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 4

Articles/ Artikels

O B I T E R
2022 Vol 43 4

FETTERING OF PRESIDENTIAL DISCRETION: DID THE PUBLIC PROTECTOR OVERREACH?

Molefhi S Phorego
LLB LLM LLD
Faculty of Law, Public Law Department
Nelson Mandela University

Hendrik J van As
BIuris LLB LLD NDip (Pol)
Professor, Nelson Mandela University

SUMMARY

The President's power to establish a commission of inquiry confers a plethora of discretionary powers for the Head of State. In the exercise of this power, the President acts alone, seemingly without the constitutional obligation to consult any public functionary or institution. This creates challenges for the question of accountability that attends the exercise of the power. Following the release of the State Capture Report, the Public Protector found that the President had *inter alia* outsourced his power to appoint cabinet members to the Gupta family, notwithstanding that he was the only one empowered to exercise the power in terms of the Constitution. Consequently, the Public Protector directed the President to establish a commission of inquiry to probe the allegations further. The President argued that the Public Protector had overreached her powers and trespassed upon his powers as Head of State. In the *State Capture* judgment, the High Court found that the Public Protector's direction to the President to establish a commission of inquiry was lawful and binding. This article investigates whether the Public Protector may compel the President to establish a commission of inquiry, and whether such an order does not violate the doctrine of the separation of powers. It also probes the nature and extent of the Public Protector's investigatory powers, *vis-à-vis* the President's discretion in appointing a commission of inquiry. The article argues that the President's power in the process is too broad and should be curtailed to enhance accountability.

1 INTRODUCTION

Most democracies grapple with the question of where presidential or executive discretionary power ends, and where abuse of power by

government begins.[1] This is because controlling the exercise of public power by those elected to office tends to raise sensitive issues concerning the separation of powers. To this extent, various mechanisms of accountability exist to minimise the abuse of public power by elected representatives. This phenomenon applies *mutatis mutandis* to the exercise of presidential powers in South Africa, which is subject to the general constitutional obligations relating to public power. It is informed *inter alia* by the principle of constitutional supremacy and the rule of law.[2] In terms of this principle, the Constitution of the Republic of South Africa, 1996 (the Constitution) is the supreme law of the Republic and any law or conduct inconsistent with it is invalid. The obligations imposed by the Constitution must be fulfilled.[3] In addition, the Bill of Rights binds the legislature, the executive, the judiciary and all organs of state.[4]

Discretionary use of public power in South Africa is also subject to the principle of legality, an incident of the rule of law.[5] A decision taken by the President may be reviewed and set aside if it is contrary to the principle of legality. In *Fedsure Life Assurance Ltd v Greater Johannesburg Transitional Metropolitan Council*,[6] the Constitutional Court pronounced on how the principle of legality may curb the misuse of public power and held that the exercise of public power is only legitimate where it is lawful.[7] The scope of the principle of legality has also been expanded by the courts to include concerns with lawfulness, rationality, undue delay and vagueness.[8] The exercise of discretion by the President at times leads to tension with the legislature, the judiciary and the state institutions supporting constitutional democracy,[9] especially where the need to exercise oversight over the use of the President's appointment powers arises. In Africa, governments have shown an unwillingness to take steps to reduce the President's powers to make appointments in order to improve presidential accountability for the

1 Andreescu "The Limits of State Power in a Democratic Society" 2016 *Journal of Civil and Legal Sciences* 4. For further reading on this aspect, refer to Lorgovan and Apostol *Discretion and Abuse of Public Power by Public Authorities* (1999).

2 S 1(*c*) of the Constitution of the Republic of South Africa, 1996.

3 S 2 of the Constitution.

4 S 8(1) of the Constitution.

5 Freedman and Mzolo "The Principle of Legality and Requirements of Lawfulness and Procedural Irrationality: *Law Society of South Africa v President of the RSA* (2019) (3) SA 30 CC" 2021 2 *Obiter* 421 421. For further reading, see Henrico "The Rule of Law in Indian Administrative Law Versus the Principle of Legality in South African Administrative Law: Some Observations" 2021 42 *Obiter* 486 486 and Henrico "Re-visiting the Rule of Law and Principle of Legality: Judicial Nuisance of Licence"? 2014 4 *TSAR* 742 742.

6 1999 (1) SA 374 (CC).

7 *Fedsure Life Assurance Ltd v Greater Johannesburg Transitional Metropolitan Council supra* par 56. The principle of legality is recognised in other jurisdictions. See further the *dictum* of the court in *The Matter of a Reference by the Government in Council Concerning Certain Questions Relating to the Secession of Quebec from Canada* Act [1998] 2 SCR 217 par 72. In this case, the Supreme Court of Canada noted that the principle of the rule of law mandates the compliance of governmental action with the law, including the Constitution. According to the Supreme Court's *dicta*, the executive branch of government may not transgress the provisions of the Constitution, including in the exercise of discretionary powers. See also the court's ruling in *Operation Dismantle Inc v The Queen* [1985] 1 S.C.R 441 455.

8 Freedman and Mzolo 2021 *Obiter* 421.

9 See Ch 9 of the Constitution.

use of such powers. This is notwithstanding that in most African countries, the President wields enormous powers of appointment, and often exercises them in an authoritarian and arbitrary manner.[10]

In South Africa, it is generally accepted that the courts of law have jurisdiction over the exercise of all public power in South Africa. The President's power to establish a commission of inquiry constitutes an exercise of public power that may be brought for adjudication before the courts. For instance, the Constitutional Court may decide any matter, if it grants leave to appeal, on the grounds that the matter raises an arguable point of law of general public importance that ought to be considered by that court.[11] The use of the word "any" illustrates the wide ambit bestowed on the judiciary to probe the alleged abuse of state power by the President and those in public office. While this is a generally accepted principle of law in relation to the courts, the interrogation of the misuse of public power by other institutions such as the Public Protector has in recent years raised controversial issues concerning the separation of powers.[12]

Challenges arise where the President exceeds the limits placed on the powers of the Head of State. A recent example is former President Jacob Zuma conducting a cabinet reshuffle purportedly on the basis of an intelligence report.[13] Defending the legal basis for his decision, the President contended that there was no constitutional obligation on him to disclose the reasons for effecting a cabinet reshuffle, as he was the sole repository of the power to appoint and dismiss cabinet members.[14] In *Democratic Alliance v President of the Republic of South Africa*,[15] the North Gauteng High Court found that the President was under a constitutional obligation to dispatch records relating to the impugned decision to dismiss then-Minister of Finance Pravin Gordhan and his deputy Mcebisi Jonas to the Registrar of the High Court. This judgment was upheld on appeal by the Constitutional Court in *President of the Republic of South Africa v Democratic Alliance*.[16] To date, the intelligence report (suggested to be the basis for the dismissal decisions) has not been produced before the High Court despite the court

---

10 See the *dictum* of the court in *Njenga v The Judicial Service Commission* [2020] EKLR. The applicants in this matter averred that "the President failed to act within a reasonable time, in the performance of a critical constitutional function as required by the Constitution by not duly appointing candidates nominated for appointment by the Judicial Service Commission". See further Masina "Malawi President Working to Trim Executive Powers" (9 August 2020) https://www.voanews.com/africa/malawi-president-working-trim-executive-powers (accessed 2020-08-20). Interestingly, this comes after there was an outcry against his (President Chakwera's) decision to appoint some of his family members to cabinet. See in this regard News Agencies "Malawi President Under Fire for Family Appointments to Cabinet" (9 July 2020) https://www.aljaazera.com/news/2020/07/malawi-president-fire-family-appointments-cabinet200709144741714.html (accessed 2020-08-20).

11 S 167(3)(*b*)(ii) of the Constitution.

12 Discussed fully below.

13 Mahlati "Economy Never Fully Recovered after Nene's Axing, State Capture Inquiry Told" (23 November 2018) https://www.iol.co.za/news/politics/economy-never-fully-recovered-after-nenes-axing-state-capture-inquiry-told-18241186 (accessed 2020-08-25).

14 *President of the Republic of South Africa v Democratic Alliance* [2019] ZACC 35 (the *Cabinet Reshuffle* judgment).

15 [2017] 3 All SA 124 (GP).

16 [2019] ZACC 35. Also refer to an earlier judgment by the Supreme Court of Appeal in *President of the Republic of South Africa v Democratic Alliance* [2018] ZASCA 79.

ruling that it should be so produced. According to the President, the intelligence report contained *prima facie* evidence of acts by the cabinet ministers that were detrimental to the country's national security. Arguments against the dismissals of the cabinet ministers were made on the basis that the President unlawfully used the intelligence report to abuse his constitutional power to appoint ministers.[17]

This article interrogates whether the Public Protector was entitled to compel the President to establish a commission of inquiry to investigate allegations of state capture, given the discretionary nature of such a power. The article also probes the approach followed by the court in relation to the President's powers as Head of State *vis-à-vis* those of the Public Protector. Central to the discussion is the extent of the Public Protector's investigatory powers, and the scope of the institution's remedial action *vis-à-vis* the exercise of the President's discretion. Questions also arise as to whether increased legislative oversight on the President's section 84(2) powers[18] is not desirable, given that the President is collectively and individually accountable to Parliament for the performance and exercise of his constitutional powers and functions.[19]

In order to achieve the above objectives, it is necessary to investigate the nature of the President's power to establish a commission of inquiry and the extent to which, despite its discretionary nature, it may be fettered by either the Public Protector or the legislature. The thesis advanced in the article is that the President's power to establish a commission of inquiry is too broad and should be curtailed in order to improve accountability for the exercise of this power, while preserving the essence of the doctrine of the separation of powers. The contention is made that legislative oversight over the President's section 84(2) responsibilities[20] remains inadequate.

2 THE PRESIDENT'S SECTION 84(2) POWERS AS HEAD OF STATE

The powers conferred on the President as Head of State, are contained in section 84(2) of the Constitution and are characterised by an element of discretion. He is the Head of State and head of the national executive.[21] He must uphold, defend and respect the Constitution as the supreme law of the Republic.[22] The President has the powers entrusted by the Constitution and legislation, including those necessary to perform the functions of Head of State and head of the national executive.[23]

---

17 ENCA "SACP Lashes Out at Zuma Over Fake Report" (30 March 2017) https://www.enca.com/south-africa/sacp-lashes-out-at-zuma-over-gordhan-removal (accessed 2022-07-06).

18 Such as the power to establish a commission of inquiry; see s 84(2)(*f*) of the Constitution.

19 S 92(2) of the Constitution.

20 The President's section 84(2) responsibilities include *inter alia* the power to appoint ambassadors, confer honours, issue pardons and establish commissions of inquiry.

21 S 83(*a*) of the Constitution.

22 S 83(*b*) of the Constitution.

23 S 84(1) of the Constitution.

Post-1994, the Constitutional Court's first opportunity to deal with the President's section 84(2) powers was in *President of the Republic of South Africa v Hugo*.[24] Referring to the President's power to grant a pardon, the Constitutional Court remarked *obiter* that

> "[t]he powers of the President under section 82(1) which are now contained in section 84(2) of the Constitution, are expressed in wide and unqualified terms."

They can be exercised without the concurrence of Cabinet.[25] As long as consultation has taken place, the President's discretion is unfettered in the sense that it is "not expressly limited by the Interim Constitution".[26] The respondent argued that the power of pardon bestowed on the President in terms of section 82(1)(*k*) of the Constitution is subject to the fundamental rights contained in Chapter 3 of the Interim Constitution and the equality provisions contained in section 8.[27] The court therefore had to consider whether the President is subject at all to the provisions of the Interim Constitution in the exercise of his section 82(1)(*k*) powers to pardon or reprieve offenders.[28]

Relying on the supremacy clause of the Interim Constitution,[29] the court held that the President's section 82(1) powers are executive powers and do not form part of a different category of powers.[30] According to the court,

> "[w]hether the President is exercising constitutional powers as head of the executive (the cabinet) or as Head of State, he is acting as an executive organ of government. His powers are neither legislative nor judicial and there is no fourth branch of government."

The court found textual support for its view in the provisions of section 83(1) and (2) of the Interim Constitution, which dealt with the confirmation of executive acts of the President.

The approach followed by the court should be understood in line with the provisions of section 101 of the Constitution, which deals with the legal requirements for executive decisions taken by the President. In terms of this provision, a decision taken by the President must be in writing if it is taken in terms of legislation[31] or has legal consequences.[32] A written decision by the President must be countersigned by another cabinet member if that decision concerns a function assigned to that other cabinet member.[33]

While the provisions of section 83 of the Interim Constitution and 101 of the 1996 Constitution are identical, it is submitted that the court's grouping of executive acts of the President together with the powers of the Head of State

---

24 1996 (4) SA 1 (CC) (*Hugo* judgment).
25 *Hugo* judgment *supra* par 14.
26 *Ibid.*
27 *Hugo* judgment *supra* par 9.
28 *Ibid*.
29 S 4(1) of the Interim Constitution.
30 *Hugo* judgment *supra* par 11.
31 S 101(1)(*a*) of the Constitution.
32 S 101(1)(*b*) of the Constitution.
33 S 101(2) of the Constitution.

cannot stand. The fact that there may be a separate set of powers from the President's executive acts does not imply the existence of a fourth branch of government. This view is supported by the wording of sections 84(1) and 85(2) of the Constitution. The former states that the President

> "has the powers entrusted by the Constitution and legislation, including those necessary to perform the functions of Head of State and head of the national executive."

The latter states that the President "exercises executive authority together with other members of the Cabinet".

Separating the President's powers as Head of State from those exercised in his capacity as head of the national executive is necessary for purposes of holding him accountable for the exercise of such powers. As head of the national executive, the President exercises his authority together with the other members of the Cabinet[34] but as Head of State he is

> "responsible for–
>
> …
>
> (e) making any appointments that the Constitution or legislation requires the President to make, other than as head of the national executive;
>
> (f) appointing commissions of inquiry."[35]

It would, for instance, be absurd to hold the President collectively accountable with a cabinet member for the appointment of a cabinet member.[36] The President exercises such a power alone, without the constitutional obligation to consult any other state or non-state actor. Should he choose to do so, that is entirely within his discretion. Such a discretion must however be exercised in line with established legal norms and standards. In such a case, the President should be held individually accountable for the cabinet appointment.

The separation of the President's Head of State powers from those exercised in his capacity as head of the national executive is a necessity because of the nature and extent of the discretion bestowed on the President in each category. In *Mansingh v President of the Republic of South Africa*,[37] the High Court held that the President's powers as Head of State, which were originally the royal prerogatives of the British Crown, have since been codified in the Constitution. This means that there are no prerogative powers other than those enshrined in section 84(2) of the Constitution. Unlike prerogative powers, which were initially not justiciable, the President's section 84(2) powers are now subject to the prescripts of the Constitution.

---

34 S 85(1) and (2) of the Constitution.

35 S 84(2) of the Constitution.

36 S 92(2) of the Constitution. The President, together with Cabinet, is individually and collectively accountable to Parliament for the performance and exercise of his powers and functions.

37 2012 (3) SA 192 (GNP) par 18, with reference to the President's power to confer honours in terms of s 84(2)(*k*) of the Constitution.

In *Minister for Justice and Constitutional Development v Chonco*,[38] the Constitutional Court held in relation to the President's pardon power that, although it is an executive power, it is unrelated to the scope of the powers bestowed on the national executive authority in terms of section 85(2)(*e*) of the Constitution. The former is exercised by the President alone whereas the latter is exercised through a collaborative venture between the President and his cabinet. According to the court,

> "[t]he President's entitlement to consult does not diminish this responsibility nor parcel it out to those with whom he consults."[39]

In *Law Society of South Africa v President of the Republic of South Africa*,[40] the Constitutional Court held that presidential power must be exercised in a way that is consistent with the supreme law of the Republic and its scheme: the President is never at large to exercise power that has not been duly assigned to the President.

According to Freedman and De Vos,[41] the President's Head of State powers are usually distinguished from those exercised in his capacity as head of the national executive by focusing on whether the President is required to exercise a political discretion on behalf of the government. If political discretion is involved, that means the President is acting as head of the national executive. They suggest that there is no clear political discretion when the President acts as Head of State. It is submitted that the use of political discretion to categorise the President's powers as head of the national executive is incorrect as the exercise of section 84(2) powers may also involve political discretion. Political discretion in the exercise of the President's powers as head of the national executive authority is limited because he is mandated by the Constitution to consult with the members of his cabinet.

Barrie[42] notes that the precise meaning of Head of State is not entirely clear. Remarking on the President's appointment powers, he argues that the Constitution should preferably indicate when an appointment is made either as Head of State or as head of the national executive. On the nature and extent of the discretion bestowed on the President, Venter[43] argues that in practice the current checks on presidential power are party political in nature. The author argues that the "parameters of government conduct laid down in the Constitution and the availability of judicial review constitute secondary checks on the exercise of presidential power".

---

38 2010 (6) BCLR 511 (CC) par 20.

39 *Ibid*.

40 2019 (3) BCLR 329 (CC) par 3.

41 Freedman and De Vos (eds) *South African Constitutional Law in Context* (2014) 178. For further reading on executive powers see Okpaluba "Judicial Review of Executive Power: Legality, Rationality and Reasonableness" 2015 30 *Southern African Public Law Journal* 379 380 and Venter "Motions of No Confidence: Parliament's Executive Check and Checkmate" 2014 2 *TSAR* 407 407.

42 Barrie "Presidential Powers in South Africa: More Questions Than Answers" 2019 40 *Obiter* 130 131.

43 Venter "Judicial Defence of Constitutionalism in the Assessment of South Africa's International Obligations" 2019 22 *Potchefstroom Electronic Law Journal* 1 7.

It is submitted that the focus should rather be on whether the President's discretion is absolute or limited. As Head of State, the President is only subject to the requirement to act in line with the principle of legality and the Constitution.[44] When acting as head of the national executive, the Constitution places various restrictions on the President. For instance, when appointing the Public Protector and members of the Constitutional Court, the President must do so in line with the recommendations of Parliament and the Judicial Service Commission.[45] The extent to which the President's discretion may be fettered by another constitutional body is instructive and should inform any discussion relating to whether the Public Protector has the power to instruct the President to establish a commission of inquiry. This aspect is explored in detail below.

3 THE PUBLIC PROTECTOR'S POWER TO TAKE REMEDIAL ACTION: THE *NKANDLA* JUDGMENT

The office of the Public Protector is established in terms of section 181(1)(*a*) of the Constitution read together with the Public Protector Act[46] as an independent institution that is "subject only to the Constitution and the law" and it is required to exercise its functions "without fear, favour or prejudice".[47] The powers of the Public Protector are to "investigate any conduct in state affairs, or in the public administration in any sphere of government, that is alleged or suspected to be improper or to result in any impropriety or prejudice,[48] to report on that conduct[49] and to take appropriate remedial action".[50]

In *Economic Freedom Fighters v Speaker of the National Assembly*[51] (the *Nkandla* judgment), the Constitutional Court had to determine whether the remedial actions of the Public Protector are legally binding. The court found that the President is under a constitutional obligation to comply with the Public Protector's remedial actions and that his failure to do so was inconsistent with his constitutional obligation to uphold, respect and protect the Constitution.[52] According to the court, taking appropriate remedial action "connotes providing a proper, fitting, suitable and effective remedy for whatever complaint and against whomsoever the Public Protector is called upon to investigate".[53]

The Public Protector's power to take remedial action is wide but not unfettered. The type of findings made, and the subject matter of the

---

44 See full discussion in this article relating to the *SARFU* judgment under heading 5.1 below.

45 In terms of s 193(4) of the Constitution, the President appoints the Public Protector on the recommendation of the National Assembly and appoints various justices of the Constitutional Court in terms of s 174(3) of the Constitution.

46 23 of 1994.

47 S 181(2)(*a*) of the Constitution.

48 *Ibid*.

49 S 182(1)(*b*) of the Constitution.

50 S 182(1)(*c*) of the Constitution.

51 2016 (3) SA 580 (CC) (*Nkandla* judgment).

52 *Nkandla* judgment *supra* par 99.

53 *Nkandla* judgment *supra* par 68 in reference to *Fose v Minister of Safety and Security* 1997 (3) SA 786 (CC) par 69.

investigation will determine what remedial action to take in a particular case.[54] The Constitutional Court summed up the Public Protector's power to take remedial action as follows:[55]

- The Constitution is the primary source of the power to take appropriate remedial action. The Public Protector Act is a secondary source.
- Remedial action can only be taken against those that the Public Protector is constitutionally and statutorily empowered to investigate.
- The words "take action" imply that the Public Protector may decide on and determine the appropriate remedial measure. The taking of the remedial action does not have to be left to other institutions and by its nature it is not a power of no consequence.
- The Public Protector can determine the appropriate remedy and the manner of its implementation.
- Remedial action is appropriate if it is effective, suitable, proper or fitting to redress or undo the prejudice, impropriety, unlawful enrichment or corruption in a particular case.
- Legally binding remedial action can be taken only when it is appropriate and practicable to effectively remedy or undo the complaint.
- A non-binding recommendation or measure may be appropriate depending on the subject matter of the investigation and the findings made.
- Whether a particular remedial action taken, or measure employed by the Public Protector in terms of her constitutionally allocated powers is binding or not or what its legal effect is, is a matter of interpretation aided by context, nature and language.[56]

In the *Nkandla* judgment, the Constitutional Court ruled that the Public Protector's remedial actions are legally binding, and that the President was under a constitutional obligation to comply with the Public Protector's remedial actions. Similarly, the National Assembly was found to have failed in its constitutional obligation to hold the President accountable for failing to comply with the remedial actions of the Public Protector.[57]

Under heading 4 below, the judgment in *President of the Republic of South Africa v The Office of the Public Protector* (*State Capture* judgment)[58] is discussed in relation to the extent of the binding nature of the Public Protector's remedial actions. In this case, the North Gauteng High Court had to determine whether the Public Protector may lawfully instruct the President to establish a commission of inquiry.

---

54 *Nkandla* judgment *supra* par 71.

55 *Ibid*.

56 *Ibid*.

57 The National Assembly is mandated by the Constitution to hold the President accountable for the performance and exercise of his functions in terms of s 92(2) read together with s 55(2)(*b*) of the Constitution.

58 2018 (2) SA 100 (GP) (*State Capture* judgment).

4 THE *STATE CAPTURE* JUDGMENT

In March 2016, the Public Protector received complaints alleging irregular conduct in the appointment of cabinet ministers and the awarding of state contracts.[59] This culminated in an investigation into and the eventual release of a report (the State of Capture report) on the veracity of the alleged improprieties. Among the findings made were that the President used his influence to enable members of the Gupta family to get preferential treatment in the awarding of state contracts. Following the release of the State of Capture Report, the Public Protector took remedial action instructing the President to establish a commission of inquiry to further probe the findings identified in the report – this notwithstanding that it is only the President who is empowered in terms of section 84(2)(*f*) of the Constitution to establish a commission of inquiry. President Jacob Zuma took the report on judicial review, challenging the legality of the remedial action. He asked the court to set aside the remedial action of the Public Protector, which directed:[60]

- the President to appoint, within thirty days, a commission of inquiry headed by a judge solely selected by the Chief Justice who shall provide one name to the President;
- the commission of inquiry to be given powers of evidence collection no less than that of the Public Protector; and
- the commission of inquiry to complete its task and to present the report and findings and recommendations to the President within one hundred and eighty days after which the President was to submit a copy with an indication of his intentions regarding the implementation of the recommendations to Parliament within fourteen days of releasing the report.

In the notice of motion, the President contended that the matter should be remitted to the Public Protector for further investigation. In support of this contention, he argued that the Public Protector did not have the power to delegate or outsource its functions to a commission of inquiry.[61] Among the issues identified by the Public Protector for further investigation were the following:[62]

- whether any state functionary in any organ of state or other person had acted unlawfully, improperly or corruptly in connection with the appointment or removal of ministers and directors or boards of directors of state-owned enterprises;
- whether any state functionary in any organ of state or other person acted unlawfully, improperly or corruptly in connection with the awarding of state contracts or tenders to Gupta-linked companies or persons;

---

59 Public Protector South Africa *"State of Capture": A Report of the Public Protector* Report No: 6 of 2016/17 (14 October 2016) https://www.sahistory.org.za/archive/state-capture-report-public-protector-14-october-2016 (accessed 2021-01-19) 4.

60 *State Capture* judgment *supra* par 3.

61 *State Capture* judgment *supra* par 5.

62 *State Capture* judgment *supra* par 16.

- whether any state functionary in any organ of state or other person acted unlawfully, improperly or corruptly in connection with the extension of state-provided business financing facilities to Gupta-linked companies or persons;
- whether any state functionary in any organ of state or other person acted unlawfully, improperly or corruptly in connection with the exchange of gifts in relation to Gupta-linked companies or persons; and
- whether any person or entity was prejudiced due to the conduct of the SOE.

The Public Protector made the following observations:[63]

> "The investigation has proven that the extent of the issues it needs to traverse and resources necessary to execute it is incapable of being executed fully by the Public Protector. This was foreshadowed at the commencement of the investigation when the Public Protector wrote to government requesting for resources for a special investigation similar to a commission of inquiry overseen by the Public Protector. This investigation has been hamstrung by the late release which caused the investigation to commence later than planned."

The Public Protector noted that the President has the power under section 84(2)(*f*) of the Constitution to appoint commissions of enquiry and that it was on this basis that the President was instructed to appoint a commission of inquiry within thirty days. However, the selection of a judge for purposes of heading the commission was to be carried out by the Chief Justice and not the President.

The President's grounds of review were *inter alia* that:[64]

- The Constitution vests the power to appoint a commission of inquiry in the President. Only he can exercise that power and it is unconstitutional for the Public Protector to instruct him to do so. The President asserts that if he complied with the remedial action, his decision would be reviewable because it would have been taken under the dictates of another and would be an abdication of his power under section 84 of the Constitution.
- The direction that the Chief Justice appoint the judge to head the commission of inquiry is unlawful as the Constitution does not assign this power to the Chief Justice. The direction is also irrational as there is no reason to suggest that a judge selected by the President would not be independent and impartial.
- It is beyond the powers of the Public Protector to give directions as to the manner in which the commission of inquiry is to be implemented. It is the President's prerogative to select the officer to preside over the commission and it is also the President alone who can decide upon the issues that the commission is to investigate, its powers and when the commission is to complete its investigation.
- The remedial action constitutes an unlawful delegation of the Public Protector's investigatory powers to a commission of inquiry.

---

63 *State Capture* judgment *supra* par 46.

64 *State Capture* judgment *supra* par 59.

- It is impermissible for the Public Protector to order the President to exercise an executive power as this offends against the separation of powers doctrine.

The primary question for consideration before the court was whether the President's power to establish a commission of inquiry could permissibly be limited by the Public Protector's remedial action.[65] The North Gauteng High Court held that the power to establish a commission of inquiry vests in the President and that only he can exercise that power. This did not mean that there are no constraints to the exercise of the power.[66]

The High Court found that the President does not enjoy unlimited powers, a fact evident from the wording of section 84. According to the court, section 84(1) is cast in obligatory language. The provision states that the President has the powers "entrusted by the Constitution". In section 84(2)(*f*), it is further provided that the President "is responsible for appointing commissions of inquiry". The court held that the use of the words "entrust" and "responsible" implies that the President's power to establish a commission of inquiry is coupled with a duty.[67] Even though the Constitution vests in the President the power to appoint a commission of inquiry, this power is not an untrammelled one. The High Court found:

> "The President's power to appoint a commission of inquiry will necessarily be curtailed where his ability to conduct himself without restraint brings him into conflict with his obligations under the Constitution".[68]

The principle that the power to establish a commission of inquiry is subject to the Constitution and the law is well established in South African law. The question should be posed whether the President's direct implication in the State of Capture report means that his ability to conduct himself without restraint brings him into conflict with his obligations under the Constitution. It is submitted that the court did not give definitive guidance on this point. Regarding the President's challenge to the powers of the Public Protector, the court referred to the ruling in the *Nkandla* judgment where the court described the mandate of the Public Protector as entailing the protection of the public from any conduct in state affairs that could result *inter alia* in impropriety or prejudice. The Constitutional Court held that pursuant to that mandate, the Public Protector should thereafter take appropriate remedial action.[69] Regarding the contention by the President that the Public Protector unlawfully delegated her investigatory powers to a commission of inquiry, the court held that the argument misconceived the manner in which the Public Protector had exercised her powers.[70] Finding that there was no delegation, the High Court found that the Public Protector did what is bestowed on her by section 182(1) of the Constitution.

Regarding the direction by the Public Protector that the Chief Justice should nominate the judge to preside over the commission of inquiry, the

---

65 *State Capture* judgment *supra* par 60.
66 *State Capture* judgment *supra* par 65.
67 *State Capture* judgment *supra* par 68.
68 *State Capture* judgment *supra* par 71.
69 *State Capture* judgment *supra* par 74. See further the *Nkandla* judgment *supra* par 51.
70 *State Capture judgment supra* par 87.

court applied the principles of recusal. On this point, the High Court held that the President's insistence that he alone select a judge to head the commission is at odds with the legal principle of recusal. According to the court,

> "judges recuse themselves from matters in which they are personally conflicted in order to exclude the possibility or the perception of bias affecting the outcome and in order to protect the integrity of the legal process in the eyes of the public."[71]

The principle of recusal is not only concerned with actual bias, but a reasonable apprehension of bias.[72] The court found that the recusal principle was equally applicable to the President because he has an official duty to select a judge to head the commission. However, by virtue of his direct or indirect implication in the matters to be investigated, he was *de jure* prevented from selecting a judge to head the commission.[73]

The application of the principle of recusal by the High Court is legally sound. However, it is submitted that the analogy drawn by the court between judicial bias and the perceived conflict of interest held by the President is not a useful comparison. This is because there is a legal mechanism to ensure that a matter in which a presiding judge has a conflict of interest continues without interruption. Should the judge recuse him or herself, another presiding officer can take over the matter and try it *de novo*.[74] However, the Constitution does not provide guidance on what should happen in the case of a discretionary power bestowed on the President alone, in cases where he is directly involved in the subject matter, and there is a need to exercise oversight flowing from a discretionary power bestowed upon him alone.

According to the ruling of the North Gauteng High Court in the *State Capture* judgment, the Public Protector may compel the President to establish a commission of inquiry. In addition, the Chief Justice and not the President may nominate the judge who will preside over the commission in instances where the President is perceived to hold a conflict of interest in the matter. The correctness of this judgment is suspect owing to the fact that the President is the only one entrusted with the power to establish a commission of inquiry by the Constitution. The judgment therefore raises sensitive issues concerning the separation of powers in relation to whether the Public Protector's remedial action impermissibly encroaches on the President's powers as Head of State.

The debate on whether the Public Protector overstepped her constitutional mandate to take appropriate remedial action is explored under the next heading. The discussion is two-fold. First, the President's power to establish a commission of inquiry is discussed and secondly, the question on whether the Public Protector exceeded the scope of her powers is probed. An analysis of the Public Protector's remedial action *vis-à-vis* the President's power to establish a commission of inquiry is also undertaken.

---

71 *State Capture judgment supra* par 144.

72 *State Capture judgment supra* par 145.

73 *State Capture judgment supra* par 146 to 147.

74 Okpaluba and Maloka "The Fundamental Principles of Recusal of a Judge at Common Law: Recent Developments" 2022 43 *Obiter* 88 89.

5 PUBLIC PROTECTOR OVERREACH

5 1 The President's power to establish a commission of inquiry

Section 84(2)(*f*) of the Constitution, read together with the Commissions Act,[75] bestows on the President the power to establish a commission of inquiry. As alluded to above, the President has the power to make any appointment that the Constitution or legislation requires him to make, other than as head of the national executive.[76] The use of the word "any" should be understood to refer to the appointment of any public official, including the appointment of the judge who will head up a commission of inquiry. Post-1994, the President's power to establish a commission of inquiry first arose for consideration in *President of the Republic of South Africa v South African Rugby Football Union* (*SARFU* judgment).[77] At issue was the constitutional validity of two presidential notices that appeared in the *Government Gazette* on 26 September 1997.[78] The first notice announced the appointment of a commission of inquiry into the administration of rugby in the country. The other notice declared the provisions of the Commissions Act applicable to the commission and promulgated regulations for its operation.[79] One of SARFU's central arguments was that the President had abdicated his responsibility to appoint a commission of inquiry to his cabinet minister. On what would constitute an abdication of power, the Constitutional Court, referring to Baxter,[80] held that abdication occurs when:

- an office-bearer unlawfully delegates a power conferred upon him or her;
- when he or she acts under dictation; and
- when he or she passes the buck.[81]

A commission of inquiry is an adjunct to the policy formulation responsibility of the President.[82] It is a mechanism that he can use to obtain information and advice.[83] The power to appoint a commission of inquiry is a tool to assist the executive branch of government in the performance of its governance duties.[84] When establishing a commission of inquiry, the President must do so personally, and any such exercise must be recorded in writing and signed.[85] The establishment of a commission of inquiry must not infringe any right in the Bill of Rights; the power to appoint such a commission is constrained by the principle of legality, and should be exercised by the

---

75 8 of 1947 (Commissions Act).

76 S 84(2)(*e*) of the Constitution.

77 2000 (1) SA 1 (CC) (*SARFU* judgment).

78 *SARFU* judgment *supra* par 2.

79 *Ibid*.

80 Baxter *Administrative Law* (1984) 434. See further *Hofmeyr v Minister of Justice* 1992 (3) SA 108 (C) 117 F–G.

81 *SARFU* judgment *supra* par 39.

82 *SARFU* judgment *supra* par 147.

83 *Ibid*.

84 *SARFU* judgment *supra* par 220.

85 *SARFU* judgment *supra* par 148. See further s 101(1) of the Constitution.

President in good faith. The President must not misconstrue the nature of the power to establish a commission of inquiry as bestowed on him by the Constitution.[86] From the aforegoing, it is apparent that the power to establish a commission of inquiry is vested in the President alone. The principles enunciated above should be understood with the assumption that the President is not directly implicated in the matters to be investigated. They do not provide definitive guidance in cases where a repository of the power to establish a commission of inquiry is also implicated in the subject matter to be investigated.

Hoffman[87] argues in relation to the State of Capture Report that the Public Protector may have overlooked the provisions of section 90 of the Constitution, which empowers the Deputy President to act in cases where the President is unable to exercise his powers. In terms of the provision, when the President is absent from the Republic, otherwise unable to perform the office of President or during a vacancy in the presidency, the Vice-President may step in and take over the role of Head of State. In light of the rule against the delegation of discretionary powers, as espoused by the court in the *SARFU* judgment, there is no indication in the Constitution as to who has the power to make a determination that the President is unable to perform his duties as Head of State, for instance.

The law regarding the extent to which the power to establish a commission of inquiry may be fettered by an oversight body such as the Public Protector should be reformed. While the Constitutional Court made it clear in the *SARFU* judgment that the President must *inter alia* act in good faith in establishing a commission of inquiry, the Constitution does not expressly specify which institution has the responsibility to hold him accountable in the event that he does not comply with this requirement. Similarly, the Constitutional Court in the *Nkandla* judgment held that the Constitution does not expressly state the mechanisms the National Assembly may use to exercise oversight over the President.[88] This poses a challenge because in instances where there is a direction to establish a commission of inquiry and the President is directly implicated, the Constitution does not provide guidance on who may step in to exercise the power, and how to go about selecting the functionary for the process.[89]

From the aforegoing, the question should be posed as to whether the High Court in the *State Capture* judgment incorrectly applied the legal principles relating to the establishment of a commission of inquiry in terms of the Constitution and as applied by the Constitutional Court in the *SARFU* judgment.

Under the next heading, the question that is probed is whether the Public Protector overreached her constitutional power to take appropriate remedial action by instructing the President to establish a commission of inquiry.

---

86 *SARFU* judgment *supra* par 148.

87 Hoffman "Op-Ed: A Commission of Inquiry into State Capture: To Be or Not to Be?" (2017-05-02) *Daily Maverick*.

88 *Nkandla* judgment *supra* par 43.

89 *Ibid.*

5 2 Did the Public Protector overreach her constitutional mandate?

Ex facie, in the *State Capture case* the Public Protector encroached on the President's power to establish a commission of inquiry. The finding of the North Gauteng High Court in recognising the legality of the Public Protector's remedial action is at odds with the Constitution and the doctrine of the separation of powers. However, sight should not be lost of the fact that the President was directly implicated in allegations of wrongdoing. Therefore, if he established the commission of inquiry and consequently nominated a judge to head the process, this would have been controversial.

To answer the question whether the Public Protector trespassed on the President's power to establish a commission of inquiry, the views expressed by Slade[90] on the subject are instructive. In reaction to the judgment, the author notes that the High Court did not consider whether, within the separation of powers doctrine, "any other branch can force the President to exercise this discretionary constitutional power for purposes of checks and balances". He argues that the discussion by the High Court of the Public Protector's power to take appropriate remedial action appears unconvincing from a separation-of-powers perspective.[91] Referring to the pre-eminent domain principle, Slade argues that where an unwarranted intrusion by one branch of government into the exclusive domain of another is alleged, "it must first be determined whether the particular power or function falls within the pre-eminent domain of one of the branches".[92] The theory of pre-eminent domain "emphasises the separation of functions and limits the attribution of certain powers to the wrong institution".[93] He contends:

> "The High Court did not consider the separation of powers and the principle of pre-eminent domain in upholding the Public Protector's remedial action against the President. The Court did not consider whether the appointment of a commission of inquiry falls within the exclusive competency (or pre-eminent domain) of the President as Head of State, and consequently under which circumstances, *if at all*, it may be justifiable to encroach upon that power for purposes of checks and balances. The decision therefore lacks an explanation of how, within the specific context, the separation of powers impacts the specific dispute before the Court or, conversely, how the outcome impacts the evolving understanding of the separation of powers doctrine."

The submission that the Public Protector *ex facie* encroached on the President's power to establish a commission of inquiry accords with the views echoed by Slade. However, the question whether the Public Protector encroached on the President's powers as Head of State cannot be resolved purely on the basis of the doctrine of the separation of powers. The fact that the President was also directly implicated in the matters to be investigated is also central to the discussion. While the above contention by Slade is

---

90 Slade "The Implications of the Public Protector's Remedial Action Directing the Exercise of Discretionary Constitutional Powers: Separation of Powers Implications" 2020 24 *Law Democracy and Development* 364 375.

91 Slade 2020 *Law Democracy and Development* 376.

92 *Ibid*.

93 *Ibid*.

correct, it does not paint a full picture of the facts if one considers the President's direct implication in the matters to be investigated.

The fact that the High Court applied the principles of recusal in upholding the Public Protector's remedial action is a critical component of the debate and should not be overlooked. To this extent, the enquiry into whether the Public Protector trespassed on the President's power to establish a commission should primarily consider the following six aspects:

- the nature of the President's power to establish a commission of inquiry;
- the Public Protector's power to take binding remedial action;
- the extent to which the remedial action may interfere with the institutional autonomy of other state institutions;
- whether such a remedial action can permissibly interfere with the discretionary powers bestowed on a public official by the Constitution;
- whether such interference would be constitutionally justified; and
- whether the President's direct involvement in the issues to be investigated calls for his recusal from the process.

Tsele[94] writes that the decision of the High Court in the *State Capture* judgment is significant because it led to the establishment of the Zondo Commission.[95] It should be noted however that the High Court in the *State Capture* judgment merely affirmed the legality of the remedial action (to establish a commission of inquiry) in the State of Capture Report. It is submitted that the Zondo Commission was established as a result of the remedial action and not the judgment *per se*. Tsele argues that, on a proper interpretation of section 84(2)(*f*) of the Constitution, only the President has the power to establish a commission of inquiry and that neither the Public Protector nor any court of law has the right to usurp that power or prescribe to the President how it should be exercised.[96] He further submits that the only *caveat* to the above rule is that the President's decision on how to establish the commission of inquiry is liable to be set aside on judicial review if it is irrational or taken in bad faith.[97]

In particular, Tsele submits that the High Court failed to distinguish between the review of a decision that has already been taken, and "directing the President to exercise a power solely reserved to him by the Constitution, even before the President has exercised the discretionary power himself".[98] This assertion is legally incorrect. This is because the question before the court had to do with the legality of the Public Protector's remedial action. It did not relate to the question whether the President's refusal to comply with the remedial action on account of its nature as a discretionary power was lawful. The High Court merely affirmed the *dictum* of the Constitutional Court's finding in the *Nkandla* judgment regarding the legally binding nature

---

94 Tsele "Observations on the State Capture Judgment" 2021 138 *South African Law Journal* 477 478.

95 The Judicial Commission of Inquiry Into Allegations of State Capture, Corruption and Fraud in the Public Sector Including Organs of State chaired by Justice RMM Zondo (Zondo Commission).

96 Tsele 2021 *SALJ* 478.

97 *Ibid*.

98 *Ibid*.

of the Public Protector's remedial actions. The very question of whether the person against whom the remedial action is directed complies with it is instructive.

In summary, the decision that had already been made was the Public Protector's instruction to the President to establish a commission of inquiry. In order to determine its legality, the court had to determine whether the Public Protector may direct the President to exercise a discretionary power. It is the nature and extent of the remedial action that was central to the dispute before the court, and not the manner in which it had "already" been exercised. In fact, whether or not the President decided to comply with the remedial action, his decision would have been liable for judicial review. In the event that the President did not dispute the validity of the remedial action, the manner in which he established the commission of inquiry would also have been justiciable before the court.

Regrettably, authors on the subject do not adequately engage with the principle of recusal, which is briefly discussed below.

6 PUBLIC PROTECTOR OVERREACH AND RECUSAL: A CURSORY APPROACH TO THE PRESIDENT'S DIRECT IMPLICATION

The President's involvement in the facts to be investigated by virtue of his implication in the State of Capture Report is of interest. It is therefore imperative to have regard to the question of bias, which is the measure applied to determine whether a public functionary should recuse him- or herself. It is submitted that the test for recusal is relevant to the question on whether the President should have been entitled to establish a commission of inquiry or not. The correct approach to determining bias is well established in relation to judicial officers, but applies *mutatis mutandis* to other forms of public power and is set out below:[99]

- There must be a reasonable apprehension.
- The reasonable apprehension ought to be held by an objective and well-informed person.
- The apprehension must be that the decision maker will not be impartial in the matter.
- The apprehension must be in light of the oath of office taken by the judges.

In South Africa, the test for bias is therefore whether there is a reasonable apprehension of the presence of bias.[100] Proof of bias can be established if the decision maker has *inter alia* a pecuniary interest in the subject matter before him.[101] The fact that the President was directly implicated in the facts

[99] Siyo and Mubangizi "The Independence of South African Judges: A Constitutional and Legislative Perspective" 2015 18 *Potchefstroom Electronic Law Journal* 817 820. See further *SARFU* judgment *supra* par 48.

[100] *Bernert v ABSA Bank* 2011 (4) BCLR 329 (CC) par 29. See further Okpaluba and Juma "The Problems of Proving Actual or Apparent Bias: An Analysis of Contemporary Developments in South Africa" 2011 14 *Potchefstroom Electronic Law Journal* 14 14.

[101] Okpaluba and Juma 2011 *PELJ* 16. See also *Webb v The Queen* 1994 181 CLR 41 74.

to be investigated, while not an absolute bar for him to set up the commission of inquiry, should definitely be factored into the debate. It is therefore insufficient for the debate to focus only on the doctrine of the separation of powers and the inappropriateness of the Public Protector's instruction to the President to exercise a discretionary power.

The current constitutional framework does not enable Parliament to participate in the appointment of a commission of inquiry. It is submitted that parliamentary involvement is desirable as the President accounts individually and collectively to Parliament. In particular, the National Assembly is responsible for electing the President.[102] The Constitution should be amended to specify instances that preclude the President from exercising a power conferred upon him by the Constitution if he is directly involved in the subject matter.

7 CONCLUSION

Given the discretionary nature of the power, the Public Protector is not empowered to instruct the President to establish a commission of inquiry in terms of the current constitutional framework. It is submitted that this is due to inadequate mechanisms for the National Assembly to oversee the exercise of the power, despite the fact that the President accounts to Parliament for the exercise of his powers and the performance of his functions. In terms of the Constitution, the President is individually and collectively accountable to Parliament for the exercise of the powers and functions entrusted to him by the Constitution.[103] The National Assembly must provide for mechanisms to ensure that all executive organs of state in the national sphere of government are accountable to it.[104] It must also provide for mechanisms to maintain oversight of the exercise of national executive authority, including the implementation of legislation, and of any organ of state.[105] The National Assembly may summon any person to appear before it and give evidence on oath or affirmation, and produce documents.[106] It may require any person or institution to report to it.[107] Any person or institution may be compelled by the National Assembly to comply with a summons or the requirement to give evidence on oath or affirmation or report to it.[108] Any interested persons may also submit petitions, representations or submissions to the National Assembly.[109] The National Assembly should be empowered to improve its ability to hold the President accountable for the exercise of his powers as Head of State.

The Constitution only gives the National Assembly the discretionary power to put in place measures to exercise oversight over the executive branch of government. It does not state what those mechanisms are. The National

[102] S 86(1) of the Constitution.
[103] S 92(2) of the Constitution.
[104] S 55(2)(*a*) of the Constitution.
[105] S 55(2)(*b*) of the Constitution.
[106] S 56(*a*) of the Constitution.
[107] S 56(*b*) of the Constitution.
[108] S 56(*c*) of the Constitution.
[109] S 56(*d*) of the Constitution.

Assembly may determine and control its internal arrangements, proceedings and procedures.[110] It may make rules and orders concerning its business, with due regard to representative and participatory democracy, accountability, transparency and public involvement.[111] The rules and orders of the National Assembly must provide for the establishment, composition, powers, functions, procedures and duration of its committees.[112] It is submitted that the National Assembly is in contravention of this constitutional injunction because it has not established a standing committee on the President's powers as Head of State and head of the national executive. There are increasing calls for the establishment of a standing committee on the President's powers, in order to enhance parliamentary oversight over the executive branch of government.[113]

The Constitutional Court has already pronounced that this is at odds with the National Assembly's duty to hold the President accountable for the exercise of his powers and the performance of his functions. In *Economic Freedom Fighters v Speaker of the National Assembly (EFF 2)*,[114] the Constitutional Court had to decide whether the National Assembly has fulfilled its constitutional obligations to hold the President accountable. Referring to section 57(1) of the Constitution, a dissenting judgment of the Constitutional Court found that it is the National Assembly and not the court that has the power to determine and control its own proceedings and procedures. According to the *dictum* of the minority court, it would be a violation of the doctrine of the separation of powers should it dictate to the National Assembly which option or model to adopt in holding the President accountable.[115] In the majority judgment, the Constitutional Court found that the National Assembly has failed in its constitutional obligation to hold the President accountable by failing to put in place rules to conduct impeachment proceedings.

There is a lacuna between the Public Protector's power to take remedial action and the National Assembly's obligation to hold the President accountable for the exercise of his powers in terms of section 84(2) of the Constitution. This lacuna stems from instances in which the President may be directed by the Public Protector to exercise a discretionary power vested in him by the Constitution in pursuance of the latter's remedial action. In view of the *SARFU* judgment, only the President may exercise a power conferred on him as Head of State. As an oversight body tasked with holding the President accountable, Parliament's role in such instances is not clear. This is also notwithstanding that, as a Chapter 9 institution, the Public Protector also accounts to the National Assembly.[116] This lacuna can be remedied by a constitutional amendment enabling the participation of Parliament in the President's power to establish a commission of inquiry. This is because both

110 S 57(1)(*a*) of the Constitution.

111 S 57(1)(*b*) of the Constitution.

112 S 57(2)(*a*) of the Constitution.

113 South African Government "Parliament Agrees on Establishment of Committees" (5 June 2019) https://www.gov.za/speeches/national-assembly-rules-committee-agrees-establishment-committees-5-jun-2019 (accessed 2022-07-07).

114 [2017] ZACC 47 (*EFF 2*).

115 *EFF 2 supra* par 76.

116 S 181(5) of the Constitution.

the Public Protector and the President are accountable to the National assembly for the performance and exercise of their constitutionally allocated powers and functions.[117]

It is not disputed that the Public Protector's remedial actions are legally binding. However, the manner in which they are directed to implicated parties should be done in such a way that it is not perceived as an invitation to exercise public power under unlawful dictation. The law should be reformed to give guidance in instances where the implementation of the Public Protector's remedial actions is dependent on the exercise of an original power conferred on the President as Head of State. There should be a three-pronged approach to the President's power to establish a commission of inquiry. All three branches of government should participate in the process in that:

- subject to a lack of clear conflict of interest, the original power of establishing the commission should still be vested in the President;
- the terms of reference of the commission should be debated in the National Assembly; and
- the nomination of who is to head the commission should be deliberated upon among members of the judicial branch of government. After such deliberation, they should present one name of a judge to the President who, acting together with the National Assembly and the judiciary, and following deliberations from the three branches of government, will then formalise the appointment of the nominee for purposes of heading the commission.

Any dispute regarding the question of whether the President is rightfully placed to establish the commission of inquiry should be debated in the National Assembly in pursuit of its constitutional obligations to hold members of the executive accountable for the exercise of their constitutional powers and functions. Should the National Assembly fail to comply with its constitutional obligations in this regard, the judiciary should then have power to make the final determination on whether both the President and the National Assembly have complied with their respective constitutional obligations. If an averment is made that the President is not rightfully placed to establish the commission because of his direct implication in the facts to be investigated, the National Assembly should debate the matter and adopt a resolution calling for the Deputy President to establish the commission instead, provided that the allegations against the President establishing the inquiry are legally sound.[118] As far as the constitutional amendment

[117] The Public Protector accounts to the National Assembly in terms of s 181(5) of the Constitution. Even though the institution has the power to take direct remedial action against the President, if the Constitution is amended to empower the National Assembly to participate in the establishment of a commission of inquiry, then the Public Protector can submit such recommendations directly to Parliament, to kick-start the process of appointing the inquiry.

[118] In pursuit of his powers as Acting President in terms of section 90 of the Constitution. The provision governs the position of the Acting President in circumstances where the President is absent from the Republic, otherwise unable to fulfil the duties of President or during a vacancy in the office of the President. As Acting President, the Deputy-President has the responsibilities, powers and functions of the President. See in this regard Hoffman "Op-Ed:

proposed above is concerned, the President should exercise the power to appoint a commission of inquiry in consultation with Parliament and the judiciary. The amended section 84 of the Constitution could read thus:

> *"84 Powers and functions of the President:*
>
> (1) The President has the powers entrusted by the Constitution and legislation, including those necessary to perform the functions of Head of State and head of the national executive.
> (2) The President is responsible for–
> …
> (f) appointing commissions of inquiry, after consulting with the National Assembly and the judiciary, and subject to a two-thirds majority vote in the National Assembly;
> …
> (3) The appointment of the commission of inquiry shall be complete, subject to the conditions outlined below:
> (a) The terms of reference of the commission are subject to debate and a two-thirds majority vote in the National Assembly;
> (b) Nomination of the Commission Chair must be debated among members of the judiciary at a panel which shall sit after consultation and consensus has been reached between the President as head of the national executive, the judiciary and the legislature regarding date, place and time. Thereafter, the panel sitting shall forward one name to the President for consideration;
> (c) The President shall thereafter formalise the appointment of the candidate to head the commission of inquiry;
> (d) If the President has reservations about the candidate submitted by the panel in subsection (4), he must inform the National Assembly and the panel sitting of the same in writing of the reasons for his rejection of the candidate selected;
> (e) Should there be any dispute regarding whether it is desirable for the President to establish the commission on account of his perceived bias, such must be debated in the National Assembly;
> (f) If any bias is established following the debate in subsection (6), Parliament should nominate the Deputy President to establish the commission of inquiry;
> (g) Subsection (7) should be read together with section 90(1) of the Constitution."

South Africa is a country founded *inter alia* on the rule of law and the principle of constitutional supremacy. Any exercise of public power, including the power to appoint commissions of inquiry, should be subject to the Constitution. The President's power to establish a commission of inquiry can no longer be an absolute discretionary power that is immune from legislative oversight. The inadequacy of the current provisions is borne out by the fact that the Zondo Commission of Inquiry was only appointed in January 2018, almost 14 months after the Public Protector's State of Capture Report was released, and only after the North Gauteng High Court declared the Public Protector's remedial action to be binding and that President Zuma had, within 30 days, to appoint a commission of inquiry, headed by a judge selected solely by the Chief Justice.

A Commission of Inquiry into State Capture: To Be or Not to Be"? (2017-05-02) *Daily Maverick*.

In addition to the amendments proposed to section 84, it is submitted that the provisions of section 55(2) should be amended to indicate that legislative oversight also extends to the President's powers as Head of State.

SAPS ELECTRONIC REGISTER FOR PERPETRATORS OF ABUSE AGAINST WOMEN

Mahlubandile Ntontela
LLB LLM PG Dip in Labour Law Practice
Attorney of the High Court,
Lecturer, Nelson Mandela University

SUMMARY

Abuse against women is a severe social problem that needs an effective combat mechanism. Globally, women have been subjected to violence to such an extent that the problem has caught the international community's attention. In response to the abuse of women, the international community has introduced a legal framework to assist countries in setting up preventative and protective measures to realise women's rights and make them free from all forms of violence. The instruments introduced by the international community include UN Resolutions, General Recommendations on violence against women and children, and the like. The Constitution of the Republic of South Africa, 1996 guarantees everyone the right to freedom of security, including the right to be free from all forms of violence. While South Africa has made great strides in passing legislation to protect women from violence, the preventative methods have not been effective in combating women abuse. Thus, South Africa needs more preventative mechanisms to protect women, and police at the forefront of implementing those preventative mechanisms. This article investigates mechanisms that the international community has suggested, looks at other countries' approaches to combating violence against women, and then argues for a process where women have access to information about a potential abuser's previous criminal history.

1 INTRODUCTION

Violence against women has been recognised internationally as a severe and pervasive phenomenon, affecting women's lives and health and violating their human rights.[1] Violence against women is prevalent in many countries, including South Africa. According to Statistics South Africa, one in five women (21 per cent) reported being physically abused by their partners

[1] Hawkins "Women's Human Rights: The Global Intersection of Gender Equality, Sexual and Reproductive Justice, and Healthcare" 2012 4 *Journal of Research on Women and Gender* 159 184; The World Bank "Gender-Based Violence (Violence Against Women and Girls)" (25 September 2019) https://www.worldbank.org/en/topic/socialsustainability/brief/violence-against-women-and-girls#:~:text=Gender%2Dbased%20violence%20(GBV),or%20non%2Dpartner%20sexual%20violence (accessed 2021-05-19).

in 2021.[2] The effects of gender-based violence can be physical, sexual, financial, psychological, or emotional, and are encountered by people of all races and socio-economic groups. Analysts and reports agree that South Africa's rate of violence (especially gender violence) is among the highest in the world.[3] Medical expenses, psychological problems, lost productivity, and intergenerational violence drain billions of rands annually from communities in social costs that violate safety, health, welfare and economies.[4] As of 2014, the cost of gender-based violence in South Africa was calculated at between R28.4 billion and R42.4 billion per year, which is between 0.9 and 1.3 per cent of the country's Gross Domestic Product.[5] Violence against women is any act of gender-based violence that results in or is likely to result in physical, sexual or mental harm or suffering to women, including threats of such acts, coercion, or arbitrary deprivation of liberty, whether occurring in public or private life.[6] In section 12(1)(*c*), the Constitution states that everyone has the right to freedom and security, including the right to be free from any form of violence, whether stemming from public or private sources.[7] Interpersonal violence presents complex challenges in the context of violence prevention, implementation of laws, and interventions with abuse survivors.[8]

This article examines the existing international legislative instruments available to combat violence against women in intimate partner relationships. The article also looks into preventative methods introduced in other jurisdictions to assist in the fight against violence in women's intimate relationships. The author then makes a case for possible legislative procedures South Africa can adopt as a preventative method to combat violence against such women. The framework aims to allow women in potentially abusive environments to receive information on a potential abuser's previous criminal history.

---

2 Stats SA "Crimes Against Women in South Africa, An Analysis of the Phenomenon of GBV and Femicide" (undated) https://www.parliament.gov.za/storage/app/media/1_Stock/Events_Institutional/2020/womens_charter_2020/docs/30-07-2020/A_Statistical_Overview_R_Maluleke.pdf (accessed 2022-07-15).

3 Goldscheid "Gender Violence and Work in the United States and South Africa: The Parallel Processes of Legal and Cultural Change" 2011 19(3) *American University Journal of Gender, Social Policy & the Law* 921 924.

4 *S v Baloyi* 2000 (1) BCLR 86 (CC) par 11, referring to a document drafted by the US National Council of Juvenile and Family Court Judges.

5 KPMG Human and Social Services "Too Costly to Ignore: The Economic Impact of Gender-Based Violence in South Africa" (18 September 2014) https://home.kpmg/za/en/home/insights/2014/09/too-costly-to-ignore.html (accessed 2022-07-15).

6 World Health Organisation (WHO) "Violence Against Women" (undated) https://www.who.int/health-topics/violence-against-women#tab=tab_1 (accessed 2021-05-21).

7 The Constitution of the Republic of South Africa, 1996 (the Constitution).

8 Parker "Violence Against Women in South Africa: Perspectives From a Mental Health Context" 2020 *Acta Juridica* 287 289.

2 INTERNATIONAL TREATIES

A few of the relevant international agreements are discussed here. The Preamble to the United Nations Charter acknowledges a need to reaffirm faith in fundamental human rights, the dignity and worth of the human person, and the equal rights of men and women.[9] The international community has introduced various mechanisms to combat violence against women.

The Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW)[10] aims primarily to eliminate discrimination against women. South Africa signed the treaty on 29 January 1993, ratified it on 15 December 1995, and the Convention came into effect in South Africa on 15 January 1996.[11] Since the original version of CEDAW does not directly speak to violence against women, several documents (in the form of recommendations) have been issued by the CEDAW Committee to assist in the fight against abuse of women.

General Recommendation No. 12 of CEDAW[12] calls on States Parties to report periodically to the CEDAW Committee on legislation enacted to protect women from violence, as well as on measures adopted to eradicate violence against women, and the availability of support services for women who are the victims of aggression or abuse.

General Recommendation No. 19, adopted by the CEDAW Committee at its 11th session in 1992, invited all States Parties to take appropriate measures to fight against violence against women that resulted from public or private actions.[13] Public acts of violence perpetrated by public authorities include acts against women by any person, organisation or enterprise.[14] Private actions by private individuals can also be considered a violation of State responsibility if the State fails to act diligently to prevent the violation of rights or if it investigates inadequately and fails to punish acts of violence.[15]

---

9 United Nations *Charter of the United Nations* 1 UNTS XVI (1945) https://www.un.org/en/about-us/un-charter/preamble (accessed 2021-05-25).

10 UN General Assembly *Convention on the Elimination of All Forms of Discrimination Against Women* 1249 UNTS 13 (1981) Adopted: 18/12/1979; EIF: 03/09/1981 https://www.ohchr.org/documents/professionalinterest/ cedaw.pdf (accessed 2021-05-25).

11 Office of the Chief State Law Adviser "South African Treaty Register" (undated) https://treaties.dirco.gov.za/dbtw-wpd/exec/dbtwpub.dll?AC=GET_RECORD&XC=/dbtw-wpd/exec/dbtwpub.dll&BU=https%3A%2F%2Ftreaties.dirco.gov.za%2Fdbtw-wpd%2Ftextbase%2Ftreatywebsearch.htm&GI=&TN=TreatyWeb&SN=AUTO27357&SE=158&RN=54&MR=20&TR=0&TX=1000&ES=0&XP=&RF=Printingformat2018&EF=Basic+Record+Form&DF=Web+full+record&RL=1&EL=1&DL=1&NP=1&ID=&MF=&DT=&ST=0&IR=525&NR=0&NB=2&SV=0&SS=0&BG=&FG=&QS=TReaties+New+Master (accessed 2021-05-25).

12 UN Committee on the Elimination of All Forms of Discrimination Against Women *CEDAW General Recommendation No. 12: Violence Against Women* (8th Session, 1989).

13 CEDAW Committee *General Recommendation No. 19: Violence against Women* (11th Session, 1992) A/47/38 par 24(a).

14 CEDAW Committee *General Recommendation No. 19* par 8 and 9.

15 *Ibid.*

General Recommendation No. 35 (GR No. 35) aims to assist States Parties with mechanisms (legislative or otherwise) for combating violence against women on the domestic front. The Recommendation's mechanisms focus on prevention, protection, prosecution and punishment.[16] GR No. 35 further advises States Parties to seek support, where necessary, from the international community (that is, from UN specialised agencies) to meet human rights obligations by designing and implementing all appropriate measures to eliminate and respond to violence against women.[17]

On 2 February 1998, the UN General Assembly adopted a resolution on crime prevention and criminal justice measures to eliminate violence against women.[18] The resolution focused on strategies and practical steps in crime prevention and criminal justice to stop violence against women. In the resolution, member states are urged to review, evaluate and revise their national legal systems' procedural, criminal and civil laws to ensure that all acts of violence against women are prohibited.[19]

In September 2015, the United Nations Sustainable Development Summit adopted a sustainable development goal (SDG) to eradicate violence against women.[20] As part of the international development agenda, gender-based violence (GBV) was included for the first time.[21]

Following CEDAW, the Constitutional Court has confirmed that states are obliged to make laws and take other measures to eliminate discrimination against women.[22] The Constitutional Court reaffirmed that the South African government has a duty under international law to prohibit any form of discrimination against women that impairs their enjoyment of fundamental rights and freedoms, and a duty to take reasonable measures to prevent the violation of their rights.[23]

In South Africa, international law is adopted and internalised through sections 231, 232 and 233 of the Constitution.

3 ABUSE AGAINST WOMEN IN INTIMATE RELATIONSHIPS AND ITS PERVASIVE NATURE

According to a report published on 9 March 2021 by the World Health Organisation (WHO) on the prevalence of women's violence globally, one in

16 CEDAW Committee *General Recommendation No. 35: Violence Against Women* (67th Session, 2017) par 27–45.

17 CEDAW Committee *General Recommendation No. 35* par 54.

18 UN General Assembly *Crime Prevention and Criminal Justice Measures to Eliminate Violence Against Women: Resolution* A/RES/52/86 Adopted: 12/12/1997; EIF: 02/02/1998 https://documents-dds-ny.un.org/doc/UNDOC/GEN/N98/764/59/IMG/N9876459.pdf?OpenElement (accessed 2021-05-31) 4.

19 *Ibid.*

20 Parker 2020 *Acta Juridica* 289.

21 *Ibid*.

22 *S v Baloyi supra* par 13.

23 *Carmichele v Minister of Safety and Security* 2001 (4) SA 938 (CC) par 62.

three women has experienced violence at least once in their lifetime.[24] Globally, nearly one-third of women between the ages of 15 and 49 reports being physically or sexually abused by their intimate partners.[25] A lifetime prevalence estimate of intimate partner violence varies from 20 per cent in the Western Pacific, to 22 per cent in high-income countries and Europe, 25 per cent in the WHO regions of the Americas, 33 per cent in the WHO African region, 31 per cent in the WHO Eastern Mediterranean region, and 33 per cent in the WHO South-East Asia region.[26] Most intimate partner and sexual violence is perpetrated by men against women.[27] Within the first half of 2020, the police received 21 203 reports of domestic violence in South Africa.[28] In South Africa, one report states that men inflict most GBV on women and girls owing to unequal power distribution between women and men.[29] As a result of gender discrimination and lower socio-economic status, women have fewer options and resources available to escape abusive situations and seek justice.[30]

The Constitutional Court has acknowledged that the effects of family violence can be devastating physically, emotionally, spiritually and financially.[31] Violence against women has significant short-term, medium-term and long-term impacts on women's physical and mental health, and on their wellbeing.[32] Among the long-term effects of violence are blindness, impaired hearing, paralysis, amputation and crippling.[33] Numerous studies indicate that battered women experience difficulties like depression and post-traumatic stress disorder.[34] A growing body of research documents how intimate partner abuse negatively impacts abused women's reproductive health.[35] Several studies have concluded that constant maltreatment causes miscarriages, unwanted pregnancies, abortions, premature births and foetal abnormalities.[36] Long after physical abuse has stopped, its effects persist.[37] It is common for psychological abuse to accompany physical violence in

---

[24] World Health Organisation "Violence Against Women" (9 March 2021) https://www.who.int/news-room/fact-sheets/detail/violence-against-women (accessed 2021-04-15).

[25] *Ibid*.

[26] *Ibid*.

[27] *Ibid*.

[28] ENCA "Over 21,000 Domestic Violence Cases Reported This Year: Cele" (1 September 2020) https://www.enca.com/news/over-21000-domestic-violence-cases-reported-cele (accessed 2021-08-31).

[29] KPMG Human and Social Services https://home.kpmg/za/en/home/insights/2014/09/too-costly-to-ignore.html.

[30] *Ibid*.

[31] *S v Baloyi supra* par 11.

[32] WHO https://www.who.int/news-room/fact-sheets/detail/violence-against-women.

[33] Damon *Factors Underlying Women's Decision not to Report Physical Abuse: A Qualitative Exploration* (master's thesis, Stellenbosch University) 2003 11.

[34] Slabbert *The Experience of Low-Income Female Survivors of Domestic Violence* (doctoral thesis, Stellenbosch University) 2010 32.

[35] Damon *Factors Underlying Women's Decision not to Report Physical Abuse* 11.

[36] *Ibid*.

[37] Felletti, Andra, Nordenberg, Williamson, Spitz, Koss and Marks "Relationship of Childhood Abuse and Household Dysfunction to Many of the Leading Causes of Death in Adults" 1998 14(4) *American Journal of Preventive Medicine* 99 107.

intimate partner relationships.[38] As a result of the constant fear of physical exploitation, women end up feeling emotionally numb.[39] Even after the abuse has stopped, survivors experience feelings of worthlessness and think they are both deserving of and are blamed for the abuse.[40] Those who have experienced intimate partner abuse believe there is no way out of the situation; they feel helpless, powerless and defenceless.[41] Women are less likely to leave violent partners when they lack access to income and employment.[42] The feeling of helplessness often results in survivors not reporting the abuse. When women report abuse or sexual offences, they occasionally encounter prejudice and get unhelpful responses from staff members in various sectors (including legal, health, social and criminal justice).[43] The stigma of family and society, survivors' fears, and the complexity of criminal justice systems contribute to women not reporting crimes.[44] All these challenges frequently discourage women from reporting crimes or asking for more help.[45] In addition, victims of domestic violence who do not receive adequate support from police, prosecutors and judges also have difficulties navigating the criminal justice system.[46] Previous studies estimate that many cases of violence against women go unreported.[47] Ineffective criminal justice systems exacerbate the victims' subordination and helplessness that is due to family violence.[48] Thus, providing women with psychological and legal information helps them make informed decisions about their futures.[49]

The abuse of women also has severe social and economic consequences for countries and societies.[50] As a hidden, repetitive act, domestic violence has massive repercussions on society and, specifically, on families.[51] Violence in families negatively affects women and all family members, especially children who learn from violent behaviour that physical violence can be an acceptable means of coping with problems or gaining control over others.[52]

---

38 Campbell and Soeken "Forced Sex and Intimate Partner Violence: Effects on Women and Women's Health" 1999 5(9) *Violence Against Women* 95 99.

39 Damon *Factors Underlying Women's Decision not to Report Physical Abuse* 12.

40 Damon *Factors Underlying Women's Decision not to Report Physical Abuse* 13.

41 Damon *Factors Underlying Women's Decision not to Report Physical Abuse* 12.

42 Goldblatt "Violence Against Women in South Africa: Constitutional Responses and Opportunities" (March 2018) https://www.researchgate.net/publication/326682166_Violence_against_women_in_South_Africa_Constitutional_Responses_and_Opportunities (accessed 2021-05-18) 3.

43 Parker 2020 *Acta Juridica* 301.

44 *Ibid*.

45 *Ibid*.

46 Lippman "Ensuring Victim Safety and Abuser Accountability: Reforms and Revisions in New York Courts' Response to Domestic Violence" 2012 76(3) *Albany Law Review* 1417 1422.

47 Parker 2020 *Acta Juridica* 298.

48 *S v Baloyi supra* par 12.

49 Parker 2020 *Acta Juridica* 301.

50 WHO https://www.who.int/news-room/fact-sheets/detail/violence-against-women.

51 *S v Baloyi supra* par 1.

52 *Ibid*.

