to give a brief synopsis of the current status of data protection law given that there is an intersection between these two areas of law and technology. This article discusses the manner in which the right to privacy has been interpreted and applied by the courts and demonstrates how cybercrime and data protection laws intertwine.

Watney provides a concise background and analysis of cybercrime law in South Africa,[27] noting that the nature of cyberspace is such that the commission of crimes across physical borders has become easier.[28] It is

---

23 These acknowledgements are embodied in the long title of POPIA.

24 S1 of POPIA.

25 The exposition on the common-law position was given by citing case law including *S v Van den Berg* 1991 (1) SACR 104 (T); *S v Harper* 1981 (2) SA 638 (D); *S v Manuel* 1953 (4) SA 523 (A) 526; and *S v Howard* (unreported case no. 41/258/02). Case law discussed prior to the enactment of ECTA includes *Narlis v South African Bank of Athens* 1976 (2) SA 573 (A); *R v Douvenga* (District Court of the Northern Transvaal, Pretoria, case no 111/150/2003); *SB Jafta v Ezemvelo KZN Wildlife* (Case D204/07); and *S v Motata* Johannesburg District Court case number 63/968/07 (unreported).

26 See *Okundu v S* [2016] ZAECGHC 131 and *Mgoqi v S* [2020] ZAECGHC 33.

27 Papadopoulos and Snail *Cyberlaw @ SA IV* (2021) ch 13 463.

28 Papadopoulos and Snail *Cyberlaw @ SA IV* ch 13 470–472.

submitted that this forms one of the bases for the argument that there is a convergence in the law on cybercrimes and data protection, especially considering that data or information has become a valuable currency traded across the globe daily.

2 CYBERCRIME IN THE CONTEXT OF ECTA AND THE COMMON LAW

Considering that the previous article clearly drew on the developments in cybercrime law in the context of the common law and ECTA at the time, it is fitting that the article first discusses developments in case law on how the Act has found practical application. The provisions of ECTA are discussed here, and for the sake of relevance, the focus is on the provisions of the Act in its current form. It should be noted that the discussion on ECTA is on how the courts have applied and interpreted its provisions.

In the previous article, the common-law position on cybercrimes was given with reference to the common-law crimes of defamation, indecency (including online child pornography), *crimen injuria*, fraud, defeating the ends of justice, contempt of court, theft and forgery.[29] The legal position on such crimes was given by citing the case of *S v Howard*,[30] where the court found that causing an information system to break down is a scenario fit for classification as malicious damage to property.[31] Although there is no one general definition for cybercrime, ECTA has characterised cybercrime by providing that it is

> "any criminal or other offence that is facilitated by or involves the use of electronic communications or information systems including any device or the internet or any one or more of them".[32]

Watney notes that cybercrime can be categorised as cyber-dependent crimes; cyber-enabled or cyber-assisted crimes; or computer-supported crimes.[33] Watney also importantly notes that the development of ICT regulation in the context of cybercrime has essentially entailed four phases.[34]

In the first phase, the Internet was not regulated; as a result, common-law offences were insufficient to deal with nuanced means of committing crimes in cyberspace. The second phase for South Africa began with the enactment of ECTA, which afforded some efficacy to law enforcement agencies and the criminal justice system to deal with cybercrimes. The third phase saw the

---

29 Snail http://go.warwick.ac.uk/jilt/2009_1/snail.

30 *S v Howard supra*.

31 The precise definition entails that a person may be found guilty of the crime of malicious damage to property "[i]f he unlawfully and intentionally damages property belonging to another; or his own insured property, intending to claim the value of the property from the insurer". See Snyman *Criminal Law* (2021) and the discussion there on *Mashanga* 1924 AD 11 12; *Bowden* 1957 (3) SA 148 (T) 150B; *Kgware* 1977 (2) SA 454 (O) 455; and *Mnyandu* 1973 4 SA 603 (N) 606A as referenced by the court in *Mokoena v S* [2020] ZAMPMHC 32 par 24.

32 Papadopoulos and Snail *Cyberlaw @ SA IV* ch 13 477.

33 *Ibid.*

34 *Ibid*.

enactment of supplementary legislation such as the Regulation of Interception of Communications and Provision of Communication-Related Information Act (RICA),[35] the purpose of which was to regulate law enforcement surveillance.

It is, however, crucial to note that large portions of RICA have since been declared unconstitutional in the *AmaBhungane* case.[36] The fourth phase, as summarised by Watney, entails the enactment of comprehensive legislation dealing exclusively with cybercrime and related issues. This is the Cybercrimes Act.[37] Practical application of the Cybercrimes Act had not yet become a reality at the time of writing this article, but a number of court decisions on the basis of ECTA are explored in order to give a view of how these provisions have been tested in the courts.

In the case of *Okundu v S*,[38] the court upheld an appeal on sentence where the appellant had been convicted on various counts of contravening section 86(1), (3) and (4) of ECTA. The appellant had been convicted for unlawfully gaining access to the information of various persons to whom some banks had issued original cards, such information having been encoded on the magnetic strips of the original cards. The appellant had neither the authority nor the consent of the lawful cardholders and/or the banks to access the information.[39]

In the case of *Okundu v S*,[40] the court found that the appellant had committed an offence in terms of section 86(4) of ECTA, whose equivalent is section 8 of the Cybercrimes Act. This is the fraud provision, and it is important to note that the court interpreted it in the following manner:

> "Fraud consists in unlawfully making, with intent to defraud, a misrepresentation which causes actual prejudice or which is potentially prejudicial to another. The essential elements of fraud are: unlawfulness; making a misrepresentation; causing prejudice or potential prejudice and intent to defraud. The appellant was convicted on counts 1 to 5 because he unlawfully made misrepresentations to the banks with the intent to defraud them, which misrepresentations caused prejudice to them and/or the lawful cardholders."[41]

In the case of *Mgoqi v S*,[42] the court allowed an appeal and set aside the sentences imposed by a magistrates' court. The court found that the appellant had contravened section 86(1) of ECTA by unlawfully and intentionally gaining access to, or intercepting, data such as client information (encoded on magnetic strips of bank cards) of various

35 70 of 2002.

36 *AmaBhungane Centre for Investigative Journalism NPC v Minister of Justice and Correctional Services; Minister of Police v AmaBhungane Centre for Investigative Journalism NPC* [2021] ZACC 3; 2021 (4) BCLR 349 (CC); 2021 (3) SA 246 (CC).

37 19 of 2020.

38 *Okundu v S supra*.

39 *Okundu v S supra* par 6.

40 *Okundu v S supra*.

41 *Okundu v S supra* par 10 (footnotes omitted).

42 *Mgoqi v S supra*.

international financial institutions.[43] This provision of ECTA has been amended by section 3 of the Cybercrimes Act.

One of the aims of cybercrime legislation is to prohibit the unlawful overcoming of protection measures intended to prevent access to data transmitted to or from a computer system. In the case of *Myeni v S*,[44] the court dismissed an appeal by the accused where he had been convicted of having been a member of a syndicate that wrongfully and unlawfully used a device primarily designed to overcome security measures. The perpetrators, without the authority of the Koukamma Municipality, had used computer software by the name of Winspy that captures keystrokes in order to overcome security measures designed to protect data, namely computer usernames and passwords.[45] The court found the court *a quo*'s sentence to be appropriate.[46]

Section 86(5) of ECTA prohibits the unlawful and intentional interference with data or a computer program.[47] In the case of *Salzmann v S*,[48] the SCA found that an offence in terms of section 86(5) of ECTA is a serious one. In this case, a mobile service provider, Cell C, had suffered a cyber-attack perpetrated by the appellant. Before striking the matter off the roll, the court found:

> "Section 89 of the ECT Act prescribes a maximum sentence of a fine or imprisonment not exceeding five years for a contravention of s 86(5). The fact that the legislature found it necessary to place this offence on the statute book is in itself a clear indication of the prevalence of the unlawful hacking of others' computers and networks. The offence is by its very nature a severe one. It invades the privacy of others, something our law earnestly protects, and may have far reaching consequences. In the present case it affected some 80% of the network of a large mobile cellular operator, and it took a week to restore the mischief that had been done."[49]

The previous article alluded to and highlighted the fact that ECTA prohibits the unlawful and intentional acquisition, possession or provision of passwords, access codes or similar data to another person for the purposes of committing cyber fraud, cyber forgery, uttering and cyber extortion.[50] In *Mgoqi v S*,[51] the court considered that among the charges against the appellant was the accusation of forgery. The appeal court, however, found that the court *a quo* had erred in its finding. Section 87 of ECTA is the applicable provision, which was referred to thus:[52]

---

43 *Mgoqi v S supra* par 3.

44 *Myeni v S* [2018] ZAECGHC 107; 2019 (1) SACR 360 (ECG).

45 *Myeni v S supra* par 4.

46 *Myeni v S supra* par 29.

47 S 86(5) of ECTA provides: "A person who commits any act described in this section with the intent to interfere with access to an information system so as to constitute a denial, including a partial denial, of service to legitimate users is guilty of an offence."

48 [2019] ZASCA 145; [2020] 1 All SA 361 (SCA); 2020 (2) SACR 200 (SCA).

49 *Salzmann v S supra* par 40.

50 Snail http://go.warwick.ac.uk/jilt/2009_1/snail.

51 *Mgoqi v S supra* par 35.

52 The court drew a distinction between forgery and fraud by citing *LAWSA* vol 11 3ed par 374, where it is stated: "Forgery is committed by unlawfully making a false document with intent to defraud to the actual or potential prejudice of another. It is a species of fraud. In forgery the misrepresentation takes place by way of the falsification of a document. Apart

> "In convicting the appellant for forgery the Magistrate did so on the basis that a plastic bank card constituted a document. This is evidenced by his reasoning that 'a plastic bank card which does not belong to you with your name printed on it and signature on the back is clearly forgery'. It is unnecessary to express a view on the correctness or otherwise of this finding. What was clearly overlooked by the Magistrate is that, by definition, the case for the State failed in one fundamental respect, namely that the intent to defraud was not proven."

In the case of *Fourie v Van der Spuy and De Jongh Inc*,[53] the court considered a dispute involving the hacking of emails and subsequent payments made to hackers who remained unknown. The relief sought by the applicant entailed requesting the court to order the respondents to be held jointly and severally liable for payment of an amount of R1 744 599.45. An important fact is that the respondents were a law firm and legal practitioners.[54] In considering the facts before it, the court took note of the case of *Jurgens v Volschenk*.[55] In *Jurgens*, the Eastern Cape Local Division made a cautionary finding for law practitioners by stating the following:

> "I do not dispute the doctrine that an attorney is liable for negligence and want of skill. Every attorney is supposed to be reasonably proficient in his calling, and if he does not bestow sufficient care and attention, in the conduct of business entrusted to him, he is liable; and where this is proved the Court will give damages against him."[56]

The court in *Fourie* found that there had been instances of fraud conducted by hackers that were unknown to any of the parties. The court nevertheless apportioned the damage suffered by the applicant to the respondents, having found specifically that the second respondent had failed to exercise the requisite skill, knowledge and diligence expected of an average practising attorney. It is submitted that instances such as the occurrences in *Fourie* are commonplace. For this reason, this discussion extends beyond the status of cybercrime regulation to include data protection as more fully discussed later in this article.

The adjudication of cybercrime in South Africa owes a debt not only to ECTA, but also to the Specialised Commercial Crimes Court, which was first established in Pretoria in November 1999.[57] The purpose of its

from this, all the requirements of the crime of fraud must be present, such as the intent to defraud and the actual or potential prejudice. However, whereas fraud is completed only when the misrepresentation has come to the notice of the representee, forgery is completed the moment the document is falsified. If the document is then brought to the attention of others, a separate offence is committed, namely uttering the document. Because the person falsifies the document is in most cases also the one who offers it to another, it has become customary to charge that person with both forgery and uttering, which are nevertheless two distinct offences."

53 [2019] ZAGPPHC 449; 2020 (1) SA 560 (GP).

54 *Fourie v Van der Spuy and De Jongh Inc supra* par 2.

55 *Ben Adrian Jurgens and Wendy Jurgens v Lynette Volschenk* (4067/18) ZAECHC (unreported).

56 *Ben Adrian Jurgens and Wendy Jurgens v Lynette Volschenk supra* par 20.

57 Albeker "Justice Through Specialisation? The Case of the Specialised Commercial Crimes Court" (2003) *Institute for Security Studies* https://www.files.ethz.ch/isn/118731/76% 20FULL.pdf (accessed 2021-07-12).

establishment was to unburden the criminal justice system and efficiently tackle various commercial crimes through a system of magistrates, prosecutors and other court officials specifically dedicated to the task. The role of this specialised court has also entailed an interpretation and application of the provisions of ECTA. In the case of *Msomi v S*,[58] the court considered an appeal from the Port Elizabeth Specialised Commercial Crimes Court, where the appellant had been charged with fraud in terms of ECTA and the Prevention of Organised Crime Act.[59] The court considered the prevalence of cyber fraud and made the following remarks regarding its effects:

> "It is so that there is unfortunately a misguided perception that these crimes are somewhat less morally reprehensible than fraud and theft committed in the 'old fashioned' way. This perception is unfortunately further encouraged by films in which cyber-criminals are portrayed as debonair and devil-may-care rebels who fight a lone and just battle against an evil system … The ability of cyber 'hackers' to infiltrate these electronic systems for their own selfish purposes consequently has far-reaching and deleterious consequences for the economy, both domestically and globally."

The body of laws regulating cybercrime prior to the enactment of the Cybercrimes Act extends beyond the provisions of ECTA and the Prevention of Organised Crime Act. In the case of *Prinsloo v S*,[60] the court had to make an appeal determination where the appellant had *inter alia* been charged in the court *a quo* with a contravention of the Films and Publications Amendment Act.[61]

The charge levelled against the appellant was that of "Importation or Procuring of Child Pornography".[62] A forensic cyber-analyst (expert) gave evidence to the court that the appellant's computer had been used to access child pornography, and that thereafter a software application had been used to remove child pornography from the appellant's computer a few hours prior to his arrest.[63] Having considered his version that third persons had downloaded such child pornography (without providing any names of the said persons), the court dismissed the appeal, finding that his version was filled with improbabilities and contradictions.[64]

The cases briefly explored in this article demonstrate that there have in fact been consequences for cybercriminals during the third phase of regulation. ECTA mainly addresses the unlawfulness of interfering with data or information, and it thus creates offences.[65] From the few reported cases decided on appeal in the high courts, it is clear that the lower courts have over the years exercised the function of interpreting and applying ECTA to practical scenarios where law enforcement agencies have preferred charges against cybercriminals in terms of section 86 of ECTA. The ECTA regime

---

58 [2019] ZAECGHC 80; 2020 (1) SACR 197 (ECG).
59 121 of 1998.
60 [2018] ZAFSHC 35.
61 3 of 2009.
62 *Prinsloo v S supra* par 1.
63 *Prinsloo v S supra* par 18.
64 *Prinsloo v S supra* par 45.
65 S 86(2) of ECTA.

has come to its end insofar as regulating cybercrimes is concerned. In its place, the Cybercrimes Act is now the key legislation that creates offences and penalties for cybercriminality. The provisions of the Cybercrimes Act are discussed in the next section of this article.

3 THE SALIENT PROVISIONS OF THE CYBERCRIMES ACT

The Preamble of the Cybercrimes Act states that its purpose entails the creation of offences that have a bearing on cybercrime and to prescribe penalties for such crimes.[66] Chapter 2 of the Cybercrimes Act has five substantive criminal law segments. Part I relates to cybercrimes that have been re-codified from existing crimes, as well as newly added offences. Part II relates to malicious communication crime. Section 2 of the Act provides that any person who unlawfully and intentionally secures access to data, a computer program, a computer data storage medium or a computer system is guilty of an offence.

Part III creates offences in the specific context of various cybercrime activities; these are attempting, conspiring, aiding, abetting, inducing, inciting, instigating, instructing, commanding or procuring a person to commit offences specified in the Act. Part IV contains competent verdicts, which guide the courts in making their pronouncements on cybercriminality. Part V makes provision for orders that may be given by the courts in order to protect complainants from the harmful effects of malicious communications.

The Act is broken up into nine chapters. Chapter 1 is the definition and interpretation section (section 1). Chapter 2 comprises Parts I, II, III, IV and V as highlighted in the preceding paragraphs. Chapter 3 pertains to issues of jurisdiction. Chapter 4 of the Act sets out the powers to investigate, search, access or seize. Chapter 5 makes provision for mutual assistance between South Africa and foreign states. Chapter 6 makes provision for the establishment and functions of a "designated point of contact".

Chapter 7 provides for the adducing of evidence by way of sworn statements. Chapter 8 provides for reporting obligations of electronic communications service providers and financial institutions and building capacity to police cybercrimes. Chapter 9 contains general provisions, including on the authority of the executive authority to enter into agreements; the repeal and amendment of certain laws; the inclusion of regulations; and the commencement of the Act. For the purpose of practicality, the discussion contained in this article is detailed insofar as Parts I and II of Chapter 2 are

[66] The Cybercrimes Act makes amendments to 11 critical pieces of legislation. These are the Criminal Procedure Act 51 of 1977; the South African Police Services Act 68 of 1995; the Films and Publications Act 65 of 1996; the Criminal Law Amendment Act 105 of 1997; the National Prosecuting Authority Act 32 of 1998; the Correctional Services Act 111 of 1998; the Financial Intelligence Centre Act 38 of 2001; the Electronic Communications and Transactions Act 25 of 2002; the Regulation of Interception of Communications and Provision of Communication-Related Information Act 70 of 2002; the Criminal Law (Sexual Offences and Related Matters) Amendment Act 32 of 2007; and the Child Justice Act 75 of 2008.

concerned, but is rather limited on the rest of the Act. The reason is that the creation of the offences as well as the consequences thereof are the most pertinent areas of concern in the wake of the Cybercrimes Act having been recently enacted at the time of writing this article. On 1 June 2021, the President of the Republic of South Africa signed the Cybercrimes Act into law. In accordance with this specialised legislation, there are now procedures created to cater for investigation of Cybercrime and co-operation of multinational law enforcement agencies -fostering multi-agency collaboration. Chapter 2 of the Cybercrimes Act has two substantive criminal law segments, namely Part I on cybercrimes (which has re-codified existing crimes and added new offences) and Part II on malicious communication crimes. The President signed a Presidential Minute indicating that the commencement date of the Cybercrimes Act will be 1 December 2021. The following sections, however, will not yet commence namely:

- Part VI of Chapter 2 which deals with issuing of protection orders which can be granted against suspected cyber harassment, cyber threats of damage to property or anyone inciting others to damage property, and revenge porn. Section 20(1) of the Cybercrimes Act provides that a complainant who lays a charge with the South African Police Service (SAPS) that an offence contemplated in s 14, 15 or 16 has allegedly been committed against them, may, on an *ex parte* basis, apply to a magistrate's court for a protection order, pending the finalisation of the criminal proceedings.
- Section 38(1)*(d)–(f)* which provides for any person who unlawfully or intentionally gives false information under oath or by way of affirmation knowing it to be false or not knowing it to be true, with the result that an expedited preservation of data direction contemplated in s 41 is issued or a preservation of evidence direction contemplated in s 42 is issued; or a disclosure of data direction contemplated in s 44 is issued, is guilty of an offence and is liable on conviction to a fine or to imprisonment for a period not exceeding two years or to both such fine and imprisonment.
- Section 40(3) provides that an electronic communications service provider who is required[67] to provide an electronic communications service which has the capability to store communication-related information and not required to store communication-related information in terms of a directive issued in terms of s 30(2) of the Cybercrimes Act must, in addition to any other obligation imposed by any law, comply with a real-time communication-related direction in terms of which the electronic communications service provider is directed to provide real-time communication-related information in respect of a customer, on an ongoing basis, as it becomes available.
- The non-commencement also applies to the direction for expedited preservation of data as contemplated in s 41 of the Cybercrimes Act, in terms of which the electronic communications service provider is directed to preserve real-time communication-related information in respect of a customer, and s 42 of the Cybercrimes Act which deals with

[67] S 30(1)*(b)* of the Regulation of Interception of Communications and Provision of Communication-related Information Act.

preservation of evidence direction in terms of which the electronic communications service provider is directed to preserve real-time communication-related information in respect of a customer.

- The non-commencement will apply to a disclosure of data direction contemplated in s 44 of the Cybercrimes Act, in terms of which the electronic communications service provider is directed to provide real-time communication-related information in respect of a customer that was preserved or otherwise stored by the electronic communications service provider or any order of the designated judge in terms of s 48(6) of the Cybercrimes Act in terms of which the electronic communications service provider is ordered to obtain and preserve any real-time communication-related information; or obtain and furnish traffic data.
- Section 54 of the Cybercrimes Act which provides that an electronic communications service provider must, within 72 hours of having become aware, report an offence committed in terms of Part I of the Act to the SAPS will also not commence. The remainder of the Act will apply save for the exclusion of ss 11B, 11C, 11D and s 56A(3)*(c)–(e)* of the Criminal Law (Sexual Offences and Related Matters) Amendment Act 32 of 2007 in Chapter 9 in the schedule of laws repealed by s 58 of the Cybercrimes Act.

In this article, the discussion focuses on unlawful and intentional access;[68] unlawful interception;[69] unlawful acts in respect of software/hardware tools; interference with data;[70] interference with data or computer programs;[71] unlawful interference with storage mediums;[72] unlawful acquisition, possession, provision, receipt or use of passwords, access codes or similar data/device(s); aggravated offences in terms of the Act;[73] theft of incorporeal property;[74] malicious communications including incitement to violence or causing damage to property;[75] revenge pornography;[76] and attempting, conspiring, aiding, abetting, inducing, inciting, instigating, and instructing or procuring another to commit a criminal offence.[77] The discussion of the provisions of the Cybercrimes Act ends with consideration of sentencing for offenders found guilty of having committed cybercrimes,[78] as well as of court orders to protect complainants during the course of criminal proceedings.[79]

68 S 2 of the Cybercrimes Act.
69 S 3 of the Cybercrimes Act.
70 S 4 of the Cybercrimes Act.
71 S 5 of the Cybercrimes Act.
72 S 6 of the Cybercrimes Act.
73 S 7 of the Cybercrimes Act.
74 S 12 of the Cybercrimes Act.
75 Ss 13, 14 and 15 of the Cybercrimes Act.
76 S 16 of the Cybercrimes Act.
77 S 17 of the Cybercrimes Act.
78 S 19 of the Cybercrimes Act.
79 S 20 of the Cybercrimes Act.

3 1 Offences against confidentiality, availability, data, computer systems and storage data

Section 2 of the Act makes provision for an offence in relation to the unlawful securing of access in respect of a computer system or a computer storage medium. This section provides that any person who unlawfully and intentionally secures access to data, a computer program, a computer data storage medium or a computer system is guilty of an offence. For example, a cybercriminal might obtain software such as eBlaster,[80] which may be used to gain access to an organisation's bank account for illicit and illegal purposes such as siphoning off funds.[81]

Section 3 of the Act creates an offence in the event of unlawful interception of data, which may take the form of wire-tapping, installing a sniffer to monitor communications on a network, and packet sniffing.[82] In the case of wire-tapping, electronic equipment may be used to monitor communications between two separate computers, while a sniffer is defined as "[a] program that monitors data that are sent via a network".[83] Watney defines surveillance broadly and generally as "to watch over", and defines monitoring specifically as "the listening to and/or reading of the content of communication". Considering that such a technical term is not specifically defined in the Act itself, it is important to view section 3 in light of available literature and other legislation such as RICA, where the definition of "monitor" "includes to listen to or record communication by means of a monitoring device".

Section 4 of the Act creates an offence in the event that a person unlawfully and intentionally uses or possesses any software or hardware tool whose purpose is to contravene sections 2(1) or (2), 3(1), 5(1), 6(1), or 7(1)(*a*) or (*d*). An interesting feature of this section is that it makes it unlawful not only to make use of such a software or hardware tool, but also simply to be in possession of such a tool. In this context, great caution and vigilance ought to be exercised by any person making use of digital technologies, considering that legally it is *prima facie* immaterial whether unlawful software or hardware tools in one's possession are subject to unlawful use by another.

Section 5 of the Act creates an offence in the event that a person unlawfully and intentionally interferes with data or a computer program. It is important to note that the Act provides some guidance in that this section

---

80 See Dinan "Ware-Withal: EBlaster the Ultimate Tool of the Spies Who Love You" (2003) *Boston Business Journal* https://www.bizjournals.com/boston/blog/mass-high-tech/2003/06/ware-withal-eblaster-the-ultimate-tool-of.html (accessed 2021-07-13): "Sign on for eBlaster and you'll get hourly reports detailing every keystroke typed by your kids, husband, wife, sweetheart or employees. You'll be able to read both sides of their e-mail conversations via Hotmail, Yahoo, AOL, Microsoft Outlook and EarthLink. Both sides of all instant messages and back-and-forth from inside chat rooms is reported in detail, including chat with providers AOL and MSN Instant Messenger."

81 Papadopoulos and Snail *Cyberlaw @ SA IV* ch 13 477.

82 Maat *Cybercrime: Unauthorised Interception* (2009) ch 6. See also Van der Merwe *Computers and the Law* (2000) 169; and Gordon "Internet Criminal Law" in Buys (ed) *Cyberlaw @ SA* (2000) 428.

83 *Ibid*.

provides a tailored definition of what constitutes interference. The Act accordingly provides that deleting, altering, rendering vulnerable, damaging, deteriorating, rendering meaningless, useless or ineffective, obstructing, interrupting or interfering with the lawful use, or denying access to data or a computer program falls within the scope of "interference".[84]

The Act is clearly wide enough to include any number of such actions, and it is submitted that the Act affords greater protection to victims of cybercrime in this way. The tailored definition of "interference" provided for by the legislature is likely to ensure legal certainty for the courts when dealing with cyber-interferences of various natures. Watney makes it clear that privacy on the Internet entails the privacy of communications. She characterises communications privacy as protection against interference and intrusion regarding communications that occur on websites visited, as well as in electronic mails sent and received.[85]

Section 6 of the Act creates an offence in the event that a person unlawfully and intentionally interferes with a computer's data storage medium or a computer system. As in section 5, section 6 provides a clear definition of what constitutes an interference in this context. In terms of section 6, an interference with a computer data storage medium or a computer system has occurred where there is: either a permanent or temporary alteration of any resource; or an interruption or impairment to the functioning, confidentiality, integrity or availability of the medium or system.[86] It is therefore submitted that the legislature has apparently considered the various eventualities of interference as tested by the courts and reported by law enforcement agencies, and accordingly resolved to provide a comprehensive definition for "interference" in this particular context.

3 2 Malicious computer-related crimes

Sections 7, 8, 9 and 10 of the Act respectively create offences in the event that a person unlawfully and intentionally acquires, possesses, provides to another person, or uses a password, an access code or similar data or device (section 7) for purposes of committing cyber fraud (section 8), cyber forgery, uttering (section 9) and cyber extortion (section 10).[87]

There is a clear distinction between cybercrimes and common-law offences such as fraud, forgery and extortion in that the Cybercrimes Act links the former directly to the use of data and a computer or computer program.[88] It is therefore submitted that the scope and application of the

[84] S 5(2) of the Cybercrimes Act.

[85] Watney "The Evolution of Internet Legal Regulation in Addressing Crime and Terrorism" 2007 *The Journal of Digital Forensics, Security and Law* 2 40.

[86] S 6(2) of the Cybercrimes Act.

[87] Ss 7, 8, 9 and 10 of the Cybercrimes Act.

[88] For e.g., in *Van Heerden v S* [2016] ZAFSHC 191, the court gave the common-law definition of fraud by stating that "[f]raud is the unlawful and intentional making of a misrepresentation which causes actual prejudice, or which is potentially prejudicial to another". See *Hattingh v S* [2016] ZAWCHC 199 in respect of the common-law definition of forgery; *Ndlovu v S* 2016 ZAECBHC 12 for a characterisation of the common-law crime of

Cybercrimes Act in relation to these crimes *prima facie* seems sufficiently suited to the context of crimes committed in conjunction with data and/or computers. It is also submitted that the Cybercrimes Act, as a more comprehensive piece of legislation, has cured possible deficiencies in the wording used in ECTA.

3 3 Aggravated offences

Section 11 of the Act provides for aggravated offences and maps out clearly that its application extends to sections 3(1), 5(1), 6(1) or 7(1) insofar as the passwords, access codes or similar data and devices are concerned. The guilt assigned to an infringer/perpetrator in this context is strict in that where such a person knows or ought reasonably to have known/suspected that the computer system is restricted, they may be found guilty of an aggravated offence. The Act goes a step further by providing a succinct definition of a "restricted computer system".[89]

Section 11 provides that any data, computer program, computer data storage medium or computer system under the control of, or exclusively used by a financial institution or an organ of state as set out in section 239 of the Constitution falls within the meaning of "restricted computer system".[90] Accordingly, the unlawful interception of data, unlawful interference with data or a computer program, unlawful interference with a computer data storage medium or computer system, or unlawful acquisition, possession, provision receipt or use of a password, access code or similar data or device of a financial institution (that is, one of the main banking institutions) or a government ministry qualifies as an aggravated offence.[91] Watney notes that the South African common law lacked the requisite flexibility to regulate cybercrimes that had not existed before the Internet became a reality. In giving a detailed discussion on cybercrime regulation in the Act, she makes the point that the Act does indeed afford greater protection.[92]

Section 12 of the Act is a rather straightforward and easy-to-comprehend provision; it holds: "The common law offence of theft must be interpreted so as not to exclude the theft of incorporeal property." This provision therefore prescribes that the theft of incorporeal property is included in the common-

extortion; and *Cossie v S* [2011] ZAFSHC 169 in respect of the common-law crime of uttering.

89 S 1 of the Cybercrimes Act.

90 S 1 of the Cybercrimes Act defines a financial institution as one: "defined in section 1 of the Financial Sector Regulation Act, 2017 (Act No. 9 of 2017)." S 1 of the Financial Sector Regulation Act 9 of 2017 defines a financial institution as any of the following, other than a representative: "(*a*) A financial product provider; (*b*) a financial service provider; (*c*) a market infrastructure; (*d*) a holding company of a financial conglomerate; or (*e*) a person licensed or required to be licensed in terms of a financial sector law." S 239 of the Constitution provides that: "'organ of state' means – (a) any department of state or administration in the national, provincial or local sphere of government; or (b) any other functionary or institution – (i) exercising a power or performing a function 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, but does not include a court or a judicial officer".

91 Papadopoulos and Snail *Cyberlaw @ SA IV* ch 13 481.

92 *Ibid.*

law offence of "theft", The court in *Van Heerden v S*[93] affirmed the following definition:

> "A person commits theft if he unlawfully and intentionally appropriates moveable, corporeal property which
>
> (a) belongs to, and is in the possession of, another; (b) belongs to another but is in the perpetrator's own possession; or (c) belongs to the perpetrator but is in another's possession and such other person has a right to possess it which legally prevails against the perpetrator's own right of possession
>
> provided that the intention to appropriate the property includes an intention permanently to deprive the person entitled to the possession of the property, of such property."

The legal distinction between corporeal and incorporeal property has been characterised in the following manner by Njotini:[94]

> "Pre-classical Roman law was a further development of old Roman law. This law classified property into corporeal things or *res corporales* and things incorporeal or *res incorporales*. Corporeal things referred to tangible objects. The examples were land, a slave, a garment, gold and silver. Incorporeal things were intangible objects, for example an inheritance, usufruct, obligation or servitude. The last-mentioned things had the quality of being rights over property … Pre-classical and classical Roman law extended the interests in property to both corporeals and incorporeals. Importantly, the view in classical Roman law was that corporeals and incorporeals must be of economic value to a person. In other words, a person had to have an interest in property, which was calculated to be economic in nature."

Section 14 of the Act creates an offence in the event that a person discloses, by means of an electronic communications service, a data message to a person, group of persons or the general public with the intention to incite damage to property that belongs to, or violence against, a person or group of persons. This section demonstrates the necessity for a piece of legislation suited specifically to acts committed in cyberspace as opposed to incitement as understood and interpreted at common law.

There is a distinction between sections 14 and 15 of the Act. Section 15 creates an offence where a person unlawfully and intentionally discloses a data message that *threatens* a person with damage to property belonging to that person or a related person, or with violence against that person or a related person. Merely making the threat of damage to property or violence is punishable as an offence.

Section 16 of the Act has the title "Disclosure of data message of intimate image" and creates an offence in the event that a person unlawfully and internationally discloses, by means of an electronic communications service, a data message of an intimate image of a person without the consent of such person. The Act specifically sets the parameters within which an intimate image can be perceived. This provision stretches to include real and simulated images of a person depicted nude, or where the bare or covered

93 *Van Heerden v S supra* par 6, where the court cited Snyman *Criminal Law* (2008) 483.

94 Njotini "Examining the 'Objects of Property Rights': Lessons from the Roman, Germanic and Dutch Legal History" 2017 *De Jure* 1.

genital organs or anal region, or the breast area of a female, transgender or intersex person, are depicted.[95]

On 4 May 2021, a person identified in the media as Hazel Mahazard allegedly posted a nude photo of a popular deejay, Kabelo Motsamai (popularly known as Prince Kaybee).[96] The media thereafter reported that the alleged victim issued a letter demanding a public apology, failing which legal steps would be taken by Mr Motsamai. It is submitted that such a scenario would invoke the section 16 provision, and that courts are likely to test such scenarios in future since "revenge pornography" has become common.[97]

Section 17 of the Act creates an offence in the event that a person unlawfully and intentionally attempts, conspires with any other person, or aids, abets, induces, incites, instigates, instructs, commands or procures another person, to commit an offence set out in Parts I or II of Chapter 2 of the Act. This provision may be interpreted to mean that not only are there consequences for persons who carry out cybercrimes in terms of the Act, but also for persons who act as accomplices, or persons who give commands and instructions for cybercrimes to take place.

Musoni relies on Bloom's characterisation of revenge pornography, which was:

> "Non-consensual pornography/involuntary pornography, involves the distribution of sexually graphic images of an individual where at least one of the individuals depicted did not consent to the dissemination."[98]

In her discussion, she makes reference to the Cybercrimes Act in its pre-enactment phase (as a Bill), highlighting the importance of the element of consent.[99] Musoni agrees that there is a world of difference between pornography in its ordinary sense and meaning and revenge pornography, which is created by the element of lack of consent in the latter.

Musoni also points out that the Act makes provision for consequences only for the original perpetrator who first disseminates the sexually graphic images, but not for any subsequent sharing by third parties.[100] While the Cybercrimes Act falls short in this regard, POPIA certainly creates offences for non-compliance with POPIA in that the definition of personal information is non-exhaustive: "Personal information means information relating to an identifiable, living, natural person".[101]

It is submitted that by virtue of such an inclusive definition, a graphic image of a person is indeed personal information and that legal

---

95 S 16 of the Cybercrimes Act.

96 Naidoo "Hazel Comes Clean on Dirty Laundry and Apologises to Prince Kaybee" (7 May 2021) *The South African* https://www.thesouthafrican.com/lifestyle/celeb-news/prince-kaybee-cheating-zola-who-is-hazel-eurica-latest/ (accessed 2021-01-13).