Owing to the widespread reporting of violence against women, including high-profile cases like Anene Booysen's rape and murder, and Reeva Steenkamp's murder, South African society has become accustomed to hearing about it. There have been renewed calls for the government to take a decisive stand against the crimes of murder and rape, including those of Karabo Mokoena, Uyinene Mrwetyana, Meghan Cremer, Leighandre Jegels, Courtney Pieters and Janika Mallo in recent years.[53]

The fight against violence against women in South Africa is fraught with many challenges. Not many of the domestic violence cases reported to the South African Police Services (SAPS) eventually get finality through court processes.[54] There could be several reasons for this. It is possible that the legislative measures in place do not serve adequately in bringing to justice those who have committed domestic violence.[55] From the perspective of victims, the law may also not be strong enough to protect them against the resurgence of violence by the perpetrators after they report the matter to SAPS for the first time.[56] Owing to the ineffectiveness of the criminal justice system in dealing with family violence, victims often feel subordinated and helpless.[57] The inefficiencies within the criminal justice system have also been documented in the courts. An example of deficiencies within the criminal justice system is evident from *Naidoo v Minister of Police*,[58] a case in which a survivor of domestic violence went to open a case of assault against her husband.[59] The police informed her that before they could help her, she must apply for a protection order in terms of the Domestic Violence Act.[60] At the magistrates' courts, she was told that a protection order is not a prerequisite for registering a domestic violence charge with the police.[61] When the survivor returned, the police officer advised her to settle the matter. When the survivor insisted on registering a domestic violence case, the police officer who was assisting her threatened that the husband could register a counter-charge. After Mrs Naidoo insisted on laying a charge, the husband (on the advice of the police officer) laid a charge against Mrs Naidoo, and she was also arrested.[62] The Supreme Court of Appeal criticised the police officer handling Mrs Naidoo's complaint.[63] The court held that the police's actions against Mrs Naidoo were negligent, and her arrest was unlawful.[64]

---

53 Barkley "A Crisis of Violence Against Women: Has South Africa Fulfilled Its Obligations in Terms of the Convention on the Elimination of All Forms of Discrimination Against Women?" 2020 *Acta Juridica* 165 167.

54 Goldblatt in Dixon and Roux (eds) *Constitutional Triumphs, Constitutional Disappointments* 141–3.

55 Goldblatt https://www.researchgate.net/publication/326682166.

56 *Ibid*.

57 *S v Baloyi supra* par 12.

58 [2015] 4 All SA 609 (SCA).

59 *Naidoo v Minister of Police supra* par 2.

60 116 of 1998; *Naidoo v Minister of Police supra* par 2.

61 *Ibid.*

62 *Naidoo v Minister of Police supra* par 42.

63 *Naidoo v Minister of Police supra* par 43.

64 *Naidoo v Minister of Police supra* par 56.

The ineffectiveness of the criminal justice system, moreover, tells the whole society that the daily trauma faced by a significant number of women does not matter much.[65] According to Burman, the enormity of domestic violence and its adverse effects on victims and society require extraordinary, (even revolutionary) measures to prevent further abuse.[66]

4 CONSTITUTIONAL PROTECTION OF WOMEN FROM ABUSE

The protection of women from all forms of violence does not stem from emotional sympathy; rather, such protection is constitutionally entrenched and is based on human values. The Constitution offers various forms of security to all people who live in the Republic of South Africa. The Constitution further sets itself as the ultimate standard on how everyone must be treated and entrenches itself as the supreme law of the land.[67] The various rights afforded in relation to protecting women from violence include rights to dignity and life, the right to be free from all forms of violence, and the right to bodily integrity.[68] The right to dignity envisions that individuals should not just be used as instruments of others' wills, as respect for their intrinsic worth is implied.[69] The right to dignity entails that women be viewed and appreciated in their concrete reality and be respected for what they represent in their family and personal lives. Section 10 also entails that women have the right to protect their dignity, which implies they have a right to claim protection from the State from having their dignity impaired by others.[70] Referring to the right to life, O'Regan J in *S v Makwanyane*[71] explained that without dignity (which goes beyond mere existence) human lives are substantially diminished.[72] The right to life includes the right to be treated as an individual with dignity.[73] A person's right to freedom and security consists of being free from all forms of violence.[74]

According to the Constitutional Court, the right to be free from all forms of violence means there is a direct obligation on the State to protect victims of domestic or private violence.[75] In other words, in section 12(1)(*c*), the State must protect the individual's rights by not invading those rights and by taking steps to prevent the rights' invasions. Although private citizens may be entitled to remain passive when there is a threat to other citizens' rights, the South African government has a positive duty to protect the rights enshrined

---

65 *Ibid.*

66 Burman "Prevention of Family Violence Act: Criticism Misses the Point" 1994 *De Rebus* 317.

67 S 2 of the Constitution.

68 Ss 10, 11 and 12 of the Constitution.

69 Schackter "Human Dignity as a Normative Concept" 1983 (77) *AJIL* 848.

70 Haysom "Dignity" in *South African Constitutional Law: The Bill of Rights* (2005) 17.

71 1995 (6) BCLR 665 (CC).

72 *S v Makwanyane supra* par 327.

73 *Ibid.*

74 S 12(1)(*c*) of the Constitution.

75 *S v Baloyi supra* par 11.

in the Bill of Rights.[76] The Supreme Court of Appeal (SCA) has reaffirmed that where there is a potential threat to any of the constitutionally protected rights to human dignity, life or security of the person, the State (represented by its officials) has a constitutional duty to protect them.[77] In *Van Eeden v Minister of Safety and Security,*[78] the court held that certain police officers who had information that adversely affected a person's fitness to possess firearms had a legal duty to take reasonable steps to prevent harm to the public.[79] In like manner, the police should disclose the information about the person being inquired about to the potential victim of abuse. In the interests of protection, legislation must allow possible victims of abuse to access criminal history information about their potential abusers. As indicated in *Minister of Safety and Security v Van Duivenboden,*[80] police disclosure of information that prevents harm to the public enhances rather than impedes efficient police functioning.[81] Thus, the State has to develop preventative mechanisms to see the realisation of rights enshrined in the Constitution to prevent violence against women.

5 CURRENT POSITION

There are currently two ways in which a person can seek information on a potential abuser's criminal history.

The first is through section 11 of the Promotion of Access to Information Act (PAIA).[82] Section 11 provides that public bodies, including the South African Police Service community service centres, must give a requester access to public records, provided that the requester complies with the procedural requirements, and that access is not prohibited in terms of Chapter 4 of PAIA.[83] Section 34 of PAIA further provides that information about third parties may not be withheld if the person has been warned that the information would be made available to the public. It is argued in this article that this provision of PAIA allows the police to make available, on request by a potential survivor, information that they have on a potential abuser regarding the latter's previous criminal history. Such information could assist the requester in understanding how to exercise her rights. Thus, women can apply to the police to access information, provided they can show that the access to the information will enable them to access their rights. In *Cape Metropolitan Council v Metro Inspection Services (Western Cape) CC*, the court held:

> "Information can only be required for the exercise or protection of a right if it will be of assistance in the exercise or protection of the right. It follows that, in order to make out a case for access to information in terms of s 32, an

---

76 *Van Eeden v Minister of Safety and Security* 2003 (1) SA 389 (SCA) par 14.
77 *Minister of Safety and Security v Van Duivenboden* [2002] 3 All SA 741 (SCA) par 22.
78 *Supra.*
79 *Van Eeden v Minister of Safety and Security supra* par 18.
80 *Supra.*
81 *Minister of Safety and Security v Van Duivenboden supra* par 21.
82 2 of 2000.
83 S 11(1)(*a*) and (*b*) of PAIA.

> applicant has to state what the right is that he wishes to exercise or protect, what the information is which is required and how that information will assist him in exercising or protecting that right."[84]

The problem with the first approach is that it may end up being costly and prolonged should the likely victim experience resistance from public officials in accessing information on the potential abuser. Speedy access to the information assists as domestic violence victims are most at risk of further and more severe violence immediately after attempting to obtain assistance.[85]

The second approach for potential survivors to accessing information is indirectly through section 271 of the Criminal Procedure Act.[86] Section 271 provides that, after an accused person has been convicted of an offence and before sentence, the state prosecutor may prove the previous convictions of such an accused person. There are various challenges for a potential abuse survivor taking this route. First, an accused must first be convicted before the previous convictions may be read to the court in a public court (in which the potential abuse victim would have to be present).[87] Secondly, the prosecutor has a discretion whether to prove an accused person's previous convictions.[88] Another challenge with this option is that only an accused's previous convictions are mentioned in court and these do not include prior arrests and charges on which the accused was acquitted.[89]

Both options mentioned offer women a limited preventative mechanism in the form of accessing information through police stations. South Africa needs a more efficient and structured approach as a preventative mechanism to ensure women's right to freedom from violence. Such a mechanism is available in other jurisdictions such as the United Kingdom (UK) and the United States of America (USA).

6 CLARE'S LAW IN THE UK, CANADA AND THE USA

Over the years, the UK (in England and Wales) has introduced a policy scheme known as Clare's Law, or the Domestic Violence Disclosure Scheme (DVDS).[90] The DVDS came after the high-profile case of Clare Wood, who was murdered by her ex-boyfriend.[91] By sharing public protection information, the DVDS prevents the escalation of violence or its

---

84 2001 (10) BCLR 1026 (SCA) par 28.

85 Meintjes van der Walt "Domestic Violence" in *Family Law Service* (2021) M18.

86 51 of 1977.

87 S 271(1) of the Criminal Procedure Act 51 of 1977.

88 *S v Maphaha* 1980 (1) SA 177 (V) 295.

89 *S v Khambule* 1991 (2) SACR 277 (W) 283.

90 Policy Paper "Domestic Violence Disclosure Scheme Factsheet" (undated) https://www.gov.uk/government/publications/domestic-abuse-bill-2020-factsheets/domestic-violence-disclosure-scheme-factsheet (accessed 2021-08-18).

91 Fitz-Gibbon and Walklate, "The Efficacy of Clare's Law in Domestic Violence Law Reform in England and Wales" 2017 17 *Criminology & Criminal Justice* 284 286.

outbreak in relationships.[92] Clare's Law is founded on two fundamental rights: the right to ask and the right to know. Any member of the public seeking information about an individual's history of domestic violence can apply to the police for that information. The right to know refers to a situation where the police pre-emptively request information to protect a potentially high-risk victim from harm by their partner. In the first calendar year of a trial operation of the DVDS (8 March 2014 to 31 December 2014), 4 724 applications were received, and 1 938 disclosures were made nationally.[93] Since its introduction, the DVDS has only existed as a policy and has never been incorporated into legislation. In the year 2020, the UK Parliament tried to introduce the DVDS through legislation. Clause 64 of the Domestic Abuse Bill incorporates into law the existing DVDS as proposed at the time.[94] However, such a clause never made it into law under the current Domestic Abuse Act in the UK.[95] The UK government's decision not to include the DVDS in the Domestic Abuse Act has received a negative response from the public.[96]

Clare's Law has been mirrored in Canada and Australia. Clare's Law legislation in Canada empowers police to inform a current or former partner, or a third party such as a parent, about someone's history of intimate partner violence.[97] There is a similar DVDS in South Australia. The DVDS in South Australia provides an avenue for a person at risk of domestic violence to access information about their partner or former partner and make decisions about their safety and the future of their relationship.[98] In all the jurisdictions discussed above, the police only disclose recorded information that is relevant to the individual at risk. Also, the police share the data on a person's history of violence directly with the affected person or potential victim.[99]

There is currently no national piece of legislation in the USA that provides for a domestic violence registry. Over the last several years, some US states (including Connecticut, Georgia, Hawaii, Kansas, Kentucky, Mississippi,

---

92 Grace "Clare's Law, or the National Domestic Violence Disclosure Scheme: The Contested Legalities of Criminality Information Sharing" 2015 79(1) *Journal of Criminal Law* 36 37.

93 Fitz-Gibbon and Walklate 2017 *Criminology & Criminal Justice* 290.

94 The Guardian "Anger as Tory MPs Vote Against Register for Stalkers and Domestic Abusers" (16 April 2021) https://www.theguardian.com/society/2021/apr/16/anger-tory-mps-vote-against-register-stalkers-domestic-abusers (accessed 2021-08-18).

95 Home Office "Domestic Violence Disclosure Scheme (DVDS) Guidance" (December 2016) https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/575361/DVDS_guidance_FINAL_v3.pdf (accessed 2021-08-18) 3.

96 The Guardian https://www.theguardian.com/society/2021/apr/16/anger-tory-mps-vote-against-register-stalkers-domestic-abusers.

97 Government of Canada "RCMP Can Now Participate in Clare's Law Legislation in Saskatchewan and Alberta" (31 March 2021) https://www.canada.ca/en/public-safety-canada/news/2021/03/rcmp-can-now-participate-in-clares-law-legislation-in-saskatchewan-and-alberta.html (accessed 2021-08-18).

98 South Australia Police "Domestic Violence Disclosure" https://www.police.sa.gov.au/your-safety/dvds (accessed 2021-08-18).

99 South Australia Government "Make a Domestic Violence Disclosure Request" (30 November 2021) https://www.sa.gov.au/topics/family-and-community/safety-and-health/domestic-violence-and-sexual-assault/make-a-domestic-violence-disclosure-request (accessed 2021-08-18).

Nevada and Texas) have introduced legislation to create a domestic abuser registry.[100] No such national legislation passed as of yet. The Kansas Bureau of Investigation has developed an online offender registry search form, which is not state-run, but allows individuals to search for a specific offender by providing certain details.[101]

New York City has enacted the Family Protection and Domestic Violence Intervention Act.[102] The legislation creates a form for reporting domestic incidents, which has improved police reporting and tracking.[103] As a result of the Family Protection and Domestic Violence Intervention Act, a state-wide computerised registry of all protection orders has been established and maintained.[104] As part of the 2011 update to the registry, New York State created a Domestic Incident Report Repository that allows law enforcement officials to search for information on domestic violence incidents in different jurisdictions regardless of which police agency responded to the call.[105] The repository enhances both victim and officer safety by enabling law enforcement and other authorised users to search domestic incident reports submitted by agencies in the 57 counties outside of New York City.[106]

Prosecutors also benefit from the repository, as searches of the database can uncover patterns of behaviour that would otherwise have gone unnoticed, helping to build stronger cases that result in stiffer penalties.[107]

The National Domestic Violence Registry, a non-profit organisation, is the first database of domestic violence convictions available to the public in the USA.[108] The non-profit organisation administering the registry is privately run and funded. In addition to listing names of offenders who have been found guilty in a court of law, it claims to verify all submissions and documents received.[109] The National Domestic Violence Registry houses criminal records of those found guilty of offences related to domestic violence, such as physical battering, stalking, imprisonment, intimidation, strangulation and sex crimes.[110]

---

100 Virginia State Crime Commission "Domestic Abuser Registry" (undated) http://vscc.virginia.gov/documents/Domestic%20Abuser%20Registry.pdf (accessed 2021-08-05).

100 Fox News "Why There Is No National Domestic Assault Offender Registry – Yet" (30 November 2019) https://www.foxnews.com/us/national-domestic-assault-offender-registry-nicole-montalvo (accessed 2021-08-31).

101 Virginia State Crime Commission http://vscc.virginia.gov/documents/Domestic%20Abuser%20Registry.pdf.

102 Family Protection and Domestic Violence Intervention Act of 1994 ch 222, 1994 NY Laws 2704.

103 Lippman 2012 *Albany Law Review* 1417 1425.

104 *Ibid*.

105 Jmaloni "State Announces New Domestic Incident Report Repository" (2011-12-30) *Niagra Frontia Publications* 1.

106 Lippman 2012 *Albany Law Review* 1417 1425.

107 *Ibid*.

108 *Ibid*.

109 Fox News https://www.foxnews.com/us/national-domestic-assault-offender-registry-nicole-montalvo.

110 Lippman 2012 *Albany Law Review* 1417 1425.

7 THE NATIONAL INSTRUCTION AND THE DOMESTIC VIOLENCE AMENDMENT ACT

7 1 National Instruction[111]

The Preamble to the Domestic Violence Act (DVA)[112] acknowledges that victims of domestic violence are among the most vulnerable in society. The South African Law Commission Research Paper on Domestic Violence, which led to the DVA, noted that domestic violence is a complex phenomenon.[113] The Research Paper also pointed out that the ills associated with domestic violence cannot be solved solely by legislative reforms.[114] However, whenever victims of domestic abuse seek protection from the law, the response must be effective and efficient.[115] Therefore, the country must have a mechanism that allows women to enquire about the criminal history of their potential abusers. The DVA must be amended to provide provisions similar to Clare's Law and the National Domestic Violence Registry.

The provisions of the National Instruction of the Domestic Violence Regulations are the closest that South Africa has come to the examples mentioned in the preceding paragraphs. The National Instruction requires police officers to keep a register of domestic violence incidents reported in each police station.[116] The National Instruction further entails that, where a protection order has been granted, a copy of such order must be forwarded to a police station of the complainant's choice.[117] The author argues that the legislature can further develop the mandate in the National Instruction to provide for an electronic register. Such an electronic repository must be accessible and in sync with all the SAPS community service centres throughout the country. This way, survivors of abuse can easily access the information wherever they are in the republic.

7 2 The Domestic Violence Amendment Act[118]

The Domestic Violence Amendment Act (DVAA) introduced an electronic repository for the court's domestic violence orders for the first time.[119] Section 6A seeks, among other things, to introduce an integrated electronic repository for domestic violence protection orders and related matters.[120] The repository aims to migrate from the paper-based system to an electronic system for managing the protection orders issued in terms of sections 5 and

111 National Instruction 7/1999 in *GG* 20778 of 1999-12-30.
112 116 of 1998.
113 South African Law Commission "Research Paper on Domestic Violence" (April 1999) 2.
114 *Ibid*.
115 *Ibid.*
116 National Instruction 7/1999 in *GG* 20778 of 1999-12-30.
117 *Ibid*.
118 14 of 2021.
119 S 6A of the DVA, as amended.
120 *Ibid*.

6 of the DVA.[121] In terms of section 6A(2)(*a*), the Director-General of the Department of Justice and Constitutional Development must designate a person responsible for administering the electronic repository.[122] The DVAA further provided that the repository's administrator and the Information Regulator, established in section 39 of the Protection of Personal Information Act,[123] must issue directives for various purposes.[124] The directives must, among other things, provide for the persons allowed to access the electronic repository.[125] To ensure that the electronic repository is in line with the right to freedom from all forms of violence, it is submitted that it should provide access to potential victims of violence. Such access will also enhance preventative responses in the fight against the abuse of women.

The integrated electronic repository created by the DVAA must be accessible to the South African Police Service community service centres. The community service centres operate 24 hours daily, assisting those who need information throughout the day. In a judgment issued by the Constitutional Court, the court reaffirmed the importance of SAPS as a primary agency to protect the public, including women and children, against sexual abuse and violence.[126] Recent court decisions have noted that the constitutional right to be free from violence requires the police to act proactively to prevent violent crime.[127]

A proportionality test should be applied to ensure that the register proposed in this article will be in line with constitutional values. The proportionality test should assist in deciding whether a person may be permitted to access the information in the register. Jamie Grace suggests that, in considering a proportionate disclosure under the register, the police should look to establish that:

a) interference with the rights of a person enquired about as an (alleged) perpetrator of domestic violence is sufficiently important to justify interfering with his rights;
b) there is a rational connection between the purpose of the proposed information sharing and the purpose of the powers of the police (common law or statutory) in disclosing information;
c) wherever possible, interference with the rights of the person enquired about is minimal; and lastly
d) a balancing exercise has been conducted, weighing the rights of the person enquired about and the rights of the (potential) victim.[128]

---

121 *Ibid*.
122 S 6A(1) and (2)(*a*) of the DVA, as amended.
123 4 of 2013.
124 S 6A(3) of the DVA, as amended.
125 S 6A(3)(*d*) of the DVA, as amended.
126 *Carmichele v Minister of Safety and Security supra* par 62.
127 *Van Eeden v Minister of Safety and Security supra* par 18.
128 Grace 2015 *Journal of Criminal Law* 42.

Existing laws (such as common law crimes of perjury and defeating the ends of justice) may assist in punishing those who abuse the processes established to protect the potential victims of violence.

8 ACCESS TO INFORMATION AND THE PROTECTION OF PERSONAL INFORMATION ACT

The purpose of the Protection of Personal Information Act (POPIA),[129] among others, is to safeguard personal information when a responsible party processes such information.[130] The protection afforded by POPIA elaborates on section 14 of the Constitution, which guarantees everyone the right to privacy. However, according to the Constitutional Court, privacy does not concern anything outside the inner sanctum of a person, such as their family life, sexual preferences, and home environment, which are protected from erosion by conflicting community rights.[131] The right to privacy becomes more susceptible to limitations when one moves from the protected environment into the criminal justice system. It is in the latter system that an abuser has been found guilty of contravening the law. Such a perpetrator does not enjoy an unfettered right to privacy, and the right can be limited if the limitation is within the confines of the Constitution. The Constitution does allow for the restriction of a right.[132] The right to privacy can be limited, provided the limitation is justifiable and reasonable.[133]

In certain circumstances, it is possible to access personal information that is protected by POPIA. The personal information referred to in POPIA includes the personal data of a natural person relating to their criminal history.[134] POPIA gives authority to process personal information provided it is in pursuit of the legitimate interests of a third party to whom the information is supplied.[135] It is argued here that giving potential victims of abuse access to relevant information is not in conflict with the Constitution or POPIA. Section 36 of the Constitution can be used by the legislature to allow a limitation on the potential abuser's right to privacy. As a result of a limitation clause, there must be two stages of analysis.[136] As a first step, one must determine if the right in question has been infringed.[137] Secondly, it is necessary to determine if an infringement of that right can be justified as a legitimate limitation of that right.[138] Constitutional rights may also be limited in a democratic society where it is reasonable and necessary (as per the

129 4 of 2013.
130 S 2 of POPIA.
131 *Bernstein v Bester NO* 1996 (4) BCLR 449 (CC) par 67.
132 S 36 of the Constitution.
133 *Ibid.*
134 S 1 of POPIA.
135 S 11 of POPIA.
136 *S v Zuma* 1995 (4) BCLR 401 (CC) 414.
137 *Ibid*.
138 *Ibid*.

limitation clause in the Interim Constitution of South Africa) after weighing competing values and assessing proportionality.[139]

However, the courts must interpret a legislative provision that violates a potential abuser's constitutional rights in the least restrictive way.[140]

9 OBJECTIONS TO THE REGISTER FOR DOMESTIC ABUSERS

Across the world, objections have been made to the creation of a register of domestic violence abusers. The subsequent paragraphs only refer to a few of the objections. Those who are against maintaining a register for domestic violence offenders have always argued that access to information as a preventative measure creates a false sense of security.[141] The argument goes that it is impossible for registries to indicate accurately the number of abusive individuals who may pose a danger to others since only a small percentage of those who violate the law enter the criminal justice system.[142] Another argument is that a solution such as creating a register for domestic abusers is a simple response to a complex situation of domestic violence toward women. Opponents of a domestic abuser register argue that it ignores the fact that many victims are killed by abusive partners when they leave abusive relationships or after leaving them.[143] While the arguments against a domestic abuser register may be reasonable, the absence of such registers also does not solve the problem. Many women, when seeking information on a potential abuser, may decide to get assistance from third parties based on the police's advice. Some women do not want the criminal justice system route and avoid litigation in the domestic violence courts by any means possible. Having access to information may help them to decide to save themselves from potential abuse and the potential of dragging the relationship through the law courts in the future.

The register also has the potential to encourage victims to report such cases so that more perpetrators' names are in the system. This potential will depend on the effectiveness of the register once it is in place. Another argument is that if abusers' names are in a public registry, they might retaliate against the victims.[144] To date, there has been no conclusive proof that perpetrators listed on these registers have retaliated against the innocent victims who made them appear on the registers.

---

139 *S v Makwanyane* 1995 3 SA 391 (CC) par 104.

140 *South African Transport and Allied Workers Union (SATAWU) v Moloto NO* 2012 (11) BCLR 1177 (CC) 43.

141 National Network to End Domestic Violence "Potential Unintended Consequences of Domestic Violence Offender Registries" (undated) https://static1.squarespace.com/static/51dc541ce4b03ebab8c5c88c/t/5bfee2b3aa4a995f459c926e/1543430836088/OffenderRegistries_2016_access.pdf (accessed 2021-08-21).

142 *Ibid.*

143 *Ibid.*

144 *Ibid.*

10 CONCLUSION

South Africa has a severe problem of violence directed at women. Violence against women is a complex phenomenon and cannot be solved solely by legislative reforms. For the country to combat this scourge against women effectively, it must find innovative, effective preventative methods. This could include amending existing laws further. The National Instruction must be amended to provide an electronic incident repository similar to that of New York State. The S6A(3) directives should make the electronic register accessible to the police, which will facilitate the implementation of a system similar to Clare's Law. Whenever victims of domestic abuse seek protection from the law, the response must be effective and efficient. The response must seek to prevent the violation of constitutional rights. As agents of the State, the police must protect the public from acts of criminal activity, including the violation of constitutional rights. One possible way of protecting women against abuse is to create a channel that allows potential victims of violence to access information about potential abusers. The existing mechanisms prevent potential victims from accessing such information speedily and in a cost-effective manner. Thus, a speedier, more reliable process is needed. It is important for potential abuse victims to be able to access historical contraventions of the DVA by abusers. This article, therefore, suggests that South Africa should enact legislative measures that make an abuser's historical contraventions of the DVA accessible.

WHETHER TO PROCEED WITH A CIVIL PROCESS REMOTELY: UNIVERSAL LESSONS FROM AUSTRALIA DURING THE COVID-19 PANDEMIC

Nicci Whitear-Nel
BA LLB LLM
Senior Lecturer, University of KwaZulu-Natal

SUMMARY

This article considers Australian case law regarding testimony given by way of video link and the conducting of remote civil processes in the time prior to the COVID-19 pandemic, as well as during the pandemic and thereafter. The article discusses the various considerations taken into account by the courts in deciding whether or not to proceed remotely with civil processes. The author examines issues regarding whether to use video-conferencing, including the importance of the evidence and the architecture of the physical courtroom. The various issues facing lawyers in running a case remotely, including document management and the physical separation of legal teams, are also considered. The author looks also at issues facing the parties such as trial length, cost and the right of parties to be present, as well as issues facing other role players in the process, and issues pertaining to the integrity of the process. Lastly, issues relating to the administration of justice, such as access to justice and the open justice principle, are dealt with. The author concludes by commenting on the way forward and the lessons that can be extracted for South Africa.

1 INTRODUCTION

This article considers Australian case law regarding testimony given by way of video link and the conducting of remote civil processes in the time prior to the COVID-19 pandemic,[1] as well as during the pandemic and thereafter. In the conclusion, there is some reflection on what the position in the future is likely to be. The article focuses on the considerations taken into account by Australian courts in deciding whether to allow evidence by video link, and whether to order that a trial proceed remotely in the face of opposition to this. The article is limited to considering civil processes being heard by a

[1] In early 2020, after a December 2019 outbreak in China, the World Health Organisation identified SARS-CoV-2 as a new type of coronavirus. It was named COVID-19. The outbreak quickly spread around the world, becoming a pandemic. The first confirmed cases in Australia came in late January 2020. As at March 2021, the total number of cases reported was 29 046, with 909 COVID-19-related deaths recorded.

judge. Considerations that may be particularly relevant to jury trials are not discussed in this article because South Africa does not run jury trials.

Australia was chosen as the case study because taking evidence by way of video-conferencing is relatively well established there. The sections empowering a court to take evidence by way of video link in the Federal Court of Australia Act, 1976 (Cth) were enacted in 1994. Australian case law is also useful because of the large number of reported interlocutory decisions regarding whether to adjourn a case or whether to order that it proceed remotely. In addition, Australia, like South Africa, is part of the Commonwealth and shares a common-law adversarial legal system.

In considering whether to compel parties to proceed with civil processes, the Australian courts canvassed considerations relevant to whether to proceed remotely, which essentially amounted to a discussion of the pros and cons of video-conferencing. These serve as valuable lessons and are just as relevant in South Africa and the rest of the common-law world. Unlike Australia, however, South Africa does not have a large database of reported decisions, interlocutory or otherwise, that deal with remote hearings. South African decisions are therefore not discussed in this article, although South Africa reacted similarly to the COVID-19 pandemic by shutting down congregational face-to-face court hearings during the most dangerous stages of the pandemic. Although South African courts were provided with directives that empowered them to run cases using remote technology, this was not widely taken up. An exception was in the case of appeal hearings, which were often conducted over telephone or platforms such as Zoom or Microsoft Teams.

2 BACKGROUND

Australia is a parliamentary democracy, in which powers are distributed between a national government and six states.[2] There are also three self-governing territories.[3]

At the top level of the judicial hierarchy is the Australian High Court. The Federal Court has jurisdiction in national areas of activity and hears cases brought under commonwealth law. Most cases surveyed in this article are Federal Court decisions. Each state and territory has a Supreme Court, as well as magistrates' courts and county or district courts.

The Federal Court is empowered to take evidence by video link technology in terms of section 47A (1) of the Federal Court of Australia Act 1976 (Cth). The section grants courts a broad discretion in this regard – to be exercised in the interests of justice. Certain conditions must be fulfilled before video links may be used. These are set out in section 47C and refer to the rules of the court. The sections relevant to video-link testimony were enacted in 1994. The states and territories have similar legislation in place.[4]

---

2 New South Wales, Queensland, South Australia, Tasmania, Victoria and Western Australia.

3 Australian Capital Territory, Northern Territory and Norfolk Island.

4 For example, in New South Wales there is the Evidence (Audio- and Audio-Visual link) Act, 1998.

3 APPROACH TO AUDIOVISUAL LINKS PRIOR TO COVID-19

Before the COVID-19 pandemic, there were two broad approaches to the giving of evidence by remote link in Australia – a line of cases in favour of using audio-visual technology in the taking of evidence, and a line of cases taking a more cautious approach.[5] The cases taking the first approach took the view that the onus was on the party opposing the use of video-conferencing technology to show why the technology should not be used. The cases taking the other approach took the view that the party seeking the use of the technological facilities should discharge the onus of showing why they should be used.[6] The cases all analysed the pros and cons of using

[5] This was noted in *Australian Securities and Investments Commission (ASIC) v Rich* [2004] NSWSC 467 https://jade.io/article/133378 (accessed 2021-03-22) par 17 and 18, where the court held: "It seems to me there are broadly two approaches exhibited by the observations in the cases. One line of cases, generally in favour of the use of audiovisual evidence, includes *Bayer AG v Minister for Health of the Commonwealth* (1988) 13 IPR 225 (Young J), *ICI Australia Ltd v Commissioner of Taxation* (Federal Court of Australia, Ryan J, unreported, 29 May 1992), *Henderson v SBS Realisations Ltd* (English Court of Appeal, 1992, unreported, extracted in *B v Dentists Disciplinary Tribunal*, cited below), *DPP v Alexander* (1993) 33 NSWLR 482 (Hunt CJ at CL), *Commissioner of Taxation v Grbich* (1993) 18 AAR 74 (Beaumont J), *Meehan v GPR Management Services Pty Ltd* (Federal Court of Australia, Einfeld J, unreported, 31 May 1994), *B v Dentists Disciplinary Tribunal* [1994] 1 NZLR 95 (Williams J), *Studniberg v JP Morgan Australia Ltd* [1998] NSWIRComm 483 (Schmidt J), *R v Kyu Hyuk Kim* (1998) 104 A Crim R 233 (Coldrey J), *Mewett v Commonwealth of Australia* [1998] FCA 1360 (Katz J), *McDonald v Commissioner of Taxation* (2000) ATC 4271 (Finn J), *Tetra Pak Marketing Pty Ltd v Musashi Pty Ltd* [2000] FCA 1261 (Katz J), *Versace v Monte* [2001] FCA 1454 (Tamberlin J), *K v S* (2001) 27 Fam LR 498 (Full Family Court), *Reinsurance Australia Corporation Ltd v HIH Casualty & General Insurance Ltd (in liq)* [2001] FCA 1549 (Jacobson J), and *Sheldon & Hammond Pty Ltd v Metrokane Inc* [2002] FCA 1561 (Conti J).

Another line of cases, which takes a more cautious approach to the use of audiovisual evidence, includes *Poschung v Jones* (Supreme Court of New South Wales, Levine J, unreported, 25 October 1996, BC9606849), *Cigna Insurance Australia Ltd v CSR Ltd* (Supreme Court of New South Wales, Rolfe J, unreported, 29 November 1995), *Sunstate Airlines (Qld) Pty Ltd v First Chicago Australia Securities Ltd* (Supreme Court of New South Wales, Giles CJ Comm D, unreported, 11 March 1997), *Lamesa Holdings BV v Commissioner of Taxation* (Federal Court of Australia, Sackville J, unreported, 30 June 1998), *Australian Medical Imaging Pty Ltd v Marconi Medical Systems Australia Pty Ltd* (2001) 53 NSWLR 1 (Palmer J), *Asermeley-Rivera v Neffati* (Supreme Court of New South Wales, Kirby J, unreported, 12 April 2001, BC200101619), *Australian Competition & Consumer Commission v World Netsafe Pty Ltd* [2002] FCA 526 (Spender J) and *Moyette Pty Ltd v Foundation Healthcare Ltd* [2003] FCA 116 (Conti J)."

[6] The court in *Kirby v Centro Properties Ltd* [2012] FCA 60 par 4–5 described the two approaches in the following way: "The first [approach] is that given the advanced state of video link technology and also because of the convenience of the procedure and the savings in time and cost, a substantial case needs to be made out to warrant the court declining to make an order for evidence to be taken by video link: see *Reinsurance Australia Corp Ltd v HIH Casualty & General Insurance Ltd (in liq)* [*supra*] … 10–11…; *Versace v Monte supra* 16 and *Tetra Pak Marketing Pty Ltd v Musashi Pty Ltd* [*supra*] … 25. The other approach has been described as more cautious, and requires good reason to be shown before *leave to give* evidence by video link is granted: *Australian Competition and Consumer Commission v World Netsafe Pty Ltd* [*supra*] … at [7]; *Sunstate Airlines (Qld) Pty Ltd v First Chicago Australian Securities Ltd* [*supra*] … (BC9700538) at 6 …; *Australian Medical Imaging Pty Ltd v Marconi Medical Systems Australia Pty Ltd* [*supra*] …; [2001] NSWSC 651 at [27]."

video technology and either concluded that the disadvantages of remote witness testimony outweighed the advantages and that it was thus not in the interests of justice to use it, or *vice versa*. In *Australian Securities and Investments Commission v Rich*,[7] Austin J held that the two conflicting approaches could be resolved by adopting two principles:

> "First, the court should strongly encourage the use of current-generation electronic aids to its work, provided they are cost-effective and their reliability has been adequately established, recognising that a technological innovation which saves time and money may be acceptable even if it delivers a product not quite as good as the traditional alternative. Secondly, there will be exceptional cases where, presented with a choice between taking evidence by electronic means or using the tried and true viva voce method, the court will decide there are good grounds for proceeding by viva voce evidence."

In *Australian Competition and Consumer Commission v StoresOnline International Inc*,[8] Edmonds J cited Austin J, saying that his observations

> "illustrate the point that the choice in every case cannot be determined solely by reference to general principles because it is the application of those principles to the facts and circumstances of the particular case which must determine the choice; in the circumstances of a particular case, a matter may point one way and in another case it may point another way. At the end of the day, the exercise of the discretion as to what is appropriate in a particular case will involve a balancing exercise as to what will best serve the administration of justice consistently with maintaining justice between the parties."

4 APPROACH DURING THE COVID-19 PANDEMIC

Once the COVID-19 pandemic entered the equation, another consideration came to the fore. Given the uncertainties concerning the duration of the limitations that made in-person trials unfeasible, or which prohibited witnesses from travelling to court for an in-person hearing, there was an interest in not delaying justice indefinitely.[9] As the court held in *Australian Securities and Investments Commission v Wilson*,[10]

> "Considerations which may have influenced an application for video evidence based on inconvenience to the witness take on a different complexion when in

---

7 *Supra* par 43.

8 [2009] FCA 717 par 14 https://jade.io/article/96097 (accessed 2021-03-29). See, also, *Australian Competition and Consumer Commission v Pirovic Enterprises Pty Ltd* [2014] FCA 544 par 11 https://jade.io/article/751850 (accessed 2021-04-07), where the court held that in deciding whether to allow evidence by audio video link "the overriding consideration must, however, forever remain what is considered by the Court to be in the best interests in the administration of justice, including the need to see that justice is done as between the parties."

9 See *Capic v Ford Motor Company of Australia Limited (Adjournment)* [2020] FCA 486 par 23–25 https://jade.io/article/725605 (accessed 2021-03-20). See, also, *Auken Animal Husbandry Pty Ltd v 3rd Solution Investment Pty Ltd* [2020] FCA 1153 par 40–45 https://jade.io/article/759681 (accessed 2021-03-22).

10 [2020] FCA 873 par 20 https://jade.io/article/753595 (accessed 2021-03-22). See, also, *JKC Australia LNG Pty Ltd v CH2M Hill Companies Ltd* [2020] WASCA 38 par 8 https://jade.io/article/723792 (accessed 2021-03-22) and *Capic v Ford Motor Company of Australia Limited supra* par 19 and 25.

> person evidence becomes a matter of practical impossibility for an indefinite time."

Another major difference in the scenarios prior to and after the start of COVID-19 was apparent: before COVID-19, the application would usually be for the court to sit as usual and for a witness or witnesses located remotely to testify by audio-video link; with COVID-19, the necessity was for the entire trial to proceed remotely, with all the stakeholders separated from each other physically. This raised new challenges, such as how to take instructions, or how senior and junior counsel would interact (for example, during the cross-examination of a witness). Counsel and client would be separated, as would counsel and bench.

There were a number of applications to adjourn trials until in-person hearings became possible, rather than allowing them to proceed on a remote-hearing basis. Again, the two lines of thinking became prominent: some courts took the view that the interests of justice required the adjournment of the process, while others ordered the process to continue remotely.[11] All, however, emphasised that the test was what was in the interests of justice and that the question had to be decided on a case-by-case basis.[12] The cases make it clear that the mere fact that a trial is to proceed remotely is not in itself a reason to grant an adjournment.[13] The interests of justice, and the overarching purpose of civil practice and procedure, require the facilitation of the just resolution of disputes according to law – and as quickly, inexpensively and efficiently as possible.[14] Determination of what the interests of justice require is all about balancing factors that point in different directions.[15] Many of the presiding judges took into account their own and their courts' experiences with conducting processes using remote video-conferencing technology to help them

---

11 See *Construction, Forestry, Maritime, Mining and Energy Union v Andrade Holdings Pty Ltd* [2021] FCCA 213 par 13 https://jade.io/article/785288 (accessed 2021-03-22).

12 See, for e.g., *Haiye Developments Pty Ltd v The Commercial Business Centre Pty Ltd* [2020] NSWSC 732 par 81–82 https://jade.io/article/752453 (accessed 2021-03-22), where Robb J agreed in principle that "the legal system must continue to function [despite the difficulties caused by the COVID-19 pandemic] and … parties may have to accommodate themselves to unconventional approaches to the conduct of hearings, including … audio-visual link", but held nevertheless that the unique facts before him were such that it would be unfair for him to order that the trial proceed remotely. See, also, *Tetley v Goldmate Group Pty Ltd* [2020] FCA 913 par 10 https://jade.io/article/754096 (accessed 2021-03-22), where Bromwich J declined to follow cases relied upon by the party seeking an adjournment to avoid proceeding remotely, saying "These cases ultimately turn on their individual facts, and the cases, whilst usefully stating some overarching principles, do not override the need for that individual assessment to take place".

13 *Ozemac Pty Ltd v Jackanic* [2020] VCC 790 par 6 https://jade.io/article/752117 (accessed 2021-03-22), where the court held that the cases in the burgeoning jurisprudence dealing with COVID-19 issues demonstrated this.

14 *Australian Securities and Investments Commission v GetSwift Limited* [2020] FCA 504 par 10 https://jade.io/article/725897 (accessed 2021-03-07); *Capic v Ford Motor Company of Australia Limited supra*; *Ozemac Pty Ltd v Jackanic supra* par 11. See, also, s 37M(1) and (3) of the Federal Court of Australia Act, 1976 (Cth).

15 *Ozemac Pty Ltd v Jackanic supra* par 11. See, also, *ASIC v Wilson supra* par 36.

balance the competing submissions and factors pointing in different directions.[16]

In *Australian Securities and Investments Commission v GetSwift Limited*,[17] the court held that the application for the adjournment of a trial on the basis of an objection to a remotely conducted trial was

> "one which was fully justified, and [which] raises matters to which it is necessary to give close attention. No litigant, particularly … in serious proceedings, should apprehend that they will be materially prejudiced by reason of the mode by which a trial is to be conducted."

These sentiments were echoed in *Capic v Ford Motor Company Australia Limited (Adjournment),*[18] and *Tetley v Goldmate Group Pty Ltd*,[19] where it was observed that what emerged from the authorities was that the decision to adjourn or proceed remotely was a balancing act – and a difficult one at that. Bromwich J said that he had found himself surprisingly torn between the two options and that it was not as clear-cut as he had thought it would be.[20]

In this article, the considerations relevant to deciding whether it is in the interests of justice to proceed remotely using audio-visual link technology is discussed in the context of the two lines of cases, and the recent approaches taken to whether to adjourn a trial, or order that it proceed remotely.

---

16 For example, in the case of *Australian Securities and Investments Commission v GetSwift Limited supra* par 25, Lee J said "Central to my analysis is the accumulating experience of the Court in the use of Microsoft Teams technology to hear cases … I have now conducted a number of interlocutory hearings, and a complex defamation trial involving extensive cross examination and reference to documents. The hearings were successful … Indeed, as someone who was quite skeptical about how the trial could be conducted in current circumstances, I was pleasantly surprised. Speaking generally … there was [nothing] second rate about the experiences that I have had with Microsoft Teams technology." See, also, *Capic v Ford Motor Company of Australia Limited supra* par 19, where the court said: "My impression of [Microsoft Teams, Zoom or Webex] has been that I am staring at the witness from about one meter away and my perception of the witnesses facial expressions is much greater than it is in court." Also see *Ozemac Pty Ltd v Jackanic supra* par 13, *Desira v Airservices Australia* [2020] FCA 818 par 36 https://jade.io/article/752475 (accessed 2021-03-07); *Universal Music Publishing Pty Ltd v Palmer* [2020] FCA 1472 par 32 https://jade.io/article/769758 (accessed 2021-03-22); *Rooney v AGL Energy Limited (No 2)* [2020] FCA 942 par 18 https://jade.io/article/755564 (accessed 2021-03-21). See, also, *Auken Animal Husbandry Pty Ltd v 3RD Solution Investment Pty Ltd supra* par 49, where Stewart J commented that his impression was that counsel, even those who had initially been skeptical of cross-examining remotely, had shared his positive experience with it. He added that counsel as well as the bench had the advantage of seeing the witness up close on a screen. See, also, *Tetley v Goldmate Group Pty Ltd supra* par 16; *Porter v Mulcahy & Co Accounting Services Pty Ltd (Ruling)* [2020] VSC 430 par 26 https://jade.io/article/756246 (accessed 2021-04-07). But compare *Rooney v AGL Energy Limited (No 2) supra* par 17–19; *Roberts-Smith v Fairfax Media Publications Pty Ltd (No. 4)* [2020] FCA 614 par 22 https://jade.io/article/728480 (accessed 2021-04-07).

17 *Supra* par 9.

18 See, also, *Capic v Ford Motor Company of Australia Limited supra* par 26.

19 *Supra* par 20.

20 *Tetley v Goldmate Group Pty Ltd supra* par 15.

5 RELEVANT CONSIDERATIONS

5 1 Issues regarding whether to use video-conferencing technology

5 1 1 Importance of the evidence

There have been cases where evidence has been allowed to be taken by audio-visual technology even though the evidence was of central importance to the case.[21] On the other hand, there have been cases where this consideration was one that weighed towards disallowing such evidence to be taken by audio-visual link and towards granting an adjournment.[22] In *ASIC v Rich*,[23] the court held that there was no inconsistency in the two lines of cases. Austin J held:

> "The fact that the witness's evidence will be centrally important should not of itself persuade the court against using audiovisual facilities. But if the court can anticipate that the cross-examination of the witness will be lengthy and complex, and that the credit of the witness will be challenged, that combination of factors is likely to persuade the court against audiovisual evidence unless there is a good reason for choosing it."

5 1 2 The architecture of the physical court room

In *Campaign Master (UK) Ltd v Forty Two International Pty Ltd (no. 3)*,[24] the court held:

> "Although the days are gone when witnesses are expected to feel any sense of intimidation as an aid to telling the truth, there is no doubt in my mind that the requirement to give evidence on oath or affirmation in the (generally) solemn atmosphere of a courtroom in the presence of a judge, and to answer questions in cross-examination in the presence also of cross-examining counsel, has at least three potential benefits. It enhances the prospect that the witness will remain conscious of the nature and solemnity of the occasion and of his or her obligations. It affords the cross-examiner some reassurance that the gravity and immediacy of the moment, and of the supervising presence of the judge, are not lost on the witness and the cross-examination is not thereby rendered any less effective, to the possible prejudice of the cross-examining party. It provides the Court with a more satisfactory environment in which to assess the nature, quality and reliability of responses by a witness, both to questions and to the overall situation presented by the necessity to give evidence in court. To my mind there remains, even in the

---

21 *McDonald v Commissioner of Taxation* (2000) FCA 577 https://jade.io/article/101659 (accessed 2021-03-25); *Tetra Pak Marketing Pty Ltd v Musashi Pty Ltd* [2000] FCA 1261 (Katz J) https://jade.io/article/102339; *R v Kyu Hyuk Kim* (1998) 104 A Crim R 233 (Coldrey J) https://jade.io/article/72577 (accessed 2021-03-25).

22 *Poschung v Jones* (Supreme Court of New South Wales, Levine J, unreported, 25 October 1996, BC 9606849); *Australian Medical Imaging Pty Ltd v Marconi Medical Systems Australia Pty Ltd* (2001) 53 NSWLR 1 https://jade.io/article/129809 (accessed 2021-03-25).

23 *Supra*.

24 [2009] FCA 1306 par 78 https://jade.io/article/119929 (accessed 2021-03-22). See, also, the case of *Capic v Ford Motor Company of Australia Limited supra* par 19, where the court commented on the increased lack of formality in the proceedings.

> modern context, a certain 'chemistry' in oral interchanges in a courtroom, whether between a judge and counsel (or other representative) or between cross-examiner and witness. I would not wish too lightly to deprive a cross-examiner of that traditional forensic element in the exchange."[25]

In *Rooney v AGL Energy Limited (No. 2)*,[26] the court held as follows:

> "Moreover, there is a sense of solemnity – perhaps even intimidation – that attaches to the receipt of oral evidence from a courtroom witness box that not even the best technology can replicate. When all witnesses (or crucial witnesses) in a matter are subjected to that same stage, the truth is less easily spun, and unsuccessful parties are less inclined or less able to find fault with the process that delivered their defeat."

5 2 Issues facing lawyers running a remote case

5 2 1 Document management

Challenges with the management of documents, particularly during cross-examination on an online platform, have often been raised as an obstacle to proceeding remotely.

In *Cigna Insurance Australia Ltd v CSR Ltd*,[27] Rolfe J said:

> "Anyone familiar with cross-examination on documents, particularly large numbers of documents, will be aware that even when that happens in court there can be delays as witnesses move from volume to volume and seek to find page numbers."

He intimated that these delays would be more pronounced on a remote platform. Ultimately, however, he allowed the process to proceed by audio-visual link but on condition that the remote witnesses had hard copies of the documents and that there was someone with them to help them find the relevant pages of the documents. Austin J, in the *Rich* case,[28] agreed with this approach but identified serious practical problems with the documentary evidence if the proceedings did not proceed *viva voce*. He noted that, in the case before him, the plaintiff's documents comprised a six-volume tender bundle and twelve volumes of exhibits for their experts' report. He held:

> "One would expect, and senior counsel for the defendants confirmed, that other documents not in [the plaintiff's] tender bundle will be put before the witnesses. To achieve this in an audiovisual setting, senior counsel for the defendants would (as a practical matter) need to prepare his cross-examination sufficiently far in advance to ensure that copies of all the

---

25 This quote has been referred to with approval in many cases, most recently in 2018 in *Flash Lighting Company Ltd v Australia Kungian International Energy Co Pty Ltd (no 2)* [2018] VSC 821 https://jade.io/article/634631 (accessed 2021-04-01). But in the case of *Universal Music Publishing Pty Ltd v Palmer supra* par 31, the court noted that these comments were made outside of the exceptional circumstances caused by the COVID-19 pandemic, and further, at par 32, that the current technology is superior to that used at the time the *Campaign Master* case was decided.

26 *Supra* par 18–19.

27 *Cigna Insurance Australia Ltd v CSR Ltd* (Supreme Court of New South Wales, Levine J, unreported, 29 November 1995) par 7, referred to in par 29 of *ASIC v Rich supra* par 28.

28 *ASIC v Rich supra* par 31.

> documents he wished to show to the witnesses were present in London by the time he came to do so. The defendants' documents would need to be kept safe and confidential in London before and even after their use."[29]

For this, and other reasons, the court did not order that the evidence of the witnesses located in London be taken by video link. Other courts have also taken the view that remote proceedings are not appropriate where the documents are voluminous and complex.[30] But compare this with the case of *Capic*,[31] where the court per Perram J held that it did not accept the submission that document management of large volumes would be that much more difficult in a virtual environment. He drew on his own experience of using Dropbox to exchange documents in a virtual trial he ran and went further to state that "the use of a third party operator may carry with it enhanced document management procedures".

Similarly, in *Auken Animal Husbandry Pty Ltd v 3rd Solution Investment Pty Ltd*,[32] Stewart J said that he was

> "not concerned about the volume of documents and cross-examination on documents. The parties may have to be a little better prepared to ensure that court books are prepared well in advance and are available in different locations with common pagination and the like, and cross-examining counsel may be constrained not to leave preparation of cross-examination until the night before the witness gives evidence as sometimes apparently occurs. That is because it may be necessary to ensure that any documents that are going to be cross-examined on are made available in the remote location in advance. File-sharing facilities such as Dropbox, Google Drive and OneDrive have made the task of 'handing up' documents or showing documents to a witness in a remote setting quite manageable."

5 2 2 Physical separation of legal teams

During periods of hard lockdown, another issue that arose was that if the process were to proceed, not only would the witness testifying remotely be separate from the rest of the stakeholders, but the stakeholders would be separated from each other: client from counsel, and members of the legal team from each other.

In *JKC Australia LNG Pty Ltd v CH2M Hill Companies Ltd*,[33] one of the issues was that senior and junior counsel would not be in the same room when delivering argument. Dismissing the concern, the court held that "[w]hile it is no doubt inconvenient that counsel are not co-located, it remains

---

29 *ASIC v Rich supra* par 32.

30 *Australian Medical Imaging Pty Ltd v Marconi Medical Systems Australia Pty Ltd supra*; *Australian Competition and Consumer Commission v World Netsafe Pty Ltd* [2002] FCA 526 https://jade.io/article/105449 (accessed 2021-03-25); *Moyette Pty Ltd v Foundation Healthcare Ltd* [2003] FCA 116 (Conti J) https://jade.io/article/106705 (accessed 2021-03-25).

31 See, also, *Capic v Ford Motor Company of Australia Limited supra* par 20.

32 *Supra* par 53.

33 *Supra*

possible for [them] to communicate electronically".[34] In *ASIC v GetSwift Ltd*,[35] Lee J held:

> "No doubt there will be real disadvantages in junior counsel being unable to tug senior counsel to remind him or her of some question or document that … [they] may have forgotten, but there are other ways … for such communications to take place in real-time, and in any event I am confident, through some patience and forbearance, that appropriate accommodations can be made, including for there to be short adjournments prior to the conclusion of the cross examination of any witness, if required."

In *Capic*,[36] while acknowledging the disadvantages of the legal team not being located in a single geographical place (ideally the courtroom), Perram J also held that there were ways for counsel to communicate in real time by platforms such as WhatsApp and instant messaging services. He specifically mentioned that document-sharing over such platforms was difficult, holding as follows:

> "Receiving whilst in full flight a WhatsApp message with a document attached is not the same experience as having one's gown tugged and a piece of paper thrust into one's hands … while I think this is a poor situation in which to have to run a trial I do not think it means that the trial will be unfair or unjust."

5 2 3 Taking instructions

One of the arguments raised in the *Tetley*[37] case was the difficulty in taking instructions from a client during the course of cross-examination when the client was not located physically with the legal team. These difficulties were also acknowledged in *GetSwift Ltd*[38] but the court dismissed the concerns holding that they were not "insuperable" "with the use of some imagination".

In contrast, in *Porter v Mulcahy & Co Accounting Services Pty Ltd (Ruling)*,[39] the court found that the difficulty in taking instructions and conferring with the legal team that would be caused by them all being confined to their homes was such that it would not be in the interests of justice to proceed remotely.

5 2 4 "Reading" the bench/chemistry

In *JKC Australia LNG Pty Ltd*,[40] an appeal hearing was due to be conducted telephonically or by video link if the parties had the means. There was an application to adjourn the hearing on, *inter alia*, the basis that senior counsel for the respondents "would be at a significant disadvantage if he could not see and 'read' the court," referring to the benefits of non-verbal communication. The court rejected the submission, saying that procedural

---

34 *JKC Australia LNG Pty Ltd v CH2M Hill Companies Ltd supra* par 16.
35 *Supra* par 29.
36 *Capic v Ford Motor Company of Australia Limited supra* par 13.
37 *Tetley v Goldmate Group Pty Ltd supra* par 10.
38 *ASIC v GetSwift Limited supra* par 34.
39 *Supra* par 32–33.
40 *JKC Australia LNG Pty Ltd v CH2M Hill Companies Ltd supra*.

fairness requires only that a party be given an adequate opportunity to properly present its case. The court held that it was its experience that

> "[t]he conduct of an appeal hearing by telephone provides for comprehensive and considered dialogue and debate between bar and bench … it is not the case that an appeal hearing by telephone is manifestly inadequate or that an appeal hearing by video link is inadequate."[41]

5 2 5 Time difference

Where a witness is located in a different time zone to that of the court and the proceedings are anticipated to be lengthy, practical problems may arise if the matter is to proceed remotely.[42] This factor was only given attention in a handful of cases where the witnesses due to testify via video link were located outside of Australia in another time zone.

In the *Rich* case, the remote link was proposed to be between Australia and London. The evidence of the two London witnesses was proposed to be heard for three hours a day between 5 pm and 8 pm Sydney time, that is 8 am to 11 am London time. The court observed as follows:

> "The rough estimate given by senior counsel for the defendants is that 5 full days will be needed for the cross-examination of the two witnesses. That translates into at least 10 audiovisual sittings. I say 'at least' because any delays inherent in the process or produced by technical difficulties (such as losing the connection) would, of course, expand the required time. Thus, for at least two weeks and in all probability more than two weeks, the court would assemble to hear audiovisual evidence in the evenings. Senior counsel for [the plaintiff] proposed that during that time, no evidence would be taken in the afternoon on Sydney, but evidence would be taken from other witnesses during the morning. Thus the court and, more particularly, the cross-examining team would be required to prepare for two cross-examinations each day, running in tandem. Although Sydney lawyers are renowned for their hard-working habits, I believe that would be a particularly arduous schedule."[43]

In *GetSwift Ltd*,[44] the time difference between the location of the witness proposed to testify remotely and the Australian court meant that the remote witness would be required to testify late at night if the Australian court was to sit during working hours. The court stated that this would not be fair for the witness but said that it would be prepared to sit outside normal court hours to accommodate that witness.

Similarly, the court said it would sit at times outside usual working times to accommodate the "time zone problem" in *Capic.*[45]

---

41 *JKC Australia LNG Pty Ltd v CH2M Hill Companies Ltd supra* par 7. Note: in the case of *Capic v Ford Motor Company of Australia Limited supra* par 19, the court also acknowledged as a problem with remote trials the reduced opportunity for chemistry to develop between cross-examiner and witness.

42 *ASIC v Rich supra* par 37.

43 *ASIC v Rich supra* par 39.

44 *ASIC v GetSwift Limited supra* par 36.

45 *Capic v Ford Motor Company of Australia Limited supra* par 15.

5 3 Issues facing the parties

5 3 1 Trial length

It is commonly accepted that conducting a process remotely takes longer than a traditional in-person hearing.[46] This is because of the possibility of technological hitches and the potential complications of navigating documents remotely, but also because of the possible delay in the transmission of sound and images from one location to another.

In *Rich*,[47] the court referred to a decision by Rolfe J, saying:

> "In the *Cigna Insurance* case [he (Rolfe J)] said (at [6]) that in his experience cross-examination is necessarily somewhat slower by video link than where a witness is present in the courtroom, and observed that there was a necessary hiatus between the asking of the question and receipt of it by the witness, and then another hiatus between the giving of the answer and reception of it by the cross-examiner. He said that where cross-examination is to take place over a substantial period of time, the use of audiovisual procedures would inordinately lengthen the cross-examination."[48]

The evidence in the *Rich* case[49] was that the technology had improved significantly since the *Cigna Insurance* case[50] and that the delay at that time (2004) was virtually imperceptible. Nevertheless, internet connections do not always function adequately, and delays caused by freezing on screen and the dropping of connections cannot be discounted. One also has to pause for longer intervals between question and answer to ensure that each party has finished speaking because of the lack of non-verbal cues signalling turn-taking (with the possible exception of facial expressions, which some judges have observed are enhanced on screen).

In *Capic*,[51] the applicant was proposing to call 50 witnesses. In *GetSwift Limited*,[52] the applicant intended calling 41 witnesses, 31 of whom would be cross-examined. In both cases, the court did not consider the size (or length) of the trial as an impediment to proceeding remotely.

A lengthier trial is of course relevant to cost, which is considered next.

5 3 2 Expense

During the time of hard lockdown in Australia, the expense of preparing for the trial remotely was also raised as a consideration.

---

46 *ASIC v Wilson supra* par 3.
47 *ASIC v Rich supra*.
48 *ASIC v Rich supra* par 33.
49 *ASIC v Rich supra* par 34.
50 *Cigna Insurance Australia Ltd v CSR Ltd supra* par 7, referred to in par 33 of *ASIC v Rich supra* par 28.
51 *Capic v Ford Motor Company of Australia Limited supra* par 18.
52 *ASIC v GetSwift Limited supra* par 13.

In *Capic*,[53] the party opposing the running of the trial remotely, and seeking a postponement, raised the issue of having to consult with expert witnesses via a virtual platform in preparation for the trial – instead of liaising with them in person. The court held that counsel must understand the expert evidence fully and that conferring with the experts to achieve this level of understanding can take days and is ideally done face to face. The court accepted that conferring with the experts (as well as the other stakeholders) on a virtual platform would "[b]e slower, more tedious for all concerned and therefore more expensive" but it did not accept that this would render a remote trial unfair.

The cost of using the virtual facilities must also be considered, and likewise that a remotely conducted trial will usually run for much longer than an in-person trial. In *Capic*,[54] the court held:

> "There is no doubt … that conducting the trial in a virtual environment will prolong the hearing and thereby increase its expense."

Against that must be balanced the costs saved in transporting witnesses located away from the site of the courtroom to the court.

5 3 3 Right of parties to be present

It has also been argued that unless a party could observe the appeal hearing and communicate with counsel through his solicitors in the conventional way, thus participating in the process, a party would feel much more aggrieved in the event of an adverse outcome.[55] The court rejected this argument, although acknowledging that justice must be seen to be done. However, the court held that in the case before them there was no material prejudice to be caused by proceeding to hear the appeal submissions by telephone or video link.[56] This case was referred to with approval by the court in *GetSwift Ltd*,[57] where the court said that even if the court was satisfied that justice could be done by proceeding remotely, it was important that it also was perceived to be so done by the party opposing the remote hearing. Nevertheless, following the *Ch2M Hill Company Ltd* case,[58] the court concluded that proceeding remotely would cause no practical injustice so as to warrant granting the application for adjournment. The case was to proceed remotely.

---

53 *Capic v Ford Motor Company of Australia Limited supra* par 14.
54 See also *Capic v Ford Motor Company of Australia Limited supra* par 22.
55 *JKC Australia LNG Pty Ltd v CH2M Hill Companies Ltd supra* par 12.
56 *JKC Australia LNG Pty Ltd v CH2M Hill Companies Ltd supra* par 15.
57 *ASIC v GetSwift Limited supra* par 40.
58 *JKC Australia LNG Pty Ltd v CH2M Hill Companies Ltd supra*.

5 4 Issues facing the parties and witnesses

5 4 1 Need for interpreters

In *Auken Animal Husbandry Pty Ltd*,[59] the court acknowledged that assessing demeanour when witnesses were testifying using an interpreter was made more difficult, but added that this was not made more difficult when it was also being done remotely.

The contrary view was taken by the court in *Haiye Developments Pty Ltd v The Commercial Business Centre Pty Ltd.*[60] The court held that assessing credibility when interpreters were used was difficult enough so that in such a case it was especially important that the trial run smoothly and not be bedeviled by "dislocation" – which was a real danger in remote proceedings. The dislocation could cause "unwarranted damage to the apparent credibility of the witnesses' evidence".[61] In addition, it was important that the interpreters and the witnesses had a "confident and functional relationship", which the court held could not be established remotely.[62] Robb J held as follows:

> "Substantial personal experience causes me to believe that, of all of the sources of practical difficulty that could arise in the hearing of a fraud claim dependent upon oral evidence and credibility findings, the physical separation of witnesses from their interpreters by the need to use an audio visual link is likely to be the most productive of inefficiency, delay and unfairness. Non-English speaking witnesses who are cross-examined through an interpreter often need the physical presence of the interpreter to create the immediate connection between witness and interpreter that is essential to the witness being able to respond to questions with an adequate level of confidence that the witness understands the questions and the cross-examiner understands the answers."[63]

In *Capic*,[64] the court held that it was clear that not every case would be suitable for remote hearing and gave the example of a remote trial not being feasible where an applicant does not speak English and is in immigration detention.

5 4 2 Illegality of witness testifying by video link in foreign proceedings

There have been a number of cases involving Chinese witnesses located in China who would, if the trial proceeded remotely, be required to testify by audio-visual link.

---

59 *Auken Animal Husbandry Pty Ltd v 3rd Solution Investment Pty Ltd supra* par 56.

60 *Supra* par 60–61.

61 *Haiye Developments Pty Ltd v The Commercial Business Centre Pty Ltd supra* par 62.

62 *Haiye Developments Pty Ltd v The Commercial Business Centre Pty Ltd supra* par 60–61, 79.

63 *Haiye Developments Pty Ltd v The Commercial Business Centre Pty Ltd supra* par 79.

64 *Capic v Ford Motor Company of Australia Limited supra* par 7.

In *Motorola Solutions, Inc v Hytera Communications Corporation Ltd (Adjournment)*[65] and *Haiye Developments Pty Ltd*,[66] submissions were made to the effect that it would be a violation of Chinese sovereignty and illegal for witnesses who were Chinese citizens to give evidence to a foreign court by way of video-link technology. This was in terms of article 277 of the 2017 revised version of The Civil Procedure Law of the People's Republic of China. Neither court had sufficient information before it to decide conclusively what the content of Chinese law was on the point, but it was accepted that it was possible that the position stated was correct.[67] In the *Motorola Solutions*[68] case, it was acknowledged that even if it were not a correct statement of Chinese law, it would, as a matter of practicality, not be possible to convince the Chinese witnesses of this. In both cases, the trial dates were vacated for this and other reasons.

5 5 Issues regarding the integrity of the process

5 5 1 Technological limitations

Prior to the advent of COVID-19 in 2020, there was perhaps more emphasis on the limitations of technology as a reason to avoid proceeding remotely than has since been the case. But even in our current times of greatly improved technology, technological limitations have been cited as a reason militating against using video-link technology to proceed with a case and rather to adjourn it.

In *Capic*[69] (a ruling made in April 2021 at the height of the COVID-19 restrictions), one of the reasons given by the party seeking an adjournment of the trial was that there were likely to be technological problems making the conduct of a remote trial cumbersome and unworkable. Perram J acknowledged that technological hitches and intermittent internet connectivity were a reality, even in 2020, but held that while they were irritating and frustrating, they were not insurmountable problems. It might, for example, be necessary to pause the hearing from time to time until the connection improved to deal with technological hitches that might occur. He said that before COVID-19, witnesses might have needed to be shuffled around to accommodate difficulties such as delayed flights; so too in a remote trial, there could be an element of fluidity in the order in which witnesses testified, to accommodate temporary internet connectivity issues. He also mentioned problems such as people being frozen on the screen or dropping out of the proceedings altogether. He said that, while aggravating, such problems could be dealt with adequately as and when they arose. Where they could not be, the trial could be adjourned on that basis. He

---

65 *Motorola Solutions Inc v Hytera Communications Corporation Ltd (Adjournment)* [2020] FCA 539 https://jade.io/article/726844 (accessed 2021-04-08).

66 *Haiye Developments Pty Ltd v The Commercial Business Centre Pty Ltd supra*.

67 *Motorola Solutions Inc v Hytera Communications Corporation Ltd supra* par 3. *Haiye Developments Pty Ltd v The Commercial Business Centre Pty Ltd supra* par 46–47.

68 *Motorola Solutions Inc v Hytera Communications Corporation Ltd supra* par 3.

69 *Capic v Ford Motor Company of Australia Limited supra* par 10–12.

noted his experience in a case that had to be suspended until one of the participants could gain access to a better internet facility. This was only one of the factors the court considered before ordering that the trial should proceed remotely.

Also, in *Rooney v AGL Energy Limited (No 2)*[70] (a ruling made in early July 2020), the court acknowledged that even then, technology could cause problems. In this case, while the court dates had been vacated in an earlier application in April, the spectre of technological problems together with other reasons caused the court to grant the application to vacate the court dates set down for later in July 2020. Snaden J held as follows:

> "The technology often begets delay, particularly when documents are to be supplied remotely. Although broadly reliable, it is not uncommon for connections to be momentarily of poor quality, occasionally to the point that they are unusable. All of these factors influence the user experience of a justice system from which all litigants are entitled to benefit."[71]

5 5 2 Coaching of witnesses and ensuring integrity of evidence

Surprisingly, the question of how to securely identify a remote witness and the problem of how to ensure the integrity of their evidence were not factors raised in many of the cases where there was an objection to witnesses testifying via video link. It did, however, arise in the two cases below.

In *Capic*,[72] the party objecting to the trial proceeding remotely raised the point that the witnesses testifying from home would not be supervised and thus there was a danger of another person "in the (upstairs bed) room coaching the witness or suggesting answers out of earshot". The particular case before the court was a class action about allegedly defective gearboxes. The court dismissed this concern saying that the danger of coaching or prompting was unlikely in such a case as opposed to, say, a fraud case. Added to this, the court considered that it was improbable that another person would "risk life and limb" to assist in this way given the circumstances of the COVID-19 pandemic, and that in any event any third party "assistant" would be unlikely to be able to help the witnesses testifying about their defective gearboxes in any significant way. The court held that a more serious problem for witnesses testifying from home could be that they were not tech savvy or that they lacked the infrastructure to testify remotely. The court held that rather than postpone the case on this speculative basis, it would deal with the problem if it arose "in a tangible form". It should be noted that the *Capic* case[73] was decided in circumstances of hard lockdown where there was no prospect of a third party (other than a family member) assisting the witness who had technological difficulties.

---

70 *Supra* par 18.
71 *Ibid*.
72 *Capic v Ford Motor Company of Australia Limited supra* par 16.
73 *Capic v Ford Motor Company of Australia Limited supra*.

In *Auken Animal Husbandry Pty Ltd*,[74] decided in August 2020, the issue of ensuring the integrity of the evidence was also raised. The court held that experience had shown that it was not practical for a remote witness to be left alone in the relevant room in case they needed technological assistance. The judge's solution was for an independent support person (preferably a lawyer admitted in Australia) to be present to ensure the integrity of the evidence and also to help the witness with technological issues if they arose. The witnesses would have been testifying from mainland China.

5 5 3 Cross-examination of witnesses

In almost all the cases, the question of whether a cross-examiner would be able to do their job properly when the witness to be cross-examined was simply shown on a screen was raised as a very important consideration. It was argued that this was of particular concern where the case hung on the credibility of the witnesses. Closely related is the question of whether the credibility and demeanour of a witness can be evaluated properly when the witness appears by audio-visual link, instead of live in the courtroom. This aspect is dealt with separately, immediately below.

In *Desira v Airservices Australia*, the court held:

> "Credit issues are a real and significant consideration in the appropriateness of proceeding by video-link facilities. Whilst I acknowledge the difficulties attending on cross examination of witnesses by video link, the hurdle has not proved insurmountable in other cases conducted by video link by this court."[75]

There are a number of cases in which the courts found that they were perfectly able to assess demeanour over a screen as opposed to in-person. This was even so in some very early cases where the technology was not up to the standard now being used in the courts.[76] However, some cases also take a contrary stance. In the full family court of *K v S*,[77] the court accepted that there may be a "[d]iminution in the ability to detect … subtle nuances" that may be relevant to assessing credibility. In *Rich*,[78] the court held that it could:

> "[s]ee that on many occasions (depending on such matters as the nature of the evidence and the issues likely to be raised in cross-examination) it will be

---

74 *Auken Animal Husbandry Pty Ltd v 3rd Solution Investment Pty Ltd supra* par 58–59.

75 *Desira v Airservices Australia supra* par 36.

76 See, for e.g., *Bayer AG v Minister for Health of the Commonwealth* (1988) 13 IPR 225 (Young J) referred to in par 24 of *ASIC v Rich supra*. See, also, *DPP v Alexander supra* referred to at par 25 of *ASIC v Rich supra*; *McDonald v Commissioner of Taxation supra*; *Tetra Pak Marketing Pty Ltd v Musashi Pty Ltd supra*.

77 *K v S* (2001) 27 Fam LR 498 (Full Family Court) par 24, referred to in par 27 of *ASIC v Rich supra*. See, also, *Cigna Insurance Australia Ltd v CSR Ltd supra*, *Sunstate Airlines (Qld) Pty Ltd v First Chicago Australia Securities Ltd* (Supreme Court of New South Wales, Giles CJ Comm D, unreported, 11 March 1997); *Asermeley-Rivera v Neffati* (Supreme Court of New South Wales, Kirby J, unreported, 12 April 2001, BC 200101619); *Australian Medical Imaging Pty Ltd v Marconi Medical Systems Australia Pty Ltd supra*; *Australian Competition and Consumer Commission v World Netsafe Pty Ltd supra*; *Moyette Pty Ltd v Foundation Healthcare Ltd supra*.

78 *ASIC v Rich supra* par 28.

> as easy to assess the credit of the witness in audiovisual as in *viva voce* evidence. The 'subtle nuances' of which the Full Family Court spoke will often not be there, and if they are, they will be captured by the video camera. But there will be exceptional cases where the audiovisual procedure will put the cross-examiner and the court at a real disadvantage in dealing with credit. They will include cases like the present one, where the witness's evidence is centrally important and the cross-examination is likely to be long and complex, and the issue of credit is likely to depend upon the witness's responses to questions based on documents shown to him by the cross-examiner. Where the court is given a choice between audiovisual and *viva voce* evidence in such a case, the court is likely to regard *viva voce* evidence as the safer course unless there is a good reason for preferring the audiovisual approach."

Likewise, in *Campaign Master,*[79] a 2009 decision, Buchanan J expressed concerns about the effectiveness of taking evidence from witnesses by video link. He said:

> "I share the concerns expressed by Spender J in *World Netscape*[80] and by Stone J in *Dorajay*[81] about the effectiveness of video link arrangements as a means of taking oral evidence. I am particularly troubled by the prospect (or possibility) that the cross-examination of an important witness might be rendered less effective by the limitations of video link technology or the absence of the witness from the court room."[82]

In *Dorajay*,[83] the court held that in its experience the technical difficulties attendant on video-link connections

> "are considerable and markedly interfere with the giving of the evidence and, particularly, with cross-examination. They include technical problems such as difficulties with hearing, in presenting documents to the witness, in maintaining transmission over an extended period of time and those arising from time differences. More importantly, even if those difficulties can be overcome or minimised, there are the problems in maintaining a line of cross-examination and the difficulty of assessing a witness where evidence is given by video link. As a matter of justice to both parties these problems are critical. It is perhaps more workable where one is dealing with an expert witness who is generally well-prepared, has written a detailed report and has an expertise and familiarity with the subject that may not be the case with a lay witness."

In *Auken Animal Husbandry Pty Ltd*,[84] Stewart J made the point that technology had much improved since the experiences leading to the

---

79 *Campaign Master (UK) Ltd v Forty-Two International Pty Ltd (no. 3) supra* par 78.

80 *World Netscape* is an erroneous reference. The case presumably intended to be referenced is *Australian Competition and Consumer Commission v World Netsafe Pty Ltd supra* https://jade.io/article/105449, where Spender J commented on the unsatisfactory features of cross-examination by video link.

81 *Dorajay Pty Ltd v Aristocrat Leisure Ltd* [2007] FCA 1502 https://jade.io/article/15342 (accessed 2021-04-01).

82 This quote has been referred to with approval in many cases, most recently in 2018 in *Flash Lighting Company Ltd v Australia Kungian International Energy Co Pty Ltd (no 2) supra*. But in the case of *Universal Music Publishing Pty Ltd v Palmer supra* par 31, the court noted that these comments were made outside of the exceptional circumstances caused by the COVID-19 pandemic, and further, at par 32, that the current technology is superior to that used at the time the *Campaign Master* case was decided. See similar comments in *Auken Animal Husbandry Pty Ltd v 3RD Solution Investment Pty Ltd supra* par 47.

83 *Dorajay Pty Ltd v Aristocrat Leisure Ltd supra* par 7.

statements of Buchanan J in *Campaign Master,*[85] and that judges and counsel have become more accustomed to conducting cross-examination by audio-video link. Especially during the pandemic times, "the learning curve has been steep and the experience intense".

In *Ascot Vale Self Storage Centre Pty Ltd v Nom de Plume Nominees Pty Ltd*,[86] the court was not satisfied that the case of *David Quince v Annabelle Quince*[87] was authority for the proposition that a trial should not proceed by video link if there were issues of credibility involved. (The *Quince* case was adjourned because the court considered that, on the facts, cross-examination of the witnesses remotely would cause unfairness to the parties).[88]

5 5 4 Assessing demeanour and credibility

In *GetSwift Ltd,*[89] decided in April 2020, Lee J held that in his experience there was no obstacle to assessing the demeanour of witnesses who were testifying remotely. He said:

> "There is no diminution in being able to assess the difficulty witnesses were experiencing in answering questions, or their hesitations and idiosyncratic reactions when being confronted by questions or documents".

He went further and said that the ability to assess demeanour was in some respects even enhanced because he was able to observe the witnesses more closely remotely than he was able to from the bench when a witness was live in his court.[90] The case was ordered to proceed remotely.

While ultimately finding that the problems identified were not sufficient to justify the adjournment sought, the court in *Capic*[91] found that the assessment of a witness's demeanour from their facial expressions was enhanced by remote viewing, but that

> "[w]hat is different – and significant – is that the video-link technology tends to reduce the chemistry which may develop between counsel and the witness. This is allied with the general sense that there has been a reduction in the formality in the proceedings. This is certainly so, and is undesirable. To these problems may be added the difficulties which may arise when dealing with objections".

---

84 *Auken Animal Husbandry Pty Ltd v 3rd Solution Investment Pty Ltd supra* par 47 and par 48.

85 *Campaign Master (UK) Ltd v Forty-Two International Pty Ltd (no. 3) supra*.

86 [2020] VSC 242 par 19 https://jade.io/article/728614 (accessed 2021-04-07).

87 [2020] NSWSC 326 https://jade.io/article/723981 (accessed 2021-04-07)

88 *David Quince v Annabelle Quince supra* par 20.

89 *ASIC v GetSwift Limited supra* par 33.

90 Referred to with approval in *Ozemac Pty Ltd v Jackanic supra* par 13. Similar remarks were made in *Universal Music Publishing Pty Ltd v Palmer supra* par 32. See, also, *Capic v Ford Motor Company of Australia Limited supra* par 19, where the court said: "My impression of [Microsoft Teams, Zoom or Webex] has been that I am staring at the witness from about one metre away and my perception of the witnesses facial expressions is much greater than it is in court." Also *ASIC v GetSwift Limited supra* par 33, and *Tetley v Goldmate Group Pty Ltd supra* par 16.

91 *Capic v Ford Motor Company of Australia Limited supra* par 19.

In *Rooney v AGL Energy Limited (No 2)*,[92] Snaden J held that in his experience

> "the technology inhibits (if not prohibits) the cadence and chemistry – both as between bar and bench, and bar and witness-box – that personify well run causes. Those are traditional forensic benefits of which litigants ought not too lightly be deprived".

Regarding the reduction in formality and solemnity in remotely run processes, Stewart J in *Auken Animal Husbandry Pty Ltd*[93] observed that in his experience,

> "[a] judge is able to quickly remind the relevant participants of the solemnity and formality of the occasion and to re-establish the appropriate atmosphere".

He was not therefore concerned about this aspect.

5 6 Issues facing the administration of justice

5 6 1 Broader implications than the parties' interests

In *GetSwift Ltd*,[94] the court found that, in deciding whether to grant a request for the adjournment of the case because of an objection to it proceeding remotely, there were broader considerations to be considered than the interests of the parties to the matter. The court held that adjourning the case would mean fitting it into the listings at a later stage, which would displace other litigants who had an equal right to have their day in court. It would have a negative knock-on effect that would cause prejudice to other litigants.

In *Capic*,[95] the court held that while it was not ideal not to have an in-person trial, remote hearings had to be given proper consideration because

> "it [was] apparent that public institutions such as the Court must do all they can to facilitate the continuation of the economy and essential services of government, including the administration of justice"

during the time of limitations imposed on the usual conduct of business by the COVID-19 pandemic.

In *GetSwift Limited*,[96] the court also emphasised that the imperative was for the court to continue to function but stressed that fundamental to this was that the court justly discharge its duties.

In *Ozemac Pty Ltd v Jackanic*,[97] the court held that

> "in addition to the parties interests, there is also a public interest in having hearings dealt with expeditiously and the work of the court must continue."

---

92 *Supra* par 18.

93 *Auken Animal Husbandry Pty Ltd v 3rd Solution Investment Pty Ltd supra* par 51.

94 *ASIC v GetSwift Limited supra* par 38.

95 *Capic v Ford Motor Company of Australia Limited supra* par 5.

96 *ASIC v GetSwift Limited supra* par 9.

97 *Supra* par 12.

The court referred to the case of *Plaintiff S111A/2018 v Minister for Home Affairs (no 2)*,[98] where Robertson J noted that:

> "[t]he pandemic is not a basis on which, in this matter … the applicants may expect a procedural standstill or procedural delay. The applicant's interests are not the only interests in the litigation. The respondents have an interest in getting the matter on for hearing and there is a similar public interest."

5 6 2 The open justice principle

An interesting point is that in none of the reported cases that the author has considered was any consideration given to the principle of transparency and open justice. Open justice is necessary to ensure the healthy, objective and fair administration of justice. It acts as a check on judicial capriciousness and serves as a powerful means to give the public confidence in the judicial process and the fairness and impartiality of the process of the administration of justice.

Unless measures are taken to ensure that the public has reasonable access to processes conducted online, virtual courts will be contrary to the open justice principle. One means of ensuring open access to the court proceedings (other than in-camera proceedings) is for the court to provide links to the virtual proceedings to the public and the media, according to available bandwidth. However, this method of ensuring public access comes with significant security concerns. Anecdotes regarding hackers and zoom bombers bedevilling proceedings abound. An alternative method that could be used is to live stream the process on a platform such as YouTube. YouTube live streaming of the process would give effect to the principle of open justice – without the risk of disturbance or impediments to the process.

5 6 3 Data privacy and security

Another important aspect that the Australian courts did not mention is that third-party software programs used for court hearings, such as Zoom or Microsoft Teams, are a security concern and are prone to hacking. Ideally, specially designed fit-for-purpose software should be developed and used. Blockchain technology should be leveraged to make the transmission of data safer and more secure.

6 CONCLUSION

A survey of the recent cases in which parties have sought an adjournment rather than proceeding remotely as the only option because of the COVID-19 pandemic reveals no hard-and-fast rules or principles or precedents dictating how a decision should be made. As the courts have emphasised repeatedly, it is a difficult balancing act of competing interests and considerations that must be weighed against each other to determine where the interests of justice lie. The interests of the parties (and fairness to them)

---

98 [2020] FCA 499 par 17 https://jade.io/article/725838 (accessed 2021-04-01).

and the administration of justice must be weighed up against each other. It is not an easy task, and each case must be decided on its own facts. This means that some cases will be ordered to proceed remotely, and some will not.

Clearly,

> "[t]he cases demonstrate that the mere fact of a matter proceeding by way of a video trial is not in and of itself necessarily a compelling basis for an adjournment. A party is not entitled 'to have a face-to-face hearing'."[99]

Similarly, in the *GetSwift* case, the court observed:

> "Just because one cannot have a hearing conducted in accordance with traditional practices and procedures, does not mean that the court's judicial functions cannot be performed effectively where it is necessary to do so. As Voltaire observed one must ensure the perfect does not become the enemy of the good."[100]

This resonates with Perram J's observation in *Capic*,[101] where he said:

> "Under ordinary circumstances, I would not remotely contemplate imposing such an unsatisfactory mode of trial on a party against its will. But these are not ordinary circumstances … I think we must try our best to make this trial work [remotely]. If it becomes unworkable then it can be adjourned but we must at least try."

In the end, the broad discretion that the courts have to either adjourn the trial or order it to proceed remotely must be exercised in accordance with the law and in order to facilitate the just resolution of disputes as quickly, inexpensively and efficiently as possible. Most judges consider a face-to-face hearing ideal, while recognising that the circumstances of the case may require that witnesses be allowed to testify from elsewhere via video link or even that the entire trial be conducted remotely. The disadvantages of remote proceedings are however significant, and this suggests that the default position ought to be that the trial proceeds in the traditional way. However, exceptional circumstances warranting a departure from the traditional position have to be motivated for by the party seeking the remote indulgence.

It is interesting to reflect on what the position is likely to be after the COVID-19 pandemic. The combined judicial experience of the Australian courts appears to be that they have been pleasantly surprised at how effectively remote proceedings can run. Despite trepidation in the initial stages about technological glitches and the difficulties of cross-examining over a screen, experience seems to have shown that the concerns were mainly overstated and that, where problems exist, they can be overcome with flexibility and creativity. Indeed, witnesses have been testifying via video link in Australia since around 1994 when section 47A(1) of the Federal Court of Australia Act, 1976 (Cth) was enacted, empowering the Federal Court to

---

99 *Ozemac Pty Ltd v Jackanic supra* par 6.

100 *ASIC v GetSwift Limited supra* par 2.

101 *Capic v Ford Motor Company of Australia Limited supra* par 25.

take evidence by video link. This was long before the COVID-19 pandemic forced entire trials to run remotely in certain cases.

In a future COVID-19-free world, it is unlikely that full trials will be run entirely remotely given the practical difficulties and given that most judges have acknowledged that such a situation was not ideal. It is hard to imagine circumstances in a future COVID-19-free world that would warrant conducting a completely remote trial. However, individual witnesses will continue to testify via video link where circumstances warrant this. The Australian cases suggest, for the reasons mentioned earlier in this article, the importance of technical and other support being made available to the witness while they testify. This will have cost implications but will help minimise problems occurring due to technological glitches and will assist witnesses who struggle with technology. In addition, the supporting third party can assist with the identity of the witness and ensure the integrity of the witness's testimony. In the author's view, video link will most likely be used where a witness is located abroad in order to save the cost and inconvenience of the witness travelling to the Australian court. This may especially be the case with foreign expert witnesses or witnesses who cannot travel.

While South Africa has not had the same judicial experience of running full trials remotely, the lessons to be learned from the Australian experience resonate strongly with South Africa. The issues associated with video-link proceedings are the same everywhere, and South Africa can learn valuable lessons from the Australian experience.

In the author's assessment, witnesses giving evidence by video link in South Africa will become more common in future. Evidence by video link has been placed in the spotlight by the COVID-19 pandemic, and litigants and witnesses are now familiar with video-conferencing. There is even a proposal to amend the Uniform Rules of Court to allow for the taking of evidence by video-conference link.

Rule 38, dealing with procuring evidence for trial, is proposed to be amended, *inter alia*, by the addition of rule 38(9), which would allow for the taking of evidence by audio-visual link. The proposed Rule 38(9) provides as follows:

> "(9)(a) A court may, on application on notice by any party and where it appears convenient or in the interests of justice, make an order for evidence to be taken through audiovisual link.
>
> (b) A court making an order in terms of paragraph (a) must give such directions which it considers appropriate for the taking and recording of such evidence.
>
> (c) An application in terms of this rule must be accompanied by a draft order setting out the terms of the order sought, including particulars of– (i) the witness who is required to adduce evidence through audiovisual link; (ii) the address of the premises from where such evidence will be given; and (iii) the address of the premises to where the evidence will be transmitted by audiovisual link.
>
> (d) For purposes of this rule 'audiovisual link' means facilities that enable both audio and visual communications between a witness and persons

in a courtroom, to be transmitted in real-time as they take place."[102]

Although rule 38(9) is only a proposal at this stage, it indicates an apparent intention to amend the rules to keep up to date with evolving technology in the court room – as endorsed by the South African High Court in previous cases.[103] This further strengthens the author's prediction that evidence by video link will become increasingly commonplace in South African litigation. The Australian experience predicts issues that may arise and how they have been balanced and weighed against one another in that context.

[102] E-Rules: Draft Amended Uniform Rules. Annexure A. https://www.justice.gov.za>rules_board>invite (accessed 2022-06-30).

[103] *Randgold Exploration Company Limited v Gold Fields Operations Limited* 2020 (3) SA 251 (GJ) par 2; *Kidd v Van Heeren* case number 27973/98 W of 3 September 2013; *Uramin (incorporated in British Columbia) t/a Areva Resources Southern Africa v Perie* 2017 (1) SA 236 (GJ); *Krivokapic v Transnet Ltd t/a Portnet* [2018] 4 All SA 251 (KZD); *Folley v Pick 'n Pay Retailers (Pty) Limited* [2017] ZAWCHC 86.

THE ROLE OF THE COURTS IN THE PUBLIC POLICY DOMAIN IN SOUTH AFRICA

Mogale Malapane
LLB LLM
Candidate Attorney, Legal Aid South Africa

Hoolo Nyane
LLB LLM LLD
Associate Professor and Head of Department of Public and Environmental Law, School of Law, University of Limpopo

SUMMARY

During the pre-democratic constitutional dispensation, South African public law was marked by the pre-eminence of the executive and the legislature in a parliamentary system of government. The courts were generally loath to review matters related to policy. The adoption of the interim and subsequently the final constitutions changed the position by making the Constitution of the Republic of South Africa, 1996 the supreme law of the country, with separation of powers between the three branches of government. The approach of the courts has changed noticeably from restraint to activism. Their role in reviewing policies has been steadily growing. They are now thrust into the formulation of government or public policy, which traditionally fell within the ambit of the executive branch of government. This new-found role of the courts has led to concerns that the judiciary's constant interference in the policy domain borders on violating the hallowed principle of separation of powers. The central argument of this article is that the courts' intervention in the public policy domain, if not handled with caution, has the potential to undermine the principle of separation of powers implicit in the South African Constitution.

1 INTRODUCTION

During the pre-democratic constitutional dispensation, the South African government was characterised by the strong concurrence of executive prerogative and parliamentary sovereignty.[1] Executive power had several

[1] Labuschagne "The Doctrine of Separation of Powers and its Application in South Africa" 2004 *Politeia* 84 84; Zvobgo "The Abuse of Executive Prerogative: A Purposive Difference Between Detention in Black Africa and Detention in White Racist Africa" 1976 6 *A Journal of Opinion* 38.

sources: the Constitution,[2] legislation and the common law.[3] In this context, the courts were generally loath to review matters related to policy.[4] When the Union of South Africa Act[5] was adopted, parliamentary sovereignty was still the defining feature of South African constitutionalism.[6] The Act provided a clear division between the executive, Parliament, the courts, and the powers conferred upon them.[7] Executive powers were vested in the king, assisted by the governor-general. The separation of powers notwithstanding, Parliament remained supreme and could amend Acts of Parliament when it so wished.[8]

On the other hand, the executive powers emanating from the common law were called prerogatives.[9] In developing the common law, judges have viewed these powers as inherently belonging to the executive and as residing in the monarch.[10] Their most important quality was their exemption from judicial review. As Schreiner JA stated in the leading case of *Sachs v Dönges*:

> "These powers are conveniently grouped under different headings by textbook writers, but they remain a heterogeneous collection, which, whatever their historical connection with the person of the King, are to-day recognised by the customary law of England, and have passed over into our South African constitutional law."[11]

The most important prerogatives were the power to assent to legislation, dissolve Parliament, dismiss a government, appoint ministers, stop prosecutions, bestow honours, pardon criminals, and declare war and peace.[12] As Schreiner JA indicates, many of these prerogatives originated from the English system of government. However, some of them were laid

---

2 The Republic of South Africa Constitution Act 32 of 1961; The Republic of South Africa Constitution Act 110 of 1983.

3 Panel of Experts and TC 2 Technical Experts*The Constitutional Accommodation of Executive Powers* (1995) 2; *President of the Republic of South Africa v Hugo* 1997 (4) SA 1 (CC) 5; *Waterfalls Town Management Board v Minister of Housing* 1957 (1) SA 336 (SR); *Tutu v Minister of Internal Affairs* 1982 (4) SA 571 (T).

4 Poole "United Kingdom: The Royal Prerogative" 2010 *International Journal of Constitutional Law* 184–149; see Carpenter "Prerogative Powers: An Anachronism?" 1989 *Comparative and International Law Journal of Southern Africa* 190 191–193.

5 Union of South Africa Act 2 of 1909.

6 Currie and De Waal *The Bill of Rights Handbook* 6ed (2013) 2; Elaine "South Africa's Parliamentary System: From Westminster to Hybrid?" in Parliamentary Liaison Office *South African Catholic Bishops Conference* (May 2015) 2.

7 Ss 8–116 of 2 of 1909.

8 Ss 8–66, 95–116 of 2 of 1909.

9 See Carpenter 1989 *CILSA* 190 on what the concept "prerogative" entails.

10 Britpolitics "What is the Royal Prerogative in the UK Constitution?" (undated) https://www.britpolitics.co.uk/royal-prerogative-a-level-uk-politics (accessed 2021-06-09); see Bartlett and Everett "The Royal Prerogative" 2017 *House of Commons Library Research Service* 1 5; *President of the Republic of South Africa v Hugo supra* 5; *Sachs v Donges* 1950 (2) SA 265 (A).

11 *Sachs v Donges supra* 306. The court went further to demonstrate that "[a]n act done by virtue of the prerogative is simply an act done by the executive, without statutory authority, the lawfulness of which depends on the customary law of England as adopted by us. It does not derive its lawfulness from any vague and elastic notion of executive sovereignty."

12 Panel of Experts and TC 2 Technical Experts*The Constitutional Accommodation of Executive Powers* 2; see Bartlett and Everett 2017 *House of Commons Library Research Service* 5.

down in legislation over time, which excluded reliance on the common law. In practice, they are not necessarily exercised by the monarch but by Cabinet Ministers by convention.[13] The 1961 South African Constitution created a state president, who replaced the monarch as the ceremonial head of state. The courts in South Africa applied this common-law principle of executive prerogative to avoid interfering with the functions of the executive.[14]

The transition from apartheid to the new democratic dispensation consequently saw a remarkable transformation of the judiciary.[15] Starting with the case of *President of the Republic of South Africa v Hugo,*[16] the courts have held the view that the common-law prerogative powers no longer exist in South African law as an independent source of power. The executive no longer has inherent common-law powers beyond the Constitution.[17] Consequently, the courts in South Africa have been encouraged to review almost everything based on different constitutional devices such as constitutional supremacy, legality, human rights and the rule of law. This new and somewhat stronger role of the courts saw their approach change noticeably from restraint to politicking. This change is aptly captured by the court in *Baloro v University of Bophuthatswana*,[18] where it was stated that the courts in South Africa

> "are now confronted by a rapid oscillation from the positivist jurisprudence founded on the sovereignty of parliament to a jurisprudence based on the sovereignty of the law contained in the constitution with a justiciable bill of rights".[19]

In this new dispensation, the courts' role in reviewing policies has steadily grown. They are now thrust into the formulation of government or public policy, which traditionally fell within the ambit of the executive branch of government. This has led to concerns that the judiciary's constant participation in the policy domain borders on violating the hallowed principle of separation of powers. The courts have cautiously developed a sensitive approach to separation of powers, which is markedly different from the concept of separation of powers under the old dispensation. The most astute formulation of this new model of separation of powers is found in the following *dictum* of the Constitutional Court in *Minister of Health v Treatment Action Campaign*:[20]

> "This Court has made it clear on more than one occasion that although there are no bright lines that separate the roles of the legislature, the executive and the courts from one another, there are certain matters that are pre-eminently within the domain of one or other of the arms of government and not the

---

13 *Council of Civil Service Unions v Minister for the Civil Service* [1984] 3 All ER 935.

14 Nicholson "Review of the Prerogative to Withdraw Passports in South Africa" 1988 47(2) *The Cambridge Law Journal* 189–192; Carpenter 1989 *CILSA* 190.

15 *AZAPO v Truth and Reconciliation Commission* 1996 (4) SA 562 (C).

16 *President of the Republic of South Africa v Hugo supra*.

17 *President of the Republic of South Africa v Hugo supra* 5–7.

18 *Baloro v University of Bophuthatswana* 1995 (4) SA 197 (B).

19 *Baloro v University of Bophuthatswana supra.*

20 2002 (5) SA 721 (CC).

> others. All arms of government should be sensitive to and respect this separation."[21]

The courts still regard the separation of powers as a sacrosanct pillar of the new constitutional design. However, they constantly insist, unlike in the past, that no branch of government is immune from judicial scrutiny.[22]

The central argument of this article is that the courts' participation in the public policy domain undermines the principle of separation of powers implicit in the South African Constitution.

2 RE-VISITING THE DOCTRINAL DEBATES

2 1 Executive powers and executive prerogatives

The executive is the second most powerful branch of government. As its name suggests, it is responsible for implementing and enforcing laws passed by the legislature.[23] It is also the executive's duty, like any other branch of government, to respect and protect the Constitution of the Republic of South Africa, 1996 (the Constitution).[24]

In South Africa, before 1994, sources of executive power, among others, included the common-law royal prerogatives that emanated from English law and were inherent in the executive.[25] Under the new constitutional dispensation, the executive no longer has common-law, royal-like prerogative powers.[26] The courts have claimed the right to review even the once-revered power to appoint and dismiss Ministers. In *Democratic Alliance v President of the Republic of SA; In re: Democratic Alliance v President of the Republic of SA*,[27] the court stated:

> "The executive power to appoint and dismiss Ministers and Deputy Ministers is wide-ranging. But it is not as unfettered as its predecessor the royal prerogative. The royal prerogative is a relic of an age past. The executive power conferred upon the office of the President by s 91(1) of the Constitution

---

21 Par 36.

22 This is somewhat politically captured by the *dictum* of Mahomed CJ in *Speaker of National Assembly v De Lille MP* [1999] ZASCA 50; [1999] 4 All SA 241 (A): "This enquiry must crucially rest on the Constitution of the Republic of South Africa. It is Supreme – not Parliament. It is the ultimate source of all lawful authority in the country. No Parliament, however bona fide or eminent its membership, no President, however formidable be his reputation or scholarship and no official, however efficient or well meaning, can make any law or perform any act which is not sanctioned by the Constitution."

23 Ghai (undated) "Your Article Library" https//www.yourarticlelibrary.com (accessed 2021-08-06); Baxter "The 'State' and Other Basic Terms in Public Law" 1982 *South African Law Journal* 212 214.

24 Spry "The Executive Power of the Commonwealth: Its Scope and Limits" 1996 *Parliamentary Research Service* 18; Department of Constitutional Development *Constitutional Handbook for Members of the Executive* (1999) 23.

25 The Republic of South Africa Constitution Act 32 of 1961; The Republic of South Africa Constitution Act 110 of 1983.

26 *Minister for Justice and Constitutional Development v Chonco* 2010 (4) SA 82 (CC) par 30; see *President of the Republic of South Africa v Hugo supra* 5–7.

27 2017 (4) SA 253 (GP).

> is circumscribed by the bounds of rationality and by sections 83(b) and (c) of the Constitution."[28]

In the current dispensation, the Constitution as the supreme law is the primary source of the scope and parameters of executive powers. Section 85(2) of the Constitution provides that the President[29] is the head of the executive, and that the head of state exercises this executive authority together with the Cabinet by:

> "(*a*) implementing national legislation except where the Constitution or an Act of Parliament provides otherwise;
> (*b*) developing and implementing national policy;
> (*c*) co-ordinating the functions of state departments and administrations;
> (*d*) preparing and initiating legislation; and
> (*e*) performing any other executive function provided for in the Constitution or in national legislation."[30]

The Constitution also enumerates the powers of the President as head of state in section 84(2). However, mindful of the possible predicament created by the seemingly exhaustive enumeration in section 82(1) of the Interim Constitution,[31] the final Constitution included a prelude in section 84(1) that

> "[t]he President has the powers entrusted by the Constitution and legislation, including those necessary to perform the functions of Head of State and head of the national executive."

Apparently, the formulation under section 84(1) suggests that executive prerogative is still part of the constitutional edifice of the Republic, but only to the extent necessary to execute the enumerated executive functions. While there is a paucity of direct judicial pronouncements on the actual meaning of section 84(1), *Minister for Justice and Constitutional Development v Chonco*[32] stands out as the most critical among the cases in which the superior courts in South Africa have grappled with the meaning of section 84(1).

In the *Chonco* case,[33] Mr Chonco had been incarcerated with 383 others for various crimes that they alleged were politically motivated. They had applied for a presidential pardon in terms of section 84(2)(*j*) of the Constitution. Their applications were not processed by the Minister, who is a member of the national executive, as a preliminary phase of the application process and such applications did not reach the President. As a result, the

---

28 Par 18.

29 The President is voted into power by members of the National Assembly in Parliament and is sworn into the office of the President by the Chief Justice, who is the head of the judiciary in South Africa.

30 S 85(2) of the Constitution; Hodgson "The Mysteriously Appearing and Disappearing Doctrine of Separation of Powers: Towards a Distinctly South African Doctrine for a More Radically Transformative Constitution" 2018 *South African Journal on Human Rights* 1 16–17; Seedorf and Sibanda "Separation of Powers" in Woolman and Bishop (eds) *Constitutional Law of South Africa* (2013) 22. The Cabinet is formed by the President as the head, together with the Deputy President and all senior Ministers in various state departments. The Deputy President and the Ministers are appointed by the current sitting President of the Republic.

31 Constitution of the Republic of South Africa Act 200 of 1993.

32 *Supra.*

33 *Supra*.

applicants took the matter to the High Court for appropriate relief; the case then went to the Supreme Court of Appeal and later to the Constitutional Court. The Constitutional Court held that the President has the power to decide on the pardon, request advice and initiate the processes needed to generate that advice. The court stated:

> "Section 84(1) gives the President the powers 'necessary' to fulfil the functions accorded to him or her. This indicates that the President bears powers that go beyond the principal decision-making power and include what may be described as 'auxiliary powers' … Accordingly, the scope of these auxiliary powers is narrow – only those powers reasonably necessary to properly fulfil the functions in section 84(2) are endowed."[34]

This approach seems to be somewhat at variance with the approach taken earlier by the Constitutional Court in *President of the Republic of South Africa v South African Rugby Football Union*,[35] and the widely held view in legal scholarship that the President's powers as head of state are exhaustively listed in section 84(2).[36] In effect, the court confirmed that section 84(2) is an exhaustive code of the powers of the President as head of state. Thus, he cannot exercise any power that is not listed in section 84(2).

The approach of the court in *Chonco* to the list of powers in section 84(2) seems to be in keeping with the interpretive approach taken by the court in several other cases. In *Mansingh v General Council of the Bar*,[37] the court had to deal with the vexed question of whether the conferral of senior counsel status on practising advocates is part of the powers of the President embodied in section 84(2)(*k*) of the Constitution: the power of "conferring honours". The Constitutional Court ruled that the President's power to confer honours in terms of section 84(2)(*k*) includes the authority to confer senior council status or silk on advocates.[38]

Seedorf and Sibanda aptly contend:

> "[T]he executive function is a broad one that entails responsibility for the development, preparation and implementation of national policy and legislation, and the co-ordination of the functions of state departments and the public administration."[39]

Executive authority, therefore, broadly entails all the functions of government that are neither legislative nor judicial. Therefore, it would seem that executive authority is residual; it encompasses virtually everything that remains after the legislative and judicial functions have been demarcated.

---

34 *Minister of Justice and Constitutional Development v Chonco supra* 31–33.

35 2000 (1) SA 1 (CC).

36 Murray and Stacey "The President and the National Executive" in Woolman and Bishop (eds) *Constitutional Law of South Africa* (2013) 1.

37 2014 (2) SA 26 (CC).

38 *Mansingh v General Council of the Bar supra* 38.

39 Seedorf and Sibanda in Woolman and Bishop (eds) *Constitutional Law of South Africa* 22.

2 2 South African model of separation of powers

Developing a distinctly South African model of separation of powers has been particularly elusive for judges and scholars in South Africa.[40] In *De Lange v Smuts*,[41] the Constitutional Court called it "a complex matter" that is better left to time, and assumed that it would develop over time on a case-by-case basis.[42]

The starting point in this search is the Constitution as the supreme law and primary source of public power.[43] The adoption of the Interim Constitution and subsequently the (final) Constitution marked a milestone in transforming the constitutional design in South Africa.[44] It reversed decades of colonial and apartheid policies of racial fragmentation and, most importantly, the governmental structures established by the apartheid constitutions.[45] The design had been cast in an obscure and often feeble assignment of functions to various branches of government. Admittedly, the three traditional branches – the judiciary, the executive, and the legislature – always undergirded government design in pre-democratic South Africa. However, the checks and balances were very weak, leading to ineffective horizontal accountability between the main branches of government.[46]

At the time of the certification of the Constitution, the Constitutional Court was asked to verify that there was indeed compliance with Principle VI (separation of powers), which is one of the principles agreed upon during the multi-party negotiation process.[47] The court in *Ex parte Chairperson of the Constitutional Assembly: in re Certification of the Constitution of the Republic of South Africa, 1996* (the *First Certification* case)[48] indicated that there is no universal model of separation of powers; the principle of separation of powers recognises the functional independence of branches of government.[49] The court argued that this anticipates the necessary and unavoidable intrusion by one branch on the terrain of another branch of

---

40 *S v Dodo* 2001 (3) SA 382 (CC); *South African Association of Personal Injury Lawyers v Heath* 2001 (1) SA 883 (CC).

41 1998 (3) SA 785 (CC).

42 Par 61.

43 Ngcobo "South Africa's Transformative Constitution: Towards an Appropriate Doctrine of Separation of Powers" 2011 *Stellenbosch Law Review* 38.

44 Langa "The Separation of Powers in the South African Constitution" 2006 22 *South African Journal on Human Rights* 2 4.

45 Seedorf and Sibanda in Woolman and Bishop (eds) *Constitutional Law of South Africa* 1; Labuschagne 2004 *Politeia* 84; Langa 2006 *South African Journal on Human Rights* 4; s 2 of the Constitution.

46 Dugard "The Judiciary in a State of National Crisis with Special Reference to the South African Experience" 1987 44 *Washington & Lee Law Review* 477.

47 Constitutional Principle VI in Schedule 4 to the Interim Constitution provided: "There shall be a separation of powers between the legislature, executive and judiciary, with appropriate checks and balances to ensure accountability, responsiveness and openness." See also O'Regan "Checks and Balances: Reflections on the Development of the Doctrine of Separation of Powers Under the South African Constitution" 2005 *Potchefstroom Electronic Law Journal* 120 120.

48 1996 (4) SA 744 (CC).

49 O'Regan 2005 *PELJ* 120.

government because no scheme can reflect a complete separation of powers.[50] The court emphasised that the new design envisages

> "a separation of powers between the Legislature, Executive and Judiciary with appropriate checks and balances to ensure accountability, responsiveness and openness."[51]

The separation of powers principle is not expressly provided for in the South African Constitution. However, it is apparent from the scheme of the Constitution that such a principle is implicit as a dominant coordinator of power within the State.[52] As former Chief Justice Ngcobo pointedly contends, the fact that the Constitution provides for it implicitly does not make it any less important than an express provision.[53] This principle is regarded as a necessary incident of a constitution in which governmental powers and functions are distributed between the three organs of state, and where one branch cannot exercise powers that are conferred on the other branches of government unless it is constitutionally mandated to do so.[54]

The pure, traditional principle of separation of powers, as advocated by Locke and Montesquieu, essentially posits that government should be divided into three arms: the executive, the legislature and the judiciary.[55] In addition, explicit duties, responsibilities and powers are assigned to each distinct branch of government with a demarcated means of capability and control.[56] On the other hand the partial separation of powers provides functional separation, permitting functional inter-branch relationships. In South Africa, it seems that this demarcation has been cast in general terms without necessarily imposing the hard-and-fast lines of the pure separation of powers.[57]

The government arrangement in the post-democratic South African dispensation displays an element of the Westminster system; there is still a fusion of the legislature and executive.[58] This indicates that there is no sharp division between these two branches of government.[59] The majority of the Cabinet members (the executive branch) are also members of Parliament (the legislature); the Constitutional Court in the *First Certification* case had to

---

50 O'Regan 2005 *PELJ* 120.

51 *First Certification* case *supra* par 45.

52 Sewpersadh and Mubangizi "Judicial Review of Administrative and Executive Decisions: Overreach, Activism or Pragmatism?" 2017 21 *Law, Democracy & Development* 201 202; Langa 2006 *South African Journal on Human Rights* 4; see also *Justice Alliance of South Africa v President of the Republic of South Africa* 2011 (5) SA 388 (CC) par 32.

53 Ngcobo 2011 *Stellenbosch Law Review* 38.

54 Okpaluba and Mhango 2017 *Law, Democracy & Development* 4; see *Justice Alliance of South Africa v President of the Republic of South Africa* 2011 (5) SA 388 (CC) par 32.

55 Mathebula and Munzhedzi "Trias Politica for Ethical Leadership and Good Governance: Praxis of Checks and Balances in the South African Context" 2017 *Bangladesh E-Journal of Sociology* 7 7–9.

56 Mathebula and Munzhedzi 2017 *Bangladesh E-Journal of Sociology* 7–9; Hodgson 2018 *South African Journal on Human Rights* 13.

57 Nyane "Separation of Powers and State Institutions Supporting Democracy: Does South Africa Have a 'Fourth Branch' Par Excellence?" 2021 *Perspectives of Law and Public Administration* 188 189.

58 Labuschagne 2004 *Politeia* 90.

59 *Ibid*.

decide whether a Cabinet member's concurrent membership in Parliament was consistent with the doctrine of separation of powers.[60] The Constitutional Court held that the system of separation of powers is not a rigid or fixed constitutional principle. The South African variant of the system, in any event, strengthened the accountability of the executive to the legislative arm and did not violate the doctrine.[61] Irrespective of the institutional separation between the branches of government, the Constitution makes provision for the involvement of the executive in the legislative function, allowing members of the Cabinet to initiate and introduce legislation in Parliament.[62]

The Constitution places the judicial authority of the Republic in the courts. Furthermore, it provides that the courts are independent and only subject to the Constitution and the law. They must apply the law without fear, favour or prejudice, and no person or organ of state may interfere with their functions.[63] In *Glenister v President of RSA,*[64] the court held that the courts are the ultimate guardians of the Constitution. They have the right to intervene to prevent the violation of the Constitution, and they also have the duty to do so. Therefore, the courts are more likely than other branches to consider venturing into the domain of other branches of government and to determine the extent of such intervention. Still, even in these circumstances, they must observe the limits of their power.[65]

The judiciary is one of the three branches of the South African government. It does not have unlimited powers. It must always be cautious and sensitive to the need to refrain from unwarranted interference with the functional independence of other branches of government, unless it is constitutionally mandated to do so.[66] It falls outside the parameters of judicial authority to prescribe to the National Assembly what mechanisms to use, how to use them, and what mandate it has to scrutinise the executive and hold it accountable, which is a responsibility primarily entrusted to Parliament.[67]

In *De Lange v Smuts NO*,[68] the court held that the courts would over time develop a distinctive South African model of separation of powers that fits the governmental system provided by the Constitution; and that reflects a balance between South Africa's history and the current dispensation, and between the need to separate powers and enforce checks and balances to

---

60 Seedorf and Sibanda in Woolman and Bishop (eds) *Constitutional Law of South Africa* 23; Langa 2006 *South African Journal on Human Rights* 5.

61 Langa 2006 *South African Journal on Human Rights* 5; *First Certification* case *supra* par 111.

62 Seedorf and Sibanda in Woolman and Bishop (eds) *Constitutional Law of South Africa* 23.

63 S 165(1)–(3) of the Constitution.

64 2009 (1) SA 287 (CC).

65 *Glenister v President of the Republic of South Africa supra* 30; see also O'Regan 2005 *PELJ* 132.

66 *Economic Freedom Fighters v Speaker of the National Assembly; Democratic Alliance v Speaker of the National Assembly* 2016 (3) SA 580 (CC) par 92.

67 *EFF v Speaker of the National Assembly supra* par 93.

68 1998 (3) SA 785 (CC).

control the government, and avoid diffusing power uncontrollably.[69] In *United Democratic Movement v President of the Republic of South Africa*,[70] the court ruled that the merits of the disputed legislation were outside its remit and that, according to the principle of the separation of powers, its job was simply to determine whether or not the legislation complied with the Constitution.[71]

The Constitution of South Africa also establishes state institutions supporting constitutional democracy, as outlined in Chapter 9 of the Constitution.[72] These institutions (for example, the Public Protector) function beyond the traditional *trias politica* and enjoy protection as well as independence from the three traditional branches of government.[73] It is unclear whether the drafters of the Constitution intended these institutions to function as a fourth branch of government. However, they seem to play a watchdog role and to strengthen the system of checks and balances between the traditional spheres of government by advocating effective accountability.[74]

The importance and nature of the powers of these institutions have been the subject of intense judicial and scholarly engagement. While the controversy around the nature of their powers in the broad institutional scheme is yet to be settled, the emerging consensus is that the Public Protector's remedial actions are binding; they are not merely recommendations.[75] This is a profound development because the orthodox view has been that the powers of the Public Protector cannot be equated with those of a court of law. The creation of these institutions, and allowing them to wield such immense powers, has far-reaching implications for the traditional concept of separation of powers. It has led to the view that these institutions have constituted themselves into a "fourth branch" of government.[76]

---

69 *De Lange v Smuts NO supra* 60; see also *Justice Alliance of South Africa v President of the Republic of South Africa* 2011 (5) SA 388 (CC) par 32.

70 2003 (1) SA 495 (CC).

71 *UDM v President of the Republic of South Africa supra* par 11.

72 Murray "The Human Rights Commission et al: What Is the Role of South Africa's Chapter 9 Institutions?" 2006 *Potchefstroom Electronic Law Journal* 121.

73 Seedorf and Sibanda in Woolman and Bishop (eds) *Constitutional Law of South Africa* 30–31; Murray 2006 *PELJ* 122.

74 Nyane 2021 *Perspectives of Law and Public Administration* 188, 198–199; Murray 2006 *PELJ* 132 .

75 *EFF v Speaker of the National Assembly supra* 103–105; s 83(*b*) read with ss 181(3) and 182(1)(*c*) of the Constitution.

76 Mahomed "The Fourth Branch: Challenges and Opportunities for a Robust and Meaningful Role for South Africa's State Institutions Supporting Democracy" in Bilchitz and Landau (eds) *The Evolution of the Separation of Powers* (2018) 177.

3 THE REVIEW OF POLICY

3 1 The problem of distinguishing administrative action from executive function

The review of policy in South Africa still reflects the deference that the courts had under the old dispensation – that is, the courts are reluctant to review policy decisions.[77] This view has been bolstered by the enactment of the Promotion of Administrative Justice Act (PAJA),[78] which has excluded policy or the executive function from its labyrinthine definition of administrative action. In terms of the Act, only administrative action, as defined by the Act, is susceptible to judicial review as envisaged by section 6 of the Act.[79] Section 1 of PAJA provides:

> "'administrative action' means any decision taken, or any failure to take a decision, by–
> *(a)* an organ of state, when–
> (i) exercising a power 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; or
> *(b)* a natural or juristic person, other than an organ of state, when exercising a public power or performing a function in terms of an empowering provision,
> which adversely affects the rights of any person and which has direct, external legal effect, but does not include–
> *(aa)* the executive powers or function of the National Executive ...;
> *(bb)* the executive powers or function of the Provincial Executive ... ."[80]

The section expressly excludes the executive function from the ambit of administrative action. However, the courts have called this definition "a rather complex taxonomy"[81] and "a rather unwieldy definition".[82] As a result, there is clear disagreement about what constitutes administrative action as opposed to executive function.[83] The emerging judicial approach is an attempt to define these two concepts – administrative action and executive function. In *Motau*, the court attempted, without much success, to create a test to be used to distinguish between the two somewhat confusing functions. The court held that

---

77 Dugard 1987 *Washington & Lee Law Review* 477.

78 3 of 2000.

79 Ss 1 and 6 of PAJA.

80 S 1 of Act 3 of 2000.

81 *Minister of Defence and Military Veterans v Motau* 2014 (5) SA 69 (CC) par 29.

82 *Minister of Defence and Military Veterans v Motau supra* par 33.

83 Hoexter *Administrative Law in South Africa* (2012) 249 contends that: "The users of PAJA are more likely to be flummoxed than guided by this definition, in which nothing can be taken for granted. It is a shame that such an important piece of legislation is so inaccessible to ordinary people. But then it is inaccessible to lawyers too. As we have seen, even the Constitutional Court is unable to agree on the status of legislative administrative action in PAJA. That the definition should produce such uncertainty about something so fundamental is inexcusable."

> "[a] power that is more closely related to the formulation of policy is likely to be executive in nature and, conversely, one closely related to its application is likely to be administrative."[84]

This is clearly a nebulous test because it creates a continuum but not a specific guideline. In the end, whether a function is administrative or executive remains subjective. The net effect is that the courts review policy or executive decisions either under PAJA or under the generic principle of legality. There is a growing concern that the distinction between administrative action and executive action is blurred and mostly unhelpful.[85] It is thus difficult for courts to decide on the extent of judicial scrutiny in reviewing a decision so as to avoid moving beyond the existing legal confines.

3 2 Rationality review: an increasing trend towards more power of review

Rationality review often places the courts in a predicament. Courts have to tread a thin line between deference and stronger review. The predicament is often more pronounced when it comes to the review of policy because, ordinarily, English and South African courts have been reluctant to enter the policy domain. However, rationality review has been one avenue that has emboldened the courts to enter the policy domain. The orthodox approach has been to enquire whether the policy under scrutiny is unlawful (illegal). If the answer is in the affirmative, the courts will intervene; if not, the courts will exercise restraint. This approach was adopted by the House of Lords in England, as far back as 1985, in *Gillick v West Norfolk and Wisbech Area Health Authority*.[86] The principle was reiterated recently in the decision of the English Supreme Court in *R (on the application of A) v Secretary of State for the Home Department.*[87] In this case, the appellant sought the judicial review of a policy, the Child Sex Offender Disclosure Scheme Guidance (the Guidance), issued by the Secretary of State (the respondent). The Guidance empowered police to disclose information in its possession about the relevant previous convictions of any child sex offender to any particular member of the public. The appellant, who was a convicted sex offender, challenged the policy on the basis that it did not make sufficient provision for the police to consult him before disclosing his offences to a member of the public who made an inquiry about him in circumstances where he was in contact with children. The Supreme Court outlined the test crisply:

> "In our view, *Gillick* sets out the test to be applied. It is best encapsulated in the formulation by Lord Scarman … and by adapting Lord Templeman's words: does the policy in question authorise or approve unlawful conduct by those to whom it is directed? So far as the basis for intervention by a court is concerned, we respectfully consider that Lord Bridge and Lord Templeman were correct in their analysis that it is not a matter of rationality, but rather that the Court will intervene when a public authority has, by issuing a policy, positively authorised or approved unlawful conduct by others. In that sort of

---

84 *Minister of Defence and Military Veterans v Motau supra* 38.

85 The weak and withering distinction between executive and administrative action.

86 [1985] 3 All ER 402.

87 [2021] UKSC 37.

> case, it can be said that the public authority has acted unlawfully by undermining the rule of law in a direct and unjustified way."[88]

The rationale for this approach is that the superior courts in England appreciate that the policy space domain is pre-eminently the province of the executive. Hence, it is risky to permit the courts to "second-guess" the decisions of the executive.

The courts in South Africa have adopted a slightly different approach. Their approach is much broader than the lawfulness test followed by the English courts. The Constitutional Court of South Africa has, in numerous judgments,[89] developed a general principle that the exercise of public power should be rational and not arbitrary.[90] Hence, the courts will readily intervene if any exercise of public power fails to meet the demands of this principle. In *Pharmaceutical Manufacturers Association: In re Ex parte President of the Republic of South Africa,*[91] the court stated:

> "rationality … is a minimum threshold requirement applicable to the exercise of all public power by members of the executive and other functionaries. Action that fails to pass this threshold is inconsistent with the requirements of our Constitution, and therefore unlawful."[92]

In *Democratic Alliance v President of the Republic of South Africa,*[93] the court noted that an executive decision (as opposed to administrative action) need not be reasonable or procedurally fair. The purpose of this rule, as the court provides, is "precisely to ensure that the principle of the separation of powers is respected and given full effect".[94] In essence, testing the lawfulness of the executive decision is only the first leg of the enquiry. The second leg is whether the decision is rationally connected to the purpose for which the power was conferred.[95] In *President of the Republic of South Africa v South African Rugby Football Union,*[96] the court held that the President's exercise of his powers must not infringe on any provision in the Bill of Rights. The exercise of those powers is also constrained by the implicit principle of legality in the Constitution. The President must act in good faith and must not misconstrue his powers.[97]

In *Masethla v President of the Republic of South Africa*,[98] Moseneke DCJ highlighted the point that procedural fairness is not a requirement of the principle of legality. It would not be appropriate to constrain executive powers by the requirements of procedural fairness, which is a fundamental

---

88 *R v Secretary of State for the Home Department supra* par 38.

89 Price "Rationality Review of Legislation and Executive Decisions: Poverty Alleviation Network and Albutt" 2010 *South African Law Journal* 580 580–581.

90 Kohn "The Burgeoning Constitutional Requirement of Rationality and the Separation of Powers: Has Rationality Review Gone Too Far?" 2013 *South African Law Journal* 810 825.

91 2000 (2) SA 674 (CC).

92 Par 90.

93 2013 (1) SA 248 (CC).

94 Par 41. The court went further to say: "If executive decisions are too easily set aside, the danger of courts crossing boundaries into the executive sphere would loom large."

95 *Democratic Alliance v President of RSA supra* par 41.

96 *Supra* par 41.

97 *President of RSA v SARFU supra* par 34.

98 2008 (1) SA 566 (CC).

feature in the review of administrative decisions. On the other hand, Ngcobo J, who wrote for the minority in the same matter, based his reasoning on the founding constitutional value of the rule of law that he construed as having a procedural component because of its implicit requirement of non-arbitrariness.[99]

There seems to be uncertainty about the test that the courts apply in reviewing the decisions of the executive. Du Plessis and Scott note that the Constitutional Court uses different scrutiny levels in cases based on legality challenges.[100] The rationality review standard that is applied varies in those cases, depending on the circumstances of the particular case.[101] The problem that emerges from the variability of the rationality review is the inadequate guidance provided by the Constitutional Court regarding the applicability and parameters of this rationality standard.[102] In *Albutt v Centre for the Study of Violence and Reconciliation,*[103] the court expanded the rationality standard to include elements of procedural fairness.[104] The court pointed out that it would not be possible to attain rationality without giving the person affected by the decision a hearing. A more deferential approach was taken in *Poverty Alleviation Network v President of the Republic of South Africa*.[105] The court preferred its own approach in *Doctors for Life,*[106] where it held that

> "[c]ourts must be conscious of the vital limits on judicial authority and the Constitution's design to leave certain matters to the other branches of government [and] …should not interfere in the processes of other branches of government unless to do so is mandated by the Constitution."

In *Poverty Alleviation Network*, the court found that the legislation that aimed to transfer a part of Matatiele from the province of KwaZulu-Natal to the province of the Eastern Cape was "rationally connected to a legitimate governmental end".[107]

In *Democratic Alliance v President of the Republic of South Africa,*[108] the Constitutional Court was concerned with whether the appointment of one Mr Menzi Simelane as the National Director of Public Prosecutions by the President was made within the bounds of the Constitution. Although, in terms of the Constitution, the President has powers to appoint the Director of Public Prosecutions,[109] he had appointed Mr Simelane despite the Ginwala

---

99 *Masethla v President of the Republic of South Africa supra* par 108.

100 Du Plessis and Scott "The Variable Standard of Rationality Review: Suggestions for Improved Legality Jurisprudence" 2013 *South African Law Journal* 597, 608.

101 *Ibid*.

102 *Ibid.*

103 2010 (3) SA 293 (CC).

104 Kohn 2013 *South African Law Journal* 834, 833.

105 2010 (6) BCLR 520 (CC).

106 *Doctors for Life International v Speaker of the National Assembly* 2006 (6) SA 416 (CC) par 37.

107 *Poverty Alleviation Network v President of RSA supra* 64–76; for a detailed analysis of the case, see Price 2010 *SALJ* 580–591.

108 *Supra*.

109 S 179(1) provides: "There is a single national prosecuting authority in the Republic, structured in terms of an Act of Parliament, and consisting of–

Commission's adverse findings against him. The vexed question was whether the decision of the President, although lawful, was rational. In its exacting enquiry, the court followed its approach in *Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs and Tourism*[110] of distinguishing between rationality and unreasonableness. According to the distinction drawn in that case, the reasonableness inquiry simply inquires whether the decision taken by the public functionary is one that a reasonable decision-maker could have reached; the rationality inquiry is about "the means selected to determine whether they are rationally related to the objective sought to be achieved".[111]

Generally, if some aspect of the process is not correct, it will colour everything with irrationality, and the ultimate decision will be irrational.[112] There is a problem with the awkward and expanded meaning that courts have tagged onto the rationality requirement, which now seems to include other elements like procedural fairness, reasonableness and proportionality. The meaning attributed to rationality corresponds to and somehow amounts to an invisible application of a somewhat thicker standard of review similar to what is used in the review of administrative action. That approach creates room for the easy setting aside of executive decisions, which is not what the separation of powers principle endorses.

There are concerns that rationality review may lead courts to overstep their mark. Yacoob J lamented in *Democratic Alliance v President of the Republic of South Africa*[113] that

> "[t]he rule that executive decisions may be set aside only if they are irrational and may not ordinarily be set aside because they are merely unreasonable or procedurally unfair has been adopted precisely to ensure that the principle of the separation of powers is respected and given full effect. If executive decisions are too easily set aside, the danger of courts crossing boundaries into the executive sphere would loom large."[114]

At the core of the rationality test, as the court noted in *Pharmaceutical Manufacturers Association*,[115] is that the courts should not substitute the opinions of the power holders with their own opinions on what they deem to be appropriate.[116] What is required is that the purpose sought to be achieved by exercising that power should be within the functionary's authority and should be objectively rational.[117] Thus, a court cannot interfere with a

(*a*) a National Director of Public Prosecutions, who is the head of the prosecuting authority, and is appointed by the President, as head of the national executive; and

(*b*) Directors of Public Prosecutions and prosecutors as determined by an Act of Parliament."

110 *Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs and Tourism* 2004 (4) SA 490 (CC).

111 See *Albutt v Centre for the Study of Violence and Reconciliation supra* par 63.

112 Kohn 2013 *South African Law Journal* 834.

113 *Supra*

114 Par 41.

115 *Supra.*

116 Par 90; see also *Albutt v Centre for the Study of Violence and Reconciliation supra* 51, where Ngcobo CJ noted that the executive has a wide discretion in selecting the means to achieve its constitutionally permissible objectives.

117 *Pharmaceutical Manufacturers Association supra* 90.

decision merely because it disagrees with it or because the power was exercised inappropriately.[118]

The *Merafong*[119] judgment dealt with a decision of the legislature and corroborates the position that a central feature of the rationality hurdle is the requirement of a merely rational connection and not a perfect or ideal connection. The bottom line should be that the decision, taken in good faith, was taken in order to achieve the results. Otherwise, the reasonability element is taken into account, which will then invoke proportionality.

Rationality review has come under immense criticism because it draws the courts into being arbiters of the legitimacy of government purpose when it inquires into the legitimacy of government purpose.[120] This is the power that the courts in South Africa seem to be accumulating on a case-by-case basis, sometimes inadvertently.

4 CONCLUSION

The review of policy decisions has always been a controversial subject in public law. The orthodox approach has always been that the policy decisions of the executive are unreviewable because of the age-old deference to executive prerogative. In South Africa, the near-universal principle was abused to cover up the most repressive actions of the executive. Hence, during the transition to a new dispensation, this was one of the first areas of public law to come under the spotlight. In *Hugo*,[121] one of the early decisions under the current dispensation, the court explicitly removed the veil on the executive decisions of the President. The case thus opened a Pandora's Box, and the line of cases that came thereafter has pushed the boundaries on a case-by-case basis.

Regard being had to the central tenet of the current Constitution – that the exercise of public power must be justified – it is not necessarily bad when the judiciary insists on reviewing the executive's policy decisions. The challenge occurs when the courts become overly active, for that is always a threat to that cornerstone of the new constitutional design – the principle of separation of powers.[122]

The foregoing analysis has demonstrated that the courts are using rationality review to scrutinise policy decisions of the executive. To that end, they ask not only about the lawfulness of the decision but also about its rationality – the relationship between the means selected and a legitimate government purpose. This is the most problematic aspect of rationality review. The main question for a policy review should be whether it is lawful. It is recommended that the judiciary exercise deference when it comes to reviewing policy decisions.

---

118 *Ibid.*

119 *Merafong Demarcation Forum v President of the Republic of South Africa* 2008 (5) SA 171 (CC).

120 Pretorius "Deliberative Democracy and Constitutionalism: The Limits of Rationality Review" 2014 29 *South African Public Law* 408 408–411.

121 *Supra*.

122 Nyane "The Judicialisation of Politics in South Africa: A Critique of the Emerging Trend" 2020 36(4) *South African Journal on Human Rights* 319–337.

ABANDONMENT OF RIGHTS TO MINERALS GRANTED IN TERMS OF THE MINERAL AND PETROLEUM RESOURCES DEVELOPMENT ACT*

Richard Cramer
BA(Hons) LLB LLM PhD
Postdoctoral Fellow, DST/NRF South African Research Chair: Mineral Law in Africa, Department of Private Law, University of Cape Town

SUMMARY

A peculiar feature of the Mineral and Petroleum Resources Development Act (MPRDA) is the mention of the possibility of abandoning rights granted in terms of its provisions. It has been commented by Van der Schyff that the possibility of abandoning these rights is inconsistent with the Act's objectives of the MPRDA. In particular, empowering a right-holder to abandon a right granted in terms of the MPRDA fails to take into account that such a right comes with significant responsibilities and obligations. As such, unilateral abandonment should not be possible in terms of the legal framework created by the MPRDA.

This article seeks to address this peculiarity in the MPRDA. It considers the legislative context in which such an abandonment (if possible) would operate. The analysis of the possibility of abandoning rights granted in terms of the MPRDA is undertaken in light of theoretical observations in respect of the abandonment of property rights, in particular the seminal article on the subject by Peñalver. The article seeks to answer the question as to whether abandonment, as envisaged by the MPRDA, is possible in the legal framework the Act creates, and outlines the potential consequences thereof for the would-be abandoner.

1 INTRODUCTION

Rights to minerals can only be obtained through an application made in terms of the provisions of the Mineral and Petroleum Resources Development Act (MPRDA)[1]. If an applicant meets the requirements for the

* The financial support of the National Research Foundation, which enabled this research, is gratefully acknowledged. The South African Research Chair: Mineral Law in Africa is funded by the South African National Department of Science and Technology, administered by the National Research Foundation, and hosted by the University of Cape Town. The views expressed in this article are those of the author and should not be attributed to any of these institutions. The detailed and valuable feedback of the reviewers of this article is also gratefully acknowledged.

1 28 of 2002.

granting of a right, the Minister must grant it.[2] Prospecting rights and mining rights, once granted and registered in terms of the Mining Titles Registration Act (MTRA),[3] are limited real rights.[4] A peculiar feature of the MPRDA is the mention of the possibility of abandoning rights to minerals granted in terms of its provisions.[5] Section 56(*f*) of the MPRDA states that a right, permit, or permission granted in terms of its provisions lapses in the event it is abandoned. The Act further notes the consequences of abandoning a right – such as obligations to secure a closure certificate for the mine in question,[6] and to remove structures and objects from the site.[7] However, beyond mentioning the possibility of abandoning a right that has been granted in terms of the Act and the consequences thereof, the MPRDA is silent on how to achieve abandonment.

This article seeks to address this peculiarity in the MPRDA. Its goal is to explore the nature of abandonment under the MPRDA, and in particular, how abandonment may be achieved, if such is possible. Doing so will require an analysis of the law of abandonment in South Africa in general, and in the legal framework created by the MPRDA in particular. The article compares "abandonment" as conceived of in terms of the MRPDA with the concept as it exists in private law, in the law of property in particular. The focus of this article is on rights to minerals, not petroleum, and as such, exploration rights and production rights are not discussed.

This article proceeds along the following lines. First, the law of abandonment in South Africa (specifically related to property) is discussed. Academic views on abandonment of real rights are evaluated. The article considers the legislative context in which such an abandonment of rights to minerals (if possible) would operate. Analysis of the possibility of abandoning rights granted in terms of the MPRDA is undertaken in light of theoretical observations in respect of the abandonment of property rights,[8] with particular reference to the seminal article on the subject by Peñalver.[9] The article seeks to answer the question as to whether abandonment, as envisaged by the MPRDA, is possible within the legal framework that the Act creates, and outlines the potential consequences of abandonment for the would-be abandoner. Suggestions for reform, with a view to bringing clarity on the Act, are provided.

---

2 See s 17(1) (prospecting rights) and s 23(1) (mining rights) of the MPRDA.

3 16 of 1967.

4 S 5(1) of the MPRDA.

5 See s 56(*f*) of the MPRDA.

6 See s 43(3)(*a*) and (4) of the MPRDA.

7 See s 44 of the MPRDA.

8 See Strahilevitz "The Right to Abandon" 2010 158 *University of Pennsylvania Law Review* 355; Peñalver "The Illusory Right to Abandon" 2010 109 *Michigan Law Review* 191.

9 Peñalver 2010 *Michigan Law Review* 191.

2 ABANDONMENT: A MISUNDERSTOOD CONCEPT

Superficially, abandonment or waiver of rights appears to be a simple concept in law.[10] In respect of a private-law claim (such as a debt), it is open to the creditor in general to abandon the claim – for example, through the forgiveness of the debt.[11] An heir may exercise her right to reject an inheritance.[12] For immaterial property rights in respect of which registration would usually be required (for example, patents), the right may be waived and the registration thereof deleted.[13] There is little to no restriction on the waiver of such incorporeal rights by the holder.

Where real rights in specific things are concerned, if a person no longer wishes to be the owner of the thing or be the holder of a right, he may abandon it. Where movables are concerned, all that is required is the physical relinquishment of the thing coupled with an intention to be no longer the owner thereof.[14] With incorporeal property (such as servitudes), it is open to the holder (such as the owner of a dominant tenement) to abandon the right.[15]

However, on closer inspection, abandonment is not as easy to achieve as one may believe. As Peñalver notes, one needs to distinguish between an informal physical act that one may colloquially refer to as abandonment, on the one hand, and "the formal legal judgment that an owner has successful and *unilaterally* severed ties of ownership", on the other.[16] The latter is heavily restricted with regard to corporeal property, to the point that a "right" to abandon cannot be said to exist.[17] While the observation above by Peñalver is in respect of United States law, it is relevant to South African law.[18]

---

10 See the discussion of the concept in property law texts such as Van der Merwe *Sakereg* 2ed (1989) 224–227; Muller, Brits, Boggenpoel and Pienaar *Silberberg and Schoeman's The Law of Property* 6ed (2019) 158–169, 305–306; Van der Merwe and Pope "Part III: Property" in Du Bois (ed) *Wille's Principles of South African Law* 9ed (2007) 490–491. On the abandonment of rights in general, see Joubert "Afstanddoening van Regte" 1981 14 *De Jure* 3.

11 Joubert 1981 *De Jure* 4; Hutchison and Du Bois "Chapter 26: Contracts in General" in Du Bois (ed) *Wille's Principles of South African Law* 9ed (2007) 836.

12 Joubert 1981 *De Jure* 5; Paleker "Chapter 25: Succession" in Du Bois (ed) *Wille's Principles of South African Law* 9ed (2007) 717.

13 Joubert 1981 *De Jure* 5. See s 64(1) of the Patents Act 57 of 1978. Note, however, the surrender of a patent would be subject to objections of interested persons in terms of s 64(2).

14 Van der Merwe *Sakereg* 224; Muller *et al Silberberg and Schoeman's The Law of Property* 158; Van der Merwe and Pope in Du Bois (ed) *Wille's Principles of SA Law* 490; *S M Goldstein & Co (Pty) Ltd v Gerber* 1979 (4) SA 930 (A) 936F–G; *Salvage Association of London v SA Salvage Syndicate Ltd* (1906) 23 SC 169 171.

15 Van der Walt *The Law of Servitudes* (2016) 572–578; Van der Merwe *Sakereg* 537–539.

16 Peñalver 2010 *Michigan Law Review* 196.

17 Peñalver 2010 *Michigan Law Review* 206.

18 See the discussion in Cramer *The Abandonment of Landownership: A Proposed Model for Regulated Exit* (doctoral thesis, University of Cape Town) 2020 ch 2.

Abandonment, in the true sense of the word, is a unilateral act.[19] It involves an owner acting independently to divest herself of a right, whether ownership or otherwise. Should the cooperation of a third party be necessary to extinguish the right, then what occurs is not truly abandonment, as the cooperation of third parties negates the unilateral nature of abandonment.[20]

With regard to movable corporeal property, it is difficult to see how such abandonment can be achieved without violating municipal by-laws on the disposal of refuse or national legislation such as the National Environmental Management: Waste Act.[21] The Act provides a wide definition of "waste", including "any substance, material or object, that is unwanted, rejected, abandoned, discarded or disposed of … whether or not such substance, material or object can be re-used, recycled or recovered".[22] Such a definition is wide enough to include any unwanted thing, whether it be a functional but obsolete laptop or an empty soda bottle. Consequently, to divest oneself of unwanted property, it is necessary to have the cooperation of a third party, whether that be the municipality collecting refuse or a specialised recycler of e-waste. The law, ultimately, heavily restricts the manner in which one may dispose of unwanted corporeal property.

Where immovable property is concerned, the abandonment of real rights is a point of contention among South African property lawyers.[23] Case law, to date, has provided no conclusive answers.[24] Sonnekus argues that the abandonment of landownership is possible in view of South Africa's negative registration system in respect of land.[25] All that is required is physical

19 Peñalver 2010 *Michigan Law Review* 194.

20 Peñalver 2010 *Michigan Law Review* 194–195.

21 59 of 2008.

22 S 1 of 59 of 2008.

23 See Cramer *The Abandonment of Landownership* ch 4; Cramer "The Abandonment of Landownership in South African and Swiss Law" 2017 134 *SALJ* 870; Mostert "No Right to Neglect? Exploratory Observations on How Policy Choices Challenge the Basic Principles of Property" in Scott and Van Wyk (eds) *Property Law Under Scrutiny* (2015) 26–28; Sonnekus "Abandonnering van Eiendomsreg op Grond en Aanspreeklikheid vir Grondbelasting" 2004 (4) *TSAR* 747; Sonnekus "Enkele Opmerkings na Aanleiding van die Aanspraak op Bona Vacantia as Sogenaamde Regale Reg" 1985 (2) *TSAR* 121; Sonnekus "Grondeise en die Klassifikasie van Grond as Res Nullius of as Staatsgrond" 2001 (1) *TSAR* 84.

24 In reported case law in which it was argued landownership had been abandoned, the courts found abandonment had not occurred as the requisite intention had not been established. As such, the courts did not consider how, exactly, abandonment of landownership may be given effect to. See *Minister van Landbou v Sonnendecker* 1979 (2) SA 944 (A); *Meintjes NO v Coetzer* 2010 (5) SA 186 (SCA); Cramer *The Abandonment of Landownership* 32–36; Cramer 2017 *SALJ* 881–882. A recent unreported case, *M v M* [2020] ZAGPPHC 155, found that, on the facts of the case before it, the necessary intention existed for co-ownership in immovable property to be abandoned (par 44–55), but the court did not delve into the practicalities of a finding of abandonment of immovable property. Leave to appeal the judgment was granted; one of the reasons for granting leave to appeal was that academic opinion differs on the possibility of abandoning landownership, as well as the absence of case authority for the abandonment of landownership. As of writing, it does not seem the appeal has been heard. See *Molema v Matabologa* [2020] ZAGPPHC 396 par 8–9.

25 Sonnekus 2004 *TSAR* 756. See also Muller *et al Silberberg and Schoeman's The Law of Property* 158–159.

relinquishment of the property, coupled with the intention to be no longer the owner, as in the case of movable property.[26] He argues that it is not necessary to comply with the formalities of the Deeds Registries Act[27] for an owner to abandon her land.[28] Furthermore, it is his view that once abandoned, immovable property is *res derelictae* and open to appropriation by the first taker.[29] Mostert, on the other hand, argues that abandonment of landownership in South African law is not possible in light of the principle of publicity.[30] The principle of publicity is not given effect to as there is no specific mechanism in the Deeds Registries Act, for a landowner to strike her name from the title deed and so unilaterally end her relationship with her property.[31] It is submitted that the view of Mostert is correct.[32] Sonnekus is correct that it is possible for the ownership situation in respect of land to change in the context of original acquisition of ownership without registration actions.[33] However, the principle of publicity is given effect to in the context of original acquisition of ownership.[34] For example, for acquisitive prescription, publicity is served through the requirement that land be held openly as if by the owner for an uninterrupted period of 30 years.[35] The abandonment of landownership, in the absence of a mechanism through which ownership may be terminated, simply cannot give effect to the principle of publicity in the same manner.[36] The abandonment of landownership in South African law is thus not possible, given the lack of a mechanism through which such abandonment may be achieved.[37] It should be noted that the standard view in South African property law is that should the abandonment of ownership in land be possible, such land is *bona vacantia* and thus accrues to the State.[38]

Even with incorporeal limited real rights, abandonment may not be as simple as first assumed. Praedial servitudes,[39] as limited real rights in the

---

26 Van der Merwe *Sakereg* 224; Muller *et al Silberberg and Schoeman's The Law of Property* 158; Van der Merwe and Pope in Du Bois (ed) *Wille's Principles of SA Law* 490; *S M Goldstein & Co (Pty) Ltd v Gerber supra* 936F–G; *Salvage Association of London v SA Salvage Syndicate Ltd supra* 171.