97 Bond "Understanding Revenge Pornography: A National Survey of Police Officers and Staff in England and Wales" 2021 36(5–6) *Journal of Interpersonal Violence* 2166–2181 doi:10.1177/0886260518760011.

98 Musoni "The Criminalisation of 'Revenge Porn' in South Africa" 2019 *Obiter* 62.

99 *Ibid.*

100 Musoni 2019 *Obiter* 71.

101 S 1 of POPIA.

consequences may result for third parties who process such images in accordance with the definition for "processing". It is therefore important to highlight that the definition of processing in POPIA is wide enough to include further dissemination or sharing:

> "Processing means 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."[102]

Section 18 of the Act creates various alternatives for when evidence presented in criminal proceedings does not prove the commission of the offence charged, but rather proves a contravention of another section of the Act. Accordingly, an accused may nevertheless be found guilty if an alternative offence is proved. By inserting this provision, the legislature seems to seek to ensure that substance takes precedence over form in criminal proceedings. For example, the right to a fair trial may be a constitutional right sought to be exercised by an accused person, who may raise possibly warranted technicalities.[103] However, the principle of substance over form is observed by the South African legal system as the court in *Van der Walt v S*[104] held:

> "[A]n accused is not at liberty to demand the most favourable possible treatment under the guise of the fair trial right. A court's assessment of fairness requires a substance over form approach. The State correctly submits that the question is accordingly whether the Regional Magistrate committed irregularities or deviated from the rules of procedure aimed at a fair trial, and if so, whether they were of the kind to render the trial unfair."[105]

3 4 Sentencing

Section 19 of the Act is contained in Part V of Chapter 2 and deals with sentencing. This provision particularly sets out the appropriate sentences to be imposed by the courts in the event that a person is found guilty of contravening the provisions of the Act. Section 19(1) provides that where a person is found guilty of contravening sections 2(1) or (2), 3(3) or 7(2), such a person is liable on conviction to a fine or to imprisonment for a period not exceeding five years, or to both a fine and such imprisonment.

Section 19(2) provides that where a person is found guilty of contravening sections 3(1) or (2), 4(1), 5(1), 6(1) or 7(1), such a person is liable on conviction to a fine or to imprisonment for a period not exceeding 10 years or to both a fine and such imprisonment. Section 19(3) provides that where a

---

[102] *Ibid*.

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

[104] *Van der Walt v S* [2020] ZACC 19; 2020 (2) SACR 371 (CC); 2020 (11) BCLR 1337 (CC).

[105] *Van der Walt v S supra* par 23.

person is found guilty of contravening section 11(1), such a person is liable on conviction to a fine or to imprisonment for a period not exceeding 15 years or to both a fine and such imprisonment. Section 19(4) provides that where the court convicts a person of an offence in terms of sections 8, 9(1) or (2), 10 or 11(2), some limited discretion is afforded where a penalty is not prescribed in respect of that offence by any other law.

The courts are therefore empowered to impose a sentence as provided for in section 276 of the Criminal Procedure Act,[106] as deemed appropriate by the court, provided it is within that court's penal jurisdiction. Section 19(5) provides that where a court imposes any sentence in terms of this section, or where a person is convicted of the offence of theft that was committed or facilitated by electronic means, it must consider certain factors to be aggravating factors.

The list of factors to be considered include that the offence was committed by electronic means; the extent of the prejudice and loss suffered by the complainant or any other person as a result of the commission of the offence; the extent to which the person gained financially, or received any favour, benefit, reward, compensation or any other advantage from the commission of the offence; or that the offence was committed in concert with one or more persons.[107] These factors are discussed in further detail by Watney, where the ambit of receiving favours, benefits, reward and compensation are investigated further. It is important to have regard to Watney's analysis in that she points out the different ways in which more than one person may act in concert with one another to commit offences in terms of the Act.[108]

Section 19(6)(*a*) makes direct imprisonment (with or without a fine) a mandatory sentence where a person is convicted of any offence provided for in sections 2(1) or (2), 3(1), 5(1), 6(1), 7(1), 8, 9(1) or (2), 10 or 11(1) or (2),

---

[106] 51 of 1977. S 276 is titled "Nature of punishments" and provides: "(1) Subject to the provisions of this Act and any other law and of the common law, the following sentences may be passed upon a person convicted of an offence, namely … – (*b*) imprisonment, including imprisonment for life or imprisonment for an indefinite period as referred to in section 286B (1); (*c*) periodical imprisonment; (*d*) declaration as an habitual criminal; (*e*) committal to any institution established by law; (*f*) a fine; … (*h*) correctional supervision; (*i*) imprisonment from which such a person may be placed under correctional supervision in the discretion of the Commissioner or a parole board. (2) Save as is otherwise expressly provided by this Act, no provision thereof shall be construed – (*a*) as authorizing any court to impose any sentence other than or any sentence in excess of the sentence which that court may impose in respect of any offence; or (*b*) as derogating from any authority specially conferred upon any court by any law to impose any other punishment or to impose any forfeiture in addition to any other punishment. (3) Notwithstanding anything to the contrary in any law contained, other than the Criminal Law Amendment Act, 1997 (Act 105 of 1997), the provisions of subsection (1) shall not be construed as prohibiting the court – (*a*) from imposing imprisonment together with correctional supervision; or (*b*) from imposing the punishment referred to in subsection (1)(*h*) or (*i*) in respect of any offence, whether under the common law or a statutory provision, irrespective of whether the law in question provides for such or any other punishment: Provided that any punishment contemplated in this paragraph may not be imposed in any case where the court is obliged to impose a sentence contemplated in section 51 (1) or (2), read with section 52, of the Criminal Law Amendment Act, 1997."

[107] S 19(5)(*a*)–(*d*) of the Cybercrimes Act.

[108] Papadopoulos and Snail *Cyberlaw @ SA IV* ch 13 487.

if the offence was committed by the person (or with the collusion or assistance of another person) who as part of their duties, functions or lawful authority was in charge of, in control of, or had access to data, a computer program, a computer data storage medium or a computer system belonging to another person in respect of which the offence in question was committed.

This is a strict rule imposed by the Act on the court. However, it is trite that there are often exceptions to legal rules.[109] The statutory rule applies strictly, save for instances where substantial and compelling circumstances justify the imposition of another sentence.

Section 19(7) provides that where a person contravenes sections 14, 15 or 16 of the Act, such a person is liable on conviction to a fine or to imprisonment for a period not exceeding three years or to both a fine and such imprisonment.

3 5 Protection of complainant from harmful effects of malicious communications

Section 20(1) provides that a complainant who lays a charge with the South African Police Service (SAPS) that an offence contemplated in section 14, 15 or 16 has allegedly been committed against them may, on an *ex parte* basis, apply to a magistrates' court for a protection order pending the finalisation of the criminal proceedings. It is worth noting that the blanket penalty provisions contained in ECTA simply provided for liability of a fine or imprisonment for periods not exceeding twelve months or five years for the various offences set out therein.[110] The new specifically created sentences signify a shift from the ECTA regime; the Cybercrimes Act provides better protection in that sentences are specific and tailored for the various offences established in the Act.

The purpose of an application in terms of section 20(1) of the Cybercrimes Act is to curtail or prohibit any person from disclosing, or further disclosing the data message to which the charge relates. Alternatively, it may be to order an electronic communications service provider, whose electronic communications service is used to host or disclose the data message relating to the charge, to remove or disable access to the data message.

Section 20(2) provides that in determining such an application, the court *must* consider any additional evidence it deems fit, including oral evidence or evidence by affidavit, which must form part of the record of the proceedings. Section 20(3) provides that if the court determines that there is *prima facie* evidence or are reasonable grounds to believe that an offence referred to in section 14, 15 or 16 has indeed been committed against the applicant, the court may grant the order, subject to such conditions as the court may deem

[109] *See S v Coetzee* [1997] ZACC 2.

[110] S 89 of ECTA: "(1) A person convicted of an offence referred to in section […] 86(1), (2) or (3) is liable to a fine or imprisonment for a period not exceeding 12 months; (2) A person convicted of an offence referred to in section 86(4) or (5) … is liable to a fine or imprisonment for a period not exceeding five years.

fit. A limited form of discretion is therefore afforded to the court in this context and each case will be tried on its own merits.

Section 21 of the Act is discussed in detail by Watney. The section makes provision that where an application for a protection order is made in terms of section 20(1) and the court is satisfied in terms of section 20(3) that a protection order must be issued and the particulars of the person referred to in section 20(1)(*a*), who discloses the data message, or the electronic communications service provider referred to in section 20(1)(*b*), whose service is used to host or where it is used to disclose the data message, is unknown, the court is entitled to adjourn proceedings on conditions it deems appropriate. The purpose of the adjournment is for the court to order an electronic communications service provider to file an affidavit in which the latter reveals personal information including but not limited to the identity number, name, surname and address associated with the origin of a particular data message.[111]

Other orders that may be made by the courts include those envisaged in section 22 of the Act. These relate to sections 14, 15 and 16. This provision holds that whenever a person is convicted of an offence in terms of the latter sections, but there is evidence that such a person is engaged in harassment as defined in the Harassment Act,[112] the trial court may issue a protection order against such a person. Section 23 specifically provides that any person or electronic communications service provider that is convicted of an offence in terms of sections 20(9) or (10), 21(7) or 22(4) or (8), such a person is liable on conviction to a fine or imprisonment for a period not exceeding two years or to both a fine and such imprisonment.

3 6 Additional provisions in the Cybercrimes Act

3 6 1 Powers to investigate, search, access or seize

Section 25 of the Cybercrimes Act provides pertinent definitions of terms such as “access”, “investigator” and “seize”. Section 26 provides for the issue of standard operating procedures and points out the different personnel within government that are responsible for the consultation process. These include the Minister in consultation with the National Commissioner, the National Head of the Directorate, the National Director of Public Prosecutions and the cabinet member responsible for the administration of justice. Section 26 sets out the standard operating procedures which points out the different personnel within government that are responsible for the consultation process including the Minister in consultation with the National Commissioner, the National Head of the Directorate, the National Director of Public Prosecutions and the Cabinet member responsible for the administration of justice. These SOPs do not only affect the Police, it affects the investigator appointed in terms of Cybercrimes Act, any person authorised in terms of any other law to

111 Papadopoulos and Snail *Cyberlaw @ SA IV* ch 13 485.
112 17 of 2011.

investigate any offence, to follow the same SOPs.[113] It is unclear if the other entities are aware that they are supposed to make comments on the SOPs.[114] With regards to the computer evidence, the sections dealing with, is still section 15 of the ECT Act, and the validity and weight of the evidence is still under this section. Section 27 provides that the Criminal Procedure Act (CPA)[115] applies to Chapter 4, insofar as it is not inconsistent with the Cybercrimes Act.[116]

Section 28 confers police officials with the authority to search for, gain access to, or seize certain articles. Section 29 delineates the types of article that may be subject to a warrant in terms of section 28.[117] Section 30 provides that application for such a warrant may be made orally.[118] Section 31 confers authority to exercise the powers in section 28 without a warrant, but with the consent of a person who has authority to give such consent.[119] Section 32 confers authority on police officials to exercise powers set out in section 28 without a warrant.[120] Section 33 confers authority upon a police officer to conduct an arrest without a warrant against any person who commits an offence in terms of Parts I or II of Chapter 2 of the Act.[121]

Section 34 makes it obligatory for electronic communications service providers, financial institutions, or persons who are in control of information, objects or facilities, to assist a police official by providing technical assistance and any other necessary assistance in the investigation process concerning a cybercrime suspect.[122] Failure to comply with this provision is an offence.[123] Section 35 makes it an offence to obstruct or hinder a police official exercising powers in terms of sections 28 and 29 of the Act.[124] Police officials are also empowered to use force.[125]

Section 36 requires police officials to exercise their powers decently and without infringing upon other persons' rights. It is important to note that a search upon a female person may only be conducted by a female official; but there is no requirement in the provision for a male person to be searched only by a male official.[126] Section 37 sets out that an offence is committed where a police official exercises section 28 powers wrongfully.[127]

---

113 Esselaar (*Sub*) "Standard Operating Procedure of Cybercrimes Act" http://www.esselaar.co.za/legal-articles/sub-standard-operating-procedures-cybercrimes-act (accessed 2022-07-31) 1.

114 *Ibid*.

115 51 of 1977.

116 S 27(1) of the Cybercrimes Act.

117 S 28(2) of the Cybercrimes Act.

118 S 30(1) of the Cybercrimes Act.

119 S 31(1) of the Cybercrimes Act.

120 S 32(1) of the Cybercrimes Act.

121 S 33(1) of the Cybercrimes Act.

122 S 34(1) of the Cybercrimes Act.

123 S 34(2) of the Cybercrimes Act.

124 S 35(1) of the Cybercrimes Act.

125 S 35(2) of the Cybercrimes Act.

126 S 36(2) of the Cybercrimes Act.

127 S 37(1) of the Cybercrimes Act.

Section 38 creates an offence where any person provides false information under oath in relation to the provisions set out in Chapter 4.[128] Section 39 provides that it is unlawful to disclose information gathered during an investigation, unless certain exceptions apply.[129] Section 40 sets out what constitutes lawful interception of indirect communication. Section 41 empowers a designated police official to issue a preservation of data direction against any electronic communications service provider referred to in section 40(3) or a financial institution that is in possession of, receives, or is in control of, certain data.[130]

Section 41 provides that an expedited preservation of data direction may be issued by a police official where certain requirements are met.[131] Section 42 accordingly confers powers upon magistrates or judges to issue a preservation of evidence direction.[132] Section 43 of the Act provides that an application for such a direction may be made orally.[133] Section 44 provides for the disclosure of data in terms of section 29(1).[134] Section 45 provides that a police official may, without authorisation, obtain and use publicly available data from a person who is in possession of it.[135]

3 6 2 Mutual assistance

Section 46 of the Act provides that sections 48 to 51 apply in addition to the International Co-operation in Criminal Matters Act.[136] Section 47 provides that the National Commissioner or the National Head of the Directorate may provide information to a foreign law enforcement agency.[137] Section 48 relates to foreign requests for assistance and cooperation. It provides that a designated point of contact may lawfully give certain information requests to a foreign authority, court or tribunal.[138]

Section 49 makes it obligatory for an electronic communications service provider or financial institution to comply with an order of a designated judge in terms of section 48(6).[139] Section 50 provides that the National Director of Public Prosecutions (NDPP) must inform the designated judge or applicable authority in a foreign state of the outcome of a request for assistance and cooperation.[140] Section 51 provides for the issuing of a direction requesting assistance from a foreign state.[141]

---

128 S 38(1) of the Cybercrimes Act.
129 S 39(1) of the Cybercrimes Act.
130 S 40(1) and (3) of the Cybercrimes Act.
131 S 41(1) of the Cybercrimes Act.
132 S 42(1) of the Cybercrimes Act.
133 S 43(1) of the Cybercrimes Act.
134 S 44(1) of the Cybercrimes Act.
135 S 45(*a*)–(*b*) the Cybercrimes Act.
136 75 of 1996.
137 S 47(1) of the Cybercrimes Act.
138 S 48(1) of the Cybercrimes Act.
139 S 49(1) of the Cybercrimes Act.
140 S 50(1) of the Cybercrimes Act.
141 S 51(1) of the Cybercrimes Act.

3 6 3 Establishment of designated point of contact

Section 52 is contained in Chapter 6 of the Act. This section obliges the National Commissioner to establish or designate an office within existing structures of SAPS to be known as the designated point of contact for South Africa.[142] The designated point of contact's mandate in terms of the Act is to ensure the provision of assistance for the purpose of proceedings or investigations regarding the commission of offences in terms of Parts I and II of Chapter 2 or other offences.[143]

3 6 4 Evidence

Section 53 provides for the adducing of evidence by way of affidavit in relation to the interpretation of data; the design or functioning of data, a computer program, a computer data storage medium or a computer system; computer science; electronic communications networks and technology; software engineering; or computer programming. This section makes expertise a requirement for such evidence,[144] and creates an offence where false information is produced as evidence.[145]

3 6 5 Reporting obligations and capacity building

Sections 54 to 56 are contained in Chapter 8 of the Cybercrimes Act. Section 54 provides that an electronic communications service provider must, within 72 hours of having become aware thereof, report an offence committed in terms of Part I of Chapter 2 to SAPS.[146] It is important that a failure to report in terms of this provision makes such a party guilty of an offence and liable on conviction to a fine not exceeding R50 000.[147]

Section 55 provides that the cabinet minister responsible for policing must establish and maintain sufficient human and operational capacity to detect, prevent and investigate cybercrimes,[148] ensure that police officials have the requisite training,[149] and develop accredited training programmes for SAPS members to achieve this purpose in cooperation with institutions of higher learning.[150] Section 56 of the Act provides that the NDPP must keep statistics of prosecutions relating to cybercrimes.[151] The Cybercrimes Act, in regulating the entire terrain of cybercrime as it is perceived currently, offers greater legal protection for victims of cybercrimes, guidance to law enforcement agencies and legal certainty for the courts. The creation of

142 S 52(1) of the Cybercrimes Act.
143 S 52(5) of the Cybercrimes Act.
144 S 53(1) of the Cybercrimes Act.
145 S 53(2) of the Cybercrimes Act.
146 S 54(1) of the Cybercrimes Act.
147 S 54(3) of the Cybercrimes Act.
148 S 55(1)(*a*) of the Cybercrimes Act.
149 S 55(1)(*b*) of the Cybercrimes Act.
150 S 55(1)(*c*) of the Cybercrimes Act.
151 S 56(1) and (2) of the Cybercrimes Act.

specific offences as well as sentences is a move towards more efficient cybercrime regulation than was previously afforded in terms of the common law and ECTA.

In the discussion that follows, the terrain of data protection and privacy is explored from both a constitutional and statutory perspective. This article discusses both data protection and cybercrime because there are some areas of common ground between these two separate areas of the law. It is therefore submitted that discussing them together is useful for understanding the risks associated with the use of computers, the processing of data and the legal remedies afforded to persons who find themselves in need of legal protection.

4 DATA PROTECTION IN TERMS OF THE CONSTITUTION, THE COMMON LAW AND LEGISLATION

Data protection laws in the Republic of South Africa are first and foremost rooted in the Constitution,[152] which is the supreme law of the land. Although it is true and factually correct that data protection laws in the Republic have their antecedents in foreign and international legal dispensations,[153] the submissions made here are limited to the South African legal position as it has matured over the years. The Constitution protects the right to privacy in terms of section 14, which provides:

> "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."

The status enjoyed by the Constitution in South Africa is high; it is the legal instrument that has a higher status than any other legislation enacted by Parliament. This position is best described in a pronouncement of the court in the case of *Doctors for Life International v Speaker of the National Assembly*,[154] where the court held:

> "But under our constitutional democracy, the Constitution is the supreme law. It is binding on all branches of government and no less on Parliament. When it exercises its legislative authority, Parliament 'must act in accordance with, and within the limits of, the Constitution', and the supremacy of the Constitution requires that 'the obligations imposed by it must be fulfilled'. Courts are required by the Constitution 'to ensure that all branches of government act within the law' and fulfil their constitutional obligations."

For practical purposes within the context of data protection, section 14 serves the purpose of prohibiting any unlawful processing of personal information. The definition of "processing" in POPIA is wide enough to

---

152 Constitution of the Republic of South Africa, 1996.

153 Van der Merwe *Information and Communications Technology Law* (2016).

154 [2006] ZACC 11; 2006 (6) SA 416 (CC) par 68–69; 2006 (12) BCLR 1399 (CC). This case was also cited in the landmark case of *Glenister v President of the Republic of South Africa* [2008] ZACC 19; 2009 (1) SA 287 (CC); 2009 (2) BCLR 136 (CC).

encompass a number of actions that may be conducted with personal information. This definition entails a non-exhaustive list of actions as follows:

> "(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." [155]

An interpretation of the constitutional right to privacy was given in the case of *Mistry v Interim National Medical and Dental Council.*[156] The court considered searches and communications made in terms of the Medicines Act[157] and the Medical Act.[158] Substantial remarks regarding the appropriateness of an investigator's infringement upon the right to information privacy were made. In making its findings, the court had to consider whether the aforementioned medical acts provided sufficient basis for a limitation on the right to privacy.[159] The court did not deem it absolutely necessary to perform a strict balancing act between the right to privacy in terms of section 13 of the Interim Constitution in view of the aforementioned medical acts and the limitation clause (section 33) of the Interim Constitution. The following remarks were, however, made by the court:

> "The right to informational privacy is covered by the broad protection of privacy guaranteed by section 13. The second is that Mr Enslin was at all material times fulfilling state functions and, as such, obliged to respect the provisions of the Bill of Rights, including section 13.72. The third assumption – in line with the finding of McLaren J – is that Mr Enslin breached section 41(A)(9)(*a*) of the Medical Act in informing Mr Coote of the fact of the complaint against the applicant and of the proposed investigation, and also in communicating with Mr Coote during the inspection."[160]

4 1 An overview of POPIA's most salient provisions

POPIA contains specific principles or guidelines for the processing of personal information. These are formally known in the Act as the "conditions" for the lawful processing of personal information.[161] The eight conditions set out between sections 8 and 25 of the Act are accountability;[162] processing limitation;[163] purpose specification;[164] further processing limitation;[165]

155 S 1 of POPIA.

156 1998 (4) SA 1127 (CC).

157 Medicines and Related Substances Act 101 of 1965.

158 Medical, Dental and Supplementary Health Service Professions Act 56 of 1974.

159 Constitution of the Republic of South Africa Act 200 of 1993. Section 13 of the Interim Constitution provided that, "Every person shall have the right to his or her personal privacy, which shall include the right not to be subject to searches of his or her person, home or property, the seizure of private possessions or the violation of private communications." The court considered whether the limitation clause (Section 33) was applicable in the circumstances.

160 *Mistry v Interim National Medical and Dental Council supra* par 48.

161 De Stadler and Esselaar *Guide to Protection of Personal Information Act* (2020) 1.

162 S 8 of POPIA.

163 Ss 9–12 of POPIA.

information quality;[166] openness;[167] security safeguards;[168] and data subject participation.[169] Burns and Burger-Smidt characterise the conditions as minimum requirements for the processing of personal information, and they point out that legal instruments from the European Union have informed the distillation of these conditions.[170]

Included in these conditions, which are explained later in this article, is the positive duty on responsible parties to disclose breaches in the proper processing of information. POPIA sets out the complaints procedure to be instituted with the Information Regulator, as well as the civil remedies available to data subjects if their right to privacy is infringed.[171]

In the context of POPIA, the route to be followed for the enforcement of rights is: the lodgement of complaints; decisions by the Information Regulator whether to institute pre-investigation or conciliatory proceedings or full investigation; the settlement of complaints at an early stage in the proceedings; the issue and execution of warrants of entry, search and seizure; the assessment by the Information Regulator regarding the lawfulness or otherwise of the processing procedure; decisions on how to deal with information notices; referrals to an enforcement committee; enforcement notices lodging appeals in the High Court; and reliance on civil remedies.[172]

It is worth noting that the ambit of the right to privacy as expressed in the Constitution provides that, "[e]veryone has the right to privacy, which includes the right not to have … their property searched",[173] and not to have "their possessions seized."[174] Musoni investigates cyber search and seizure in light of both the Cybercrimes Act (in its form as a Bill at the time of writing) and POPIA. She notes that a search often entails a serious encroachment upon an individual's right to privacy.[175] In her discussion, Musoni draws from common-law judicial precedent to investigate whether the mechanism entitling police officials to use warrants to conduct a search and seizure in terms of the Act is not so wide as arbitrarily to infringe upon the right to privacy.[176]

Musoni firstly draws on the legal position as adopted in *Minister of Safety and Security v Van der Merwe*,[177] where the court held that in order for a

164 Ss 13 and 14 of POPIA.
165 S 15 of POPIA.
166 S 16 of POPIA.
167 Ss 16 and 17 of POPIA.
168 Ss 19–22 of POPIA.
169 Ss 23–25 of POPIA.
170 Burns and Burger-Smidt *A Commentary on the Protection of Personal Information Act* (2018) 43.
171 De Stadler and Esselaar *Guide to Protection of Personal Information Act* 1.
172 Burns and Burger-Smidt *A Commentary on the Protection of Personal Information Act* 219.
173 S 14(*b*) of the Constitution.
174 S 14(*c*) of the Constitution.
175 Musoni "Is Cyber Search and Seizure Under the Cybercrimes and Cybersecurity Bill Consistent With the Protection of Personal Information Act?" 2016 *Obiter* 690.
176 *Ibid.*
177 2011 (2) SACR 301 (CC) par 55–56.

search warrant to be valid, it must: state the statutory provision(s) in terms of which it is issued; identify the searcher; clearly mention the authority it confers upon the searcher; describe the person, container or premises to be searched; describe the article to be searched or seized with sufficient particularity; specify the offence that triggered the criminal investigation; and specify the names of the suspected offenders. Musoni offers a critique of the Cybercrimes Act in that it remains wide, and thus permits police officials to rifle arbitrarily through an individual's emails, social networking profiles, data messages, computer files and various other forms of data that may contain personal information but may not be relevant for the purposes of the criminal investigation.[178] Such a critique demonstrates the need for coherence between data protection and cybercrime legislation.

POPIA was signed into law on 19 November 2013 and its provisions began to enjoy full application from 1 July 2021, when responsible parties had to ensure compliance with the Act, failing which legal consequences would follow as the Information Regulator had been conferred with full powers to operate as a data protection authority.[179] A critical characteristic of POPIA is that it is an enabling Act, rather than an inhibiting one. This is so in that the conditions set out in the Act are what they purport to be – that is, conditions. They are for all intents and purposes to be seen as guiding principles within the ambit of which lawful processing of personal information can take place.

This is to say that POPIA does not set out to prohibit the processing of personal information, but rather to ensure that such processing is lawful, necessary and not excessive, among other limitations.[180] It is for this reason that the conditions for lawful processing of personal information are set out and discussed further in this article. From a practical perspective, it is important to note that the provisions of the Act have not found specific interpretation by the courts, but there has been some discourse emanating from the case of *Black Sash Trust v Minister of Social Development,*[181] where the court held:

> "SASSA is under a duty to ensure that the payment method it determines … contains adequate safeguards to ensure that personal data obtained in the payment process remains private and may not be used for any purpose other than payment of the grants or any other purpose sanctioned by the Minister … precludes a contracting party from inviting beneficiaries to 'opt in' to the sharing of confidential information for the marketing of goods and services."

---

178 *Ibid*.

179 Commencement dates for POPIA https://www.popiact-compliance.co.za/popia-information (accessed 2021-07-12): "Sections 2 to 38; sections 55 to 109; section 111; and section 114 (1), (2) and (3) shall commence on 1 July 2020. Sections 110 and 114(4) shall commence on 30 June 2021. Sections 2 to 38; sections 55 to 109; section 111; and section 114 (1), (2) and (3). Sections 110 and 114(4) shall commence on 30 June 2021. Please see the official Press Release from the Presidency of the Republic of South Africa "Commencement of certain sections of the Protection of Personal Information Act, 2013" (22 June 2020) http://www.thepresidency.gov.za/press-statements/commencement-certain-sections-protection-personal-information-act%2C-2013 (accessed 2021-07-12).

180 Ss 8–13 of POPIA.

181 *Black Sash Trust v Minister of Social Development supra*.

4 2 The conditions for the lawful processing of personal information

The conditions must be observed and adhered to, unless specific exemptions apply in terms of the Act.[182] In the discussion that follows, a concise summary of the conditions is made. Condition 1 is the *accountability* condition, the meaning of which is self-evident.[183] Responsible parties are obliged to be accountable to data subjects in their exercise of the function of processing their personal information.[184] It is incumbent upon both responsible parties to ensure that obligations imposed by data privacy laws are observed for the benefit of the data subject, and that where obligations are placed by POPIA *vis-à-vis* the Information Regulator or any relevant party, such obligations are honoured and observed.

Condition 2 is the *processing limitation* condition,[185] where in order for processing to be lawful, responsible parties should deliberate and be cognisant of the reason that such personal information is processed, the type of personal information involved, and the persons from whom it is collected. Lawfulness of processing is a subset of this condition, which prescribes that the processing of personal information must not be done for an unlawful purpose.[186]

Minimality is another subset of the processing limitation condition; it places a bar on the processing of personal information where the purpose of processing is inadequate, irrelevant and excessive.[187] Consent, justification and objection form the third subset of the processing limitation condition. This subset places importance upon the involvement of a data subject in the processing of their personal information.[188] In this respect, it is important to note what consent is and is not. The Act specifically defines consent in such a manner that it is only valid when it is voluntary, specific and informed.[189]

It is incumbent upon a responsible party to ensure that any exceptions or deviations from the consent condition are made in accordance with the ambit of the Act's provisions – whether these relate to direct marketing or some other ground. Direct collection from data subjects is the fourth and final subset of the processing limitation condition, which imposes a strict requirement for direct collection. However, as with most rules, there are

---

182 Thaldar "Protecting Personal Information in Research: Is a Code of Conduct the Solution?" 2021 117 *South African Journal of Science* 3.

183 S 8 of POPIA: "The responsible party must ensure that the conditions set out in this Chapter, and all the measures that give effect to such conditions, are complied with at the time of the determination of the purpose and means of the processing and during the processing itself."

184 S 1 defines a "responsible party" as follows: "The responsible party is the '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.'"

185 Ss 9–12 of POPIA.

186 S 9 of POPIA: "Personal information must be processed – (*a*) lawfully; and (*b*) in a reasonable manner that does not infringe the privacy of the data subject."

187 S 10 of POPIA: "Personal information may only be processed if, given the purpose for which it is processed, it is adequate, relevant and not excessive."

188 S 11 of POPIA.

189 S 1 of POPIA.

exceptions.[190] It may be impractical for example to meet such a condition where the personal information is contained in a public record; or if it was made public by the data subject.

Condition 3 is *purpose specification*. This condition prescribes that personal information must be collected for a purpose that is specific, explicitly defined and lawful.[191] Accordingly, the first subset of this condition is collection for a specific purpose. In the event that this condition is not observed, responsible parties may expose themselves to remedies that data subjects pursue, or that are imposed by the Information Regulator or civil remedies instituted in alternative forums such as the courts.

The second subset of this condition relates to the retention and restriction of records.[192] This condition provides that records of personal information must not be retained any longer than is necessary for achieving the purpose for which the information was collected or subsequently processed. Exceptions to this condition entail further processing for statistical, historical and research purposes, provided there are proper safeguards in place to protect the personal information.[193]

Condition 4 is the *further processing* limitation. Further processing of personal information is unlawful if it is no longer compatible with the original purpose of collection. A determination of compatibility is efficiently dealt with where the relationship between the responsible party and the data subjects, or where applicable between a responsible party and an operator, clearly sets out a limitation on further processing.[194]

Condition 5 is *information quality*, which makes it obligatory for responsible parties to take reasonably practicable steps to ensure that personal information is complete, accurate, not misleading and updated where necessary.[195] It is important to note that the purpose of processing such information is the benchmark to justify such processing.[196] The importance of such a condition is seen in instances where a contractual dispute arises between a data subject and a responsible party such as a financial institution, where the latter institutes legal proceedings on the basis of personal information collected and sets out a domicile address.

Condition 6 is *openness*, which makes it obligatory for responsible parties to maintain information manuals of their processing activities and accordingly to make crucial information available to data subjects when

190 S 12 of POPIA.

191 S 13 of POPIA: "(1*)* Personal information must be collected for a specific, explicitly defined and lawful purpose related to a function or activity of the responsible party; (2) Steps must be taken in accordance with section 18(1) to ensure that the data subject is aware of the purpose of the collection of the information unless the provisions of section 18(4) are applicable."

192 S 14 of POPIA.

193 S 14(2)–(8) of POPIA.

194 S 15 of POPIA.

195 S 16(1) of POPIA.

196 S 16(2) of POPIA.

called upon to do so.[197] It is incumbent on a responsible party to inform a data subject when personal information is collected, the purpose of its collection, the name and address of the responsible party, whether it is mandatory/necessary or not to provide the information, consequences for any failure to provide information, whether the collection is done in terms of a legal obligation, and whether the responsible party intends to transfer the information outside Republic of South Africa and any other relevant information.[198]

De Stadler and Esselaar expand on the content of the openness condition, first by highlighting that this condition requires that data subjects be informed when personal information is collected.[199] Secondly, they point out that the purpose of collection in terms of section 13 must be communicated to the data subject *before* the personal information is collected.[200] Burns and Burger-Smidt take the discussion further by bringing the principles of openness and transparency within the purview of the Constitution.[201] They state:

> "[T]he requirements of openness and transparency are well-known principles of a democratic system of government. Decisions which are shrouded in secrecy lead to suspicion and distrust."[202]

These sentiments are echoed in this article to buttress the view that openness is not only an important condition for lawful processing in terms of POPIA, but also a constitutional principle that must be observed in doing so. There are instances where the right to privacy must be weighed up against the right of access to information. In such instances, the principle of openness and transparency is tested. The importance of this principle has been demonstrated in the case of *My Vote Counts NPC v Minister of Justice and Correctional Services*,[203] where the court stated the test for lawful access to and exchange of an individual's personal information.

Condition 7 is *security safeguards*¸ which places an obligation upon responsible parties to apply appropriate, reasonable, technical and organisational steps in terms of section 19 of POPIA. The Act is instructive in the sense that it first points out that these steps or measures must be taken in order to prevent loss of, damage to or unauthorised destruction of personal information, and unlawful access to or processing of personal information.[204]

---

197 S 17 of POPIA, read together with s 14 or s 51 of the Promotion of Access to Information Act 2 of 2000.

198 S 18 of POPIA.

199 De Stadler and Esselaar *A Guide to the Protection of Personal Information Act* 18.

200 De Stadler and Esselaar *A Guide to the Protection of Personal Information Act* 19.

201 Burns and Burger-Smidt *A Commentary on the Protection of Personal Information Act* 66.

202 S 1 of the Constitution provides: "The Republic of South Africa is one, sovereign, democratic state founded on the following values: (*a*) Human dignity, the achievement of equality and the advancement of human rights and freedoms; (*b*) Non-racialism and non-sexism; (*c*) Supremacy of the constitution and the rule of law; (d) Universal adult suffrage, a national common voters roll, regular elections and a multi-party system of democratic government, to ensure accountability, responsiveness and openness."

203 *My Vote Counts NPC v Minister of Justice and Correctional Services* [2018] ZACC 17.

204 S 19(1)(*a*) and (*b*) of ¸POPIA.

This condition not only places legal obligations on responsible parties, but on operators as well.[205] Secondly, the Act maps out a further purpose for taking such measures.[206] It is important to note that this is the measure aimed at preventing data breaches and in this context, the convergence of cybercrime and data protection laws is most evident. The best example of this is the obligation upon responsible parties and operators to notify data subjects and the Information Regulator if the security of personal information is compromised.[207]

Condition 8, the final condition, is *data subject participation*, which protects the constitutional right of access to personal information and the right to the maintenance of correct personal information as being inherent in the right to privacy.[208] This ensures that responsible parties maintain correct information in addition to Condition 5,[209] and provides guidance on the manner of accessing such information.

This condition provides that where access to information requests are made in terms of sections 18 and 53 of PAIA, this ought to be done in compliance with section 23 of POPIA.[210] In terms of the right of access to information, data subjects are entitled to know that their personal information is held by responsible parties. Data subjects are also entitled to call upon responsible parties to produce proof of consent conferring upon them the authority to process their (the data subjects') personal information.

4 3 Offences, penalties, administrative fines and enforcement of POPIA

POPIA sets out offences,[211] penalties,[212] and administrative fines where infringements to its provisions occur.[213] The specific offences set out in the Act are "obstruction of Regulator", "breach of confidentiality", "failure to comply with enforcement notices", "failure to comply with information notices", "offences committed by witnesses", and "unlawful acts by responsible parties in connection with account number".[214]

Section 107 of the Act provides that any person convicted of an offence contained in sections 100, 103(1), 104(2), 105(1), or 106(1), (3) or (4) is

[205] Ss 20 and 21 of POPIA.

[206] S 2 of POPIA: "In order to give effect to subsection (1), the responsible party must take reasonable measures to – (*a*) identify all reasonably foreseeable internal and external risks to personal information in its possession or under its control; (*b*) establish and maintain appropriate safeguards against the risks identified; (*c*) regularly verify that the safeguards are effectively implemented; and (*d*) ensure that the safeguards are continually updated in response to new risks or deficiencies in previously implemented safeguards."

[207] S 22 of POPIA.

[208] S 23 of POPIA.

[209] S 24 of POPIA.

[210] S 25 of POPIA.

[211] Ss 100–106 of POPIA.

[212] Ss 107 and 108 of POPIA.

[213] S 109 of POPIA.

[214] S 100 of POPIA.

liable to a fine or imprisonment not exceeding 10 years.[215] Where there is an offence committed in terms of sections 59, 101, 102, 103(2) or 104(1), the Act provides for a fine or imprisonment for a period not exceeding 12 months.[216] It is important to note that in terms of these provisions, the court is empowered to mete out a sentence that constitutes both a fine and imprisonment.

POPIA confers powers upon the Information Regulator to deliver by hand to a responsible party who commits an offence specified in terms of the Act an infringement notice.[217] Such a notice must specify the name and address of the infringer,[218] the particulars of the alleged offence,[219] and the amount of the administrative fine payable by the infringer.[220] It is important to note that POPIA places a cap on the fine that may be imposed upon an infringer. The maximum amount payable as a fine, subject to subsection (10), may not exceed R10 000 000.00 per incident. The factors to be considered by the Regulator when determining an appropriate fine are set out in section 109(3) of POPIA.

POPIA creates an offence in the event that account information is passed onto a third party without the requisite authority from a data subject. POPIA is data protection legislation that regulates the lawful processing of personal information; in so doing, it places a duty upon responsible parties to safeguard such information by having technical and organisational measures in place to achieve this. This duty also entails cybersecurity imperatives in the form of responsible parties being in a position to identify internal or external security threats and vulnerabilities. The Cybercrime Act contains substantive and procedural measures to curtail cybercriminality, even in the context of personal information protection and the protection of incorporeal things. The convergence of laws on data protection and cybercrime is discussed next.

5 THE CONVERGENCE OF CURRENT LAWS ON CYBERCRIME AND DATA PROTECTION

It is also important to note that the convergence argument advanced in this article becomes clear when consideration is given to the fact that criminal consequences remain within the enforcement authority of the South African Police Service, the National Commissioner, the NDPP, the cabinet minister responsible for policing and other law enforcement functionaries. It is also important to note that POPIA provides an election that may be made by a responsible party to be tried in court for having committed an alleged offence.[221] Consideration may be given to section 109(6), which provides:

[215] S 107(1) of POPIA.
[216] S 107(2) of POPIA.
[217] S 109(1) of POPIA.
[218] S 109(2)(*a*) of POPIA.
[219] S 109(2)(*b*) of POPIA.
[220] S 109(2)(*c*) of POPIA.
[221] S 109(4) of POPIA.

> "[T]he Regulator may not impose an administrative fine contemplated in this section if the responsible party concerned has been charged with an offence in terms of this Act in respect of the same set of facts."

It is clear from the above that a law enforcement agency or another party may lay charges against a responsible party for the commission of an offence in terms of POPIA. In such event, the Regulator is accordingly limited in its powers to administer administrative fines.[222]

It is therefore reiterated that a convergence of cybercrime legislation and data protection legislation becomes evident in such circumstances. It is submitted that the provisions contained in the Cybercrimes Act are quite extensive. The creation of the Regulator provides an extra body that is necessary to curtail the occurrence and perpetuation of cybercrime.

This is especially true when consideration is given to the golden thread in the Cybercrimes Act, which is the imposition of mandatory obligations upon electronic communication service providers and financial institutions to cooperate with police officials. It is submitted that these service providers and financial institutions are in fact responsible parties in terms of POPIA. The available literature, including Watney's extensive discussion on cybercrime law demonstrates that the Cybercrimes Act is important legislation that has built on the common-law position and ECTA, and whose application has a bearing on data protection legislation such as POPIA.

6 CONCLUSION

It is submitted that there is a level of coherence in cybercrime and data protection laws in South Africa. Both the Cybercrimes Act and POPIA deal substantively and procedurally with the legal effects of data security and data vulnerability. Although criticism may be levelled at the length of time it has taken to enact such legislation since cybercrimes began to be a threat in the South Africa cyberspace, the law has not been completely silent; ECTA and the common law have been in place to provide remedies for victims of cybercrimes. Furthermore, the Constitution's protection of the rights to privacy and access to information has to an extent provided a legal basis for persons to take the steps in the courts where necessary.

[222] S 107 of POPIA.

SOCIAL INSURANCE COVERAGE FOR SADC MIGRANT WORKERS IN SOUTH AFRICA: A REGIONAL AND INTERNATIONAL FRAMEWORK COMPLIANCE ANALYSIS*

Bongani Khumalo
LLB LLM
Senior Lecturer, University of South Africa

SUMMARY

South Africa is a migrant destination country, attracting migrant workers from SADC countries and other regions. SADC migrant workers are vulnerable to many social security risks and need deliberate social security protection through legislation and practice. The Constitution of the Republic of South Africa, 1996 enshrines the right to social security and extends it to "everyone". This article singles out social insurance as one of the pillars of social security and examines the legislation enabling this right. It also discusses supra-national instruments that promote access to this right and evaluates compliance with relevant legislation and implementation. It posits that South Africa needs to adopt relevant and key international instruments, and to comply with the current ones. This is aimed at achieving universal access to social insurance benefits for those who are entitled, thereby progressively realising this right as envisaged in the Constitution.

1 INTRODUCTION

Labour migration is an ever-growing global phenomenon. It is estimated that in 2020 there were more than 258 million people living in a foreign country, mostly in pursuit of work and better living standards.[1] This phenomenon is prevalent in Southern Africa with South Africa regarded as the traditional migrant-receiving country and a regional leader in the economy.[2] Migrant workers who choose South Africa as their destination become part of the

* This article derives from the author's unpublished LLM dissertation. Thanks to Prof Itumeleng Tshoose for critical reading the draft of this article. I should also thank Prof Tukishi Manamela for the supervising the dissertation from which this contribution derives.

1 International Labour Organisation "Social Protection for Migrant Workers" (2021) https://www.ilo.org/global/topics/labour-migration/policy-areas/social-protection/lang--en/index.htm (accessed 2021-05-31).

2 Crush (ed) "Migration, Remittances and Development in Lesotho" 2010 52 *African Books* 22–23. This work shows that a substantial number of South African mineworkers are from Lesotho. Van Eck and Snyman "Social Protection Afforded to Irregular Migrant Workers: Thoughts on International Norms, the Southern African Development Community, Botswana and South Africa" 2015 *Journal of African Law* 1–2.

most vulnerable groups in the labour and social security landscape insofar as asserting and exercising their rights is concerned. Their vulnerability is exacerbated by their lack of political representation and of adequate legislative protection. In most of the Southern African Development Community (SADC) countries, a person's nationality and immigration status play an important role in determining that person's access to social security.[3] Almost all social assistance benefits are dependent on the citizenship and immigration status of the person. Access to social insurance benefits on the other hand is not necessarily dependent on these factors since social insurance schemes are mostly employment-based and contributory in nature. This means that South African migrant workers who are able to pay contributions to these schemes can have access to benefits with relative ease if they remain in the country after their employment terminates.[4] This may not be the case should they leave the country. The International Convention on the Protection of Rights of All Migrant Workers and Members of Their Families[5] (ICRMW) defines a migrant worker as "a person, who is to be engaged, is engaged or has been engaged in a remunerated activity in a State in which he or she is not a national".[6] Social insurance refers to public schemes created to achieve income maintenance or replacement by providing earning-related benefits,[7] and this is the context in which the term is used in this work.

South Africa's public social insurance system is created through various specialised pieces of legislation and this article deals with the role each plays in social insurance coverage for migrant workers. Each social risk (such as unemployment and illness) is covered under its own specific piece of legislation. This article focuses only on social risks covered under compulsory public schemes; therefore, retirement and health care are only mentioned to provide a complete overview of social insurance as they are covered through voluntary private retirement funds and medical schemes respectively.

The purpose of this article is to lay out the legal framework for the provision of access to public social insurance for migrant workers from the SADC region in South Africa. It does this by examining legislation, regional and international instruments pertinent to the issue. Moreover, it evaluates South Africa's compliance with these regional and international standards and puts forward a few recommendations.

---

3 Mpedi and Smit (eds) *Access to Social Services for Non-Citizens and the Portability of Social Benefits Within the Southern African Development Community* (2011) 6.

4 This is subject to exceptions (Unemployment Insurance Fund is a case in point).

5 A/RES/45/158 (1990), Adopted: 18/12/1990; EIF: 01/07/2003.

6 Art 2 of ICRMW.

7 Smit and Mpedi "Social Protection for Developing Countries: Can Social Insurance Be More Relevant for Those Working in the Informal Economy" 2010 14 *Law Democracy & Development* 3.

2 THE RIGHT TO SOCIAL SECURITY

Social security is a recognised human right in South Africa, SADC and internationally.[8] Section 27(1)(*c*) of the Constitution of the Republic of South Africa, 1996 (the Constitution) gives everyone the right to have access to social security, including, if they are unable to support themselves and their dependants, appropriate social assistance. Social security is an umbrella concept that encompasses, among other measures, social assistance and social insurance; this discussion focuses on the latter. On a number of occasions, the Constitutional Court has considered the rights enshrined in section 27 and has developed a body of jurisprudence that gives meaning and content to these rights.[9] The right to social security therefore includes a right to social insurance as its first leg. Beneficiaries of social insurance have a subjective entitlement to the benefits based on their contribution.[10] It is submitted that the use of the word "including" in section 27(1)(*c*) denotes the precedence of social insurance over social assistance. Social assistance is necessary only for those who are unable to support themselves.[11] Smit and Mpedi describe social insurance as public schemes designed to achieve income maintenance or income replacement by providing earnings-related benefits.[12] The court has said that the right to social security creates a positive duty on the State to put in place reasonable measures towards progressive realisation of access.[13] The court has further held that this does not mean that everything should be realised at the same time and that a standard of reasonableness will be employed to assess the performance on the part of the State.[14] This assessment takes into consideration the reasonableness of the government's programme given the social, economic and historical context of our society and the capacity of government institutions to implement that programme.[15] Having established that we are dealing with a right enshrined in the Bill of Rights, the pieces of legislation giving particularity to this right are outlined below.[16]

---

8 Reynaud "The Right to Social Security: Current Challenges in International Perspective" in Riedel (ed) *Social Security as a Human Right* (2007) 1. See Mpedi and Smit *Access to Social Services for Non-Citizens* 33 showing that the Constitution of Zambia makes provision for the right to social security in section 7. An indirect protection of this right can be found in section 11 of the 1998 Tanzanian Constitution. See also the SADC Code on Social Security of 2007, Art 4(1).

9 *Soobramoney v Minister of Health, KwaZulu Natal* 1997 (12) BCLR 1696 (CC); *Government of the Republic of South Africa v Grootboom* 2000 (11) BCLR 1169 (CC); *Minister of Health v Treatment Action Campaign* 2002 (1) BCLR 1033 (CC).

10 Van Langendonck (ed) "The Meaning of the Right to Social Security" in *The Right to Social Security* (2007) 6.

11 *Ibid.*

12 Smit and Mpedi 2010 *Law Democracy & Development* 3. See also Tshoose *Social Assistance: Legal Reforms to Improve Coverage and Quality of Life of Poor People in South Africa* (unpublished LLD thesis, University of South Africa) 2016 25–26 where it is set out that social insurance protects income earners and their families against a reduction or loss of income as a result of exposure to risk.

13 *Government of the Republic of South Africa v Grootboom supra* par 45.

14 *Soobramoney v Minister of Health, KwaZulu Natal supra* par 53.

15 *Ibid.*

16 See Liebenberg "The Judicial Enforcement of Social Security Rights in South Africa: Enhancing Accountability for the Basic Needs of the Poor" in Riedel (ed) *Social Security as*

3 SOCIAL INSURANCE LEGISLATIVE FRAMEWORK

3 1 Unemployment Insurance Act 63 of 2001 (UIA)

The UIA was enacted to establish the Unemployment Insurance Fund to which employees and employers must contribute[17] and to secure income protection in cases of temporary unemployment.[18] Participation in this scheme is compulsory unless specifically excluded in terms of section 3, which is briefly ventilated below. The Act makes provision for five contingencies – namely unemployment, illness, maternity or adoption, and dependant's benefit.[19]

All employees who are regarded as "contributors" in terms of section 1 of the Act are eligible for unemployment benefits. However, section 3(1)(*d*) provides that migrant workers who have to leave the Republic upon termination of their employment do not qualify as "contributors" as defined in section 1 of the Act. This means that migrant workers are not covered for the contingencies listed in section 12 of the Act.[20] However, migrants with permanent residence status are entitled to benefits under the Act.[21] This is simply because these migrants are not required to leave the Republic even after the termination of their employment.

Prospective beneficiaries can access unemployment insurance benefits by visiting any Department of Labour's Labour Centre or its provincial offices.[22] Section 17(2) of the Act provides that an application must be made within six months of the termination of the contract of employment. The Commissioner has the discretion to accept an application made after this period if a just cause is shown.[23] All necessary documentation must accompany the application when lodged.[24]

It is submitted that the exclusion created by section 3(1)(*d*) of the UIA should be challenged in light of the provisions of section 27(1)(*c*) of the Constitution, which affords the right to have access to social security to everyone, and of section 9 of the Constitution, which guarantees everyone the right to equality before the law and the right to equal protection and

a Human Right: Drafting a General Comment on Article 9 ICESCR – Some Challenges (2006) 72.

17 Except if specifically excluded by s 3 of the UIA.

18 S 2 read with s 4 of the UIA.

19 See Industrial Health Resource Group "Compensation and Other Social Protection Benefits for Workers and Ex-Workers in the Mining Sector" (2014) http://www.health-e.org.za/wp-content/uploads/2014/04/South-Africa-compensation-and-other-benefits-brochure.pdf (accessed 2021-03-03) 6.

20 The contingencies in terms of s 12(1)(*a*)–(*e*) are unemployment, illness, maternity, adoption and death.

21 Meyer "Migrant Workers and Occupational Health and Safety Protection in South Africa" 2009 21 *SA Merc LJ* 838.

22 Industrial Health Resource Group http://www.health-e.org.za/wp-content/uploads/2014/04/South-Africa-compensation-and-other-benefits-brochure.pdf 6.

23 S 17(2) of the UIA.

24 Department of Labour "How to Claim UIF Unemployment Benefits" (2008) http://www.labour.gov.za/DOL/legislation/acts/how-tos/unemployment-insurance-fund-uif/how--to-claim-uif- unemployment-benefits (accessed 2021-03-02).

benefit of the law.[25] It is submitted that section 3(1)(*d*) deprives migrant workers (at least those without permanent residence) of the protection and benefit of the law relating to unemployment insurance.

The Act differentiates between different categories of fixed-term contract worker on the ground of citizenship.[26] Olivier points out this glaring inconsistency in the Act where fixed-term contract employees who are South African citizens are covered by this scheme[27] while migrants employed on fixed-term contract are not.[28] This amounts to discrimination based on citizenship.[29]

3 2 Compensation for Occupational Injuries and Diseases Act 130 of 1993 (COIDA)

COIDA was enacted to provide for compensation for disablement caused by occupational injuries sustained or diseases contracted by employees in the course of their employment, or for death resulting from such injuries or diseases, and to provide for matters connected thereto.[30]

At common law, every employee had a right to a safe working environment.[31] This entailed that an employee who had sustained an injury or contracted a disease at work was able to lodge a delictual claim against their employer. COIDA was introduced to provide for a no-fault compensation claim against the Fund[32] rather than the employer, as the common-law protection proved to be cumbersome for affected employees.[33] The civil claim that employees had against an employer is therefore replaced by an insurance claim in terms of COIDA.[34]

Section 15(1) of the Act establishes the Compensation Fund to which every registered employer must contribute.[35] Contributions are calculated on industry-based risk assessments.[36]

---

25 Dupper, Olivier and Govindjee "Extending Coverage of the Unemployment Insurance System in South Africa" 2010 3 *Stell LR* 438.

26 Dupper *et al* 2010 *Stell LR* 456.

27 Olivier *Regional Overview of Social Protection for Non-Citizens in the Southern African Development Community (SADC)* World Bank Social Protection Discussion Paper No. 0908 (2009) 49. See also s 16(1)(*a*)(i) of the UIA.

28 S 3(1)(*d*) of the UIA.

29 Dupper *et al* 2010 *Stell LR* 456.

30 Preamble to COIDA.

31 Myburgh, Smit and Van der Nest "Social Security Aspects of Accident Compensation: COIDA and RAF as examples" 2000 4 *Law Democracy & Development* 44.

32 Nyenti, Du Plessis and Apon "Access to Social Services for Non-Citizen and the Portability of Social Benefits Within the Southern African Development Community: South Africa Country Report" (2007) http://siteresources.worldbank.org/INTLM/Resources/390041-1244141510600/Nyenti_Plessis_Apon-South_Africa-2007.pdf (accessed 2021-02-15) 20.

33 Employees had to establish some form of fault.

34 S 35(1) of the COIDA. See *Mankanyi v Anglogold Ashanti* 2011 32 *ILJ* 545 (CC) 57; *Jooste v Score Supermarket Trading (Pty) Ltd* 1999 (2) SA 1 (CC) 14; *MEC for Education v Strauss* [2007] SCA 155 (RSA) 12.

35 S 15(2)(*b*) of the Compensation for Occupational Injuries and Diseases Act.

36 Nyenti *et al* http://siteresources.worldbank.org/INTLM/Resources/390041-1244141510600/Nyenti_Plessis_Apon-South_Africa-2007.pdf 19.

The Act defines an employee as a person who has entered into or works under a contract of service or of apprenticeship/learnership, with an employer, whether the contract is express or implied, oral or in writing, and whether the remuneration is calculated by time or by work done or is in cash or in kind.[37]

It is clear from this definition that citizenship or immigration status is not a determinant factor for insurance coverage. It is also clear that even though the Act has numerous provisions on employees who are excluded from coverage, such exclusions have nothing to do with the employees' nationality or status in the Republic.[38] This means that migrant workers are also covered for occupational injuries and diseases under the Act.[39] Compensation payable is paid to a worker's dependants if he or she dies from the occupational injury or disease. The benefits offered are payable to employees who suffer temporary disablement, employees who suffer permanent disablement, and dependants of employees who die as a result of an occupational injury or disease.[40]

The Act makes provision for a range of benefits payable under different circumstances. A worker who suffers permanent disablement as envisaged in section 49 will be entitled to a monthly pension that is payable until he or she dies.[41] Section 52 makes provision for the payment of a lump sum instead of a monthly pension, upon application by the pensioner, subject to the pension not exceeding a certain prescribed amount. Medical expenses incurred by the worker as a result of an accident or disease are also covered for up to two years.[42] Another form of rehabilitative benefit is created for a sick or injured worker who needs constant help from another person in order to perform the essential activities of life. This benefit is available in addition to any other benefit received in terms of the Act.[43]

If a migrant worker to whom compensation is due, or the worker's dependants where he or she is deceased, is outside the Republic for a period of more than six months, he or she may be awarded a lump sum and his or her pension be deemed to have expired.[44] The administrative processes involved in claiming this compensation are more cumbersome for the migrant worker or his or her dependants once they leave the country.[45] In some instances, the applicants are even advised to approach SADC

---

37 S 1 of COIDA.

38 S 1(xix)(*d*) of COIDA. In terms of the definition of employee in the Act, the following are also included and therefore covered by the Act: Casual workers, seasonal workers, temporary workers, workers employed by labour brokers, and apprentices and learners.

39 Nyenti *et al* http://siteresources.worldbank.org/INTLM/Resources/390041-1244141510600/Nyenti_Plessis_Apon-South_Africa-2007.pdf 20.

40 Myburgh *et al* 2000 *Law Democracy & Development* 46.

41 S 49(4) of COIDA.

42 S 73(1) of COIDA. See also Myburgh *et al* 2000 *Law Democracy & Development* 51. In terms of s 73(2) of COIDA, the Director-General may, if he or she is of the view that continued medical treatment will reduce the disablement from which the employee is suffering, order that medical expenses be covered beyond this period or direct the employer or mutual association concerned to pay these expenses.

43 S 28 of COIDA.

44 S 60 of COIDA.

45 Rothgiesser "Social Insecurity" (2008-09-25) *Mail and Guardian* http://mg.co.za/article/2008-09-25-social-insecurity (accessed 2021-01-15).

consulates for assistance in establishing contact with the Compensation Fund.[46] Section 94 of COIDA empowers the Minister to issue a notice that puts into effect an agreement (bilateral agreement) concluded with another state to make provision for reciprocity in issues relating to compensation for occupational injuries and diseases. This provision makes it possible for a former migrant worker to receive his or her benefits in his or her home country.[47] The potential benefits of this provision are obvious, but it is unfortunate that authorities have made little or no use of this provision.[48] Maximum use of this provision by the Minister coupled with relevant and updated bilateral agreements can ensure that migrant workers receive their benefits wherever they are in the region.

Injuries in the mining and construction sectors are covered by the Rand Mutual Assurance Company Limited (RMA) and the Federated Employers Mutual respectively,[49] and not by the Compensation Fund. The benefits offered by the RMA are more or less similar to those offered by the Compensation Fund. The RMA pays lump-sum compensation if permanent disability is 30 per cent or less than total impairment. If total impairment is higher than that, then a monthly pension is awarded. Medical expenses are paid up until either maximum medical improvement or two years. Where the miner is deceased, a fatal pension is awarded to the widow or widower and the funeral expenses are taken care of. Moreover, a family allowance is paid to pensioners who are assessed at 100 per cent permanent disability.[50]

The RMA has offices in most of the mining regions of the country, as well as satellite offices in former high recruiting areas such as Maseru in Lesotho and Xai-Xai in Mozambique.[51] These offices are there to process the claims of (and on behalf of) injured and deceased former migrant miners who have returned to their home countries. In principle therefore, former miners who have returned to their home countries should be able to claim their benefits at these offices. It is submitted that the RMA should duplicate its efforts in other recruiting areas to cover more potential beneficiaries.

These funds (the Compensation Fund and RMA) often face challenges when dealing with the administration of the benefits. Compensation from the Compensation Fund must be paid directly into bank accounts of beneficiaries.[52] The obvious problem here is that some beneficiaries, especially those in remote rural areas of the SADC region, may not have access to the necessary infrastructure. In these cases, the Compensation Commissioner has to be creative and find alternatives such as the

---

46 See also the Industrial Health Resource Group http://www.health-e.org.za/wp-content/uploads/2014/04/ South-Africa-compensation-and-other-benefits-brochure.pdf 4.

47 These provisions empower the Minister of Labour to put into effect bilateral agreements that may make provision for the transfer of compensation benefits to other countries.

48 Olivier *Regional Overview of Social Protection for Non-Citizens in SADC* 49.

49 Myburgh *et al* 2000 *Law Democracy & Development* 52. These mutual associations are licensed in terms of s 30 of COIDA.

50 *Ibid*.

51 Rand Mutual Assurance Company *Annual Report* (2012) 269.

52 Olivier "Enhancing Access to South African Social Security Benefits by SADC Citizens: The Need to Improve Bilateral Arrangements Within a Multilateral Framework (Part I)" 2011 1 *SADC Law Journal* 133.

arrangement made for Basotho migrants where payments are made through the Office of the High Court.[53]

The RMA outsources the payment of benefits to service providers such as The Employment Bureau of Africa (TEBA). TEBA charges a fee to trace, verify and pay out benefits to the rightful beneficiaries.[54] In cases where beneficiaries cannot be traced or their status verified, payments are suspended until this process is successful.[55] Needless to say, the lengthier the process, the more likely it is adversely to affect the lives of the potential beneficiaries, thereby infringing upon their fundamental rights. Alternative arrangements have been made in Lesotho for those who do not have bank accounts, and payments are made through the Workmen's Compensation Trust Fund, which in turn remits the benefits down to the rightful beneficiaries. In Mozambique, benefits are entrusted with the labour ministry, which filters them down to the correct recipient.[56] As already stated, these efforts need to be duplicated throughout all affected areas as there are still many beneficiaries who are yet to receive their benefits. In 2013, the unclaimed benefits were estimated at around R5.7 billion.[57] This is a lot of money to be left idling in unclaimed benefit funds with no proper and consistent claiming processes. This money could assist the State to realise its socio-economic responsibilities towards the poor.

3 3 Occupational Diseases in Mines and Works Act 78 of 1973[58] (ODIMWA)

ODIMWA is a specialised piece of legislation that regulates medical examinations and compensation for lung diseases contracted at work in the mining sector and other works defined in the Act. This piece of legislation proves to be crucial for migrant workers since statistics show that most contract migrant workers in South Africa are employed in the mining sector.[59]

The Act makes provision for both current and former mineworkers. It provides for continuous evaluation of compensable lung diseases for active employees and lifelong surveillance and monitoring of former employees.[60] The health ministry is tasked with the administration of this Act whereas administration of COIDA lies with the labour ministry. This creates unnecessary fragmentation but will not be explored further in this contribution. The Medical Bureau for Occupational Diseases (MBOD) conducts medical examinations and certification of occupational

---

53 *Ibid*. Olivier explains how payments are made in Lesotho in fn 73 of his article.

54 RMA *Annual Report* 46.

55 *Ibid*.

56 Olivier 2011 *SADC Law Journal* 133. See fn 74 of Olivier's article.

57 Mpedi and Nyenti *Portability of Social Security Benefits in Mining Sector: Challenges Experienced by Former Mineworkers in Accessing Social Security Benefits in Selected Southern African Countries* A scoping study for Southern Africa Trust (2013) 24.

58 As amended in 1993 and in 2002.

59 Myburgh *et al* 2000 4 *Law Democracy & Development* 48.

60 Robert *The Hidden Epidemic Amongst Former Miners: Silicosis, Tuberculosis and the Occupational Diseases in Mines and Work Act in the Eastern Cape, South Africa* (2009) 16.

compensable diseases and benefits due are paid by the Compensation Commissioner for Occupational Diseases (CCOD).[61]

The Act makes provision for the payment of lump-sum cash payments and medical benefits to eligible individuals.[62] Mineworkers must undergo a medical benefits examination once every two years for the rest of their lives to detect the presence of any occupational lung disease. Former mineworkers are also required to undergo a medical benefits examination within 12 months of leaving their employment (the mine). They are, thus, entitled to these benefits even after leaving their employment.[63] If a compensable occupational lung disease is detected, the director of MBOD must be notified so that the process of accessing compensation can be put in motion. The costs of these medical examinations for in-service workers are borne by the employer, and those of former miners are borne by the Department of Health.[64]

Medical practitioners, more especially pathologists, are obliged to communicate their findings of compensable diseases to the director of MBOD. The medical practitioner must have knowledge or have reason to believe that a particular patient or the deceased was working in a mine or works as defined in the Act.[65] Owing to the territoriality principle,[66] this provision applies to South African medical practitioners and pathologists only. A migrant who dies from an occupational disease abroad will not necessarily be medically examined in the way the Act requires, and if examined, the relevant practitioner does not have to report to South African authorities. The dependants of the deceased are therefore deprived of their right to social insurance benefits.[67]

3 4 Road Accident Fund Act 56 of 1996 (RAF Act)

The RAF Act establishes the Road Accident Fund in section 2. The Fund was established to process claims and pay compensation for loss or damage wrongfully caused by the negligent driving of a motor vehicle.[68] The Act shifts the liability of the wrongful driver or owner to the RAF.[69]

This non-occupational social insurance scheme is funded by a fuel levy collected by the South African Revenue Service (SARS).[70] The Fund pays compensation for bodily injuries or deaths from all motor vehicle accidents occurring within the Republic. An employee who sustains an injury or dies

61 *Ibid*.

62 Robert *The Hidden Epidemic Amongst Former Miners* 22 and 29.

63 S 32(1) of ODIMWA.

64 Robert *The Hidden Epidemic Amongst Former Miners* 23.

65 Ss 33 and 34 of ODIMWA.

66 In terms of this principle, laws enacted in one country only apply in that country and cannot be enforced extra-territorially.

67 See the Industrial Health Resource Group http://www.health-e.org.za/wp-content/uploads/2014/04/ South-Africa-compensation-and-other-benefits-brochure.pdf 7.

68 Road Accident Fund "About the Road Accident Fund" (undated) www.raf.co.za (accessed 2021-01-15).

69 S 21(1)(*a*) of the RAF Act.

70 Road Accident Fund "Fuel Levy" (undated) www.raf.co.za/About-us/Pages/Fuel-levy.aspx (accessed 2021-01-15).

while driving or being ferried on an employer's vehicle will be compensated.[71] The Act places no restrictions on the citizenship or immigration status of the applicant.[72] Therefore migrant workers and their dependants are protected in terms of this Act.[73] The Act is, however, silent on the procedure to be followed where dependants of a deceased are outside South Africa. In view of jurisdictional limitations, it would seem that such potential beneficiaries would have to come to South Africa if they want to lodge a claim.

4 CONSTITUTIONAL SIGNIFICANCE OF REGIONAL AND INTERNATIONAL INSTRUMENTS ON SOUTH AFRICA'S SOCIAL INSURANCE PROVISION

Regional and international bodies such as SADC, the International Labour Organisation (ILO) and the United Nations (UN) have developed a body of standards in the form of treaties, conventions and protocols on social security. These standards serve as a benchmark against which the social security laws of members of these organisations must be measured.[74] Section 39(1)(*b*) of the Constitution provides for the consideration of international instruments in the interpretation of the Bill of Rights, which encompasses social security rights.[75] Section 233 of the Constitution provides for the adoption of an interpretation that is more in line with international law when interpreting social security legislation.[76] These provisions show that international law plays a vital role in the way in which South African courts interpret legislation and the rights enshrined in the Bill of Rights.[77] Furthermore, South Africa's willingness to comply with relevant regional and international instruments is demonstrated by ratification of some of these instruments. The legislature and courts are enjoined to consider international standards when passing and interpreting legislation pertinent to social security.[78] It is important to mention that these instruments

---

71 Tshoose "Justice Delayed Is Justice Denied: Protecting Miners Against Occupational Injuries and Diseases: Comments on *Mankayi v Anglogold Ashanti Ltd* 2011 32 *ILJ* 545 (CC)" 2011 (14) *PELJ* 245.

72 Mpedi and Smit *Access to Social Services for Non-Citizens* 18.

73 Nyenti *et al* http://siteresources.worldbank.org/INTLM/Resources/390041-1244141510600/Nyenti_Plessis_Apon-South_Africa-2007.pdf 20.

74 Tshoose *Social Assistance: Legal Reforms to Improve Coverage and Quality of Life of Poor People in South Africa* 237–238.

75 S 39(1)(*b*) of the Constitution provides that when interpreting the Bill of Rights, a court, tribunal or forum must consider international law. Social security rights are entrenched in s 27 of the Bill of Rights. See Olivier and Kalula "Regional Social Security" in Olivier, Smith, Kalula and Mhone (eds) *Introduction to Social Security* (2004) 163.

76 S 233 of the Constitution provides that "when interpreting any legislation, every court must prefer any reasonable interpretation of the legislation that is consistent with international law over any alternative interpretation that is inconsistent with international law". See Olivier *et al Introduction to Social Security* 179.

77 The Bill of Rights is contained in chapter 2 of the Constitution of the Republic of South Africa. See *Bhe v Khayelitsha Magistrate* 2005 (1) SA 580 (CC) par 55.

78 The case of *S v Makwanyane* 1995 3 SA 391 (CC), 1995 6 BCLR 665 (CC) par 35, serves as authority for considering both binding and non-binding international law. This principle was quoted with approval by Yacoob J in *Government of the Republic of South Africa v Grootboom supra* par 26.

are far from perfect. Some shortcomings relating to migrant worker coverage are identified, and suggestions aimed at improving the situation are put forward. The extent to which these instruments promote coverage for migrant workers is discussed below.

5 REGIONAL INSTRUMENTS

5 1 Southern African Development Community Treaty of 1992 (SADC Treaty)

The SADC Treaty is the founding document of the SADC region, which is made up of 15 member states.[79] One of the objectives of SADC is to support, through regional integration, those who are socially disadvantaged.[80] Article 21 deals with areas of cooperation and provides that member states should work together in harmony in order to achieve an integrated region based on balance, equity and mutual benefit.[81] The provision goes on to list the specific areas of cooperation; and social security is conspicuously absent from this list.[82] Article 6(2) also provides an exhaustive list of grounds of prohibited discrimination; again, discrimination based on citizenship is absent from this list.[83] It is submitted that these provisions were missed opportunities; the Treaty should have included social security as one of the areas of cooperation and citizenship as a ground upon which not to discriminate. Another opportunity to realise social security rights for non-citizens presents itself in the form of the Protocols concluded in terms of article 22 of the Treaty. The Protocols envisaged by the provision are meant to provide details of how the objectives of the Treaty should be achieved. It is rather disappointing to note that, of the 27 Protocols concluded, none deals with the social security of people in SADC.[84] The SADC Treaty and its Protocols are binding instruments;[85] the inclusion of social security rights for regional migrants would thus have served as a strong incentive for states to align their domestic social security systems with the tenets of the Treaty.