27 Act 47 of 1937.

28 Sonnekus 2004 *TSAR* 751–752.

29 Sonnekus 2004 *TSAR* 751ff.

30 Mostert in Scott and Van Wyk (eds) *Property Law under Scrutiny* 26–27.

31 *Ibid*.

32 See detailed discussion in Cramer *The Abandonment of Landownership* ch 4; Cramer 2017 *SALJ* 870.

33 Cramer *The Abandonment of Landownership* 63; Cramer 2017 *SALJ* 882.

34 Cramer *The Abandonment of Landownership* 63–70; Cramer 2017 *SALJ* 882–886.

35 Cramer *The Abandonment of Landownership* 63–64; Cramer 2017 *SALJ* 882–883.

36 Cramer *The Abandonment of Landownership* 65; Cramer 2017 *SALJ* 883–884.

37 Cramer *The Abandonment of Landownership* 63–70; Cramer 2017 *SALJ* 882–886.

38 Van der Merwe and Pope in Du Bois (ed) *Wille's Principles of SA Law* 492; Van der Merwe *Sakereg* 227; Van der Merwe "Minister van Landbou v Sonnendecker 1979 2 SA 944 (A)" 1980 (2) *TSAR* 183; Miller *The Acquisition and Protection of Ownership* (1986) 8–9.

39 In South African law, a praedial servitude is a limited real right, in which a burden is "imposed on one piece of land (servient tenement) in favour of another piece of land (dominant tenement)" – for example, a right of way. See Muller *et al Silberberg and Schoeman's The Law of Property* 373. Praedial servitudes differ from personal servitudes, which are "established in favour of particular persons over things and may confer a variety of benefits on their holders" – for example, a usufruct that entitles the holder to live on and

property of another,[40] serve as just such an example. It may be assumed that such a right may be freely abandoned by the owner of a dominant tenement, at will, and entirely unilaterally. However, Van der Walt explains that rather than being a unilateral act on the holder's part, the termination of servitudes through abandonment has a more bilateral nature.[41] The termination of a servitude through abandonment will usually occur through an agreement between the parties – the owner of the dominant tenement and the owner of the servient tenement.[42] Even in the absence of express agreement, tacit abandonment of a servitude has a bilateral nature, as the parties are cooperating, even if implicitly.[43] For example, in respect of a positive servitude, the owner of the dominant tenement may acquiesce to conduct that effectively precludes the exercise of her right.[44] In respect of negative servitudes, the owner of the dominant tenement may acquiesce to conduct that runs contrary to the provisions of the servitude.[45] While both parties may be silent, they are cooperating.[46] However, abandonment of a limited real right such as a servitude only takes effect in respect of third parties once expunged from the Deeds Registry.[47]

The position above is reflected in case law. In *Edmeades v Scheepers*,[48] the court found that the holder of a servitude had lost his right by virtue of permitting the owner of the servient tenement to act in a manner that frustrated the terms of the servitude for eighteen years.[49] In *Nowers NO v Burmeister*,[50] the applicants had built a wall in excess of the height permitted by a servitude, in addition to permitting foliage to grow in excess of the height permitted by the servitude. The court in this case found that the applicants' conduct had amounted to an abandonment of the provisions of the servitude.[51] The most recent case concerning the abandonment of a servitude is *Pickard v Stein*.[52] The court in *Pickard* stated that the abandonment of servitudes may be express or tacit – that is it may be inferred through the conduct of the owners of the dominant and servient tenements.[53] The case concerned a servitude of light. The owner of the dominant tenement had given the respondents permission to construct a

use a particular piece of land. See Muller *et al Silberberg and Schoeman's The Law of Property* 382–383.

40 Muller *et al Silberberg and Schoeman's The Law of Property* 53.

41 Van der Walt *The Law of Servitudes* 557–558. In *Pickard v Stein* 2015 (1) SA 439 (GJ), the court stated that the "requirement that waiver operates bilaterally excludes the notion of a unilateral abandonment or waiver of a servitude, as contended for on behalf of Pickard. However, abandonment or waiver satisfying that requirement may still be inferred as having tacitly come about through the conduct of the parties" (par 57).

42 Van der Walt *The Law of Servitudes* 573.

43 Van der Walt *The Law of Servitudes* 577–578.

44 *Ibid*.

45 *Ibid*.

46 *Ibid*.

47 Van der Walt *The Law of Servitudes* 573–574.

48 (1880–1882) 1 SC 334.

49 *Edmeades v Scheepers supra* 339–340.

50 [2011] ZAECELLC 8.

51 *Nowers NO v Burmeister supra* par 40–42.

52 2015 (1) SA 439 (GJ).

53 *Pickard v Stein supra* par 47.

wall that effectively obstructed the servitude of light "in all its components".[54] By giving permission, the court found that the owner of the dominant tenement had abandoned the servitude.[55] As Van der Walt notes, the *Pickard* case demonstrates the bilateral nature of the abandonment of a negative servitude, given the manner in which the owner of the dominant tenement tolerates or even permits conduct that negates her rights in terms of the servitude.[56]

Prior to the commencement of the MPRDA, rights to minerals may have been capable of abandonment in a manner similar to servitudes.[57] However, unlike normal servitudes, the lapsing of mineral rights did not necessarily mean these rights would unite with the servient piece of land.[58] According to Van der Merwe, abandonment could be achieved through a waiver of the right and cancellation of the registration of the right.[59] If the holder of a right to minerals ceased to exist (for example, if a company were liquidated), then the right would most likely be *bona vacantia* and fall to the State.[60] Authority for the position set out by Van der Merwe is found in the case of *Ex Parte Marchini*.[61] The applicant, as owner of the land, claimed the mineral rights related to his land, as the right holder had since been liquidated. The mineral rights had not been disposed of by the liquidators, which the applicant contended meant the rights were considered "worthless" and thus abandoned. The court, however, stated the position that, as quasi-servitudes, mineral rights did not simply revert to the landowner when the holder ceased to exist (or if the right were abandoned).[62] Furthermore, authority supported the position that mineral rights that were abandoned, or where the holder ceased to exist without proper disposal thereof, become *bona vacantia*.[63]

Even the abandonment of incorporeal property rights such as servitudes is not unrestricted. In circumstances where the abandonment of a servitude would result in serious harm to the servient tenement, the owner of the dominant tenement may not unilaterally abandon her right.[64] This rule would apply in circumstances where certain works need to be maintained, and the possibility of restoring the land to its natural state is unlikely[65] – for example, a servitude requiring the servitude holder to bear the costs of maintaining structures needed to divert a river running over the servient tenement.[66]

---

54 *Pickard v Stein supra* par 65.
55 *Pickard v Stein supra* par 72.
56 Van der Walt *The Law of Servitudes* 577.
57 Van der Merwe *Sakereg* 558–559; Hart *The Abandonment of Rights Under the Mineral and Petroleum Resources Development Act* (LLB paper, University of Cape Town) 2013 15–17.
58 Van der Merwe *Sakereg* 558.
59 Van der Merwe *Sakereg* 558; Hart *The Abandonment of Rights* 15.
60 Van der Merwe *Sakereg* 558; Hart *The Abandonment of Rigths* 15–17.
61 1964 (1) SA 147 (T).
62 *Ex Parte Marchini supra* 150F–G.
63 *Ex Parte Marchini supra* 150H.
64 Muller *et al Silberberg and Schoeman's The Law of Property* 401; Van der Walt *The Law of Servitudes* 572–573; Hall and Kellaway *Servitudes* 3ed (1973) 144.
65 Hall and Kellaway *Servitudes* 144.
66 *Ibid*.

The case authority for the prohibition against abandoning servitudes, where doing so may result in injury to the servient tenement, is *Du Plessis v Philipstown Municipality*.[67] The municipality in this case had diverted a river flowing across land owned by the plaintiff, in accordance with an agreement between the parties. Diverting the river required the construction of a weir and a wall, effectively to dam the water above the wall. The municipality sought to abandon the servitude, and the wall, so diverting the river back to its original course. Owing to the manner in which the diversion of the river had altered the land, there was no guarantee that the land could be returned to its natural state. Diversion of the river back to its original course thus posed a significant threat of injury to the plaintiff's land.[68] Given the possibility of harm to the servient tenement, the court stated that the municipality was not entitled to abandon the servitude and remove the wall (thus diverting the river back to its original course).[69] The municipality's request to abandon the servitude while leaving the existing wall in place was also rejected, as it could not simply be permitted to divest itself of its duties to maintain the wall.[70]

What is clear is that the circumstances in which true, unilateral abandonment may occur in South African law are highly circumscribed. Even for incorporeal property rights, it is not uncommon for the cooperation of third parties to be necessary to facilitate abandonment. Abandonment thus operates as a very circumscribed and contextual entitlement of ownership, reflecting the "constant interplay between autonomy and obligation".[71]

3 NATURE OF RIGHTS UNDER THE MPRDA

The MPRDA classifies prospecting rights and mining rights as limited real rights,[72] which can be registered in terms of the MTRA. Badenhorst suggests that the use of the label "limited real right" be viewed as a means by which investors are provided with greater security of tenure.[73] In South African law, a limited real right is a right in property owned by another person.[74] South African law does not have a *numerus clausus* of real rights, and thus the development of novel forms of real rights remains possible (beyond those created by the legislature through statute).[75] Unlike limited real rights at common law, these statutory rights are granted by the State in the land of an individual owner, who cannot prevent the grant or exercise of the right.[76]

---

67 1937 CPD 335.

68 *Du Plessis v Phillipstown supra* 340–342.

69 *Du Plessis v Phillipstown supra* 339–343.

70 *Du Plessis v Phillipstown supra* 343.

71 Peñalver 2010 *Michigan Law Review* 193.

72 S 5(1) of the MPRDA.

73 Badenhorst "The Nature of New Order Prospecting Rights and Mining Rights: A Can of Worms?" 2017 134(2) *SALJ* 361 362; Badenhorst "Security of Mineral Tenure in South Africa: Carrot or Stick?" 2014 32(1) *JENRL* 5 17.

74 Muller *et al Silberberg and Schoeman's The Law of Property* 54.

75 Muller *et al Silberberg and Schoeman's The Law of Property* 54–55.

76 Badenhorst 2017 *SALJ* 369.

Since the legislature classifies the most important rights created in terms of the MPRDA as limited real rights, there is no need to expand on this point further.

The nature of the rights to minerals granted in terms of the MPRDA, and especially the continued relevance and application of property law to them, has been subject to academic scrutiny.[77] Original modes of acquisition (such as *occupatio* or prescription) are not possible in respect of rights granted in terms of the MPRDA.[78] *Occupatio* (or appropriation) is not possible because the acquisition of rights to minerals under the MPRDA cannot be done through a unilateral act on the part of the acquirer.[79] Such rights also cannot be acquired (or lost) through prescription; this can happen only in terms of the procedures set out in the Act itself.[80] The manner in which rights are granted in terms of the MPRDA and then registered in terms of the MTRA is comparable to derivative acquisition.[81] It is true that the granting of a right in terms of the MPRDA is a unilateral administrative act.[82] The grant of the right, however, is followed by the conclusion of a notarial agreement between the grantee and the State.[83] Following the execution of this agreement, the grantee has a claim to the registration of the right in the Mineral and Petroleum Titles Registration Office, following which a limited real right comes into existence.[84] These three legal processes are distinct from one another.[85]

The MPRDA contains its own remedies for holders of rights,[86] as well as setting out the consequences of the granting and registration of those rights.[87] Administrative law will be the relevant avenue for redress if a right holder is aggrieved by government action that impacts upon her right – for example, the granting to another party of an overlapping right, or the suspension or cancellation of a right.[88] The MPRDA has its own appeal

---

77 See Van Niekerk "Mineral Tenure Security, Registration, and Enforceability of Rights: Debunking the Property-law Paradigm" 2018 135(1) *SALJ* 159; Badenhorst 2017 *SALJ* 361; Mostert "The 'Thing' Called 'Mineral Right': Re-examining the Nature, Content and Scope of a Rather Confounding Concept in South African Law" 2014 17(1) *Recht in Afrika* 28; Van der Schyff *Property in Minerals and Petroleum* (2016) ch 8.

78 Van Niekerk 2018 *SALJ* 175–180.

79 Van Niekerk 2018 *SALJ* 175.

80 *Ibid*.

81 Van Niekerk 2018 *SALJ* 176. Van Niekerk explains that, in terms of s 5(1)(*d*) of the MPRDA, the status of limited real rights is accorded to prospecting rights and mining rights granted in terms of the Act, so long as they are registered in terms of the MTRA. Section 2(4) states that the "registration of a right in terms of this Act in the Mineral and Petroleum Titles Registration Office shall constitute a limited real right binding on third parties".

82 Van Niekerk 2018 *SALJ* 177; Badenhorst 2017 *SALJ* 366, 380. See *Minister of Mineral Resources v Mawetse (SA) Mining Corporation (Pty) Ltd* 2016 (1) SA 306 (SCA) par 24–26.

83 Badenhorst 2017 *SALJ* 366, 380.

84 Badenhorst 2017 *SALJ* 363, 380.

85 *Minister of Mineral Resources v Mawetse (SA) Mining Corporation (Pty) Ltd supra* par 19.

86 See s 96 of the MPRDA, which provides for an internal appeal procedure and for when parties may approach the courts. See also Van Niekerk 2018 *SALJ* 180–185.

87 See, for example, ss 5, 17 and 23 of the MPRDA. See also Van Niekerk 2018 *SALJ* 180–185.

88 Van Niekerk 2018 *SALJ* 180. See s 1 of the Promotion of Administrative Justice Act 3 of 2000, which defines administrative action as "any decision taken, or any failure to take a

procedure that must be followed by aggrieved parties prior to seeking to take a decision on judicial review.[89]

Enforcement of these rights against third parties (such as landowners or lawful occupiers) is also regulated by the MPRDA, as well as by some private-law remedies.[90] Some common-law principles and remedies do remain relevant, so long as they are consistent with the MPRDA.[91] Prospecting and mining rights still need to be exercised in line with the common-law principle of *civiliter modo*.[92] That is to say, they must be exercised in a reasonable manner causing as little inconvenience as possible to the landowner or lawful occupier.[93] Van Niekerk points out that the entitlements of prospecting rights and mining rights flow from section 5(3) of the MPRDA, which empowers a right holder to enter upon land and to engage in prospecting or mining, as well as incidental activities.[94] Section 5A(c) requires that any landowner or lawful occupier be given a minimum of 21 days' notice prior to the right holder entering the land to exercise her rights.[95] Where conflict arises between a right holder and landowners or lawful occupiers before mining commences, it is not private-law remedies that immediately apply, but a specific conflict-resolution provision in the MPRDA.[96] According to the Constitutional Court in *Maledu v Itereleng Bakgatla Mineral Resources (Pty) Ltd*,[97] only once the right holder has exhausted the procedure set out in the MPRDA may she approach a court for relief (such as an eviction or interdict) against an intransigent landowner or lawful occupier.[98] The only exception to this situation is where the landowner or lawful occupier refuses to comply with the procedure set

decision by- (*a*) an organ of state, when- … (ii) exercising a public power or performing a public function in terms of any legislation".

89 Van Niekerk 2018 *SALJ* 180. See s 96 of the MPRDA.

90 Van Niekerk 2018 *SALJ* 180–185.

91 S 4(2) of the MPRDA. See Badenhorst and Van Heerden "Conflict Resolution Between Holders of Prospecting or Mining Rights and Owners (or Occupiers) of Land or Traditional Communities: What Is Not Good for the Goose is Good for the Gander" 2019 136 *SALJ* 303 315–318; *Anglo Operations Ltd v Sandhurst Estates (Pty) Ltd* 2007 (2) 363 (SCA) par 21–22.

92 Van der Schyff *Property in Minerals and Petroleum* 602; *Maledu v Itereleng Bakgatla Mineral Resources (Pty) Ltd* 2019 (2) SA 1 (CC) par 58; *Anglo Operations Ltd v Sandhurst Estates (Pty)* Ltd *supra* par 21–22.

93 *Ibid*.

94 Van Niekerk 2018 *SALJ* 182.

95 Van Niekerk 2018 *SALJ* 182–183.

96 See s 54 of the MPRDA. See *Maledu v Itereleng Bakgatla Mineral Resources (Pty) Ltd supra* par 85–97. However, the right holder is not precluded from approaching the court where the landowner or lawful occupier is not cooperating – for example, where the landowner is denying access while seeking expropriation of the land in question. See *Joubert v Maranda Mining Co (Pty) Ltd* 2010 (1) SA 198 (SCA) par 15–16.

97 *Supra*.

98 *Maledu v Itereleng Bakgatla Mineral Resources (Pty) Ltd supra* par 85–97. See the discussion of this part of the *Maledu* judgment in Badenhorst and Van Heerden 2019 *SALJ* 321–322. They submit that the SCA in *Maranda* "did not require the remedies in terms of s 54 first to be exhausted but … accepted that the jurisdiction of the courts is not excluded by s 54". Thus, the remedies contained in the MPRDA, in the SCA's view, do not need to be exhausted before a party may approach the courts.

out in the MPRDA.[99] Effectively, private-law remedies operate to fill the gaps left by the MPRDA in respect of the enforcement of limited real rights created by the Act, whether against government or private persons.[100]

4 OBLIGATIONS ATTACHING TO RIGHTS UNDER THE MPRDA

The rights granted in terms of the MPRDA do not endow the holder only with entitlements, but also with significant responsibilities and obligations.[101] The application phase for a right includes consultation with relevant stakeholders (such as landowners and lawful occupiers),[102] as well as affected communities.[103] Furthermore, environmental reports must be submitted in terms of Chapter 5 of the National Environmental Management Act.[104] Financial provision for rehabilitation of the land, including "ongoing post decommissioning management of negative environmental impacts", is required before mining or prospecting operations can begin.[105] Financial provision is not a once-off obligation, but an integral obligation to the continuation of the right. It entails annual assessments of environmental liability, followed by a submission of an audit report outlining the adequacy of the existing financial provision.[106] Failure to satisfy the Minister with a report may lead to the right holder incurring the costs of an assessment conducted by an independent assessor appointed by the Minister.[107] The Minister may also instruct the right holder to increase the financial provision on an annual basis on the basis of this assessment.[108] Financial provision can be withheld from the right holder, in whole or in part, upon termination of the right should the right holder fail to "rehabilitate the environment or to manage any impact on the environment".[109]

Once a right is terminated, stringent mine closure obligations bind the previous right holder.[110] Until the issuing of a closure certificate, the right holder

> "remains responsible for any environmental liability, pollution, ecological degradation, the pumping and treatment of extraneous water, compliance to

99 *Maledu v Itereleng Bakgatla Mineral Resources (Pty) Ltd supra* par 87.
100 Van Niekerk 2018 *SALJ* 185.
101 Van der Schyff *Property in Minerals and Petroleum* 612.
102 Ss 16(4)(*b*), 22(4)(*b*) and 27(5)(*a*) of the MPRDA.
103 S 10 of the MPRDA.
104 107 of 1998. See ss 16(4)(*a*), 22(4)(*a*) and 27(5)(*b*) of the MPRDA.
105 S 24P(1) of 107 of 1998.
106 S 24P(3) of 107 of 1998.
107 S 24P(4) of 107 of 1998.
108 S 24P(3)(*a*) of 107 of 1998.
109 S 24P(2) of 107 of 1998.
110 See s 43 of the MPRDA concerning the requirements that a right holder must adhere to in order to be issued with a closure certificate following the termination of her right or cessation of mining or prospecting operations.

> the conditions of the environmental authorisation and the management and sustainable closure thereof."[111]

Effectively, the obligations that attach to a prospecting right or a mining right may follow the right holder indefinitely after the termination of the right. The only manner in which a right holder can truly escape these obligations is to cease to exist, which is unfortunately often the case in the South African context.[112]

5 ABANDONMENT UNDER THE MPRDA

The MPRDA uses the term "abandon" in seven places in respect of rights to minerals.[113] Section 56(*f*) is the provision that expressly states that a right to minerals granted in terms of the MPRDA will lapse when "it is abandoned". Section 43(3)(*a*) provides that the lapsing of a right through abandonment triggers an obligation on the former right holder to apply for a closure certificate. Section 43(4) requires an application for a closure certificate in the event of abandonment to be made to the relevant Regional Manager within 180 days of the lapsing of the right. Section 44, concerning the removal of "buildings, structures and other objects", also applies in the event of the lapsing of a right to minerals through abandonment.

The mention of abandonment in the MPRDA has drawn the attention of Van der Schyff, who finds the possibility of a right holder being empowered to abandon a right granted in terms of the MPRDA inconsistent with the Act's objectives.[114] In particular, empowering a right holder to abandon a right granted in terms of the MPRDA fails to take into account that such a right comes with significant responsibilities and obligations.[115] As such, unilateral abandonment should not be possible in terms of the legal framework created by the MPRDA.[116]

While the MPRDA refers to the possibility of the lapsing of a right through abandonment, it does not explicitly clarify how abandonment may be effected.[117] Section 107(1)(*g*) provides that the Minister may make regulations regarding the abandonment of rights to minerals, but the existing

---

111 S 43(1) of the MPRDA.

112 Field has highlighted the problem of mining companies selling rights on to smaller concerns who are ill-equipped to rehabilitate the environment and manage the environmental impacts of prospecting or mining operations, a practice she calls "pass-the-parcel". Often, when it is necessary to conduct rehabilitation of mined-upon land, the last holder of the prospecting right or mining right may quickly cease to exist. See Field *State Governance of Mining, Development and Sustainability* (2019) 335–336; Field *Facilitating Dereliction? How the South African Legal Regulatory Framework Enables Mining Companies to Circumvent Closure Duties* Paper Presented at conference titled 9th International Conference on Mine Closure, University of Witwatersrand and Australian Centre for Geomechanics, (October 2014) 7; Humby "The Spectre of Perpetuity Liability for Treating Acid Water on South Africa's Goldfields: Decision in *Harmony II*" 2013 31 *JERL* 453 459–460, 463.

113 See ss 30(1)(*d*), 30(5), 43(3)(*a*), 43(4), 44(1), 56(*f*) and 107(1)(*g*).

114 Van der Schyff *Property in Minerals and Petroleum* 508–509.

115 Van der Schyff *Property in Minerals and Petroleum* 509.

116 *Ibid*.

117 *Ibid*.

MPRDA regulations do not explicitly do so. In this respect, to determine how abandonment may be effected in terms of the MPRDA, it is necessary to consider section 11(1) of the Act.

Section 11 of the MPRDA provides for the "[t]ransferability and encumbrance of prospecting rights and mining rights". Section 11(1) states that ministerial consent is required for the cession, transfer, letting, subletting, assignment, alienation or any disposal of a prospecting or mining right. Abandonment is not mentioned explicitly. However, given the Act's mention of the possibility of abandonment in later sections, it is reasonable to interpret "otherwise disposed of" as including abandonment. Although the section purports, in its title, to be concerned with transferability and encumbrance, the word "disposed" is a possible catch-all for acts other than transfers and encumbrances. The Oxford English Dictionary defines "dispose" as "[t]o put or get [anything] off one's hands … to get rid of".[118] The Oxford English Dictionary also defines "abandon" as "[t]o let go, give up, renounce".[119]

As abandonment (in the context of the law of property) entails relinquishing a thing with the intention of no longer being owner,[120] such an act evidently can be classified as a disposal. Thus, it is submitted that abandonment under the MPRDA is subject to ministerial consent in terms of section 11(1).[121]

Furthermore, in light of the buildings and other structures that usually accompany mining operations, one can potentially even argue that, at common law, these limited real rights cannot simply be abandoned. The MPRDA makes provision for common-law rules not inconsistent with the Act to continue to operate within the new legal framework.[122] Given the obligations that attach to a mining or prospecting right, a common-law rule restricting abandonment where harm would inevitably follow to the servient tenement appears consistent with the Act. Following the authority of *Du Plessis v Philipstown Municipality*,[123] a limited real right (such as that granted in terms of the MPRDA) cannot simply be abandoned where it would result in harm to the servient tenement. Indisputably, failure by a right holder to comply with her obligations and rehabilitate the servient tenement constitutes harm.

Dale argues that a holder may abandon a mining right or prospecting right "as it relates to part of the relevant area, or insofar as it relates to some of the minerals".[124] Referral is made to regulation 76(4) of the MPRDA regulations,[125] which contemplates the relinquishment by the right holder of

---

118 "dispose, v." www.oed.com (accessed 2022-02-10).

119 "abandon, v." www.oed.com (accessed 2022-02-10).

120 Van der Merwe *Sakereg* 224 537–539; Muller *et al Silberberg and Schoeman's The Law of Property* 158; Van der Walt *The Law of Servitudes* 572–578.

121 This conclusion was also reached in Hart *The Abandonment of Rights* 22.

122 See s 4(2) of the MPRDA.

123 *Supra*.

124 Dale *SA Mineral and Petroleum Law* (2021) 487.

125 GN R527 in *GG* 26275 of 2004-04-23.

areas that have been prospected.[126] For such relinquishment, written notice with the relevant details must be submitted to the Regional Manager or Designated Agency.[127] The right holder must also not have any outstanding prospecting fees.[128] While section 56(*f*) of the MPRDA does not provide for the manner in which a right may be abandoned, written notice would be sufficient in the view of Dale (such as that foreseen in regulation 76(4)).[129] Registration of such abandonment would then take place in terms of section 5(1)(*d*) of the MTRA.[130] In terms of section 12A(3), the registration of the abandonment would need to be accompanied by a "plan or diagram depicting the area affected".[131]

The argument put forward by Dale does not consider section 11(1) of the MPRDA, which requires ministerial consent for disposal of a right. While a right holder may be entitled to seek to relinquish her right or any part thereof, she is not entitled to do so unilaterally. The right holder may submit written notice in pursuit of such relinquishment, but it is submitted there is no obligation on the Minister to accept. In any case, any such relinquishment of the right automatically triggers the obligation to obtain a closure certificate and to comply with the stringent rehabilitation requirements that flow therefrom.

Effectively, unilateral abandonment is not possible in the legal framework created by the MPRDA. This position is reinforced by applying the common-law rule restricting abandonment of limited real rights where doing so would harm the servient tenement. What is referred to as abandonment in the MPRDA is perhaps better classified as a form of surrender, because another party (being the Minister) has the discretion to accept or reject the conveyance of the right.[132] Surrender would ultimately entail obtaining the Minister's consent in the same manner for the transfer or encumbrance of a right granted in terms of the MPRDA.[133] In any event, once abandonment or surrender is achieved with ministerial consent, the obligations attached thereto remain. Abandonment or surrender only achieves the extinguishment of entitlements.

It is best classified as a form of surrender, as the right holder must secure the Minister's consent to relinquish the right, and this will probably be subject to the Minister's conditions. Furthermore, "surrender" would appear to fit better the consequences of relinquishing the right, since the termination of the right (that is, the entitlements) is not an end to the obligations attached thereto. The right holder will still be obligated to take the necessary steps to

126 Dale *SA Mineral and Petroleum Law* 487.

127 Reg 76(4)(a).

128 Reg 76(4)(b).

129 Dale *SA Mineral and Petroleum Law* 487.

130 See Dale *SA Mineral and Petroleum Law* 488.

131 Dale *SA Mineral and Petroleum Law* 488.

132 The Oxford English Dictionary defines "surrender" as "[t]o give up (something) out of one's own possession or power into that of another who has or asserts claim to it", or "[t]o give up, resign, abandon, relinquish possession of, esp. in favour of or for the sake of another" ("surrender, v." www.oed.com (accessed 2022-02-10)). Unlike the term "abandon", it gives discretion to the other party to accept or reject the conveyance.

133 S 11(1) of the MPRDA.

rehabilitate the land and secure a closure certificate. The term "abandonment" does not, it is submitted, adequately capture the consequences of the termination of a right in this manner.[134]

It is true that at common law the abandonment of a limited real right such as a servitude can also be framed as a bilateral act – a tacit agreement between two parties.[135] Following the authority of *Pickard*,[136] it may be suggested that limited real rights granted in terms of the MPRDA may similarly be abandoned by agreement.[137] However, absent circumstances in which abandonment of a servitude may cause harm to the servient tenement,[138] there is nothing in law to stop the holder of a servitude from taking the step to abandon without the agreement of the owner of the servient tenement, even if most cases demonstrate cooperation between the parties. A limited real right granted in terms of the MPRDA will always require the consent of the Minister for abandonment (or surrender) to be effected and can thus be distinguished from limited real rights at common law in this respect.

The reasons that a party would wish to abandon (or surrender) a valuable right to mine, or prospect, are unclear. To date, case law on the abandonment of rights granted in the MPRDA has involved a claim by a third party that the holder of a right has abandoned the right, not a claim by the right holder to abandon.[139] In *Van den Heever v Minister of Minerals and Energy*,[140] the court concluded that the intention to abandon a right to mine diamonds over a number of portions of land could not be established on the facts.[141] In *Minister of Mineral Resources v Mawetse (SA) Mining Corporation (Pty) Ltd*,[142] it was found that a prospecting right had expired by effluxion of time, and it was thus not necessary to consider whether the right had been abandoned.[143] Given the liabilities that attach to a right, even upon its lapsing, it would appear unlikely that a right holder would elect to abandon. In any case, any such election would still be subject to ministerial consent. As noted, the only manner in which a right holder may truly escape liability is by ceasing to exist.

---

134 This state of affairs is similar to that which prevails in the context of immovable property, which cannot be abandoned in South African law (Cramer *The Abandonment of Landownership* ch 4; Cramer 2017 *SALJ* 870; Mostert in Scott and Van Wyk (eds) *Property Law Under Scrutiny* 26–28). In the context of immovable property, some landowners who find themselves saddled with ownership of negative-value property, for which they owe municipal rates, will enter into an "abandonment agreement" with the relevant municipality. In return for transferring the property to the municipality, any arrears owed are forgiven. Owing to the nature of these agreements, it is submitted that "surrender agreements" would be a more appropriate term (Cramer *The Abandonment of Landownership* 57).

135 Van der Walt *The Law of Servitudes* 577–578.

136 *Supra*.

137 *Pickard v Stein supra* par 47.

138 Muller *et al Silberberg and Schoeman's The Law of Property* 401; Van der Walt *The Law of Servitudes* 572–573; Hall and Kellaway *Servitudes* 144. See discussion of *Du Plessis v Philipstown Municipality supra*.

139 See *Van den Heever v Minister of Minerals and Energy* 2015 JDR 0515 (SCA).

140 *Supra.*

141 *Van den Heever v Minister of Minerals and Energy supra* par 23.

142 *Supra*.

143 *Minister of Mineral Resources v Mawetse (SA) Mining Corporation (Pty) Ltd supra* par 21.

6 SUGGESTIONS FOR REFORM

Based on the interpretation of the legal framework provided above, the unilateral abandonment of rights granted in terms of the MPRDA is not possible. However, it is still desirable that the legislature bring clarity to the situation. As Van der Schyff points out, "the legislature should have created a clearly circumscribed process through which a right holder could surrender his right".[144] Some suggestions for reform, with a view to clarifying the position in the MPRDA, are offered below.

"Abandonment" can only be achieved through the grant of ministerial consent, as argued above, but it would be ideal if section 11(1) of the MPRDA could be amended to include the word "abandon" as an action that would require such consent. Otherwise, reference to the possibility of abandonment in later sections of the Act remains peculiar on first reading. Such a small amendment would easily clarify the position in the MPRDA.

Alternatively, since abandonment in the true legal sense of the word is not possible under the MPRDA, the Act could be amended to replace references to abandonment with surrender. Furthermore, section 11(1) should include the term "surrender", to make it clear that ministerial consent is always required to bring to an end to a right holder's relationship with a right granted in terms of the MPRDA. As submitted above, the use of the word "surrender" would be a more accurate description of what the MPRDA envisions when it uses the term "abandon". Effectively, a right holder would be able to surrender a right granted in terms of the Act, subject to the Minister's consent, and any conditions attached thereto.

Furthermore, unlike the operation of abandonment in the law of property, a surrendered right granted in terms of the MPRDA would not simply become unowned, and open to appropriation. Rather, the right to the minerals in question would fall once again into the custodianship of the State, and the Minister would be empowered to award any part thereof to any future applicant.[145] Thus, the surrender of the right in question is directed to a specific party for potential reallocation, which conflicts with the operation of abandonment in the law of property.

---

144 Van der Schyff *Property in Minerals and Petroleum* 509.

145 Any "abandonment" of a right to minerals granted in terms of the MPRDA must be registered with the Mineral and Petroleum Titles Registration Office, in terms of s 5(1) of the MTRA. The lapsing of a right in this manner means it ceases to exist (Van der Schyff *Property in Minerals and Petroleum* 511). The MPRDA makes the State the custodian of the nation's mineral resources (s 3(1)), which acting through the Minister, has the power to grant and issue rights to mineral resources (s 3(2)). As the previous right has ceased to exist, there would seem to be no obstruction to the State, as custodian of mineral resources, in granting a new right in the same minerals on the same land. The consequence of "abandonment" in terms of s 56(*f*) would be consistent with that of deregistration of a company in terms of s 56(*c*). See *Palala Resources (Pty) Ltd v Minister of Mineral Resources and Energy* 2014 (6) SA 403 (GP) par 65, in which the court stated that, in the event of a right lapsing in terms of s 56(*c*), the "right reverts to the custodianship of the state, which assumes the power to reallocate the right in terms of the MPRDA, and thus to ensure that the objectives of the Act are met". See also Badenhorst "Lapsed Prospecting Rights: 'The Custodian Giveth and the Custodian Taketh Away'? *Palala Resources (Pty) Ltd v Minister of Mineral Resources and Energy*" 2016 133(1) *SALJ* 37.

The suggested reforms would have no substantive effect on the contents of the MPRDA and would merely serve to make explicit the position that prevails in the existing legal framework. It would also more correctly describe the legal consequences of what is currently referred to as "abandonment" in the MPRDA.

7 CONCLUSION

"Abandonment", as it operates in the context of the MPRDA, reflects a wider trend in the law of property, as first identified by Peñalver.[146] So long as externalities may arise from relinquishing a particular right, whether it be ownership or a limited real right, the law will place restrictions on how one may dispose of such a right. The severity of these restrictions will scale depending on the nature of the thing in question, ranging from regulated disposal to outright prohibition of disposal in the absence of a third party willing and able to take responsibility for the thing in question. These restrictions apply not only to corporeal property, but also to incorporeal property, such as limited real rights.

Rights granted in terms of the MPRDA entail not only entitlements but also onerous obligations. To permit a right holder to abandon without restriction would clearly be inconsistent with the objectives of the MPRDA.[147] However, this is not possible on the suggested interpretation of the Act. First, the Act itself expressly provides for the consequences of abandonment, which triggers obligations to rehabilitate the land in question and to seek a closure certificate.[148] Secondly, a reading of the Act as a whole makes it evident that any form of abandonment of a right granted therein would be subject to ministerial consent in terms of section 11(1). The latter transaction would not, in fact, be abandonment in the true sense of the word, since the right would revert to the authority of the State, and thus could be granted to another applicant for the same right.

While the MPRDA may use the term "abandon", it is submitted that it does not correspond with the meaning of "abandonment" as understood in the law of property. Rather, the MPRDA envisions a form of regulated surrender of rights, subject to ministerial consent and obligations to rehabilitate the mined-upon land.

146 Peñalver 2010 *Michigan Law Review* 191.

147 Van der Schyff *Property in Minerals and Petroleum* 508–509.

148 See s 43(3)(*a*) and (4) of the MPRDA.

VACCINE MANDATES, DENIALISM AND FREEDOM OF CONSCIENCE AND THOUGHT: EXAMPLES FROM BELGIUM AND BOTSWANA

Mutsi Phethedi Mleya
LLB LLM
Doctor of Laws Candidate, Faculty of Law, University of Pretoria

Charles Maimela
LLB LLM LLD
Associate Professor, Department of Private Law, University of Pretoria

SUMMARY

Vaccine mandates and vaccine denialism appear to be in stark opposition, but closer analysis will reveal that those who propagate both such ideals are rigid. Public buy-in on matters of public health is an important precondition for healthy social environments inasmuch as informed consent is important to individual autonomy, freedom of conscience and democracy. Botswanan case law provides an example of how vaccine denialism can lead to fatal consequences in the face of religious extremism, while Belgian case law provides an example of how vaccine mandates and their accompanying modalities may be held to be unlawful and discriminatory. Both freedom of conscience and administrative action are subject to the rule of law and every norm that is imposed on the population must be accompanied by liability for those propagating such norms if harm is the result. As South Africa has grappled with whether or not it should make vaccination mandatory, lessons have been noted and recommendations made – in line with the Constitution as the supreme law in the land. (Section 2 of the Constitution of the Republic of South Africa, 1996 affirms the supremacy of the Constitution.)

1 INTRODUCTION

Vaccination and belief systems lead to hostile discussions but consensus may be found if prescription of harmful vaccination ideals leads to liability

(whether for the State, an employer or a religious institution).[1] Ideals on matters of public health are difficult to detect especially concerning vaccine mandates because the principle of individual informed consent to health procedures,[2] and the social preconditions necessary for a shared environment, do not always align.[3] The maxim "public health is the greatest good" is contentious, given that beliefs and opinions strive for traction in law-making processes.[4] The population may have diverse views about what constitutes the common good, given that ideas are financially sponsored in science, religions and corruptible politics; but when consensus has been reached strong leadership is required.[5]

The protection of individual and collective conscientious convictions has been an historic bone of contention where infectious diseases are concerned, given that vulnerable populations were "frequently met with discrimination and gross denials of individual liberty", as in cases of racially-based immunisation, and sterilisation of women with a history of illness.[6] Failure to immunise and treat children under the care of a guardian is child neglect; if a fatality occurs in such a scenario, the guardian is guilty of homicide. However, does this principle apply to a trusted minister of religion or the leader of a sect?[7] Are religious leaders and consciousness movements within their rights to protest against frequent health tests at one's personal expense, or against mandatory vaccination from COVID in order to access public facilities or gatherings?[8] The distinction between a child's guardian and a religious leader in this context appears to be adult autonomy and the population's willingness to seek treatment in the event of illness. Whether an individual has witnessed the effect of untreated cases, is aware of common symptoms, and understands "the importance of collective action in preserving life", is both a religious and a scientific issue.[9] The oral traditions, myths and dramatised events involved in religion are more psychologically loaded than scientific explanations of phenomena[10] – with adverse drug reactions often being demonised as the consequence of defying divine order, and successful vaccinations being hailed as a gift from

---

1 Ellis "Mandatory Vaccine Policies Will Survive a Constitutional Challenge: Legal Expert Halton Cheadle" (10 November 2021) https://www.dailymaverick.co.za/article/2021-11-10-mandatory-vaccine-policies-will-survive-a-constitutional-challenge-legal-expert-halton-cheadle/ (accessed 2022-01-22); Nsereko "Religious Liberty and the Law in Botswana" 1992 34 *Journal of Church and State* 843 854.

2 Torfs "The Permissible Scope of Legal Limitations on the Freedom of Religion or Belief in Belgium" 2005 19 *Emory International Law Review* 637 674.

3 Parmet *Populations, Public Health, and the Law* (2009) 11.

4 Parmet *Populations, Public Health, and the Law* 1.

5 Parmet *Populations, Public Health, and the Law* 1 42.

6 Parmet *Populations, Public Health, and the Law* 112.

7 Van der Vyver and Green "Law, Religion and Human Rights in Africa: Introduction" 2008 8 *African Human Rights Law Journal* 337 350.

8 Wolfe "Belgian Court Declares COVID Vaccine Passports Illegal" (1 December 2021) https://www.lifesitenews.com/news/belgian-court-declares-covid-vaccine-passport-illegal/ (accessed 2022-01-20).

9 Parmet *Populations, Public Health, and the Law* 11.

10 Pelčić, Karačić, Mikirtichan, Kubar, Leavitt, Tai, Morishita, Vuletić, and Tomašević "Religious Exception for Vaccination or Religious Excuses for Avoiding Vaccination" 2016 57 *Croat Med J* 516 516; Quansah "Law, Religion and Human Rights in Botswana" 2008 8 *African Human Rights Law Journal* 486 487.

God.[11] Given these complications with ideas about vaccinations, the importance of limited government, corporate or group interference with individual rights and due process cannot be overemphasised when imposing vaccine mandates or preaching vaccine denialism.[12]

Secular law is reluctant to define religious doctrine but vaccine denialism has clear legal consequences.[13] "Belief systems, whether non-conforming, spiritual or humanist in their nature" are protected by international law and personal convictions remain the greatest predictor of uptake of healthy behaviour.[14] Thought, religion and conscientious behaviour is the norm rather than the exception; as the basis of family life and public order, they distinguish between puppets, animals and autonomous human beings who have power of reason.[15] Human beings can change their minds about religion, can have beliefs that are not linked to their religion and can act in unison for the good of the public.[16] Repressive regimes, habitual offenders and anarchists are said to have no respect for the public good, which is the supreme law and is protected by the principles of legality and due process.[17] This article starts by giving a background outlining threats to the rule of law in relation to freedoms and vaccines, then outlines applicable international law principles, then seeks out neutral principles that modern states can agree on about freedoms and vaccines, and finally delineates how they are distorted in practice in order to present lessons for South Africa.

2 CAUSE OF INQUIRY

The controversial rule by "virologists" has led to a technocracy and a departure from the rule of law.[18] There are also growing concerns that politicians have become passive in the making of laws and comfortable with taking recommendations from medical experts, failing to look at their broader social consequences and leading to despondency and strong opposition by societal groupings.[19] Globally religious groupings have led the bulk of negative reactions to COVID 19 interventions – in particular to the limitation of freedom of association and movement. Attending religious gatherings unless in possession of a COVID Safe Ticket was criminal in Belgium. The COVID Safe Ticket was a legal document equivalent to a pass law in Belgium.[20] This law may seem to have been justifiable at face value.

11 Pelčić *et al* 2016 *Croat Med J* 518.

12 Quansah 2008 *African Human Rights Law Journal* 499.

13 Torfs "Religion and State in Belgium" 2015 17 *Insight Turkey* 97 102; Pelčić *et al* 2016 *Croat Med J* 516.

14 Hill "Locating the Right to Freedom of Religion or Belief Across Time and Territory" in Ferrari, Hill, Jamal and Bottoni (eds) *Routledge Handbook of Freedom of Religion or Belief* (2021) 6.

15 Quansah 2008 *African Human Rights Law Journal* 491.

16 Art 1 of United Nations *Universal Declaration of Human Rights* (1948).

17 Parmet *Populations, Public Health, and the Law* 1.

18 Praet "Reflections on the COVID-19 Restrictions in Belgium and the Rule of Law" 2021 30 *Juridica International* 194 204.

19 *Ibid*.

20 Szucs "Belgian Court Rules COVID Pass Illegal in Wallonia" (2 December 2021) https://www.aa.com.tr/en/middle-east/belgian-court-rules-covid-pass-illegal-in-wallonia/2436283# (accessed 2022-01-20).

However, the frequent vaccinations or COVID tests involved in renewing the COVID Safe Ticket were held to be arbitrary, intrusive and unsustainable.[21] Legal accountability mechanisms and democratic engagement are features of an organised society, and attempts to silence strong voices in medical states of disaster create disorder in both socio-cultural and socio-economic institutions.[22] Interpersonal interaction and the possibility of meaningful engagement on matters of health have lost traction owing to the controversial nature of COVID restrictions. People who have lost their way of life as a result of this threat can view all COVID mandates and restrictions as suspect.

Most religions encourage holistic thought and humanistic approaches to problems, linking them closely to human rights, which are interrelated and difficult to apply selectively.[23] Human rights, like the human conscience, are inalienable:

> "[T]hey have not been granted by any earthly authority; neither by Parliament nor by the head of state. They are inherent nature. They are born with."[24]

At its core, freedom of conscience and thought requires negotiation – the primary negotiation being by individuals within religious societies and the secondary negotiation being within democratic institutions that use conventional reasoning.[25] Both negotiations can end in hostility, but the decisions taken by such institutions should lead to respect for individuality. Liberal views also present a challenge in conscience-based debate because it is difficult to separate spiritual matters from factual matters[26] – for example, science cannot provide generic solutions that "includ[e] those who cannot be vaccinated because of medical contraindications or have been vaccinated but without adequate immunogenic response."[27] The individual who is the subject of treatment in most cases can weigh prior knowledge of such risks and conclude on whether it is more beneficial than prejudicial. However, where a vaccine mandate is imposed by the State, for example, "the European Court of Human Rights and the Italian Court both ruled that if a government wanted to make vaccines mandatory there had to be some compensation for those who suffered adverse effects".[28] These judgments reinforce the saying that "freedom is the norm, restrictions are the exception," and restrictions should only be imposed in circumstances where they are unavoidable, justifiable and proportionate.[29]

---

21 Zweig, Zapf, Beyrer, Guha-Sapir and Haar "Ensuring Rights While Protecting Health: The Importance of Using a Human Rights Approach in Implementing Public Health Responses to COVID-19" 2021 23 *Health and Human Rights* 173 182.

22 Micklitz "The COVID-19 Threat: An Opportunity to Rethink the European Economic Constitution and European Private Law" 2020 11 *European Journal of Risk Regulation* 249 250.

23 Pelčić *et al* 2016 *Croat Med J* 518.

24 Nsereko 1992 *Journal of Church and State* 844.

25 Hill in Ferrari *et al Freedom of Religion or Belief* 5.

26 Pelčić *et al* 2016 *Croat Med J* 518.

27 Pelčić *et al* 2016 *Croat Med J* 517.

28 Ellis https://www.dailymaverick.co.za/article/2021-11-10-mandatory-vaccine-policies-will-survive-a-constitutional-challenge-legal-expert-halton-cheadle/.

29 Torfs 2005 *Emory International Law Review* 637.

International human rights law is underpinned by the view that the public good is served by not offending most religious and cultural sensibilities, hence the call for an absolute "minimum of state interference in religious matters".[30] Public order is universally recognised as requiring a limitation of freedom of thought.[31] Although law has its ethical foundations in the collective conscience, popular sensibilities require a measure of material engagement to avoid sensationalism spiralling out of control.[32] This speaks to the "mutual interdependence of church and state" with a reasonable measure of separation.[33] Both public order and public health require limitations to freedom of thought and freedom of movement, so it seems counterintuitive for governments to risk violent anti-vaccine protests over avoidable vaccine mandates.[34] Rather than publicly engaging minority religious views, governments justify their sternness and fail to acknowledge dissenting views from religious groupings despite religious extremists' willingness to die for their convictions. This autocratic behaviour compounds the feeling of alienation of minority religions.[35] Matters that cannot be subject to democratic or at least purposeful engagement under the guise of public health are resonant of the eugenic movement.[36]

Failure to accept disagreements and exceptions to any set norm shows absolute trust in it; an exclusive embrace of science without human rights considerations can seldom stand up to the muster of legality.[37]

> "The laudable goal of public health protection has often been misapplied, or even abused, to subvert other critical values held by our legal system, such as equality and due process … it should suffice to recall that eugenicists relied on the claim of public health, as well as the credibility of science, to justify the involuntary sterilisation of thousands of poor, disenfranchised, young women."[38]

A culture of justification is required when laws that limit individual freedom are enacted for public health reasons. Laws that are vague, disproportionate to the goal pursued, and arbitrary, must fail. For example, the COVID Safe Ticket was granted to both vaccinated people and those who could prove they had had COVID in the past six months.[39] Apart from acting as legal checks and balances against the arbitrary use of power, religious institutions must strengthen solidarity with individuals who have been exposed to the harsh side effects of vaccines, and fund research into the likely causes thereof.[40]

---

30 Hill in Ferrari *et al Freedom of Religion or Belief* 1–2; Quansah 2008 *African Human Rights Law Journal* 499.

31 Art 18(3) of the UN General Assembly *International Covenant on Civil and Political Rights* (ICCPR) 999 UNTS 171 (1966).

32 Hill in Ferrari *et al Freedom of Religion or Belief* 1–2.

33 Torfs 2015 *Insight Turkey* 98.

34 Art 18(3) and art 21 of the ICCPR.

35 Nsereko 1992 *Journal of Church and State* 845.

36 Parmet *Populations, Public Health, and the Law* 2–3.

37 Praet 2021 *Juridica International* 196.

38 Parmet *Populations, Public Health, and the Law* 2–3.

39 Parmet *Populations, Public Health, and the Law* 113.

40 Pelčić *et al* 2016 *Croat Med J* 517.

Routine vaccinations have been proved to "reduce infectious disease burden" and are commonly done in the "first 1 000 days of life",[41] thus leading to the stereotype that they are for children. Measures such as social distancing, personal hygiene and quarantines have proved to be not as effective as vaccines, especially in poor communities.[42] Social status alone is not an adequate basis for vaccine mandates given that all social classes interact daily, from banking queues to grocery stores. Although diverse socio-cultural beliefs are held by large groups in a population, they are not bound to clash with public health policy[43] – for example, if religious exceptions to certain vaccines are respected by finding culturally acceptable alternatives to them.[44] Accommodating diversity in public health policy will not inevitably cause friction. Keeping the population's perspective in mind in public health policies is critical.[45]

3 INTERNATIONAL HUMAN RIGHTS AND WHEN THEY APPLY

3 1 Public health law and interpretive paradigms

Public health law presents both benefits and costs to individuals and the population at large, but it carries the full force of law and is not merely a set of suggestions.[46] Criminal offences committed in the course of exercising a religion find barely any sympathy in the eyes of the law. Although both religion and law are institutions of social control, the law maintains sovereign command of the population at large. Restrictions on the right to practise a religion (which is an internationally enshrined human right) are subject to being necessary and proportionate to the protection of health, which is difficult to establish during debate.[47]

Parment prefers to define public health as:

> "the health of the population as a whole, especially as monitored, regulated, and promoted by the state (by provision of sanitation, vaccination, etc.)."[48]

Excessive monitoring and surveillance on the part of public health officials given the recent COVID crisis may be framed as a skilful way to detach the population from gathering and holding common beliefs.[49] Those whose convictions would oppose the new normal and vaccines are by no means

---

41 Nandi and Shet "Why Vaccines Matter: Understanding the Broader Health, Economic, and Child Development Benefits of Routine Vaccination" 2020 16 *Human Vaccines and Immunotherapeutics* 1900 1901.

42 Parmet *Populations, Public Health, and the Law* 112.

43 Parmet *Populations, Public Health, and the Law* 113.

44 UN Committee on Economic, Social and Cultural Rights (CESCR), *General Comment No. 14: The Right to the Highest Attainable Standard of Health (Art. 12 of the Covenant)*, 2000 par 12b.

45 Parmet *Populations, Public Health, and the Law* 21–22.

46 Parmet *Populations, Public Health, and the Law* 2.

47 Praet 2021 *Juridica International* 201.

48 Parmet *Populations, Public Health, and the Law* 7.

49 Praet 2021 *Juridica International* 204.

unreasonable given the continuous compromise of natural freedoms they have had to endure.[50] The demand that COVID Safe Tickets be acquired by the population to attend religious gatherings and to board public transport, may seem justifiable on the grounds that an individual is a danger to self and others; yet, it has odd connotations to other related rights and can be disproportionate and discriminatory to non-conforming individuals. The limitation of religion on grounds that are "prescribed by law … protect[s] public safety, order, health, or morals or the fundamental rights and freedoms of others", must be necessary,[51] not merely ritual vaccinations that have a short-term immunogenic response. The exclusion of people who do not get vaccinated, from social and religious endeavours, seems to be a natural part of social life, given that "public health … is a precondition to social life" to the extent that vaccination is necessary to achieve interaction.[52] Given the possibility of COVID infection post-vaccination and the multiplicity of environmental determinants of health, it is difficult to silence alternative notions about vaccines without conducting several risk and impact studies and presenting acceptable alternatives.[53] It is necessary to accept that there is a possibility for science to strengthen the human body's immunogenic response to any disease without a direct vaccine.

The highly technical nature of finding feasible alternatives to existing public health initiatives has led to a technocracy, comprised mainly of individuals who give insufficient weight to human rights when making determinations.[54] Public health experts to some extent doubt the efficacy of human rights as a doctrine and equate the concept to a set of debatable norms and standards not worthy of being the grand norm.[55] Freedom of worship is essential to health because health cannot be narrowly defined as medicine and treatment of patients, given that the constitution of the World Health Organisation (WHO) includes "social well-being" in the definition of health.[56] Therefore, the role of collective ideas and "collective efforts undertaken to improve health" cannot be undermined.[57]

The traditional mode of government in Commonwealth countries is parliamentary sovereignty, which places trust in a legislative assembly to make prescriptions concerning the population's health. From a healthcare perspective this means broad vaccine mandates need to be tested for efficacy and safety by a representative group. In health matters, however decisions made considering group efficacy may overlook individual harm and lead to lawsuits concerning individual harm and autonomy, because the side-effects of a drug must be made clear and must be agreed to by the end user.[58] If any person immutably imposes a health standard on a person in such a way that their personal thoughts are suppressed, they consider the

---

50 *Ibid*.

51 Art 18(3) of the ICCPR.

52 Parmet *Populations, Public Health, and the Law* 11.

53 Parmet *Populations, Public Health, and the Law* 20.

54 Parmet *Populations, Public Health, and the Law* 3.

55 *Ibid*.

56 World Health Organization *Constitution of the World Health Organization*, 1946.

57 Parmet *Populations, Public Health, and the Law* 9.

58 Lloyd, Haussman and James "Religion, Health Care and Africa" in Lloyd, Haussman, and James *Religion and Health Care in East Africa* (2019) 16.

other person to be a legal object and unequal in reasoning capacity to them. Deeper meanings will be given to informed consent, and the public health limitations on freedom of conscience as time passes and further discourse takes place given that judges and lawyers have the freedom of interpretation.[59]

The international law tradition of dualist and monist states either requiring an act of incorporation to use international law norms, or automatically integrating international law into their domestic systems, is being gradually blurred as multilateral treaty bodies and intergovernmental agencies become more visible when health concerns are addressed.[60] Sovereign states have the continued duty to monitor what gets into their borders and to hold pharmaceutical companies to account in the clarification of groups of people that may have contra-indications to drugs and weakened immunogenic responses.[61] The test for legality in public health mandates should follow existing laws – either international human rights or domestic law – and not only be recognised as a limitation on freedom of conscience, thought and religion.[62] African nations' drive for homegrown laws and "African solutions for African problems" (a common political mantra) denotes, at the very least, distrust in foreign interventions, given the sad history of colonisation and the dumping of defective goods in Africa. Administering treaty obligations, and keeping up with the facade of compliance with international standards, may place an undue burden on African states, which are accountable to African law and religion.[63]

Written laws, such as a supreme constitution and other instruments that limit the authority of governments, are necessary for the "incremental realisation of human rights, including economic and social rights".[64] Failings of parliamentary sovereignty and popular rule led to constitutionalism, and checks and balances, that would hold leaders to account by making sure that laws are procedurally and substantively correct and compliant with human rights standards.[65] Human rights are neutral norms. The neutrality of human rights makes them easy to overlook but repressive regimes that ignore them usually find elections, political opposition, and judicial activism offensive.[66] In an egalitarian society, there should be room for adults to disagree with vaccine mandates without disenfranchisement. The clash of conscience-related positions among liberal individuals, governments and religious groupings is inevitable. However, all three players have points they can agree on and which can be maximised.[67]

---

59 Parmet *Populations, Public Health, and the Law* 5.

60 Torfs 2005 *Emory International Law Review* 638; Parmet *Populations, Public Health, and the Law* 31.

61 Pelčić *et al* 2016 *Croat Med J* 517; Kumar "Customary Law and Human Rights in Botswana" 2009 52 *Human Rights and Human Welfare* 2 2.

62 Torfs 2005 *Emory International Law Review* 638.

63 Kumar 2009 *Human Rights and Human Welfare* 2.

64 Nsereko 1992 *Journal of Church and State* 843.

65 *Ibid*.

66 *Ibid*.

67 Hill in Ferrari *et al Freedom of Religion or Belief* 4.

3 2 Global human rights and perspectives

"All human rights are universal, indivisible, interdependent and interrelated", according to the Vienna Declaration and Programme of Action.[68] They contribute to the experience of a person feeling fully human and being truly represented, recognised and empowered to participate in social, religious, cultural, political and economic endeavours.[69] The Universal Declaration of Human Rights[70] provides that "all human beings are born free and equal in dignity and rights", but this would be incomplete without their personal health choices being recognised and respected by their elected representatives and peers with diverse views. Misrecognition, misrepresentation, and disenfranchisement of people based on health choices does not mean they do not have rights, but it does invite political and legal resistance to vaccine mandates.[71] It is important to note that not all discrimination is unfair, and without discrimination or limitation of rights it would be difficult to address public health concerns.

Religious and consciousness movements are not born out of human rights; it is the struggles of such movements that led to rights recognition and social harmony.[72] In the legal order of things politics precede rights and legitimate religious expectations precede politics. Laws are therefore an expression of the values the populace hold. Social rights, human agency and autonomy are conditions necessary for securing the population's health.[73] Human beings are rational and capable of making their own health choices despite "political, economic and cultural systems" and secular governments must endeavour to protect, promote and fulfil this capacity by providing health information.[74] Informed choices and conscious risk-taking are the backbone of legitimate health choices.

The ICCPR[75] stipulates that "no one shall be subject to coercion which would impair his/her freedom to have or to adopt a religion or belief of his/her choice", which entrenches volition as an essential element of "the right to freedom of thought, conscience and religion". "The right to freedom of thought, conscience and religion" is recognised by all states with a Constitution that elevates human rights to supreme law, and by monist states, where the highest norms are found in international authority, making religious freedom not only a norm but a measure that limits states' authority in imposing mandates.[76] Religious freedom is a neutral norm, which implies that a measure of trust is afforded to religious norms and that the secular state does not bother itself with the content of religious norms, while religion

---

68 Part I par 5 of UN General Assembly *Vienna Declaration and Programme of Action* A/CONF.157/23 (1993).

69 Quansah 2008 *African Human Rights Law Journal* 489.

70 Art 1 of Universal Declaration of Human Rights.

71 Nsereko 1992 *Journal of Church and State* 844.

72 Quansah 2008 *African Human Rights Law Journal* 489.

73 Parmet *Populations, Public Health, and the Law* 114.

74 Part I par 5 of Vienna Declaration and Programme of Action.

75 Art 18(2) of the ICCPR.

76 Quansah 2008 *African Human Rights Law Journal* 488–489; Torfs 2005 *Emory International Law Review* 638.

must acknowledge the existence of formal laws.[77] Religion and health information belong in the private domain as much as they exist in the public domain, but private health correspondence may not be "subjected to arbitrary or unlawful interference",[78] such as police demanding COVID Safe Tickets at funerals of loved ones. Public authorities must draw a line when restrictions to religion are avoidable or are dangerous to public order, given that "religious freedom is an internationally recognised norm and restrictions are an exception".[79]

Reference to "public safety, order, health or morals" in the ICCPR was not made in subjective terms but is to be understood in the context of a democratic society that is subject to the rule of law – such as South Africa, for example, which has a supreme constitution.[80] "A sanitary crisis" brings about several dramatic consequences for the infringement of public health rights by either governments or religious leaders, but equal weight should be given to the harm that may be caused by both institutions, and human rights must prevail in any natural disaster.[81] The United Nations Commission on Human Rights and the International Commission of Jurists put extensive work into the Siracusa Principles on the Limitation and Derogation Provisions in the International Covenant on Civil and Political Rights.[82] The emphasis is on necessity, proportionality, curative health services, preventative measures against communicable diseases and deference to the World Health Organisation as they are best suited to providing evidence in a health crisis; but the principles expressly forbid "vague or arbitrary limitations … when there exist adequate safeguards and effective remedies against abuse".[83] State and employer liability in the case of a vaccine mandate that causes adverse drug reactions is not an effective remedy against adverse drug reactions. State liability is not fully "compatible with the nature of the rights protected" and it is indefensible in the absence of informed consent that is "consistent with other obligations under international law".[84] Vaccine mandates costs toward the State may end up being outweighed by lawsuits for adverse drug reactions, which is an undesirable state of events.

The nature of the right to health presupposes mainly provision of goods "rather than restraint on the part of government", thereby tempting governments and other like-minded individuals such as employers and

---

77 Torfs 2015 *Insight Turkey* 98.

78 Art 17(1) of the ICCPR.

79 Torfs 2005 *Emory International Law Review* 637.

80 Arts 18(3) and 21 of the ICCPR.

81 Praet 2021 *Juridica International* 198.

82 United Nations Commission on Human Rights *The Siracusa Principles on the Limitation and Derogation Provisions in the International Covenant on Civil and Political Rights* E/CN.4/1985/4 (1984).

83 Art 34 of the Siracusa Principles on the Limitation and Derogation Provisions.

84 Par 28 of UN Committee on Economic, Social and Cultural Rights (CESCR) *General Comment No. 14: The Right to the Highest Attainable Standard of Health (Art. 12 of the Covenant)* E/C.12/2000/4 (2000); Art 4 of the ICCPR and Art 4 of the UN General Assembly *International Covenant on Economic, Social and Cultural Rights* (ICESCR) 993 UNTS 3 (1966). Adopted: 16/12/1966; EIF: 03/01/1976.

intergovernmental organisations to impose vaccines that do not satisfy individual preferences.[85] The ICESCR[86] provides:

> "1. The States Parties to the present Covenant recognize the right of everyone to the enjoyment of the highest attainable standard of physical and mental health.
> 2. The steps to be taken by the States Parties to the present Covenant to achieve the full realization of this right shall include those necessary for:
> …
> (c) the prevention, treatment and control of epidemic, endemic, occupational and other diseases;
> (d) the creation of conditions which would assure to all medical service and medical attention in the event of sickness."

The right to health is a constant pursuit and "the highest attainable standard" of health invariably includes determination of mental, social, cultural and religious elements that set up a "social framework in which populations live, face disease and injury, and die".[87] Life cycle requirements such as vaccinations are now a culturally engrained precondition to facing disease but where that is not the case for a particular adult vaccine, it is doubtful that a vaccine mandate would fulfil human rights requirements.[88] Health risk factors include not only physiological "factors that are intrinsic or unique to an individual" but also "the individual's social environment" and physical environment, which can make it convenient to access health care in the event of sickness, in the absence of vaccines.[89] Healthy social environments include missionary churches and other civic organisations that build hospitals.[90] Toxic social environments include civic organisations that preach denialism and demonise health seeking by allopathic means.

4 IDEALISING VACCINE MANDATES, DENIALISM AND FREEDOM OF CONSCIENCE AND THOUGHT

The rule of law for purposes of this work is a value-neutral grounding theory that ensures law's predictability, encourages accountability to set norms and ensures mandates are both substantively and procedurally legitimate.[91] Neither vaccine mandates nor vaccine denialism is ideal at law and sponsoring religious or technocratic tyranny cannot pass muster in a state with an independent judiciary that guarantees "equality before the law".[92] Where questions of vaccine mandates and possible judicial activism arise, the foundations of liberalism, individualism, necessity, evidence, proportionality and non-discrimination remain as the rule, rather than the exception.[93] Judicial activism is only problematic if the rule of law is not a

---

85 Parmet *Populations, Public Health, and the Law* 111.
86 Art 12 of the ICESCR.
87 Parmet *Populations, Public Health, and the Law* 31.
88 *Ibid*.
89 Parmet *Populations, Public Health, and the Law* 20.
90 Hill in Ferrari *et al Freedom of Religion or Belief* 5.
91 Praet 2021 *Juridica International* 196.
92 *Ibid*.
93 UNCHR *The Siracusa Principles on the Limitation and Derogation Provisions*.

priority and judges blindly oppose government for philosophical reasons, that cannot find expression within the existing legal framework. However, where due process is subverted in imposing vaccine mandates without parliamentary ratification the judiciary can be used as a necessary check against technocratic rule.

The technical and advisory wings of governments do not hold unchecked power. They are bound by the positive laws set by parliaments, constitutional assemblies and incorporated international human rights.[94] Positive laws ensure that "the normal rules of decision making" are followed and that the role of parliaments is not subverted to conform to the preferences of scientists who fulfil advisory functions in states of emergency.[95] Deferring matters of a scientific and religious import to Parliament is fairer than deferring to a technically staffed executive that has a material interest in maintaining the status quo that caused a challenge.[96] The role of the judiciary is not to protect the executive.

Some medical practitioners dispute whether "rights are necessary or at least conducive to public health".[97] The interventions that medical practitioners take need to be "correctly established by law and strictly proportionate to the protection of health".[98] When establishing health mandates, the legal test of necessity and proportionality is incomplete without further enquiry into the environmental factors that lead to disease, such as people's background education and beliefs.[99] These factors are commonly referred to as social determinants of health and they point to the "indivisibility, interdependency, and interrelatedness" of human rights and often give meaning to overlooked factors in decision making.[100] Parliaments maintain their elected mandate during sanitary emergencies and they need periodically to review restrictive measures.[101] International law reporting and accountability bodies also need to be more vigilant in reviewing actions taken by governments in times of crisis.[102] Crisis amplifies society's collective vulnerability to state action, increasing the need for judicial review of administrative action for both procedural and substantive fairness.[103]

The question of whether a vaccine mandate supports public health is subjective and the public narrative of which health beliefs people follow in private is influenced by environmental determinants and personal exposure.[104] Public health mandates or directives need public buy-in to be successful. The free exchange of opinions, beliefs, facts and historic accounts of events must enter the public space and social institutions in a

94 Praet 2021 *Juridica International* 196.
95 Praet 2021 *Juridica International* 197.
96 Parmet *Populations, Public Health, and the Law* 42.
97 Parmet *Populations, Public Health, and the Law* 116.
98 Praet 2021 *Juridica International* 201.
99 Parmet *Populations, Public Health, and the Law* 116.
100 Parmet *Populations, Public Health, and the Law* 116; 56; Torfs 2005 *Emory International Law Review* 647; Zweig *et al* 2021 *Health and Human Rights* 182.
101 Zweig *et al* 2021 *Health and Human Rights* 182.
102 *Ibid*.
103 Praet 2021 *Juridica International* 197.
104 Parmet *Populations, Public Health, and the Law* 54.

democratic manner. The extent to which social entities facilitate individual agency is limited, given that beliefs are dogmatic and are collectively constructed through experience.[105] Public health law's emphasis on populations usually causes problems,[106] as the side effects or ineffectiveness of a vaccine can be generalised and resisted in solidarity by social and religious institutions.[107] Public health law has much more realistic application for the distribution of desirable goods and the improvement of living conditions for underprivileged populations than the imposition of unwanted vaccines.[108] Vaccine mandates in particular, as a law, are problematic because they negate the value of participants as "subjects and agents of human events".[109]

For formalistic individuals, society follows "the law as it is not how it ought to be". The law, however, stops to make sense to human beings when it is not grounded in public morals such as freedom of conscience. Justice is immutable law and mandates are not. Failure to tolerate different forms of thinking on the grounds of neutrality is mischievous and usurps other individuals' freedom of thought and conscience.[110] This is true even of leaders of religious sects who forbid their members to interact with persons of diverse views or to receive treatment from allopathic medical practitioners.[111] Responsible religious practices may include tolerance and respect of other religious views, even those who change religion or act in line with a "multifaith adherence".[112] Mockery of religious values has historically been a cause of many conflicts but the failure to acknowledge flaws in science (both hard science and social science) endangers the public. The public domain remains open to scientific opinions and the regulation of harmful religious practices, notwithstanding that; history, experience, and drama hold greater power to convince than hard science in the face of controversy.

5 VACCINE MANDATES, DENIALISM AND FREEDOM OF CONSCIENCE AND THOUGHT IN PRACTICE

The unhappy history of public health initiatives, from the eugenic movement to the era of vaccine mandates, is not without sound scientific backing or without actual supporters in the form of utilitarian thinkers who can quantify harm and discrimination in the sight of a potentially fatal vaccine.[113] Public health initiatives seldom need defence given the historical and progressive advancement of effective medical science in the twentieth century.[114] The

105 *Ibid*.
106 Parmet *Populations, Public Health, and the Law* 19.
107 Pelčić *et al* 2016 *Croat Med J* 517.
108 Parmet *Populations, Public Health, and the Law* 19.
109 *Ibid*.
110 Nsereko 1992 *Journal of Church and State* 846.
111 Nsereko 1992 *Journal of Church and State* 858.
112 Nsereko 1992 *Journal of Church and State* 850–851; Quansah 2008 *African Human Rights Law Journal* 488.
113 Parmet *Populations, Public Health, and the Law* 2–3.
114 Parmet *Populations, Public Health, and the Law* 42.

law's attention has shifted to health care law, where questions of service delivery, desirability, medical risks and patient management dominate, all of which pursuits are fundamentally of a commercial nature.[115] Pharmaceuticals are among the top trading firms globally and the commercialisation of opinions in government and science is an unavoidable phenomenon. What may seem to be a technocratic imposition of vaccines by virologists can stem in fact from powerful commercial players. The rule of money is most evident in vaccine nationalism, which has meant that Africans were the last recipients of COVID vaccines and drug stockouts of any drugs proven efficacious against COVID by rich nations.[116] Pillay and Kramers-Olen[117] liken this phenomenon to "colonial mentality" targeting medicine.