5 2 SADC Charter of Fundamental Social Security Rights of 2003 (SADC Charter)

The SADC Charter is a legally binding instrument that enjoins member states to create an environment in which every worker in the region will have

---

79 SADC member states are South Africa, Mozambique, Zimbabwe, Swaziland, Lesotho, Botswana, Namibia, Tanzania, Zambia, Malawi, Angola, Democratic Republic of Congo, Mauritius, Madagascar and Seychelles. See Art 3 of the SADC Treaty.

80 Art 5(1)(a) of the SADC Treaty.

81 Art 21 of the SADC Treaty.

82 Nyenti and Mpedi "The Impact of the SADC Social Protection Instruments on the Setting Up of a Minimum Social Protection Floor in Southern African Countries" 2012 15 *PELJ* 252.

83 *Ibid.* See also art 21 of the SADC Treaty.

84 Southern African Development Community "SADC Protocols" (undated) http://www.sadc.int/about-sadc/overview/sa-protocols/ (accessed 2021-07-03).

85 Art 1 of the SADC Treaty.

adequate social protection and enjoy social security benefits.[86] Article 10(2) makes provision for social security coverage of the unemployed and those previously employed but unable to re-enter the job market. This would include those who have acquired occupational diseases or those who suffered workplace injuries and were put on retirement. These workers must be compensated by domestic social security schemes of the host country.[87] It is notable that the SADC Charter does not distinguish between citizens and non-citizens in its provisions. This means that the provisions apply to all inhabitants of member states irrespective of where they happen to be.[88] Article 16 requires member states to submit progress reports on the implementation of the provisions of the Charter and that those who fail to comply with the standards risk be indicted to the SADC Tribunal. However, the Tribunal has been suspended since 2010.[89] The provisions of the Charter are well envisioned, and its commitments bring a glimmer of hope but as long as there is no proper implementation and enforcement mechanism, these good aspirations remain mere pipe dreams and do not translate into the lives of the people of the region.[90]

5 3 SADC Code on Social Security of 2007 (SADC Code)

The SADC Code is a non-binding regional instrument adopted to provide member states with strategic direction and guidelines in the development and improvement of their domestic social security schemes.[91] The Code seeks to provide an instrument of coordination and harmonisation of social security schemes in the region.[92] Article 6 enjoins member states to adopt social security schemes and progressively to expand their coverage and impact. The entire working class should have some form of social security coverage.[93]

Article 17(2)(a) provides that member states should enable migrant workers to participate in the social security schemes of the host state and that member states should not differentiate between citizens and non-citizens in their social security coverage.[94] Furthermore, member states should facilitate payment of the social benefits due to migrants in the host state and the exportability of those benefits to the home country where the

86 Nyenti and Mpedi 2012 *PELJ* 249. See also art 10 of the SADC Charter.

87 Art 10 read with art 8(a) of the SADC Charter. See *South Africa's Occupational Retirement System: A Comparative Social Security Perspective* (unpublished LLD thesis, University of South Africa) 2015 32.

88 Olivier and Dupper "Political and Regulatory Dimensions of Access, Portability and Exclusion: Social Security for Migrants, with an Emphasis on Migrants in Southern Africa" (2012) *International Institute for Social Law and Policy* 12 http://ilera2012.wharton.upenn.edu/ RefereedPapers/DupperOckert.pdf (accessed 2021-06-15).

89 Art 16 of the SADC Charter. See also Manamela *South Africa's Occupational Retirement System* 33.

90 See Manamela *South Africa's Occupational Retirement System* 33.

91 Nyenti and Mpedi 2012 *PELJ* 255.

92 Art 3 of the SADC Code.

93 Art 6.4 of the SADC Code.

94 Art 17(2)(b) of the SADC Code.

migrant worker has returned home or to dependants there.[95] The Code further extends its protection to irregular migrants by encouraging member states to provide them with at least basic minimum protection.[96] It can be said that this Code offers the most detailed and extensive social insurance coverage of migrants in the region as it especially mentions contingencies such as maternity/paternity, unemployment and occupational injuries and diseases as risks against which migrant workers should be protected.[97] Nonetheless, as commendable at it may be, this Code remains a non-binding instrument; as a result, member states do not have to adhere to its precepts. One way in which South Africa could live up to the aspirations of this instrument is to widen the scope of coverage of the unemployment insurance and by considering the conclusion of a bilateral agreement with neighbouring countries to facilitate exportability of benefits. The discussion that follows looks at international instruments crafted by bodies such as the UN and the ILO that are instrumental in protecting the social security rights of migrant workers.

6 INTERNATIONAL INSTRUMENTS

6 1 International Covenant on Economic, Social and Cultural Rights of 1996 (ICESCR)

The ICESCR has been ratified by 13 SADC member states.[98] South Africa signed the Covenant in October 1994 but only ratified it in 2015.[99] The Covenant makes provision for the right of everyone to social security including social insurance.[100] General Comment No.19 adopted in 2008 provides details on this provision.[101] It provides *inter alia* that migrant workers' entitlement to a benefit should not be affected by a change in workplace. Migrant workers who have contributed to a social security scheme of a country should benefit from it or at least have their contributions refunded if or when they leave the country.[102] The General Comment further explains that the right to social security encompasses the right to access and maintain benefits without discrimination.[103] The General Comment refers here to access to benefits such as unemployment benefits, occupational injury and disease benefits, and old-age benefits.[104] The General Comment

95 Art 17(2)(c) of the SADC Code.

96 Art 17(3) of the SADC Code.

97 Art 8, 11 and 12 of the SADC Code.

98 SADC member states that have ratified the Covenant are: Angola, Democratic Republic of Congo, Lesotho, Malawi, Madagascar, Mauritius, Namibia, Seychelles, South Africa, Swaziland, Tanzania, Zambia and Zimbabwe https://treaties.un.org/doc/Treaties/2007/11/27/IV-.en.pdf (accessed 2021-01-15).

99 Tshoose *Social Assistance: Legal Reforms to Improve Coverage and Quality of Life of Poor People in South Africa* 244.

100 Art 9 of the ICESCR.

101 UN Committee on Economic, Social and Cultural Rights (CESCR) *General Comment No. 19: The Right to Social Security (Art 9 of the Covenant)* (4 February 2008) E/C.12/GC/19 http://www.refworld.org/docid/47b17b5b39c.html (accessed 2021-01-25).

102 UN CESCR *General Comment No. 19* 11 par 36.

103 UN CESCR *General Comment No. 19* 2 par 2.

104 *Ibid*

reiterates the provision of article 9 of the International Covenant on Economic, Social and Cultural Rights that makes special reference to social insurance as part of the right to social security.[105] The ratification of the Covenant by South Africa is a positive and welcome development because it serves as motivation to the country to discharge its responsibilities regarding protection of socio-economic rights and to catch up with other countries that ratified the Covenant earlier.[106] Moreover, South Africa will be motivated by the reporting mechanism of the UN Committee on Economic, Social and Cultural Rights, which requires member states to submit progress reports within two years of ratification and further reports from time to time.[107] However, South Africa is reluctant to ratify the Optional Protocol to the Covenant on Economic, Social and Cultural Rights (OP-ICESCR), which gives individuals a complaint mechanism in terms of which they can lodge complaints regarding violations of their socio-economic rights by member states.[108] This means that individuals cannot yet use this Optional Protocol against South Africa.

6 2 International Convention on the Protection of All Migrant Workers and Members of Their Families of 1990 (ICRMW)

The ICRMW is the most comprehensive in providing for the social protection of migrant workers. In the Preamble, it recognises the important role played by migrant workers in the economies of poor countries and appreciates that there are millions of people affected by this phenomenon globally. The Preamble further concedes that migrant workers and members of their families have not been adequately afforded social protection throughout the whole world and therefore require international intervention. Article 27 provides that migrant workers and members of their families should be treated as nationals with regard to social security matters. Where domestic legislation excludes migrant workers and members of their families, the host state should devise a means of refunding them any contribution they may have made to a particular scheme.[109] Thus, the Convention advocates for non-discrimination and equality of treatment between nationals and migrant workers in the provision of social security.[110] The Convention appreciates that domestic legislation may exclude migrant workers in certain cases but

105 UN CESCR *General Comment No. 19* 1 par 1.

106 Tshoose *Social Assistance: Legal Reforms to Improve Coverage and Quality of Life of Poor People in South Africa* 244.

107 Tshoose *Social Assistance: Legal Reforms to Improve Coverage and Quality of Life of Poor People in South Africa* 245–246.

108 See the International Network for Economic, Social & Cultural Rights (ESCR-Net) "The Government of South Africa Ratifies the ICESCR" (2015) https://www.escr-net.org/news/2015/government-south-africa-ratifies-icescr (accessed 2021-07-04). See also Manamela *South Africa's Occupational Retirement System* 38.

109 Art 27(2) of the ICRMW.

110 Olivier and Dupper http://ilera2012.wharton.upenn.edu/RefereedPapers/DupperOckert.pdf 10.

that those exclusions should be fair.[111] If migrants have contributed towards a scheme, then they should get back their contributions.[112]

7 INTERNATIONAL LABOUR ORGANISATION (ILO) CONVENTIONS

The ILO was established in 1919 and has a membership of 185 countries.[113] The objectives of the ILO include, *inter alia*, enhancing coverage and effectiveness of social protection for all.[114] All SADC member states are members of the ILO and therefore the ILO conventions should have an impact on the provision of social protection to migrant workers in the region. Furthermore, the need to protect migrant workers from social risks has been at the heart of the ILO since its inception.[115] To achieve these objectives, the ILO has adopted a number of conventions that have a bearing on the provision of social insurance by member states. The Migration for Employment Convention (Revised)[116] provides that signatory states should afford migrant workers the same treatment as their citizens in matters of social security, and specifically mentions social insurance contingencies such as occupational injuries and diseases, maternity and unemployment.[117] Five SADC member states have ratified this convention to date.[118] The Migrant Workers (Supplementary Provisions) Convention[119] also calls for equal treatment between migrant workers and citizens in the provision of social security.[120] Article 10 provides that signatory states must adopt national policy aimed at ensuring equality of opportunity and treatment in respect of, among other matters, social security of regular migrant workers and members of their families.[121] Other conventions such as the Social Security (Minimum Standards) Convention,[122] the Maintenance of Social Security Rights Convention,[123] and the Unemployment Convention[124] enjoin

111 *Ibid.*

112 *Ibid.*

113 Dupper "Migrant Workers and the Right to Social Security: An International Perspective" 2007 2 *Stell LR* 225.

114 See the ILO website http://www.ilo.org/global/about-the-ilo/mission-and-objectives/lang--en/index.htm (accessed 2021-02-15).

115 Preamble to the Constitution of the ILO http://www.ilo.org/public/english/bureau/leg/download/constitution.pdf (accessed 2021-02-15). The Preamble notes the need for the protection of the interests of workers when employed in countries other than their own.

116 ILO *Migration for Employment Convention (Revised)* C97 (1949). Adopted: 01/07/1949; EIF: 22/01/1952.

117 Art 6(1)(b) of the Migration for Employment Convention.

118 The following countries have ratified this Convention: Malawi, Mauritius, Madagascar, Tanzania and Zambia http://www.ilo.org/dyn/normlex/en/f?p=1000:11300:0::NO:11300:P11300_INSTRUMENT_ID:312242 (accessed 2021-03-03).

119 ILO *Migrant Workers (Supplementary Provisions) Convention* C143 (1975). Adopted: 24/06/1975; EIF: 09/12/1978.

120 See the Preamble to the Migrant Workers (Supplementary Provisions) Convention.

121 Art 10 of the Migrant Workers (Supplementary Provisions) Convention.

122 ILO *Social Security (Minimum Standards) Convention* C102 (1952). Adopted: 28/06/1952; EIF:27/04/1955.

123 ILO *Maintenance of Social Security Rights Convention* C157 (1982). Adopted: 21/06/1982; EIF: 11/09/1986.

124 ILO *Unemployment Convention* C002 (1919). Adopted: 28/11/1919; EIF14/07/1921.

signatory states, for instance, to establish and maintain a system of unemployment insurance that covers migrant workers.[125] Furthermore, these instruments also call for bilateral and multilateral agreements to regulate how migrant workers should receive their benefits upon returning to their home countries.[126]

8 EVALUATION OF COMPLIANCE WITH INTERNATIONAL AND REGIONAL NORMS

This section juxtaposes aspects covered by South African social insurance legislation with the picture presented by international and regional instruments. It is clear from the discussion above that our social insurance legislation has shortcomings and in certain cases deprives migrant workers of social security rights. This continues despite the constitutional guarantee of equality of treatment and equal benefit of the law.[127] Some of the glaring dichotomies are pointed out below.

Despite the call for equality of treatment between citizens and migrant workers in matters relating to occupational injuries and diseases by the SADC Charter, legislation such as COIDA and ODIMWA continue to burden migrant workers and former migrant workers with bureaucratic processes that either hinder or delay access to benefits. Former migrants who have acquired occupational lung diseases from the mines find themselves having to come back to South Africa for examination and certification.[128]

COIDA, ODIMWA and the RAF Act do make provision for a cross-border mechanism in terms of which bilateral agreements can be concluded to ensure that migrant workers who have left the Republic gain access to their accrued social insurance benefits.[129] This is a positive gesture by the legislature. However, in practice, accessing benefits remains a pipe dream because nothing has been done to implement it. The reality is that the bilateral agreements envisaged by these provisions have not been concluded and therefore the violation of SADC migrant workers' human rights continues unabated.[130]

The South African unemployment insurance system[131] falls short when gauged against the provisions of the SADC Code, which specifically calls for consistent treatment of citizens and migrant workers, including irregular migrants, in their access to maternity,[132] unemployment[133] and occupational

125 Art 3 of the Unemployment Convention.

126 Art 9(1) of the Maintenance of Social Security Rights Convention.

127 S 9 of the Constitution.

128 See Robert *The Hidden Epidemic Amongst Former Miners.*

129 S 94 of COIDA; s 105 of ODIMWA; s 9 of the RAF Act.

130 Olivier, Dupper and Govindjee "Redesigning the South African Unemployment Insurance Fund: Selected Key Policy and Legal Perspectives" 2011 2 *Stell LR* 403.

131 S 3(1)(*d*) of the UIA excludes migrant workers who have to leave the Republic when their contract of employment terminates from access to unemployment insurance, and they are excluded from the definition of "contributor" in s 1 of the Act.

132 Art 8 of the SADC Code.

133 Art 11 of the SADC Code.

injuries and diseases benefits.[134] Similar ideas of access and maintenance of unemployment benefits without discrimination are expressed by the Unemployment Convention, the ICESCR and the UN CESCR General Comment 19 – namely that migrant workers should be allowed to contribute to unemployment insurance and that their benefits should not be affected by a change of workplace or country of residence.[135]

Dupper suggests that one way that policy makers can extend access to unemployment insurance for migrants is to zoom into section 16 of the Social Assistance Act[136] read with Regulation 31 of the Act.[137] These provisions state that a social assistance beneficiary who will be out of the country for a period not exceeding 90 days (three months) can arrange with the Minister of Social Development to receive his or her grant outside the country. The author's argument that this approach can also work concerning social insurance benefits where beneficiaries have left the Republic finds my support.[138] Migrant workers should be allowed to contribute to the UIF just like citizens who are employed on a fixed-term basis; this means that the definition of "contributor" should be extended to reflect this.[139] This would make the UIA more compatible with section 9 of the Constitution, which guarantees the right to equality.

Olivier points out that one of the factors causing migrant workers' poor access to social insurance benefits in South Africa is inadequate administrative and institutional capacity throughout the region.[140] Migrant workers are unable to contact South African authorities in their home countries and when they resort to their own governments for assistance, they are met with reluctance.[141] The poor ratification rate by South Africa of some of the key instruments also compounds the lack of compliance and makes the country's commitment to internally accepted norms suspect.[142] Olivier suggests that even though ratification of instruments does not guarantee compliance, failure to do so may be viewed as an attempt to evade international monitoring.[143]

9 CONCLUSION

The South African social insurance system makes provision for most social security contingencies espoused by international instruments. However, the

134 Art 12 of the SADC Code.

135 UN CESCR *General Comment No. 19* 11–12 par 36–37. See also Olivier *et al* 2011 2 *Stell LR* 402 where it is argued that South Africa is not complying with the Unemployment Convention.

136 13 of 2004.

137 Dupper *et al* 2010 *Stell LR* 457.

138 *Ibid.*

139 *Ibid.*

140 Olivier and Kalula in Olivier *et al Introduction to Social Security* 188.

141 Mpedi and Nyenti *Portability of Social Security Benefits in Mining Sector* 42–43.

142 Dekker "The Social Protection of Non-Citizen Migrants in South Africa" 2010 22 *SA Merc LJ* 392. See also Olivier "Enhancing Access to South African Social Security Benefits by SADC Citizens: The Need to Improve Bilateral Arrangements Within a Multilateral Framework (Part II)" 2012 2 *SADC Law Journal* 149.

143 Olivier *Regional Overview of Social Protection for Non-Citizens in SADC* 94.

legislative framework meant to give meaning to social security rights remains wanting in different respects. Migrant workers are still excluded, in some cases solely on the grounds of citizenship, a ground of discrimination that is prohibited by SADC, UN and ILO instruments. The bilateral agreements envisaged in COIDA, ODIMWA and the RAF Act should be concluded in order to facilitate the movement of benefits to their rightful beneficiaries. The definition of a "contributor" in the UIA should be expanded to enable migrant workers to contribute and to draw benefits from the UIF. Furthermore, relevant international instruments such as the Migration for Employment Convention and the Social Security (Minimum Standards) Convention should be ratified.

While waiting for legislative reforms and improvement in the ratification rate, officials directly or indirectly involved in the dispensation of social insurance benefits should find creative ways of ensuring that benefits reach the hands of the rightful beneficiaries, be it in the Republic or in the region. The RMA's offices in Maseru and Xai-Xai and the Compensation Commissioner's office in Lesotho have set examples of what can be done in this respect.[144]

[144] RMA *Annual Report* 269. See also Olivier 2011 *SADC Law Journal* 133.

MOTIVATING LAW STUDENTS TO WRITE LIKE LAWYERS: CONTEXTUALISING LEARNING IN THE "WRITE IT LIKE A LAWYER" CASE STUDY

Angela Diane Crocker
BSc LLB LLM
Lecturer, University of KwaZulu-Natal,
Attorney of the High Court of South Africa

SUMMARY

This article explores the incorporation of contextualisation as a teaching method in legal writing programmes in South African law schools. The article argues that teaching legal writing using contextualisation can take students on a transformative journey as they learn how to write like lawyers. This will enhance student comprehension and motivation, inspiring them to engage critically with the learning materials and encouraging them to transform both on a personal level and in the context of practising law within South Africa's constitutional dispensation. This concept is examined through the lens of a case study on a legal writing programme, the "Write it Like a Lawyer" [WiLL] programme implemented at the University of KwaZulu-Natal, Durban, in 2019. The article begins by emphasising the importance of critical thinking and student motivation when teaching students how to write persuasively. It then goes on to describe the significance of transformative, values-based teaching in South Africa today. The article concludes with recommendations for further research that could be carried out to inform the implementation of future legal writing programmes in South African law schools.

1 INTRODUCTION

> "Good legal writing is a virtual necessity for good lawyering. Without good legal writing, good lawyering is wasted, if not impossible. Good lawyering appreciates and is sensitive to the power of language to persuade or antagonize, facilitate or hinder, clarify or confuse, reveal or deceive, heal or hurt, inspire or demoralize."[1]

This quote emphasises the influence that persuasive legal writing can have on a target audience and makes the point that a well-written legal document can have the power to produce an intended outcome. In a recent two-part article in this journal, the author argued that law students must be able to think critically – like lawyers – in order to write critically and produce high-quality, persuasive legal writing. Also, it was submitted that students had to

[1] Feerick "Writing Like a Lawyer" 1994 21(2) *Fordham Urban Law Journal* 381–388.

be intrinsically motivated to engage with their learning materials and develop their ability to think critically.[2] The article further discussed three distinct teaching principles that are instrumental in intrinsically motivating students to engage with their writing in order to produce logical, coherent text containing well-substantiated legal arguments. These teaching principles are constructive alignment, student participation and conversations in feedback. The article also stated that each of these three principles embraces constructivist, participatory, peer-learning teaching methodologies. Part One outlined the theoretical underpinnings of the pedagogical practices considered essential to teaching and learning in a legal writing programme. Part Two focused on how the teaching principles discussed in Part One were applied in practice to the "Write it Like a Lawyer (WiLL)" case study.[3] This legal writing programme was piloted in 2019 at the University of KwaZulu-Natal, Durban (UKZN).[4] The WiLL programme formed part of a larger action research study comprising four iterations of legal writing programmes carried out over a period of about 10 years at UKZN.

Upon further evaluation of the pedagogy employed in the WiLL programme, however, it became clear that there is a further teaching principle that plays an equally important role in motivating law students to think and write critically. This additional teaching principle is transformative contextualisation.[5]

The purpose of this article is to expand on the discussion of the teaching principles that were incorporated into the WiLL legal writing programme by examining the transformative-contextualisation teaching principle. This teaching principle is particularly significant when striving to enhance student motivation, since the contextualisation of learning materials within the personal experiences of the students and in a contemporary, transformative South African constitutional democracy enables students to engage with materials in a very real way, thereby piquing their interest and increasing motivation. Thus, this article examines the importance of transformative teaching in South Africa today. It also considers how the contextualisation of legal study materials can be an important motivating factor when encouraging students to engage deeply with learning material – thereby inspiring the critical thought required to produce persuasive writing.

---

2 Crocker "Motivating Large Groups of Law Students to Think Critically and Write Like Lawyers: Part 1" 2020 41(4) *Obiter* 751–766.

3 Crocker "Motivating Large Groups of Law Students to Think Critically and Write Like Lawyers: Part 2" 2021 42(1) *Obiter* 1–19.

4 The face of teaching has forever changed since the advent of the Covid-19 pandemic so as to incorporate online teaching, or blended-learning practices at the least. However, although an in-depth discussion of online teaching techniques is beyond the scope of this article, it must be noted that the WiLL legal writing programme was conducted as a face-to-face programme before the Covid-19 restrictions on teaching practices were implemented. The pedagogical principles underpinning the concept of transformative contextualisation outlined in this article, however, remain unchanged, whether they are implemented solely online, in a blended-learning approach or in a face-to-face teaching environment. Also, the larger study referred to above, of which the WiLL programme forms a part, does address the necessity of using online and blended-learning teaching techniques post-pandemic and how this might impact the practical implementation of a legal writing programme using the teaching principles mentioned in this article.

5 It must be noted that the term "transformative contextualisation" was coined by the author.

2 THINKING LIKE A LAWYER IN ORDER TO WRITE LIKE A LAWYER

Law students must be taught the skill of critical thinking. Wegner describes "thinking like a lawyer" as "dealing with uncertainty in a very profound way" or, in an interesting turn of phrase, "domesticating doubt". She maintains that "uncertainty is inevitable in every profession that introduces students to situations that are abstract in the first instance, but then are shaped in reality by a host of individual circumstances".[6] Thus, if legal educators are to teach their students how to think like lawyers, they need to teach them strategies for dealing with uncertainty. For example, law students must be taught how to reason by posing questions, developing a routine, and by reconstructing knowledge.[7]

Much has been written about the production of a persuasive piece of legal writing being a process, and about the importance of critical thinking to that process. Bean believes:

> "Good writing … grows out of good talking – either talking with classmates or talking dialogically with oneself through exploratory writing. A key observation among teachers of critical thinking is that students, when given a critical thinking problem, tend to reach closure too quickly. They do not suspend judgment, question assumptions, imagine alternative answers, play with data, enter into the spirit of opposing views, and just plain linger over questions. As a result, they often write truncated and underdeveloped papers."[8]

So, students who are learning how to write need to learn how to engage critically with the material they are writing about. They need to be made aware that legal writing – good, persuasive legal writing in any case – is not an easy process and that it involves an "intellectual and often emotional struggle".[9] Bean argues:

> "[S]tudents come to college imagining knowledge as the acquisition of correct information rather than the ability, say, to stake out and support a position in a complex conversation. Eventually, students develop a complex view of knowledge, where individuals have to take stands in the light of their own values and the best available reasons and evidence."[10]

However, merely thinking like a lawyer is not sufficient, students must also acquire the skill of writing like a lawyer. But what is it to "write like a lawyer"? Feerick speaks of sound advice received as a young lawyer from experienced legal professionals who emphasised that "legal writing must be clear, precise, factually-based, and ethically sound".[11] Greenbaum states that the term "legal writing" implies:

---

6 Wegner "Better Writing, Better Thinking: Thinking Like a Lawyer" 2004 10 *The Journal of the Legal Writing Institute* 9–22.

7 Wegner 2004 *The Journal of the Legal Writing Institute* 14.

8 Bean *Engaging Ideas: The Professor's Guide to Integrating Writing, Critical Thinking, and Active Learning in the Classroom* (1996) 7.

9 Bean *Engaging Ideas* 19.

10 Bean *Engaging Ideas* 25.

11 Feerick 1994 *Fordham Urban Law Journal* 387.

> "[a]n understanding of rhetorical structure and certain stylistic conventions, and an appropriate use of legal terminology within a range of fairly well-defined genres of legal texts, such as judgments, legal opinions, heads of argument and formal communications between members of the discourse community, as well as written communications to non-members, that is clients."[12]

The nature of legal writing, however, is often more nuanced than this and may take on different characteristics in order to achieve a desired outcome. This outcome may be to persuade a client to accept a legal opinion using simple, clear wording devoid of legal jargon; or to persuade a judge of a client's innocence in legal heads of argument using clear, unambiguous legal terminology and legal justification; or to provide an opportunity for negotiation at a later date in a labour contract by intentionally leaving certain clauses open-ended; or to draft government regulations using clear and unequivocal technical phrasing. Feerick illustrates the nuanced nature of legal writing:

> "Some language that seems to be bad legal writing is not that at all. Vagueness or ambiguity is sometimes deliberate. It may result from compromises which are necessary to resolve a present dispute even though the possibility of future disagreement or even litigation is left open."[13]

Thus, legal writing must use whatever literary devices are necessary to communicate persuasively. This is not an easy skill to teach but it can be done, and it begins with student motivation.

3 MOTIVATING LAW STUDENTS TO WRITE LIKE LAWYERS

Bean argues that, in order to think critically and write persuasively – like lawyers – students must engage deeply with the topic and with the materials underpinning that topic. In order to engage deeply, they must talk about the topic, be patient and sit with the topic, suspend their own judgement and look at alternatives, pose questions to expose any doubt contained in the materials, and enter into the spirit of opposing views. In this way, they will then be in the position to deconstruct the doubt that was exposed so that their knowledge of the topic can ultimately be reconstructed.[14] Thus, students must realise that there is no one correct answer. Instead, they must be encouraged to take a stand in light of their personal values and the best available reasons supporting their decision.

Getting students to engage deeply with the required legal materials to produce well-written, critical comment requires motivation.[15] Keller makes

---

12 Greenbaum "Teaching Legal Writing at South African Law Faculties: A Review of the Current Position and Suggestions for the Incorporation of a Model Based on New Theoretical Perspectives" 2004 1 *Stellenbosch Law Review* 3–21, discussing the ideas of Benson in Benson "The End of Legalese: The Game is Over" 1985 *Review of Law and Social Change* 518–522.

13 Feerick 1994 *Fordham Urban Law Journal* 382.

14 Bean *Engaging Ideas* 5.

15 There is extensive literature confirming the importance of student motivation in effective teaching and learning. Keller ("How to Integrate Learner Motivation Planning into Lesson Planning: The ARCS Model Approach" *Paper presented at VII Semanario, Santiago, Cuba*

the assumption that providing students with motivation is, for the most part, the responsibility of the educator. He states:

> "This assumption is important because educators, both designers and instructors, all too often assume that motivation is the student's responsibility. 'I can design (or teach) a good course,' we often hear, 'but it's up to the students to decide if they want to learn it.'"[16]

Bean's simple, practical approach of getting students to talk can be used to great effect to enhance student motivation to engage with legal material at a deeper, more critical level. If students are offered a range of materials that lend themselves to alternative views and creative solutions, this will spark their imagination and the will to start talking. They can then develop the stamina to continue this communication beyond the surface level. Then, as these students develop intellectually in a supportive learning environment, they can learn how to formulate insightful opinions and persuasive, cogent, complex arguments from disparate sources and evidence. Encouraging students to talk among themselves in groups or in pairs or in lecturer-led class discussions is the first step to motivating them really to think about the issues at hand. The more they talk in a guided environment, the more critical and worthwhile the discussions will become. However, Bean's view that this approach needs time to embed in the minds of the students is also vitally important when considering the intrinsic motivation of students.

Materials must be carefully chosen around a complex, creative, central theme. This will allow them to delve deeper into more critical discussions about the topic, inevitably leading to more nuanced and interesting insights. These discussions are key factors in enhancing the intrinsic motivation of law students. Materials that contextualise issues so as to resonate with students at a personal level and transform their mindsets in a broader, values-based societal context can raise students' interest level in class discussions and lead them on to more critical debates. One of a number of teaching principles that can be used to motivate students is transformative contextualisation.

4 THE TRANSFORMATIVE-CONTEXTUALISATION TEACHING PRINCIPLE

Implementing the transformative-contextualisation teaching principle in a legal-writing programme requires a great deal of thought to be given to the

11) writes: "[There has] never been any doubt about the importance of learner motivation, but there have been difficulties obtaining methods and approaches for systematically predicting and influencing motivation" .Keller advocates the use of the ARCS model of motivation, which, he writes, "(is) based on a synthesis of motivational concepts and characteristics into the four categories of attention (A), relevance (R), confidence (C), and satisfaction (S). These four categories represent sets of conditions that are necessary for a person to be fully motivated" (Keller *Paper presented at VII Semanario, Santiago, Cuba* 2). However, Keller also contends that, despite being widely recognised and implemented around the world, this model is still evolving and that alternative approaches will still be developed. See also Keller "Strategies for Stimulating the Motivation to Learn" 1987 *Performance and Instruction* 1–7.

16 Keller and Burkman "Motivation Principles" in Fleming and Levie (eds) *Instructional Message Design: Principles From the Behavioral and Cognitive Sciences* 2ed (1993) 4.

type of materials used to encourage intrinsic student motivation. It is vital that materials be contextualised. In other words, the materials about which students will be writing must place the writing exercise in a familiar reality that they understand on a personal level. In addition, ultimately the materials and facilitated discussions must be relatable, but still complex enough to take the students out of their personal context and into a new way of thinking about and understanding the issues raised by the writing exercise.

The transformative-contextualisation teaching principle leads students on a journey of transformation from the familiar (for example, a student's experience of racial prejudice) to the unfamiliar (for example, a gay or lesbian student's experience of homophobia or a disabled student's experience of ableism). It helps them to use their understanding of an issue such as discrimination but apply it to new contexts, thus exposing them to transformative thinking. The journey takes them out of one way of thinking (the rush to judgement based on a superficial understanding) and introduces them to a new way of values-based, critical thinking (taking their time and becoming immersed in the topic). This approach keeps students motivated, as the issue is relevant but potentially challenging to their value system.

This journey of transformation, however, cannot simply be personal. Given that South Africa has a transformative Constitution and that part of the role of lawyers is to contribute to achieving the goals of the Constitution, this journey has also to pay attention to wider societal needs and goals. In this way, contextualisation and transformative, values-based teaching are inextricably linked. Thus, a legal-writing programme (ranging from the theme chosen for discussions, to the materials chosen to support those discussions, and the forms of assessment used) must be contextual in a personal sense *and* in a transformative sense. The overall design of a legal-writing programme must situate the programme in a social context that is relevant to students at a personal level, as well as in the broader South African constitutional context of the transformative imperative. In this way, student motivation and engagement will be enhanced.

The discussion below unpacks this teaching principle and the link to intrinsic motivation. First, the contextualisation aspect of the principle is analysed, and then the transformative, values-based teaching aspect is reviewed.

4 1 Contextualised teaching

When teaching legal writing to law students, it is vital to encourage intrinsic motivation. To do this, it is important to use contextualised legal material and employ contextualised practical exercises to supplement teaching methods, as well as ensure that the programme's assessments are appropriately contextualised. This is especially important when teaching in our multi-cultural South African society where very often "words that may seem to have a single meaning may not be understood in the same way with people living and working in varying cultural contexts".[17]

[17] Wegner 2004 *The Journal of the Legal Writing Institute* 16.

To motivate students intrinsically, the materials used must not only demonstrate how to write persuasively, but must also implicitly show why a law student should want to write persuasively. They must answer the student's questions: what is the purpose of persuasive writing and why should I care about this? In other words, when choosing the module materials to support the writing process, law teachers must choose materials that link to the lived experiences of the students that are to engage with those materials.[18] This will stimulate discussion and active participation, as students will be inspired by their ability to contribute to the dialogue.

The pedagogical strategy underpinning the contextualisation principle uses Quinot's ideas on transformative legal teaching[19] and Lovat's writings on values education.[20] Both these pedagogical concepts (discussed in more detail below) provide rich opportunities to contextualise material, thereby motivating law students to think critically and ultimately write like lawyers. Not all legal writing needs to be dry and formalistic. It may incorporate life stories[21] that are intrinsically motivating because they expose real-world values that will resonate with students.

A careful selection of high-quality, contextualised subject matter is invaluable; only once students have seen the powerful difference that high-quality writing can make, will they be motivated to put in the hard work required to improve their legal writing. The material chosen must also aid the transformation journey that students embark upon in the legal writing programme and enable students to understand the importance of creative, persuasive writing in a transformative, contemporary South Africa. Quinot maintains that responsible teaching requires law teachers to follow a transformative teaching framework that

> "embraces the normative framework put forward by the Constitution in its methodology. This involves not only overt substantive reasoning but also recognition of the possibilities for creativity in applying and developing the law to meet the aims of social transformation."[22]

4 2 Transformative, values-based teaching

When teaching legal writing in the context of a country bound by a transformative constitution, it is not enough merely to awaken a curiosity in law students in order to encourage critical thinking.[23] Students need to be

---

18 An example of contextualised legal material that could be used to teach writing skills to UKZN law students would be the case of *MEC for Education, KwaZulu-Natal v Pillay* 2008 (1) SA 474 (CC). The case discusses the right to dignity of a South Indian High School pupil. The principles discussed in this case would resonate with many students who are of a similar ethnicity and age and live in a similar geographical location to the persons in the case. These aspects will pique their interest and encourage deep engagement with the material.

19 Quinot "Transformative Legal Education" 2012 129 *South African Law Journal* 411.

20 Lovat *Values Education: The Missing Link in Quality Teaching, Values Education for Australian Schooling* Keynote address summary, Values Education Forum (May 2006).

21 These life stories could include, for example, actual and fictionalised events, biographies, fables, literature, poems and songs.

22 Quinot 2012 *The South African Law Journal* 414.

23 Crocker 2020 *Obiter* 756.

aware of the need to move beyond the views expressed in the legal materials with which they are engaging and to consider the transformative imperative laid down by the South African Constitution. The South African Constitution in its Preamble challenges South Africans to "(h)eal the divisions of the past and establish a society based on democratic values, social justice and fundamental human rights".[24] Legal practitioners as guardians of the law are perfectly placed to uphold these foundational values that ought to permeate every aspect of legal practice. Freedman and Whitear-Nel note that lawyers are critical to the success of our democracy as they are able to use the law to hold the State accountable and to promote social justice. They suggest it is the responsibility of lawyers to ensure the Constitution does not become "dead letter" law.[25]

This emphasis on the living law and its ability to transform not only the views of law students at a personal level, but also ordinary South Africans in society, has a powerful motivating effect. Legal educators who are committed to teaching law responsibly in a climate of transformative education are in the ideal position to transform student thinking by inculcating a social conscience in their students. This is reiterated in the writings of Freedman and Whitear-Nel on the 2013 LLB summit:

> "Concerns that were prominent at the summit included the need to develop knowledgeable, skilled, value-driven and ethical law graduates who would be able to contribute meaningfully to society, who would have a highly developed social conscience, and who would strive towards social justice."[26]

Legal writing in South Africa today requires nuanced critical thinking and problem-solving skills, and curriculum design cannot be carried out in isolation. If legal educators are committed to teaching law responsibly, they must be aware of the wider context within which they teach, including the transformative constitutional dispensation of contemporary South Africa.[27]

Quinot posits that teaching students how to think, read and write like lawyers in South Africa today requires some reimagining. He comments:

> "As law teachers, our legal culture manifests in the way we teach and it is thus our teaching methodology with which we need to engage critically in order to align what we do with the transformative aspirations of our Constitution."[28]

He believes that constructivist teaching methodologies that encourage active participation to enable students to construct their own knowledge of the law are the best fit for a transformative teaching paradigm.[29]

---

[24] Constitution of the Republic of South Africa, 1996.

[25] 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* 234 236.

[26] Whitear-Nel and Freedman 2015 *Fundamina* 247.

[27] Quinot 2012 *SALJ* 417. See also Crocker ("Facing the Challenge of Improving the Legal Writing Skills of Educationally Disadvantaged Law Students in a South African Law School" 2018 21 *PER/PELJ* 1 7), who makes the point with respect to teaching legal writing skills in particular that "the multi-faceted nature of legal writing, encompassing legal analysis and application, as well as logical sequencing and argument, could not be taught in a vacuum, particularly when most of the student base was largely unfamiliar with any form of legal discourse and many had English as a second language".

[28] Quinot 2012 *SALJ* 416–417.

A teaching paradigm that incorporates transformative contextualisation also encompasses a values-based teaching approach. Lovat draws on Habermas's theory of knowing, which he says "has been instrumental in much of the thought that educationists have seized on in attempting to deepen our understanding of learning and stretching conceptions of the role of the teacher".[30] Lovat maintains that values education should further Habermas's ideas of what it is to understand, which he says is

> "the knowing and understanding that comes from critique of all one's sources of knowledge and ultimately from critique of one's own self or, in Habermas's terms, from knowing oneself, perhaps for the first time."[31]

To encourage understanding in this way is to further values education, the focus of which is:

> "[t]o push student learning towards self-reflectivity, that knowing of self that allows one to step out of the shadow of one's upbringing and cultural heritage, to challenge not only the preconceived beliefs and behaviours of this upbringing and heritage but, more painfully, one's own deep seated comfort zone of beliefs and behaviours. The task, in other words, is to transform."[32]

Lovat makes another important point. This transformation of student beliefs and behaviours

> "[d]oes not mean imposing a different set of beliefs and values on students than those they came in with. Imposing someone else's comfort zone would be a contradiction of everything implied by critical and self-reflective knowing. It does however mean challenging students to see that whatever beliefs and values they brought with them are but one set, one life-world, and to consider the life-worlds of others."[33]

This ability to accept other world views is essential to thinking like a lawyer, since lawyers are obliged objectively to assess problems presented by clients and then advocate the best course of action for those clients, regardless of who they might be.[34] Lawyers are frequently required to advise

---

29 Quinot notes: "Under constructivist pedagogy, the teacher is no longer the sole authoritative figure in the class, presenting students with ready-made knowledge for them simply to accept. Rather, the process of learning occurs by students engaging with the materials and each other and forming their own constructions that they must justify within the knowledge community, guided by the teacher using a set of explicit and clear normative values." Quinot 2012 *SALJ* 422.

30 Lovat *Values Education: The Missing Link in Quality Teaching* 3.

31 *Ibid.*

32 Lovat *Values Education: The Missing Link in Quality Teaching* 4.

33 *Ibid*. In a similar vein, Fink (*Creating Significant Learning Experiences: An Integrated Approach to Designing College Courses* (2003) 7) talks of increasing student motivation by providing students with "significant learning experiences". These experiences, the author maintains, are learning experiences that change the students in some important way and have two outcomes, namely: "Significant and lasting change: Course results in significant changes in the students, changes that continue after the course is over and even after the students have graduated. Value in life: What the students learn has a high potential for being of value in their lives after the course is over, by enhancing their individual lives, preparing them to participate in multiple communities or preparing them for the world of work."

34 An in-depth exploration of values-based teaching practices and ethical pedagogy are beyond the scope of this article. However, in this respect, the pedagogy developed by Mary Gentile – giving voice to values (GVV) – is important to note. Holmes ("Giving Voice to

and represent clients whose values do not reflect their own. Therefore, in order to represent their clients adequately and to maintain the standard of professionalism required, they must learn to manage this separation between their own beliefs and that of their clients.[35]

The importance of upholding the transformation imperative as set out in the Constitution, and by extension the necessity for law teachers to adopt values-based teaching methodologies, is echoed in several documents that are designed to regulate the conduct of legal professionals – from the time they begin their tertiary studies as potential legal professionals to the time they enter legal practice as qualified legal professionals. For example, the exit level outcomes of South African law students are clearly articulated in the South African Qualifications Authority (SAQA) registered qualification document, which describes the purpose and rationale of the Bachelor of Laws qualification as, *inter alia*:

> "To provide the South African community with lawyers who are empowered to accept their responsibility towards the realisation of a just society based on a constitutional democracy and the rule of law within an international legal order."[36]

Also, the Legal Practice Act[37] requires the professional conduct of legal practitioners to be regulated in terms of the Code of Conduct for Legal Practitioners, Candidate Legal Practitioners and Juristic Entities. Sections 3.1 and 3.2 of the Code state:

> "Legal practitioners, candidate legal practitioners and juristic entities shall–
> 3.1 maintain the highest standards of honesty and integrity;
> 3.2 uphold the Constitution of the Republic and the principles and values enshrined in the Constitution, and without limiting the generality of these principles and values, shall not, in the course of his or her or its practice or business activities, discriminate against any person on any grounds prohibited in the Constitution."[38]

The transformative-contextualisation teaching principle was implemented in the WiLL legal writing programme, which formed part of the LLB module "Legal Research, Writing and Reasoning" at the University of KwaZulu-Natal.

Values: Enhancing Students' Capacity to Cope with Ethical Challenges in Legal Practice" 2015 18(2) *Legal Ethics* 115–137, discussing Gentile *Giving Voice to Values. How to Speak Your Mind When You Know What's Right* 2010) makes the comment: "Legal ethics pedagogy does not often attend to the gap between principles and effective action. A pedagogy that directly addresses this gap is 'Giving Voice to Values' (GVV). Developed by US academic, Mary Gentile, GVV focuses not on the normative question of 'what is the right thing to do?', but on the behavioural question of 'how do we get the right thing done?'"

35 This concept is not dissimilar to the idea of decolonisation of the mind.

36 https://regqs.saqa.org.za/viewQualification.php?id=22993 (accessed 2021-03-04).

37 28 of 2014.

38 This Code of Conduct is published in terms of s 97(1)(*b*) of the Legal Practice Act 28 of 2014, published in *GG* 42337 of 2019-03-29.

5 TRANSFORMATIVE CONTEXTUALISATION IN THE WiLL LEGAL WRITING PROGRAMME: A CASE STUDY

The Legal Research, Writing and Reasoning module (LRWR) is an eight-credit,[39] semesterised, second-year LLB module. The module content covers theory and practical exercises in critical thinking and legal-writing skills, with some practical application, and uses a transformative, constructivist teaching pedagogical framework.[40] The Write it Like a Lawyer legal writing programme (WiLL) took a small-group, participatory, skills-based lecture format, using an active learning ethos to encourage student motivation. The materials, formal lecture preparation, lecture tasks and assessments (examples of which are discussed under heading 6 to follow) were all carefully chosen, so as to be congruent with a contextualised, transformative teaching paradigm.

The WiLL programme began by introducing the theme of the programme: the right to dignity in South Africa. This theme was chosen because it allowed for the transformative contextualisation of the module materials in two ways. First, much of the material dealing with the right to dignity contextualises real-world issues relating to this right, thereby enabling students to identify at a personal level with the issues discussed in the academic articles and law reports that are studied throughout the programme. Secondly, the theme highlights a range of important societal issues that the right to dignity addresses, both in a historical context and currently in a transformative South African society.[41] This transformative contextualisation of the teaching materials increases students' intrinsic motivation, encouraging students to engage deeply and to think critically about the issues raised in the materials, thereby enhancing their persuasive writing skills.

Thus, the subject materials chosen to facilitate the acquisition of legal writing skills in the WiLL Legal Writing programme were specifically selected to fit within a transformative teaching framework and to contextualise the use of creative, values-based, persuasive legal-writing skills. The materials are embedded in a contemporary South African context, illustrating the power of critical, persuasive writing to transcend conservative legal thinking and to promote social reform and transformative constitutional norms and values. Quinot states:

> "Matters of morality and policy, even politics, can no longer be excluded from legal analysis … It will call into question our own professional sensibilities and will require a critical self-assessment of whether we are able to engage in the kind of value-based reasoning that we are now required to teach."[42]

---

39 An 8-credit module is one that has 80 notional study hours allocated to it and usually has two 45-minute lecture slots per week for 13 weeks.

40 See a detailed discussion on the structure of this module in Crocker 2020 *Obiter* 763.

41 For example, the interrelationship between the right to freedom of culture and the right to dignity, which addresses the expression of cultural identity in the form of dress, as well as the plight of same-sex partners and their historical legal struggle for the right to marry under the same law as heterosexual couples.

42 Quinot 2012 *SALJ* 415.

Three main source materials were used in the programme: an academic journal article written by Peté, entitled "South Africa's Quixotic Hero and His Noble Quest: Constitutional Court Justice Albie Sachs and the Dream of a Rainbow Nation";[43] the Constitutional Court judgment of *Minister of Home Affairs v Fourie*;[44] and a legal blog article written by De Vos entitled "Newsflash: Sex Workers Also Have Dignity".[45] These materials were chosen to highlight the value of the right to dignity and the dignity of difference in South Africa. Thus, the sources were chosen not only because they are simply and persuasively written and thus demonstrate how to write clearly and simply – like a lawyer – but because these sources lend themselves to a critical, values-based discussion on an important foundational value of the Constitution, namely dignity. This is a value that requires the protection of the highest court in the land and which, if adequately protected, will lead to the transformation of the lives of ordinary South Africans. The topics discussed in the materials were also contextually relevant to the students. Programme facilitators encouraged a close reading of and discussion on the legal language, legal argumentation and legal logic of these three sources in order to demonstrate how persuasive quality writing can be.

The first source, the academic journal article written by Peté,[46] discusses a Constitutional Court case[47] about the right to dignity and the background of the judge who penned the judgment, Justice Albie Sachs. The persuasiveness of the academic journal article lies not only in its eloquent outline of the importance of human dignity as an abstract value, but also in its focus on the human connection, that is, the man behind the Constitutional Court judgment that was creatively and elegantly written and which strongly facilitated the protection of dignity in South Africa. Students were able to connect with the creative, story-telling writing style of the journal article on a number of levels. It enabled them to contextualise the subject matter of dignity jurisprudence in an easy-to-understand manner and to appreciate how a well-written piece can draw in the reader, while still encouraging critical thought. Peté's focus on personalising the man behind a Constitutional Court judgment was a strong motivation for students to appreciate not only the profound impact that Sachs J's words had on certain sectors of society, but also to appreciate the passion and care behind the Constitutional Court Justice's powerful words. Peté voices this sentiment:

> "What, however, of the man behind the stark details set out above? A romantic and idealistic thread is apparent throughout both the judgments and other writings of Sachs. Indeed, it is precisely the emotional thrust behind his ideas, his sensitivity to the pain of others, his willingness to dream, and his

---

43 Peté "South Africa's Quixotic Hero and His Noble Quest: Constitutional Court Justice Albie Sachs and the Dream of a Rainbow Nation" 2010 *Obiter* 1–15.

44 *Minister of Home Affairs v Fourie (Doctors For Life International, Amici Curiae); Lesbian and Gay Equality Project v Minister of Home Affairs* 2006 (1) SA 524 (CC).

45 De Vos "Newsflash: Sex Workers Also Have Dignity" (7 June 2010) https://constitutionallyspeaking.co.za/newsflash-sex-workers-also-have-dignity/.

46 Peté 2010 *Obiter* 1–15.

47 *Minister of Home Affairs v Fourie (Doctors For Life International, Amici Curiae); Lesbian and Gay Equality Project v Minister of Home Affairs supra*.

> courage not to allow the dream to die, which has endeared him to lawyers, academics and ordinary South Africans."[48]

The second source used in the WiLL programme was the Constitutional Court case of *Minister of Home Affairs v Fourie*.[49] This is the case that is also discussed in Peté's academic journal article used for the first source. This case was introduced after the article to students in order to demonstrate the more formal, complex style of judgment writing and how to draft a case summary. Wegner maintains that "[c]ases provide a very neat framework by which to advance people's cognitive skills – higher-order thinking skills, through systematic exploration".[50] An in-depth exploration of this case allowed students to witness how the relevant legal principles were expertly applied to a complex set of facts supported by sound legal reasoning. This was a practical demonstration of how to write like a lawyer. They were then encouraged to discuss alternative outcomes to the case, should the facts have differed in any way – that is, a demonstration of how to think like a lawyer. In addition to this, students were taken through a critical reading of the judgment in some detail – to illustrate how mini-summaries and sub-headings were used throughout the piece by Justice Sachs to break up chunks of text and to keep the reader engaged and up-to-speed with the arguments presented.

However, in addition to showing students the necessity of a simple, structured writing style to help with the comprehension of a lengthy legal text with complex, nuanced arguments, this judgment was selected as it showed Sachs J's superior, persuasive legal-writing skills and the ability to engage in a creative, critical discussion of important social issues in such a way that readers are elegantly persuaded by his point of view.

Thus, this source demonstrated how a creative writing style can be used, even within the confines of a formal judgment, in order to elevate the persuasiveness of the arguments. An excellent example of this is Sachs J's eloquent writings about the right to be different:

> "The acknowledgment and acceptance of difference is particularly important in our country where for centuries group membership based on supposed biological characteristics such as skin colour has been the express basis of advantage and disadvantage. South Africans come in all shapes and sizes. The development of an active rather than a purely formal sense of enjoying a common citizenship depends on recognising and accepting people with all their differences, as they are … At issue is a need to affirm the very character of our society as one based on tolerance and mutual respect. The test of tolerance is not how one finds space for people with whom, and practices with which, one feels comfortable, but how one accommodates the expression of what is discomfiting."[51]

This text also served to remind students of the importance of changing their mindset from one of authority to one of justification; to this end, they were asked to compare the different perspectives that emerged from the majority

---

48 Peté 2010 *Obiter* 4.

49 *Supra*.

50 Wegner 2004 *The Journal of the Legal Writing Institute* 17.

51 *Minister of Home Affairs v Fourie (Doctors For Life International, Amici Curiae); Lesbian and Gay Equality Project v Minister of Home Affairs supra* 549 E–G.

and minority judgments in the *Fourie* case. Students were encouraged to conduct a close critical reading of both the majority and the minority judgments, and to use their critical thinking skills to decipher how judicial opinion in a single judgment can be both the same and different.

An important aim of studying this particular judgment, which dealt with the right of same-sex couples to marry, was to take the students on a transformative journey on two levels: first, at a personal level, learning about South Africans who may embrace a different lifestyle to themselves but who are nevertheless deserving of being treated with equal dignity; and secondly, at a broader societal level, seeing the powerful difference that dignity jurisprudence can make in certain sectors of South African society.

The third source used in the WiLL programme was a legal blog article written by De Vos, an experienced legal journalist and constitutional law commentator. The subject matter of this source mirrors the subject matter of the previous sources and provides an interesting discussion on the inherent right to dignity of sex workers. De Vos's legal blog piece illustrates to the students a third and final style of legal writing: the informal, factual, abbreviated writing style of newspaper journalists, with a completely different target audience to that of an academic journal article or judgment. Just as important, this source illustrates in a deft, uncomplicated fashion, the creative development of an argument. It also touches on the transformative, societal debate about the controversial topic of sex work in South Africa.

Thus, the transformative contextualisation of the materials used made the sources relevant to students at a personal level, which increased student comprehension of the subject matter and their intrinsic motivation to engage deeply with the materials. This deep engagement enabled students to think creatively about how a specific writing style could be used to communicate most persuasively with their target audience. The complex issues raised in the materials gave students the space to pose questions and debate any areas of doubt and ultimately reconstruct their knowledge of the issues addressed. Thus, the materials took students on a journey of transformation from a personal revelation of the importance of dignity to them as individuals – to a realisation of the importance of this right to South African society as a whole.

6 ASSESSMENT IN THE WiLL LEGAL WRITING PROGRAMME

The constructive alignment of the WiLL legal writing programme was designed to ensure that the transformation journey on which the students were taken during class translated into achievable module outcomes that were assessed by continuous assessment.

Students were given two assessments in the programme. These assessments were essential to anchor the programme in the Legal Research, Writing and Reasoning (LRWR) module, which formed part of the mainstream, second-year LLB syllabus lending credibility to the programme and motivating students to participate to the best of their abilities. The assessments used in the WiLL programme were designed to promote critical

thinking around issues such as the importance of social transformation, its practical implications and the value of dignity jurisprudence in South Africa today. They also served to motivate students to engage deeply with the source material by showing them that good legal writing can indeed make a practical difference.

The first assessment used was a case summary.[52] Students were required to summarise a judgment by Chief Justice Langa in the *Pillay*[53] case. This judgment was chosen for the assessment, not only because of the elegant, persuasive way in which it was written, but because of its seamless alignment with the programme's theme of dignity jurisprudence. Understanding the principles outlined in this assessment judgment serves to supplement the knowledge required for the module outcome of understanding the value of dignity in South Africa today, as well as to test the students' functioning knowledge. In addition, the *Pillay* case contains arguments that students would immediately be familiar with, since both the *Fourie* case and the *Pillay* case discuss issues relating to the violation of human dignity. In this way, students were able to focus on applying their case-summary and critical-reading skills learnt during their interaction with the *Fourie* case, without being unduly distracted by unfamiliar complex arguments.[54]

The second and final assessment was to write an article for a newspaper's legal column, discussing any aspect of South Africa's dignity jurisprudence. The assignment instructions clearly defined the maximum word count and writing style. However, the topic of the assignment was kept vague by design, encouraging students to think creatively while maintaining the need for them to justify their arguments.[55]

---

[52] The case summary was assessed by means of a rubric. Key ingredients to be assessed in the case summary fell into two categories: writing skills and substantive knowledge. So, for example in the skills category, an excellent case summary would make use of all the correct headings; include all relevant information, and be written succinctly, avoiding waffle and verbosity. In the substantive knowledge category, for example, the correct *ratio decidendi* had to be identified and the main principles of the case summarised and clearly explained. It is important to note that prior engagement during class on a deep level with judgments that discuss similar principles and issues to the assessment case is pivotal in ensuring that students can apply their minds to drafting a case summary that is not just rote but engages with the principles in the way a lawyer would – with understanding and intention.

[53] *MEC for Education, Kwazulu-Natal v Pillay* 2008 (1) SA 474 (CC).

[54] In addition to learning the nuts and bolts of how to summarise a case, students were encouraged to engage in a more nuanced analysis of the facts of the case and to brainstorm (as part of their class participation) possible outcomes of alternative legal interventions. Feerick (1994 *Fordham Urban Law Journal* 386) notes that any legal-writing programme should teach the essential skill of fact analysis, which "requires the ability to engage in different problem-solving techniques, such as brainstorming, ends-means thinking, cost-benefit analysis, risk-calculation, problem identification analysis, and integration of legal analysis with factual investigation".

[55] For example, some students wrote about the importance of South Africa's dignity jurisprudence in protecting the rights of certain minority groups in South Africa, while others argued that South African jurisprudence is not doing enough to protect the right to dignity of South African citizens. This assessment was designed to test the students' ability to draw together the threads of a number of sources of information (including the case summary assessment judgment) to formulate an opinion based on these sources and then to justify that opinion. Key ingredients to be identified in an excellent opinion would be a clearly defined aim and focus, supported by a well-reasoned, persuasive argument with logical flow.

7 EVALUATION OF THE WiLL PROGRAMME AND RECOMMENDATIONS

The Write it Like a Lawyer programme was a reflective research project, undertaken at the time solely for the purposes of improving my own teaching practices. Evans interprets the concept of "reflective practice" as, "the constant striving for improvement by a process involving evaluative reflection to identify areas for improvement and creative reflection to identify remedial practice."[56] Evans then relates this practice to educational research, saying:

> "[T]his is achieved by a cycle whereby researchers analyse what they do, evaluate their output, seek a better way of doing things where they feel one is needed, and then apply to their research practice as much of that better way of doing things as circumstances permit."[57]

This project forms part of a larger reflective teaching exercise conducted at UKZN to improve the legal writing skills of first- and second-year law students, which comprises four cycles. The WiLL project is the last in the series of iterations of the project. The first three cycles were evaluated using a variety of instruments, including: personal student questionnaires; feedback from students by means of annual student module evaluations, regular informal meetings with students; author notes on informal class discussions; and reflective comments of peer tutors and first- and second-year students that were recorded in the module reports to the internal moderator and external examiner.[58] The fourth and final action research cycle – the Write it Like a Lawyer programme – was evaluated using the author's personal observations as lecturer and course designer. These observations take place after a number of years of teaching legal writing in this module, during which time the author used a variety of teaching methods and perused hundreds of student essays each year.

When comparing student motivation and the persuasive writing skills of students who have been taught using a transformative-contextualisation approach to those of students from previous years (when the approach was not used), it was observed that students did in fact experience a transformation in their thinking as well as in their writing. Students in the WiLL programme were more motivated to take part in robust, respectful class discussions, often interrogating the course materials with enthusiasm long after the allotted lecture time had ended. Also observed was a marked difference in the persuasiveness of the students' legal writing, with nearly every student showing an interest and willingness to complete more than one draft in order to hone their argument, despite not being required to do so.

---

56 Linda Evans "Reflective Practice in Educational Research" 2002 Continuum, London.

57 *Ibid*.

58 See Crocker "Using Peer Tutors to Improve the Legal Writing Skills of First-Year Law Students at University of Kwazulu-Natal, Howard College School of Law" 2020 45(1) *Journal for Juridical Science* 93–118; and Crocker "Facing the Challenge of Improving the Legal Writing Skills of Educationally Disadvantaged Law Students in a South African Law School" 2018 21 *PER / PELJ* 1–27.

The teaching approach used is also well grounded in literature, which links the contextualisation of study materials to intrinsic motivation leading to critical thinking and critical writing. Further research is, however, needed to measure these outcomes formally, including the perceived increase in student motivation and improvement in the persuasiveness of the students' legal writing. It is therefore recommended that this study should be continued by testing these lecturer observations using qualitative instruments such as student and lecturer questionnaires.

8 CONCLUSION

If students are to be taken on a journey of transformation, it is essential that values-based teaching techniques and contextualised teaching materials are used to facilitate learning at a deep level. Thus, transformative contextualisation is an important teaching principle to incorporate into the curriculum design of legal-writing programmes at South African universities. Using this technique will provide students with the intrinsic motivation that is essential to engage at a deep level, which in turn gives students the intellectual space to think, to read and to write critically. This is imperative in South Africa today, where legal educators have a responsibility to heed the constitutional mandate to promote a society based on social justice, by inspiring a social conscience in their students.

CASES / VONNISSE

PROTEST ACTION WITHIN THE AMBIT OF THE LABOUR RELATIONS ACT 66 OF 1995

COSATU v Business Unity of South Africa (2021) 42 *ILJ* 490 (LAC)

1 Introduction

Protest action is not a new phenomenon in democratic South Africa. In the 1980s and 1990s, many stay-aways were used by workers to demonstrate opposition to government policy (Du Toit, Godfrey, Cooper, Giles, Cohen, Conradie and Steenkamp *Labour Relations Law: A Comprehensive Guide* (2015) 380; Manamela *The Social Responsibility of Trade Unions: A Labour Law Perspective* (unpublished LLD thesis, University of South Africa) 2015 130; Le Roux and Van Niekerk "Protest Action in Support of Socio-Economic Demands: The First Encounter" 1997 6(10) *CLL* 81). However, the Industrial Court was disinclined to grant such actions protection and, as a result, they were deemed unlawful under the Labour Relations Act 28 of 1956 (1956 LRA) (see *Amalgamated Clothing & Textile Workers Union of SA v African Hide Trading Corporation (Pty) Ltd* (1989) 10 *ILJ* 475 (IC)). Unlike protest action, strike action was regulated and defined under the 1956 LRA. Nonetheless, the International Labour Organisation (ILO)'s Fact-Finding and Conciliation Commission on Freedom of Association criticised the narrow definition of "strike" in the 1956 LRA, stating that employees should be permitted to strike in protest against the government's economic and social policies (see ILO Report of the Fact-Finding and Conciliation Commission on Freedom of Association concerning the Republic of South Africa (May–June 1992) https://www.ilo.org/global/standards/information (accessed 2021-05-03)).

Under the democratic dispensation, the Constitution of the Republic of South Africa, 1996 (the Constitution) clearly provides that everyone has the right, peacefully and unarmed, to assemble, to demonstrate, to picket and to present petitions (s 17) and that employees have the right to strike (s 23(2)(*c*)). The term "assemble" in section 17 of the Constitution has been interpreted to cover meetings, pickets, protest marches and demonstrations that are aimed at expressing a common opinion (see De Waal, Currie and Erasmus *The Bill of Rights Handbook* (2001) 334). Based on these constitutional provisions, employees can therefore use economic power to support their various demands. In terms of section 1 of the Labour Relations Act 66 of 1995 (LRA), one of the aims of this Act is "to advance economic

development, social justice, labour peace and the democratization of the workplace". Among other measures, this is done through allowing employees and their organisations the right to engage in protest action. While a strike is focused on "matters of mutual interest" between employees and their employer, protest action is focused on the "socio-economic interests" of employees (s 213 of the LRA). Strike action is the most common and better understood of the two actions, while protest action is often misconstrued. Protest action assists employees, their trade unions and federations to play an important wider role in society (see Garbers, Le Roux, Strydom, Basson, Christianson and Germishuys-Burchell *The Essential Labour Law Handbook* (2019) 495; Manamela *The Social Responsibility of Trade Unions* 13–14). Through protest action, employees can influence policy decisions in society. Section 77 of the LRA gives effect to and regulates the right to engage in protest action.

South Africa has experienced many protests and as a result, the country has been referred to as "the protest capital of the world" (Rodrigues "'Black Boers' and other Revolutionary Songs" (2010-04-05) *Mail & Guardian* https://thoughtleader.co.za/on-revolutionary-songs (accessed 2021-05-06)). Federations of trade unions such as the Congress of South African Trade Unions (COSATU) have over the years organised a number of protests, including those against labour broking and high tolls (see Buhlungu *A Paradox of Victory: COSATU and the Democratic Transformation in South* Africa (2010) 2–3). Protests are used for various reasons, including those related to service delivery. However, the focus in this discussion is on protests regulated by the LRA. Given the number of protests that take place in South Africa, it is important that the concept of protest action, and the nature and scope of the right to engage in protest action as regulated by section 77 of the LRA, be properly understood. The discussion focuses on *COSATU v Business Unity of South Africa* ((2021) 42 *ILJ* 490 (LAC)), which deals with the interpretation of section 77 of the LRA.

2 Facts of the case

The first appellant (COSATU) issued a notice to the second respondent, the National Economic Development and Labour Council (NEDLAC)) on 21 August 2017 in terms of section 77(1) of the LRA, notifying it of possible protest action. The notice outlined the reasons for the intended protest action in an annexure, including what it described as "neoliberal or trickle-down" economic policies. It further raised concerns regarding retrenchments taking place in the country, which it alleged were caused by employers dismissing employees based on the employer's intention to increase profits. It was further argued that retrenchments increased levels of poverty and that this was not consistent with *ubuntu*, addressing socio-economic challenges in the country and the need to rectify the legacy of apartheid and colonialism (par 4). COSATU demanded that companies be prohibited from retrenching employees based on profit-seeking; that they be required to create a certain number of jobs per year and that through NEDLAC, government should convene an Economic and Jobs Summit within three months after the issuing of the notice. COSATU stated that NEDLAC would be advised, of the precise nature of the protest action and the date/s on which it would take

place, in a notice in terms of section 77(1)(*d*) of the LRA. On 15 September 2017, NEDLAC's standing committee convened a consultative meeting with representatives of government, the first respondent (Business Unity South Africa (BUSA)), COSATU and the South African Society of Bank Officials (SASBO) at which it was agreed that a job summit would be convened. However, there was no agreement on the demand concerning a prohibition on retrenchments (par 7 of the judgment). On 15 January 2019, 17 months later, COSATU issued another notice in terms of section 77(1)(*d*) of the LRA, describing forms of protest action in the annexure. Further notices were issued by COSATU, including one on 28 August 2019 stating that protest action with a focus on the financial sector would take place on 27 September 2019, and one on 29 August 2019 stating its intention to proceed with protest action in relation to issues outlined in the annexure to the notice of 21 August 2017 (par 10 of the judgment). It described the protest actions in paragraph 4 as follows:

> "4. The protest actions that will involve time away from work are:
> 4.1 Rallies, marches, demonstrations, pickets, placards demonstrations, lunchtime pickets, etc. in all major towns and cities on the weeks leading to 7 October 2019.
> 4.3 A National Stay-away or a Socio-Economic Strike on Monday 7 October 2019. The specific activities in paragraph 4 above will take place during working hours. The socio-economic strike will commence at 00:00 and end at 23:59 on 7 October 2019, except that shift workers will be away for the duration of one whole shift and it will be the shift that has the majority of hours on the day in question." (par 11 of the judgment)

On 5 September 2019, BUSA wrote a letter to the appellants requesting an undertaking in respect of intended protest action that it regarded as unlawful and unprotected owing to a failure to comply with section 77(1)(*b*) and (*c*) of the LRA. The appellants denied such failure and stated that the protest action would continue. As a result, BUSA approached the court *a quo* for relief (par 13 of the LAC judgment).

3 The finding of the court *a quo*

The court *a quo* found that the appellants failed to meet the requirements of section 77 of the LRA and therefore that the protest action was unprotected. The court as a result interdicted and restrained the appellants from engaging in the protest or any related conduct until they had complied with the provisions of section 77 of the LRA. The court stated that the section 77(1)(*d)* notice should be issued within a reasonable period and that the section did not contemplate the issuing of more than one such notice in respect of a referral in terms of section 77(1)(*b)* of the LRA. The court *a quo* granted the appellants leave to appeal (par 14 of the LAC judgment).

4 The finding and reasoning of the Labour Appeal Court

The appeal is based on the meaning and scope of section 77(1) of the LRA. The Labour Appeal Court (LAC) (par 16) referred to *Business South Africa v*

Congress of SA Trade Union ((1997) 18 *ILJ* 474 (LAC) 516), wherein Myburgh JP (for the majority) stated:

> "[I]f the Act exacts the price of responsibility (in the form of adhering to the statutory requirements before embarking on a strike) in order to gain the benefit of protection of strikes, at least the same, if not greater, obligation or responsibility rests on a trade union, or federation of trade unions, that seeks protection for its members taking part in protest action."

The judge further examined the specific meaning of section 77(1)(*c*) of the LRA and stated as follows:

> "The actual wording of s 77(1)(*c*) is, once again, not particularly helpful in determining this. It is possible to argue that the matter in dispute can be 'considered … in order to resolve the matter' on more than one occasion, and that therefore it is open to take the next step in the sequence, viz to serve the s 77(1)(*d*) notice of an intention to proceed with the protest action at least fourteen days in advance of that protest action, at any time after one of these occasions where the matter was so considered. But such an interpretation would defeat the purpose of a regulated exercise of the right to protest action. If protest action may be proceeded with whilst all the parties at Nedlac are still committed to consider the matter giving rise to the dispute in order to resolve it, the purported regulation of that exercise of the right to protest action becomes meaningless. Why refer the matter giving rise to the dispute to Nedlac in order to resolve it if protest action may take place regardless of whether the issue has been resolved or not at Nedlac? The answer must be consistent with the purpose of s 77, viz the regulated exercise of the right to protest action. This consistency is achieved if the requirement of 'consider … in order to resolve' in s 77(1)(*c*) is interpreted so that it is only met once it becomes clear that any one or more of the parties at Nedlac is not committed to resolve the matter in dispute any more. Only when that is clear, may the next step, the s 77(1)(*d*) notice, be proceeded with." (par 17)

It was argued on behalf of BUSA that, when holistically read, section 77 of the LRA envisaged a continuum of conduct, including that protest action may only follow upon a series of steps taken in sequence after each other. BUSA argued further that the initial notice as per section 77(1)*(b)* of the LRA is to allow NEDLAC an opportunity to resolve the matters raised in the notice; thereafter, it was upon the affected employer to meet with the relevant union at NEDLAC to engage in the resolution of the grievances raised in the notice. It was also argued that the fact that the LRA seeks timely and expeditious resolution of disputes militates against a construction of section 77 of the LRA that leaves the option of protest action "open ended" by allowing it to take place at a time chosen by the trade union, irrespective of how much time has passed since the initial referral of the matter in dispute to NEDLAC in terms of section 77(1)(*c*) of the LRA (par 18). It was noted that there are three constitutional rights implicated in the determination of the meaning of section 77(1) of the LRA; these include the right to freedom of expression (s 16), the right of assembly, demonstration, picketing and petitions (s 17), and a number of other labour rights, including the right to fair labour practices and the right of each worker to participate in the activities and programmes of a trade union in terms of section 23(1) and (2)(*b*) of the Constitution (par 19).