Human rights law seems to be at odds with science; many believe in science in the absence of human rights and morality. Compounded by capitalism being the norm even in healthcare crisis, which makes legal checks and balances against commercialised vaccines unpopular.[118] There have been protests against vaccine mandates, all these were met with repressive measures and censoring of the internet, which may serve to justify the reluctant uptake of vaccine mandates.[119] Political opposition on the matter of vaccine mandates is taken to be populism and tension in the relationship between globalisation, public order and public health concerns has in some instances been used to limit participation in protests.[120] Also, the volume of human and physical resources dedicated to fighting the scourge of COVID has seemed to overshadow all other medical pursuits and has caused delayed detection, prevention, or treatment of other diseases.[121] It seems to the observing public, and to the public health system, that the urgent vaccination drive is an unavoidable priority.

The rallying points behind vaccine denialism include the unnecessary link between vaccines, work, education, and "sociocultural interaction".[122] The sociocultural appropriateness of vaccines is also in focus because of the history that vaccines have been derived from aborted foetuses in the past,[123] and "the theological claim that epidemics resulted from a community's sin" make vaccines all the more undesirable.[124] These theological claims do not represent the views of all people of faith and the influence of faith seems to be regressing on matters of life and death.[125] Claims of the immutability of clerical views and their unchecked authority are subsiding and the ordinary rules of law are becoming visibly applicable to religious bodies.[126] Individuals are further expected to make sound sanitary decisions when exposed to

115 *Ibid*.
116 Pillay and Kramers-Olen "COVID-19, Psychosocial Issues, Politics, and Public Mental Health Care" 2021 51 *South African Journal of Psychology* 293 298.
117 Pillay and Kramers-Olen 2021 *South African Journal of Psychology* 298.
118 Praet 2021 *Juridica International* 195.
119 *Ibid*.
120 Hill in Ferrari *et al Freedom of Religion or Belief* 4–5.
121 Zweig *et al* 2021 *Health and Human Rights* 176.
122 Zweig *et al* 2021 *Health and Human Rights* 174.
123 Pelčić *et al* 2016 *Croat Med J* 516–517.
124 Parmet *Populations, Public Health, and the Law* 14.
125 Torfs 2005 *Emory International Law Review* 250.
126 Torfs 2005 *Emory International Law Review* 647.

different environments – for example, at work, school, church and entering public space, provided such sanitary standards are not invasive.[127]

There is broad consensus that the laws revoking the legal personality of religious bodies who refuse to submit to medical care in Botswana are good at law.[128] Belgium, however, does "not prevent or forbid the expression of an opinion by a philosophical or religious minority".[129] International law limitations on freedom of religion are incorporated through the Societies Act of 1972 in Botswana and the preservation of public order, peace and welfare have been allowed as exceptional reasons not to register harmful sectarian religious bodies in Botswana.[130] The discussion on freedom of thought and conscience and vaccine denialism cannot be concluded without practical examples of how it causes legal tension. The examples selected here are from Botswana and Belgium where there is case law that has been largely divergent, but the nuances of the cases can be reconciled.

6 SUMMARY OF CASE LAW

The cases in Belgium involve the repeal of the COVID Safe Ticket by a Wallonia regional court and the discretion of medical practitioners to offer blood transfusion to a patient while unconscious despite a conscientious objection by his wife. Circular norms such as the COVID Safe Ticket and blood transfusion in case of injury are decided on state law grounds and where issues of doctrine or religious freedom arise, judges prefer avoiding discussion.[131] The courts are expected to protect vulnerable people in various states of vulnerability,[132] and it is unreasonable to assume that an individual cedes his or her personality to doctrine in matters affecting life and death.[133]

The disputed COVID Safe Ticket gave freedom of movement to three categories of people: the vaccinated; those recently sick with COVID; and those with recent COVID-negative test results.[134] The selective disbursement of the right to freedom of movement was in question before the Wallonia court,[135] and even the science behind facilitating limited human interaction in the face of a sanitary emergency where there is no effective vaccine that stops transmission of the disease.[136] By "curbing individual freedoms in a disproportionate way which does not serve the goal they pursue",[137] COVID Safe Tickets were found to be unjustified.

---

127 Parmet *Populations, Public Health, and the Law* 56.

128 Quansah 2008 *African Human Rights Law Journal* 499; Nsereko 1992 *Journal of Church and State* 858.

129 Torfs 2015 *Insight Turkey* 102–103.

130 Quansah 2008 *African Human Rights Law Journal* 499.

131 Torfs 2005 *Emory International Law Review* 651.

132 Zweig *et al* 2021 *Health and Human Rights* 182.

133 Torfs 2005 *Emory International Law Review* 651.

134 Wolfe https://www.lifesitenews.com/news/belgian-court-declares-covid-vaccine-passport-illegal/.

135 *Ibid*.

136 Szucs https://www.aa.com.tr/en/middle-east/belgian-court-rules-covid-pass-illegal-in-wallonia/2436283#.

137 *Ibid*.

Other commentators on the digitised COVID Safe Ticket have raised issues of accountability in the face of surveillance and protection of personal health information and travel data. The comitology system that designed the COVID Safe Ticket is too distant from democratic processes to regulate human conduct. "Follow the science" is an unfortunate mantra that seeks to get politicians to rubber-stamp the opinions of a group of scientists.[138] The surveillance concerns are twofold: first, regarding the easy collection of metadata concerning individuals by hackers that could lead to a surge in digital crime;[139] and secondly, regarding the automatic assumption that health information and diagnosis of such is not private and is to be objectively determined.[140] Vaccination from COVID does not guarantee inability to contract the disease, hence an individual's health status cannot be objectively determined by a vaccination card. One of the implications of the COVID Safe Ticket conditions was that the holder of a pass who has recovered from COVID within the last six months was similar to a vaccinated individual.[141] The recovery condition raises questions about health status privacy and discrimination against those who acquired COVID but were asymptomatic. The Wallonia regional court was justified in holding that the COVID Safe Ticket is discriminatory.

The second Belgian case is about the refusal of Jehovah's witnesses to undergo a blood transfusion and (implicitly) receive vaccines made from genetic material "derived from an aborted foetus".[142] Adults can clearly decide to forgo such a vaccine if they find it immoral. Children, however, are wards of the State and may be routinely vaccinated.[143] Torfs[144] establishes that "a possible conscientious objection expressed by the parents can never endanger the physical or mental health of the minor of age". Vaccines that are accessible and appropriate for minors cannot be avoided on grounds of conscience in Belgium unless there is an ethically and medically sound alternative.

In Botswana, failure to vaccinate, or to yield to allopathic care, and instead remain adamant on a shallow spiritism, was held to be malevolent disregard of the laws of the country.[145] Failure to yield to efficacious health solutions, while depending on abstract spiritual powers was held to be child neglect.[146] "Most people in Botswana are as likely, in time of crisis or ill health, to seek help from a traditional healer as they are likely to visit a priest or a hospital."[147] However, the polytheistic, monotheistic, scientology or humanistic nature of religion does not allow "anybody to practise or propagate their religion in complete disregard of the rights of others or the

138 Praet 2021 *Juridica International* 204.
139 Micklitz 2020 *European Journal of Risk Regulation* 254–255.
140 Praet 2021 *Juridica International* 204.
141 Wolfe https://www.lifesitenews.com/news/belgian-court-declares-covid-vaccine-passport-illegal/.
142 Pelčić *et al* 2016 *Croat Med J* 516–517.
143 Torfs 2005 *Emory International Law Review* 674.
144 *Ibid*.
145 Quansah 2008 *African Human Rights Law Journal* 497.
146 *Ibid*.
147 Quansah 2008 *African Human Rights Law Journal* 498.

laws of Botswana".[148] In Botswana, the precedent is that refusal "to permit medical personnel to treat … children who contract measles culminating, in their death results in the parent being convicted of homicide".[149] It has yet to be tested whether a priest of an extremist sect of religion would be held blameworthy for propagating homicidal doctrines.[150]

7 LESSONS FOR SOUTH AFRICA

To ensure that beliefs do not interfere with practical administrative, labour, socio-environmental and humanitarian concerns, it is necessary to turn to history for lessons. The arrival of anti-retroviral medicines in the fight against HIV/AIDS was met with much scepticism, notably by the Mbeki administration.[151] The population paid the price for such reasoning until the roots of denialism were replaced with positivism through positive experiences.[152] The uptake of vaccines will determine if the population views them as either a positive or negative thing. The mantra "the public will not take the pill if it does not trust the doctor" applies and no measure of coercion will work on those who are self-employed if the power and knowledge gap between the medical and the social fields is not bridged.[153] The issue of vaccine denialism cannot simply be written off as a ploy for populism, and vaccine mandates are not an unassailable indicator of pragmatic leadership.

Religion that is based on "common sense", and on natural remedies such as African traditional religion, may brew scepticism over unnatural events such as adult vaccination to treat a disease that vaccination has yet to show itself to be completely effective.[154] In such schools of thought, scientific excesses are also suspected of triggering adverse drug reactions.[155] It is also common sense that people would detest using a drug that has side effects that include thrombosis and blood clots in a country with a poor health care delivery system. Socio-economic status becomes a factor in vaccine uptake given differing levels of access to health care and trust in the private and public health care systems.[156]

Those who are employed by or are bound to institutions with active vaccine mandates are candidates for coerced vaccination. The protagonists of such mandates argue that employers must "take reasonable and practical steps to maintain and ensure a safe working environment",[157] in fulfilling their obligations to the Mine Health and Safety Act,[158] as well as the Occupational

148 Quansah 2008 *African Human Rights Law Journal* 497.
149 Van der Vyver and Green 2008 *African Human Rights Law Journal* 350.
150 *Ibid*.
151 Pillay and Kramers-Olen 2021 *South African Journal of Psychology* 298.
152 *Ibid*.
153 Parmet *Populations, Public Health, and the Law* 114.
154 Pelčić *et al* 2016 *Croat Med J* 519.
155 Bhuda and Marumo "African Traditional Medicine and Healing in South Africa: Challenges and Prospects Before and During Covid 19" 2020 18 *Gender and Behaviour* 16710 16710.
156 Parmet *Populations, Public Health, and the Law* 13.
157 Ellis https://www.dailymaverick.co.za/article/2021-11-10-mandatory-vaccine-policies-will-survive-a-constitutional-challenge-legal-expert-halton-cheadle/.
158 29 of 1996.

Health and Safety Act.[159] Compensatory measures for adverse drug reactions are a condition for the legality of vaccine mandates but the administrative capacity of the courts to accommodate such matters, at a large scale, is questionable.[160] Employers who have vaccine mandates have compensation for adverse drug reactions covered by the Compensation for Occupational Injuries and Diseases Act.[161] Questions remain on how populations such as university students will be covered in the event of adverse drug reactions. At the start of the 2022 academic year, various universities in South Africa imposed mandatory vaccinations for both students and staff; whether this will be successful is a question of fact which only time will tell.

Trust issues are barely eased by the South African Health Practice Regulatory Authority, which regulates products that threaten public health and which registers and monitors health products.[162] Empirical evidence on vaccine safety and efficacy is incomplete without building a relationship of trust between government and the population.[163] There will always be ways to escape an unwelcome vaccine mandate; and it is hard to expect buy-in to improve without a reduction in incidents of adverse drug reactions, and in counterintuitive claims such as scientifically proven immunity for six months after infection.[164] The intuitive and religious sensibilities of people are worth respecting when reporting on health issues. This article has aimed to assist governments – and in particular the South African government owing to its uncertain position on this matter – to prepare arguments that will improve vaccine uptake through addressing the highlighted conscientious concerns.

159 85 of 1993.

160 Ellis https://www.dailymaverick.co.za/article/2021-11-10-mandatory-vaccine-policies-will-survive-a-constitutional-challenge-legal-expert-halton-cheadle/.

161 130 of 1993.

162 Parmet *Populations, Public Health, and the Law* 32.

163 Parmet *Populations, Public Health, and the Law* 115.

164 Parmet *Populations, Public Health, and the Law* 113.

THE SEARCH WARRANT PROVISIONS OF THE CYBERCRIMES ACT AND THEIR RELATIONSHIP WITH THE CRIMINAL PROCEDURE ACT

Pieter du Toit
Blur LLB LLM LLD
Faculty of Law, North-West University

SUMMARY

The recently enacted Cybercrimes Act 19 of 2020 regulates the powers of the police and investigators to investigate cybercrimes. Chapter 4 of the Act provides for the powers of the police and others in respect of search, access or seizure in the investigation of cybercrimes and other offences committed by means of cybertechnology. The provisions of the Criminal Procedure Act 51 of 1977 will continue to operate in addition to the provisions of the Cybercrimes Act, to the extent that the Criminal Procedure Act is not inconsistent with the Cybercrimes Act. The search and seizure provisions of the Criminal Procedure Act are object-based, as they do not deal explicitly with the specialised procedures that are required to investigate cybercrimes or other offences that involve the use of digital devices. The Cybercrimes Act attempts to address this shortcoming. The coexistence of the search and seizure provisions in these two Acts may cause difficulties in the fight against crime. In addition to the validity requirements of search warrants, as set out in the Acts, additional intelligibility requirements for the validity of search warrants have been developed by the courts.

1 INTRODUCTION

Section 14 of the Constitution of the Republic of South Africa of 1996 (the Constitution) guarantees the right to privacy. The first part of section 14 guarantees a general right to privacy, while the second part protects against the search and seizure of someone's person, property or possessions, and against infringements of communications.[1] The lawfulness of a search and seizure operation in the course of a criminal investigation is dependent on the citizen's legitimate expectation of privacy, as privacy extends "*a fortiori* only to those aspects in regard to which a legitimate expectation of privacy

[1] Currie and De Waal *The Bill of Rights Handbook* 6ed (2013) 294.

can be harboured".[2] It is a general principle of our law that a search and seizure operation may only be conducted on authority of a search and seizure warrant. The Constitutional Court has held that a search warrant is a mechanism employed to balance an individual's right to privacy with the public interest. A search warrant governs the time, place and scope of the search. This, the court held, "softens the intrusion on the right to privacy, guides the conduct of the inspection, and informs the individual of the legality and limits of the search".[3] The failure of the police or other law enforcement agencies to obtain a search warrant in circumstances where no swift action is required, and sufficient time is available to obtain such a warrant, will typically render a warrantless search illegal.[4] The informed consent of the person whose rights are affected by the search may also obviate the need for a search warrant.[5] Statutory prescripts providing for the power to conduct search and seizure operations generally infringe on the right to privacy, and must therefore comply with the limitations clause in the Constitution.[6]

The Criminal Procedure Act[7] is the primary criminal procedural code in South Africa, and Chapter 2 thereof provides for search and seizure operations in considerable detail. The provisions of the Criminal Procedure Act in respect of search and seizure do not derogate from the powers in respect of search and seizure conferred by any other law.[8] Section 21 of the Act regulates search warrants. The search and seizure provisions of the Criminal Procedure Act are object-based; they do not deal explicitly with any of the specialised procedures that are required to investigate cybercrimes or other offences that involve the use of digital devices.[9] A vast body of literature exists on the distinction between electronic or digital evidence on the one hand, and object-based evidence on the other, as well as the need for legal regimes to adopt criminal investigative procedures to deal more effectively with modern technological advances. These issues are not

---

2 *Bernstein v Bester* 1996 (2) SA 751 (CC) 75; *Minister of Police v Kunjana* 2016 (2) SACR 473 (CC) 26.

3 *Gaertner v Minister of Finance* 2014 (1) SA 442 (CC) 69.

4 *Gumede v S* (800/2015) [2016] ZASCA 148; *Ngqukumba v Minister of Safety and Security* 2014 (5) SA 112 (CC) 19. S 22(*b*) of the Criminal Procedure Act 51 of 1977 sets out the prerequisites for warrantless searches in matters of urgency.

5 S 22(*a*) of 51 of 1977. See *Buthelezi v Minister of Police* 2020 (2) SACR 21 (GJ) on the issue of "informed consent".

6 *Investigating Directorate: Serious Economic Offences v Hyundai Motor Distributors (Pty) Ltd In re: Hyundai Motor Distributors (Pty) Ltd v Smit NO* 2001 (1) SA 545 (CC) 20. S 36 of the Constitution "requires a weighing-up of the nature and importance of the right(s) that are limited together with the extent of the limitation, as against the importance and purpose of the limiting enactment. Section 36(1) of the Constitution spells out the factors that have to be considered in making a proportional evaluation of all the counterpoised rights and interests involved." See in this regard *Ex Parte Minister of Safety and Security: In Re S v Walters* 2002 (4) SA 613 (CC) 26–27.

7 51 of 1977.

8 S 19 of 51 of 1977. For various examples of such other legislation, see Kruger *Hiemstra's Criminal Procedure* (2008–SI 14) 2-1–2-2.

9 Department of Justice *Memorandum on the Cybercrimes and Cybersecurity Bill* 2017 [B 6–2017] 2. The clauses relating to cybersecurity were removed in later versions of the Cybercrimes Bill.

revisited in this contribution.[10] An attempt was made to address the shortcomings in the South African legal framework when the Electronic Communications and Transactions Act[11] (ECT Act) was enacted. This Act provided for the appointment of cyber inspectors.[12] These cyber inspectors were empowered to conduct search and seizure operations[13] and to apply for search and seizure warrants.[14] These provisions have been described as "more technical in nature" and catering for the electronic environment.[15] These provisions, however, have remained a dead letter as they have never come into operation in practice.[16]

Certain sections of the Cybercrimes Act,[17] including most of Chapter 4 thereof, came into operation on 1 December 2021.[18] In addition to creating offences that have a bearing on cybercrime,[19] the Cybercrimes Act regulates the powers of the police and investigators to investigate cybercrimes. Chapter 4 of the Act provides for the powers of the police and others in

---

10 See for instance, Kerr "Search Warrants in an Era of Digital Evidence" 2005 75(1) *Mississippi Law Journal* https://papers.ssrn.com/sol3/papers.cfm?abstract_id=697541 (accessed 2022-01-21) 85 85–138; Basdeo "The Legal Challenges of Search and Seizure of Electronic Evidence in South African Criminal Procedure: A Comparative Analysis" 2012 25(2) *South African Journal of Criminal Justice* https://hdl.handle.net/10520/EJC127879 (accessed 2022-01-21) 195 195–212; Bouwer "Search and Seizure of Electronic Evidence: Division of the Traditional One-Step Process Into a New Two-Step Process in a South African Context" 2014 27(2) *South African Journal of Criminal Justice* https://hdl.handle.net/10520/EJC167857 (accessed 2022-01-21) 156 156–171; Nortjé and Myburgh "The Search and Seizure of Digital Evidence by Forensic Investigators in South Africa" 2019 22(1) *Potchefstroom Electronic Law Journal* https://doi.org/10.17159/1727-3781/2019/v22i0a4886 (accessed 2022-01-21) 1 1–42. Digital evidence also brings about admissibility challenges. For comprehensive discussions regarding the issues of admissibility of, and weight to be afforded to, electronic evidence, see De Villiers "Old 'Documents', 'Videotapes' and New 'Data Messages': A Functional Approach to the Law of Evidence (Part 1)" 2010 3 *South African Law Journal* https://hdl.handle.net/10520/EJC55325 (accessed 2022-01-21) 558 558–575; De Villiers "Old 'Documents', 'Videotapes' and New 'Data Messages' – A Functional Approach to the Law of Evidence (Part 2)" 2010 4 *South African Law Journal* https://hdl.handle.net/10520/EJC55352 (accessed 2022-01-21) 720 720–735; Hofman "Electronic Evidence in Criminal Cases" 2006 19(3) *South African Journal of Criminal Justice* https://hdl.handle.net/10520/EJC52892 (accessed 2022-01-21) 257 257–275; Swales "An Analysis of the Regulatory Environment Governing Hearsay Electronic Evidence in South Africa: Suggestions for Reform – Part One" 2018 21(1) *Potchefstroom Electronic Law Journal* https://doi.org/10.17159/1727-3781/2018/v21i0a2916 (accessed 2022-01-21) 1 1–30; Swales 2018 *PELJ* 1–34; Theophilopoulos "The Admissibility of Data, Data Messages, and Electronic Documents at Trial" 2015 3 *Journal of South African Law* https://hdl.handle.net/10520/EJC-61acfb0f9 (accessed 2022-01-21) 461 461–481.

11 25 of 2002.

12 S 81 of the ECT Act.

13 S 82 of the ECT Act.

14 S 83 of the ECT Act.

15 Govender *A Critical Analysis of the Search and Seizure of Electronic Evidence Relating to the Investigation of Cybercrime in South Africa* (LLM dissertation, University of KwaZulu Natal) 2018 33. For a detailed analysis of the search and seizure provisions in terms of the ECT Act, see the same work at 30–35.

16 Govender *Search and Seizure of Electronic Evidence* 33.

17 19 of 2020

18 Proc R 42 in *GG* No 45562 of 2021-11-30.

19 Ch 2 of the Cybercrimes Act.

respect of search, access or seizure in the investigation of cybercrimes.[20] The provisions of the Criminal Procedure Act[21] continue to apply to the investigation of cybercrimes in that they operate in addition to the provisions of Chapter 4 of the Cybercrimes Act to the extent that the Criminal Procedure Act is not inconsistent with the Cybercrimes Act.[22] The aim of this article is to compare the search warrant provisions of the Cybercrimes Act to those of the Criminal Procedure Act in order to determine to what extent they differ. In the course of the discussion, problems that may arise in interpreting the search warrant provisions of the Cybercrimes Act as a result of the fact that they coexist with the provisions of the Criminal Procedure Act are also identified, and possible solutions are presented. The following matters are considered: the issuing official, the content of the application, the content of the warrant and the execution of the warrant. The issue of warrantless searches falls outside the scope of this contribution.

2 THE ISSUING OFFICIAL

The Constitutional Court regards the vesting of authority to issue search warrants in judicial officers as a significant tool to minimise the interference with personal liberties of individuals.[23] Judicial officers "possess qualities and skills essential for the proper exercise of this power, like independence and the ability to evaluate relevant information so as to make an informed decision".[24] It is of vital importance that the person issuing the warrant must have authority and jurisdiction to do so.[25] In terms of the Criminal Procedure Act, a pre-trial search warrant for investigative purposes must be issued by a magistrate or a justice of the peace.[26] The Act does not empower a judge of the High Court to issue a search warrant for investigative purposes. Furthermore, the definition of a "magistrate" in the Criminal Procedure Act excludes a regional magistrate.[27] Thus, where a provision of the Criminal Procedure Act empowers a magistrate to execute certain duties, a regional magistrate may not execute them. In instances where regional magistrates are empowered to execute duties, their office is explicitly named in the relevant provisions of the Criminal Procedure Act,[28] or reference is made to a broader term such as "judicial officer" in order to include them.[29] If a regional magistrate (and arguably a judge) issues a pre-trial search warrant contrary to the provisions of the Criminal Procedure Act, this does not, without more, render the evidence obtained in the subsequent search

---

20 In terms of s 28 of the Cybercrimes Act, a police official may, in accordance with Ch 4 of the Cybercrimes Act, search for, access or seize any article, within the Republic.

21 51 of 1977.

22 S 27 of the Cybercrimes Act.

23 *Minister for Safety and Security v Van der Merwe* 2011 (2) SACR 301 (CC) 37.

24 *Minister for Safety and Security v Van der Merwe supra* 38. Also, see South *African Association of Personal Injury Lawyers v Heath* 2001 (1) SA 883 (CC) 34.

25 *Minister for Safety and Security v Van der Merwe supra* 56.

26 S 21(1)(*a*) of the Criminal Procedure Act.

27 In terms of s 1 of the Criminal Procedure Act, the term magistrate includes "an additional magistrate and an assistant magistrate but not a regional magistrate".

28 See, for instance, s 205 of the Criminal Procedure Act.

29 See s 21(1)(*b*) of the Criminal Procedure Act.

inadmissible. In terms of section 35(5) of the Constitution, the trial court retains the discretion to admit the evidence obtained as a result of a technically deficient warrant, if the exclusion thereof would not be conducive to a fair trial or to the advancement of the administration of justice. Thus, where judicial approval for a search is sought from the wrong judicial officer in a *bona fide* fashion in order to protect individual rights, the defect in the warrant is not necessarily fatal for the admissibility of the evidence found as a result of the warrant in question.[30] In addition to magistrates, justices of the peace may also issue search warrants in terms of the Criminal Procedure Act. Justices of the peace are appointed in terms of the Justices of the Peace and Commissioners of Oaths Act.[31] Senior members of the prosecuting service and commissioned officers of the South African Police Service are among those who, *ex officio*, hold the office of justice of the peace.[32] They are most likely to issue search warrants. It is nevertheless submitted that a judicial officer ought to be the first port of call when an application is made for a search warrant, as justices of the peace may lack the measure of independence. The Criminal Procedure Act does, however, empower a judge or a "judicial officer presiding at criminal proceedings" to issue a search and seizure warrant (trial warrant) if required in evidence, subject to certain prerequisites.[33] Therefore, the warrant issued at the trial may clearly be issued by a judge, magistrate or regional magistrate presiding in a criminal trial.

The Cybercrimes Act extends the power to authorise search and seizure warrants to magistrates and judges of the High Court.[34] Unlike the Criminal Procedure Act, justices of the peace are not so empowered. The Cybercrimes Act empowers "a magistrate or a judge of the High Court presiding at criminal proceedings" to issue trial warrants. This provision thus differs from those of the Criminal Procedure Act in that the latter refers to a judge or a presiding officer in criminal proceedings. The Cybercrimes Act makes no explicit reference to regional magistrates in respect of the issuing of search and seizure warrants either at the pre-trial stage or at the trial. The question therefore arises whether regional magistrates are excluded. The present author submits that the Cybercrimes Act must be interpreted in a manner so as to include regional magistrates in issuing both these types of warrants. This is because, unlike the Criminal Procedure Act, the Cybercrimes Act neither defines the term "magistrate", nor specifically excludes regional magistrates from the meaning of "magistrate". The Magistrates Act,[35] which regulates the appointment and conditions of service of magistrates, defines a magistrate as "a judicial officer appointed under section 9 of the Magistrates' Courts Act,[36] read with section 10 of [the Magistrates] Act, excluding any person occupying that office in an acting or

30 *S v Dos Santos* 2010 (2) SACR 382 (SCA) 21–24.
31 16 of 1963. S 2 of the Act provides for their appointment by the Minister of Justice.
32 S 4 of 16 of 1963, read with the first schedule to the Act.
33 S 21(1)(*b*) of the Criminal Procedure Act.
34 S 29(1)(*a*) of the Cybercrimes Act.
35 90 of 1993.
36 32 of 1944.

temporary capacity and any assistant magistrate".[37] Section 9 of the Magistrates' Courts Act,[38] in turn, refers to the appointment of both district court magistrates and regional court magistrates.[39] The term "magistrate", therefore, also encompasses a regional magistrate for purposes of the two key pieces of legislation regulating the appointment of judicial officers in the lower courts. It would further be nonsensical if the legislator empowered both district court magistrates and judges of the High Court to issue search warrants (especially when presiding over a criminal trial), but excluded regional magistrates, who should be equally skilled to consider the authorisation of search warrants.

3 ARTICLES THAT MAY BE SEIZED

Section 20 of the Criminal Procedure Act provides for the articles that may be seized by the State. There must be some link between these articles and a criminal offence. Three categories of article may be seized. The first category is anything that is concerned, or is on reasonable grounds believed to be concerned, in the commission or suspected commission of an offence.[40] The second category refers to anything that may afford evidence of the commission or suspected commission of an offence.[41] The third category has to do with anything that is intended to be used or is on reasonable grounds believed to be intended to be used in the commission of an offence.[42] "Anything"[43] falling within one of these categories may be seized. A search and seizure warrant may authorise a search operation with reference to all three categories insofar as they are applicable.[44] Given the focus of the Cybercrimes Act on cybercrime and the fact that it caters for technological advances, the articles that may be seized in terms thereof are more precisely described. An "article" in this context refers to any data,[45] computer program,[46] computer data storage medium[47] or computer system.[48] Each of these articles is further defined in the definitions provisions.[49] The Cybercrimes Act, in very similar terms to the Criminal Procedure Act, also requires a link between the articles that may be seized and evidence of the suspected commission of a criminal offence. The offences are, however, further delimited under the definition of "article" in the Cybercrimes Act, namely:

---

37 S 1 of 90 of 1993.
38 32 of 1944.
39 S 9(1)(*a*) of 32 of 1944.
40 S 20(*a*) of the Criminal Procedure Act.
41 S 20(*b*) of the Criminal Procedure Act.
42 S 20(*c*) of the Criminal Procedure Act.
43 Introductory sentence of s 20 of the Criminal Procedure Act.
44 In *Polonyfis v Minister of Police* 2012 (1) SACR 57 (SCA) 10, the court held that the jurisdictional facts necessary for the issue of a single warrant may be found in all three sub-sections of section 20 of the Criminal Procedure Act.
45 S 1(1)(*a*) of the Cybercrimes Act.
46 S 1(1)(*b*) of the Cybercrimes Act.
47 S 1(1)(*c*) of the Cybercrimes Act.
48 S 1(1)(*d*) of the Cybercrimes Act.
49 S 1(1) of the Cybercrimes Act.

"(*aa*) an offence in terms of Part I and Part II of Chapter 2;
(*bb*) any other offence in terms of the law of the Republic; or
(*cc*) an offence in a foreign State that is substantially similar to an offence contemplated in Part I or Part II of Chapter 2 or another offence recognised in the Republic."[50]

Part I of Chapter 2 creates a number of cybercrimes,[51] while Part II criminalises "malicious communications".[52] It becomes clear that it is not only articles that are in some way or other involved in the commission of offences created by the Cybercrimes Act that are susceptible to seizure. The search and seizure operation may be in respect of any offence where data, a computer program, a computer data storage medium or a computer system is concerned in or may afford evidence of the commission of a crime. It will remain important that the articles to be seized are identified with sufficient particularity in both the application for the warrant and the search warrant itself.[53]

4 THE CONTENT OF THE APPLICATION

The Criminal Procedure Act requires that the information setting out the jurisdictional facts for the issuing of a search warrant be on oath.[54] The Cybercrimes Act, on the other hand, provides that the information may be presented either on oath or by way of affirmation.[55] The application for a pre-trial search warrant under the Criminal Procedure Act must satisfy the magistrate or justice of the peace, as the case may be, that there are reasonable grounds for believing that the article in question "is in the possession or under the control of or upon any person or upon or at any premises within the area of the jurisdiction" of the magistrate or justice of the peace.[56] It must be clear from the information made available to the magistrate that the article in question is covered by section 20 of the Criminal Procedure Act, which provides for the articles that may be seized by the State (as discussed under heading 3 above). The affidavit in support of the search warrant to be issued in terms of the Criminal Procedure Act must contain two important objective jurisdictional facts, namely: (i) the existence of a reasonable suspicion that a crime has been committed, and

50 *Ibid*.

51 These are: unlawful access to a computer system or a computer data storage medium (s 2); unlawful interception of data (s 3); unlawful acts in respect of software or hardware tool (s 4); unlawful interference with data or a computer program (s 5); unlawful interference with a computer data storage medium or computer system (s 6); unlawful acquisition, possession, provision, receipt or use of a password, access code or similar data or device (s 7); cyber fraud (s 8); cyber forgery and uttering (s 9); cyber extortion (s 10) and aggravated offences in respect of "restricted computer systems" (s 11). The Act also criminalises the theft of incorporeal property (s 12).

52 They are: data messages that incite damage to property or violence (s 14) and data messages that threaten persons with damage to property or violence (s 15).

53 *Minister for Safety and Security v Van der Merwe supra* 55.

54 S 21(1)(*a*) of the Criminal Procedure Act.

55 S 29(1)(*a*) of the Cybercrimes Act.

56 S 21(1)(*a*) of the Criminal Procedure Act.

(ii) the existence of reasonable grounds to believe that objects connected with the offence may be found on the premises or persons intended to be searched.[57]

In terms of the Cybercrimes Act, it must appear from the application that the article (a) is in the area of jurisdiction of the magistrate or judge,[58] *or* (b) is being used or is involved in or has been used or was involved in the commission of an offence and that there are reasonable grounds to believe that the article is within the area of the said jurisdiction.[59] The nature of cybercrimes or crimes involving the use of computers may present difficulties in establishing where precisely the offence was committed. A warrant may, therefore, also be issued if it appears to the issuing official that the article is within the Republic, but it is unsure within which area of jurisdiction the article is being used or is involved or has been used or was involved in the commission of an offence.[60] It is critical that these jurisdictional facts be placed before the judicial officer considering the warrant. A judicial officer authorising the warrant must satisfy himself or herself that the affidavit contains sufficient information on the existence of the jurisdictional facts. If not, the judicial officer should refuse to issue the warrant.[61] The affidavit in support of the application for a search warrant must be properly signed and sworn to before a commissioner of oaths, as set out in the Justices of the Peace and Commissioners of Oaths Act.[62] If the affidavit was already prepared and signed before it was presented to the commissioner of oaths for the administering of the oath, the warrant issued on the strength thereof will be invalid.[63]

5 ORAL APPLICATION FOR A SEARCH WARRANT

Both the Criminal Procedure Act[64] and the Cybercrimes Act[65] provide for warrantless searches in circumstances of urgency or where consent is given for the search. The Cybercrimes Act provides for a unique in-between procedure, namely an oral application for the warrant (or the amendment of the warrant) in matters of urgency or in other exceptional circumstances. Such an oral application may be made by a specifically designated police official in circumstances where "it is not reasonably practicable, having regard to the urgency of the case or the existence of exceptional circumstances to make a written application".[66] The application must indicate the particulars of urgency of the case or the other exceptional

57 *Minister of Safety and Security v Van der Merwe supra* 39.
58 S 29(1)(*a*)(i) of the Cybercrimes Act.
59 S 29(1)(*a*)(ii)(*aa*) of the Cybercrimes Act.
60 S 29(1)(*a*)(ii)(*bb*) of the Cybercrimes Act.
61 *Minister of Safety and Security v Van der Merwe supra* 39 and 56.
62 16 of 1963.
63 *Mogale v Minister of Safety and Security* 2016 (2) SACR 682 (GP). Also see *S v Malherbe* 2020 (1) SACR 227 (SCA).
64 S 22 of the Criminal Procedure Act.
65 S 32 of the Cybercrimes Act.
66 S 30(1) of the Cybercrimes Act.

circumstances,[67] and must also comply with any supplementary directives relating to oral applications that may be issued by the Chief Justice in terms of the Superior Courts Act.[68] The Act sets out the preconditions for the issuing of a warrant based on an oral application.[69] In addition to the normal requirements for the issuing of a warrant,[70] it must be evident that the warrant is immediately necessary in order to search for, access or seize an article,[71] and that it is not reasonably practicable, having regard to the urgency of the case or the existence of exceptional circumstances, to make a written application for the issuing of a warrant or to amend a warrant.[72] Furthermore, the police official concerned must submit a written application to the magistrate or judge of the High Court concerned, within 48 hours after the issuing of the warrant.[73] Such a warrant must, among other things, contain a summary of the facts that were considered, as well as the grounds upon which the warrant was issued.[74] Upon receipt of a written application, the issuing officer must reconsider that application, whereupon he or she may confirm, amend or cancel the warrant.[75]

6 THE CONTENT OF THE WARRANT

It is an essential requirement for the validity of a search warrant that its terms must be neither vague nor overbroad. The issue was summarised by the Supreme Court of Appeal as follows:

> "For where the warrant is vague it follows that it will not be possible to demonstrate that it goes no further than is permitted by the statute. If a warrant is clear in its terms a second, and different, question might arise, which is whether the acts that it permits go beyond what is permitted by the statute. If it does, then the warrant is often said to be 'overbroad' and will be invalid so far as it purports to authorise acts in excess of what the statute permits. A warrant that is overbroad might, depending upon the extent of its invalidity, be set aside in whole, or the bad might be severed from the good."[76]

The terms of the warrant must be reasonably intelligible to both the searcher and the person being searched, and the courts will construe the terms of a warrant with reasonable strictness.[77] The Criminal Procedure Act states that a search warrant should require a police official to seize the article in question. In order to achieve this, the warrant must authorise the police official to search any person identified in the warrant, or to enter any premises identified in the warrant and to search any person found on or at

---

67 S 30(2)(*a*) of the Cybercrimes Act.
68 10 of 2013. See s 30(2)(*b*) of the Cybercrimes Act.
69 S 30(4) of the Cybercrimes Act.
70 S 30(4)(*a*)(i) of the Cybercrimes Act.
71 S 30(4)(*a*)(ii) of the Cybercrimes Act.
72 S 30(4)(*a*)(iii) of the Cybercrimes Act.
73 S 30(4)(*b*) of the Cybercrimes Act.
74 S 30(5)(*c*) of the Cybercrimes Act.
75 S 30(6) of the Cybercrimes Act.
76 *Minister of Safety and Security v Van der Merwe supra* 14. Also see *Powell v Van der Merwe* [2005] 1 All SA 149 (SCA) 50–59.
77 *Minister of Safety and Security v Van der Merwe supra* 56.

such premises.[78] A search warrant issued in terms of the Cybercrimes Act must require a police official identified in the warrant to search for, access or seize the article in question, and to that end:

- search any person identified in the warrant;[79]
- enter and search any container, premises, vehicle, facility, ship or aircraft identified in the warrant;[80]
- search any person who is believed, on reasonable grounds, to be able to furnish any information of material importance concerning the matter under investigation and who is found near such container, on or at such premises, vehicle, facility, ship or aircraft;[81]
- search any person who is believed, on reasonable grounds, to be able to furnish any information of material importance concerning the matter under investigation and who (i) is nearby; (ii) uses; or (iii) is in possession or in direct control of, any data, computer program, computer data storage medium or computer system identified in the warrant to the extent set out in the warrant;[82]
- search for any article identified in the warrant to the extent set out in the warrant;[83]
- access an article identified in the warrant to the extent set out in the warrant;[84]
- seize an article identified in the warrant to the extent set out in the warrant;[85] or
- use or obtain any instrument, device, equipment, password, decryption key, data, computer program, computer data storage medium or computer system or other information that is believed, on reasonable grounds, to be necessary to search for, access or seize an article identified in the warrant to the extent set out in the warrant.[86]

It should be mentioned that the Act places certain restrictions on the use of the instrument, device, password or decryption key or information to gain access to the article defined in the warrant.[87]

The validity requirements laid out in the Cybercrimes Act must further be read with the common law intelligibility requirements for search warrants, as identified by the Constitutional Court in *Minister of Safety and Security v Van der Merwe*,[88] where it was found that a valid warrant: states the statutory

---

78 S 20(2) of the Criminal Procedure Act.

79 S 20(2)(*a*) of the Cybercrimes Act.

80 S 20(2)(*b*) of the Cybercrimes Act. A technically wrong address does not invalidate a warrant if it otherwise described the premises with sufficient particularity so that the police could ascertain and identify the place to be searched. See, in this regard, *Polonyfis v Minister of Police supra* 16.

81 S 20(2)(*c*) of the Cybercrimes Act.

82 S 20(2)(*d*) of the Cybercrimes Act.

83 S 20(2)(*e*) of the Cybercrimes Act.

84 S 20(2)(*g*) of the Cybercrimes Act.

85 S 20(2)(*h*) of the Cybercrimes Act.

86 S 20(2)(*a*) of the Cybercrimes Act.

87 S 37(2)(*a*) of the Cybercrimes Act.

88 *Supra* 55.

provision in terms of which it is issued;[89] is addressed to a specifically named police official; identifies the searcher; clearly mentions the authority it confers upon the searcher; identifies the person, container or premises to be searched; describes the article to be searched and seized with sufficient particularity; specifies the offence that triggered the criminal investigation; and names the suspected offender.[90]

There has been some academic and judicial debate on the question whether separate judicial authorisation is needed for the seizing of computer or device hardware, on the one hand, and accessing and retrieving data from the device on the other. Bouwer[91] argues that judicial authorisation is needed for each step. In *S v Miller,*[92] Gamble J analysed the relevant provisions of the Electronic Communications and Transactions Act and their relationship to the Criminal Procedure Act and concluded that such an approach is not necessary. In *Oosthuizen v the Magistrate, Hermanus*,[93] it was held that a warrant authorising the seizure of "all electronic equipment which include [sic] cell phones, desktop computers, laptops and Ipad's [sic]" was "strikingly broad" as the warrant did not distinguish between the electronic devices themselves and any material or information stored on them, neither did it identify the material to be seized as material that might have a bearing on the suspected offence. Norton AJ held:

> "What was required, in my view, was for the warrant, first, to specify that the object of the search (under this category of articles) would be material stored on the electronic devices, and second, to identify the relevant material by its connection to the suspected offences, and with reference to the types of electronically stored material (such as accounting records, invoices, correspondence, photographs or videos) which might evidence activities related to the suspected offences. This is the only way in which the police officers conducting the search would be able to distinguish between the electronically stored material subject to seizure, and material not subject to seizure."[94]

It is now clear from the wording of the Cybercrimes Act that, indeed, separate authorisations for the seizure of equipment and the accessing of data is required. In fact, even the method used to access the data must be

---

89 When a statutory offence is the subject of the investigation, the search warrant should refer to the specific statute and the section or subsection of the applicable legislation. This is necessary to enable both the person in charge of the premises to be searched and the police official authorised to execute the search warrant, to know precisely for which offences the search has been authorised. See, in this regard, *Goqwana v Minister of Safety and Security* 2016 (1) SACR 384 (SCA) 54–55.

90 Errors in the description of the offence may render a search and seizure warrant invalid on the grounds of vagueness and lack of reasonable intelligibility. See *Oosthuizen v Magistrate, Hermanus* 2021 (1) SACR 278 (WCC) 59.

91 Bouwer 2014 *South African Journal of Criminal Justice* 156–71.

92 2016 (1) SACR 251 (WCC).

93 *Supra* 69–70.

94 *Oosthuizen v Magistrate, Hermanus supra* 75. For a more detailed discussion of the case, see Du Toit 2021 2 *South African Journal of Criminal Justice* https://doi-org.nwulib.nwu.ac.za/10.47348/SACJ/v34/i2a11 (accessed 2022-12-31) 386 386–391. Also see *Craig Smith and Associates v Minister of Home Affairs* [2015] BCLR 81 (WCC). Also see *Beheersmaatschappij Helling I NV v Magistrate, Cape Town* 2007 (1) SACR 99 (C) 115f–h.

authorised. The authorisation for these different actions may, however, be contained in a single search and seizure warrant.

7 EXECUTION OF THE SEARCH AND SEIZURE WARRANT

7 1 Time of execution

The Criminal Procedure Act requires a search warrant to be executed by day, unless the person issuing the warrant in writing authorises the execution thereof by night.[95] The Cybercrimes Act, on the other, provides that a search warrant may be executed *at any time*, unless the person issuing the warrant in writing specifies otherwise.[96] It is submitted that judicial officers should give careful consideration to this issue and that authorisation for the search should not be lightly extended to night time, at least as far as the search of persons and premises are concerned. This consideration will be less concerning when "offsite" access is gained by experts to devices that had been seized earlier. It is preferable that the time of execution of the warrant also be delimited in a search warrant. One of the aims of a search warrant is to govern the time of a search, so as to limit the privacy intrusion.[97] Search and seizure must be carried out in the least intrusive and disruptive manner possible. The police may, for instance, not disrupt business more than is necessary, and may not act beyond the terms of the warrant.[98] Unless the affidavit in support of the application for the warrant makes out a case for the search and seizure of a person or premises at night, the warrant should preferably authorise day-time searches only.

7 2 Informational requirement

It is not necessary for persons whose rights are affected by a search and seizure operation to receive prior notice thereof as there is a risk that they would remove or destroy the evidence.[99] In terms of the Criminal Procedure Act, a police official executing a warrant must, after the execution thereof, upon demand of any person whose rights have been affected by the search, hand to him or her a copy of the warrant.[100] The Supreme Court of Appeal has held that it is not only the search and seizure warrant but also the affidavit in support of the application for the warrant that should accompany the warrant and be handed over if requested by the party affected by the search. The court found that this procedure would expedite any court application in which a person may wish to contend that his or her rights were

---

95 S 21(3)(*a*) of the Criminal Procedure Act. See, in this regard, *Young v Minister of Safety and Security* 2005 (2) SACR 437 (SE) 30.

96 S 29(4)(*a*) of the Cybercrimes Act.

97 *Magajane v Chairperson, North West Gambling Board* 2006 (2) SACR 447 74.

98 *Beheersmaatschappij Helling I NV v Magistrate, Cape Town supra* 115h–116e.

99 *Thint (Pty) Ltd v NDPP, Zuma v NDPP* 2008 (2) SACR 421 (CC) 98.

100 S 21(4) of the Criminal Procedure Act.

adversely affected by the search.[101] Ally[102] raises two objections against this provision. He is of the view, first, that a copy of the warrant should, whenever possible, be provided before the search and seizure operation. Secondly, the delivery of a copy should not depend on the request of the individual, as many subjects will not make such a request as a result of their lack of knowledge of the law.[103] Some of these concerns are addressed in the Cybercrimes Act, in terms of which the police official who executes a search warrant must hand a copy of the warrant and the written application of the police official to any person whose rights in respect of any search, or article accessed or seized under the warrant have been affected.[104] The handing over does not depend on the request of the individual whose rights are affected by the search. The provisions also give effect to the requirement that not only the warrant but also the application for the warrant be handed over. This, by implication, entails that the affidavit or affirmed statement in support of the application be handed over.

7 3 Assistance in the execution of the search

In terms of section 21(2) of the Criminal Procedure Act, only a police official may be authorised by a search warrant to conduct a search. Warrants authorising private individuals to search and seize are invalid.[105] In *Keating v Senior Magistrate*,[106] Kollapen J considered the question whether it is permissible for "outside persons" (for example, forensic investigators and computer experts) to be authorised to be present at a search and seizure for the limited purpose of the expertise they bring. The court held that one must take a realistic approach to the issue, while at the same time guarding against outsourcing the functions and powers of the police, or allowing private individuals or entities to usurp such powers. The court found that as technology and expertise become increasingly specialised and significant bodies of knowledge and expertise are developed in dedicated areas, it is unrealistic to expect the investigative agencies of the State, at any given time, to possess all of the expertise that may be required to conduct successful investigations. As such expertise may reside outside of the State, the use of such expertise may indeed be necessary.[107] The court concluded that there is nothing in the Criminal Procedure Act that finds the presence of private persons at a search and seizure offensive, provided, first, they are properly authorised to be there, and secondly, their role is clearly defined and does not relate to the actual execution of search and seizure activities.[108] The court also listed a number of issues to be placed before the authorising magistrate, including: the necessity for the presence of such

101 *Goqwana v Minister of Safety and Security supra* 31.
102 Ally "Search and Seizure" in Joubert (ed) *Criminal Procedure Handbook* 13ed (2020) 196.
103 Ally in Joubert (ed) *Criminal Procedure Handbook* 196.
104 S 29(5) of the Cybercrimes Act.
105 *Extra Dimensions v Kruger* 2004 (2) SACR 493 (T); *Smit & Maritz Attorneys v Lourens* 2002 (1) SACR 152 (W)).
106 2019 (1) SACR 396 (GP).
107 *Keating v Senior Magistrate supra* 37.
108 *Keating v Senior Magistrate supra* 39.

persons; whether they bring special expertise or knowledge to the search and seizure operation that do not ordinarily reside in police officials; the clearly defined role(s) the persons are required to play in the search operation; and under whose control and authority such persons will operate during the search and seizure operation. The affidavit should also indicate how the presence and assistance of such persons would render the search more effective and compliant, and possibly reduce or limit the incursion into the privacy and other rights of those who are the subject of the search.[109]

A search warrant issued in terms of the Cybercrimes Act may require an investigator or other person identified in the warrant to assist the police official identified in the warrant with the search for, access or seizure of the article in question, to the extent set out in the warrant.[110] It is submitted that in order for such an investigator or other person to be so authorised, the affidavit in support of the application should set out the need for their presence, as was described in *Keating v Senior Magistrate*. The Act also places an obligation on electronic communications service providers, financial institutions or persons who are "in control of any container, premises, vehicle, facility, ship, aircraft, data, computer program, computer data storage medium or computer system that is subject to a search authorised in terms of the Act" to provide assistance in the search, if required. The assistance includes "technical assistance" and "such other assistance as may be reasonably necessary" to a police official or investigator in order to search for, access or seize an article.[111] An "investigator" does not necessarily refer to an official appointed by the State, but rather to any fit and proper person who is not a member of the South African Police Service, and who is either identified and authorised in terms of a search warrant to assist the police official with the search operation, or is requested by the police officer to do so. Such a person remains subject to the direction and control of the police official.[112]

8 A SEPARATE WARRANT NECESSARY IN RESPECT OF ARTICLES NOT COVERED BY THE CYBERCIMES ACT?

As was pointed out earlier in this contribution, the Criminal Procedure Act continues to apply to the extent that its provisions are not incompatible with the Cybercrimes Act. It was also shown that the articles that may be seized in terms of the Cybercrimes Act are: any data; computer program; computer data storage medium; or computer system. It was further pointed out that the search and seizure provisions of the Cybercrimes Act are applicable not only to cybercrimes created by the Act but also to any offence committed in the Republic. The question arises whether it will be necessary to obtain a separate warrant in terms of the Criminal Procedure Act (or other relevant legislation) in respect of search and seizure of articles not covered by the

[109] *Keating v Senior Magistrate supra* 40.
[110] S 29(3) of the Cybercrimes Act.
[111] S 34(1) of the Cybercrimes Act.
[112] S 25 of the Cybercrimes Act.

Cybercrimes Act. For instance, an investigation in respect of a financial crime may require the search for and seizure of both computer data and handwritten documents. As the latter is not covered by the definition of "article" in the Cybercrimes Act, the situation would necessarily require that separate search warrants be issued in terms of the Cybercrimes Act and the Criminal Procedure Act. It must be recalled that one of the validity requirements for a search and seizure warrant is that it should state the statutory provision in terms of which it was issued. Such a fragmented approach seems to be quite inefficient and counterproductive to the investigation of crime. The Constitutional Court has held that our courts must take care that in ensuring protection for the right to privacy, they do not hamper the ability of the State to prosecute serious and complex crime, which is also an important objective in our constitutional scheme.[113] It is submitted that it should be quite acceptable for a single search warrant to be applied for and issued with reference to the provisions of both the Criminal Procedure Act and the Cybercrimes Act. Ultimately, the search warrant must be "reasonably intelligible", in the sense that it should be capable of being understood by the reasonably well-informed person who understands the relevant empowering legislation and the nature of the offences under investigation.[114]

9 CONCLUSION

Although the provisions of the Criminal Procedure Act have hitherto often been used to search for and seize articles now provided for in the Cybercrimes Act, the reality is that the search and seizure provisions of the Criminal Procedure Act have not kept pace with technological advancements. As such, the investigative tools provided for by the Cybercrimes Act must be welcomed. Not only should the requirements of search warrants, as set out in the Act, be strictly adhered to, but issuing officials should also bear in mind the additional requirements for the validity of search warrants that have been developed by our superior courts, so as to ensure that the validity of these warrants are upheld in either preliminary litigation or during the trial where the admissibility of evidence obtained pursuant to a search warrant may become an issue. It is imperative that the legislature incorporates the search and seizure provisions of the Cybercrimes Act into the Criminal Procedure Act in order to avoid the issuing various search warrants in respect of a single criminal investigation. The Criminal Procedure Act remains the primary criminal procedural code for the investigation of crime, and should, as such, reflect the social realities in respect of the use of electronic devices in criminal activities.

[113] *Thint (Pty) Ltd v NDPP, Zuma v NDPP supra* 80.
[114] *Thint (Pty) Ltd v NDPP, Zuma v NDPP supra* 154.

A SHORT CRITIQUE OF MINIMUM SENTENCES

Alphonso Goliath
B Juris LLM (cum laude)
Doctoral Candidate, Lecturer, Criminal and Procedural Law, Nelson Mandela University

SUMMARY

The state has a constitutional duty to respect, promote and protect the rights of citizens. To this end, every citizen has the right to dignity, the right to equality, and the right to freedom and security of the person. Allied thereto is that they will not be subjected to punishment that is cruel, inhuman, and degrading, among others. With the advent of democracy, South Africa inherited a host of challenges and one of these challenges was the explosion of violent crime. Mandatory minimum sentences were introduced by the Criminal Law Amendment Act 105 of 1997 to serve as a temporary, emergency crime-control measure based on the commonly-held belief that harsh punishment would reduce crime. Since minimum sentencing legislation has been in full operation for more than two decades, one would expect crime in South Africa to be relatively under control. However, violent crimes like murder and rape in our society have not abated. It is argued that minimum sentences do not serve as a deterrent to violent crime, instead, they exacerbate prison overcrowding. Lengthy prison terms and high imprisonment rates fuel the conditions for higher crime rates as it impedes the objectives of rehabilitation and promotes recidivism. The state's continued support for these increased sentences infringes on the constitutional rights of citizens. In this article, the author concludes that if we feel outraged by the high rate of violent crime, we need to find a sentencing regime that leads to the reduction rather than the exacerbation of crime in line with constitutional provisions.

1 INTRODUCTION

In 1997 the South African parliament adopted legislation[1] introducing severe mandatory minimum sentences. This was a political response to counter the escalating violent crime South Africa experienced when it transitioned to a new democracy. Minimum sentencing legislation was only supposed to be temporary and could be extended every two years.[2] However, after

[1] The Criminal Law Amendment Act 105 of 1997 (the Act).

[2] Van Zyl Smit "Mandatory Sentences: A Conundrum for the New South Africa?" 2000 2(2) *Punishment and Society* 197 203 where Dullah Omar, then Minister of Justice, conveyed to the Justice Portfolio Committee of the National Assembly, that if new minimum sentences were to be introduced, these would only be to "tide us over our transition period". The Minister stated that he was confident that the crime situation would be under control within a couple of years and once that happened the punitive sentences for serious crimes would be abolished. The Minister stated that these increased sentences were needed to "restore confidence in the ability of the criminal justice system to protect the public against crime"; see also Muntingh "Sentencing" 2009 *Criminal (In) Justice in South Africa* 178 180 with

substantive and procedural amendments by the Criminal Law (Sentencing) Amendment Act,[3] the minimum sentencing provisions are now permanently in force until repealed by Parliament. In doing so the legislature failed to intensely scrutinise whether minimum sentences have the desired impact on serious violent crime.

Despite minimum sentences being fully operational for more than two decades, violent crimes like murder and rape have not abated. This article provides a critique of the efficacy of minimum sentences with a primary focus on the Act's main aim of preventing or curbing crime, its relationship with prison overcrowding, and its continued constitutionality.

2 BRIEF BACKGROUND AND LEGISLATIVE FRAMEWORK

The essence of the prescribed minimum sentences is to ensure that courts impose sentences that are consistently heavier than before for the crimes specified in section 51 of the Act.[4] It requires the imposition of mandatory minimum penalties for a wide range of the more serious offences that can only be imposed by the High Courts and Regional Courts.[5] The Act mandates life sentences for certain serious offences, including premeditated murder, the murder of a law enforcement officer or a potential state witness, and various forms of rape. It further mandates a 15-year imprisonment sentence for a first-time offender convicted for crimes, such as murder (under circumstances that would not otherwise merit a life sentence), robbery, and certain drug-related offences (to name a few). Additionally, a repeat offender must be sentenced to no fewer than 20 years, and a third or further-time offender a sentence of no fewer than 25 years.

Included in the Act is the so-called "departure" or "escape" clause, which allows for the imposition of a lesser sentence than that prescribed by the Act if the sentencing court is satisfied that "substantial and compelling circumstances" exist.[6] In the seminal judgment of *S v Malgas*,[7] the Supreme

reasons given such as addressing public demand, restoring confidence, confirming government's policy, allowing discretion and effective sentencing.

3 38 of 2007. These amendments include greater powers for Regional Courts concerning life imprisonment. The jurisdiction also allows them to deviate from imposing a life sentence and to impose a sentence that does not exceed 30 years. S 53(1)(*aA*) now expressly excludes some factors that cannot rank as "substantial and compelling circumstances" in respect of the offence of rape as follows: "When imposing a sentence in respect of the offence of rape the following shall not constitute substantial and compelling circumstances justifying the imposition of a lesser sentence: (i) The complainant's previous sexual history; (ii) an apparent lack of physical injury to the complainant; (iii) an accused person's cultural or religious beliefs about rape; or (iv) any relationship between the accused person and the complainant prior to the offence being committed."

4 *Centre of Child Law v Minister of Justice and Constitutional Development* 2009 (2) SACR 477 (CC) par 14 and par 45.

5 Terblanche *A Guide to Sentencing in South Africa* 3ed (2016) 49–75; see also Muntingh 2009 *Criminal (In) Justice in South Africa* 182–184.

6 S 51 of the Criminal Law Amendment Act 105 of 1997 states, in broad terms, that if a court has convicted a person of an offence specified in the schedules to the Act, then it shall

Court of Appeal gave extensive guidance on how the departure clause should be interpreted. The court decided that the provision should have the following effect:

Courts are required to consider the prescribed sentences as the benchmark (point of departure) which should ordinarily be imposed and should not be departed from lightly or for flimsy reasons.[8] However, if the cumulative effect of all the factors that a court would normally consider in respect of sentencing would justify the court to depart from the minimum sentence in a specific case, the court should consider deviating from the prescribed sentence.[9] When the prescribed sentence would amount to an injustice being disproportionate to the crime, the criminal, and the needs of society, the sentencing court should prevent the injustice and impose a lesser, appropriate sentence.[10] Thus, the legislature's intention was not to eliminate the courts' discretion when sentencing offenders for crimes specified in the Act.[11] The Constitutional Court in *S v Dodo*[12] confirmed the approach to the "substantial and compelling" formula adopted in *Malgas.*[13]

Offenders under the age of 18 years at the time when the crime was committed are excluded from the operation of the Act.[14] The court held that all persons under 18 are children and that life imprisonment as a starting point is not in line with the constitutional requirement in section 28. The court found that where incarceration is unavoidable it should be for the shortest possible period.[15]

Some of the provisions in the Act were subjected to constitutional scrutiny. In *Dodo*,[16] the court had to decide, among others, whether the interference with the court's sentencing discretion by the legislature infringed the separation of powers doctrine. In a criminal trial, it is the prerogative of the court as an independent judiciary to determine an appropriate sentence by

impose the minimum term of imprisonment unless it is able to find "substantial and compelling reasons" to impose a lesser sentence.

7 2001 (1) SACR 469 (SCA) (*Malgas*).

8 *Malgas supra* par 25B and par 25I.

9 *Malgas supra* par 22; see also par 25E–G.

10 *Malgas supra* par 22, see also par 25I, which *S v Dodo* 2001 (1) SACR 594 (CC) par 40 (*Dodo*) describes as the "determinative test"; see also *Centre of Child Law v Minister of Justice and Constitutional Development supra* par 40 (the question whether "substantial and compelling circumstances" exist is "answered by considering whether the minimum sentence is clearly disproportionate to the crime".

11 *Malgas supra* par 25A. S 51 of the Act "has limited but not eliminated the courts' discretion" concerning the imposition of the prescribed sentences for specified offences.

12 *Dodo supra* par 11.

13 *Supra*.

14 S 51(6) (as amended by s 26(6) of the Judicial Matters Third Amendment Act 42 of 2013), read with *Centre of Child Law v Minister of Justice and Constitutional Development supra* that declared the previous position in s 51(6) of the Act, that set the age limit at sixteen, as unconstitutional.

15 *Centre of Child Law v Minister of Justice and Constitutional Development supra* par 31.

16 *Supra*.

weighing and balancing all factors relevant to the crime, the accused, and the interest of society.[17]

The court pointed out that the legislature and the executive have a legitimate interest in the sentencing policy in that they can determine the severity of sentences to protect law-abiding citizens.[18] The court held that even though the Act limits the sentencing discretion of the court by prescribing minimum sentences it did not eliminate the court's discretion to impose a sentence that is consistent with the Bill of Rights.[19] The rights in section 12(1)(*e*)[20] of the Constitution of the Republic of South Africa[21] requires the sentencing court to impose punishment that is proportionate to the seriousness of the offence.[22] The rights of an offender will be infringed when the punishment is "grossly disproportionate" to the crime. Since the departure clause enables sentencing courts to depart from the prescribed sentences, where "substantial and compelling circumstances" exist, such disproportionality can be avoided and therefore section 51 of the Act prescribing minimum sentences is in general constitutional.[23]

3 MINIMUM SENTENCES PREVENTING AND CURBING CRIME

The object of mandatory minimum sentences is to ensure tougher and longer sentences to combat crime.[24] It is, therefore, necessary to determine whether mandatory minimum sentences promote some defensible purpose; in other words, whether it can be justified by any of the sentencing rationales for incarceration namely deterrence, incapacitation, rehabilitation, and retribution.

---

17 Sloth-Nielsen and Ehlers "A Pyrrhic Victory? Mandatory and Minimum Sentences in South Africa" 2005 Paper 111 *Institute of Security Studies Papers* https://media.africaportal.org/documents/PAPER111.pdf (accessed 2018-09-23) 7; s 35(3)(*c*) of the Constitution of South Africa, 1996 (the Constitution) guarantees every person a public trial before a court.

18 *Dodo supra* par 24.

19 *Dodo supra* par 25–26; see also *Malgas supra* par 25A.

20 S 12(1)(*e*) states that "Everyone has the right to freedom and security of the person, which includes the right to – not to be treated or punished in a 'cruel, inhuman, or degrading way'".

21 The Constitution.

22 *Dodo supra* par 37. Proportionality "goes to the heart of the inquiry as to whether punishment is cruel, inhuman or degrading, particularly where, as here, it is almost exclusively the length of time for which an offender is sentenced that is in issue". This means that "the length of punishment must be proportionate to the offence."

23 *Dodo supra* par 40.

24 *Dodo supra* par 11 where the court held that the purpose of the regime is to make sure that "consistently heavier sentences" are imposed; see also *Centre of Child Law v Minister of Justice and Constitutional Development supra* par 14 and par 45 "the very essence [of] the minimum sentencing regime makes for tougher and longer sentences"; see also *S v Mabunda* 2013 (2) SACR 161 (SCA) par 4; and see also Baehr "Mandatory Minimums Making Minimal Difference: Ten Years of Sentencing Sex Offenders in South Africa" 2008 20 *Yale JL & Feminism* 224 where the author said that "mandatory minimum provisions … were introduced as a temporary, emergency measure to combat crime", citing previous Minister of Justice Dullah Omar who predicted that the minimum sentencing regime should cause a reduction in crime.

3 1 Deterrence

Advocates of mandatory minimum sentences argue that these penalties deter crime and stop people from harming others.[25] This perception is based on the rational-choice theory, which assumes that criminals, before committing a crime, consider the severity of the punishment and the probability of being caught. These prescribed sentences make punishment clear and well-known to the public. By increasing the severity of impending punishment, these sentences deter crime.[26] Former Constitutional Court Justice Cameron contends that the argument advanced by the rational-choice theory is not supported by any evidence. [27]

Van Zyl Smit[28] explains that even though punishment does have a deterrent effect, it is the certainty of punishment, rather than the severity of the sentence, that is likely to have the biggest deterrent effect. The author further points out:

> "There is certainly no evidence, empirical or even anecdotal, to suggest that increasing sentences from, say, six to 11 years for rape or robbery deters rapists or robbers generally. Or even discourages them individually from committing a crime that otherwise they would not have risked."[29]

The Constitutional Court in *S v Makwanyane*[30] held that it is the likelihood that a criminal will be apprehended, convicted, and punished that is more likely to deter than the severity of the sentence on its own. Furthermore, studies show that most active and violent offenders either do not think they will be caught or if they were to be apprehended, they do not have any idea what punishment to expect for their crimes.[31] Severe sentences can have little impact on these criminals as they do not consider the severity of the sentence they may face before committing a crime.[32]

Ballard[33] points out that it is the certainty of the prosecution that deters crime; however, the figures are not impressive. In 2000, when violent crime was close to its highest point in South Africa, only 610 000 of the 2.6 million

---

25 Cameron "Imprisoning the Nation: Minimum Sentencing in South Africa" Paper presented on Minimum Sentences in South Africa, Dean's Distinguished Lecture, Faculty of Law, University of Western Cape (19 October 2017) https://www.groundup.org.za/media/uploads/documents/UWCImprisoningThe%20Nation19October2017.pdf (accessed 2018-08-13) 14.

26 *Ibid.*

27 *Ibid.*

28 Van Zyl Smit "Swimming Against the Tide: Controlling the Size of the Prison Population in the New South Africa" in Dixon, Scharf, and Van der Spuy (eds) *Justice Gained? Crime and Crime Control in South Africa's Transition* (2004) 248.

29 *Ibid*.

30 1995 (3) SA 391 (CC) par 122.

31 Cameron https://www.groundup.org.za/media/uploads/documents/UWCImprisoningThe%20Nation19October2017.pdf 16.

32 Anderson "The Deterrence Hypothesis and Picking Pockets at the Pickpockets Hanging" (18 April 2000) https://papers.ssrn.com/sol3/papers.cfm?abstract_id=214831 (accessed 2018-10-01) 293–313.

33 Ballard "Crime and Punishment Don't Add Up" (8 May 2015) https://mg.co.za/article/2015-05-07-crime-and-punishment-dont-add-up/ (accessed 2019-01-17).

crimes recorded were referred for prosecution.[34] The National Prosecuting Authority[35] prosecuted only 271 000 of these matters, resulting in 210 000 convictions.[36] Even though the NPA's conviction rate was commendable, the convictions amounted to only eight percent of crimes recorded.[37] In 2019 the NPA reported that less than 20 percent of the estimated 21 000 cases of murder committed in the country annually end up in court. Additionally, out of a total of 52 450 sexual offences reported, the NPA secured only 4 724 convictions for the same period.[38] Based on the aforementioned research and figures, it is difficult to see how tough minimum sentences will deter thousands of criminals, who are not arrested and successfully prosecuted.[39]

Moreover, although deterrence is regarded as the most important punishment rationale in criminal law,[40] research proves that tougher and longer sentences as advocated by mandatory minimums have "either no deterrent effect or modest deterrent effect that soon wastes away".[41] The latest crime statistics paint a grim picture of the crime situation in South Africa with almost every single crime increasing significantly year on year since 2018.[42] There were 6 083 murders between January 2022 and March 2022 which amounts to over 67 murders per day.[43] In the same period, there were 10 818 rapes reported which meant 153 people were raped every single day.[44] Serious violent crime is therefore still a very real threat to the constitutional freedom and security[45] of citizens in the country.

International research findings clearly denote "the politicised nature of sentencing, and of responding to perceived demands for harsher punishment from the public", even though the available evidence demonstrates that punishment has little effect on crime rates.[46] Politicians

---

34 *Ibid.*

35 Hereinafter referred to as "NPA".

36 *Ibid.*

37 See fn 33 above; see also Rademeyer "Conviction Rates an Unreliable Benchmark of NPA (12 April 2013) https://africacheck.org/reports/conviction-rates-an-unreliable-benchmark-of-npa-success/ (accessed 2018-10-01).

38 Versluis and De Lange "Rising Crime, Low Prosecution Rates: How Law Enforcement in SA Has All But Collapsed" (21 October 2019) https://www.news24.com/citypress/News/rising-crime-low-prosecution-rates-how-law-enforcement-in-sa-has-all-but-collapsed-20191021 (accessed 2022-06-30).

39 Muntingh 2009 *Criminal (In) Justice in South Africa* 190.

40 Cameron https://www.groundup.org.za/media/uploads/documents/UWCImprisoningThe%20Nation19October2017.pdf 16.

41 Tonry "Sentencing, Judicial Discretion and Training" 1992 as quoted in Terblanche "Mandatory and Minimum Sentences: Considering s 51 of the Criminal Law Amendment Act 1997: Sentencing" 2003 1 *Acta Juridica* 194.

42 Whitfield "SA Crime Stats: The 90 Day Bloodbath" (3 June 2022) https://www.da.org.za/2022/06/sa-crime-stats-the-90-day-bloodbath#:~:text=According%20to%20the%20latest%20crime,were%20raped%20every%20single%20day (accessed 2022-06-30).

43 *Ibid.*

44 *Ibid*.

45 S 12(1)(*c*) of the Constitution.

46 Terblanche and Mackenzie "Mandatory Sentences in South Africa: Lessons for Australia" 2008 41(3) *The Australian and New Zealand Journal of Criminology* 405. The authors are of

showing that they are "doing something" about rising crime rates and lenient sentencing by enacting such laws, reap significant electoral benefits.[47] As a result, they are quick to note that the public supports tougher punishments in the form of mandatory sentences.[48] However, to prove such public support, politicians usually cite correspondence from "concerned constituents" or unrepresentative polls rather than the results of scientific surveys.[49] It is submitted that criminals who commit horrible crimes should be dealt with harshly. However, minimum sentences are not the way because these sentences fail to have the desired impact on violent crime with a focus on the relatively small number of criminals who are arrested and successfully prosecuted.

3 2 Prevention or Incapacitation

The "incapacitation effect," is defined as the number of crimes averted by physically isolating an offender from society at large. The incapacitation argument works on the assumption that the criminal justice system has the capability to recognise and then incapacitate the most dangerous offenders, which has a deterrent effect on violent crime.[50] However, this does not explain or justify the way mandatory minimum sentences work in South Africa. The evidence is clear that incapacitative sentencing such as advocated by mandatory minimums attracts more "non-dangerous" than "dangerous" offenders, with a "false positive rate" of up to two out of three.[51] This means to imprison a large number of less dangerous people for lengthy periods, will not further reduce crime. [52]

To illustrate this, South Africa's minimum sentencing legislation provides for "broad and poorly defined crime categories".[53] For example, there is basically no difference between a bank robber who kills a bank teller and a woman who shoots and kills her abusive husband while asleep, where life imprisonment will be imposed on both, despite the latter being less dangerous and less likely to re-offend.[54] This is also applicable to certain non-dangerous offenders who commit non-violent offences like drug offences which is placed in the same category as violent offences such as murder as per Part II of Schedule 2.[55] Arguably, the relatively non-dangerous drug offenders are easily replaced when they are successfully prosecuted,

the opinion that it is not surprising that the number of supporters of minimum sentences legislation systems have clear political links.

47 Roberts "Public Opinion and Mandatory Sentencing" 2003 30(4) *Criminal Justice and Behaviour* 483 487.

48 *Ibid.*

49 *Ibid.*

50 Muntingh 2009 *Criminal (In) Justice in South Africa* 192.

51 Ashworth *Sentencing and Criminal Justice* 5ed (2010) 84.

52 Chattanooga "Criminal Justice and Mass Incarceration – The Moral Failures of America's Prison-Industrial Complex" (20 July 2015) https://www.economist.com/democracy-in-america/2015/07/20/the-moral-failures-of-americas-prison-industrial-complex (accessed 2019-06-28).

53 Muntingh 2009 *Criminal (In) Justice in South Africa* 192.

54 *Ibid*.

55 S 51 of the Act.

and therefore incarcerating them for long periods of time will not have a significant effect to curb violent crime and crime in general.

Another key point to consider is that the incapacitation rationale for violent offenders would be fully served by the time these offenders reach 50 or 60 years, the age where, statistically, it is unlikely that they would re-offend.[56]

Statistical evidence depicts that higher rates of incapacitation and longer sentences do not reduce crime.[57] A 2015 report issued by the Brennan Center for New York University shows that a high level of incarceration has not produced a reduction in crime in the United States.[58] On the other hand, a study from California indicates that reducing incarceration does not result in a notable increase in crime.[59] The United States Supreme Court, in *Brown v Plata*,[60] ruled that California's overcrowded prison system resulted in cruel and unusual punishment. California had to pass reforms that ended the practice of sending convicts back to prison for technical violations.[61] This resulted in about 20 000 offenders, who previously would have been sent to prison, not going there.[62] Studies found that the reduction in California's prison population caused by the reform modestly increased property crime but had little effect on violent crime.[63] This indicates that harshness in sentencing in many instances results in prison terms not justified by the risk posed by the offender.[64]

Finally, one should bear in mind that a large social network of criminal activity exists in our prisons, which in fact increases the incidence of crime.[65]

---

56 Altbeker "The Impact of the Introduction of the Minimum Sentencing Legislation on Levels of Crime and Crime Prevention" Presentation at the OSF-SA Workshop Report on Minimum Sentence (January 2005) 7.

57 Cameron https://www.groundup.org.za/media/uploads/documents/UWCImprisoningThe%20Nation19October2017.pdf 17.

58 Roeder, Eisen and Bowling "What Caused the Crime Decline" (12 February 2015) https://www.brennancenter.org/sites/default/files/analysis/What_Caused_The_Crime_Decline.pdf (accessed 2019-06-28) 7. In the report, using an economic model with 13 years of data (2000–2013), it found that since 2000, the effect of increasing incarceration on the crime rate has been virtually zero.

59 Raphael and Stoll "A New Approach to Reducing Incarceration While Maintaining Low Rates of Crime" (1 May 2014) https://www.brookings.edu/wp-content/uploads/2016/06/v5_THP_RaphaelStoll-DiscPaper.pdf (accessed 2019-06-28) 11.

60 563 US 493 (2011).

61 Raphael and Stoll https://www.brookings.edu/wp-content/uploads/2016/06/v5_THP_RaphaelStoll-DiscPaper.pdf 10. See also Lofstrom and Raphael "Incarceration and Crime: Evidence from California's Public Safety Realignment Reform" 2016 664 *ANNALS of APPSS* 197.

62 *Ibid.*

63 Lofstrom and Raphael "Public Safety Realignment and Crime Rates in California" (December 2013) https://www.ppic.org/content/pubs/report/R_1213MLR.pdf (accessed 2019-06-28) 9. See also Lofstrom and Raphael 2016 *ANNALS of APPSS* 216.

64 Raphael and Stoll https://www.brookings.edu/wp-content/uploads/2016/06/v5_THP_RaphaelStoll-DiscPaper.pdf 14.

65 Cameron https://www.groundup.org.za/media/uploads/documents/UWCImprisoningThe%20Nation19October2017.pdf 18.

3 3 Rehabilitation

Rehabilitation is a third justification for incarcerating criminals. However, with mandatory minimum sentences prescribing extremely long prison sentences, offenders are left hopeless because their release is so far off in the future that they are not amenable to rehabilitation.[66]

Moreover, rehabilitation is lacking in the majority of South African prisons as overcrowding makes rehabilitation programmes impracticable.[67] Retired Judge Fagan[68] warns that overcrowding prevents proper rehabilitation and transforms prisons into places where criminality is nurtured. On paper, rehabilitation beyond punishment is promoted by the state to reduce recidivism; however, South Africa's reoffending rate is one of the highest in the world.[69] This illustrates very little or no rehabilitation in our prisons.

Ironically, of the Department of Correctional Services' estimated budget of R25.4 billion for 2019/20, only R2 billion is allocated for rehabilitation, which is about 8 percent of the budget.[70] The biggest share of the budget is allocated to incarceration, a massive R15.1 billion, which is about 60 percent of the budget.[71] This can be seen as an "incarceration philosophy" aimed at keeping prisoners behind bars, rather than striving to correct behaviour, by providing a "safe, secure and humane environment which allow for optimal rehabilitation and reduced offending", as stipulated in the Department of Correctional Services' mandate.[72]

3 4 Retribution

The fourth and last possible justification for mandatory minimum sentences is retribution.

The death penalty was declared cruel, inhuman, and degrading,[73] despite the retributive rhetoric in favour thereof being popular among politicians and

---

66 Sloth-Nielsen and Ehlers "Assessing the Impact – Mandatory and Minimum Sentences in South Africa" 2005 14 *SA Crime Quarterly* http://repository.uwc.ac.za/xmlui/handle/10566/2199 (accessed 2018-08-14) 17.

67 Altbeker *A Country at War with Itself* (2007) 146 states that overcrowding in prisons has made rehabilitation (an unproven science) "impossible" states further at 150 that "our overcrowded prisons will rehabilitate no one ... They are also a potential time bomb that needs to be defused."

68 Fagan "Our Bursting Prisons" 2005 18(1) *Advocate* https://journals.co.za/doi/10.10520/AJA10128743_471 (accessed 2018-09-23) 33 35.

69 Arackathara *Light Through the Bars: Understanding and Rethinking South Africa's Prisons* (2019) 20.

70 National Treasury, Republic of South Africa *Estimates of National Expenditure 2019: Vote 18 – Correctional Services* http://www.treasury.gov.za/documents/national%20budget/2019/ene/FullENE.pdf (accessed 2019-07-11).

71 *Ibid.*

72 Karrim "How Our Focus on Punishment Fails Society and Inmates" (12 April 2018) https://www.businesslive.co.za/bd/opinion/2018-04-12-how-our-focus-on-punishment-fails-society-and-inmates/ (accessed 2019-07-11).

73 *S v Makwanyane supra* par 95, where Chaskalson J held "I am satisfied that in the context of our Constitution the death penalty is indeed a cruel, inhuman and degrading punishment."

the public. The court assumed that most South Africans agreed that the death penalty should only be imposed in exceptional cases of murder. However, it was not up to them to decide what the appropriate sentence for murder should be, but rather whether the sentence is allowed by the Constitution.[74] The court held that it will not be persuaded to deviate from its mandate "to act as an independent arbiter of the Constitution" by making decisions that will find approval with the public.[75] Public opinion is relevant, but it cannot replace the duty bestowed on the courts to interpret and uphold the provisions of the Constitution without fear and favour.[76]

Justice Chaskalson regarded retribution as of secondary importance, and that there was no need for the government to partake in the "cold and calculated killing of murderers", in pursuance of the expression of moral outrage.[77] Instead, he confirmed that there is no requirement that punishment is identical to the offence because the "eye for an eye" principle has long since been outgrown.[78] Also, a long prison sentence can achieve the same purpose of expressing outrage and inflicting retribution on the offender.[79] If a "less restrictive but equally effective form of punishment" is available in a specific case, it must be imposed,[80] because "a law which invades a right more than is necessary to achieve its purpose, is disproportionate."[81] Additionally, the objects of punishment must be balanced with the individual's rights.[82]

With mandatory minimum sentences, life imprisonment is now imposed for offences that would have rarely attracted the death penalty, even though life imprisonment as a "severe alternative punishment" was supposed to be a replacement for the death penalty.[83] In line with the disproportionality discussed concerning the death penalty above, it can be argued that in

---

74 *S v Makwanyane supra* par 87.

75 *S v Makwanyane supra* par 89.

76 *S v Makwanyane supra* par 88, where the court commented that "If public opinion were to be decisive, there would be no need for constitutional adjudication. The protection of rights could then be left to Parliament, which has a mandate from the public, and is answerable to the public for the way its mandate is exercised, but this would be a return to parliamentary sovereignty, and a retreat from the new legal order established by the 1993 Constitution."

77 *S v Makwanyane supra* par 129 where Chaskalson J points out that "retribution is one of the objects of punishment, but it carries less weight than deterrence", with reference to *S v J* 1989 (1) SA 669 (A) par 682G and *S v P* 1991 (1) SA 517 (A) par 523(G–H).

78 *S v Makwanyane supra* par 129. The need for retribution, therefore, did not justify the death penalty.

79 *Ibid*.

80 Ferreira and Steyn "The Limitation of Fundamental Rights by Imposition of Sentence" 2006 21(1) *SAPL* 96 107; see also *S v Makwanyane supra* par 212, where Justice Kriegler held "that the death penalty has no demonstrable penological value over and above that of long-term imprisonment" referring to a United States Supreme Court case.

81 Barrie "The Application of the Doctrine of Proportionality in South African Courts" 2013 *SAPL* 40 54.

82 Terblanche *A Guide to Sentencing in South Africa* 2ed (2007) 429; see also *S v Makwanyane supra* par 135: - "In the balancing process, deterrence, prevention and retribution must be weighed against the alternative punishments available to the state and the factors which taken together make capital punishment cruel, inhuman and degrading."

83 Muntingh "Op-Ed: Rethinking Life Imprisonment" https://www.dailymaverick.co.za/article/2017-03-02-op-ed-rethinking-life-imprisonment/.

cases that would not have attracted the death penalty, shorter sentences can be a significant alternative measure. These would be less restrictive, but equally effective forms of punishment, which would achieve the same purpose as the life sentence as prescribed by the minimum sentencing legislation.

Minimum sentencing legislation was drafted with its primary focus on punishment of the offender for the commission of specified offences, without proper gradation between categories of offences.[84] This is contrary to the widely expressed view of our courts and even the Constitutional Court, where retribution is regarded as of "lesser importance".[85]

It is evident from the above that the only logical rationale for long-term prison sentences, which are mandated by our minimum sentencing legislation, can be viewed along the same lines as the rationale for the death sentence (retribution). The death sentence is no longer part of our law so it can be argued that minimum sentencing legislation should also not be part of our law.

None of the previous sentencing rationales discussed justified mandatory minimum sentencing satisfactorily, leaving retribution as the only theory that can possibly warrant minimum sentences. However, under our constitutional dispensation, where retribution has been responsible for the cruellest of punishments throughout history, retribution alone cannot be the theory upon which we base our criminal punishments.[86]

4 IMPACT ON PRISON OVERCROWDING AND HUMAN RIGHTS

The Constitution mandates and acknowledges the right of people in prison (both remand detainees and sentenced offenders), to humane and dignified conditions of detention.[87] Inmates are protected by the Constitution against cruel, inhuman, or degrading treatment or punishment.[88] In this regard, the

---

84 *S v Vilakazi* 2009 (1) SACR 552 (SCA) par 13. With reference to the offence of rape, the judge refers to the absence of gradation between 10 years' imprisonment and life imprisonment. Once any of the aggravating circumstances are present the minimum sentence of 10 years progresses immediately to life imprisonment no matter how many of the features are present, no matter the degree to which the feature is present, and no matter if the convicted person is a first-time or repeat offender. Which will see an "18-year-old boy who rapes his 15-year-old girlfriend on one occasion must receive the same sentence as a recidivist serial rapist … The 18-year-old boy who rapes his 15-year-old girlfriend must also receive the same sentence as the adult recidivist who rapes an infant. The offender who imprisons and rapes his victim repeatedly every day for a week is considered to be no more culpable than one who rapes his victim twice within ten minutes. It requires only a cursory reading of the Act to reveal other startling incongruities".

85 Terblanche *A Guide to Sentencing in South Africa* 185 where the author refers to a wide range of cases emphasising this point.

86 S 12(1)(*e*) provides that everyone has a right "not to be treated or punished in a cruel, inhuman or degrading way".

87 S 35(2)(*e*) of the Constitution.

88 S 12(1)(*e*) of the Constitution; see also *Lee v Minister of Correctional Services* 2013 (1) SACR 213 (CC) par 65 where the Constitutional Court recognised that "[p]risoners are amongst the most vulnerable in our society to the failure of the state to meet its

Correctional Services Act[89] regulates that prisoners must have sufficient "floor space, cubic capacity, lighting, ventilation, sanitary installations, and general health conditions," to protect and respect the human dignity of prisoners.[90] South African prison conditions are not in line with the aforementioned, as illustrated by the JICS 2019/2020 report stating that certain prison facilities were unsatisfactory, whereas others are clearly not fit for human occupancy.[91]

The official capacity at which South Africa's prisons were operating, as of the end of March 2020 has been recorded as 132.25 percent, with the number of prisoners at 154 437, which is more than the accommodation capacity of 118 572 bed spaces.[92] Furthermore, South Africa has one of the highest imprisonment rates in the world, namely 259 prisoners per 100 000 of the population,[93] ranking as the 12th highest prison population in the world and the highest in Africa.[94] This places a huge burden on the country's economy and its citizens.

This situation can be attributed to the prison population increasing by 39 percent since 1995.[95] The mandatory minimum sentencing regime increased the number of people serving life sentences from only 400 prisoners serving life in 1994 to more than 16 000 today which is an increase of over 2000 percent over 20 years.[96] Despite sentencing a lesser amount of people to terms of imprisonment, the prison population increased due to longer sentences served.[97] Thus, the increasing number of people serving life sentences in South African prisons, is a growing contributor to prison overcrowding.[98] Mandatory minimum sentences exacerbate prison overcrowding which in turn leads to human rights violations, bearing in mind that these sentences cause more offenders to receive prison sentences and for longer periods of time.[99]

---

constitutional and statutory obligations," and that a "civilised and humane society demands that when the state takes away the autonomy of an individual by imprisonment it must assume the obligation … inherent in the right to "conditions of detention that are consistent with human dignity".

89 111 of 1998. Hereinafter referred to as "CSA".

90 S 7(1) of the CSA.

91 Van der Westhuizen "The Judicial Services for Correctional Services Annual Report 2017/18 Financial Year" (undated) https://static.pmg.org.za/JICS_Annual_Report_1718_Final.pdf 9; see also s 2 of the CSA.

92 The Judicial Inspectorate for Correctional Services (JICS) "Annual Report 2019/2020 Financial Year" http://jics.dcs.gov.za/jics/wp-content/uploads/2021/01/JICS_AR_2020-LOW-RES_compressed_compressed_compressed.pdf (accessed 2021-09-24) 24.

93 *JICS* http://jics.dcs.gov.za/jics/wp-content/uploads/2021/01/JICS_AR_2020-LOW-RES_compressed_compressed_compressed.pdf 27.

94 World Prison Brief "Highest to Lowest Prison Population Total" (undated) https://www.prisonstudies.org/highest-to-lowest/prison-population-total?field_region_taxonomy_tid=All (accessed 2021-09-24).

95 JICS http://jics.dcs.gov.za/jics/wp-content/uploads/2021/01/JICS_AR_2020-LOW-RES_compressed_compressed_compressed.pdf 8–9.

96 *Ibid.*

97 Ballard https://mg.co.za/article/2015-05-07-crime-and-punishment-dont-add-up/.

98 Muntingh https://www.dailymaverick.co.za/article/2017-03-02-op-ed-rethinking-life-imprisonment/.

99 Ballard https://mg.co.za/article/2015-05-07-crime-and-punishment-dont-add-up/.

The above factors are worsened by the effects of 15 years of Bosasa-driven corruption within the prisons system as pointed out by the Zondo Commission of Inquiry into Allegations of State Capture, previously pointed out by the Jali Commission which is still being felt in ways that directly impact on the humane treatment of prisoners. Between 2004 and 2019 Bosasa won several contracts to supply services (IT, TV, and CCTV, fencing contracts, and guarding contracts) to South African prisons under the management of the DCS. Most notable is the prison catering service which Bosasa provided even though South African prisons had always produced their own meals. In exchange for these contracts, lucrative bribes were paid to top government officials and politicians. By 2013, when the contract was illegally extended for the third time, the value had risen to more than R420 million per year and at the end of the 2016/2017 financial year, the spending was beginning to affect the entire prison system.[100] Instead, these resources could have been used to reduce the negative effects of overcrowding and promote the rights of vulnerable prisoners to conditions of detention that are consistent with human dignity.[101]

5 CONSTITUTIONAL CHALLENGES

In *Dodo*,[102] the court noted that "the length of punishment must be proportionate to the offence." Also, a "mere disproportionate sentence" does not infringe on the right not to be subjected to cruel, inhuman, or degrading punishment.[103] This right is only violated when there is "gross disproportionality" between the punishment and the offence".[104] However, it remains unclear in the South African legal system as to what standard to apply to determine when a sentence can be typified as "gross".[105] In the United States[106] and Canada,[107] from where the Constitutional Court in *Dodo* found useful guidance in this regard,[108] the "gross disproportionality" standard is applied significantly differently from each other. The United States sets a high threshold before a sentence can be typified as "gross" whereas in Canada a much lower threshold applies.[109] Therefore, the "gross

---

100 Davis "How State Capture Led to Human Right Abuses – The Case of Bosasa and the Prisons" (14 March 2022) https://www.dailymaverick.co.za/article/2022-03-14-how-state-capture-led-to-human-rights-abuses-the-case-of-bosasa-and-the-prisons/ (accessed 2022-06-15).

101 S 35(2)(*e*) of the Constitution.

102 *Dodo supra* par 37.

103 *Ibid.*

104 Terblanche "Twenty Years of Constitutional Court Judgements: What Lessons are there about Sentencing?" 2017 20 *PER/PELJ* 16.

105 *Ibid.* Even though the author states that "'gross' in this sense is probably best equated with 'blatant'", it remains unclear as it is applied so differently in North American jurisdictions.

106 *R v Latimer* 2001 SCC 1 par 76; *Rummel v Estelle* 445 US 263 (1980) 274–275*; Hamelin v Michigan* 501 US 957 (1991); *Ewing v California* 538 US 11 (2003).

107 *R v Nur* 2015 SCC 15 par 77; *R v Lloyd* 2016 1 SCR 130 par 22 and par 35.

108 *Dodo supra* par 28–31.

109 For example, in *Harmelin v Michigan* 501 US 957 (1991) where the court gave life imprisonment without possibility of parole for 672 grams of cocaine, where the possession was only a little more than the 650 grams limit. The US Supreme Court ruled that the prescribed sentence is not sufficiently disproportionate. In Canada in *R v Lloyd* (2016) 1

disproportionality standard" from a South African perspective needs more explanation.[110]

This is significant because, under the mandatory minimum sentencing regime, sentences imposed by the courts are now substantially higher, than those previously regarded as appropriate for similarly situated offenders before the Act was introduced.[111] Even when "substantial and compelling circumstances" are present the lesser sentences are higher than what normally would have been regarded as appropriate.[112]

If minimum sentences are found to violate certain rights,[113] the infringement must be justified for minimum sentences to be constitutional.[114] Taking into account the relative harshness of minimum sentences together with the temporary nature of the legislation it is common course that the main aim of the Act is to combat crime.[115] However, as set out in this article minimum sentences do not serve as a deterrent and therefore do not justify the infringement of rights.

SCR 130, the Canadian Supreme Court declared a provision that prescribes a minimum of 1-year imprisonment for "trafficking or possession" of certain drugs unconstitutional if the accused had another drug conviction within the previous ten years.

110 Terblanche 2017 *PER/PELJ* 1 24.

111 See fn 24 above.

112 In *S v Abrahams* 2002 (1) SACR 116 (SC) par 25, the Supreme Court of Appeal found that the sentence imposed by the sentencing court was too lenient and although the court refused to impose the life sentence, the court still increased the sentence by five years. The court referred to the Act as "a legislative standard that weighs upon the exercise of the sentencing court's discretion. This entails sentences for the scheduled crimes that are consistently heavier than before." See also *Centre of Child Law v Minister of Justice and Constitutional* 2009 (2) SACR 477 (CC) par 17 where the court aligned itself with the comments of the court in *Malgas* par 8 and par 25 stating that "[u]nder *Malgas*, the minimum sentencing legislation had two operative effects. First, the statutorily prescribed minimum sentences must ordinarily be imposed. Absent 'truly convincing reasons' for departure, the scheduled offences are 'required to elicit a severe, standardised and consistent response from the courts' through the imposition of the ordained sentences. Second, even where those sentences do not have to be imposed because 'substantial and compelling circumstances' are found, the legislation has a weighting effect leading to the imposition of consistently heavier sentences."

113 For example, the s 12(1)(*e)*: "Everyone has the right to freedom and security of the person, which includes the right … (e) not to be treated or punished in a cruel, inhuman or degrading way", which emphasises proportionate sentencing. All rights may, however, be limited in terms of s 36 of the Constitution which is summarised as follows: Constitutional rights may be limited for purposes that would be reasonable and necessary in "an open and democratic society based on freedom and equality"; see also Terblanche 2017 *PER/PELJ* 20; Terblanche 2017 *PER/PELJ* 19 where it is indicated that the prohibition against "degrading" punishment cannot be separated from the right to have even offenders' dignity protected and respected.

114 *Centre of Child Law v Minister of Justice and Constitutional Development supra* par 51 where the court commented that "in determining whether a limitation is reasonable and justifiable within the meaning of s 36 of the Constitution, 'it is necessary to weigh the extent of the limitation of the right, on the one hand, with the purpose, importance and effect of the infringing provision on the other, taking into account the availability of less restrictive means to achieve this purpose".

115 See fn 24 above.

Another important aim of the legislature, when introducing minimum sentencing provisions, was to achieve consistency in sentencing.[116] However, the Act contains unexplained inconsistencies, the worst being the sentencing "cliffs" that are evident in the prescribed sentences for rape.[117] If an offender is charged with rape, together with one of the aggravating factors listed in Part I of Schedule 2, such an offender will be sentenced to life. In the absence of such an aggravating factor, the court will start considering a sentence[118] from ten years upwards.[119] The inconsistencies in the Act with the high ceiling of minimum sentencing legislation, in combination with the sentencing discretion of courts, increase the possibility of sentences being arbitrary.[120] The increased disparity is obvious, as harsh judicial officers will impose minimum sentences, even if that sentence is much more severe than what would normally be regarded as fair and just.[121] This is in contrast with less harsh judicial officers, who would find the minimum sentence unreasonable and unjust.[122] In the latter cases, courts apply the departure clause as a rule and not the exception distinct from *Malgas*,[123] where the court held that the statutorily prescribed minimum sentences must ordinarily be imposed and not be departed from lightly.

However, even where courts apply "substantial and compelling circumstances" as a rule, especially in rape cases, consistency in sentencing remains elusive. This is so because some courts will acknowledge that sentences for scheduled crimes should still be consistently heavier than before, despite the presence of "substantial and compelling circumstances".[124] Others will impose a sentence that would normally have

---

116 Sloth-Nielsen and Ehlers 2005 *SA Crime Quarterly* 20; see also *Malgas supra* par 8 where it was held that the legislature's aim was in a nutshell to make sure that the courts adopt a "severe, standardised and consistent" approach when passing sentencing for these offences except where there are compelling reasons to deviate; and see *S v Brown* 2015 (1) SACR 211 (SCA) par 118.

117 Baehr 2008 *Yale JL & Feminism* 213 226; see also Van der Merwe "Recent Cases: Sentencing" 2013 *SACJ* 399 411.

118 *Malgas supra* par 8; *S v Mabuza* 2009 2 SACR 435 (SCA) par 20 refers to "benchmark".

119 See fn 84 above.

120 *S v Makwanyane supra* par 164.

121 In this regard see *S v Matyityi* 2011 (1) SACR 40 (SCA) par 23; see *S v PB* 2011 SACR 448 (SCA) par 9; see *S v PB* 2013 (2) SACR 553 (SCA) par 24 where the Supreme Court of Appeal largely ignored the constitutional requirement of proportionality in favour of imposing the prescribed sentences.

122 A number of judgements emphasised proportionality and held that the "worst sentence" should be reserved for the "worst crime. Although the prescribed sentences, should be set as the benchmark, proportionality to the seriousness of the offence, is a higher value which overrides the minimum sentences - In this regard see *S v Mahomotsa* 2002 (2) SACR 435 (SCA) par 20; see *S v Abrahams* 2002 (1) SACR 116 (SCA) par 26, par 27; see *S v Dodo* 2001 (3) SA 382 (CC) par 38,40, see *S v Vilikazi* 2009 (1) SACR 552 (SCA) par 20; see also *S v SMM* 2013 (2) SACR 292 (SCA) par 18-19; and see also *S v Nkawu* 2009 (2) SACR 402 (E) par 14–17.

123 *Supra* par 8.

124 For example, in *S v Abrahams* 2002 (1) SACR 116 (SC) par 25, the Supreme Court of Appeal found that the sentence imposed by the sentencing court was too lenient and although the court refused to impose the life sentence, the court still increased the sentence by five years. The court referred to the Act as "a legislative standard that weighs upon the exercise of the sentencing court's discretion. This entails sentences for the scheduled

been regarded as appropriate, before the enactment of minimum sentences, where all the circumstances traditionally relevant to sentencing are taken into account.[125]

The constitutionality order in Dodo was made not long after minimum sentences came into operation, which means that *Dodo* could not gauge the effectiveness of the relatively harsh minimum sentencing regime. Other factors that make the Act vulnerable to a constitutional challenge include the fact that the Act is no longer temporary[126] and Regional Courts have greater powers concerning life imprisonment.[127]

6 A WAY FORWARD

A good starting point for sentencing reform would be a review of the report from the South African Law Commission which Parliament had at its disposal since December 2000.[128] The Commission investigated sentencing and its shortcomings extensively involving sentencing experts and other stakeholders and followed this investigation with a full set of recommendations.[129]

A review of the entire report falls beyond the scope of this article; but it may be useful to briefly consider some key findings included in the report as follows:

> "It is clear from the evidence presented to the Commission over a long period ... that the problems identified as having plagued sentencing in South Africa, continue to cause difficulties. It remains a problem that like cases are not being treated alike; that sentences do not give enough weight to certain

crimes that are consistently heavier than before; see also *Centre for Child Law v Minister of Justice and Constitutional Development* 2009 (2) SACR 47 (CC) par 17.

125 *S v Vilakazi* 2009 (1) SACR 552 (SCA) par 15 and par 18; see also Terblanche *A Guide to Sentencing in South Africa* 79.

126 Before the Act became permanent judges recognised the poor drafting used in the Act, but excused it because of its temporary emergency nature; see Terblanche 2017 *PER/PELJ* 25; see also Terblanche *A Guide to Sentencing in South Africa* 91; see also Terblanche *A Guide to Sentencing in South Africa* 51 who states that "the scheme itself has variously been described as unsophisticated, as covering the field of serious crime in no more than a handful of blunt paragraphs', as providing for 'draconian sanctions,' as an invasive piece of legislation; The author points out that *Dodo* did not consider how the severity of the minimum sentences relates to the objective gravity of the different crimes in comparison with each other. In this regard, the Act provides for only four sentences for a wide range of serious offences namely life-, 15-years', 10-years' and 5-years' imprisonment.

127 See Terblanche 2017 *PER/PELJ* 26 who argues that the consequence is that life imprisonment is imposed by presiding officers with possibly less experience and competence, which could infringe on the equality and fair trial rights of the offender.

128 South African Law Commission "Sentencing (A New Sentencing Framework) Report Project 82" 2000 (Report); see also the preceding Discussion Paper 91. The Commission was renamed the South African Law Reform Commission in 2003 as per s 4 of the Judicial Amendments Act 55 of 2002.

129 Report par 1.42; see also *S v Vilakazi supra* at par 10: "A sophisticated system to construct guidelines for consistency in sentencing that would take care of the views of all interested parties was subsequently recommended by the South African Law Commission in December 2000. The recommendation was made after a comprehensive review of sentencing practice in the country and abroad, where sentencing guidelines in one form or another are common."

> serious offences; that imaginative South African restorative alternatives are not being provided for offenders that are being sent to prison for less serious offences; that sufficient attention is not being paid to concerns of victims of crime and that, largely because of unmanageable overcrowding, sentenced prisoners are being released too readily."[130]

From the above it is obvious that the Commission considered disparity in sentences as a major problem in the South African sentencing system, due to sentencers having a fairly wide discretion when sentencing offenders.[131] Furthermore, South Africa not having a comprehensive legislative framework for sentencing is a major contributor to the lack of consistency in sentencing because no legislative guidance is provided to the courts as to which approach to adopt when sentencing offenders.[132] To address this issue the Commission suggested that "one should have a clear idea of what the purpose of sentencing is and what principles should be applied to it."[133]

As a result, part of the recommendations was that the basic sentencing principles should be distinctly defined in legislation.[134] Furthermore, that a Sentencing Council be established that would produce sentencing guidelines that might better structure the exercise of sentencing discretion to counter the widely diverging sentencing practices of courts, thereby enhancing consistency in sentencing.[135] The Commission concluded that,

> "an ideal sentencing system should be seen to promote consistency in sentencing, deal appropriately with concerns that particular offences are not being regarded with an appropriate degree of seriousness, allow for victim participation and restorative justice initiatives and, at the same time, produce sentencing outcomes that are within the capacity of the State to enforce in the long term."[136]

Notably, the Commission excluded the mandatory minimum sentences as a possible option for sentencing policy reform.[137]

7 CONCLUSION

Despite being ineffective, mandatory minimum sentences remain prominent in South Africa's sentencing law.[138] This is contrary to the international trend

---

130 Report par 2.1.

131 Report par 1.8; par 1.19–1.2; par 2.17 and par 3.14. See also Terblanche "Sentencing Guidelines for South Africa: Lessons from Elsewhere" 2002 120 *SALJ* 858–859.

132 Report par 1.16.

133 Report par 3.1.4.

134 Report par 1.44.

135 Report par 1.44; see also Report 3.1.17 where the Commission clearly stated the role and determination of sentencing guidelines together with their application upon conviction. Furthermore, it stated that a guideline may provide for a range of sentences, allowing for a 30 percent deviation upwards or downwards from the standard guideline. The criteria for reasonable departures from the basic guidelines was also specified.

136 Report par 2.5.

137 Roth "South African Mandatory Minimum Sentencing: Reform Required" 2008 17 *Minn J Int'l* 155 163.

138 Joubert *Criminal Handbook* 13ed (2020) 413. Even though these sentences are only applicable to offences specified in the Act and only applicable to High Courts and Regional

where governments are moving away from relating deterrence directly to sentencing.[139] The "incarceration philosophy" has electoral and crime benefits for politicians which can explain the lack of political will to abolish this misleading sentencing regime. There is therefore an urgent need for South Africa to de-politicise punishment and sentencing.

If we feel outraged by the high rate of violent crime, we need to find a sentencing regime that leads to the reduction of crime in line with the constitutional provisions, rather than the exacerbation of crime as is the case with the minimum sentencing regime. The primary focus should not be on punishment and sentencing to solve crime. Instead, the judiciary should be supported with the certainty of effective law enforcement and prosecution, meaning more arrests and more successful prosecution.

Additionally, South Africa urgently needs a sentencing system that can be justified by more than just retribution. The approaches recommended by the South African Law Reform Commission, to better structure the exercise of sentencing discretion to promote consistency in sentencing, amongst others as alluded to in this article, are supported.

Finally, it must be stressed that criminals who commit serious violent crimes should be punished severely but the ineffective and misleading minimum sentencing legislation is not the way.

Magistrates' Courts, "minimum sentences completely dominate court judgements reported about sentencing, and many discussions outside these courts."

139 Doob and Webster "Sentence Severity and Crime: Accepting the Null Hypothesis" 2003 30 *Crime and Justice* 149 191; see also Muntingh 2009 *Criminal (In) Justice in South Africa* 192; consider also the present situation in the United States that enacted the First step Act with the purpose of reforming "tough on crime" policies and reducing its overcrowded prisons. Some of the various reforms include widening federal judges' discretion to bypass mandatory minimum sentences, reducing sentences for drug offences, and reducing the three strikes penalty. The United States is where mandatory minimum sentences originated from, and which provided specifically the model for South Africa's statutory format.

JUDICIAL REVIEW IN SOUTH AFRICA AND INDIA: ADVANCING CONSTITUTIONALISM OR UNDUE ACTIVISM?*

Radley Henrico
BProc LLB LLM LLD
Associate Professor, Department of Public Law and Jurisprudence, University of the Western Cape, Advocate of the High Court of South Africa

SUMMARY

The Supreme Court of India and the Constitutional Court of South Africa, as apex courts, also function as guardians of the constitutions of each respective country. This article seeks to establish the extent to which judicial review in India and South Africa can be said to be more aligned with constitutionalism or undue activism. An assessment of the aforesaid is determined with regard to the transformative and progressive constitutional interpretation approach adopted by the aforesaid courts which also gives impetus to the living tree doctrine, the role that dignity plays in giving substantive meaning to democracy, ineptitude, and or corruption on the part of the executive precluding the effective realisation of socio-economic rights as well as parliament's failure to hold members of the executive to account. The extent to which constitutionalism, as opposed to undue activism, has been advanced by the aforesaid courts is demonstrated with reference to specific cases.

1 INTRODUCTION

Anti-majoritarian scholars advocate ring-fencing judicial review on grounds that judicial activism subverts the authority of the democratically elected arms of government. Instances arise where the executive fails to fulfil its duties either on account of strained financial resources, ineptitude, corruption, poor service delivery, or a combination of all these factors. The same may apply where parliament fails to hold its members accountable. Essentially a vacuum is created by the government. What role do our courts in general and in particular, the Supreme Court of India and Constitutional

* This article is based on a paper presented by Henrico "Judicial Review in South Africa and India: Advancing Constitutionalism or Undue Activism?" at the virtual 10th International Annual Research Conference on Rule of Law in Context: Climate Change and Sustainable Development – Indian and Global Perspectives at Symbiosis Law School, Pune, India on 25 and 26 March 2022.

Court of South Africa (apex courts) then assume as guardians of the constitution? Since the separation of powers can never be conceived of in absolute terms, is there not a constitutional duty on the court to intervene – not as a substitute for the other branches of government – but to complement the democratic process of policy development and service delivery?

The aim of this article is to establish whether judicial review in India and South Africa is consonant with constitutionalism or undue activism. In answering this question, the following aspects will be considered. First, the shared experiences of the two countries for the purpose of establishing the comity between the countries as comparators. Secondly, a discussion of judicial activism as manifested in the two jurisdictions. This is assessed with reference to the transformative and generous manner in which the courts have interpreted their respective constitutions so as to give effect to the living tree doctrine of progressive interpretation. A further assessment is the role dignity has come to assume in giving deeper meaning to democracy. The discussion then focuses on the vacuum created by a failure on the part of the executive, due to a lack of financial resources, indolence, corruption, or a combination of such factors to deliver on socio-economic rights. Similarly, where parliament fails to hold the executive to account, what are the implications thereof for our courts? For the sake of brevity, and for purposes of contextualising the aforesaid, this article has selected specific cases that serve as a point of reference.

2 KINDRED SPIRITS IN LAW AND SO MUCH MORE

India and South Africa share a rich bittersweet heritage. Until the early twentieth century indentured Indian labourers were sent to work on sugar cane plantations in South Africa.[1] Both are vibrant pluralistic secular societies. They were subject to British domination prior to gaining sovereign independence yet remain members of the Commonwealth[2] that now share international economic and political cooperation as members of BRICS. The Constitutional Court of South Africa and the Indian Supreme Court enjoy a "cross-pollination" of jurisprudence.[3]

Part III (Articles 12–35) of the Indian Constitution,[4] sets out certain fundamental rights, namely equality before the law,[5] freedom of religion,

---

1 Henrico "The Rule of Law in Indian Administrative Law Versus the Principle of Legality in South Africa Administrative Law: Some Observations" 2021 42(3) *Obiter* 486.

2 South Africa left the commonwealth 31 May 1961 and re-joined in 1994.

3 Henrico 2021 *Obiter* 498. See *S v Makwanyane* 1995 (3) SA 391 (CC) 16; *S v Dodo* 2001 (3) SA 382 (CC) 32; *S v Mamalobo* 2001 (3) SA 409 (CC) 49; Pillay "Protecting Judicial Independence Through Appointments Processes: A Review of the Indian and South African Experiences" 2018 3 *Indian Law Review* 283–311; Bentele "Mining for Gold: The Constitutional Court of South Africa's Experience with Comparative Constitutional Law" 2009 37 *Georgia Journal of International and Comparative Law* 219 248.

4 Adopted by the Indian Constituent Assembly on 26 November 1949, coming into effect on 26 January 1950.

5 Article 14.

race, caste, sex, place of birth,[6] equality in matters of public employment,[7] and the right to freedom of expression.[8] While the rule of law is not expressly mentioned, the author has argued that it is to be inferred or implied from the Preamble's wording that India secures "to all its citizens justice".[9] It has also long been recognised that the Indian Constitution is implicitly premised on the rule of law with reference to the extent to which the framers were all too familiar with the Diceyan concept of the rule of law. In *Golaknath v State of Punjab*,[10] the Court held that parliament could not curtail any of the fundamental rights contained in the Constitution since:

> "[r]ule of laws under the Constitution has the glorious content. It embodies the concept of law involved over the centuries".[11]

The rule of law underpins constitutionalism as it manifests itself in administrative law in general and judicial review in particular in ensuring that the exercise of public power is *intra vires*.[12] Unlike the South African Constitution of 1996, which expressly recognises the rule of law, the rule of law "permeates the entire fabric"[13] of the Indian Constitution. The court in *ADM Jabalpur v S Shukla* (per Kanna J) held:

> "[the] rule of law is the antithesis of arbitrariness […] Rule of law is now the accepted norm of all civilized societies."[14]

The Indian Constitution recognises that nobody is above the law and the Constitution.[15] Every person, irrespective of their status in society or the executive, is subject to the supremacy of the rule of law.[16] Moreover, in a system subject to the rule of law, unbridled power can never be countenanced; it is always subject to the constraints imposed by the rule of law.[17] All government agencies including the courts, who are vested with discretionary powers are thus subject to the rule of law in as much as their decisions must be premised upon cogent legal principles that promote fairness, transparency, and equality.[18] This is not unlike the South African Constitution which recognises the supremacy of the Constitution and the rule

---

6 Articles 15(1)–(5).
7 Article 16(1)–(3).
8 Article 19(1)(*a*)–(*e*).
9 Henrico 2021 *Obiter* 490.
10 1967 2 SCR 276.
11 *Golaknath v State of Punjab supra* 98.
12 See *ADM Jabalpur v S Shulka* (1976) 2 SCC 521.
13 Jain and Jain *Principles of Administrative Law* (2015) 20.
14 *ADM Jabalpur v S Shulka supra* 154. See also Henrico 2021 *Obiter* 492–493.
15 Jain and Jain *Principles of Administrative Law* 21.
16 See *State of Punjab v Khanchand* (1974) 2 SCR 768; *VC Mohan v Union of India* (1969) 2 SCC 262; *Pancham Chand v State of HP* (2008) SCC 123.
17 *Maya Devi v Raj Kumari Batra* (2010) 9 SCC 486; *Mohinder Singh Gill v Chief Election Commissioner* (1978) 1 SCC 405.
18 *Maya Devi v Raj Kumari Batra supra*. See also Tyagi "The President of India: The Constitutional Head with Discretionary Powers" 2017 63 *Indian Journal of Public Administration* 330 337–340 and Henrico 2021 *Obiter* 493.

of law.[19] As such, no power may be exercised unless authorised by law and their decisions cannot be ignored unless set aside by a court of law.[20]

Reference to notions of "fairness" and "equality" draw strongly on the important role to be assumed by the Indian judiciary in transformation by taking into account the emphasis placed on substantive equality and social justice. Section 39(1)–(3) of the South African Constitution obliges our courts, when interpreting legislation or the Bill of Rights, to do so in a manner that promotes the values of the Constitution and develops the common or customary law. Thus, the judiciary – while subject to the rule of law – is an activist of social change; activists that seek to bring about substantive changes in the lives of those that plead their cases before them, particularly the poor, vulnerable, marginalised persons of society. It is this active socio-economic change brought about through judicial intervention that calls into question the issue of judicial activism.

3 THE PHENOMENON OF JUDICIAL ACTIVISM

3 1 Organic interpretation of the text

Judicial activism is a relative term. It has been defined in various ways.[21] One description reads as follows

> "[j]udicial activism [is] the power of the Supreme Court and High Courts to declare a law unconstitutional if it affects the larger section of the society and to promote justice".[22]

The power to declare a law unconstitutional is also known as substantive judicial review powers, while the promotion of socio-economic justice is a matter lending itself to wide debate as to whether the judiciary (as the unelected branch of government) has any business meddling in matters that are falling within the domain of the elected branches of government. While no universal definition of judicial activism exists, the context in which the Indian Supreme Court and the Constitutional Court of South Africa have given effect to certain provisions of their respective constitutions is important to consider for purposes of reflecting on whether this is inimical or supportive of constitutionalism.

Both Indian and South African legal systems are based on the common law tradition. A common refrain is that judges speak through their judgments. Since the coming into operation of constitutional dispensations in both countries, a significant body of judicial precedent or judge-made law has been established. For reasons that appear from the cases discussed below, the glib assertion that judges merely interpret the law is not only naïve, but

---

19 Henrico 2021 *Obiter* 493. See ss 1(*c*), 2 and 8(1)–(2) of the Constitution.

20 Burns and Henrico *Administrative Law* (2020) 9–11.

21 Susanta "For Public Administration: Is Judicial Activism Really Deterrent to Legislative Anarchy and Executive Tyranny" 1997 XLII *The Administrator* 1; Rishi and Ananth "Judicial Activism in India: Whether More Populist or Less Legal?" 2017 1 *Indian Journal of Constitutional and Administrative Law* 11–23.

22 See Morwal and Mathur "Evolution of Judicial Activism in India" 2020 3(3) *International Journal of Law Management & Humanities* 1211 1212.

out of touch with reality. Judges play an instrumental role in developing (and animating) the law (with reference to the demands of present-day society) as they adjudicate cases against the backdrop of relevant legislative regimes as read with normative constitutional rights and obligations. Yet, they do not interpret or give effect to the aforesaid without also having regard to the underlying constitutional values and principles informing fundamental human rights and relevant international law and instruments. A failure to do so would be myopic. Their contribution to our jurisprudence is transformative in the sense that they bring about change(s) in respect of cases as pleaded. They afford litigants standing, an opportunity to be heard, and the possibility of being afforded relief that translates into social justice, thus a change for the better.

The gloss placed on a specific text of the constitution animates such text. To this end, it can be argued, and rightly so, that a judge is an activist. A perusal of the law reports clearly shows a general tendency to not merely dispense the "law", but rather to give effect to the latter with due consideration of various factors including, but not limited to, social justice imperatives. This speaks to the creative role of the judiciary and in particular the apex courts acting as guardians of the constitution and of the most vulnerable and marginalised persons in society.

Transformative constitutionalism[23] in South Africa is consistent with the "living tree" metaphor approach of progressive constitutional jurisprudence. The metaphor was introduced by Lord Chancellor Sankey in *Edwards v Attorney-General for Canada*[24] in a case involving an interpretive provision under the then Canadian constitution involving gender equality justice. It is used as a means of interpreting the constitution in an organic way; to read "broadly and progressively so that it may adapt to changing times".[25] It is no small coincidence that the Constitutional Court has adopted as its official logo, a tree which has been pointed out by retired Constitutional Court justice Sachs as representing, "[t]he court's place in Africa and the Constitution's historical roots in the struggle for human rights".[26] It is thus befitting that a tree is a place "[u]nder whose branches the poor and vulnerable could seek the shelter afforded by the justice system."[27]

India and South Africa are both victims of colonial domination and oppression. While India has been in the felicitous position of being a

---

[23] The term "transformative constitutionalism" was coined by Karl Klare who described it as follows, "[a] long-term project of constitutional enactment, interpretation, and enforcement committed (not in isolation, of course, but in a historical context of conducive political developments) to transforming a country's political and social institutions and power relationships in a democratic, participatory and egalitarian direction." See Klare "Legal culture and transformative constitutionalism" 1998 14(1) *South African Journal on Human Rights* 146–188. For further reading on transformative constitutionalism, see Meirenik "A Bridge to Where? Introducing the Interim Bill of Rights" 1994 10(1) *South African Journal on Human Rights* 10; Van Marle "Revisiting the Politics of Post-Apartheid Constitutional Interpretation" 2003 3 *TSAR* 549; and Langa "Transformative Constitutionalism" 2006 *Stellenbosch Law Review* 351–360.

[24] 1930 AC 124 (PC 1929).

[25] Corder and Brickhill "The Constitutional Court" in Hoexter and Olivier (eds) *The Judiciary in South Africa* (2014) 355 363.

[26] Corder and Brickhill in Hoexter and Olivier *The Judiciary in SA* 355 363.

[27] Corder and Brickhill in Hoexter and Olivier *The Judiciary in SA* 363.

constitutional state since the 1950s – when South Africa was still in the early grips of the apartheid regime – both countries have had to transform (and continue to transform) as an ongoing process aspiring to the elusive goal of egalitarianism. The "living tree" doctrine does not expressly appear in any judgments, however, the progressive approach that renders constitutional interpretation organic and transformative, as opposed to formal and parsimonious, is evident in the judgments of many of the courts in both jurisdictions and particularly the apex courts of both countries. It has been correctly pointed out that as early as 1977 the Indian Supreme Court has given effect to the "living tree" doctrine through a liberal interpretation of the Constitution that has since given expression to the changing needs and demands of society.[28] The consequence thereof has been the relief afforded vulnerable citizens under Public Interest Litigation (PIL) and the expansive interpretations of the right to life under article 21 to accommodate additional rights such as, for example, the right to shelter, rights to privacy, right to free legal aid, right to pollution free water and air, right to clean environment, protection against hazardous industries, right to free education up to the age of 14 years, right to livelihood, and the right to a speedy trial.[29]

Moreover, with reference to environmental law, the judiciary in India has always been privy to international developments and sustainable development initiatives and has thus itself been a trailblazer in this field of jurisprudence by successfully expanding the scope of the fundamental personal liberty right under article 21 of the Constitution to include the right to a healthy environment.[30] The South African judiciary and the Constitutional Court in particular have been vested with powers to give substantive effect to the rights of equality, freedom, and human dignity.[31] Evidence of this appears from a host of applications brought by way of judicial review where a more expansive and generous notion of "public law" relief with reference to constitutional values and principles has been provided which would not otherwise have been afforded through the strict confines of private law.[32]

The aforesaid shows that through a generous interpretation of the Constitution, the apex courts have actively contributed to the organic development and transformation of society in a manner that has given substantive meaning to the rights contained in the respective Constitutions.

3 2 Human dignity awareness

The author has elsewhere referred to the curiosity of human rights awareness that became a focal area of legal discourse since 1945.[33] Former Chief Justice Chaskalson stated:

---

[28] Boruah "Living Tree Doctrine: Role of Indian Judiciary Against Constitutional Silence in India" 2019 *Rajiv Gandhi National University of Law Student Law Review* 53.

[29] Boruah 2019 *Rajiv Gandhi National University of Law Student Law Review* 55.

[30] Chakravarty "Indian Constitution and Judiciary" 2006 *Indian Law Institute* 99 102–105.

[31] In terms of s 39(1)–(3) of the Constitution.

[32] See, for example, *Ferreira v Levin NO* 1996 (1) SA 984 (CC); *Mazibuko v City of Johannesburg* 2010 (4) SA 1 (CC); and *Joseph v City Power* 2010 (4) SA 55 (CC).

[33] Mc Crudden "Human Dignity and Judicial Interpretation of Human Rights" 2008 19(4) *The European Journal of International Law* 655 662–663; Besson "Human rights and

> "The affirmation of [inherent] human dignity as a foundational value of the constitutional order places our legal order firmly in line with the development of constitutionalism in the aftermath of the second-world war."[34]

Albie Sachs has pointed out:

> "Respect for human dignity is the unifying constitutional principle for a society that is not only particularly diverse, but extremely unequal […] [An open and democratic society] acknowledges the foundational character of the principle of human dignity, and aspires to accept people for who they are. It presupposes diversity and welcomes and treats everyone with equal concern."[35]

Dignity *per se* may be ineffable, but its application has been instrumental in the protection, affirmation, and realisation of other basic rights such as the right to equality, adequate health care, and a clean environment. Referring to human dignity, Nugent JA, in *Minister of Home Affairs v Watchenuka*[36] stated: "[it is] the ability to live without positive humiliation and degradation".[37] It is beyond dispute that human dignity forms an inexorable component in the protection of human rights and as such has provided an impetus to a robust corpus of jurisprudence.[38] In its Preamble, the Indian Constitution expressly warrants "… assuring the dignity of the individual …" Human dignity also finds articulation in the Directive Principles and Fundamental Duties, but not in the text on Fundamental Rights.[39] With a history of legislated racial segregation, it is no surprise that the South African Constitution has a stand-alone section that reads: "Everyone has inherent dignity and the right to have their dignity respected and protected."[40] It is worth recalling that in *Maneka Gandhi v Union of India*,[41] (which had to do with the right to travel) the Supreme Court observed:

> "These fundamental rights represent basic values cherished by the people of this country since Vedic times and they are calculated to protect the dignity of the individual and create conditions in which every human being can develop his personality to the fullest. They weave 'a pattern of guarantees on the basic

---

Democracy in a Global Context: Decoupling and Recoupling" 2011 4 *Journal of Ethics & Global Politics* 19 27–28; Dodoo "The Demand For Human Rights in a Diverse Socio-Cultural World Society: Approaches and Tools" 2011 4 *Journal of Politics & Law* 162 163–164 and Mutua "Standard Setting in Human Rights: Critique and Prognosis" 2007 29 *Human Rights Quarterly* 547 552–554. See Henrico "Educating South African Legal Practitioners: Combining Transformative Legal Education with Ubuntu" 2016 *US-China Law Review* 817 820.

34 Chaskalson "Human Dignity as a Foundational Value of our Constitutional Order" 2000 *SAJHR* 193 196.

35 Sachs *The Strange Alchemy of Life and Law* (2011) 213–214.

36 2004 (4) SA 326 (SCA).

37 See *Minister of Home Affairs v Watchenuka supra 32.*

38 For further reading see, Du Bois "Rights Trumped? Balancing in Constitutional Adjudication" in Du Bois (ed) *The Practice of Integrity: Reflections on Ronald Dworkin & South African Law* (2005) 155; Ackermann *Human Dignity: Lodestar for Equality on South Africa* (2013)*;* Botha "Human Dignity in Comparative Perspective" 2009 *Stellenbosch Law Review* 217–220.

39 Chia-Shin Hsu "Introduction: Human Dignity, Human Rights, and Cultural Change in Asia" in Chia-Shin Hsu (ed) *Human Dignity in Asia: Dialogue Between Law and Culture* (2021) 12.

40 S 10.

41 1978 SC 597.

> structure of human rights' and impose negative obligations on the State not to encroach on individual liberty in its various dimensions."[42]

The self-worth of individuals located in a constitutional society would only be enhanced through the realisation of socio-economic imperatives. Conversely, as long as socio-economic goals such as access to adequate health services, housing, education, clean environment are *not* realised it impacts adversely upon human dignity inasmuch as people are forced to live in abject poverty and in conditions not fit for human habitation. In this sense, dignity must conceptually and notionally inform the type of democracy under which citizens have agreed to be governed. To this end, Dworkin asserts that democracy can only exist where human rights are recognised and respected.[43] Bilchitz advances the following supportive argument:

> "[where] millions of people live in dire poverty, the exclusion of guarantees in a Constitution which address the economically depressed living conditions of so many would impact on the very legitimacy of the system itself. This point highlights the fact that when courts enforce such guarantees against the other branches of government, they are not acting in an undemocratic manner; rather they are defending the conditions for the legitimacy of the constitutional order itself in which many are excluded".[44]

Dignity takes on a broader dimension than mere recognition of self-worth. The citizenry, together with all organs of the state and the judiciary have a collective role to play in contributing to a stronger (deeper) sense of democracy. Hence, we must conceive of a form of civic dialogue arising from participatory democracy that plays itself out not only by way of exercising political rights, for example, voting, but other rights such as *locus standi* that seeks to hold the exercise of public power (on the part of government), or rather the failure of government to act, accountable by way of judicial review. The assertion by Bilchitz lends credence to the enforcement of the (justiciable) socio-economic rights by the courts in South Africa and the non-justiciable enforcement of socio-economic rights by the courts in India.

Support for this appears from the writings of Erin Daly who compellingly argues that the nexus between dignity and democracy is sufficiently strong to justify judicial activism, through the lens of enhancing the status and sovereignty of the people as opposed to the court. Adjudication on the part of the courts, especially apex courts (as impacted upon by international law, human rights imperatives, and demands for consolidated democratic models) is more demonstrative of the "*constitutionalisation* of politics" as opposed to "judicialisation of politics" or politicisation of the courts". What this translates into is that courts "[ensure] that the politics of the day stay within the bounds of constitutional limits and further constitutional values".[45]

While courts must always be alert to their limited powers as the unelected branch of government,[46] their enforcement of socio-economic rights should

---

42 See *Maneka Gandhi v Union of India supra* 667–668.

43 Dworkin *Justice for Hedgehogs* (2011) 320.

44 Bilchitz "Constitutionalism, the Global South and Economic Justice" in Bonilla (ed) *Constitutionalism of the Global South* (2021) 97.

45 Daly *Dignity Rights: Courts, Constitutions, and the Worth of the Human Person* (2021) 147.

46 For further discussion in this regard, see Anand "Judicial Review-Judicial Activism-Need for Caution" 2000 *Journal of Indian Law Institute* 149 155; Khosla "Judicial Activism" 2008 *The*

not be seen as usurping either elected branch of its powers; instead, it should be seen as an "enhanced role for both the political and the judicial branches, and one that requires ongoing interaction between the two".[47] In this sense, judicial intervention shouldn't be seen as undue activism but rather as part of the democratic process facilitating "policy development and service delivery monitoring"[48] and also furthering the cause of civic dialogue.

Dignity assumes a role far greater than recognising self-worth. It is essentially the vanguard on which the status quo, progression, and development of democratic government are showcased. Stripped to its basics, there is no room for equivocation as to the humiliating and degrading impact that homelessness or abject poverty has on the self-worth of any human being, thereby compelling judicial intervention (in a vacuum left by the government) where it fails or neglects to act. The extent to which our courts have been compelled to act, against the backdrop of human dignity awareness and progressive constitutional interpretation requires consideration of certain Indian and South African decisions.[49]

4 JUDICIAL APPROACH

4 1 The Indian courts

Part IV of the Indian Constitution contains Directive Principles of State Policy relating to socio-economic rights. These are non-justiciable (in terms of article 39). The rationale is that it is a guide for the government as a policy maker to take necessary welfare measures in securing socio-economic rights for its citizens. This much appears from article 38. The increase of PIL and the exercise of writ jurisdiction on the part of the Supreme Court has given rise to the latter being referred to as the most "vigorous" organ of state in the world impinging on the functions of the other two arms of government.[50]

In principle, constitutional enshrinement of health as a socio-economic obligation to be imposed (as policy initiatives) on the executive to take reasonable and necessary steps to implement relevant legislative regimes giving effect to the realisation of health rights and opportunities is noble. Unfortunately, the reality is less noble. Ongoing inequality, increased unemployment, and the need for healthcare services naturally gave impetus to PIL. Thus, the interpretation of the right to health, as read with Articles 9 and 14 of the Constitution as a fundamental right came to be recognised by

Indian Journal of Political Science 113 123; and Khosla "Addressing Judicial Activism in the India Supreme Court: Towards an Evolved Debate" 2009 *Hastings International and Comparative Law Review* 55 55 and the authorities cited at ft 2; Corder "Constitutional Reform in South African History" in Corder, Federico and Orrù (eds) *The Quest for Constitutionalism: South Africa since 1994* (2020) 181 191.

47 See Daly *Dignity Rights* 152.

48 Daly *Dignity Rights* 158.

49 For the sake of brevity and for purposes of this article, regard is given in the main to decisions of the Supreme Court of India and South African Constitutional Court. This contribution does not purport to suggest that these decisions are an exhaustive account of all the reported cases, since such a task would fall without the scope of this article.

50 Singhania "Judicial Activism in India" 2018 4(2) *International Journal of Law* 238.

the court in *Minerva Mills v Union of India*,[51] and in *Parmanand Katara v Union of India*,[52] wherein it was held that the right to emergency medical care is a fundamental right that cannot be denied by any hospital. In addition, the Supreme Court reiterated the need and essence of access to primary healthcare facilities in *Paschim Banga Khet Mazdoor Samity v State of West Bengal*.[53] Finding that local municipal bodies were responsible for the maintenance of hygiene and sanitation, the Supreme Court ordered the municipality to build proper drainage and filling of a cesspool to protect members of the public from the flow of such draining in *Municipal Council, Ratlam v Shri Vardhichand*.[54]

Enforcement of socio-economic rights also appears from *Francis Coralie Mullin v Union Territory of Delhi*,[55] in which an expanded notion of fundamental rights to life and personal liberty was made to include the right of a detainee to "live with human dignity" including "the bare [necessities] of life.[56] The court associated the right to life with the socio-economic Directive Principles in *Bandhua Mukti Morcha v Union of India*,[57] explaining that the "right to live with human dignity, enshrined in Article 21 derives its life breath from the Directive Principles".[58] Judgments have gone as far as dealing with full-scale policymaking, such as the case of *Union for Civil Liberties (PUCL) v Union of India, Writ Petition (Civil)*[59] wherein the Court declared a duty on the part of the state to provide emergency nutrition and issued 49 various interim orders between 2001 and 2005 implementing its judgment at a detailed level of social policy, touching on everything from school lunches to accountability.[60]

Further examples include *Common Cause v Union of India (Writ Petition (Civil)*,[61] involving the recognition of passive euthanasia; the *Independent Thought v Union of India (Civil)*,[62] where the court criminalised sexual intercourse by a husband with his wife who is below 18 years of age; *Shakti Vahini v Union of India Writ Petition (Civil)*,[63] where the court held that the consent of the family or community is not necessary once the two adult individuals agree to enter into wedlock since it is their fundamental right to marry of their own choice.[64] Judicial activism on the part of the Supreme Court of India has been lauded for giving imputes to social justice and thus served the interests of the greater society. As praiseworthy as the

---

51 (1980) AIR 1789.
52 AIR [1989] SC 2039.
53 AIR [1996] SC 2426.
54 (1980) AIR 1622.
55 (1981) 2 SCR 516.
56 Menell "Judicial Enforcement of Socioeconomic Rights: A Comparison Between Transformative Projects in India and South Africa" 2016 49 *Cornell International Law Journal* 724 733.
57 (1983) 90.
58 Menell 2016 *Cornell International Law Journal* 734.
59 No. 196 (2001).
60 Menell 2016 *Cornell International Law Journal* 734.
61 No. 215 (2005).
62 WP. No. 382 of 2013.
63 No. 231 (2010).
64 Singhania 2018 *International Journal of Law* 239.

intervention of the judiciary may be especially in invoking its powers under article 142 of the Constitution, it has also been urged that the judiciary needs to tread cautiously in interpreting fundamental rights so broadly and generously as to assert social justice for society in instances where there is no compelling reason(s) for the judiciary to be meddling in matters of governance by the executive arm of government.

4 2 The Constitutional Court of South Africa

A marked difference between the Indian and the South African Constitution is that the latter does contain in its Bill of Rights justiciable socio-economic rights. In this regard, reference is had, for example, to the right to an environment that is not harmful to one's health or well-being;[65] the right to have access to adequate housing;[66] the right to have access to health care services, including reproductive health care and access to sufficient food and water and social security;[67] and the right to basic education, including adult basic education and further education.[68]

In *Soobramoney v Minister of Health, KwaZulu-Natal*,[69] the Constitutional Court dismissed the applicant's claim for state-funded dialysis treatment, finding the policy of the state to prioritise treatment for curable cases to be reasonable with reference to a limitation. In *Republic of South Africa v Grootboom*,[70] the state was ordered to take reasonable measures towards the progressive realisation of the right to access to adequate housing – within the state's available means. The irony (and sadness) is that the house for the applicant was only built some years after the court order, and after the demise of the applicant, Irene Grootboom. In *Nokotyana v Ekurhuleni Metropolitan Municipality*,[71] the Court held that the government's failure to reach a final decision to improve an informal settlement violated residents' rights to adequate housing but deferred to the government's proposed plan to review and remedy the situation and refused to grant monetary relief to individual claimants. Restraint was also exercised by the court in *National Treasury v Opposition to Urban Tolling Alliance*,[72] in which the Constitutional Court set aside an interdict granted by a lower court against the government on the basis that the order was a clear violation of the separation of powers as the lower court failed to consider the budgetary implications of its order on government.

In *Njongi v Department of Welfare, Eastern Cape*,[73] the Court called the cancellation of a disabled woman's benefits without notice or explanation "devoid of all humanity" and ordered the restoration of her benefits.[74]

---

65 S 24(*a*).
66 S 26(1).
67 S 27(1)(*a*)–(*c*).
68 S 29(1)(*a*)–(*b*).
69 1998 (1) SA 765 (CC).
70 2001 (1) SA 46 (CC).
71 2014 (4) BCLR 312 (CC).
72 2012 (6) SA 201 (CC).
73 2008 (4) SA 237 (CC).
74 Menell 2016 *Cornell International Law Journal* 735–736.

However, the recent case of *Thubakgale v Ekurhuleni Metropolitan Municipality*[75] saw the court dismiss an appeal by the applicants against the state for failing to realise their rights to adequate housing. In this instance, there was evidence of corruption on the part of the local government (municipality) tasked to build houses for the applicants. When the applicants sued for constitutional damages, on account of the government failing to take reasonable measures to realise their rights to adequate housing, their claim was ultimately dismissed on the basis that non-fulfillment of a socio-economic right on the part of the state does not translate into a citizen being entitled to an award of constitutional damages against the state. The restraint exercised by the Constitutional Court in *Soobramany*; *National Treasury* and *Thubakgale* is indicative of the court duly acknowledging the role to be assumed by the executive and parliament in terms of their own responsibilities.

In the case of *National Director of Public Prosecutions v Freedom Under Law*,[76] a non-governmental organisation had successfully challenged decisions to drop criminal charges as well as disciplinary charges against a senior police officer. The court of first instance ordered the NDPP to reinstate the original charges and the Commissioner of Police to reinstate the disciplinary proceedings. The SCA set the decision aside on the basis that the order in the form of interdicts was a clear violation of the separation of powers doctrine and could see no compelling reasons to interfere with the decision of the executive, alternatively assume a function that fell within the realm of the executive. It would appear that in neither *National Treasury* nor *Freedom Under the Law* there was sufficient evidence before the Constitutional or Supreme Court to find a compelling basis on which to interfere in the realm of the executive.

A particular aspect of undue activism levelled against the Constitutional Court has arisen under the nomenclature of "warfare". In reference to the writings of Comaroff,[77] Corder and Hoexter refer to the latter as having been employed to mean "the use of litigation as 'a weapon of the weak'".[78] A phenomenon that has characterised South African jurisprudence is the use of litigation to resolve contentious political disputes, to this end courts have been approached by civic groups and or political parties to rule on matters that should essentially be resolved by political means and are hence not justiciable.[79] This is particularly prevalent in instances where parliament has failed (or refused or neglected) to hold members of the executive accountable, leaving it essentially in the hands of the court.

In *Minister of Justice and Constitutional Development v Southern Africa Litigation* Centre,[80] the court upheld a decision of the court of the first

---

75 2021 ZACC 45.

76 2014 (4) SA 298 (SCA).

77 Comaroff and Comaroff "Millennial Capitalism: First Thoughts on a Second Coming" in Comaroff and Comaroff (eds) *Millennial Capitalism and the Culture of Neoliberalism* (2001) 305.

78 Corder and Hoexter "'Lawfare' in South Africa and its Effects on the Judiciary" 2017 10 *African Journal of Legal Studies* 105 106.

79 Corder and Hoexter 2017 *African Journal of Legal Studies* 107.

80 2016 (3) SA 317 (SCA).

instance finding that the government had acted unlawfully and unconstitutionally in failing to arrest President al-Bashir of Sudan in terms of warrants for his arrest issued by the International Criminal Court.[81] The Constitutional Court in *Economic Freedom Fighters v Speaker, National Assembly*,[82] affirmed the binding nature of remedial action taken by the Public Protector against former state president Jacob Zuma and went so far as to declare President Zuma and Parliament as having failed in their most fundamental constitutional obligations with reference to personal upgrades at President Zuma's private homestead Nkandla.[83] The High Court per Vally J, ruled in favour of an opposition political party against former President Zuma, compelling him to produce the full record of his Cabinet decisions as well as the reasons for them, at a time when he was still State President. While the reshuffle of the Cabinet by the head of the executive is usually regarded as the epitome of a political decision, the reshuffle announced on 30 March 2017 resulted in the dismissal of an effective former finance minister Pravin Gordhan, known to be stringently against corruption by the state, led to South Africa's financial rating to "junk" status.[84]

The growth of a mafia state was a feature of the presidency of Jacob Zuma. This was made possible by the power vested in the President as head of state and head of the executive. This culminated in the State of Capture Commission of Inquiry (the Commission) which has completed its mandate and released a comprehensive report detailing the extent of looting and corruption within the government. Hearings before the Commission highlighted the complicity (and direct involvement) of members of the executive while under the watchful eye of President Zuma who did nothing to stem the cancer of corruption to effectively aid and abet the growth of a "dual state" or "state of capture". Parliament's dismal failure to address corruption and its attempt to "smother the findings of the Public Protector in the Nkandla investigation, that Zuma and his family had been unduly enriched at public expense by some of the 'security upgrades' made to his private rural compound at Nkandla" was only aggravated by the National Assembly's appointment of a commission rival investigations that exonerated President Zuma. This is clearly irresponsible and unlawful conduct on the part of a body charged with holding the executive to account.[85]

The unwillingness or inability of various portfolio committees in Parliament, and of the responsible cabinet ministers to tackle manifest corruption in the corporate governance of state-owned enterprises led to opposition parties and NGOs turning to the courts to fill the accountability vacuum.[86] What is heartening is the extent to which the judiciary seems to have retained its independence of mind despite the efforts made to appoint compliant judges. The erstwhile Chief Justice himself has been cited as an example of a judge who "confounded expectations (presumably shared by

81 Corder and Hoexter 2017 *African Journal of Legal Studies* 111–112.
82 2016 (3) SA 580 (CC).
83 Corder and Hoexter 2017 *African Journal of Legal Studies* 113–114.
84 Corder and Hoexter 2017 *African Journal of Legal Studies* 114.
85 Corder and Hoexter 2017 *African Journal of Legal Studies* 118–119.
86 Corder and Hoexter 2017 *African Journal of Legal Studies* 119.