The LAC further noted that when interpretation of a statute is required, automatic and uncritical reference is usually made to *dicta* in *Natal Joint Municipal Pension Fund v Endumeni Municipality* ((2012) (4) SA 593 (SCA)),

which unfortunately does not make reference to section 39(2) of the Constitution, which enjoins the court to promote the spirit, purport and object of the Bill of Rights when interpreting legislation. The court stated that section 77 of the LRA should be viewed and understood through the prism of the constitutional rights implicated in the section. BUSA argued that the reading of the LRA is equally important, and content should be given to the principle of expeditious resolution of labour disputes. It was, however, argued on behalf of COSATU that the right to strike does not go stale (citing *Chamber of Mines SA v National Union of Mineworkers* (1986) (7) *ILJ* 304 (W) 307), and therefore the principle of expeditious resolution of a labour dispute did not apply in the case of strikes or protest actions. In this regard, in *Public Service Association of SA v Minister of Justice and Constitutional Development* ((2001) 22 *ILJ* 2302 (LC) par 38), Landman J found that a time limit could not be read into the right to strike as guaranteed in the Constitution.

The LAC found that section 77 of the LRA does not expressly provide for time limits. It also stated that the nature of protest action may not be subject to the kind of expeditious resolution that would be the case with a labour dispute between employees and an employer, as in the present protest that concerned a series of complaints about the government's economic policy. According to the LAC, unlike a labour dispute, the nature of the protest is not the one that falls to be resolved as expeditiously as a defined labour dispute (par 25). It was stated that the construction of section 77 of the LRA requires an initial notice in which reasons for the protest action and the nature of the protest action are set out and thereafter NEDLAC or another appropriate forum must consider the matter before a protest is embarked upon. If these requirements are met, section 77(1)(*d*) of the LRA only requires that, at least 14 days' notice before the commencement of the protest action, a further notice must be served on NEDLAC (par 26). The LAC stated that there was no need to read further requirements into the section based on the three constitutional rights mentioned above and that there was therefore no reason upon which the order of the court *a quo* was based. The finding by the court *a quo* was therefore set aside.

5 Protest action

5 1 Definition

Section 213 of the LRA defines "protest action" as "the partial or concerted refusal to work, or retardation or obstruction of work, for the purpose of promoting or defending the socio-economic interests of workers, but not for a purpose referred to in the definition of a strike". It must be noted from this definition that the type of actions that may amount to protest action are the same as those found in the definition of strike. However, strike action and protest action differ insofar as their purposes are concerned. While the purpose of a strike is "to remedy a grievance or resolve a dispute in respect of any matter of mutual interest between the employer and employees", the purpose of protest action is "to promote or defend the socio-economic interests of the workers".

Unfortunately, the LRA does not define the concepts of "matters of mutual interest" and "socio-economic interests". The correct interpretation of these concepts is important as the dividing line between "matters of mutual interest" and "socio-economic interests" may at times be a thin one (*Greater Johannesburg Transitional Metro Council v IMATU* [2001] 9 BLLR 1063 (LC)). The concept of "matters of mutual interest" refers to matters that are "work related" or "concern the employment relationship" (see Manamela "'Matters of Mutual Interest' for Purposes of a Strike: *Vanachem Vanadium Products (Pty) Ltd v National Union of Metalworkers of South Africa* [2014] 9 BLLR 923 (LC)" 2015 36(3) *Obiter* 791 796; *Rand Tyre and Accessories (Pty) Ltd & Appel v Industrial Council for the Motor Industry (Transvaal), Minister for Labour, & Minister for Justice* (1941) TPD 108 115).

With regard to the concept of "socio-economic interests" of workers, it was stated in *Government of the Western Cape Province v Congress of SA Trade Unions* ((1999) 20 *ILJ* 151 (LC)) that, in failing to define the phrase "socio-economic interests", the legislature left the determination of its meaning to the courts. The court accepted that the definition is capable of a range of interpretations, ranging from a restrictive one to a liberal one. In this case, the determination by the court was on whether educational reform was a socio-economic matter relating to or relevant to workers. The court found that indeed educational issues were relevant to workers and were the direct result of past government policy and that workers have a general interest in educational issues and in ensuring that their children do not suffer the same ills that afflicted them as a result of the policies of apartheid. "Socio-economic interests" of workers go beyond the workplace (see Grogan *Collective Labour Law* (2019) 309). Things that may be of concern to workers, or advance the interests of the community from which workers come, may fall within the definition of socio-economic matters. Matters such as the imposition of taxes, employment creation, the provision of housing and privatisation (see Bendix *Industrial Relations in South Africa* (2010) 685) may also be regarded as socio-economic matters. Some of the socio-economic rights provided for in the Constitution include the right to health care services (s 27) and the right to basic education (s 29). Socio-economic rights are positive rights that impose obligations on government (see De Waal *et al The Bill of Rights Handbook* 432). However, for purposes of protest action, it is important that the matter must relate to socio-economic interests of workers. "Socio-economic interests" of workers must be distinguished from purely "political issues" as the latter will not be covered under section 77 of the LRA (see Garbers *et al The New Essential Labour Law* 496; Grogan *Collective Labour Law* 309; ILO Freedom of Association: Digest of Decisions and Principles of the Freedom of Association Committee of the Governing Body of the ILO (5ed revised 2006) par 528).

It must further be noted that the word "worker" used in the definition of protest action is different from the word "employee". The word "worker", which is also used in section 23(2) of the Constitution, is wider in meaning than the word "employee", which is defined in section 213 of the LRA. Protest action may therefore be called in support of the interests of people who are not necessarily employees and against organisations that are not employers. Unfortunately, the word "worker" is also not defined in the LRA. Although in terms of the definition of protest action, the right is for "workers",

the right to participate in protest action is limited to employees in section 77 of the LRA. Independent contractors may therefore not participate in protest action regulated by section 77 of the LRA (see Grogan *Collective Labour Law* 310).

5 2 Requirements for protected protest action

Given its nature, protest action may have devastating effects on the economy and society at large (see Garbers *et al The New Essential Labour Law* 496; *ACTWUSA v African Hide Trading Corporation* (1989) 10 *ILJ* 475 (IC) 478–479A; *NUM v Free State Consolidated Gold Mines (Operations) Ltd* (1992) 13 *ILJ* 366 (IC) regarding what the court said about stay-aways and the economy). For these reasons, section 77 of the LRA requires compliance with procedural requirements before protest action may take place (Explanatory Memorandum to the Draft Labour Relations Bill B 85B–95, published in 1995 16 *ILJ* 278 307). Section 77(1) of the LRA provides as follows:

> "Every employee who is not engaged in an essential service or a maintenance service has the right to take part in protest action if–
> (*a*) the protest action has been called by a registered trade union or federation of trade unions;
> (*b*) the registered trade union or federation of trade unions has served a notice on NEDLAC stating–
> (i) the reasons for the protest action; and
> (ii) the nature of the protest action;
> (iii) the matter giving rise to the intended protest action has been considered by NEDLAC or any other appropriate forum in which the parties concerned are able to participate in order to resolve the matter; and
> (iv) at least 14 days before the commencement of the protest action, the registered trade union or federation of trade unions has served a notice on NEDLAC of its intention to proceed with the protest action."

It is evident from this section that the right to engage in protest action in the context of the LRA is for employees. However, employees in essential services or maintenance services may not engage in protest action. Unfortunately, unlike with strikes, there is no provision for the arbitration of disputes in essential services relating to socio-economic interests. Only a registered trade union or federation of trade unions can call for protest action. However, all employees will acquire the right to join the protest action (mass stay-away) once notice has been given, whether or not they are members of the union that called for the protest (see Grogan *Collective Labour Law* 311). As a first phase, section 77(1)(*b*) of the LRA requires a registered trade union or federation of trade unions to serve on NEDLAC a notice that states the reasons for and nature of the protest action. The second phase, in terms of section 77(1)(*c*) of the LRA, is that NEDLAC or any other appropriate forum in which parties are able to participate in order to resolve the matter must consider the matter. Unfortunately, the LRA does not provide more details regarding the other appropriate forum. However, Grogan states that this could include debates in Parliament or even bargaining councils in which parties have a voice (see Grogan *Collective Labour Law* 313). This has also been interpreted to mean "a forum that has

jurisdiction over the matter and is in a position to influence the outcome of the issue in dispute" (see Du Toit *et al Labour Relations Law* 381, fn 335).

Furthermore, the word "consider" used in section 77(1)(*c*) of the LRA, shows that NEDLAC, or the other forum, do not have prescriptive powers, as the process largely involves facilitating a debate between the parties and taking necessary steps, such as mediation, to address the matter (see Grogan *Collective Labour Law* 313). The LRA does not provide a period within which NEDLAC, or the appropriate forum, should consider the matter and it can only be assumed that it should be for a reasonable period, taking into consideration the nature of the matter. The third phase is that the registered trade union or federation of trade unions must, in terms of section 77(1)(*d*) of the LRA, after the matter has been considered, serve another notice on NEDLAC, 14 days before commencement of the intended protest action, of its intention to proceed with the protest action. As stated in *Business South Africa v COSATU* (*supra*), the steps or phases envisaged in section 77 of the LRA should therefore be taken in the order in which they are stated. The notice in section 77(1)(*b*) of the LRA contains caution to apply pressure through protest action, unless the matter is resolved at NEDLAC or by another appropriate forum. If the dispute is not resolved, the section 77(1)(*d*) notice may be given.

It must be noted that courts have a different approach to interpreting the limitations of section 77 of the LRA from the one used for other labour rights, such as the right to strike. The LAC in *Business South Africa v COSATU* (481D–G) stated as follows:

> "Because of the different nature and character of the right to take part in protest action in terms of the Act, the interpretation and application of that right needs to be assessed in a broader context than the fundamental 'labour rights' [which includes the right to strike] which form part of the primary objects of the Act in terms of section 1. The application and interpretation of the latter takes place in the context of their contribution, in general, to collective bargaining. Collective bargaining itself is constitutionally guaranteed. The parties to collective bargaining are primarily restricted to employers and employees, not the general public. Not so in the case of protest action. Collective bargaining is not at stake. The extent of the right to protest action involves the weighing up of that right, taking not only the rights of employees and employers into consideration, but also, importantly, the interests of the public at large and, in a case such as this, the effect on the national economy … in a nutshell: the purpose of the Act does not necessarily require an expansive or liberal interpretation of section 77, in the sense that the exercise of the right to protest action must be restricted as little as possible."

The rights and interests of employees, employers and the public should therefore be taken into consideration before protest action can take place, given the nature of its possible national economic effects and consequences. In terms of section 77(3) of the LRA, as with strikes, if the above procedural requirements are met, the protest action will be protected. There is protection against civil claims and employees may not be dismissed for participating in protest action as that will amount to automatically unfair dismissal (s 187(1)(*a*) of the LRA). However, in terms of section 77(2)(*a*) of the LRA, if the protest action is not protected, it may be prohibited through an order of the Labour Court. Furthermore, even if the above requirements are met, the Labour Court may grant a declaratory order restraining a person

from participating in protest action or prohibiting the continuation of protest action (s 77(2)(*b*) of the LRA).

6 Analysis and discussion

The finding of the LAC in *COSATU v BUSA* is now evaluated against the above discussion and in light of the facts of the case. First, it must be determined whether the proposed protest action by COSATU complied with the definition of protest action. It was stated in the annexure to the notice of 21 August 2017 given by COSATU in terms of section 77(1)(*b*) of the LRA that the purpose of the protest related to "neoliberal or trickle-down" economic policies (among other issues); and concerns regarding the retrenchments taking place in the country, which increase the levels of poverty. Furthermore, COSATU demanded that companies must be prohibited from retrenching employees based on profit-seeking, must create a certain number of jobs per year and also that through NEDLAC, government must convene an Economic and Jobs Summit. It is submitted that the reasons given by COSATU for the protest action were in line with the definition of protest action provided by the LRA, which requires that the purpose of the protest action must be "to promote or defend the socio-economic interests of the workers". The reasons related to economic policies and employment creation (see Bendix *Industrial Relations* 685; Grogan *Collective Labour Law* 309) and therefore the action qualified as protest action. It must be mentioned that the LRA does not protect all forms of protest action. The motive or purpose of the protest should fall under the purpose of protest action as defined by section 213 of the LRA in order for the action to be protected. Protests in general are regulated by the Regulation of Gatherings Act 205 of 1993, which is the primary statute regarding the regulation of public assemblies in South Africa. However, this Act has been criticised for over-restricting the rights of those who intend to engage in protest action, especially in section 12(1) of the Act, which criminalises non-compliance with provisions of the Act. Furthermore, it has been stated that this discourages and inhibits freedom of assembly as it limits the right to assemble freely, peacefully and unarmed (see Omar "The Regulation of Gatherings Act: A Hindrance to the Right to Protest?" 2017 62 *SA Crime Quarterly* 26).

Secondly, it must be determined whether the appellants complied with the provisions of section 77 of the LRA before engaging in protest action. In the present case, there was no dispute regarding the employees who were to take part in the protest action, as they were not engaged in either essential services or maintenance services. In addition, as required by the section, the protest action was called by COSATU, which is a federation of trade unions. It is also evident from the facts that COSATU gave notice of the protest action to NEDLAC as required by section 77(1)(*b*) of the LRA, also stating the reasons and nature of the protest action. NEDLAC was therefore given an appropriate notice stating the reasons for the protest action and the nature of the protest action. This would then enable NEDLAC or another appropriate forum to consider the matter giving rise to the intended protest action in terms of section 77(1)(*c*) of the LRA. As stated above, the consideration by NEDLAC or another appropriate forum mainly involves

facilitating debate between the parties and not necessarily resolving the dispute. Once this was done, COSATU in the present case gave several notices (on 15 January 2019, 5 February 2019, 28 August 2019 and 29 August 2019) in terms of section 77(1)(*d*) of the LRA, stating its intention to proceed with the protest action. Some of the notices were given two years after the section 77(1)(*b*) notice. It is nonetheless submitted that COSATU complied with the procedural requirements set out by section 77 of the LRA.

According to the LAC in *Business South Africa v COSATU*, just as it is important for trade unions to comply with the LRA requirements for strikes to be protected, trade unions and federations of trade unions should likewise comply with set requirements for a protest action to be protected. A registered trade union or federation of trade unions should give notice to NEDLAC in terms of section 77(1)(*b*) of the LRA and then allow time for NEDLAC or another appropriate forum to consider the matter. It is submitted that of necessity, the trade union or federation of trade unions should allow NEDLAC or another appropriate body time to consider the matter in order to resolve it. If this is not done, the process prescribed by the LRA will become purposeless. The trade union or federation of trade unions cannot therefore simply give notice and proceed with protest action while the matter is still being considered. The trade union or federation of trade unions can only proceed to issue the section 77(1)(*d*) notice if it is evident that there is no commitment from parties to consider the matter in order to resolve it. All the procedural steps and their sequence are therefore pivotal in meeting the requirements of section 77 of the LRA. Of concern is that although the 14 days' notice required by section 77(1)(*d*) was given by COSATU informing NEDLAC of the commencement of the intended protest action, the notices were several and given in 2019. This took an unreasonably long period, and the several notices were excessive. It must, however, be noted that, while the LRA encourages timely and expeditious resolution of disputes, the drafters of the Act did not make provision for the time period within which the matter should be considered by NEDLAC or another appropriate forum.

As it stands, different approaches are adopted for protest action and strike action respectively; in the latter case, in terms of section 64(1)(*a*)(i) and (ii) of the LRA, the trade union and employees may give the employer just 48 hours' notice of strike action if a certificate stating that the dispute remains unresolved has been issued, or if 30 days have elapsed since the referral of the dispute to the CCMA or to a bargaining council. According to Grogan, these steps serve to ensure that employees do not engage in strikes reflexively and to compel parties to subject themselves to conciliation with the help of a neutral party (Grogan *Collective Labour Law* 228). It is submitted that leaving "open ended" the period within which a matter leading to protest action is considered raises challenges; on the one hand, the trade union or federation of trade unions could become impatient, which might not allow NEDLAC or another appropriate forum enough time to consider the matter; on the other hand, NEDLAC or another appropriate forum may not know how much time is available for them to consider the matter at hand. It is therefore proposed that a period be set taking into consideration all constitutional rights (freedom of expression; freedom of assembly, demonstration, picketing and petitions; right to fair labour practices; and the right to participate in the activities of a trade union) that are implicated in

section 77 of the LRA, as well as the economy and the interests of the public. This period should be reasonable and realistic in order to ensure that the right to engage in protest action is restricted as little as possible. This will provide guidance to trade unions and federations of trade unions on how much time they have before they can issue a section 77(1)(*d*) notice and NEDLAC or another appropriate forum would know how much time is available to deal with the matter. Although, as stated by Landman J in *Public Service Association of SA v Minister of Justice* (*supra*), a time limit cannot be read into the right to strike or the right to engage in protest action, as with strikes, guidance with regard to the time period before a section 77(1)(*d*) notice can be issued could make a difference.

Section 17 of the Constitution gives effect to South Africa's international obligations by providing for the right to peaceful assembly as provided for in article 21 of the International Covenant on Civil and Political Rights, 1966 (ICCPR) and article 11 of the African Charter on Human and Peoples' Rights, 1981 (ACHPR). Among other provisions, article 21 of the ICCPR states that restrictions should not be placed on this right unless the restriction is in conformity with the law and is necessary in a democratic society in the interests of national security or public safety, public order, or the protection of the rights and freedoms of others. Article 11 of the ACHPR echoes article 21 of the ICCPR regarding the rights and freedoms of others. The Constitution allows for the limitation of rights in terms of section 36, but only if reasonable and justifiable in a democratic society based on human dignity, equality and freedom. It is imperative to strike a balance between the rights of those who want to protest and those of others. Therefore, the inclusion of a reasonable, but sufficient time for NEDLAC or an appropriate forum to consider the matter in terms of section 77(1)(*c*) of the LRA could be introduced to the extent that it is in line with the Constitution, the ICCPR and the ACHPR.

7 Conclusion

Protest action is an important tool in the hands of employees beyond the workplace in order to promote and defend their socio-economic interests. It assists them to participate directly or indirectly in matters that cannot be pursued through strike action, and which are of national importance. The LRA covers and regulates only protest action that falls under the definition in section 213. It is therefore important for employees, trade unions and federations of trade unions to understand how the right to engage in protest action can be exercised in the labour law context. The LRA further sets out the procedural requirements that are necessary for protest action to be protected and not attract certain consequences. Although the right to protest action should not be unnecessarily limited, it is important that in giving effect to this constitutional right, the LRA should provide more information and be clear on certain aspects, including the period that NEDLAC or another appropriate forum should have in order to consider the matter, and the time trade unions and federations of trade unions have before they can issue a section 77(1)(*d*) notice stating their intention to commence with protest

action. As previously stated, a balance between the right to engage in protest action and the rights of others is necessary.

ME Manamela
University of South Africa (UNISA)

WHEN ARE PERSONAL RIGHTS TOO PERSONAL TO BE CEDED?

University of Johannesburg v Auckland Park Theological Seminary 2021 JDR 1151 (CC)

1 Introduction

Context in law is everything, or so says the aphorism (*R v Secretary of the State for the Home Department, ex parte Daly* [2001] UKHL 26 par 28; *Aktiebolaget Hassle v Triomed (Pty) Ltd* [2002] 4 All SA 138 (SCA) par 1; *Minister of Home Affairs v Scalabrini Centre* 2013 (6) SA 421 (SCA) par 89). That said, to what extent should courts consider the surrounding context of a contract when interpreting and construing it and its provisions? Does the parol evidence rule preclude a court from taking into account contextual evidence or circumstances in interpreting contractual provisions? Or is the court restricted to the contractual provisions and nothing beyond the four corners of the contract? These are some of the central issues that were considered in *University of Johannesburg v Auckland Park Theological Seminary* (2021 JDR 1151 (CC)) (*UJ CC*). The Supreme Court of Appeal (*Auckland Park Theological Seminary v University of Johannesburg* 2020 JDR 0494 (SCA) (*UJ SCA*)) and the Constitutional Court had divergent views on the matter. This case note provides a critical analysis of both judgments, ultimately preferring the decision of the Constitutional Court.

In the law of contract, it is trite that, generally, all personal rights may be freely transferred or ceded to a third party without requiring the consent or knowledge of the other contracting party, who has a correlative duty. This is known as cession (Van der Merwe, Van Huyssteen, Reinecke and Lubbe *Contract: General Principles* 4ed (2012) 386; Nicol "The Legal Effect of Amalgamations and Mergers Upon Third-Party Contracts Containing Anti-Transfer Provisions" 2013 25 *South African Mercantile Law Journal* 30 35–36; *Johnson v Incorporated General Insurance Ltd* 1983 (1) SA 318 (A)). An example is necessary. Consider A's deposit of R10 000 into B Bank where B Bank is contractually obliged to return the deposit on A's demand. A then transfers his right to claim (or demand) his deposit to C. There is no requirement that A procures B Bank's consent to cede his right to claim. For the sake of completeness, cession is a bilateral juristic act aimed at transferring a personal right from a cedent/creditor to another legal person (cessionary). The cessionary then wears the shoes of a creditor in the cedent's place (Scott *The Law of Cession* 2ed (1991); Nienaber "Cession" in Joubert (founding ed) *The Law of South Africa* 2ed (2003); *Brayton Carlswald (Pty) Ltd v Brews* 2017 (5) SA 498 (SCA)). Cession can be differentiated from delegation (which concerns the substitution of a debtor, as opposed to a creditor) and assignment (which refers to a combination of

cession and delegation) (Latsky "The Fundamental Transactions Under the Companies Act: A Report Back From Practice After the First Few Years" 2014 *Stellenbosch Law Review* 361; *Froman v Robertson* 1971 (1) SA 115 (A); *Securicor (SA) (Pty) Ltd v Lotter* 2005 (5) SA 540 (E); Christie *The Law of Contract in South Africa* 4ed (2001)).

However, the general rule of cession is subject to limitations. There are two crucial limitations in this regard. First, a right cannot be ceded where it is the subject of a *pactum de non cedendo*, which can generally be defined as an agreement to not cede. Accordingly, a contract may contain a provision that prevents a creditor from ceding a right without the debtor's consent. An example of a *pactum de non cedendo* is where a tenant, in a lease agreement, is not permitted to cede her rights of occupation and possession unless there is prior written consent by the landlord. Secondly, there may be certain rights that are so personal in nature that they cannot be ceded. Such rights cannot be ceded because the identity of the creditor is paramount to the debtor and there is an expectation that the party initially contracted with will fulfil the obligations. Claims for pain and suffering in delict, and claims for maintenance, are traditional examples of such rights. These rights are classified as *delectus personae* (see generally *Eastern Rand Exploration Co Ltd v AJT Nel, JL Nel, SM Nel, MME Nel's Guardian and DJ Sim* 1903 TS 42 53; *Sasfin (Pty) Ltd v Beukes* 1989 (1) SA 1 (A) 31G–H; *Boshoff v Theron* 1940 TPD 299 304; *Frielander v De Aar Municipality* 1944 AD 79 93; *Propell Specialised Finance (Pty) Ltd v Attorneys Insurance Indemnity Fund NPC* 2019 (2) SA 221 (SCA) par 17; LAWSA "Cession" 3ed par 165; Scott *The Law of Cession* 202; Scott "Can a Banker Cede His Claims Against His Customers" 1989 1 *South African Mercantile Law Journal* 248; Scott "Sasfin (Pty) Ltd v HJS Beukes (Saak Nos: 7132/86 EN 10849/86) Ongerapporteerd 1987-01-22 (W)" 1987 20 *De Jure* 355).

In light of that general background, the author turns to consider the case of *University of Johannesburg v Auckland Park Theological Seminary* (*supra*) with a particular focus on the judgments of the Supreme Court of Appeal and the Constitutional Court. To this end, this case note is structured as follows. First, the pertinent facts of the case are canvassed; secondly, the decision of the Supreme Court of Appeal is examined; thirdly, the findings of the Constitutional Court are analysed; and lastly, the author provides a critical evaluation of the judgments, and endorses the reasoning furnished by the Constitutional Court.

2 Background facts of the case

The pertinent facts of the case as outlined by the Constitutional Court can be summarised as follows. The applicant, the University of Johannesburg (UJ), entered into a cooperation agreement in 1993 with the first respondent, Auckland Park Theological Seminary (ATS). In terms of the agreement, the two parties were to collaborate in offering students certain higher education degrees (*UJ CC* par 6). During the subsistence of this agreement, the parties began negotiating ATS's acquisition of property for the purposes of operating a theological college (*UJ CC* par 7). Ultimately, as a result of these negotiations, UJ proceeded to obtain permission, in accordance with the

Rand Afrikaans University Act 61 of 1955, from the Minister of Education to enter into a lease agreement with ATS over certain immovable property located in Auckland Park to construct a campus (*UJ CC* par 7). In securing permission for the lease agreement, UJ specifically named ATS in its application to the Minister of Education and specified the purposes for which ATS would use the property (*UJ CC* par 7).

In 1996, the ministerial permission was granted and subsequently UJ and ATS entered into a written notarial long-term lease concerning the property in Auckland Park. In the same year, the lease was duly registered against the title deed of the property. The lease was for a period of 30 years, and was renewable on six months' written notice given before the 30-year period lapsed. ATS paid a once-off rental amount of R700 000 to UJ (*UJ CC* par 7). Instead of establishing a theological college on the property, ATS entered into a notarial deed of cession with the second respondent, Wamjay Holdings Investments (Pty) Ltd (Wamjay), and ceded its rights contained in the lease agreement to Wamjay (*UJ CC* par 8). ATS was paid a once-off R6 500 000 for these rights by Wamjay, which intended to establish a religious school for primary and high school education on the property (*UJ CC* par 8).

UJ had no knowledge of the cession of the rights at the time and when it later found out about the cession, it believed that the rights in the lease agreement were personal to ATS (that is, *delectus personae*) (*UJ CC* par 9). UJ was then of the view that ATS was in breach of the lease agreement in the form of repudiation (*UJ CC* par 9). UJ elected to cancel the lease agreement. Wamjay and ATS disagreed with UJ's right to cancel the lease agreement (*UJ* CC par 9–10). UJ approached the High Court seeking orders to cancel the notarial lease against the title deed of the property and to evict ATS and Wamjay from the property (*UJ CC* par 10). UJ purported to cancel the lease on the basis that, on a proper construction of the lease agreement, the rights contained therein were not capable of being ceded as they were *delectus personae* and thus personal to ATS. UJ argued that by ceding the rights to Wamjay, ATS had repudiated the lease, and that UJ had now accepted the perceived repudiation.

The author interposes here to set out the findings of the Gauteng Local Division of the High Court (*University of Johannesburg v Auckland Park Theological Seminary (Pty) Ltd* 2017 JDR 1991 (GJ) (*UJ HC*)). The High Court, per Victor J, agreed with UJ and found in its favour. The court concluded that the rights in the lease were *delectus personae* (*UJ HC* par 54–58). Victor J reasoned that, on the uncontested evidence, it was clear that the lease between UJ and ATS was of a personal nature, particularly when considering clause 8 of the agreement (*UJ HC* par 46–47). Clause 8 related to the use of the property and provided that the property will be used for educational, religious, and related purposes, construction of a campus for education, teaching, research, training, offices, and student facilities (*UJ HC* par 33.8).

ATS and Wamjay appealed to the Full Court of the High Court (*Auckland Park Theological Seminary v University of Johannesburg* 2018 JDR 1631 (GJ) (*UJ FC*)). The majority of the Full Court, per van Oosten J (Carelse J

concurring), dismissed the appeal with costs and held that the reasoning and findings of Victor J in relation to the interpretation of the lease agreement could not be faulted (*UJ FC* par 11). The majority concluded that the lease agreement, interpreted in light of the other factors, indicated that UJ and ATS's goals were aligned and intertwined (*UJ FC* par 13). The rights in the lease were thus of a personal nature. Wamjay's intention to build a high school and primary school were at odds with the goals recorded by UJ and ATS in their agreement and could not be reconciled. Interestingly, the Full Court remarked that the cession would result in an absurdity in that Wamjay would be a right-holder under the lease, but ATS would be contractually bound to discharge the obligations under the lease (*UJ FC* par 14–15).

The concurring judgment, per Wright J, agreed with the outcome but employed a different approach (*UJ FC* par 9–10). ATS and Wamjay were aggrieved by this decision and appealed to the Supreme Court of Appeal.

3 The decision of the Supreme Court of Appeal

On appeal, the Supreme Court of Appeal disagreed with the High Court and the Full Court and overturned their decisions. In upholding the appeal, Dlodlo JA, writing unanimously for the court, held that all contractual rights can be transferred, provided that they are not of a personal nature (referring to *delectus personae*) and that the parties did not intend to restrict the transfer of the rights (*UJ SCA* par 8). The court reasoned, citing *Sasfin (Pty) Ltd v Beukes* (*supra* 31G–H) and *Goodwin Stable Trust v Duchex* (*Pty) Ltd* (1998 (4) SA 606 (C) 617I–J), that the primary mischief that the principle of *delectus personae* seeks to cure is that the cession should not disadvantage the debtor (*UJ SCA* par 8). Relying on *Boshoff v Theron* (*supra* 304), the Supreme Court of Appeal held that it is trite that generally the lessor does not expect the lessee personally to perform the obligations contained in the lease agreement (*UJ SCA* par 9). It opined that generally there is no *delectus personae* in long-term lease agreements. In the court's view, there was no evidence in this case to demonstrate that the rights in the lease agreement were *delectus personae* (*UJ SCA* par 10).

Moreover, the court held that UJ should prove the intention of the parties by relying only on the lease agreement and nothing external to the agreement (*UJ SCA* par 10). To this end, the court held that UJ could not adduce external evidence to prove the surrounding circumstances that underpinned the contract and the parties' intention. The parol evidence rule, the court held, prevented UJ from producing and relying on contextual evidence – that is, contextual evidence was held to be inadmissible. The court posited that the written agreement was the entire agreement, and that it could not be varied by extrinsic evidence. The court held that where there is a written contract, such a contract will be the memorial of the transaction and no extrinsic evidence that contradicts, alters, adds, or varies the written contract (*UJ SCA* par 7) may be adduced. The court concluded that the contextual evidence provided by UJ was in fact evidence that had the effect of adding to, varying and contradicting the general, objective words of the lease (*UJ SCA* par 10).

The court further held that the parties agreed that they could not rely on any warranties or representations that were not explicitly mentioned in the lease agreement. Accordingly, the written lease agreement served as the only memorial of the agreement between the parties (*UJ SCA* par 11). The court found that there were no express or implied provisions in the written lease agreement to indicate that the contractual rights therein were personal to ATS (*UJ SCA* par 11). A court is constrained by the words used in the contract. To this end, the terms of the lease agreement were unequivocal and not open to doubt (*UJ SCA* par 11). On an objective interpretation of the lease agreement, so the court held, it was clear that the rights were not *delectus personae*. All things considered; the court concluded that the rights could be ceded to Wamjay. The court found that clause 8, which the High Court relied on to reach the conclusion that the rights could not be ceded, had no significant indicators that would support a finding that the rights were personal to ATS and could not be ceded to Wamjay or any other third party (*UJ SCA* par 11).

On this basis, the Supreme Court of Appeal overturned the decisions of the High Court and the Full Court. UJ then knocked on the doors of the Constitutional Court.

For completeness, the decision of the Supreme Court of Appeal is summarised as follows. First, all contractual rights are capable of being ceded unless the parties have indicated that they did not intend for the rights to be ceded or if the rights are *delectus personae*. Secondly, rights contained in long-term lease agreements are generally not *delectus personae* because there is generally no expectation for a lessee to perform the obligations ensconced in the lease agreement. Thirdly, the parol evidence rule serves to ensure that a written contract is the sole memorial and embodiment of the transaction. No extrinsic evidence may contradict, vary, alter, add, or modify the written contract. The intention of the parties must be deduced from the written contract and the contractual provisions. Contextual evidence is similarly excluded by the parol evidence rule.

4 The decision of the Constitutional Court

The Constitutional Court, per Khampepe J, unanimously overturned the decision of the Supreme Court of Appeal. Khampepe J reiterated that generally all rights may be freely and voluntarily ceded to a third party without the knowledge or consent of the other contracting party (*UJ CC* par 55). However, this transferability of rights is subject to *delectus personae* and *pactum de non cedendo* (*UJ CC* par 55–56 and 59]. Moreover, the court cited *Eastern Rand Exploration Co Ltd v A J T Nel* (*supra*) in outlining the general principle that rights are capable of being freely transferred (*UJ CC* par 58). These were the only legal issues at stake in this case on which the Constitutional Court and the Supreme Court of Appeal agreed.

Khampepe J held that the Supreme Court of Appeal was incorrect in holding that contextual evidence is irrelevant and immaterial if the intention of the parties and the nature of the rights can be, and is, determined on the ordinary, grammatical meaning of the words in a written agreement. The

court argued that determining whether the rights in question are *delectus personae* is an exercise of contractual interpretation. As such, the oft-cited *dictum* in *Natal Joint Municipal Pension Fund v Endumeni Municipality* (2012 (4) SA 593 (SCA) par 18) is instructive. In *Endumeni*, the court made it clear that consideration of the language and context of contractual provisions is pertinent to contractual interpretation. Neither context nor language should take precedence over the other in the exercise (*UJ CC* par 65). Contractual interpretation is a unitary exercise, which must be done holistically, and requires that the text, purpose, and context of the contract be considered contemporaneously when interpreting a contract (*UJ CC* par 65).

The import of this is that parties will have to, at some point, adduce evidence pertaining to the context and purpose of the contract and some of the bespoke contractual provisions. Such evidence can relate to the pre-contractual deliberations and discussions that resulted in the conclusion of the written contract as well as evidence pertaining to the context evincing the circumstances under which the contract is concluded. In determining the intention of the contracting parties, a court must consider all the relevant contextual circumstances that underpin the contract (*UJ CC* par 67, citing the Supreme Court of Appeal in *Novartis SA (Pty) Ltd v Maphil Trading (Pty) Ltd* 2016 (1) SA 518 (SCA) par 27–28). The overall thrust of the court's argument in relation to the admissibility of contextual evidence when interpreting a written contract is that context must always be taken into account when interpreting contractual provisions and it must be considered at the beginning as part and parcel of the unitary exercise of interpretation (*UJ CC* par 69).

In relation to determining the nature of a right and whether it is *delectus personae,* Khampepe J opined that the same principle applies. Courts cannot determine the nature of a right in the abstract. It is incumbent on courts to consider and take into account the context and purpose of the contract to construct properly the nature of the right (*UJ CC* par 70). It was emphasised that an inquiry into the nature of the right and whether such a right is *delectus personae* is subject to the same interpretation principles as any other contractual provision (*UJ CC* par 70). The primary question in a *delectus personae* inquiry is whether the contract is so personal in nature that it would either make a substantial or reasonable difference to the other party whether the cedent or the cessionary is entitled to enforce it. This test was enunciated by *Eastern Rand Exploration Co Ltd v AJT Nel* (*supra* 53).