President Zuma when he appointed him) that he would be pliant and beholden to the executive."[87]

Disobedience of court orders is another insidious and slow but potentially very effective way of undermining the judiciary. Continual non-compliance with court orders imperils judicial authority and the rule of law as pointed out by the Constitutional Court in *Nyathi v MEC for Department of Health, Gauteng*.[88] The flagrant disregard by members of the executive of judgments is also borne out in the Minister of Social Development. In *AllPay Consolidated Investment Holdings (Pty) Ltd v Chief Executive Officer of the South African Social Security Agency*,[89] wherein the court found that a substantial tender for the nationwide payment of social grants had been awarded unlawfully. A personal cost order has been made against the Minster who is unable to pay the same. Sadly, the structural interdict granted by the court has still not been complied with by the parties.[90]

Corder and Hoexter have suggested that lawfare has arisen on account of a clear failure on the part of the executive and legislature to carry out their functions properly or at all. This has placed the courts in an unenviable position where they are effectively the only arm of government to which concerned parties can turn for relief. Ironically, when relief is granted by way of judicial review against the executive or parliament, the latter has contemptuously disregarded court orders, alternatively asserting that the courts are guilty of undermining the institution of democracy in South Africa. It is this battle that has the tendency, as correctly pointed out by the learned authors, to translate into a greater concern, which is public confidence in judicial legitimacy.[91]

Enforcement of socio-economic rights on the part of the Supreme Court of India has clearly taken place by means of the "living tree" or progressive constitutional interpretive approach. It may well be argued that this approach was in and of itself a compelling reason to obviate the exclusion of justiciability on account of Directive Principles of State Policy. However, history and the clamouring demand for social justice, combined with ineptness on the part of the government in realising such justice, effectively resulted in recourse to the courts for the relief that should otherwise (but did not) come from the government. To this end, there can be no sinister connotation attached to judicial activism as courts are compelled to act in a vacuum created by the government. Socio-economic rights have always been justiciable under the South African constitutional dispensation. Our courts have also adopted a progressive approach in giving effect to transformative constitutionalism but have not disregarded judicial deference. It does appear that if there is no compelling reason to interfere, our courts will refrain from doing so.

---

87 Corder and Hoexter 2017 *African Journal of Legal Studies* 122, referring to the former Chief Justice Mogoeng Mogoeng.

88 2008 (5) SA 94 (CC) par 63; 83 and 129. See also Corder and Hoexter 2017 *African Journal of Legal Studies* 122.

89 2014 (1) SA 604 (CC).

90 Corder and Hoexter 2017 *African Journal of Legal Studies* 123.

91 Corder and Hoexter 2017 *African Journal of Legal Studies* 126.

The approach of the courts in both jurisdictions draws strong parallels with an anti-positivist textual interpretation of the respective constitutional texts, which is consonant with a "living tree" progressive approach. This has animated the constitutional rights and duties in a manner that makes both constitutions essentially transformative in nature so as to give effect to socio-economic rights. Moreover, the weighty status assumed by dignity has effectively served to enhance the protection of various fundamental rights and created a more prominent place for the judiciary to be more vigilant in protecting the socio-economic rights of the most indigent in society.

5 CONCLUDING REMARKS

Many may argue that the best guarantor of constitutional rights and liberties is an apex court. It must be accepted that neither the Supreme Court of India nor the Constitutional Court of South Africa has limitless powers. The rule of law imposes inherent limitations on the exercise of their judicial powers. Both courts are also restrained by their respective constitutions. The Supreme Court of India has been referred to as an organ of the state. This terminology cannot be employed with reference to the Constitutional Court[92] (or any court) in South Africa. Section 8(1) of the Bill of Rights applies to all laws and binds the legislature, the executive, the judiciary, and all organs of the state. One cannot disregard the fact that the judiciary is represented by a gamut of experienced individuals. While each one is unique in her or his jurisprudential schooling, experiences, inherent prejudices, ideologies, and so forth it would be far-fetched and fanciful to assert that a judge seized with a judicial review application is not advertent to polycentric or lawmaking issues that should best be left to the respective arms of government.

Case law appears to suggest a tendency to provide relief in instances where the executive or parliament has failed to take reasonable or necessary steps to realise the rights of citizens, alternatively where parliament fails to perform its own job; this then in effect demands action on the part of the court through means of an appropriate court order. However, the effectiveness of the latter is by and large also dependent on the extent to which there is cooperation on the part of the other arms of government in implementing or giving effect thereto, thus demonstrating that the reach of our courts is limited. However, a far more sinister phenomenon gripping South African jurisprudence is warfare. When courts are used to resolve political spats, the real danger exists of the credibility and legitimacy of the judiciary being questioned. Is this, as opposed to judicial review in general or activism in particular, anathema to constitutionalism?

[92] S 239 of the Constitution defines an organ of state as an administrative body to the exclusion of "a court or a judicial officer".

THE ADMINISTRATION OF SOCIAL SECURITY IN THE MIDST OF COVID-19: A NEED FOR A SPECIALISED AND INDEPENDENT SOCIAL SECURITY ADJUDICATION SYSTEM IN SOUTH AFRICA

Ntando Ncamane
LLB LLM
Lecturer, Department of Mercantile Law
University of the Free State

SUMMARY

The spread of the Coronavirus has had an adverse effect in many parts of the world including South Africa. Many people contracted the disease, and some even died. It is worth mentioning that to date, people are still contracting and dying from this disease. Related consequences that came with the management of the disease have had dire repercussions both on the economy of the country and social conditions of many, in particular the impoverished. In a bid to circumvent the socio-economic hardships given birth to by the disease the State made provision for a number of social relief measures to improve the conditions of those who were at the plight of poverty. These social relief measures had their own shortcomings, such as mismanagement of allocated funds, fraud and maladministration. These shortcomings left the intended beneficiaries destitute. At this point those affected by such discrepancies had no recourse available to them due to lack of awareness, lengthy adjudication processes, exorbitant legal fees and most importantly the lack of an independent social security adjudication system to solely deal with matters of this nature. The lack of an independent social security adjudication system invites quite a number of constitutional breaches such as the breach of the right to social security and the right of access to courts and in turn, has a bearing on socio-economic rights during this era of the pandemic. In an endeavour to provide amicable solutions to the above shortcomings, this article suggests that the pandemic necessitated the implementation of the long-called-for establishment of an independent social security adjudication system which will only deal with social-security-related matters. To amplify the need for an independent social security adjudication system the article makes recommendations to this effect. It is worth mentioning that the article was written at the height of Covid-19 and when the lockdown regulations were still in force and effective, this is thus reflective in the contents of the article.

1 INTRODUCTION

The coronavirus (COVID-19) started in China, and subsequently affected the rest of the world. South Africa is no exception to the causalities precipitated

by this pandemic.[1] To flatten the curve of the virus, President Cyril Ramaphosa announced that South Africa would be on lockdown for 21 days which came into effect on the 26th of March 2020 and implemented a system of monitoring the spread of the virus.[2] However, owing to an increase in infected persons and fatalities, the second wave was more severe than the first wave. The insurgence of the pandemic necessitated the government to extend the lockdown over the subsequent months, with adjustments being made in accordance with the lockdown regulations as empowered in terms of section 27(2) of the Disaster Management Act.[3] The restrictions on most of the economic activities posed an immense threat to the economy and jobs of people, as lots of retrenchments were seen. To circumvent the hardship of the shrinking economy, the State devised measures to assist both the economy and the marginalised people of South Africa. The President announced the economic and social measures such as social relief interventions[4] which equated to social security at play, which is the focus of this article.

The President on 21st of April 2020 announced economic and social measures, but for the purposes of this article, the focus is on social-security-related measures. There have been State social relief interventions through food parcels that were distributed at the local government level.[5] The State also increased social assistance grants and announced the new temporary social assistance intervention of R350 for unemployed people, it was termed "social relief distress grant". The other measure was made possible through the Compensation for Occupational Injuries and Diseases Act[6] (COIDA) which exonerated employers from claims arising from employees occupationally acquiring Covid-19. Lastly, companies that were deemed as non-essential were permitted to lodge a claim with the Unemployment Insurance Fund on behalf of their employees.[7]

There are internal remedies available at the disposal of the aggrieved beneficiaries, should they become dissatisfied with the services of these institutions tasked with the responsibility of administering these social relief funds, this option has been in place long before the emergence of Covid-19. However, these internal dispute resolution mechanisms have been regarded to be ineffective. At the heart of this article, it demonstrates the dire need of establishing a specialised and independent social security tribunal. To better support this argument reference is therefore made to other areas of law that have been blessed with independent and specialised tribunals or

---

1 Peterson, Wasserman, Lee, Go, Holmes, Al-Abri, McLellan, Blumberg and Tambyah "Covid-19– We Urgently Need to Start Developing an Exit Strategy" 2020 96 *International Journal of Infectious Diseases* 233 234.

2 South African Government "President Cyril Ramaphosa: South Africa's Response to Coronavirus COVID-19 Pandemic" (23 Apr 2020) https://www.gov.za/speeches/president-cyril-ramaphosa-south-africas-response-coronavirus-covid-19-pandemic-23-apr-2020# (accessed 2021-01-26).

3 57 of 2002.

4 South African Government https://www.gov.za/speeches/president-cyril-ramaphosa-south-africas-response-coronavirus-covid-19-pandemic-23-apr-2020#.

5 *Ibid*.

6 130 of 1993.

7 South African Government https://www.gov.za/speeches/president-cyril-ramaphosa-south-africas-response-coronavirus-covid-19-pandemic-23-apr-2020#.

adjudication systems and which have been efficient and effective in addressing the right to access to justice for those who are aggrieved with the decisions of the concerned institutions and those who cannot afford legal fees. This article argues further that the mishandling of these social relief funds during this pandemic amplifies the need for reforming the social security adjudication system. This article was penned at the peak of Covid-19 and during the strict lockdown regulations, therefore some of the arguments made henceforth are limited to that era.

2 THE INTERNATIONAL PERSPECTIVE

Olivier notes the importance of considering international law and further states that several factors are convincing as to why the international law perspective of social security should be assessed as far as it relates to access to social security.[8] First, he highlights that South Africa has voluntarily obliged itself as a party to international treaties. Secondly, even in cases where South Africa is not a party to a treaty, section 39(1)(*b*) of the Constitution[9] is still applicable. Thirdly, "there is substantial and developing jurisprudence and persuasive commentary available on the scope and content of socio-economic rights."[10] Section 39(1)(*b*) states that when interpreting the Bill of Rights, a court, tribunal or forum must consider international law; this approach is based on an internationally friendly system, which various courts of law have tested. Section 233 of the Constitution states

> "When interpreting any legislation, every court must prefer any reasonable interpretation of the legislation that is consistent with international law."

This section of the article briefly notes the international and regional instruments; however, this part first tackles instruments relating to the right to access courts and thereafter instruments relating to social security.

The International Covenant on Civil and Political Rights (ICCPR) requires a member of state to afford citizens the recognisable effective remedy when their rights or freedom have been violated.[11] It further warrants anyone who claims such a remedy, the right for their claim to be tried and heard in a competent judicial, administrative, or legislative authority and to provide for any amicable judicial remedy.[12] The International Labour Organisation Social Security (Minimum Standards) Convention guarantees every applicant the right to appeal in the case where their application has been refused.[13] Minimum standards make provisions for establishing social security platforms that will deal with social security-related matters.[14] Regionally article 7 of the African Commission on Human and Peoples' Rights African

---

8 Olivier *Introduction to Social Security* (2004) 164.

9 Constitution of the Republic of South Africa, 1996.

10 *Ibid*.

11 Art 2(3)(a) of United Nation General Assembly *International Covenant on Civil and Political Rights* 999 UNTS 171. Adopted 16/12/1966; EIF: 23/03/1976.

12 Art 2(3)(b) of the ICCPR.

13 Art 71(1) of International Labour Organisation *Convention Concerning Minimum Standards of Social Security* C102 (1952). Adopted 28/06/1952; EIF: 27/04/1955.

14 Art 71(3) of *Social Security (Minimum Standards) Convention*.

Charter of Human and Peoples Rights states that every citizen shall have the right to have his/her cause be heard,

> "[t]he right to an appeal to competent national organs against acts of violating his fundamental rights as recognized and guaranteed by conventions, laws, regulations and customs in force."[15]

Moreover, the African Charter of Human and Peoples Rights makes provision for everyone's cause to be heard.[16] This right also entails the right of an individual to appeal to a competent organ of the State for fundamental rights that have been violated.[17] The Code on Social Security requires the member states to establish an administrative and regulatory framework to ensure the effective and efficient delivery of social security benefits.[18] The Code also makes provision for easy access to an independent adjudication system for everyone who wants his/her social security dispute to be resolved.[19] To this end an analysis of South Africa's social security adjudication system is hereby necessary, the following section of this article deals specifically with South Africa's social security adjudication system.

3 SOUTH AFRICA'S SOCIAL SECURITY ADJUDICATION SYSTEM

The South African Social Security System consists of four necessary elements to render social security effective and efficient. The first is "social assistance", which is defined as a scheme funded by the State and every so often it is regarded as a social grant. To this end, social assistance is non-contributory and depends solemnly on the government.[20] "Social insurance" on the other hand, is described as:

> "Joint contributions by employers and employees to a pension or provident funds, or social insurance covering other unexpected events. The government may also contribute to social insurance covering accidents at work".[21]

These schemes under social insurance are contributory in nature depending on both the employee and employer, unlike social assistance, where the fund depends on the State. Social insurance covers contingencies such as pensions or provident funds, medical benefits, maternity benefits, illness, disability, unemployment, employment injury benefits, family benefits and survivor's benefits.[22] Strydom describes "social relief" as follows:

> "Entails short-term measures undertaken by the state to assist persons during individual or community crises that have caused the affected persons or communities to be unable to meet their most basic needs."

---

15 Art 7 of Organization of African Unity *African Charter of Human and Peoples' Rights* (1981). Adopted 27/06/1981; EIF 21/10/1986.

16 *Ibid*.

17 Art 7(1)(a) of the *African Charter of Human and Peoples' Rights*.

18 Art 21.1 of SADC *Code on Social Security in the SADC* (2008).

19 *Ibid*.

20 Strydom *Essential Social Security Law* (2012) 7.

21 Department of Welfare "White Paper for Social Welfare" (August 1997) 222.

22 Department of Welfare "White Paper for Social Welfare" (August 1997) 223.

These hardships include former enemies, victims of war, victims of harmful compulsory vaccination measures, persons who had sacrificed their jobs and education in the process of overturning oppressive governments and establishing democratic governments and persons whose governments of their predecessors had violated fundamental human rights.[23]

The most common crisis in communities which requires social relief is natural disasters. Unlike other social security elements, there is no means test required for the supposed beneficiaries despite one's financial situation. Social relief is only temporarily available to a community that has been affected by a natural disaster, such as floods.[24] The other stream of social security is social compensation, which is viewed as the government's solidarity fund for persons in society who encounter hardship or misery on the government's account. Pieters describes "social compensation" as

> "[t]he appreciation or sense of guilt of society towards those people on whom the government has rightfully or wrongfully and at any rate disproportionally inflicted damages."

Having highlighted all these crucial social security elements, the focal point of this article is on elements affected during the lockdown period, when the government announced social and economic relief measures. These affected elements include social assistance, social insurance with particular focus on the Unemployment Insurance Fund (UIF) and the last element which also bears attention in this article is social relief. The right to social assistance and social insurance is expressly given effect by virtue of legislation, which comprises necessary provisions for adjudication mechanisms available to parties who are less satisfied with the outcomes of their application.

This article examines alternative dispute resolutions available to persons aggrieved or beneficiaries of social security who are not satisfied with the institution's decision. Suffice to say that available dispute resolutions in this arena are meant to give effect to the constitutional right, which is the right to access courts.[25] This right is said to be crucial under a constitutional democratic country that subscribes to the rule of law. The right bestows citizens' the right to question the validity of specific statutes or conduct, a principle that was foreign under the apartheid government. Every citizen under this right is afforded the opportunity to challenge the law through the prism of the rule of law. The right is divided into three components which are embedded in section 34 of the Constitution. [26] The Constitutional Court in the case of *Napier v Barkhuizen* 2007 (5) SA 323 (CC)[27] alluded to the importance of the right to access to court under a democratic state, it held:

> "Our democratic order requires an orderly and fair resolution of disputes by courts or other independent and impartial tribunals. This is fundamental to the

---

23 Strydom *Essential Social Security Law* 185.

24 International Labour Organisation "Informal Economy" (undated). http://www.ilo.org/global/topics/employment-promotion/informal-economy/lang--en/index.htm (accessed 2021-05-13).

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

26 Currie and De Waal *The Bill of Rights Handbook* 6ed (2016) 711.

27 2007 (5) SA 323 (CC).

> stability of an orderly society. It is indeed vital to a society that, like ours, is founded on the rule of law. Section 34 gives expression to this foundational value by guaranteeing to everyone the right to seek the assistance of a court."[28]

Social assistance and social relief are regulated in terms of the Social Assistance Act,[29] making provisions for the administration and payment of social grants. The secondary legislation that gives effect to social assistance is the South African Social Security Agency Act,[30] which provides for the establishment of the South African Social Security Agency (SASSA), which is the agency responsible for administering and payment of social grants.[31] The Social Assistance Act provides for a person or any person acting on behalf of someone who is not satisfied with the outcomes of his or her application and within 90 days of such a decision, to file a written appeal to the Minister of Social Development stating reasons why the Minister should vary or set aside the decision made by the agency.[32] Having considered the decision of the agency and the reasons of the appellant, the Minister may confirm the decision or vary the decision or even set aside the decision. Alternatively, the Minister may appoint an independent tribunal and prescribe conditions of the tribunal in the Gazette and after cogitation of the appeal, the tribunal may set aside, vary or confirm the decision of the agency.[33] If the tribunal deems it just, it may make another decision.[34] It should be borne in mind that this alternative dispute resolution is also made available for a person whose application has been rejected and who would desire to file an appeal.

The UIF is tasked with the sole responsibility of collecting contributions from both employee and employer.[35] This enables those employees who are entitled to unemployment benefits to apply for these benefits when they are temporarily unemployed. The application is filed with the UIF as the institution responsible for administering and pay-outs of unemployment benefits.[36] If the application for the right to benefit of an employee is rejected or suspended by the Commissioner, not only the Commissioner, even the claims officer that processes the payment or non-payment, the said employee may appeal to the appeal committee of the UIF Board.[37] This is also in accordance with the Employment Promotion and Protection against Unemployment Convention, which gives the person claiming a right to challenge the withdrawal, suspension or refusal of an unemployment benefit.[38] The Act provides for further dispute alternatives for people who are aggrieved by the decision of the Board to approach the Commission for

---

28 *Napier v Barkhuizen supra.*

29 S 3(*a*) of the Social Assistance Act 13 of 2004.

30 9 of 2004.

31 Preamble of the South African Social Security Agency Act.

32 S 18(1) of the Social Assistance Act.

33 S 18(2)(a) of the Social Assistance Act.

34 *Ibid*.

35 S 2 of the Unemployment Insurance Act 63 of 2001.

36 *Ibid*.

37 S 37(1) of the Unemployment Insurance Act.

38 Article 70(1) of International Labour Organisation *Employment Promotion and Protection Against Unemployment Convention* C168 (1988). Adopted: 21/06/1988; EIF: 17/10/1991.

Conciliation, Mediation, and Arbitration (CCMA) for alternative relief.[39] Olivier states that the Labour Court has jurisdiction except where the criminal offence has been made according to the Act. Olivier further submits that where there is a dispute in terms of the application or interpretation of the Act, the Director-General out of his interest or in the interest of another party can lodge an application to the Labour Court for clarification.[40] The case of *Sibanda v Department of Labour*[41] outlines the need of the aggrieved applicant to utilise internal dispute resolution before approaching a court of law. The case involved an applicant (Mr Sibanda) who sought to review and set aside the decision to deny him unemployment benefits in terms of the Unemployment Insurance Act.[42] The application was brought in terms of section 146 of the Labour Relations Act,[43] which states:

> "Any party to a dispute who alleges a defect in any arbitration proceedings under the auspice of the commission may apply to the Labour Court for an order setting aside the arbitration award."[44]

The court stated that the test placed before it was a review of the Department of Labour's decision, not the arbitration award. The court stated that it does not have jurisdiction over a decision of an official, as there is an internal procedure of appeals that needs to be followed in cases where an applicant's benefits application is declined.[45] The court further stated that section 37 of the Unemployment Insurance Act provides for internal dispute resolution, such as through the regional committee of appeals and the national appeals committee. The court dismissed the application for lack of jurisdiction.[46]

Section 38 of the Unemployment Insurance Act places a duty on the labour inspector to issue a compliance order where it suspects non-compliance with the Act by the employer. The Act further provides that the labour inspector must seek to obtain a written undertaking from the employer stating that he or she will comply with the provisions of the Act.[47] In attempting to secure such, the employer must outline steps it will take to comply with this Act, or if it has failed to comply due to failure to contribute after payment has been made, then a receipt must be produced. Nevertheless, the employer may dispute the compliance order by referring the matter to the Director-General using the proper channels for review of the decision taken, the Director-General may make an application to the Labour Court in a quest of making the compliance order an order of the court.[48]

---

39 Nyenti "Reforming the South African Social Security Adjudication System: Innovative Experiences From South African Non Social Security Jurisdictions" 2016 19 *Potchefstroom Electronic Law Journal* 1 6–7.

40 Olivier, Okpaluba, Smit and Thompson *Social Security Law General Principles* (1999) 284.

41 [2007] ZALC 30.

42 *Sibanda v Dept of Labour supra.*

43 66 of 1995.

44 *Sibanda v Dept of Labour supra.*

45 *Sibanda v Dept of Labour supra.*

46 *Sibanda v Dept of Labour supra.*

47 S 38 of the Unemployment Insurance Act.

48 Ss 39 and 40 of the Unemployment Insurance Act.

In terms of COIDA, the Act makes provision for the establishment of a Compensation fund. It also makes provision for the management and administration of contributions and claims of employees who have occupationally contracted a disease or injured.[49]

The Director-General/Commissioner may review any decision related to a claim of occupational injuries or diseases. This must be done after the concerned person has been afforded an opportunity to make representation.[50] The Director-General/Commissioner may, after considering evidence and representations, amend, set aside or confirm the decision. The Commissioner may further reduce, suspend, discontinue or increase the compensation award.[51] Anyone who is affected by the Director-General's decision may lodge an objection or appeal within 180 days.[52] The objection shall be considered and decided by the presiding officer assisted by two assessors. The presiding officer may with the assistance of the assessors confirm the decision or make any just and equitable decision.[53] An aggrieved person by the decision of the presiding officer may appeal to the High Court having jurisdiction.[54] The appeal may concern any interpretation of the Act, whether the sustained injury or contracted disease was on account of the employee's wilful misconduct. It can also relate to whether the amount of the compensation […] was inadequate or excessive.

4 THE RIGHT OF ACCESS TO COURTS

The Constitution affords every citizen the right to have any dispute that is resolvable by applying the law to be adjudicated in a fair public hearing, a court of law or an appropriate forum or tribunal that is impartial and independent.[55] This right is not unique to other Bill of Rights in our Constitution. Against these reasons, the State must respect, protect, promote, and fulfil the right of access to the court. The realisation of the right to access justice is an intrinsic right that relates to many other fundamental rights in the Bill of Rights. This proves the long-standing stance of the Constitutional Court that there is no Bill of Rights that exists in isolation from another. Therefore, it is essential to note that the right to access a court is an important component of the right to achieve the realisation of the right to social security. The case of *Napier v Barkhuizen* held that the right of access to court to have any dispute resolved in terms of the law by an impartial and independent tribunal is a foundational right that is necessary for an orderly society.[56] This becomes imperative for South Africa which is founded on the values of the rule of law, therefore this right is beneficial for the people of our

49 Preamble of COIDA.
50 S 90(1) of COIDA.
51 S 90(2) of COIDA.
52 S 91(1) of COIDA, as amended.
53 S 91(3) of COIDA, as amended.
54 S 91(5) of COIDA, as amended.
55 S 34 of the Constitution.
56 *Napier v Barkhuizen supra*.

society as it guarantees redress for citizens from the court in cases of disputes.[57]

The High Court in *Nedbank Limited v Thobejane*[58] pronounced this right as a substantive right which is a turning point in South Africa's history of inequality, apartheid and denial of access to courts. This right has wider intentions which are practical and give effect to the right to access court. It further held that any right must be linked to the right to access court, which must be practically accessible.[59] Social security is regarded as a fundamental right falling under the category of socio-economic rights. The monitoring and enforcement of socio-economic rights is dependent on the collaboration of the executive, legislature and judiciary. This also extends to the South African Human Rights Commission and NGO's.[60] Enforcement of socio-economic rights is very crucial for the realisation of the right to social security hence this might be made possible and effective by the State fulfilling the right to access the court. The social security reform will ideally achieve both access to social security and enforcement of the said right through the lenses of section 34 of the Constitution.[61] To fully understand and give effect to the right of access to courts entrenched in our Bill of Rights it is necessary to examine the available approaches in interpreting this right.[62] The first approach is to understand the purpose of the right, which is regarded as purposeful because it outlaws apartheid practices that denied certain groups from testing the validity of the law and bringing any dispute before a court of law. This is in line with the rule of law principle that anyone may challenge the legality of any law or conduct, needless to say, that the purpose of the right to access courts is to give effect to the founding principle of our law which is the rule of law.[63] For every dispute, it is a constitutional requirement that it must be a matter that is resolvable by application of law and disputes relating to the administration of social security matter are disputes which warrant to be resolvable under the perimeters of section 34 of the Constitution. If it can be ascertained that a dispute can be resolvable by application of the law, a concerned or aggrieved person to the dispute must be able to access a court, tribunal or forum to have his/her dispute resolved in terms of the law. The primary purpose of this component of the right of access to courts is to ensure that there's protection for the aggrieved and the State or other institutions do not impair access to people seeking justice in a court of law, tribunal or forum. It is so unfortunate and concerning that this leg of the right of access to court is yet a mission impossible while the legislature has tried to fulfil this aspect in other areas such as in the establishment of the CCMA, the small claims courts and the National Consumer Tribunal. Fairness forms an integral part

---

57 *Napier v Barkhuizen supra.*

58 [2018] 4 All SA 694 (GP).

59 *Nedbank Limited v Thobejane supra.*

60 Olivier and Van Rensburg "Protection and Enforcement of the Right to Social Security" 2000 *Law, Democracy & Development* 87.

61 S 34 of the Constitution.

62 Nyenti *Developing an Appropriate Adjudicative and Institutional Framework for Effective Social Security Provisioning in South Africa* (LLD thesis, University of South Africa) 2012 32.

63 Currie and De Waal *The Bill of Rights Handbook* (2016) 711.

of the right to access to courts. The Constitutional Court also ventilated this in the case of *De Beer NO v North-Central Local Council and South-Central Local Council*[64] where it made the following remarks:

> "This section 34 fair hearing right affirms the rule of law which is a founding value of our Constitution. The right to a fair hearing before a court lies at the heart of the rule of law. A fair hearing before a court as a prerequisite to an order being made against anyone is fundamental to a just and credible legal order. Courts in our country are obliged to ensure that the proceedings before them are always fair. Since procedures that would render the hearing unfair are inconsistent with the Constitution, the courts must interpret legislation and the rules of court, where it is reasonably possible to do so, in a way that would render the proceedings fair."[65]

The right to have a dispute fairly resolved in a tribunal alternates with section 33 of the Constitution,[66] which confers the right to administrative action that is lawful, reasonable and procedurally fair.[67] The Promotion of Administrative Justice Act (PAJA)[68] was enacted to give effect to the provisions of section 33.[69] Lastly, the right of access to a court is to be resolved in a public hearing, customarily all courts of law are open to all. Only in certain exceptions will this not be allowed.[70]

5 THE STATE SOCIAL RELIEF INTERVENTIONS AND ARISING CHALLENGES THEREOF

To ensure the effectiveness of the national lockdown, regulations in a schedule were enacted to supplement the Disaster Management Act,[71] which restricted the movement of people except in exceptional circumstances. Not only did the regulations have a bearing on the movement of people but they also banned most of the economic activities, such as the sale of alcohol and cigarettes to mention a few.[72] These economic restrictions had a negative bearing on the livelihoods of indigent people and people earning a living on a hand-to-mouth basis. To mitigate the economic hardships brought about by these restrictions, the State announced both social and economic interventions to enable the vulnerable to survive during this period. Owing to the increase in the number of people who were infected with the virus and the escalating number of fatalities, it impelled the State to

---

64 *De Beer NO v North-Central Local Council and South-Central Local Council* 2002 (1) SA 429 (CC).

65 *Ibid.*

66 S 33 of the Constitution.

67 S 33(1) of the Constitution.

68 3 of 2000.

69 S 33(3) provides: "National legislation must be enacted to give effect to these rights and must (a) provide for the review of administrative action by a court or, where appropriate, an independent and impartial tribunal; (b) impose a duty on the state to give effect to the rights in sub-sections (1) and (2); and (c) promote an efficient administration."

70 S 34 of the Constitution.

71 57 of 2002.

72 Disaster Management Act 57 of 2002: Amendment of Regulations issued in terms of s 27(2).

extend the lockdown.[73] The extension of the lockdown had severe effects on the daily living conditions of impoverished people *inter alia* workers, informal traders and small business enterprises. The President announced several government interventions to enable the needy to endure the challenging circumstances of the pandemic.[74] The State took seriously the fight not only against the coronavirus, but the economic effects caused by the disease on businesses and people. This is evident in the President's sentiments uttered in his speech where he said the following:

> "Our country finds itself confronted not only by a virus that has infected more than a quarter of a million people across the globe, but also by the prospects of a very deep economic recession that will cause businesses to close and many people to lose their jobs. Therefore, as we marshal our every resource and our every energy to fight this epidemic, working together with business, we are putting in place measures to mitigate the economic impact both of this disease and of our economic response to it. We are today announcing a set of interventions that will help to cushion our society from these economic difficulties."[75]

Government interventions that are discussed in this article, are social relief interventions as far as they relate to social security with a particular focus on social assistance, social insurance and social relief as streams of social security. The first proposed intervention was the Temporary Employee Relief Scheme, which was said to enable employers to continue paying their employees during the period of the pandemic.[76] The success of this initiative was dependent on the Department of Employment and Labour. It is against this reason that the Minister issued a directive that will provide for the payment of the Covid-19 Temporary Employee/Employer Relief Scheme (C-19 TERS).[77] The purpose of the scheme was to permit payment for contributors who had lost income owing to the effects of Covid-19[78] and to mitigate the economic pitfalls of Covid-19 and avert any contact during the application of the TERS benefit.[79] Chief amongst its purpose, the directive gave effect to the establishment of the Temporary Employee/Employer Relief Scheme and stipulated the application process that contributors need to adhere to for purposes of mitigating the economic catastrophes posed by Covid-19.[80]

For a company to qualify for a claim for payment to contributors, the company must have closed shop for three months or less otherwise have suffered financial distress as a result of Covid-19 related matters.[81] The TERS benefit is disjoined from the normal UIF benefits –that is, the ordinary

---

73 Statement by President Cyril Ramaphosa on Escalation of Measures to Combat Covid-19 Epidemic (23/03/2020) http://www.dirco.gov.za/docs/speeches/2020/cram0323.pdf (accessed 2021-05-30).

74 *Ibid*.

75 *Ibid*.

76 *Ibid*.

77 Directive by the Minister of Employment and Labour in Terms of Regulation 10(8) issued by the Minister of Cooperative Governance and Traditional Affairs in terms of s 27(2) of the Disaster Management Act, 2002 (Act 57 of 2002).

78 Par 2.1.1(*a*) of C-19 TERS.

79 Par 2.1.1(*b*)–(c) of C-19 TERS.

80 Par 2.1.1(*d*) of C-19 TERS.

81 Par 3.1 of C-19 TERS.

rule which relates to unemployment insurance applies where for every four days worked the worker accumulates a one-day credit and the general rule of "days payable is 365 for every 4 (four) years" will not be applicable.[82] Further to the outlined requirements, the company must be registered as a contributor with the UIF,[83] the company must adhere to the application process of the temporary relief fund[84] and the closure of the company must be on account of Covid-19.[85]

The Temporary Employee Relief Scheme has been an admirable unemployment insurance initiative aimed at providing financial relief for contributors of UIF during the insurgencies of Covid-19. However, the administration and pay-out turned out to be a debacle. One of the major reasons for this relates to fraud and corruption as it was discovered that approximately R1 billion was paid to persons who did not qualify.[86] The other challenge of the scheme is that payments to contributors were delayed as there were claims that some companies were not paid, and this negatively affects employees who are in dire need of these funds.

The reasons for delays in payment were on account of inadequate IT resources and flawed administration processes. These two factors have been identified as the roots of the Temporary Employee Relief Scheme problems.[87] Obscurities continue to exist in this scheme as the Act only permits companies who have registered their workers to lodge a claim to the Temporary Employee Relief Scheme (TERS).[88] This has raised concerns as there are a number of companies that have never registered their workers. This means that in terms of the directive Covid-19 Temporary Employee/Employer Relief Scheme were and they are still not beneficiaries of the scheme.[89]

The President announced that employees exposed to the coronavirus and who have contracted the said virus are permitted to claim from the Compensation Fund for having contracted the disease.[90] The Compensation Commissioner gazetted a Notice on Compensation for Occupationally-Acquired Novel Coronavirus Disease under COIDA.[91] The notice makes provision for employees who are defined as employees in terms of COIDA to claim compensation for Covid-19 acquired diseases.[92] The compensation is

82 Par 3.2 of C-19 TERS.

83 Par 3.7.1 of C-19 TERS.

84 Par 3.7.2 of C-19 TERS.

85 Par 3.7.3 of C-19 TERS.

86 Business Insider SA "UIF Corona Payouts: 157 Employers Investigated for Fraud, R3bn in Wrong Payments Recovered" (06/10/2020) https://www.businessinsider.co.za/uif-ters-payments-2020-10-2.

87 https://www.businessforsa.org/important-message-to-all-employers-regarding-temporary-employer-employee-relief-scheme-ters (accessed 2021-06-20).

88 Par 3.7.1 of C-19 TERS.

89 Runciman "Gaps in South Africa's Relief Scheme Leave Some Workers With No Income" (22/04/2021) https://theconversation.com/gaps-in-south-africas-relief-scheme-leave-some-workers-with-no-income-136403 (accessed 2021-06-27).

90 Statement by President Cyril Ramaphosa on Escalation of Measures to Combat Covid-19 Epidemic http://www.dirco.gov.za/docs/speeches/2020/cram0323.pdf.

91 The Compensation Commissioner gazetted a notice on Compensation for Occupationally-Acquired Novel Coronavirus Disease.

92 Par 2 of Notice on Compensation for Occupationally-Acquired Novel Coronavirus Disease.

paid out when an employee has been exposed to many sources or a single source of Covid-19 or has travelled to a high-risk area.[93] The report from the Auditor-General shows that there has been a delay in processing compensation for occupationally-acquired novel coronavirus disease which was system related.[94] Internal control measures have been identified as a long-existing problem; these include poor financial reporting and poor record management. With these inadequate control measures, the Compensation Fund is not able to manage claims for compensation for occupationally-acquired novel coronavirus disease.[95] This outrageous lack of effective control measures might exacerbate the protracted challenges of the fund because restrictions have been relaxed on our economy and more people are now back at work. This means that more workers are contracting the disease and the influx of applications will continue.

On 21 April 2020, the President announced additional coronavirus economic and social-relief measures. The President also announced the extension of the lockdown on account of the rise in people who were infected with the virus as well as an increase in the number of fatalities.[96] These much anticipated economic and social-relief measures were the second-phase of the economic response of the State following the first address on 23 March 2020. The second-phase of the economic response package was supposed to amount to R500 billion which equated to 10 per cent of GDP.[97] The State had budgeted for relief of hunger and social distress. The State further reprioritised an amount of R20 billion which was meant for municipalities to enable them to provide emergency water supply, increased sanitation of public transport and facilities as well as food and shelter for those who do not have such.[98] The measures which were announced to support workers in the formal sector were going to be extended to also cater for workers in the informal sector.[99]

Furthermore, R50 billion was reserved for those most adversely affected by the virus. This included a six-month at the amount of R350 coronavirus grant which was known as Covid-19 Social Relief of Distress grant. To qualify for this grant, a person must be unemployed and must not be receiving any other form of a social grant or UIF payment.[100] The State, through SASSA, announced the rollout of food parcels which were to be issued as vouchers or via cash transfers for efficiency purposes. An amount of R100 billion was allocated to guard against job losses as well as to create employment.[101]

---

93 Par 3 of Notice on Compensation for Occupationally-Acquired Novel Coronavirus Disease.

94 Auditor-General of South Africa *First Special Report on the Financial Management of Government's Covid-19 Initiatives* (2020) 140.

95 *Ibid*.

96 Department of Health: Covid-19 Online Resource & News Portal "Statement by President Cyril Ramaphosa on Further Economic and Social Measures in Response the Covid-19 Epidemic" (21 April 2020) https://sacoronavirus.co.za/2020/04/21/extraordinary-budget-for-coronavirus-response (accessed 2021-06-30).

97 *Ibid*.

98 *Ibid*.

99 *Ibid*.

100 *Ibid*.

101 *Ibid*.

6 SHORTCOMINGS OF THE EXISTING SOUTH AFRICAN SOCIAL SECURITY DISPUTE RESOLUTION SYSTEM

This part of the article demonstrates the long-drawn-out deficiencies of South Africa's social security system. To this effect, substantive reasoning will be charted on as to why a social security adjudication system will suffice and ultimately realise the right of access to court.[102] South Africa does not have a singular or universal social security dispute resolution system, however, each relevant statute to social security makes provision for dispute resolution. The government interventions during the pandemic period can be qualified as the State living up to its socio-economic commitments as entrenched in different provisions of the Constitution. These socio-economic interventions dating back to April 2020 have been so beneficial to some targeted groups of people throughout the difficulties given birth by Covid-19 and the repercussions brought by lockdown regulations. However, these socio-economic interventions did not reach all the desired groups of people on account of various reasons as alluded to above. Now when this happens vulnerable persons who are beneficiaries of these socio-economic rights turn to court with the hope that the court will rule in their favour as the supposed beneficiaries of these socio-economic interventions.[103] However, this is not necessarily the case in the social security arena, the unfortunate inadequacies of the adjudication systems in place have their own designed shortcomings and the debacle of the Covid-19 social relief measures warrants a reflection on the reason for the absence of such an adjudication system as well as discussion on the envisaged social security adjudication system.

Accessing some of these social security institutions is from time to time a challenge, precipitated by factors such as the locations of the operating offices of these institutions being centralised.[104] This is an impediment for people living on the outskirts of the city and in rural areas. Sometimes, people in rural areas do not have the means or knowledge to access institutions that are centrally based on their geographical location. Another factor impeding access to these adjudication systems is that lodging a claim is usually a laborious process and the appeal process provided by these statutes and finalisation of matters for the aggrieved party is not guaranteed as there is no mention in the statutes of when the process should be finalised. Nyenti argues that some of these social security statutes provide for appeal and review at ordinary courts, usually High Courts. However, ordinary courts are not the best forums to deal with social security matters as they have little power to deal with appeals and more power to deal with reviews.[105] Review and appeal to such ordinary courts may not be to the advantage of many indigent people owing to a lack of revenue to access

[102] S 34 of the Constitution.

[103] Govindjee "Adjudication of Socio-Economic Rights by the Constitutional Court of South Africa: Walking the Tightrope Between Activism and Deference" 2013 25 *National Law School of India Review* 62 65.

[104] Nyenti 2016 *Potchefstroom Electronic Law Journal* 7.

[105] Nyenti 2016 *Potchefstroom Electronic Law Journal* 8.

these courts. Owing to the inherent delays in court cases and legal technicalities in every court case one can tell that the current system is not user-friendly for the needy people who seek justice on their social security matters. The system is only accessible to those who can afford legal representation. This is a concern as most if not all beneficiaries of these social-relief measures are marginalised people who are not able to afford exorbitant legal fees.[106] Nyenti, the well-known advocate of social security adjudication reform, suggested a designated institution that deals with appeals. This is because there is a lack of a systematic approach as far as it relates to the social security appeal system.[107] He further makes the following assertions on the inappropriateness of the social security appeal system:

> "It is inappropriate to establish an appeal tribunal purely on the basis of Ministerial or Registrar direction/regulation, also due to the gravity and importance of the issues at stake, such as the establishment of the institution; the appointment of its members; its main objective(s); its jurisdiction, functions and powers; procedures for the disposal of complaints; giving parties an opportunity to comment and to be represented; time limits; record-keeping; making a determination and enforceability of determinations; review possibility; accountability; remuneration; and limitation on liability etc."[108]

An additional issue with the existing social security adjudication system is that these institutions have limited jurisdiction in dealing with the matters of social security, their scope and jurisdiction only go as far as stipulated in the relevant statutes. Even the High Court, as an external adjudicator on social security matters, has limited powers to deal with appeals and mainly deals with reviews because of the nature of social security matters. Social security institutions are not only limited in terms of jurisdiction but also in terms of remedies because remedies are circumscribed by legislation. This means that responsible forums do not completely enjoy autonomy when deciding on the best possible remedy. The independence of these social security adjudication systems is questionable because there is a lot of internal processes involving internal appeals to personnel employed by the same institution. To some extent, appeals are required to be forwarded to the Director-General or Minister whose lack of impartiality is concerning because he or she is not detached from the said social security institution that adjudicated on the matter.[109]

The inadequacies of social security were also identified and addressed at length by the Committee of Inquiry into a Comprehensive System of Social Security in South Africa, also known as the Taylor Committee.[110] The Department of Social Development formed the committee so as to review and investigate obscurities in the South African social security system.[111] The Committee stressed its concerns and challenges, which related to South

---

106 *Ibid*.

107 Nyenti *Developing an Appropriate Adjudicative and Institutional Framework for Effective Social Security Provisioning in South Africa* 292.

108 *Ibid*.

109 S 4 of COIDA.

110 Committee of Inquiry into a Comprehensive System of Social Security for South Africa *Transforming the Present – Protecting the Future: Consolidated Report* (March 2002) 10.

111 *Ibid*.

Africa's social security framework. The first challenge which was identified was a lack of consistency from officials of different social security institutions on complaints and appeals lodged by beneficiaries.[112] It also found that delays were inevitable and court outcomes on social security matters in dealing with such issues were not pleasing. The Committee further discovered that ordinary courts are not well equipped to deal with social security matters, and access to court was limited to indigent persons. Cases were found to be more legalistic, less consideration of the beneficiaries concerned, and the cost of litigation was found to be exorbitant.[113]

7 HOW TO ENSURE A SPECIALISED AND INDEPENDENT SOCIAL SECURITY ADJUDICATION SYSTEM

7 1 A constitutional framework approach

Earlier on, this article demonstrated the underlying Constitutional standards and principles for the transformation of the social security system. The proposed reform of the social security adjudication system clearly finds expression within the ambits of our constitutional framework and the realisation of this proposed adjudication system would be the fulfillment by the State of its constitutional commitments. The long overdue call to have a specialised adjudication system of social security is influenced by the interrelated constitutional provisions, at the core of which is the right to social security. In this regard, the first point of departure is section 2 of the Constitution, which recognises the Constitution as the supreme law of the land.[114] Chapter 2 of the Constitution guarantees everyone a Bill of Rights.[115] The State has an obligation to respect, protect, promote and to fulfill the Bill of Rights.[116] The Constitution guarantees everyone equal treatment and status before the law as well as equal protection.[117] This can be translated to mean that every beneficiary of social security who is aggrieved by a certain outcome of his or her application, or by the ill-treatment of one of the social security institutions should receive equal treatment and status in the new proposed social security system. The human dignity of citizens is to be protected and respected.[118] At the centre of this proposed adjudication system is the effective realisation of the right to social security, as the lack of an effective system compromises the right to social security as well as other supplementary constitutional provisions. Having delineated these crucial constitutional provisions, the reforming of the social security adjudication system should be informed and guided by these provisions of the Constitution.

---

112 Taylor Committee of Inquiry *Transforming the Present* 23.
113 *Ibid*.
114 S 2 of the Constitution.
115 Ch 2 of the Constitution.
116 S 7(2) of the Constitution.
117 S 9(1) of the Constitution.
118 S 10 of the Constitution.

7 2 Implementing the recommendations of the Taylor report

The described recommendations of the Taylor Committee should be implemented as they pertain to the establishment of a social security adjudication system. This would be made possible through the collaboration of the office of the Chief Justice and the Department of Justice and Constitutional Development working closely with other relevant departments, such as the Department of Social Development and the Department of Employment and Labour. The committee on a comprehensive social security system for South Africa was established to devise methods of reviving South Africa's social security to be a comprehensive system.[119] It is recommended that there is a need for a dismantled institutionalised administration, accountability, review and revision, and an impartial substantive adjudication system.[120] Chief amongst its recommendations, it suggested a uniform social security adjudication system established to precisely deal with social security claims that will have an independent internal review or appeal institutional process.[121] The Taylor report has thus described the much-needed adjudication system, a special social security court, that deals solely with social-security-related matters, and which will determine these cases based on law and fairness. The envisaged special court system should have jurisdiction in all social security matters from UIA, COIDA, the Road Accident Fund[122] and the Social Assistance Act.[123]

7 3 Aligning the social security adjudication system with other adjudication frameworks

The proposed adjudication system in the social security arena is not entirely foreign to South African jurisprudence. There are a number of specialised adjudication systems in other areas of South African law that arise from their respective statutes. For the purposes of this article, attention is drawn to at least four areas of law with fully functioning adjudication systems. This is to validate the call for the proposed social security adjudication system and to prove that the State has previously committed to ensuring that there is a fair and effective adjudication process available to affected persons within the specified area of law. For ease of reference, discussions under this section are limited to the dispute adjudication systems provided for under the Labour Relations Act (LRA),[124] Consumer Protection Act[125] and the National Credit Act (NCA).[126]

---

119 Taylor Committee of Inquiry *Transforming the Present* 9.
120 Taylor Committee of Inquiry *Transforming the Present* 122.
121 Taylor Committee of Inquiry *Transforming the Present* 124.
122 56 of 1996.
123 *Ibid*.
124 66 of 1995.
125 Consumer Protection Act 68 of 2008.
126 35 of 2005.

The LRA[127] was enacted to give effect to section 23 of the Constitution,[128] to provide for collective bargaining on wages, and on terms and conditions of employment and any other related matters of mutual interest.[129] Chapter 7 of the LRA puts in place specialised institutions to deal solely with labour-related issues.[130] The first is the Commission for Conciliation, Mediation and Arbitration popularly known as the CCMA.[131] The CCMA enjoys an independent status from the State or any other stakeholders such as the employers, employees and trade unions.[132] Chief amongst its functions, the CCMA is tasked with conciliating any matter brought before it in terms of the Act.[133] If a matter remains unresolved at the conciliation level, the Act provides for it to be referred to arbitration.[134] As part of having an effective and efficient labour adjudication system, section 151 of the LRA gives effect to the establishment of the Labour Court.[135] This court is a superior court that has inherent jurisdiction and shares an equal status to the High Court.[136] Subject to the provision of section 173, the Labour Court has exclusive jurisdiction on all labour matters.[137] The LRA further makes provision for the establishment of the Labour Appeal Court.[138] Subject to the provisions of the Constitution, the Labour Appeal Court has exclusive jurisdiction to hear appeals against judgments of the Labour Court,[139] although the Judge President of the Labour Appeal Court may permit the Labour Appeal Court to sit as a court of first instance.[140]

A second specialised adjudication system concerns the effective and procedural adjudication of consumer-protection-related matters, which is the National Consumer Tribunal and is hereby established by the National Credit Act. The NCA aims to ensure non-discriminatory and fair practices in the credit marketplace to enable consumers to access the credit market system.[141] The NCA makes provision for the establishment of the National Credit Regulator and National Consumer Tribunal.[142] The Regulator is an independent institution that is subjected only to the Constitution and the law.[143] The NCA requires the Regulator to always be impartial[144] and to perform its functions in a transparent manner[145] and without fear, favour or

127 66 of 1995.
128 S 1(*a*) of the LRA.
129 S 1(*c*)(i) of the LRA.
130 Ch 7 of the LRA.
131 S 112 of the LRA.
132 S 113 of the LRA.
133 S 115(1)(*a*) of the LRA
134 S 115(1)(b) of the LRA.
135 S 151(1) of the LRA.
136 S 151(2) of the LRA.
137 S 157(1) of the LRA.
138 S 167(1) of the LRA.
139 S 173(1)(*a*) of the LRA.
140 S 175(1)(*a*) of the LRA.
141 Preamble of the NCA.
142 *Ibid*.
143 S 12(1)(*c*) of the NCA.
144 S 12(1)(*e*) of the NCA.
145 S 12(*f*)(i) of the NCA.

prejudice.[146] The Regulator is tasked with promoting informal dispute resolutions to resolve credit-related matters between consumers and credit providers or credit bureaux, without the Regulator intervening in such matters.[147] The Regulator is also tasked with receiving complaints with regards to the contravention of the Act and investigating such complaints.[148] The Regulator is empowered by the Act to refer matters to the National Consumer Tribunal and to appear before the Tribunal regarding credit-related matters.[149] It is against such reasons that the National Consumer Tribunal is established[150] with functions such as adjudicating on any application made before it in terms of the NCA and making any order provided for in the NCA.[151] The Tribunal has the power to adjudicate any prohibited conduct as per the NCA and make a remedy to that effect.[152]

The purpose of the Act is to ensure that there is a legal framework for fair, accessible, efficient, responsible and sustainable marketplace for the better good of the consumers.[153] The Act also aims to prohibit unfair market practices and makes provision for the establishment of the National Consumer Commission.[154] A person whose consumer rights have been violated, infringed or impaired and would want redress in the National Consumer Tribunal must do so in a manner prescribed by the Consumer Protection Act (CPA) and rules of the National Consumer Tribunal regulating proceedings. The National Consumer Tribunal is tasked with the role of adjudicating on applications brought before it and allegations brought before it and grants remedies to that effect.[155]

7 4 Compliance with international standards

There are several international instruments that South Africa is a member of but for purposes of this article and for narrowing discussion, attention is drawn to the most relevant and crucial instruments. These include but are not limited to the International Covenant on Civil and Political Rights (ICCPR),[156] the ILO Minimum Standards of Social Security,[157] the African Charter on Human and People's Rights[158] and Code on Social Security.[159] The above-mentioned international instruments outline some minimum standards relating to the right to adjudication and the right to social security that are to be followed by member states and South Africa as a member of

146 S 12(*f*)(ii) of the NCA.
147 S 15(*a*) of the NCA.
148 S 15(*b*) of the NCA.
149 S 15(*i*) of the NCA.
150 S 26(1) of the NCA.
151 S 27(*a*)(i) of the NCA.
152 S 27(*a*)(ii) of the NCA.
153 Preamble of the Consumer Protection Act 68 of 2008.
154 *Ibid*.
155 Van Eeden and Barnard *Consumer Protection Law in South Africa* 2ed (2017) 478–479.
156 Art 49 of the ICCPR.
157 ILO *Social Security (Minimum Standards) Convention* 102.
158 African Commission on Human and Peoples' Rights *African Charter of Human and Peoples Rights*.
159 SADC *Code on Social Security.*

these above-mentioned international instruments should comply and incorporate these instruments into domestic instruments law. The Constitution makes it an obligation of any court, tribunal or forum to consider international law[160] and foreign law.[161] With the supremacy of the Constitution and the concerned international instruments on the inevitability of an adjudication of the framework for social security, South Africa should factor in this regard and join the long ongoing call of reforming its social security adjudication system to align itself with international instruments.

7 5 Accessibility of the social security adjudication system

To ensure the effectiveness of this proposed social security adjudication system, it should be accessible to every aggrieved person who wants redress in a social security matter. Persons must be able to apply for their cases to be heard and present their cases. Accessibility is said to mean that everyone must have access to bring his or her dispute. As highlighted above, most social security institutions are situated in geographical areas where it becomes difficult for people in the outskirts or rural areas to access. Nyethi describes accessibility in social security adjudications to mean:

> "Accessibility is promoted through aspects such as the geographic or physical location of an institution; hearing venues and modalities education of claimants on available avenues for redress; the language(s) utilised during proceedings; the friendliness of the prescribed documents and forms; the diversity of dispute lodgement options; the reasonableness of timeframes for lodging disputes; and the provision of financial and other support."[162]

7 6 Procedural fairness

At the heart of this proposed adjudication system should be the procedural fairness as stipulated in section 33 of the Constitution,[163] which bestows on everyone the right that is procedurally fair.[164] Procedural fairness entails good administration that is sensitive in its application. Procedural fairness encompasses two components, the first being *audi alteram partem* and the second being *nemo iudex in sua causa.*[165] *Audi alteram partem* means people should have an opportunity to partake in the decision making that affects them, and they are therefore afforded an opportunity to sway the outcomes of the process.[166] This principle is also made effective through the enactment of the Promotion of Administrative Justice Act (PAJA),[167] which guarantees every affected person by a decision the right to administrative action that is lawful, reasonable and procedurally fair, as well the right to be

---

160 S 39(1)(*b*) of the Constitution.

161 S 39(1)(*c*) of the Constitution.

162 Nyenti *Developing an Appropriate Adjudicative and Institutional Framework for Effective Social Security Provisioning in South Africa* 303.

163 S 33 of the Constitution.

164 S 33(1) of the Constitution.

165 Hoexter Administrative Law in South Africa 2ed (2013) 362.

166 Hoexter Administrative Law in South Africa 363.

167 3 of 2000.

given written reasons.[168] The *nemo iudex in sua causa* is better described as a common-law principle against bias and requires decision-makers to be impartial in making decisions.[169] This principle is made effective in terms of section 6 of PAJA,[170] which makes provision for a review of administrative action.[171]

8 CONCLUSION

The call to reform the current South African social security system so as to allow for the establishment of an independent adjudication system has long been advocated for in our scholarship. This call has not yet been realised in our jurisprudence, nor has the State committed or pondered on the possibility or feasibility of the proposed adjudication system. The lack of such an adjudication system has been demonstrated to occasion its own shortfalls, particularly to the impoverished and marginalised beneficiaries of social security benefits. This compromises important constitutional rights in a country that embraces the Constitution as the supreme law of the land and bestows equal rights on everyone. The rapid increase in the number of fatalities and infections on account of Covid-19 exposed the deficiencies and inadequacies. This necessitated the State to put in place and implement measures to curb the spread of the virus and implement lockdown regulations which were said to be an ideal solution to the Covid-19 crises. Due to South Africa's state of affairs where many people live below the poverty line and have a high unemployment rate required the State to provide social relief measures to reduce the hardships which were caused by the lockdown regulations.

As noted, the success of these social relief measures was halted by the State's maladministration at all levels of government. This had an immense impact on the livelihoods of the supposed beneficiaries of the social relief interventions as they were delayed, insufficient and some beneficiaries have still not received their benefits. Accessibility and knowledge of the existing adjudication system remains a challenge in the social security arena. In a worst-case scenario, those who finally make use of these adjudication processes lose faith and give up as they have been proved to be laborious, inefficient and ineffective and have failed beneficiaries, since many, if not all beneficiaries are either low-income earners or do not have the necessary means to afford legal representatives to seek redress in courts of laws.

With all this debacle at play especially in the prevalent circumstances of the pandemic and the maladministration of social relief measures, the consequences of such, negatively affects both the right of access to courts and the right to social security. This has been evident through a number of challenges presented by the lack of a specialised system of social security as some of the challenges between beneficiaries and officials of the concerned institutions could have been fairly resolved by an independent and specialised social security tribunal or court system. Therefore, the call

168 S 3 of PAJA.

169 Hoexter Administrative Law in South Africa 362.

170 S 6 of PAJA.

171 Hoexter Administrative Law in South Africa 362.

for a social security adjudication system is more necessary considering the persistent shortcomings of the internal dispute resolution processes which are provided by social security statutes. The establishment of a social security adjudication system is more of a dire need during the past prevalent circumstances of the pandemic, it would thus be an ideal solution to have a social security adjudication system in place which will uphold the principle of procedural fairness at all times.

DEINDIVIDUATION AND CRIMINAL RESPONSIBILITY

Shannon Hoctor
BA LLB LLM DJuris PG Dip (Latin)
Professor of Law
Stellenbosch University

SUMMARY

This contribution assesses the social-psychological concept of deindividuation in the particular context of its use in instances of crowd violence in South African criminal law. Well-established as a mitigating factor, and yet not used over the past couple of decades, the question is posed as to whether this concept still finds application in contemporary South African law and society.

1 INTRODUCTION

Crowd violence is an all-too-commonly encountered phenomenon in the South African context. Given that crowd violence may inflict more harm than where an individual is acting alone, potentially concomitantly violating public peace and order as well as threatening or infringing the rights of other people, it is required that any such violence be consistently and comprehensively dealt with by the authorities. The response to such violence is typically the application of criminal law.[1] In such factual scenarios, the State has often made use of the doctrine of common purpose in the criminal law context to facilitate the process of proving individual guilt, where such an individual was a member of the crowd engaging in violent behaviour. The common purpose doctrine is discussed below in more detail, but prior to doing so, we turn to the question as to which psychological factors are at play when a person is a member of a crowd.[2]

---

1 The civil law may also be transgressed – see the ruling of the Constitutional Court in *SATAWU v Garvas* 2013 (1) SA 83 (CC) regarding harm caused to non-protestors by protestors or striking workers, discussed by Khumalo "Developing the Crime of Public Violence as a Remedy to the Violation of the Rights of Non-Protestors During Violent Protests and Strikes – A Critical Analysis of the South African Jurisprudence" 2015 36 *Obiter* 578.

2 The author first explored these issues in a brief note some two decades ago, in "Crowd Violence and Criminal Behaviour: Dissecting Deindividuation" 2000 21(1) *Obiter* 161–166. This is an expanded and updated assessment of this topic.

2 DEFINING DEINDIVIDUATION

Deindividuation has been described as "one of the most widely cited effects of social groups", which seeks to provide an explanation for various expressions of antinormative collective behaviour.[3] Such behaviour is typically associated with a state in which persons are "blocked from awareness of themselves as distinct individuals, fail to monitor their actions, and can behave impulsively".[4] Social psychologists have used the term "deindividuation" to describe the situation where, being part of a crowd caught up in strong emotion, the attention of the individual concerned is directed away from personal self-awareness and the usual methods of self-control and towards the shared emotion.[5] The apparent experience of loss of individuality inherent in deindividuation has been described as "a psychological state characterised by reduced self-awareness and personal identity salience, brought on by external conditions such as being an anonymous member of a large crowd".[6] The consequences of deindividuation typically include the weakening of control over one's own behaviour, and less concern about "normative standards, self-presentation and later consequences of one's behaviour".[7] Zimbardo, one of the leading deindividuation theorists, summarises the effect of deindividuation within the context of criminal conduct as follows:[8]

> "Deindividuation makes the perpetrator anonymous, thereby reducing personal accountability, responsibility, and self-monitoring. This allows perpetrators to act without conscience-inhibiting limits."

Factors which contribute towards deindividuation include anonymity, diffusion of responsibility, the presence of a group, and a shortened time perspective.[9] These factors, along with the physiological arousal usually linked with noise, excitement and stimulation, are typically associated with crowds.[10] While the notion of deindividuation has roots dating back to the 19th century and is still a part of the social psychological perspectives explaining the causes of antisocial behaviour to this day, it remains a somewhat contested notion in theoretical terms.

---

3 Postmes and Spears 1998 123(3) *Psychological Bulletin* 238.

4 Hogg and Vaughan *Social Psychology* 7ed (2014) 119.

5 Louw and Edwards *Psychology: An Introduction* 2ed (1997) 764; Hogg and Vaughan *Social Psychology* 434. Aronson, Wilson and Akert *Social Psychology* 6ed (2007) 283 put it in these terms: "In other words, getting lost in a crowd can lead to an unleashing of behaviours that we would never dream of doing by ourselves".

6 Baron, Branscombe and Byrne *Social Psychology* 12ed (2009) 399.

7 Mummendey "Aggressive Behaviour" in Hewstone, Stroebe, Codol & Stephenson *Introduction to Social Psychology – A European Perspective* (1988) 285.

8 Zimbardo *The Lucifer Effect* (2007) 295.

9 Mummendey in Hewstone *et al Introduction to Social Psychology* 285; Aronson, Wilson and Akert *Social Psychology* 284.

10 Middlebrook *Social Psychology and Modern Life* (1974) 528; Hogg and Vaughan *Social Psychology* 434.

3 DEINDIVIDUATION THEORY

The roots of the modern concept of deindividuation are generally acknowledged to lie in the theory of social contagion as outlined by Le Bon in 1896. Drawing on the impact of psychological mechanisms of anonymity, suggestibility, and contagion, Le Bon postulated that "in a mob, the emotions of one person spread through the group … [leading to] … a breakdown of normal control mechanisms … [which] … result in violent, immoral acts …"[11] Hence, the crowd, in psychological terms, "is a group of individuals who, in specific circumstances, acquire new characteristics that are very different from the characteristics of the individuals that constitute it".[12] As a result of the individual conscious personality submitting to a group unconscious personality,[13] the crowd consequently constitutes "a single collective being which is guided by a mental unity and a collective soul" that makes individuals feel, think and act differently – even automatically – than they would independently.[14] Though Le Bon's ideas have been criticised, they have formed the basis for virtually all modern deindividuation theorists,[15] and in particular the influential concept of "group mind", the collective consciousness that manipulates the homogenous and highly emotional mass that constitutes the "mob".[16]

Festinger, Pepitone, and Newcombe[17] reintroduced a more scientific version of Le Bon's theory into social psychology in 1952. They argued that certain conditions often present in groups can lead individuals to feel as if they have lost their personal identities and merged anonymously into the group, in other words, that such individuals become deindividuated.[18] Anonymity is a key factor in deindividuation. The more anonymous the group members are, the less they feel that they have an identity of their own, and the less likely they are to be held accountable for their acts, the more

---

11 Taylor, Peplau and Sears *Social Psychology* 12ed (2006) 305; see also Smith and Mackie *Social Psychology* 2ed (2000) 382.

12 Vilanova, Machado Beria, Brandelli Costa and Koller "Deindividuation: From Le Bon to the Social Identity Model of Deindividuation Effects" 2017 4(1) *Cogent Psychology* 3.

13 This process serves to insulate the individuals who constitute the group from feelings of social responsibility and fear of reprisal – Wilson and Brewer "Individuals and Groups Dealing With Conflict: Findings From Police on Patrol" 1993 14(1) *Basic and Applied Psychology* 55.

14 Vilanova *et al* 2017 *Cogent Psychology* 3.

15 Foster "Social Influence III: Crowds and Collective Violence" in Foster and Louw-Potgieter *Social Psychology in South Africa* (1991) 446–7; Hogg and Vaughan *Social Psychology* 432.

16 Middlebrook *Social Psychology and Modern Life* 528; Brown "Intergroup Relations" in Hewstone *et al Introduction to Social Psychology* 384. Though the crowd is made up of people who tend to exhibit automated behaviour, in terms of Le Bon's theory every crowd has a "conductor", an individual who decisively influences the opinion of the crowd – Vilanova *et al* 2017 *Cogent Psychology* 3.

17 Festinger, Pepitone and Newcomb "Some Consequences of Deindividuation in a Group" 1952 47 *Journal of Abnormal and Social Psychology* 382.

18 Atkinson, Atkinson and Hilgard *Introduction to Psychology* 8ed (1983) 564; Smith and Mackie *Social Psychology* 382–3.

irresponsibly they may behave.[19] Festinger, Pepitone, and Newcombe stated that "under conditions where the member is not individuated in the group, there is likely to occur for the member a reduction of inner restraints in doing certain things".[20] However, they did not hypothesise that the loss of individuality is replaced by a collective mind that guides the crowd's actions, but rather that the loss of individuality removes individual controls, which releases a person from individualised moral restraints.[21] Being "submerged" in the group makes the group more attractive to the individual, who may sometimes seek out such an experience.[22]

Further theoretical refinement of deindividuation theory can be credited to Zimbardo,[23] who presented a theoretical framework including the variables leading to deindividuation and the behaviour which results therefrom. Hence, as Vilanova *et al* summarise Zimbardo's approach:[24]

> "[I]nternal or external variables related to the subject (anonymity, sense of shared or diffused responsibility, numerous groups, altered time perspective, arousal, overload of sensory input, trust that there will not be cognitive interactions, physical involvement in group actions, or altered states of consciousness) cause a state of deindividuation. This state is characterised by changes in the perception of oneself and others, such that self-observation and concern for social evaluation are reduced."

As a result, there is "a weakening of controls based on guilt, shame, fear and commitment, which in turn leads to lowered thresholds for the expression of inhibited behaviour."[25] Anonymity as the cause of diminished concern for self-evaluation, which enables individuals to disregard social norms of behaviour, is central to Zimbardo's thinking.[26] Zimbardo's proposed model developed the thinking about deindividuation by including both internal variables and variables external to the subject that may cause deindividuation, and that the resulting behaviours could also be prosocial, although his focus was overwhelmingly on antisocial behaviour.[27]

While certain aspects of Zimbardo's deindividuation theory have been contested, others were subsequently corroborated by Diener and his collaborators,[28] including the direct relationship between the diffusion of

---

19 Taylor, Peplau and Sears *Social Psychology* 305; Smith and Mackie *Social Psychology* 383.

20 Festinger *et al Journal of Abnormal and Social Psychology* 382.

21 Postmes and Spears *Psychological Bulletin* 239.

22 Sabini *Social Psychology* 2ed (1995) 439.

23 Zimbardo "The Human Choice: Individuation, Reason and Order vs Deindividuation, Impulse and Chaos" in Arnold and Levine (eds) *Nebraska Symposium on Motivation* (1969) 237.

24 Vilanova *et al* 2017 *Cogent Psychology* 4.

25 Postmes and Spears *Psychological Bulletin* 239.

26 Chang "The Role of Anonymity in Deindividuated Behavior: A Comparison of Deindividuation Theory and the Social Identity Model of Deindividuation Effects (SIDE)" 2008 6(1) *The Pulse* 2.

27 Vilanova *et al* 2017 *Cogent Psychology* 6; Postmes and Spears *Psychological Bulletin* 239.

28 Vilanova *et al* 2017 *Cogent Psychology* 7. See Diener's involvement in the South African case of *S v Motaung* 1990 (4) SA 485 (A) as an expert witness for deindividuation.

responsibility and aggressive behaviour,[29] the relationship between the reduction of self-consciousness and antinormative behaviour,[30] and the direct relationship between arousal and oppositional behaviour.[31] Diener sought to refine Zimbardo's theory by focusing on the psychological mechanism causing deindividuation, rather than external variables.[32] In this regard, the particular intrapsychic aspect of the deindividuation process for Diener is that "when conscious attention is not focused on oneself, the decision of whether to elicit a behaviour is undermined", which in turn "reduces inner restrictions and makes room for antinormative behaviour".[33]

Postmes and Spears point out that each of the researchers mentioned above emphasised different aspects of deindividuation: Festinger *et al* associated deindividuation with the feeling of not being scrutinised or accountable when submerged in the group; Zimbardo focused on reduced self-observation, thus emphasising anonymity; while Diener viewed reduced self-awareness as the defining feature of the state.[34] However, the work of these theorists may together be classified as classical deindividuation theory.[35]

In an effort to further refine deindividuation theory, Prentice-Dunn and Rogers[36] sought to distinguish between a decrease in public self-awareness and a decrease in private self-awareness. A decrease in public self-awareness, resulting from accountability cues such as anonymity and diffusion of responsibility, gives rise to a lack of concern with evaluations and a belief that negative consequences will not ensue from behaviour. However, a decrease in private self-awareness results from "attentional cues" such as group cohesiveness and physiological arousal and draws attention away from oneself and one's own behaviour. Prentice-Dunn and Rogers argue that whilst antinormative and disinhibited behaviour can result from both processes, only the reduced private self-awareness route should be defined as deindividuation.[37] Postmes and Spears describe this position as contemporary deindividuation theory. Both classical and contemporary views nevertheless agree on the main thrust of the deindividuation

---

29 Diener, Dineen, Endresen, Beaman and Fraser "Effects of Altered Responsibility, Cognitive Set, and Modeling on Physical Aggression and Deindividuation" 1975 31 *Journal of Personality and Social Psychology* 328.

30 Diener and Wallbom "Effects of Self-Awareness on Antinormative Behavior" 1976 10 *Journal of Research in Personality* 107.

31 Diener, Westford, Diener and Beaman "Deindividuating Effects of Group Presence and Arousal on Stealing by Halloween Trick-or-Treaters" 1973 8 *Proceedings of the 81st Annual Convention of the American Psychological Association* 219.

32 Vilanova *et al* 2017 *Cogent Psychology* 7.

33 *Ibid*.

34 Postmes and Spears *Psychological Bulletin* 240ff.

35 *Ibid*.

36 Prentice-Dunn and Rogers "Effects of Public and Private Self-Awareness on Deindividuation and Aggression" 1982 43 *Journal of Personality and Social Psychology* 503; Prentice-Dunn and Rogers "Deindividuation and the Self-Regulation of Behavior" in Paulus (ed) *The Psychology of Group Influence* 2ed (1989) 86.