The court explained that, in *Densam (Pty) Ltd v Cywilnat (Pty) Ltd* (1991 (1) SA 100 (A)), Botha JA merely clarified that, in determining whether the creditor is *delectus personae*, what is important is the nature of the debtor's obligations and whether the identity of the creditor is paramount for the sake of the obligation. The court remarked that Botha AJ endorsed the *dictum* set out by Innes CJ in *Eastern Rand Exploration Co Ltd v AJT Nel* (*supra*) and did not contradict or amend the test set out in that judgment (*UJ CC* par 72). The key point is that Botha JA articulates a different formulation for asking the same question (*UJ CC* par 74).

Turning to the facts of this case, the court held that it was not enough merely to allege that the rights in the lease agreement are not *delectus*

personae because UJ's obligation was only to provide beneficial occupation and that this obligation is the same regardless of whether it is being provided to ATS or Wamjay (*UJ CC* par 75). Although an underlying obligation (and the correlative right) may be general in nature, as in the case of beneficial occupation, this does not necessarily and axiomatically mean that the right is not personal and *delectus personae* (*UJ CC* par 75). The court emphasised that the important inquiry is whether the rights and obligations arising from beneficial occupation in a particular lease are *delectus personae*. This is because courts cannot in abstract adjudicate the question of the nature of the rights created in a particular contract without having due regard to the text, purpose, and context of the contract (*UJ CC* par 75). If courts were to interpret contracts in abstract, it would render the principle of *delectus personae* nugatory because nearly all rights are "at a level of abstraction, capable of being construed impersonally" (*UJ CC* par 75). Accordingly, courts have a duty not just to question whether generally certain rights are of a personal nature, but rather courts have a duty when interpreting a contract to question whether the specific rights contained in a specific contract are of so personal a nature as to be *delectus personae* (*UJ CC* par 78).

In relation to whether lease rights can be *delectus personae*, the court clarified Greenberg JP's judgment in *Boshoff v Theron* (*supra*). The court remarked that Greenberg JP's statement that rights arising from lease agreements will rarely be *delectus personae* was made in the context of long-term lease agreements where the core of the issue before him pertained to the position of the lessor and not a lessee. The court emphasised that this statement, which was obiter, merely provided that, generally, the longer the lease, the more unlikely it was that the rights were so personal that they could not be ceded (*UJ CC* par 83). Greenberg JP did not assert that the long-lease rights could *never* be *delectus personae* (*UJ CC* par 85). Khampepe J noted that this could be understood as a presumption that could be rebutted where parties were able to demonstrate and prove that they intended to transact with each other personally and that no other third party could take over the rights and obligations (*UJ CC* par 84). The inquiry of the nature of a right is specific to the agreement, and will inevitably be sensitive to context, purpose, and text. The court held that the fact that the agreement before it was a lease, without more, was neither here nor there in relation to the determination of the nature of the rights. A court must probe further (*UJ CC* par 86).

Khampepe J proceeded to consider the role of the parol evidence rule. The court cited, with approval, the *dictum* in *Union Government v Vianini Ferro-Concrete Pipes (Pty) Ltd* (1941 AD 43 47), where the Appellate Division (per Watermeyer JA) held that generally where the parties have reduced their agreement to writing, such a contract serves as the sole memorial of the transaction. Where there is a contractual dispute, no extrinsic evidence may be adduced to prove the terms of the contract or its content and no provisions of the contract can be altered, contradicted, varied, or added by extrinsic (parol) evidence (*UJ CC* par 88). The court further noted that the parol evidence rule serves two functions, namely an interpretational function and integrational function. The latter refers to the role of parol evidence in setting the limits of a contract, whereas the former

refers to how the parol evidence rule governs the use and reliance of extrinsic evidence where a contract has been reduced to writing (*UJ CC* par 89). The court held that the parol evidence rule does not preclude contextual evidence from being produced and relied upon, where the context is relevant for purposes of properly interpreting a contract. The rule is relevant and apposite when the evidence adduced seeks to contradict, vary, add, or alter the terms of the written agreement. It is not relevant when the evidence is adduced to assist a court to interpret a contract (*UJ CC* par 92). The court remarked that, for instance, if UJ attempted to adduce evidence that would illustrate that the parties had intended to include a *pactum de non cedendo* but had omitted to do so for some reason or other, then the parol evidence would be properly invoked, and it would prevent UJ from adducing such evidence (*UJ CC* par 92).

The court agreed with the High Court and held that clause 8 of the lease agreement made it abundantly clear that the agreement between UJ and ATS was of a personal nature and was not capable of being ceded. It held that this clause had to be interpreted in light of the ministerial request for lease approval and permission. The terms of the request were unambiguous and identify the relationship between UJ and ATS and the purpose of the lease arrangement (*UJ CC* par 95). Khampepe J noted that during the negotiations there was reference to a "partnership" between UJ and ATS and reference to the relationship between the two entities under the cooperation agreement (*UJ CC* par 96). The court also opined that the statutory framework (that is, the Universities Act 61 of 1955 and the Rand Afrikaans University Act 51 of 1966) that governed the lease agreement also indicated that the rights were personal to ATS, and thus ATS could not transfer these rights to another party for a profit (*UJ CC* par 97).

The respondents had argued that the cession should be left to stand because UJ would not suffer any prejudice and thus the rights were not *delectus personae* (*UJ CC* par 100). Khampepe J decidedly rejected this contention and held that there is no authority that suggests that prejudice is a factor or element when determining whether rights are *delectus personae*. She reiterated that the *dicta* in S*asfin (Pty) Ltd v Beukes* (*supra* 31G–H) and *Goodwin Stable Trust v Duohex (Pty) Ltd* (1998 (4) SA 606 (C) 617H–I) should not be misunderstood as setting down a rule that prejudice is an independent consideration. Rather, those cases must be understood as setting out the aim of *delectus personae*, which is protecting the debtor from any disadvantage arising from a cession. The relevant test is not whether the debtor is prejudiced or disadvantaged, but it is whether the rights in question are so personal that it matters to the debtor who the creditor is, in light of the contract, understood within its context and purpose (*UJ CC* par 100).

However, the court noted that the Supreme Court of Appeal in *Propell Specialised Finance (Pty) Ltd v Attorneys Insurance Indemnity Fund NPC* (*supra* par 36) remarked that while actual prejudice is not a requirement, the debtor may demonstrate that a particular cession will impose greater burdens on it. In any event, the court found that UJ would be prejudiced by the cession to Wamjay because it meant that ATS was no longer able to

discharge its obligations of building the theological college in terms of the lease agreement. Accordingly, the cession imposed additional burdens on the debtor because it rendered the cedent (ATS) unable to discharge its obligations under the agreement (*UJ CC* par 101). The court held that ATS could not build a theological college because of the cession, and this was clearly prejudicial to UJ, as it had not contemplated having to provide the premises for any other purpose (*UJ CC* par 102). Accordingly, ATS should have obtained consent from UJ prior to ceding its rights to Wamjay.

Khampepe J found that the High Court's and the Full Court's conclusions were correct. The court agreed with the High Court's finding that the rights were personal to ATS (*UJ CC* par 94). Khampepe J believed that clause 8 of the lease agreement, which must be interpreted with regard to the request for ministerial approval and the subsequent permission, demonstrated that the parties intended that the leased premises would be used by ATS (*UJ CC* par 95). The court also held that the result of the purported cession between ATS and Wamjay was to render the contract nugatory and incapable of being performed (*UJ CC* par 101–103). The court embraced the definition of repudiation provided by *Datacolor International (Pty) Ltd v Intamarket (Pty) Ltd* (2001 (2) SA 284 (SCA) par 16), which defined repudiation as a situation where a contracting party objectively and manifestly demonstrates an intention to be no longer bound by the agreement and no longer discharge its obligations under the agreement (*UJ CC* par 104). It was thus reasonable for UJ to conclude that ATS had repudiated the lease agreement and that the repudiation was of a serious nature (*UJ CC* par 111). The court then concluded that it was appropriate for UJ to cancel the contract.

Although not relevant for purposes of this note, the court rejected the respondents' contention that UJ had waived its right to rely on the personal nature of the lease agreement (*UJ CC* par 113–115). The court also rejected the respondents' reliance on the defence of estoppel (*UJ CC* par 116–120). Ultimately, the court ruled in favour of UJ, and upheld the appeal with costs (*UJ CC* par 121–122).

5 Critical evaluation of the decisions

5 1 *Parol evidence rule and the role of context*

From the outset, the decision of the Supreme Court of Appeal was narrow and rigid. First, the Supreme Court of Appeal did not fully appreciate the role of the parol evidence rule considering the interpretational approach set out in *Endumeni*. Unterhalter AJA, writing for a unanimous Supreme Court of Appeal, has recently highlighted that there is an apparent tension between the parol evidence rule, which is a crucial doctrine in contract law, and the interpretational principles set out in *Endumeni* (*Capitec Bank Holdings Limited v Coral Lagoon Investments 194 (Pty) Ltd* [2021] ZASCA 99 par 38). Specifically, in *Endumeni*, the Supreme Court of Appeal emphasised that when interpreting a contract, it is important that a court considers the language used, understood in the context and purpose of the contract and

the provisions therein, as part of a unitary exercise of interpretation (*Capitec Bank Holdings Limited v Coral Lagoon Investments supra* par 18).

Of note, the *Endumeni* approach overturns the previous position, which was that context could only be resorted to if there was ambiguity or lack of clarity in the text (see *Coopers & Lybrand v Bryant* 1995 (3) SA 761 (A) 767E–768E). While it is evident from *Endumeni* that the context and purpose of a contract are to be taken into account from the outset, the Supreme Court of Appeal has found it necessary to explicitly point this out in subsequent cases and to make it plain that context and purpose will be taken into account as a matter of course, whether or not the words used in the contract are ambiguous or lack clarity (for e.g., see, *Novartis SA (Pty) Ltd v Maphil Trading (Pty) Ltd supra* par 28; *Unica Iron and Steel (Pty) Ltd v Mirchandani* 2016 (2) SA 307 (SCA) par 21; *North East Finance (Pty) Ltd v Standard Bank of South Africa Ltd* 2013 (5) SA 1 (SCA) par 24). This means that a court interpreting a contract must, from the outset, consider the contract's factual matrix, its purpose, the circumstances leading up to its conclusion, and the knowledge at the time of those who negotiated and produced the contract. Accordingly, *Endumeni* sets out a triad of factors to consider – that is, language, context, and purpose. However, the purported issue is the parol evidence rule, which provides that where the parties have intended to reduce an agreement to writing, and intended that the agreement should be the sole memorial of the transaction, then extrinsic evidence that contradicts, adds to, modifies or varies the contract is inadmissible (*KPMG Chartered Accountants (SA) v Securefin Limited* 2009 (4) SA 399 (SCA) par 39; *The City of Tshwane Metropolitan Municipality v Blair Atholl Homeowners Association* 2019 (3) SA 398 (SCA) par 64–77). The question then becomes: how do you reconcile the parol evidence rule and the *Endumeni* interpretation principles?

Unterhalter AJA endorsed the decision of the Constitutional Court in the *UJ* case and remarked that an expansive approach should be preferred when deciding the admissibility of extrinsic evidence relating to context and purpose to determine what the contracting parties intended (*Capitec Bank Holdings Limited v Coral Lagoon Investments supra* par 39). Therefore, evidence that relates to the purpose and context of a particular contract should be admitted because context is everything (*Capitec Bank Holdings Limited v Coral Lagoon Investments supra* par 40). Importantly, Unterhalter AJA, citing Corbin (*Corbin on Contracts* (1960) 108–110) with approval, noted:

> "The parol evidence rule simply reflects the agreement between the parties that the written document constitutes their exclusive agreement. It supersedes earlier agreements, whether written or oral, and excludes evidence of such agreements. The parol evidence rule is not a rule as to the admission of evidence for the purpose of interpretating the meaning of the written agreement that constitutes the parties' exclusive agreement." (*Capitec Bank Holdings Limited v Coral Lagoon Investments supra* par 44)

Accordingly, the Supreme Court of Appeal in the *UJ* matter erred in giving primacy to the text of the contract to the exclusion of contextual evidence. Words, without context, mean nothing (*Capitec Bank Holdings Limited v Coral Lagoon Investments supra* par 46). Understood in this light, it means

that the parol evidence rule and the *Endumeni* principles may coexist. The decision of the Constitutional Court in *UJ* must not be understood as judicial licence for courts to accept every claim of contextual evidence where such evidence is unmoored in the text and structure of a contract. Context and purpose must be used to clarify the language and structure of a contract.

The parol evidence rule cannot be used as a mechanism for affirming the primacy of the written terms of contract. The parol evidence rule cannot be used to give priority to the text to the exclusion of evidence relating to context and purpose. This was reaffirmed in *Capitec Bank Holdings Limited v Coral Lagoon Investments* (*supra* par 40–45).

It bears reiterating that the parol evidence rule has two components: namely, the interpretation rule and the integration rule (*Johnston v Leal* 1980 (3) SA 927 (A) 943A–B; *Delmas Milling Co. Ltd. v Du Plessis* 1955 (3) SA 447 (AD) 453–455). In terms of the interpretation rule, the court must endeavour to ascertain and determine the meaning of the terms contained in a contract. To this end, as articulated in *KPMG Chartered Accountants (SA) (supra)* par 39, interpretation is not a matter of fact, but rather a matter of law. Accordingly, it is a question for the court to determine and not for witnesses. In terms of the integration rule, a written agreement is the sole and exclusive memorial of the transaction between the parties (*Union Government v Vianini Ferro-Concrete supra* 47). This means that a court may not admit extrinsic evidence relating to the parties' intention where such evidence would have the effect of altering the terms of the contract to which the parties have, in writing, clearly agreed (*Absa Technology Finance Solutions (Pty) Ltd v Michael's Bid a House CC* 2013 (3) SA 426 (SCA); Wigmore "A Brief History of the Parol Evidence Rule" 1904 4 *Columbia Law Review* 338; Marston "The Parol Evidence Rule: The Law Commission Speaks" 1986 45 *The Cambridge Law Journal* 192; Posner "Parol Evidence Rule, the Plain Meaning Rule, and the Principles of Contractual Interpretation" 1997 146 *University of Pennsylvania Law Review* 533; Iyer "The Parol Evidence Rule: Insurance/Contract Law" 2016 16(9) *Without Prejudice*; Ross and Trannen "The Modern Parol Evidence Rule and Its Implications for New Textualist Statutory Interpretation" 1995 87 *Georgetown Law Journal* 195; Klass "Parol Evidence Rules and the Mechanics of Choice" 2019 20 *Theoretical Inquiries in Law* 457; Burnham "The Parol Evidence: Don't Be Afraid of the Dark" 1994 55 *Montana Law Review* 98).

That said, the import of the Constitutional Court's decision is that the parol evidence rule will most probably become a residual rule that identifies the written agreement from which meaning must be attributed. This was recognised and affirmed in *Capitec Bank Holdings Limited v Coral Lagoon Investments* (*supra* par 47). A court will only be able to determine whether the extrinsic evidence sought to be introduced has the effect of contradicting, adding, varying or altering a contract once a court has concluded what the meaning of the contract is. In light of the *Endumeni* injunction in relation to contractual interpretation, the parol evidence rule cannot be used to exclude extrinsic evidence that speaks to the context and purpose of the contract. Evidence will most likely be excluded where it is irrelevant to ascertaining the meaning of the contract.

5 2 *The test to determine whether rights are* delectus personae

Courts have held that rights and obligations espoused in lease contracts are not ordinarily *delectus personae*, particularly where the lease is for a long term. For example, in *Boshoff v Theron* (*supra*), Greenberg JP in an *obiter dictum* held that in a long-term lease agreement a lessor does not expect the obligations to be discharged personally by the lessee throughout the whole lifetime of the contract. The Supreme Court of Appeal relied on this decision as authority for the proposition that rights and obligations in long-term lease agreements, in particular, are not *delectus personae*. The Supreme Court of Appeal erred in two respects. First, the statement was obiter. It cannot therefore be held to be authority for this proposition without a court substantiating its reliance on the decision. Furthermore, on a proper construction of *Boshoff v Theron* (*supra*), Greenberg JP did not hold that provisions in long-term lease agreements are never *delectus personae*. What Greenberg JP observed was that provisions in such agreements are generally not *delectus personae* but there may be instances where they are. This was confirmed by the Constitutional Court (*UJ CC* par 85). The enquiry is not into the nature of the contract – whether it is a long-term lease or some other type of contract. Instead, the inquiry is whether the rights in the contract are so personal that they cannot be ceded because the identity of the creditor makes a substantial or reasonable difference to the debtor. There may be instances where the specific identify of the lessee is of substantial and reasonable importance and relevance to the lessor. This would be in line with the classical statement by Innes CJ in *Eastern Rand Exploration Co Ltd v AJT Nel* (*supra*).

The fact that the contract pertains to a long-term lease does not denude a court of its duty to enquire whether the rights in such a contract are *delectus personae*. If one were to consider the test from the perspective of the debtor, the test has been eloquently outlined in *Densam (Pty) Ltd v Cywilnat (Pty) Ltd* (*supra* 112A–D). In that case, Botha JA stated:

> "The question whether a claim (that is, a right flowing from a contract) is not cedable because the contract involves a *delectus personae* falls to be answered with reference, not to the nature of the cedent's obligation vis-à-vis the debtor, which remains unaffected by the cession, but to the nature of the debtor's obligation vis-à-vis the cedent, which is the counterpart of the cedent's right, the subject-matter of the transfer comprising the cession. The point can be demonstrated by means of the lecture-room example of a contract between master and servant which involves the rendering of personal services by the servant to his master: the master may not cede his right (or claim) to receive the services from the servant to a third party without the servant's consent because of the nature of the latter's obligation to render the services; but at common law the servant may freely cede to a third party his right (or claim) to be remunerated for his services, because of the nature of the master's corresponding obligation to pay for them, and despite the nature of the servant's obligation to render them." (author's emphasis)

In short, the test is whether it makes a difference to the debtor whether it is the cedent or the cessionary who is entitled to enforce the contract. The question is not about the type of contract. It is respectfully submitted that the

Supreme Court of Appeal erred in concluding that the contract could be ceded merely because the contract in question concerned a lease. What is essential is this: if the identity of the creditor makes a difference to the debtor, then the rights are *delectus personae*.

Moreover, it appears that the Supreme Court of Appeal conflated two different principles. The Supreme Court of Appeal noted that the lease agreement did not have any express or implied provisions in the contract that barred ATS from ceding the rights contained, and therefore concluded that the rights were not at all *delectus personae* (*UJ SCA* par 11). The Supreme Court of Appeal clearly conflated the question of whether rights were *delectus personae* with a question relating to the existence of a *pactum de non cedendo*, which as described above generally refers to an agreement not to cede. However, the absence of such an agreement does not then mean that the rights are not *delectus personae*. These are two separate enquiries. The Supreme Court of Appeal asked the wrong question, and unsurprisingly, it got the wrong answer.

6 Conclusion

The Constitutional Court's decision in *UJ* is an important decision for two reasons. First, it reconciles the apparent tension between the *Endumeni* triad rules of interpretation and the parol evidence rule, which is still important doctrine in our law. Importantly, it reminds us that contextual evidence should not be excluded merely because it is external to the written contract. The language and text of a contract no longer enjoy primacy. Secondly, the court clarified the test for whether rights are *delectus personae* and the statement of Greenberg JP in *Boshoff v Theron* (*supra*). It is a progressive decision and a step in the right direction in clarifying two key principles of contract law.

Sfiso Benard Nxumalo
University of Oxford

THE IMPACT OF THE *KOMAPE* JUDGMENT ON THE SOUTH AFRICAN COMMON LAW OF DELICT: AN ANALYTICAL REVIEW

Komape v Minister of Basic Education
[2020] 1 All SA 651 (SCA); 2020 (2) SA 347 (SCA)

1 Introduction

The case of *Komape v Minister of Basic Education* ([2020] 1 All SA 651 (SCA); 2020 (2) SA 347 (SCA)) arose out of tragic circumstances in which a five-year-old Grade-R learner, M, died from drowning in a pit latrine. According to the evidence, M had gone to the toilet unsupervised when he drowned (*Komape supra* par 1). Following the incident, the family unsuccessfully instituted a claim in delict for damages for emotional shock, grief and bereavement, as well as constitutional damages, in the Limpopo High Court (*Komape v Minister of Basic Education (Tebeila Institute of Leadership Education and Governance and Training Equal Education Amicus Curiae)* 2018 JDR 0625 (LP)). The family of M then appealed to the Supreme Court of Appeal (SCA). The SCA handed down its judgment on 19 December 2019, reversing the decision of the High Court. It is this judgment of the SCA that is the subject of this note (any reference to *Komape* in this note is to the SCA judgment). The SCA judgment was generally well received, especially among human rights activists advocating for children's right to education. Some advocates for human rights regard the *Komape* judgment as a giant step towards the realisation of basic rights in South Africa, in particular the right to basic education, using the common law (see Harding "Using the Common Law to Realise Basic Rights in South Africa: The Case of *Komape v Minister of Basic Education*" (8 April 2020) *@SECTION27news* https://www.right-to-education.org/fr/node/1152 (accessed 13/07/2021)). While the judgment of *Komape* has generally been welcomed, some authors may regard this judgment as a whole (that is, the High Court and SCA judgments) as a missed opportunity to develop the South African common law of emotional shock by introducing an action for pure grief (see Mukheibir and Mitchell "The Price of Sadness: Comparison Between the Netherlands and South Africa" 2019 22 *PER/PELJ* http://dx.doi.org/10.17159/1727-3781/2019/v22i0a6413, although the authors' argument is based on the decision of the High Court). This note conducts an analytical appraisal of the SCA's decision of *Komape,* as well as its impact on the common law of delict, particularly insofar as the action for emotional shock is concerned. The note begins by outlining the factual background to the case of *Komape*. The note then advances a critical

analysis of the judgment, with some special focus on Claim B, in terms of which M's immediate family cumulatively sued the Department of Basic Education, the Limpopo Member of the Executive Council, the school principal and the school's governing body for compensation for pure grief, in addition to the general action for emotional shock and psychological lesions (*Komape supra* par 17). To achieve their goal in this regard, the family first argued for the common law to be developed in light of section 39(2) of the Constitution, 1996 (*Komape supra* par 17). Moreover, as an alternative to the second main claim (Claim B), the family argued for an award of constitutional damages, also on the basis of the common law, so developed in accordance with their initial prayer for such development (*Komape supra* par 17). After its analysis, the note offers a conclusion.

2 Factual background

This case of *Komape* arose out of the death of a five-year-old boy, M, when he fell into a pit latrine at a rural school in Limpopo Province (see *Komape supra* par 1 9–14). As M drowned in the muck, he suffered "the most appalling and undignified death" (par 1). Both the boy's father and mother had witnessed his shameful death as they came to the school while M's lifeless body was still stuck in the toilet filth (par 12). As a consequence of hearing of and witnessing the incident, the boy's parents suffered post-traumatic stress disorder and prolonged depression (par 12). In addition, his siblings suffered post-traumatic stress disorder and prolonged depression, resulting from hearing about the death of M under those deplorable conditions (par 13). Consequently, the family instituted a court action for delictual damages against the Department of Basic Education in the Limpopo High Court, citing also the Limpopo Member of the Executive Council, the boy's school principal and the school's governing body as other respondents (par 1). In addition to the claim for damages based on emotional shock (founded on post-traumatic stress disorder), the family instituted a separate claim for grief and bereavement (par 1 and 15). For the grief and bereavement claim, the family argued for the development of the common law, in terms of section 39(2) of the Constitution, 1996, to recognise a claim for compensation for grief and bereavement for the immediate family (par 17(*b*)). As an alternative to this claim (also based on developing the common law), the family argued for compensation for grief and bereavement as constitutional damages (and/or punitive damages) (par 17(*b*)). There were other peripheral claims that fall outside the scope of this note (par 17). The respondents conceded liability in respect of both main claims in the High Court, but the parties could not reach a settlement as the offer of the Department was not acceptable to the family (par 18 and 19) – hence, the matter proceeding to trial in the High Court. However, the High Court dismissed both the main claims (par 20). Moreover, the High Court refused to develop the common law to recognise a separate claim for grief and bereavement (par 21 and 22). Instead, the High Court opted to grant a structural interdict against the respondents, even though it had not been pleaded by the plaintiffs (par 20).

The matter then went on appeal to the SCA with the leave of the High Court (par 22). The appeal was against the dismissal of the prayer for a

declaratory order relating to the respondents' breach of their constitutional obligations, and the dismissal of Claim A, Claim B, and the claim for future medical expenses for M's younger sibling (par 22). In the SCA, the decision of the High Court in respect of the main claim (Claim A) was overturned, as was the denial of part of the claim in respect of M's eight-year-old brother (par 22). Furthermore, the SCA held that grief and bereavement is accounted for in the main claim (that is, the claim for emotional shock). The SCA also refused to allow the alternative to the second main claim (Claim B) to recognise grief and bereavement and award constitutional damages.

There are other noteworthy aspects of the SCA judgment. These are considered in the section below.

3 The review

It is noteworthy that the SCA judgment is well researched and gives compelling legal reasoning for the court's decision. For example, when making a finding in respect of the second main claim (Claim B), the SCA went through the jurisprudence of other jurisdictions, in addition to South African jurisprudence. In this regard, the court considered at length the legal position in England, Australia, New Zealand and Canada, as required by section 39 of the 1996 Constitution (par 58–61). Also, the SCA revisited the South African common law of delict in respect of an action for emotional shock and psychological lesions (par 24–32 and 45). The court correctly remarked that an action for emotional shock and psychological lesions was long settled and trite in South African law. Indeed, the South African law of emotional shock was settled in 1972, in *Bester v Commercial Union Versekeringsmaatskappy van SA Bpk* (1973 (1) SA 769 (A)) and the SCA reaffirmed the position as far back as 2001 in the judgment of *Road Accident Fund v Sauls* (2002 (2) SA 55 (SCA)). Primarily, the action for emotional shock and psychological lesions is based on delict under the *actio legis aquilae* (*lex Aquilia)* and, as such, all the basic elements for delictual liability have to be present for the action to succeed. The elements are: conduct in the form of a commission or an omission, wrongfulness, fault, causation and harm (in the form of emotional shock) (Neethling and Potgieter *Neethling–Potgieter–Visser Law of Delict* 7ed (2015) 300–305; Raheel and Steynberg "Claims for 'Emotional Shock' Suffered by Primary and Secondary Victims" 2015 78 *THRHR* 181–199). It is a legal requirement that emotional shock (or harm) should be accompanied by a psychological injury that is "reasonably serious" (*Media 24 Ltd v Grobler* [2005] 3 All SA 297 (SCA) par 23 and par 56–60; *Barnard v Santam BPK* 1999 (1) SA 202 216E–F; see also Neethling and Potgieter *Law of Delict* 301–302). Thus, an insignificant emotional shock that lasts for a short duration is not actionable in terms of the law (*Majiet v Santam Limited* [1997] 4 All SA 555 (C) 555h–i to 566d–e; see Raheel and Steynberg *THRHR* 190–191; see also Neethling and Potgieter *Law of Delict* 302).

In casu, the SCA dismissed a claim for damages based purely on grief and bereavement, which the appellants had argued for under Claim B. In rejecting this appeal for an action based purely on grief and bereavement, and which is not detectable as psychological injury, the SCA revisited the legal position in other jurisdictions, in line with section 39(1)(*c*) of the

Constitution, which bestows discretion on the South African courts to consider foreign law (see par 28–31 and 34–37). It found that there were jurisdictions that allowed claims for pure grief and bereavement, but that in those jurisdictions there had been legislative interventions that recognised such actions (par 33–40). In contrast, the SCA found that there is no such legislation in South Africa, despite the fact that a call for such intervention was made long ago in the judgment of *Warneke* (*Union Government (Minister of Railways and Harbours* v *Warneke* 1911 AD 657) (*Komape supra* par 35 and 37). The SCA, in the present case, correctly held that what the family of M sought to recover as compensation for pure grief and bereavement under Claim B had been catered for under the main claim in the quantum to be awarded. For example, the court held:

> "[The] appeal against the dismissal of claim B fails because the recoverable damages described therein are to be compensated under Claim A". (par 50)

The SCA went on to conclude:

> "In the light of this, I tum to consider the quantum of the damages suffered by the appellants in respect of the claim for emotional trauma and shock, which will include allowance for their grief and bereavement." (par 51)

The law, through an action for emotional shock, compensates for serious psychological injury, be it post-traumatic stress disorder, emotional distress, depression, nervous shock, or fright, to name a few (see for e.g., Neethling and Potgieter *Law of Delict* 300; *Komape supra* par 50–51). Viewed in this light, psychological lesion is an end result of prolonged grief and bereavement, which begins as emotional shock as a result of the plaintiff's conduct (a commission or an omission). Accordingly, the author is in full accord with the court that awarding the appellants separate damages for grief and bereavement would amount to an unwarranted duplication of awards.

Thirdly, *in casu,* the SCA declined to develop the common law in terms of section 39(2) of the Constitution, and also declined to allow a claim prayed for as an alternative to Claim B. In regard to development of the common law, section 39(2) of the Constitution provides that "when developing the common law or customary law, every court, tribunal, or forum must promote the spirit, purport, and objects of the Bill of Rights". As a matter of principle, the courts have an inherent power to develop the common law in terms of s 173 of the Constitution (see *Carmichele v Minister of Safety and Security* 2001 (4) SA 938 (CC); 2001 (10) BCLR 995 (CC) par 33 and 39). Still, development of the common law, where it is deficient, ought to be carried out in a certain systematic pattern. In that regard, the Constitutional Court held in *Carmichele* that development of the common law in terms of section 39(2) of the Constitution, 1996 ought to be undertaken with due regard to the "spirit, purport and objects" of the Bill of Rights (*Carmichele supra* par 32). Meanwhile, litigants have a corresponding obligation to ensure a "reliable and harmonious" development of the jurisprudence under the Constitution by raising constitutional arguments. This has long been affirmed by the Constitutional Court (see for e.g., *Carmichele supra* par 39 and 41).

In *Carmichele*, Ackermann J adopted a two-fold approach to the development of the common law in terms of section 39(2) of the Constitution

(*Carmichele supra* par 40) whereas, in *Mighty Solutions CC t/a Orlando Service Station v Engen Petroleum Ltd* (2016 (1) SA 621 (CC); 2016 (1) BCLR 28 (CC)), Van der Westhuizen J advanced a five-pronged approach to the development of the common law in terms of section 39(2) of the Constitution (par 38). According to Ackermann J, a court first needs to satisfy itself that the common law is deficient and requires development in order to be brought in line with the objectives of section 39(2) (par 39; see also *Minister of Police v Mboweni* 2014 (6) SA 256 (SCA); [2014] 4 All SA 452 (SCA) par 22 and 24). Secondly, such a court has to take into account policy considerations such as fairness and the interests of justice (*Carmichele supra* par 40). Effectively, the second stage of the enquiry looks into the manner in which such development ought to be carried out so as to meet the objectives of section 39(2) of the Constitution. Among other considerations, the development of the common law in terms of section 39(2) needs to be carried out in a manner that allows 'for the most appropriate development of the common law within its own paradigm' (*Carmichele supra* par 40). In other words, the development of the common law should be carried out with minimal disturbance to the foundational principles of the relevant branch of the law under consideration. The court will only proceed to the second part of the enquiry when it has ascertained that the common law was inadequate and required development. The SCA *in casu* outlined the authorities and the legal criteria for developing the common law, commencing with the principles laid down by the Constitutional Court (CC) in *Carmichele* (see *Komape supra* par 41).

On the other hand, Van der Westhuizen J stated the following in *Mighty Solutions CC:*

> "Before a court proceeds to develop the common law, it must (a) determine exactly what the common law position is; (b) then consider the underlying reasons for it; and (c) enquire whether the rule offends the spirit, purport and object of the Bill of Rights and thus requires development. Furthermore, it must (d) consider precisely how the common law could be amended; and (e) take into account the wider consequences of the proposed change on that area of law." (par 38)

The approach adopted by Van der Westhuizen J in *Mighty Solutions CC* should not be viewed as being at odds with the one adopted in *Carmichele.* Instead, the *Mighty Solutions CC* approach should be viewed as an amplification of *Carmichele.* This view may be premised on a couple of factors. For one, *Mighty Solutions CC* does not criticise the stance that *Carmichele* takes towards the development of the common law. Instead, the court reaffirms the other part of *Carmichele* regarding the need to guard against encroaching on the functions of the legislature as the primary organ of state entrusted with the responsibility to legislate in accordance with the principle of the separation of powers (par 39; see also *Carmichele supra* par 36). Moreover, a closer examination of the approaches in both *Carmichele* and *Mighty Solutions CC* reveals that the two are in harmony with, and complimentary to each other. Therefore, although the Constitutional Court has adopted two lines of thought with regard to the development of the common law, one can safely conclude that the test for the development of the common law, in terms of section 39(2) of the Constitution, has been settled in South African law.

Of course, the author is mindful of the criticism that authors Davis and Klare level against this approach of *Carmichele*; they argue that it is un-transformative or potentially problematic, as it commits itself too strongly to the common law at the expense of constitutional goals (Davis and Klare "Transformative Constitutionalism and the Common and Customary Law" 2010 *SAJHR* 403). The author is unable to agree with the learned authors' criticism of the approach in *Carmichele,* for several reasons. For one, the stance that the court has taken safeguards the rule of law and its principle of legality, which, among other things, entails that there should be certainty in the law. The rule of law, which is inherent in the principle of legality, has been held by the Constitutional Court to be fundamental to constitutional law (see *Fedsure Life Assurance Ltd v Greater Johannesburg Transitional Metropolitan Council* 1999 (1) SA 374 (CC); 1998 (12) BCLR 1458 (CC) par 58; *State Information Technology Agency SOC Limited v Gijima Holdings (Pty) Limited* 2018 (2) SA 23 (CC); 2018 (2) BCLR 240 (CC) par 38 and 39). Also, *Carmichele* gives due regard to the principle of the separation of powers, which holds that it is Parliament, and not the courts, that is tasked with the primary authority to drive law reform (*Carmichele supra* par 36; *Mighty Solutions CC supra* par 39; see also *Du Plessis v De Klerk* 1996 (3) SA 850 (CC); 1996 (5) BCLR 658 (CC) par 61 and 105). Moreover, our courts have long settled the relationship between the Constitution, on the one hand, and other branches of our law on the other. For example, in *Van Eeden v Minister of Safety and Security (Women's Legal Centre Trust, as Amicus Curiae)* (2003 (1) SA 389 (SCA) par 12)*,* the SCA held that the Constitution does not trump other laws in the Republic; it merely acts as a touchstone for what is lawful and unlawful in a constitutional democracy. Thus, in the author's opinion, Davis and Klare's criticism of the approach in *Carmichele* is without sound basis.

It is submitted that Claim B, and its alternative*,* in the case of *Komape* amount to an unnecessary duplication of claims. As the SCA held, a claim for grief and bereavement (appellants' Claim B) ought not to have been argued separately from Claim A, as grief and bereavement would have been inherently taken into account when calculating the amount of damages (quantum) to be awarded to the appellants for emotional shock (par 50–51). In short, the common law in the area of emotional shock and psychological injury is not deficient and, as such, it was not in need of development. Moreover, it is submitted that, even if the South African common law were deficient in that it did not recognise an independent claim for grief, *Komape* was not the right case to argue for such development. The appellants were not left without a remedy under the common law of delict; and thus, there was no injustice to be suffered under the circumstances of their case. A development of the common law may be appropriate and necessary where a defendant's wrongful conduct causes the plaintiff serious grief and bereavement, although not accompanied by psychological injury nor amounting to constitutional damages. In other words, since a delictual claim for emotional shock requires psychological lesions that are serious, a close family member who suffers serious grief would be without a remedy in law unless grief and bereavement were accompanied by psychological injury or the conduct causing such grief amounted to a violation of the plaintiff's constitutional rights.

Lastly, the SCA declined to award constitutional damages and to issue a declaratory order to the effect that the Department of Basic Education (and the other respondents) were in violation of the constitutional duty they owed the learners. The court reached this conclusion after considering various legal authorities, including both domestic and foreign jurisprudence (*Komape supra* par 58–63). In respect of constitutional damages, the courts have held that they would only award such damages where the existing law (including development of the common law in terms of section 39(2) of the Constitution,1996) is (or would be) inadequate to vindicate a violation of or threat against a citizen's rights (*Residents of Industry* House*, 5 Davies Street, New Doornfontein, Johannesburg v Minister of Police* [2021] ZACC 37 par 89–103; *Mboweni supra* par 22–24; *Fose v Minister of Safety and Security* 1997 (7) BCLR 851; 1997 (3) SA 786; see also *President of the Republic of South Africa v Modderklip Boerdery (Pty) Ltd)* 2005 (5) SA 3 (CC) par 57(*sic)*–57 *and 64–65; MEC for the Department of Welfare v Kate* 2006 (4) SA 478 (SCA); [2006] 2 All SA 455 (SCA) par 23–26). The only issue that was left open was whether an action for constitutional damages was available for a breach of, and/or threat to, any other rights enshrined in the Bill of Rights or Chapter 2 of the Constitution, or whether the awarding of damages qualifies as appropriate relief in such instances (see *Fose supra* par 20 and *Kate supra* par 25). In the case of *Fose*, the applicant had sued the Minister of Safety and Security in delict for damages arising out of a series of assaults perpetrated by members of the police (*Fose supra* par 12–13). Additionally, Fose (the applicant) had also claimed for "constitutional damages" for exactly the same incidents (*Fose supra* par 13 and 23). However, the Constitutional Court held that Fose's constitutional rights would be powerfully vindicated through the award of substantial damages for the assault allegedly perpetrated against him by members of the police – that is, using the normal Aquilian action (*Fose supra* par 67). On the other hand, delictual damages aim to compensate, whereas the constitutional remedy is aimed at affirming constitutional values: that is, to enforce, protect and vindicate guaranteed rights and the values that underpin them (*Fose supra* par 19, 61, 82, 83, 96 and 98). The court accordingly held that there was no place in our law for constitutional damages as an addition to an award for delictual damages (*Fose supra* par 67 and 75; see also *Komape supra* par 59) However, recently in *Thubakgale v Ekurhuleni Metropolitan Municipality* ([2021] ZACC 45), the Constitutional Court has asserted that constitutional damages may be awarded even where there are alternative remedies that are available to the aggrieved party (par 46). Such will be the case where an award of constitutional damages is the most effective remedy (appropriate relief) to vindicate the constitutional rights that have been violated (*Thubakgale supra* par 46). In *Thubakgale,* the court also reminds us that a violation of constitutional rights such as dignity goes beyond infringement of an individual litigant, and may be an attack against the "[South African] constitutional project as a whole" (par 43). In such cases, constitutional damages may be awarded as opposed to traditional remedies that may be available in any particular circumstances (see *Thubakgale supra* par 44–45). In *Thubakgale*, the Constitutional Court has also dispelled the notion that constitutional damages are intended to be punitive (par 43 and 46–50).

The stance that the courts have maintained regarding the awarding of constitutional damages as an alternative, rather than as an addition to other remedies available in any particular situation, is preferable and not without merit, in light of the limitation of available resources in South Africa. Among other things, awarding constitutional damages in addition to other awards may amount to an unjust duplication of compensation and a "windfall" for the plaintiff (*Fose supra* par 65; see for instance the Constitutional Court's statement in *Le Roux v Dey* 2011 (3) SA 274 (CC); 2011 (6) BCLR 577 (CC) par 139–143 in respect of the *actio iniuriarum*. It is submitted that the same principle would also apply in respect of the *Aquilian action*). A claim for constitutional damages is inherently (or at least potentially) punitive in nature (see *Mboweni supra* par 5; *Fose supra* par 62–65) This is at odds with the nature of a claim for damages, which is compensatory (see *Fose supra* par 63). Thus, the courts need to use this remedy only in limited circumstances, especially where conventional remedies are inadequate to atone for constitutional rights disturbed or threatened, as has been argued in this note. Furthermore, an unrestrained award for constitutional damages could have far-reaching implications for defendants, especially private individuals (or non-state persons). For defendants, an unrestrained award for constitutional damages would pose a double jeopardy, as it would amount to compensating plaintiffs twice, and the imposition of punitive damages. For the State as a defendant, it would result in an extra burden for taxpayers, who are the ones paying the damages to compensate a plaintiff for the State's wrongdoing (see *Mboweni supra* par 25). The author shares the same sentiments expressed in *Mboweni* (*supra* par 25) and *Fose* (*supra* par 71–72) that the awarding of constitutional damages may only serve to enrich the plaintiff, rather than serve as deterrence. This is not to say that the author rejects the sentiments expressed by the SCA in *Kate*:

> "Courts should not be overawed by practical problems. They should 'attempt to synchronise the real world with the ideal construct of a constitutional world' and they have a duty to mould an order that will provide effective relief to those affected by a constitutional breach." (*South Africa v Modderklip Boerdery (Pty) Ltd*) 2004 (6) SA 40 (SCA) par 42; *Kate supra* par 24)

Nevertheless, this assertion does not imply that the courts should indiscriminately award (punitive) constitutional damages even where infringed rights can be indirectly and effectively vindicated through the awarding of common-law damages. However, some authors advocate for constitutional damages in preference to conventional remedies owing to its deterrent effect in the hope that this will spur the State into action to prevent future violations of citizens' constitutional rights (see Barns "Constitutional Damages: A Call for the Development of a Framework in South Africa" 2013 *Responsa Meridiana* https://www.journals.ac.za/index.php/responsa/article/view/3790/2182 (accessed 2021-12-10)). The author concurs with the view that conventional remedies are often sufficiently broad and flexible enough to fully vindicate infringed or threatened plaintiffs' constitutional rights (*Fose supra* par 58*(b)*; *Kate supra* par 27).

In the present case of *Komape*, the SCA also made clear that it was inappropriate to award constitutional damages to the appellants, as the problem of the lack of proper toilets in public schools was not an isolated issue (par 59 and 63). Instead, the problem affected many other learners

across the province (par 66), and maybe across the country. Therefore, the court correctly held that it would serve no purpose to use the public purse to pay

> "a handful of persons a substantial sum over and above the damages they have sustained and for which they have been compensated." (par 63)

In the author's view, it would appear that the claim for constitutional damages had been motivated by the awarding of such damages in the *Life Esidimeni* arbitration, in which the former Deputy Chief Justice (DCJ) Moseneke ordered the Departments of Health (National and Gauteng Provincial Health Department) to pay constitutional damages to relatives of patients who had died under inhumane and appalling conditions (Life Esidimeni Arbitration Award http://www.saflii.org/images/LifeEsidimeni ArbitrationAward.pdf*;* see also *Komape supra* par 62). The SCA categorically rejected any reference to the *Life Esidimeni* arbitration award, holding that that matter was distinguishable from the present case and that the *Life Esidimeni* arbitration award was not binding on the SCA or courts in general (*Komape supra* par 62).

Whereas the SCA may have been correct that an arbitration award has no legal effect on courts, the author disagrees with the court that the *Life Esidimeni* matter is distinct from the *Komape* case. Instead, it is the author's view that the two have similar characteristics; in both, there has been death in appalling and dreadful circumstances. It is public knowledge that in the *Life Esidimeni* matter, some patients were starved and covered in their own faeces (*Life Esidimeni* arbitration award par 109; see also par 90, 95 and 187). In the author's view, the main difference is that *Life Esidimeni* involved hundreds of persons, whereas *Komape* involved only one death. While the facts of the two cases are different, the circumstances under which death occurred are similar and the perpetrator who failed to discharge constitutional obligations is the same, namely the State. Nevertheless, in the *Komape* judgment, the SCA has given clarity regarding the value in our jurisprudence of arbitration awards such as the *Life Esidimeni* arbitration award. Arbitration awards are not binding on our courts. Authors, like Dutilleux are in agreement that arbitration awards do not form part of the jurisprudence, unless an award has been made an order of the court or an award has been to court by way of judicial review (Dutilleux "To Arbitrate, or not to Arbitrate: That Is the Question: The Development of Jurisprudence in South Africa?" (26 May 2020) https://www.cliffedekkerhofmeyr.com/en/news/publications/2020/dispute/dispute-resolution-alert-26-may-to-arbitrate-or-not-to-arbitrate-that-is-the-question-the-development-of-jurisprudence-in-south-africa.html (accessed 2021-10-20)). In fact, the author decries the status quo and argues that it may lead to stagnation of the development of jurisprudence, given the increase of arbitrations in South Africa (Dutilleux https://www.cliffedekkerhofmeyr.com/en/news/publications/2020/dispute/dispute-resolution-alert-26-may-to-arbitrate-or-not-to-arbitrate-that-is-the-question-the-development-of-jurisprudence-in-south-africa.html). It is submitted that the *Life Esidimeni* award was one of a kind; it was unlike those arbitrations that are usually in the area of labour law, and those involving private disputes. Instead, the *Life Esidimeni* arbitration was between an organ of state (the provincial department for health) and

citizens. Most importantly, the central issue in the *Life Esidimeni* arbitration concerned the State's violation of citizens' rights enshrined in the Bill of Rights, especially the human dignity of mental health patients (and their immediate families). Also of significance, the arbitrator was a former Deputy Chief Justice (the erstwhile second highest judge in the Republic), Moseneke. In view of the foregoing, it is submitted that arbitration awards such as the *Life Esidimeni* arbitration award should have a persuasive value in our jurisprudence.

In respect of declaratory orders, as a general rule, the court will only grant it as relief if it is satisfied that such a declaratory order will serve a particular purpose and the applicant proves that he has an identifiable constitutional right. In the present case, the SCA found that the declaratory order would not serve any useful purpose since the High Court had already reprimanded the Department of Basic Education for failure to discharge its constitutional obligations in respect of the learners (*Komape supra* par 66). The SCA was correct to refuse to grant the declaratory order that the appellants were seeking. That the Department of Basic Education was in violation of its constitutional obligation by failing to provide learners with safe toilets was already common cause between the parties. It is submitted that the declaratory order sought is already accounted for in the delictual element of wrongfulness (unlawfulness). Indeed, the appellants would not have succeeded with their main claim for emotional shock (Claim A) without proving wrongfulness. In this regard, wrongfulness would have been in the form of omission and a breach of a legal duty owed to the learners (*Van Eeden v Minister of Safety and Security supra* par 9–12; see also *Minister van Polisie v Ewels* 1975 (3) SA 590 (A)).

4 Conclusion

This note has provided a critical review of the SCA judgment in *Komape v Department of Basic Education* with regard to the family's claim for pure grief and bereavement (Claim B) in addition to their delictual claim for emotional shock and psychological injury. The note has argued that the SCA correctly dismissed the appellants' action for grief and bereavement, and their attempt to develop the common law to recognise such a claim for pure grief and bereavement not accompanied with serious psychological injury. The court saw no distinction between grief and psychiatric harm but vehemently stated that showing grief without proving psychiatric harm cannot be actionable in law. Merely showing grief on its own is not sufficient for a delictual claim to succeed. Thus, the judgment of *Komape* affirms that, under South African law, there is no separate action or compensation for pure grief and bereavement that is not accompanied by substantial psychological lesions. Instead, in order to be entitled to compensation, it is still necessary to prove psychiatric injury in an action for emotional shock. The note also argued that the SCA was correct to hold that grief and bereavement, in general, is properly accounted for when assessing the quantum for emotional shock and psychological lesions. Moreover, this note has argued that the SCA was also correct to hold that awarding constitutional damages was not the appropriate relief in the circumstances of the appellants' case. The appellants had been awarded a substantial amount in damages for the main

claim (Claim A). Furthermore, the family of the appellants was one among many families affected by the problem of a lack of proper toilets in public schools in the province of Limpopo. The judgment of *Komape* has reaffirmed the South African law regarding an action for emotional shock and psychological injury. The judgment has also provided a comparative view of the law in an action for emotional shock and psychological injury. It has surveyed the legal position from different (foreign) jurisdictions, more especially with regard to an action based purely on grief and bereavement that is not accompanied by serious psychological lesions. To some extent, and despite declining an invitation to develop the common law to recognise compensation for pure grief and bereavement, the *Komape* judgment has also laid the foundational basis for a possible future development of South African law in appropriate case circumstances. Such development of this area of law could either be through a legislative process or by the courts should the need arise in appropriate circumstances, as is the position in other jurisdictions. *Komape* has amplified and restated the South African law with regard to the awarding of constitutional damages. Without a doubt, it has become another valuable source of reference on the South African law on emotional shock and psychological injury, as well as grief and bereavement.

Michael C Buthelezi
University of Zululand

THE LEGALITIES OF MANDATORY COVID-19 VACCINATION AT UNIVERSITIES: LESSONS TO BE LEARNT FROM

Klaassen v Trustees of Indiana University (No. 1:21-CV-238 DRL, N.D. Ind.)

1 Introduction

The Covid-19 pandemic, which started in Wuhan, China, in December 2019, has continued to wreak havoc and has changed humanity forever. The Higher Education sector, like many others, has not been spared. In an effort to save the academic year and ensure that some teaching and learning could take place in a safe and secure environment, many tertiary institutions in South Africa and other parts of the world transitioned to online education (Le Grange "Could the COVID-19 Pandemic Accelerate the Uberfication of the University?" 2020 *South African Journal of Higher Education* 10). There is no doubt that online learning promotes rich learning and understanding, and it is an effective modality for teaching both concepts and skills in most disciplines (Khalil, Mansour and Fadda "The Sudden Transition to Synchronized Online Learning During the COVID-19 Pandemic in Saudi Arabia: A Qualitative Study Exploring Medical Students' Perspectives" 2020 *BMC Med Educ* 285). Online education has enabled many tertiary institutions to become innovative in the way students learn and academics teach, while also overcoming the constraints of space, time and distance (McCrimmon, Vickers and Parish "Online Clinical Legal Education: Challenging the Traditional Model" 2016 *International Journal of Clinical Legal Education* 565). However, the shift to remote learning has also unmasked historical, geospatial and economic inequalities that permeate the world in which students live (Czerniewicz, Agherdien, Badenhorst, Belluigi, Chambers, Chili, De Villiers, Felix, Gachago, Gokhale, Ivala, Kramm, Madiba, Mistri, Mgqwashu, Pallitt, Prinsloo, Solomon, Strydom, Swanepoel, Waghid and Wisding "A Wake-Up Call: Equity, Inequality and Covid-19 Emergency Remote Teaching and Learning" 2020 *Postdigit Sci Educ* 946). Challenges include the digital divide, lack of technical support, poor learning environments, conditions at home, and lack of assets (among others), resulting in many student organisations in Africa and South Africa rejecting online teaching, with some viewing it as "an unaffordable, impractical and an elitist solution" to COVID-19 (Mukeredzi, Kokutse and Dell "Student Bodies Say E-Learning is Unaffordable and Elitist" (2020) https://www.universityworldnews.com/post.php?story=20200422075107312 (accessed 2020-11-06). With the realisation that COVID-19 is here to stay for a while, and many

students complaining about the difficulties posed by online learning from home, it seems inevitable that many universities in South Africa have already or may in future consider expediting the return of students to campus. However, to open fully, universities (like other sectors) may deem it necessary, as part of their planning process, to make it mandatory for all staff and students to be vaccinated. The question that arises then is whether mandatory vaccination in a tertiary setting will pass constitutional muster in a court of law. Students, if required to vaccinate or produce a vaccination card upon entry to campus, may argue that their legal rights, such as their right to bodily integrity, religious freedom and possibly their choice to choose or refuse their medical treatment, may be infringed. South Africa has not yet had to deal with such challenges. However, the US case of *Klaassen v Trustees of Indiana University* (No 1:21-CV-238 DRL ND IND) (*Klaassen*) 1–101, was one of the first cases from a global perspective to deal with such challenges and can provide valuable assistance for South Africa going forward. This case note critically examines the case of *Klaassen*, which is a landmark case dealing with the issue of mandatory vaccinations for students within a university setting. It is hoped that the case will provide guidance to universities in drafting policy documents surrounding mandatory vaccination, as well as in dealing with possible legal challenges in future.

2 *Klaassen*: Facts and legal issues

The case of *Klaassen v Trustees of Indiana University* (*supra*), a 2021 United States federal court case, resulted in one of the first rulings to uphold a vaccine mandate in the public sector (*Klaassen supra* 1–10). Students at the Indiana University were issued with a directive that, as from the start of the new semester, they had to be vaccinated against COVID-19, unless they were exempt for medical or religious reasons (*Klaassen supra* 3). Those students who were exempt for medical or religious reasons had to wear masks and be tested for the disease twice a week if they wanted to attend classes at the University (*Klaassen supra* 3). Eight students contested the decision of the University on the basis that their fundamental rights (bodily integrity, autonomy and medical treatment choice) were being infringed (*Klaassen supra* 3–4). They applied for an injunction to halt the University's Covid-19 vaccine mandate for students (*Klaassen supra* 3–4). The University made it clear that those who failed to comply with the mandate would have their registration cancelled and would also be barred from any campus activities (*Klaassen supra* 3–4). The University's policy made provision for medical and religious exemption. The students argued that the injunction was necessary in order to protect their bodily autonomy, religious freedom, and ability to choose or refuse their medical treatment (*Klaassen supra* 5). The students alleged that continuous wearing of masks, COVID-19 testing and social distancing for the unvaccinated also infringed upon their religious freedom (*Klaassen supra* 5). The students went on to add that the University gave them an ultimatum to choose between taking the vaccine or their tertiary education, and such an ultimatum was unfair (*Klaassen supra* 5). The University argued that the mandate was necessary in order to safeguard students and staff in light of the pandemic crisis (*Klaassen supra* 5). The motion for a preliminary injunction was denied by Judge Leichty in

the federal court. On appeal, the United States Court of Appeals for the Seventh Circuit also followed suit and the vaccination mandate was upheld.

3 Findings of the court in *Klaassen*

The court made it clear that the students could not show that the University's mandate would cause them irreparable harm (*Klaassen supra* 98). The court held that vaccination requirements, like other public health measures have been common in the country as well as institutions of learning (*Klaassen supra* 98). The court found that even though a vaccine mandate fell under emergency use authorisation, the fact that the vaccine had received approval from the Food and Drug Administration created no issue in terms of its use, as there had been a stringent degree of examination *(Klaassen supra* 98*)*. The court held that the students' Fourth Amendment claim must fail as the University had taken reasonable measures to protect a legitimate public health interest (*Klaassen* supra 98). It was not in dispute that the students have the right to choose whether to receive the vaccine, but such a choice must be subject to the State's reasonable measures in attempting to eradicate a dangerous disease. It was held that there was no blanket requirement that all people, or in this case all students be vaccinated *(Klaassen supra* 98*)*. The Indiana University had made provision for exemption for those with medical conditions, or on grounds of religious beliefs *(Klaassen supra* 99*)*. A problem could arise where no provision has been made for students who fall into this category. In the particular case, six of the students had claimed religious exemption and a seventh had been eligible for it. All they had to do was wear masks and be tested, which was not constitutionally problematic. However, the eighth student did not qualify for an exemption, and therefore had to be vaccinated in order to continue studying at the University. The court emphasised that Indiana itself did not require adult citizens to be vaccinated *(Klaassen supra* 99*)*. The COVID-19 vaccination was a condition of attending Indiana University. People (in this case, students) did not have a right to collegiate education, and they had a choice to study elsewhere if they chose not to be vaccinated *(Klaassen supra* 99*)*.

The judge, finding in favour of the University, made it clear that it had acted reasonably at all material times and there was no irreparable harm suffered by the students as a result of the mandate *(Klaassen supra* 99*).* The University's course of action on insisting on a vaccination programme was in the interest of public health and the University could take reasonable measures such as mandatory vaccinations to protect a public health interest *(Klaassen supra* 99*).*

4 Lessons to be learnt from *Klaassen*

The judgment highlights that public or state universities have a right to demand that all students be kept safe in a congregate setting (Klaassen *supra* 99). It was also made clear that close contact between people in a university setting is inevitable and vaccinations are extremely important, especially in the education sector, as vaccinations provide protection, not only to the vaccinated persons but also to those who come into contact with

them. Mandatory vaccinations can be considered a reasonable measure to protect a public health interest. Courts are unlikely to make blanket rulings that all people be vaccinated in certain settings. There would be exclusions, such as for medical or religious reasons. However, where human rights violations are called into question, such rights must be measured against the reasonableness of such measures, as in this case, for safeguarding the health interests of the public. The judgment also makes it clear that a policy on mandatory vaccination does amount to an ultimatum to students – to choose between receiving the vaccine and pursuing their studies at the institution (Klaassen *supra* 100). Students have options; they can apply for medical or religious exemption, attend another university or even attend online classes (Klaassen *supra* 100). Universities have the right to make health and safety decisions and such decisions may revolve around keep the majority of students safe in a mass setting (Klaassen *supra* 101).

5 The pros and cons of mandatory vaccination in South Africa

In a recent South African survey conducted in May and June 2021, 54 per cent of South Africans indicated that they were unlikely to get a COVID-19 vaccine and nearly 50 per cent of those surveyed indicated that prayer provided more protection than a vaccine The Afrobarometer survey obtained the views of 1 600 South Africans (see article by Sguazzin "Most South Africans Don't Want Covid Shot, Many Rely on Prayer" (28 July 2021) *Bloomberg News* https://www.bloomberg.com/news/articles/2021-07-28/most-south-africans-dont-want-covid-shot-many-rely-on-prayer/ (accessed 2021-09-03)). Recent media reports suggest that the problem of vaccine supply has now switched to a demand issue where vaccine hesitancy has come to the forefront (Sguazzin https://www.bloomberg.com/news/articles/2021-07-28/most-south-africans-dont-want-covid-shot-many-rely-on-prayer/). Vaccine hesitancy seems to be a problem not only in South Africa but worldwide, with many people raising further concerns about a lack of access to trustworthy data and the side effects of COVID-19 vaccines (see National Income Dynamics Study Coronavirus Rapid Mobile Survey (NIDS-CRAM) http://www.nids.uct.ac.za/about/nids-cram/nids-cram, a nationally representative survey reflecting the impacts of the COVID-19 pandemic on South African citizens; see also Spaull, Daniels, Ardington, Branson, Breet, Bridgman, Brophy, Burger, Burger, Casale, English, Espi, Hill, Hunt, Ingle, Kerr, Kika-Mistry, Köhler, Kollamparambil, Leibbrandt, Maughan-Brown, Mohohlwane, Nwosu, Oyenubi, Patel, Ranchhod, Shepherd, Stein, Tameris, Tomlinson, Turok, Van der Berg, Visagie, Wills and Wittenberg *Synthesis Report: NIDS-CRAM Wave 5* (8 July 2021) https://cramsurvey.org/wp-content/uploads/2021/07/1.-Spaull-N.-Daniels-R.-C-et-al.-2021-NIDS-CRAM-Wave-5-Synthesis-Report.pdf). As a result of vaccine hesitancy, many sectors have called for COVID-19 vaccines to be made mandatory so that the country can re-open and operate similarly to the way it did pre-pandemic. It appears that the ministerial advisory committee is also discussing the possibility of mandatory COVID-19 vaccines for certain groups of people (Farber "Mandatory Jabs Not on Cards Yet, But Experts

Say Pandemic Requires Special Measures" (2021-08-22) *Sunday Times* http://www.timeslive.co.za/sunday-times/news/2021-08-22-mandatory-jabs-not-on-cards-yet-but-experts-say-pandemic-requires-special-measures/ (accessed 2021-09-04).

In August 2021, Health Minister Joe Phaahla, in his address to the National Council of Provinces (NCOP), said that he is quite certain that many public facilities will soon not be accessible without proof of vaccination. He said:

> "Our own preference would be for people to come voluntarily to vaccinate, but as people want more freedoms [such as attending religious ceremonies or entertainment venues] and to access facilities, we are not excluding the considerations of a stage where [the people in charge of those facilities] would have the right to make certain demands."

The issue of whether an individual's right to decline a COVID-19 vaccine is more valid than the public interest in protecting and saving lives has now been brought to the forefront. Many medical experts, bioethicists, legal experts and even the average person on the street are expressing strong views about the necessity of mandatory vaccinations. Wits University vaccinology expert, Professor Shabir Madhi, has recently said that normally he is not a fan of mandatory vaccination but COVID-19 makes it necessary (Farber http://www.timeslive.co.za/sunday-times/news/2021-08-22-mandatory-jabs-not-on-cards-yet-but-experts-say-pandemic-requires-special-measures/). The Director of the Centre for Medical Ethics and Law at Stellenbosch University, Professor Keymanthri Moodley, has also called for all high-risk environments, occupations and communal activities to develop mandatory vaccine policies (Farber http://www.timeslive.co.za/sunday-times/news/2021-08-22-mandatory-jabs-not-on-cards-yet-but-experts-say-pandemic-requires-special-measures/). She added that such policies would be for the common good and in the public interest (Farber http://www.timeslive.co.za/sunday-times/news/2021-08-22-mandatory-jabs-not-on-cards-yet-but-experts-say-pandemic-requires-special-measures/). It is obvious that we are not living in normal times and extreme measures may now be necessary.

The crucial question that needs to be asked is whether mandatory vaccination policies will pass legal and constitutional muster. Many South Africans will argue that the Constitution of South Africa safeguards their basic human rights. If they are forced to take the COVID-19 vaccine, the right to bodily integrity, religious freedom and possibly their choice to choose or refuse their medical treatment may be infringed. However, it must be remembered that rights are not absolute and may be limited in certain circumstances. Section 36 of the South African Constitution (referred to as the limitation clause) requires that any limitation of a human right contained in the Bill of Rights must be "reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom". Any restriction in terms of section 36 must be proportional to the purpose of the limitation and not be arbitrary, discriminatory or unreasonable. There is an argument that the Constitution demands that the least restrictive means must be employed when limiting rights and that a vaccine mandate is not the least restrictive means to protect public health from COVID-19 (Thaldar and

Shozi "Mandatory COVID-19 Vaccine Policy Not Best Option" (2021) *The Conversation* https://www.news24.com/opinions/analysis/analysis-donrich-thaldar-boginkosi-shozi-mandatory-covid-19-vaccine-policy/ (accessed 2021-09-06)). Those against mandatory vaccination feel that policy options such as incentive schemes, money awards, lotteries and discounted food items (among others) could be explored before making vaccines mandatory (Thaldar and Shozi http://com/news24/analysis-donrich-thaldar-boginkosi-shozi-mandatory-covid-19 vaccine policy/). However, there is no evidence to suggest that such incentive policies will be successful in increasing vaccination numbers or changing the mindset of those who are against vaccination. However, the case of *Klaassen* could provide valuable insight into how South African courts might decide on the matter should the issue of infringement of human rights be raised in the coming months. The court in *Klaassen* was clear that the University's course of action (insisting on a vaccination programme) was in the interest of public health and stated that the University was at liberty to take reasonable measures such as imposing mandatory vaccinations to protect a public health interest. Against a backdrop of curbing the dangerous airborne disease and saving lives, the requirement of reasonableness will be satisfied, in particular because vaccines are being administered globally, the majority of deaths worldwide is occurring among those who have not been vaccinated, and research and current data confirm its safety among the majority (Moodley "Why COVID-19 Vaccines Should Be Mandatory in South Africa" (2021) *The Conversation* http://www.google.com/amp/why-covid-19-vaccines-should-be-mandatory-in-south-africa-165682/ (accessed 2021-09-06)). It cannot be said that an individual's right to refuse the vaccine is more valid than the public interest in saving lives and curbing the spread of the disease.

It is clear that COVID-19 vaccinations have been administered globally, with scientific data and evidence backing up its importance in fighting and curbing the spread of the virus. According to Moodley, vaccine mandates are justifiable on multiple levels, based on the common good and a public health ethics framework that aims to save lives, use limited resources efficiently and build public trust (Moodley http://www.google.com/amp/why-covid-19-vaccines-should-be-mandatory-in-south-africa-165682/). However, against this backdrop, arguments against mandatory vaccination such as government's slow roll-out process, the existence of a climate of vaccine hesitancy, the lack of trust, existing conspiracy theories and concerns about side effects still continue to loom large.

6 The current regulatory framework in South Africa

There is no clear legislative framework governing mandatory vaccination in South Africa. However, should any person deliberately or intentionally expose another to COVID-19, such person may face criminal sanction. Regulation 14(3) of the regulations issued in terms of the Disaster Management Act (GN R480 in *GG* 43258 of 2020-04-29 in terms of Act 57 of 2002) states, any person "who intentionally exposes another person to COVID-19 may be prosecuted for an offence, including assault, attempted

murder or murder". The injured party may also institute a separate civil claim for damages.

Interestingly, the government seems to have left the door open to mandatory vaccination. In the workplace, mandatory vaccination may be considered alongside labour legislation such as the Labour Relations Act (66 of 1995), the Occupational Health and Safety Act (95 of 1993), the Employment Equity Act (55 of 1998), and the Basic Conditions of Employment Act (75 of 1997). In addition, a new Consolidated Direction on Occupational Health and Safety Measures was published by government on the 11 June 2021, which requires that employers in certain workplaces conduct a risk assessment that focuses on the operational requirements of the business and whether there is an intention to make vaccination mandatory (see discussion by Gwala and Matavire "Mandatory Vaccination: Which Way Will SA Go?" (2021) *Health E News* https://health-e.org.za/2021/09/02/mandatoryvaccination-which-way-will-sa-go/ (accessed 2021-09-05)). However, in developing workplace policies, employers must not only take into account the operational requirements of the business, but also the risk posed by an employee to others, the constitutional rights of employees, medical grounds for not taking the vaccine such as allergic reactions, and a working environment that is safe (see s 8 and 9 of the Occupational Health and Safety Act 85 of 1993). Section 24(*a*) of the Constitution states that "everyone is entitled to an environment that is not harmful to their health or well-being" while section 23 of the Constitution states that "everyone has the right to fair labour practices" (Moodley http://www.google.com/amp/why-covid-19-vaccines-should-be-mandatory-in-south-africa-165682/). Even though employees may challenge mandatory vaccination policies at the workplace, such a policy could be regarded as a fair labour practice if the safety of its employees is at risk. Employees who are vaccinated may also argue they have a right to a safe working environment, and may legitimately object to having unvaccinated employees within close proximity at the workplace (Dhai "To Vaccinate or Not to Vaccinate: Mandatory COVID-19 Vaccination in the Workplace" 2021 *S Afr Journal of Bioethics Law* 42). In terms of the National Health Act (61 of 2003), employees should understand the implications, risks and obligations of a refusal to engage in health services and this could include job loss or other punitive measures (Dhai 2021 *S Afr Journal of Bioethics Law* 42). If refusal to take the vaccine poses an extreme risk to public health, the protection of individual rights will not trump the public good.

7 Conclusion

The head of the Health Justice Initiative recently said, "We are in a global pandemic and vaccines saves lives" (see discussion by Gwala and Matavire https://health-e.org.za/2021/09/02/mandatory-vaccination-which-way-will-sa-go/). There is no doubt that successful vaccination programmes are extremely important, especially in the education sector as they provide protection, not only to the vaccinated person but also to those who come into contact with them. The highly contagious delta variant and the decrease in vaccination intake has forced many countries to make vaccination mandatory and countries such as Australia, the UK, Greece, Kazakhstan,

Saudi Arabia, Russia, Canada, France and the USA, among others, have already made vaccines mandatory for certain groups and sectors (Dhai 2021 *S Afr Journal of Bioethics Law* 42). History points to the fact that mandatory vaccine laws and policies have effectively managed to eradicate pandemics in the past, especially in the early 1900s in the United States, where mandatory vaccination laws have been credited with eradicating smallpox in most areas (Farber http://www.timeslive.co.za/sunday-times/news/2021-08-22-mandatory-jabs-not-on-cards-yet-but-experts-say-pandemic-requires-special-measures/). We have reached a stage where drastic measures must be taken to save lives and stop the spread of the current contagion. The landmark case of *Klaassen* indicates clearly that personal rights do not trump public health interests and courts will always lean towards furthering public good. Although the case of *Klaassen* is not binding on South African courts, it does provide some direction on how South African courts may rule in terms of mandatory vaccination cases. The clarion call for students to start returning to in-person classes is growing louder and the "mandatory COVID-19 vaccination of staff and students at universities must be considered as an option for the safe repatriation of students back to campuses" (Sibanda "Should SA Varsities Consider Mandatory COVID-19 Vaccine Policies?" (2021) opinion@news24.com (accessed 2021-09-06)). University mandates are becoming commonplace in many other countries, and already students in countries such as the USA and Canada are required to provide proof of vaccination in terms of policy requirements (Sibanda opinion@news24.com). From a South African perspective, a mandatory vaccination policy at tertiary institutions may be the only option for the return to some level of normality in the future.

Desan Iyer
University of Zululand

EDITORIAL NOTE / REDAKSIONELE NOTA

OBITER is published triannually and welcomes contributions in English.

Contributions are received throughout the year and will be subject to peer-review prior to being accepted for publication. An English summary not exceeding 300 words must accompany the submission of full-length articles, which must preferably not exceed 7000 words.

All contributions must be sent *via* email to Adriaan.VanDerWalt@mandela.ac.za (Editor) in a file written in a recent version of Microsoft Word. It may be required that a hard copy of a contribution be sent to the following address: The Editor, *OBITER*, Faculty of Law, PO Box 77000, Nelson Mandela University, Port Elizabeth, 6031.

Page charges will be levied. The tariff is R180,00 per page.

—