37 See discussion in Postmes and Spears (fn 2 above) 240.

hypothesis: The psychological state of deindividuation brings about antinormative and disinhibited behaviour.[38]

Whilst empirical findings may give general support to this conclusion, unconditional support is, however, lacking.[39] The experiments confound a number of different variables (e.g., the effects of anonymity with the effects of being part of a group).[40] Foster points out that there are a number of questions and limitations which can be identified with regard to deindividuation theory: the methodologically flawed nature of some studies, the fact that there are still questions regarding external validity or generalisation of findings, and the question of whether the purported inner state implies a loss of control, or merely a reduction in control.[41] Moreover, it has been argued, aggression is not the inevitable result of deindividuation in that other behaviours can result,[42] particularly if the social context provides strong cues.[43] In this regard, the Social Identity model of Deindividuation Effects (SIDE) has been developed, which focuses on the positive nature of deindividuation to seek to explain crowd behaviour by an individual's conformity to salient group norms.[44]

According to the SIDE model, rather than leading to a loss of personal identity, deindividuating settings can "facilitate a transition from a personal to a more social or collective identity" and so what appears "antinormative" in fact reflects what is normative in the crowd.[45] The transition, in terms of this model, is therefore from a personal to a group identity in deindividuating circumstances,[46] amounting to a change in identity, rather than a loss of identity. The acceptance of a common social identity would also help to explain a group targeting its violence against a particular, opposing, target.[47]

Whilst a discussion of these aspects, unfortunately, falls outside of the ambit of this article, the question has been raised in the context of international criminal law as to how involvement in these grave crimes by ordinary citizens can be explained. While these questions cannot be dealt with in this article, it is perhaps useful to very briefly allude to some of the research done in this particular context, to provide a broader understanding of the attempts to explain participation in group criminality.

---

38 *Ibid*.

39 Mummendey in Hewstone *et al Introduction to Social Psychology* 285; Taylor, Peplau and Sears *Social Psychology* 306.

40 Atkinson *et al Introduction to Psychology* 566; Smith and Mackie *Social Psychology* 383.

41 Foster in Foster and Louw-Potgieter *Social Psychology in South Africa* 450.

42 Atkinson *et al Introduction to Psychology* 566; Aronson, Wilson and Akert *Social Psychology* 285; Hogg and Vaughan *Social Psychology* 434.

43 Taylor, Peplau and Sears *Social Psychology* 306.

44 Chang 2008 *The Pulse* 3–4, see Postmes and Spears *Psychological Bulletin* 241–242, and Kugihara "Effects of Aggressive Behaviour and Group Size on Collective Escape in an Emergency: A Test Between a Social Identity Model and Deindividuation Theory" 2001 40 *British Journal of Social Psychology* 575. As indicated above, this is consistent with Zimbardo's theory.

45 Postmes and Spears *Psychological Bulletin* 254.

46 Postmes and Spears *Psychological Bulletin* 254; Hogg and Vaughan *Social Psychology* 435.

47 Smith and Mackie *Social Psychology* 383.

In his overview of criminological theories,[48] Neubacher explores Milgram's experiments on obedience[49] and associated doctrines of authorisation, routinisation and dehumanisation.[50] In addition, he examines the application of the theory of neutralisation, in terms of which while the legitimacy of the social order is accepted, the perpetrator learns to neutralise the prevailing social norms in certain situations, which allows him to violate such norms.[51] In respect of international crimes committed by otherwise law-abiding State officials, neutralisation by the State in the context of labelling the adversary a political enemy is a particularly powerful means of justifying and explaining macro-crimes.[52]

Waller seeks to interrogate the same question of how ordinary, rank-and-file individuals come to participate in the most serious crimes and does so by adopting a psychological explanation of the problem.[53] In his analysis Waller utilises the following categories to explain conduct giving rise to mass killing and genocide amongst this group of people:

(i) cultural construction of worldview,[54] which incorporates *collectivistic values* in terms of which group identity shapes worldview, *authority orientation* which relates to how the social world may be ordered hierarchically, and *social dominance*, which deals with how some individuals may dominate within a hierarchical system;

(ii) psychological construction of the "other",[55] characterised by *us-them thinking* which reinforces the superiority of the group that the individual is in, *moral disengagement* which results in certain individuals or groups being placed outside of certain values, rules and considerations of fairness – leading to the dehumanisation of victims, and the tendency to *blame victims* for their own victimisation; and

(iii) social construction of cruelty,[56] which may arise and be sustained by *professional socialisation* through organisational structures, *group*

---

48 Neubacher "How Can It Happen That Horrendous State Crimes Are Perpetrated?" 2006 4 *JICJ* 787.

49 Neubacher describes Milgram's understanding of the essence of obedience as where a person comes to the point where he "sees himself as a tool that carries out the will of others and is thus no longer responsible for his own actions" (2006 *JICJ* 789).

50 Kelman built on Milgram's work and identified these aspects. Authorisation occurs where persons see themselves in a "no-choice" situation, as they have to be obedient; routinisation results in opportunities for the questioning of moral responsibility to be minimised through adherence to routine; and dehumanisation, where the perpetrator excludes the victim from the general protection afforded to a member of the community (Neubacher 2006 *JICJ* 791–792). See fn106 below for Zimbardo's definition of dehumanisation.

51 Neubacher 2006 *JICJ* 792–794.

52 Neubacher 2006 *JICJ* 794ff.

53 Waller "The Ordinariness of Extraordinary Evil: The Making of Perpetrators of Collective Violence" in Smeulers (ed) *Collective Violence and International Criminal Justice: An Interdisciplinary Approach* (2010) 19.

54 Waller in Smeulers *Collective Violence and International Criminal Justice: An Interdisciplinary Approach* 26–28.

55 Waller in Smeulers *Collective Violence and International Criminal Justice: An Interdisciplinary Approach* 28–31.

56 Waller in Smeulers *Collective Violence and International Criminal Justice: An Interdisciplinary Approach* 31–35.

> *identification* as a result of which "outside" values are excluded and locally generated values dominate, and *binding factors of the group*, which keep people within an organisation or hierarchy.

All these processes can function in association with the deindividuative processes discussed above to enhance the effect of deindividuation upon the individual.

4 DEINDIVIDUATION IN THE SOUTH AFRICAN CRIMINAL LAW

The concept of deindividuation has arisen in the context of group criminal activity, and thus inevitably involves an assessment of whether common purpose liability is applicable. The common purpose doctrine, while it retains a controversial aspect, given its predominance in criminal trials involving group criminal activity in the pre-democratic era, has been increasingly regarded as an important and necessary part of the inquiry into criminal liability in such cases. While the common purpose doctrine considerably predates the period in which it was applied in trials with a political context in the 1980s and early 1990s,[57] the cases decided in this period were extremely influential in the development of the doctrine, none more so than the seminal case of *S v Safatsa*.[58]

It cannot be denied that the common purpose doctrine fulfils a very useful role where, using the context of murder, as a result of an attack by a group of perpetrators, a victim has been killed. While the unlawfulness of each member of the group, along with the intention to kill on the part of each member of the group, may readily be established, it may be very difficult to establish who of the group should be held causally liable for the death of the victim. If the ordinary principles of causation were applied, this may indeed be an impossible quest, given the joint conduct of the group members in killing the deceased. Would it be just to simply then acquit all members of the group on a charge of murder? It is clear that such a result would be unacceptable to the legal convictions of the community. This is where the common purpose doctrine comes into its own, neatly avoiding the need to establish a causal link between the act of each individual accused in the group and the harmful result. The imputation of the acts of each member of the group to every other member of the group ensures that the element of causation is not required. The common purpose doctrine may be defined as follows:

> "Where two or more people agree to commit a crime or actively associate in a joint unlawful enterprise, each will be responsible for the specific criminal conduct committed by one of their number which falls within their common design."

---

57 For the historical development of the doctrine see Rabie "The Doctrine of Common Purpose in Criminal Law" 1971 88 *SALJ* 227.

58 1988 (1) SA 868 (A). In this case the Appellate Division specifically rejected the argument that a murder conviction could only be established if a causal connection could be established between the individual conduct of the accused and the death of the deceased.

This definition, as framed by Burchell,[59] was approved by the Constitutional Court in the case of *S v Thebus*,[60] in which case the Court held that the doctrine of common purpose was constitutional, despite its operation dispensing with the element of causation in proving the guilt of each member of the group. It is noteworthy that the form of common purpose under review in the *Thebus* case was that form of the doctrine which is commonly regarded to be the manifestation that most militates against the sacrosanct principles of criminal guilt, active association common purpose, which incorporates a common purpose formed on the spur of the moment. The other form of the common purpose doctrine,[61] the common purpose predicated upon a prior agreement between the parties, is relatively uncontroversial and resonates with the well-established rules relating to liability for conspiracy.[62] If there is proof of a prior agreement between the members of the group acting together, then it usually presents no problem to establish that each person in the group associated himself with the others. However, as is frequently the case, no such prior agreement can be established, then the active association form of common purpose may be established where the following five requirements[63] are met (again, expressed in the context of murder): (i) presence at the scene of the crime; (ii) awareness of the assault on the victim by another; (iii) intention to make common cause with the person or persons committing the assault; (iv) performance of some act of association with the conduct of the others in the group (indicating common purpose); and (v) intention to kill the victim.

Deindividuation may conceivably arise in either form of conduct flowing from a common purpose, although in practice it has been associated with active association common purpose. Despite the earlier academic criticism of the common purpose doctrine,[64] since the decision in *Thebus*, the courts have felt free to apply the doctrine to numerous cases involving criminal conduct committed by a group of persons. Most recently, the Constitutional Court in *S v Tshabalala*[65] has swept away any previous doubt regarding the utility of the doctrine, and the appropriateness of its use. The Court held that the doctrine could apply even to autographic crimes (crimes that can only be committed through the instrumentality of a person's own body),[66] and further held that the dispensing with the need to prove the causation requirement in

59 Burchell *Principles of Criminal Law* 5ed (2016) 477.

60 *S v Thebus* 2003 (2) SACR 319 (CC) par 18.

61 It seems that Burchell suggests a third, hybrid form of the common purpose doctrine - *Principles of Criminal Law* 477ff.

62 As described, for example, in Kemp, Walker, Palmer, Baqwa, Gevers, Leslie and Steynberg *Criminal Law in South Africa* 3ed (2018) 306.

63 As authoritatively set out in the Appellate Division case of *S v Mgedezi* 1989 (1) SA 687 (A) 705I–706C, and followed in a number of cases, including: *S v Jama* 1989 (3) SA 427 (A) 436; *S v Barnes* 1990 (2) SACR 485 (N) 492; *S v Nooroodien* 1998 (2) SACR 510 (NC) 517–518; and *S v Mbanyaru* 2009 (1) SACR 631 (C) par 14.

64 De Wet *Strafreg* 4ed (1985) 193, Burchell *Principles of Criminal Law* 485ff, and see Kemp *et al Criminal Law in South Africa* 286.

65 2020 (2) SACR 38 (CC).

66 On the facts, the autographic crime of common-law rape.

respect of each member of the group,[67] which has attracted some academic opposition, was justifiable. As regards the latter aspect, the Court held that the object and purpose of the common purpose doctrine is to overcome an otherwise unjust result which offends the legal convictions of the community, by removing the element of causation from criminal liability and replacing it, as appropriate, with imputing the act which caused the unlawful harm to all the co-perpetrators.[68]

Having set out the current state of the common purpose doctrine, let us turn our attention to those cases in which the question of deindividuation has been canvassed in respect of unlawful activity in the context of a group of persons acting together. Prior to doing so, it may be useful to take into account the idea that even though deindividuation has been raised in cases based on terrible brutality in the mob context, there is an argument that despite the atrocity committed, those involved in its commission are normal people, and that anyone placed "in certain situations, under certain conditions, and subjected to certain pressures and constraints [such as deindividuation] is capable of committing acts of extreme atrocity, cruelty, cupidity …"[69] It should also be noted that where the presence of deindividuation has been indicated by psychiatric or psychological testimony, the South African courts have not regarded this phenomenon as a substantive defence, but instead have regarded it as a factor relevant to mitigation of sentence.

The first case in which the presence of deindividuation was raised as extenuating circumstances was that of *Safatsa*.[70] In this case, a crowd of approximately one hundred people attacked the deceased while he was in his house by pelting the house with stones and throwing petrol bombs through the windows. When the deceased attempted to flee, he was caught and stoned with rocks, before petrol was poured over him, and he was set alight. On behalf of those convicted of the murder in *Safatsa*, it was argued by Professor Tyson, who was described as a highly qualified and experienced psychologist, that they were deindividuated. The court *a quo*, per Human AJ having considered Professor Tyson's testimony, stated

> "I consider, on the basis of my assessment of the psychological literature, that it is highly probable that an individual in a mob situation will experience de-individuation and that this de-individuation will lead to diminished responsibility in much the same way as do the consumption of too much alcohol or great emotional stress."[71]

---

67 To be clear, the causation requirement is not entirely dispensed with, it is simply that there must be a causal link between the conduct of any of those acting in the common purpose and the harmful result. Establishing this causal link suffices for liability for all other members of the common purpose.

68 Par 56.

69 Fattah "Is Punishment the Appropriate Response to Gross Human Rights Violations? Is a Non-Punitive Justice System Feasible?" 2007 *Acta Juridica* 215–216.

70 *S v Safatsa supra*. Prior to 1991, the death penalty was mandatory for murder, except where extenuating circumstances were found to be present. Terblanche *A Guide to Sentencing in South Africa* 3ed (2016) 209 defines extenuating circumstances as circumstances "which influenced *subjectively*, thus reducing her moral blameworthiness" (original emphasis).

71 *S v Safatsa supra* 904E–F.

However, despite this affirmation of the potential of deindividuation to found a verdict of diminished responsibility, the court *a quo* nevertheless did not find that there were extenuating circumstances on the facts of the case. This finding was challenged on appeal, but the Appellate Division did not deviate from the finding of the trial court, holding as follows:

> "The views expressed by the witness were of a wholly generalised nature, and unrelated to the individual accused. The generalisation of the probability referred to by the witness cannot be specifically related to any individual accused in the absence of any evidence at all regarding the actual motivation and state of mind of such individual accused. No such evidence was placed before the trial Court."[72]

As a result, the death sentences imposed on the appellants were confirmed. Shortly thereafter some of the key role-players in the introduction of the concept of deindividuation into South African jurisprudence were reunited in the case of *S v Thabetha*.[73] Human AJ was once again the judge in this matter. Once again, the factual scenario underlying this case related to the killing of an alleged political opponent, after the deceased had been chased, attacked and killed by stoning by a group of persons, among them the accused. The events took place after the funeral of the chairman of a community civic association, who was believed to have been killed by members of a "vigilante" group. The deceased was believed to be a vigilante by the members of the group. While the accused in question all pleaded guilty to murder, it was contended on their behalf that there were extenuating circumstances that militated against the imposition of the death penalty, including youthfulness, deprived family and social backgrounds, provocation (by the vigilantes),[74] and their psychological state at the time of the crime. In respect of the psychological state of the accused, Professor Tyson was again called as an expert witness to testify about the effects of deindividuation on the accused. As in the *Safatsa* case, Professor Tyson's qualifications and the correctness of his evidence regarding the phenomenon of mob violence giving rise to the deindividuation of the members of the group were accepted.[75] The content of Professor Tyson's testimony[76] was clearly and accurately summarised by Professors Paizes and Skeen in a passage later cited with approval by the Appellate Division,[77] as follows:

---

72 *S v Safatsa supra* 904G–H.

73 1988 (4) SA 272 (T).

74 A psychiatrist, Dr Shevel testified regarding the aforementioned factors in respect of the accused in the *Thabetha* case *supra*. The court accepted that Dr Shevel had interviewed all the accused, and that his evidence and recommendations for extenuating circumstances was sincerely and honestly given (285I–J).

75 279D–G.

76 Which may be found at 279G–281A of the *Thabetha* case *supra*.

77 The passage appears in 1988 *Annual Survey of South African Law* 417–418, discussing the *Thabetha* case. It was cited with approval by the Appellate Division in *S v Matshili* 1991 (3) SA 264 (A) 271A–F, and is also used to describe the effect of deindividuation by Terblanche *A Guide to Sentencing in South Africa* 228. It follows that this passage is particularly important for the South African courts' understanding of the content of the phenomenon of deindividuation.

> "It is not uncommon for people without a violent predisposition to act differently in crowds and to engage in atypical violent behaviour. This is occasioned by a number of factors. First... there are strong pressures on an individual in such circumstances to conform, both because the aggressive conduct of the crowd comes to be perceived as normative and appropriate and because of the fear of disapproval, rejection or even physical harm. There is, too, the question of obedience to authority figures which must be considered in these cases. A third factor is what is referred to by psychologists as 'modelling': a number of studies have shown that people who observe aggressive models are likely to be far more aggressive... as people who observe non-aggressive models. Then, fourthly, there is the question of psychological arousal caused by shouting, singing, dancing or other kinds of physical exertion, which may deprive members of the crowd of rational thought and lead to heightened aggression.
>
> Where all or some of these reactions occur, the result is frequently what is called 'deindividuation', in which a person loses his self-awareness and focuses all his attention on his environment. This state induces behaviour similar to that of people who are hypnotised or intoxicated. It interferes with one's cognitive abilities and hampers one's ability to regulate one's conduct. External cues replace internal standards of behavioural direction and one becomes emotional, impulsive and irrational. And, if additional factors such as provocation and endemic political frustration are added to this already combustible mix, the result may well be diminished responsibility."

Significantly, the Court accepted the conclusion of Professor Tyson that the accused in the "charged atmosphere prevailing that day … became completely deindividuated, that there was the factor of arousal and there are numerous mitigating circumstances".[78] In addition to accepting that the psychological processes giving rise to deindividuation constituted extenuating circumstances, the Court held that the youthfulness of the accused was in itself an extenuating circumstance.[79]

The acceptance of deindividuation as an extenuating circumstance was welcomed by Skeen,[80] with the qualifications that such application occurs in "appropriate and proven" cases, and that such a finding must not be established as a generality, but "in relation to the accused in person", as was indeed the case in *Thabetha*. The acceptance of deindividuation as a mitigating factor was confirmed in the unreported Eastern Cape case of *S v Gqeba*,[81] following the "necklacing" (where the deceased was doused with petrol, a tyre was placed around her neck, and she was set alight and burnt to death) of a young woman who had been accused by a crowd of having an affair with a Zulu policeman. In sentencing, the Court took into account the social conditions in which the accused lived, along with factors such as relative deprivation and frustration leading to aggression and, notably, deindividuation. Notwithstanding the brutality of the crime, the Court

---

78 286B–C.

79 286A–B.

80 Skeen "Deindividuation and Extenuating Circumstances" 1989 5 *SAJHR* 81. Skeen regards the need to prove the existence of deindividuation as a sufficient safeguard against spurious claims in respect of extenuating circumstances. In the current context, there is a duty on defence counsel to provide all relevant information to substantiate a plea of mitigation (see Terblanche *A Guide to Sentencing in South Africa* 99).

81 *S v Gqeba* ECD Case No 53/89, discussed by Keightley "Mob Violence and Judicial Discretion in Sentencing" 1990 6 *SAJHR* 296.

specifically accepted that all the accused were to some extent deindividuated at the time of the killing and that this constituted an important mitigating factor.[82] Although the Appellate Division in *S v Ncaphayi*[83] did not specifically discuss the phenomenon of deindividuation, it is evident that it was alive to the influence of a crowd on the mind of an accused, in particular where the accused is youthful.[84]

In the cases which followed that of *Ncaphayi*, while the acceptance of deindividuation as a possible ground for diminished capacity, and consequently mitigation, had clearly been accepted at this point, some caveats were expressed. It was noted by the Appellate Division in *S v Motaung*[85] that even if the court is happy to accept the correctness of the theoretical underpinnings of deindividuation – in this case, provided by the eminent expert witness Professor Diener, an acknowledged expert on this phenomenon[86] – the application of this notion is dependent on the reliability of the evidence on which it is based.[87] The Court accepted that deindividuation "is characterised, *inter alia*, by a lack of self-awareness on the part of the person subjected to the process".[88] Moreover, as is evident from the case of *S v Machasa*, the courts' acknowledgement of deindividuation is tempered by the consideration that where it is held that the influence of the crowd did not affect the accused such that he could be regarded as acting with diminished responsibility, there can be no question of deindividuation as such operating to mitigate punishment.[89]

Nevertheless, it is evident that where it was held appropriate, the application of deindividuation to criminality arising out of crowd violence, even where this gave rise to brutality, had come to be accepted by the courts. In *S v Matshili*,[90] deindividuation was contended where the appellants, who were striking workers of the then South African Transport Services (SATS) embittered by the fact that those who continued to work allowed SATS to continue its operations without settling the strike, mercilessly executed four non-strikers. Although the Court regarded the killing as "a particularly serious case", it accepted that on the basis of the expert evidence led on behalf of the defence there were strong mitigating factors inherent in the fact that the appellants "were subject to certain powerful, situational forces or influences which caused them to behave in an uncharacteristically violent manner".[91] Noting the reliance on "psychological

82 Keightley 1990 *SAJHR* 300.

83 1990 (1) SACR 472 (A). Once again, the facts involve the pursuit and killing of a political opponent by a mob, by stoning and stabbing.

84 495D–G. See also the testimony of the expert witness Prof Manganyi which was delivered in this case, and which *inter alia* sets out deindividuation in crowd situations as a condition favourable to the perpetration of atrocities by otherwise moral individuals (497I–J).

85 *Supra*.

86 As the court is evidently prepared to do – see 506B–507A, as well as the court's statement at 526I that in "weighing the moral (as opposed to the legal) culpability" of the appellants, the evidence of Prof Diener is directly relevant and helpful.

87 507B–H.

88 506E–F.

89 *S v Machasa* 1991 (2) SACR 308 (A) 316c–h.

90 *Supra*.

91 269B–C.

phenomena" amounting to deindividuation in *Safatsa* and *Thabetha*, which evidence was accepted by the court *a quo*, the Appellate Division affirmed this approach:[92]

> "There is no problem about this. They accord with age-old descriptions of the mob as 'our supreme governors' and 'that great enemy of reason'… And there is no dispute that this mob psychology was, in principle, capable of constituting a mitigating factor (as it did in *Thabetha's* case). Whether it does is in each case a question of fact, namely did what I call the group influence result in the accused's responsibility being diminished to an extent sufficient to reduce his moral guilt?"

Despite the court *a quo* holding otherwise, the Appellate Division accepted that in the circumstances of the case the appellants "suffered from a lack of self-restraint, which it is fair to assume they would otherwise have exercised", and that given that they could therefore be regarded as acting with diminished responsibility at the time of the killing, their moral guilt must be held to be reduced, however brutal and reprehensible their conduct.[93] Therefore, despite the seriousness of the crimes, which would normally merit "the utmost rigour of the law", it was held that the appellants "were subjected to psychological forces which caused them to act in an uncharacteristically violent manner towards persons against whom they had an intense resentment", and that these crimes were consequently committed "under abnormal circumstances".[94] The death sentence imposed on four of the appellants was therefore set aside, and all received substantial terms of imprisonment.

The Appellate Division adopted a similar approach in the case of *S v Khumalo*,[95] where despite describing the actions of the crowd in murdering a municipal policeman as barbaric and repugnant, the Court accepted the testimony of the expert witnesses for the defence, including Professor Tyson, that all the accused were to a greater or lesser extent "deindividualised" at the time of the killing. The Court's understanding of this phenomenon was that it is a temporary state of mind resulting from a combination of external factors, which is characterised by the person in question being so identified with the group in which he finds himself, his attention so completely focused on external factors rather than himself, and being so emotionally swept up and carried away, that he loses his inhibitions, his self-consciousness and his self-control, and acts differently – more impulsively, more aggressively, less rationally – than what he ordinarily would.[96] The imposed death penalty was accordingly set aside on appeal in favour of imprisonment for all convicted offenders.

The established status of the phenomenon of deindividuation as a mitigating factor was further confirmed in *S v Matala*,[97] despite the Court

---

92 271F–H.

93 274A–B.

94 274F–G.

95 1991 (4) SA 310 (A). The deceased, who was apparently targeted as a representative of the erstwhile regime, was chased and severely assaulted before being set alight.

96 360I–361B.

97 1993 (1) SACR 531 (A).

finding that the appellants, who killed a woman as a supposed witch by setting her alight, had not been deindividuated.[98] It was held by the Appellate Division that even in the absence of expert evidence the possibility of deindividuation being present could be considered by a court.[99] Similarly, in *S v Matela*,[100] while the Court found that there was no evidence indicating that the appellants had been deindividuated, the possibility of deindividuation was clearly accepted by the court, based on extensive precedent.

There do not appear to be any further High Court or Supreme Court of Appeal cases where the phenomenon of deindividuation has been raised. It has more recently been suggested that deindividuation ought to have been considered in a case to avail the accused,[101] and it is clearly listed and discussed as a mitigating factor associated with diminished responsibility.[102] Although it appears that deindividuation has not been directly pleaded as a mitigating factor for the past couple of decades, at least not in reported cases, there is no question that it is open to defence counsel to do so.

Could the presence of deindividuation go further than merely providing grounds for mitigation, and serve as the basis for a substantive defence, excluding criminal liability? This question has yet to be tested in South African courts, but this possibility is clear from the analogy drawn between the conduct of a deindividuated individual and the conduct of a person who is drunk or has been hypnotised.[103] It has been postulated that as a result of being in a state of deindividuation (and dependent on the level or intensity of the process of deindividuation), a person may be unable to make rational and moral decisions about his actions,[104] or may be unable to foresee the consequences of his actions.[105] It is submitted that it is highly unlikely that deindividuation may in itself constitute the basis for a substantive defence (it may be different if the deindividuation is also associated with provocation

98 537H–J.

99 537F–H, in respect of which the court quotes Hiemstra *Suid-Afrikaanse Strafproses* 4ed (1987) 625, where the author points out that ordinary people who are not by nature violent or murderers, can develop a sudden tendency to violence when they are emotionally swept up in a group context, and that this can be regarded as a mitigating factor. The court comments that this statement of Hiemstra is "presumably on the basis of common judicial experience".

100 1994 (1) SACR 236 (A). The deceased in this case were four white persons who were pursued, and then assaulted and killed after their vehicle came to an abrupt halt in a township. The court accepted that there was a general tension between black and white communities in the area at the time, as a result of ongoing industrial action, a disparity between resources and opportunities available to the communities, and as a result of attacks by white right-wing extremists on innocent black people in the area. The court held that it was not however possible to link any of these factors directly with the motivation for the brutal killing of the deceased.

101 Whitear-Nel "Recent Cases: Evidence" 2011 24 *SACJ* 83, discussing the case of *S v Ramabokela* 2011 (1) SACR 122 (GNP).

102 Terblanche *A Guide to Sentencing in South Africa* 228.

103 *S v Thabetha supra* 280E; *S v Motaung supra* 506C.

104 Drawing into question whether the accused could contend that at the time of the harm being inflicted, he lacked capacity as a result of non-pathological causes. On this defence, see Hoctor *Snyman's Criminal Law* 7ed (2020) 139ff.

105 In which case the accused would lack the *mens rea* form of intention. On this element, see Hoctor *Snyman's Criminal Law* 159ff.

and/or intoxication). As regards its possible effect on capacity, it is well established that the presence of deindividuation can result in a verdict of diminished capacity. However, the evidence of the cases in which deindividuation was successfully pleaded in mitigation indicates that the courts will not look past the dehumanisation[106] inherent in the vengeful and targeted killings in the crowd context, and will find that the accused did not lack self-control, however strong the internal and external influences on their conduct. Similarly, there is no evidence that a defence based on lack of intention would prevail, as in all the cases there was no question that the accused believed themselves to be acting within the law, and were clearly acting with the direct intent to kill in each case.

It should always be remembered in ascertaining the effect of deindividuation, in the usual context of the operation of the common purpose doctrine, that with regard to criminal liability (whatever the position is in psychology or sociology or philosophy)[107] a crowd cannot have a (relevant) intent, and thus "the intent of the crowd" actually refers to the intent of every member of the crowd.[108] The Court in the *Khumalo* case pointed out that there is no logical objection to a syllogism which states: every member of the crowd (or in brief, the crowd) had the intent to kill; the accused were members of the crowd; therefore the accused had the intent to kill.[109] However it must always be borne in mind that what is required to be proved is the intent of each accused, and any attempt to infer such intent from the mental state of a larger group of persons can only be justified where the court has no reasonable doubt that all the members of such group indeed had such a singular intent, and that the accused was a member of such group in the sense that he shared such intent.[110] It follows that just as intent must be proven for each accused, proof of deindividuation must be established for each individual accused in order for it to be effectively taken into account as a factor mitigating sentence.

5 CONCLUDING REMARKS

It is evident that deindividuation remains one of social psychology's most influential concepts.[111] Deindividuation theory has been used to explain

---

106 Zimbardo *The Lucifer Effect* 307 describes dehumanisation as follows: "Dehumanisation occurs whenever some human beings consider other human beings to be excluded from the moral order of being a human person. The objects of this psychological process lose their human status in the eyes of their dehumanisers. By identifying certain individuals or groups as being outside the sphere of humanity, dehumanising agents suspend the morality that might typically govern reasoned actions towards their fellows."

107 See in this regard Kistner "'Common Purpose': The Crowd and the Public" www.repository.up.ac.za/handle/2263/51032 (accessed 2022-10-30) (also published in 2015 26(1) *Law & Critique* 27).

108 *S v Khumalo supra* 343H.

109 343H–I. The court notes that there are examples of this use of language in the cases of *Safatsa* 901H–J and *Motaung* 525D–J in particular.

110 *S v Khumalo supra* 343I–344A.

111 Postmes, Spears and Lea "Social Identity, Normative Content and 'Deindividuation' in Computer-mediated Groups" in Ellemers, Spears and Doosje (eds) *Social Identity: Context, Commitment, Content* (1999) 168.

social atrocities such as genocide[112] and has found application in respect of a number of contemporary issues,[113] notably in the context of computer-mediated communication,[114] where it has been applied to a wide-ranging set of scenarios, including video games,[115] the interaction between Jews and Arabs,[116] and gender perspectives.[117] Even the role of the presence of other people in an individual's shopping behaviour has been assessed in terms of deindividuation theory. It is evident that the factor of anonymity remains a central consideration in the deindividuation process.[118] Vilanova *et al* identify some further promising areas of research relating to deindividuation:[119] the insights that social cognitive neuroscience can bring to understanding the process; the use of mathematical models to better predict the conditions in which deindividuation may occur; seeking ways to prevent transgressive behaviour in deindividuation situations; age differences in relation to complying with group norms; and understanding othering (viewing or treating others as different or alien to oneself).[120] As a model for understanding group phenomena, deindividuation theory therefore still finds application in modern practice,[121] and its theoretical influence may grow further as it draws from other theories, and is employed to explain essential social issues such as the reduction of prejudice and public order and the enhanced construction of social identity.

---

112 Postmes and Spears *Psychological Bulletin* 238, citing the work of Staub "Cultural-Societal Roots of Violence: The Examples of Genocidal Violence and of Contemporary Youth Violence in the United States" 1996 51 *American Psychologist* 117, and Staub and Rosenthal "Mob Violence: Cultural-Societal Sources, Instigators, Group Processes, and Participants" in Eron, Gentsy and Schlegel (eds) *Reason to Hope: A Psychosocial Perspective on Violence and Youth* (1994) 281.

113 Vilanova *et al* 2017 *Cogent Psychology* 14–17 discuss the research in some detail, the individual research contributions are listed in the footnotes which follow.

114 See Postmes, Spears and Lea in Ellemers, Spears and Doosje *Social Identity: Context, Commitment, Content* 168.

115 Webb and Soh "Cheating in Networked Computer Games: A Review" in *Proceedings of the 2nd International Conference on Digital Interactive Media in Entertainment and Arts* (2007) 105; Chen and Wu "Group Identification as a Mediator of the Effect of Players' Anonymity on Cheating in Online Games" 2015 34 *Behaviour and Information Technology* 658.

116 Walther, Hoter, Ganayem and Shonfeld "Computer-Mediated Communication and the Reduction of Prejudice: A Controlled Longitudinal Field Experiment Among Jews and Arabs in Israel" 2015 52 *Computers in Human Behavior* 550.

117 Guegan, Moliner and Milland "Social Asymmetries and Anonymity in Dyadic Computer-Mediated Communication" 2016 75 *Swiss Journal of Psychology* 15.

118 Chang 2008 *The Pulse* 3, who refers to research relating to the impact of anonymity on violence (Silke "Deindividuation, Anonymity and Violence: Findings from Northern Ireland" 2003 143 *Journal of Social Psychology* 493), aggression (Douglas and McGarty "Identifiability and Self-Presentation: Computer-Mediated Communication and Intergroup Interaction" 2001 40 *British Journal of Social Psychology* 399) and the tendency for adolescents to disclose sexual information to others over the Internet (Chiou "Adolescents' Sexual Self-Disclosure on the Internet: Deindividuation and Self-Impression" 2006 41 *Adolescence* 547).

119 Vilanova *et al* 2017 *Cogent Psychology* 17–18.

120 Vilanova *et al* 2017 *Cogent Psychology* 18, citing Klein, Spears and Reicher "Social Identity Performance: Extending the Strategic Side of SIDE" 2007 11 *Personality and Social Psychology Review* 28.

121 See its application to police on patrol in Wilson and Brewer 1993 *Basic and Applied Psychology* 55.

What then of the use of deindividuation in the criminal legal context? As suggested above, it is extremely unlikely that deindividuation would be accepted as the foundation for a defence in its own right, although it may conceivably be a factor in establishing an existing defence such as provocation or emotional stress. However, it may be questioned whether the strengthening and validating of the functioning of the common purpose doctrine has effectively put paid to the leading of evidence in mitigation based on deindividuation. This is Kistner's view:[122]

> "With the grounding of the common purpose rule in the Bill of Rights, the scenario evinced in the prominent late apartheid-era cases tried under the common purpose rule, in which expert evidence on crowd psychology was admitted for consideration of mitigation of sentence due to extenuating circumstances, is highly unlikely in common law cases under the 1996 Constitution, dampening the excitement of the social psychologist who discovered a wider public role, greater importance, enhanced scope, and diversification of his client base with the high profile trials of the late 1980s."

Does the fact that deindividuation has not been argued in mob violence cases for some years mean that it *cannot* be so employed today? There can be no reason in principle why this should be, and indeed, the discussion of deindividuation as a mitigating factor in the relevant literature[123] would lend credence to the conclusion that deindividuation may certainly be pleaded in the sentencing context. The practical question that arises in the context of sentencing accused who have been convicted on the basis of the common purpose doctrine is whether it matters – is it not true that courts simply impose a blanket sentence for all found guilty on the basis of common purpose? Would it not be required that *all* the accused were deindividuated for the sentence to be mitigated?

Kemp *et al* refer to a number of criticisms of the common purpose doctrine,[124] including that when "meting out sentence in [common purpose] cases, courts seldom draw a sufficient distinction between the individual participants based on their actual role in and contribution towards the commission of the crime". Is it true that the courts routinely disregard the personal circumstances of those found guilty on the basis of common purpose? The authors refer to the part of the general critique of Burchell of the common purpose doctrine[125] as support for this criticism. However, Burchell does not deal with sentencing in any detail in this discussion, simply making a brief link between fair labelling and fair sentencing, without elaboration. In any event, the court ultimately has discretion over the sentence imposed on an individual accused, and so, on a conspectus of all the significant factors impacting on sentence, the court has the task of handing down a sentence which is fair and just for each and every accused.[126] It follows that a court could (and should) apply differing

---

122 Kistner www.repository.up.ac.za/handle/2263/51032 13.

123 Terblanche *A Guide to Sentencing in South Africa* 228–229.

124 Kemp *et al Criminal Law in South Africa* 284

125 Burchell *Principles of Criminal Law* 485–491.

126 For a case where the court distinguished between offenders who had committed an offence with a common purpose, see *S v Mambo* 2006 (2) SACR 563 (SCA), in relation to the robbery conviction.

sentences to the accused in the same common purpose, finding grounds for mitigation concerning any members of the common purpose who were deindividuated at the time of acting, as opposed to those members of the common purpose who were not deindividuated.

The lack of reference or application of the phenomenon of reported case law in recent times by no means excludes the courts from considering this issue in relation to contemporary cases. If one takes account of the comments of Milne JA in the *Matala* case,[127] it may be that the courts are so convinced of the effect of deindividuation and associated phenomena ("mob psychology") that judicial notice may be taken of these processes. In any event, given the clear connection between violence and factors such as anonymity[128] and reduced self-awareness, the questions around the effect of being in a crowd remain very pertinent to the courts, particularly in the sentencing process, where a finding of diminished capacity may be based on deindividuation.

[127] *S v Matala supra* 537E–H.

[128] See Silke *Journal of Social Psychology* 493. Aside from the issue of deindividuation, does the link between anonymity and violence indicate a basis for the retention of the controversial Prohibition of Disguises Act 16 of 1969? For a discussion of this statute see Hoctor "The Offence of Being Found in Disguise in Suspicious Circumstances" 2013 34(2) *Obiter* 316.

CASES / VONNISSE

HOLDING THE EXECUTIVE TO ACCOUNT?

Public Protector v President of the RSA 2021 (9) BCLR 929 (CC)

1 Introduction

This case is part of a growing body of jurisprudence relating to the Public Protector (PP). In particular, it concerns the PP's mandate, contained in section 182 of the Constitution of the Republic of South Africa, 1996 (the Constitution), to "investigate any conduct in state affairs, or in the public administration, that is alleged or suspected to be improper or to result in any impropriety or prejudice". The PP is further empowered in terms of the Public Protector Act (23 of 1994) (PP Act) to investigate, *inter alia*, maladministration, the unjustifiable exercise of power and dishonest conduct.

In terms of this statutory framework, the PP's primary function is to hold the executive to account. The Constitutional Court judgment that is the focus of this case note is an example of the PP attempting to hold the President accountable, but failing to do so as a result of producing an error-strewn report that was rejected by a full bench of the High Court and by a majority of judges in the apex court. On the facts, it is possible that had another PP produced a different report – one that satisfied the judges' concerns – the President might have been less successful in avoiding public accountability.

Apart from the main issue of the (at time of publication) now-suspended PP's inability to hold the President to account, the judgment is significant from an administrative law perspective. In particular, the judgment adds to the debate on whether the PP's remedial action amounts to administrative action.

Although the Supreme Court of Appeal (SCA) held in 2018 that the PP's remedial action does not constitute administrative action, the question has yet to be definitively dealt with by the Constitutional Court, with judges generally being content to leave the question open. Confusingly, the court *a quo* held that it was common cause that the PP's reports do not amount to administrative action, but the judgment nevertheless made numerous references to the right to just administrative action. While Jafta J chose to leave the question open in *Public Protector v President of the RSA* (2021 (9) BCLR 929 (CC)), he engaged with the SCA's judgment in *Minister of Home Affairs v Public Protector* (2018 (3) SA 380 (SCA) (*Home Affairs*)) and set out some guidelines on how the issue could be dealt with in the future.

The judgment also explores the applicability of the *audi alteram partem* rule to the manner in which the currently suspended PP (as at time of publication) conducted her investigations. Jafta J and Mogoeng CJ, who wrote the majority and minority judgments respectively, differed markedly on this aspect of the case, with the former holding that the PP had acted in a procedurally unfair manner and that this was sufficient to vitiate her findings. Mogoeng CJ, on the other hand, warned that a rigid application of the *audi* principle in this case could result in the ends of justice being denied. Jafta J incorrectly held that it is necessary for the PP to invoke the Promotion of Administrative Justice Act (3 of 2000) (PAJA) in the decision-making process undertaken as part of her investigations. In fact, procedural fairness in the form of *audi alteram partem* is recognised at common law and applies under the principle of legality.

Another area of administrative law that was developed in this case is the ground of review relating to errors of law. This was the main ground upon which the High Court and the Constitutional Court chose to dismiss the PP's submissions. In particular, both courts found that the PP had added words to paragraph 2.3(*a*) of the Executive Ethics Code (Proc R41 in *GG* 21399 of 2000-07-20) (Code), which had the effect of altering the legal test contained therein in order to match the facts as interpreted by the PP. It was held in both courts that this was a material error of law, and that it was sufficiently grave that the PP's findings should be set aside on this ground alone.

2 Facts

On 6 November 2018, the President appeared in the National Assembly and was asked the following question by Mr Mmusi Maimane, the leader of the opposition:

> "Mr President, here I hold a proof of payment that was transferred to say that R500 000 had to be transferred to a trust account called EFG2 on 18 October 2017. This was allegedly put for your son, Andile Ramaphosa ... Following on that, I have a sworn affidavit from Piet Venter, stating that he was asked by the chief executive officer of Bosasa to make this transfer for Andile Ramaphosa. Mr President, we can't have family members benefiting ... I would like to ask you, right away today, that you bring our nation into confidence and please set the record straight on this matter. Thank you very much." (Public Protector's Report No. 37 of 2019/20 5)

The President chose not to insist that the accepted procedure of submitting the question to him in advance and in writing be followed and he answered as follows:

> "I proceeded to ask my son what this was all about. He runs a financial consultancy business, and he consults for a number of companies, and one of those companies is Bosasa where he provides services on entrepreneurship, particularly on the procurement process. He advises both local and international companies. Regarding this payment, I can assure you, Mr Maimane that I asked him at close range whether this was money obtained illegally, unlawfully – and he said this was a service that was provided. To this end, he actually even showed me a contract that he signed with Bosasa ... The contract also deals with issues of integrity, issues of anti-corruption, and all that." (PP's Report *supra* 5)

Soon after this session, it was revealed by one of the President's advisers that the R500 000 payment was not intended for the President's son, Andile, but was earmarked as a donation to the CR17 campaign by Mr Gavin Watson, the CEO of African Global Operations, formerly known as Bosasa (*Public Protector v President of the RSA supra* par 30). Subsequently, the President wrote a letter to the Speaker of the National Assembly explaining that the answer he provided in the National Assembly was incorrect. The CR17 campaign also explained to the media that the President did not know the details concerning donations made to the campaign; as a result, he had no knowledge of Mr Watson's donation on 6 November 2018.

Notwithstanding the President's letter to the Speaker, Mr Maimane filed a complaint with the PP on 26 November 2018, citing section 4 of the Executive Members' Ethics Act (82 of 1998) (Ethics Act). In the complaint, he repeated his claim that he had proof of the payment to Andile Ramaphosa. The complaint further alleged: "there is possibly an improper relationship existing between the President and his family and African Global Operations" (*PP v President of the RSA supra* par 34). The Deputy President of the Economic Freedom Fighters (EFF), Mr Floyd Shivambu, subsequently lodged a second complaint against the President calling on the PP to establish the veracity of the President's statement that he had seen a contract between his son and African Global Operations and whether the President had deliberately misled Parliament.

The President was then invited by the PP to submit a written response to Mr Maimane's complaint, which he did in January 2019 (*PP v President of the RSA supra* par 27). In May, the PP invited the President to a meeting, following which he responded in writing to her preliminary report. In her final report, published on 19 July 2019, she dismissed the President's submissions made in response to the preliminary report and concluded that the President had contravened paragraph 2.3(*a*) of the Code. The report also concluded that the President had failed to disclose the donation made to him. The PP also believed that certain of the payments raised a reasonable suspicion of money laundering. The PP also alleged that the President had exposed himself to a risk of conflict between his official responsibilities and his private interests. Finally, the report found he had contravened section 96(1) of the Constitution.

The PP also added supervisory orders to her remedial action, instructing the Speaker, the National Police Commissioner and the National Director of Public Prosecutions (NDPP) to submit implementation plans explaining how they were planning to give effect to her instructions. Following the publication of the PP's Report, the President – joined by the Speaker and the NDPP – filed a review application in the Pretoria High Court. The PP and the EFF opposed the application, and the AmaBhungane Centre for Investigative Journalism NPC (amaBhungane) was granted leave to intervene in order to launch a constitutional challenge in respect of the Code.

The PP was unsuccessful in the High Court and the Office of the Public Protector (OPP) was ordered to pay costs on the punitive scale of attorney and client. The PP then applied for leave to appeal the decision of the High Court directly to the Constitutional Court. In that court, the majority judgment dismissing her was written by Jafta J (Madlanga, Mhlantla, Theron, Tshiqi JJ

and Mathopo and Victor AJJ concurring) and handed down on 1 July 2021. Mogoeng CJ wrote a dissenting judgment largely in support of the PP.

3 Judgment

In arriving at his decision, Jafta J dealt with a number of themes that arose from the High Court judgment. Each of these is discussed below. Mogoeng CJ's reflections on these themes are also considered.

3 1 Misleading Parliament

Jafta J carefully examined whether the PP had correctly concluded that the President had contravened the Code by misleading Parliament. In order to contravene the Code, an Executive member must provide inaccurate information with the intention of misleading Parliament. Providing inaccurate information alone is not enough to breach the provisions of the Code. The following extract from the PP's Report suggests that she misinterpreted the Code:

> "President Ramaphosa's reply was in breach of the provisions of paragraph 2.3(a) of the Executive Ethics Code, the standard of which includes deliberate and inadvertent misleading of the Legislature. He inadvertently and/or deliberately misled Parliament, in that he should have allowed himself sufficient time to consider the question and make a well-informed response." (PP's Report *supra* par 5.1.34)

According to Jafta J, in the PP's mind, the mere fact that the President gave an inaccurate answer was enough to constitute an infringement of the Code. Furthermore, the PP altered the wording of the Code by adding the words "inadvertently and/or deliberately" (par 59). By doing so, the PP changed the wording of the Code "so as to match with the facts" (*Public Protector v President of the RSA supra* par 60).

The PP's approach to this issue led the High Court to conclude that her finding was "fatally flawed due to a material error of law" (*President of the RSA v Public Protector* (2020 JDR 0406 (GP) par 55). Jafta J agreed with the High Court that the PP's findings should be set aside based on this ground alone as the nature of the error was sufficiently serious so as to affect the outcome of the case.

Mogoeng CJ ruled that the PP was incorrect in recording that the President deliberately misled Parliament and when using the words "wilful" and "inadvertent" interchangeably when the terms are mutually exclusive. In his view, however, the PP – despite clear evidence to the contrary – did not unlawfully change the Code; rather than amending it, she had derived an incorrect meaning from the Code (*Public Protector v President of the RSA supra* par 202–203).

3 2 Donations given to the CR17 campaign

The PP's findings relating to donations made to the CR17 campaign dealt with the twin issues of whether the President "exposed himself to any situation involving the risk of a conflict between his official duties and his

private interest or used his position to enrich himself and his son through business owned by African Global Operations" (PP's Report *supra* par 7.2.1). The PP framed the issues in this way even though Mr Maimane's complaint only referred to a conflict between his official duties and his private interests. Jafta J questioned whether the PP could widen the scope of a complaint made in terms of section 4 of the Ethics Act. He further observed that the manner in which the complaint was framed suggested that the PP was undecided about which of the two grounds applied.

Jafta J also voiced his concerns about the "quality of reasoning leading up to the various findings" (*PP v President of the RSA supra* par 71). For instance, the PP concluded that the President personally profited from donations made to the CR17 campaign, but her report – a summary of the evidence heard during the enquiry – did not support this.

The evidence of the witnesses appearing before the PP is recorded in summary form in the report. The report records that Ms Donne Nichol, one of the CR17 campaign managers, had confirmed that the identities of donors and amounts pledged were not communicated to the President. It was also stated in the report that the campaign managers confirmed the truth of each other's evidence (PP's Report *supra* 68–69). Despite this, the PP chose to rely instead on additional e-mail evidence suggesting that the President played a prominent role in the CR17 campaign.

In Jafta J's view, the PP set out to demonstrate that the President had personally benefitted from donations made to the CR17 campaign. He concluded that the managers' testimony did not support this idea and the e-mail evidence merely demonstrated that the President participated in the activities of the campaign. He felt that that the PP simply ignored the evidence of the campaign managers because it did not match the email evidence. In this light, Jafta J held that, on the facts, the President did not personally benefit from donations made to the campaign (*PP v President of the RSA supra* par 80).

With regard to a possible conflict of interest between the President's official responsibilities and his private interests, Mogoeng CJ alluded to the "billions of Rands received by African Global Operations in *irregular State tenders*" (par 155). For its part, the EFF argued that the President was not able to evade disclosing information by "wifully remaining ignorant" of donations made to the campaign (par 81). Jafta J rejected this submission, as it missed the point: the issue was not whether the President wilfully kept himself in the dark regarding campaign donations but whether he personally benefitted from those donations.

3 3 Competence to investigate the affairs of the CR17 campaign

The President's lawyers submitted that the activities of the CR17 campaign fell outside the PP's jurisdiction. The court observed that section 182(2) of the Constitution provides the PP with additional powers as determined by appropriate legislation, such as the PP Act and the Ethics Act. However, none of the powers emanating from section 6 of the PP Act related to the

activities of the CR17 campaign and, in respect of the Ethics Act, none of the complaints covered the affairs of the campaign. As a result, neither the PP Act nor the Ethics Act authorised the PP to conduct an inquiry into the activities of the campaign. Regarding section 182(1) of the Constitution, Jafta J held that when a political party arranges internal elections, this does not amount to exercising a public power.

Counsel for the EFF argued that the PP's jurisdiction to enquire into the dealings of the campaign was founded in section 96(2)(*b*) of the Constitution. Counsel for the party further argued that, as the ruling party, the ANC "undoubtedly influences the direction of the State" (par 103). Jafta J acknowledged that this was true but held that the ruling party and the State remained separate bodies: "the bright line separating the party from the state remains intact" (par 103). Mogoeng CJ, by contrast, held that it "required a hair-splitting exercise" to "seek to draw a line between the pursuit of the Presidency of the ANC and the desire to rise to the highest office of President of our country" (par 165). Although his reflections may reflect the political reality in South Africa, it is critical for the judiciary to uphold the constitutional separation between the ruling party and the State.

3 4 Money laundering

According to the PP, the manner in which the donation of R500 000 was made gave rise to a suspicion of money laundering. The amount of R500 000 was part of a sum of R3 million that was transferred from Mr Watson's account into the account of Miotto Trading. This company was owned by an employee of African Global Operations, who was ordered to transfer R500 000 to the CR17 campaign's trust account (par 41).

The complaints to the PP were made in terms of section 4 of the Ethics Act, which makes no mention of money laundering. The PP made reference to the Prevention and Combatting of Corrupt Activities Act (12 of 2004) (PCCA). However, the PCCA does not refer to the offence of money laundering. Counsel for the PP tried to account for this error by arguing that the incorrect Act had been cited inadvertently. The court noted, however, that extensive reference had been made by the PP to the PCCA in her report and she had, in fact, equated money laundering with bribery and corruption (PP's Report *supra* par 5.3.10.68–5.3.10.70). Apart from specified offences in terms of the PCCA, crimes are not reported to the PP, but are investigated by the South African Police Service. The court also pointed out that money laundering is not listed in section 6(4) of the PP Act and, apart from certain offences listed under the PCCA, crime is not referred to the PP for investigation (par 115).

3 5 Administrative action and audi alteram partem

Tied to the issue of the applicability of the *audi alteram partem* principle is the lack of certainty surrounding the question of whether the PP's remedial action qualifies as administrative action. Jafta J chose to leave this question open, noting that the application of the *audi* principle was not dependent on whether the PP's constitutes administrative action or not.

Regarding the implementation of the *audi* principle, section 7(9) of the PP Act makes it clear that where it is apparent that adverse remedial action is to be taken in respect of a particular person, the PP must provide that person with an opportunity to make representations. In this respect, the President claimed that the emails relied on by the PP were not made known to him and, in addition, he was not afforded an opportunity to make representations in this regard. Jafta J held that the PP was legally bound to make the emails available to the President and to allow him to make representations and emphasised the far-reaching consequences of not doing so:

> "a decision based on adverse information which was not disclosed to the affected person and in respect of which that person was not heard, is fatally defective and ought to be set aside." (par 130)

Mogoeng CJ, however, held that in determining how the *audi alteram partem* rule applies to the PP, reference must be made to how the rule is applied in civil and criminal court proceedings. He disagreed with the notion that the *audi* principle compels the PP to inform an affected party of the remedial action she intends to take. He argued that in any civil or criminal matter before a court, a judge or magistrate is under no obligation to inform any of the parties of the decision he or she intends to hand down. Occasionally, preliminary observations from the bench are made known to the parties, but these are not given as a result of any legal obligation to do so. He believed that the same principle should apply to the PP and section 7(9) of the PP Act should be interpreted in this way.

Mogoeng CJ further held that the *audi* principle is designed to "yield substantive justice and equity" and is not a "mechanical instrument" (par 184). In assessing how to apply the *audi* principle regarding the email evidence, Mogoeng CJ noted that evidence that is irregularly obtained may be admissible even in criminal cases. The emails in question were not only relevant but they revealed the untruthfulness of the version presented to the PP by the President and the campaign managers – that there was an intentional plan to make sure the President did not get to know the identity of donors, the amounts they donated as well as how the money was spent. He was scathing in his assessment of the President's conduct who, in his view, had knowingly given a false version of events to the PP, which was unethical. With regard to the *audi* principle, he believed that a "somewhat simplistic and mechanical application of the *audi* principle could only be at the expense of substantive justice and equity" (par 193).

3 6 AmaBhungane's constitutional challenge

In the High Court, AmaBhungane challenged the constitutional validity of the Code in terms of section 96 of the Constitution (which concerns the conduct of cabinet ministers) but was unsuccessful. Jafta J criticised that decision on a number of grounds. For instance, he ruled that the High Court mistakenly held that the Promotion of Access to Information Act (2 of 2000) (PAIA) was applicable. The High Court also held that the relief sought by amaBhungane was to have the Code amended so as to necessitate the disclosure of "donations made to campaigns for positions within political parties" by members of the Executive (par 144). This, in the view of the High Court,

would threaten the separation of powers. Jafta J disagreed; if it was found that amending the Code was not just and equitable, other remedies were available. He stated that the High Court had erroneously held that amaBhungane's challenge was impermissible and he remitted the matter to the same court for a fresh hearing.

4 Comment

4 1 Misleading Parliament

This is not the first time that Advocate Mkhwebane has made an error of law. In the *Gordhan* case, she also misconstrued the Code when she found that Pravin Gordhan had violated paragraph 2.3(*a*) of the Code by deliberately misleading Parliament (*Gordhan v Public Protector* [2019] (3) All SA 743 (GP)). In her report, the PP averred that Gordhan had dishonestly kept secret the fact that a member of the Gupta family was present at a particular meeting. He later submitted that, in preparation for his appearance at the Zondo Commission, his chief of staff had informed him that a member of the Gupta family had been present; Gordhan later disclosed this to the Commission. The EFF also submitted in that case that it didn't matter that Gordhan may not wilfully have misled Parliament and that an innocent error on his part was sufficient. This was rejected by Potterill J in the Pretoria High Court, who ruled that Gordhan had established a *prima facie* right to an interdict based on the facts presented to the court (par 22–24).

In addition to an error of law, the PP also made an error of fact when she found that the President had misled Parliament while acting in good faith (PP's Report *supra* par 7.1.4). In court pleadings, the PP claimed:

> "reliance by the *court a quo* that I found that the President was ostensibly acting in good faith to justify its reasoning that I accepted that the President acted in good faith simply misconstrues the issue." (President's Submissions in the Main Application CCT No. 62/2020 par 29)

Hoexter and Penfold have identified the court *a quo*'s judgment as an "especially notable recent example" of an error of law where the PP was "found to have been fatally confused" about the scope of a provision of a code (Hoexter and Penfold *Administrative Law in South Africa* 3ed (2021) 389). In that case, the PP maintained that "if she had made an error at all it was an immaterial error of form over substance" ([2020] 2 All SA 865 (GP) par 207). In response, the High Court remarked that her "submission shows a flawed conceptual grasp of the issues with which she was dealing" (par 207).

Regarding the issue of whether an error of law is reviewable in instances where PAJA does not apply, the SCA held, in *Premier of the Western Cape v Overberg District* (2011 (4) SA 441 (SCA) par 37–38), that a provincial executive had not acted in accordance with section 139(4) of the Constitution and that the principle of legality applied. With respect to errors of law, the distinction between process and substance in administrative law requires a court of review to establish whether a decision was arrived at in a satisfactory manner, not to ask whether the decision maker was right or

wrong (Hoexter and Penfold *Administrative Law* 389). In the leading case of *Hira v Booysen* (1992 (4) SA 69 (AD)) – the decision that established the materiality test for an error of law – Corbett CJ provided the following examples of different kinds of errors of law:

> "where a tribunal 'asked itself the wrong question', or 'applied the wrong test', or 'based its decision on some matter not prescribed for its decision', or 'failed to apply its mind to the relevant issues in accordance with the behests of the statute'." (*Hira v Booysen supra* 367)

The case of *Public Protector v President of the RSA* (*supra*) provides an example of an error of law that goes beyond the types of error set out in *Hira v Booysen* (*supra*). Jafta J referred to a "series of weighty errors some of which defy any characterisation of an innocent mistake" (par 137). One of those errors – the claim by the PP that the offence of money laundering was contained in the PCCA – could be explained as a failure of the PP to apply her mind to the relevant issues as described in *Hira v Booysen* (*supra*). The PP also disregarded "uncontroverted evidence" that the President did not derive any personal benefit from CR17 donations. The principal error in the case, however, is far more serious as the PP changed the wording of the Code in order to give the "phrase 'wilfully misleading' the meaning of 'inadvertently misleading' for it to fit established facts" (par 137).

Quoting the SCA in *Public Protector v Mail and Guardian* (2011 (4) SA 420 (SCA)), Jafta J offered advice on how PPs could avoid errors of law in the future by emphasising that investigations by the PP should be directed with an "open and enquiring mind" (par 22):

> "I think that it is necessary to say something about what I mean by an open and enquiring mind. That state of mind is one that is open to all possibilities and reflects upon whether the truth has been told. It is not one that is unduly suspicious but it is also not one that is unduly believing. It asks whether the pieces that have been presented fit into place. If at first they do not then it asks questions and seeks out information until they do. It is also not a state of mind that remains static. If the pieces remain out of place after further enquiry then it might progress to being a suspicious mind. And if the pieces still do not fit then it might progress to conviction that there is deceit. How it progresses will vary with the exigencies of the particular case. One question might lead to another, and that question to yet another, and so it might go on. But whatever the state of mind that is finally reached, it must always start out as one that is open and enquiring."(par 22)

The questions posed by the PP led to the incontrovertible fact that the President did not know about donations to the CR17 campaign and that he did not personally benefit from them. Jafta J suggested that, had the PP possessed an "open and enquiring mind", she would have accepted those facts. Proceeding with an "open and enquiring mind" means that the PP should be "open to being persuaded to reach whatever conclusion [is] justified by the facts" (par 140).

Mogoeng CJ acknowledged that it was incorrect of the PP to decide that the President deliberately misled Parliament and to use the words "wilful" and "inadvertent" interchangeably. Even though it was established that the PP had clearly added words to the Executive Code, he claimed the following:

> "I am also concerned about any notion that she somehow amended the Code without authority. I think hers was more of giving a wrong meaning to a legal instrument than amending it." (par 203)

Interestingly, this is not the first instance where Mogoeng CJ has written a dissenting judgment in support of Advocate Mkhwebane. In *Public Protector v South African Reserve Bank* (2019 (6) SA 253 (CC)), he placed great emphasis on the importance of the State's – in this case the PP's – ability to investigate and expose unethical conduct. Despite finding that the PP "got the law completely wrong by acting as if it was open to her to direct parliament to amend the Constitution" (par 64), he highlighted the need to

> "vigilantly guard against making personal costs against State functionaries acting in their official capacities fashionable, which is likely to have a chilling effect on their willingness to confront perceived or alleged wrongdoing especially by the rich, powerful or well-connected." (par 6)

4 2 Donations given to the CR17 campaign

According to Mogoeng CJ, when people or organisations from outside the ANC made donations to the CR17 campaign, the result was that the President exposed "himself to a situation involving the risk of conflict" (par 162). To emphasise his point, Mogoeng CJ referred to extracts from his own judgment in *My Vote Counts*:

> "Money is the tool they use to secure special favours or selfishly manipulate those who are required to serve and treat all citizens equally ... Unchecked or secret private funding from all, including other nations, could undermine the fulfilment of constitutional obligations by political parties or independent candidates so funded, and by extension our nation's strategic objectives, sovereignty and ability to secure a 'rightful place' in the family of nations ... Only when there is a risk of being exposed for receiving funding from dubious characters or entities that could influence them negatively, for the advancement of personal or sectoral interests, would all political parties and independent candidates be constrained to steer clear of such funders and be free to honour their declared priorities and constitutional obligations." (*My Vote Counts NPC v Minister of Justice and Correctional Services* (2018 (5) SA 380 (CC) par 40–42)

When it was revealed that Bosasa had given R500 000 to the CR17 campaign, that the campaign had spent millions of rands, and that the PP had bank statements from the CR17 campaign in her possession, it seemed that her report would be certain to "deal a devastating blow" to the President (De Vos "Why Busisiwe Mkhwebane Has Been a Godsend to Cyril Ramaphosa and the CR17 Campaign" (11 March 2020) https://www.dailymaverick.co.za (accessed 2022-08-27)). However, the PP's report proved to be of such poor quality – as well as being deficient in impartiality and fairness – that both the High Court and the Constitutional Court had no alternative but to reject it.

4 3 Competence to investigate the affairs of the CR17 campaign

The PP widened the scope of the investigation to include donations made to the CR17 campaign, but it was determined by Jafta J that she lacked the

jurisdiction to do so. In terms of the Constitution, the PP is empowered to enquire into any conduct in state affairs or in the public administration; and in terms of the PP Act, she may probe private entities but only in relation to public funds. It's clear that the PP lacks the jurisdiction to investigate matters squarely within the private sphere.

Importantly, Jafta J held that the Code does not apply to internal party elections and is concerned with the promotion of "open, democratic and accountable government" (par 91). In a futile attempt to counter this, counsel for the PP sought to equate the election of the President of the ANC with being elected President of South Africa. It is clear, however, from a reading of the Constitution, that the President is elected by the National Assembly.

In his dissenting judgment, Mogoeng CJ held that the President was a "direct and primary beneficiary" of the donation in question and the CR17 campaign was "all about him" (par 165). He was adamant that avoiding disclosure "as a result of the juristic veneer of the likes of the CR campaign would encourage corruption and malfeasance in South Africa" (par 166). While his comments regarding the separation between political parties and the state are constitutionally inaccurate, his call to "pierce through the trust veil" resonates strongly with those who seek to promote accountability and openness (par 169).

4 4 Money laundering

Arguably the most damaging part of the High Court and Constitutional Court judgments (from the PP's perspective) deals with the PP's submission that the CR17 campaign was involved in money laundering. The PP again misconstrued the empowering legislation (s 4 of the Ethics Act), which did not empower her to investigate that aspect of the investigation. Aware of this, the PP invoked the PCCA, concluding that this statute criminalised money laundering. She also invoked section 6(4) of the PP Act when investigating the money laundering allegations. However, the PCCA does not provide for the crime of money laundering, and nor is the offence listed in section 6(4) of the PP Act as falling within the PP's competence, which led Jafta J to rule that the PP misconstrued the Ethics Act, the PCCA and the PP Act (par 112–115).

Counsel for the PP tried to account for this error by arguing that the incorrect Act had been cited by mistake. The court noted, however, that extensive reference to the PCCA had been made in the PP's report. It was clear that the PP interpreted the PCCA as criminalising financial offences, including money laundering. In doing so, she had misconstrued the PCCA. Usually in cases where it is pleaded that an "innocent" reference has been made to the wrong Act, counsel will refer the court to the existence of proper authority elsewhere. For instance, in *Minister of Education v Harris* (2001 (4) SA 1297 (CC)), the Minister of Education issued a notice in terms of the National Policy Act (84 of 116) instead of the Schools Act (27 of 1996). Sachs J noted that there was no suggestion in the affidavits that the Minister had made an administrative error. Furthermore, the notice cited the National Policy Act three times, so the court concluded that the provision had been purposefully selected (par 18). In *PP v President of the RSA* (*supra*), the PP

deliberately chose to rely on the PCCA and when it was pointed out that the legislation was irrelevant, she did not refer the court to the existence of relevant authority elsewhere.

4 5 Administrative action and audi alteram partem

In order to determine whether PAJA applies, in each case involving judicial review, it is necessary to determine whether the action in question constitutes administrative action (Hoexter and Penfold *Administrative Law* 149). If it does, then the action must be founded in terms of PAJA. O'Reagan J affirmed this in *Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs* (2004 (4) SA 490 (CC)), where she held

> "[t]he cause of action for the judicial review of administrative action now ordinarily arises from the PAJA, not from the common law as in the past." (par 25)

However, in the first decade following PAJA's promulgation, its increasing overlap with the principle of legality has resulted in a relatively high number of cases in which PAJA was not invoked when it ought to have been. There have also been cases where courts have found it unnecessary to consider the applicability of PAJA, either because the matter in question was provided for by the principle of legality, or because the parties in a particular case had conceded that legality applied (Hoexter and Penfold *Administrative Law* 171–172).

In a number of decisions over the past five years, the Pretoria High Court has held that the PP's remedial action constitutes administrative action (*Minister of Home Affairs v Public Protector* 2017 (2) 597 (GP); *Absa Bank v Public Protector* [2018] 2 All SA 1 (GP); *SARB v Public Protector* 2017 (6) SA 198 (GP)). The Constitutional Court has largely left the question open – for example, in *Economic Freedom Fighters v Speaker of the National Assembly; Democratic Alliance v Speaker of the National Assembly* 2016 (3) SA 580 (CC), Mogoeng CJ mentioned in passing that

> "[w]hether the Public Protector's decisions amount to administrative action or not, the disregard for remedial action by those adversely affected by it, amounts to taking the law into their own hands and is illegal." (par 74)

The Supreme Court of Appeal (SCA), however, held in *Home Affairs* that the PP's decisions are not administrative in nature. In that judgment, Plasket AJA correctly stated that an applicant for judicial review "does not have a choice as to the 'pathway' to review". If the action in question is judged to be administrative action, then the application must be founded in terms of section 6 of PAJA. If the action is "some other species of public power", then the principle of legality applies (*Home Affairs* par 28). Plasket AJA then listed a number of factors that distinguish the decisions of the PP from those of an administrative nature. First, the OPP is a peculiar institution intended to reinforce constitutional democracy; it is not one of the public administration institutions. Secondly, it is an independent "purpose-built watch-dog" that answers to Parliament, not the Executive. Thirdly, the OPP is not a state department and is "functionally separate" from the state administration: "it is only an organ of state because it exercises constitutional

powers and other statutory powers of a public nature". Fourthly, the OPP's main function is to investigate, report on and remedy malfeasance, not to administer. Lastly, the PP is given broad discretionary powers regarding what complaints to accept and how to investigate them: her powers are "as close as one can get to a free hand to fulfil the mandate of the Constitution" (*Home Affairs* par 36–37).

In the court *a quo*, the High Court held:

> "[I]t is common cause that, based on the decision of the Supreme Court of Appeal in *Minster of Home Affairs v Public Protector*, the Public Protector's reports do not constitute administrative action." (*President of the RSA v Public Protector* ([2020 2 All SA 865 (GP) par 159 and 162)

Despite this unequivocal statement, reference is made later in the same judgment to the right to just administrative action (par 157, 159 and 161). As a consequence, Hoexter and Penfold have commented that

> "[u]nfortunately, the court's reasoning on the point is not particularly instructive: it is clouded by several references to the President's right to just administrative action under s 33(1) of the Constitution – a provision whose application seemed to have been ruled out." (Hoexter and Penfold *Administrative Law* 575)

This lack of clarity has continued in the Constitutional Court, where judges have chosen to leave open or ignore the question of whether the PP's remedial action should be regarded as administrative action, while also making reference to section 33 of the Constitution and PAJA. For example, in *Public Protector v South African Reserve Bank* (*supra*), the court, without deciding the question of whether the PP's remedial action constitutes administrative action, and without making reference to *Home Affairs* (despite that judgment being handed down in the SCA over a year previously), Khampepe and Theron JJ held that the PP "was reasonably suspected of bias in terms of s 6(2)*(a)*(iii) of the Promotion of Administrative Justice Act" (par 168). They also made reference to the "parties' ability to enforce their rights under s 33 of the Constitution to administrative action that is lawful, reasonable and procedurally fair" (par 185).

In *Public Protector v President* (*supra* par 118), Jafta J emphasised that he was not persuaded that the factors relied on by Plasket AJA in *Home Affairs* distinguished the decisions of the PP from those of an administrative nature. In particular, he disagreed with the idea that because a power is directly derived from the Constitution it necessarily means that its exercise is not administrative in nature, and he emphasised that administrative action came "into existence from the exercise of public power". He further argued that the SCA – contrary to the Constitutional Court's jurisprudence – placed greater emphasis on the identity of the functionary who exercised the power than on the nature and impact of the power itself (par 119). In doing so, he referred to two previous Constitutional Court judgments – *President of the RSA v South African Rugby Football Union (SARFU*) (2000 (1) SA 1 (CC)) and *Sidumo v Rustenburg Platinum Mines Ltd* (2008 (2) SA 24 (CC)) – which came to the conclusion that the focal point of any enquiry into whether the exercise of power constitutes administrative action should be on the nature of the power rather than on the functionary who applies it:

> "In s 33 the adjective 'administrative' not 'executive' is used to qualify 'action'. This suggests that the test for determining whether conduct constitutes 'administrative action' is not the question whether the action concerned is performed by a member of the executive arm of government. What matters is not so much the functionary as the function. The question is whether the task itself is administrative or not. It may well be, as contemplated in *Fedsure*, that some acts of a legislature may constitute 'administrative action'. Similarly, judicial officers may, from time to time, carry out administrative tasks. The focus of the enquiry as to whether conduct is 'administrative action' is not on the arm of government to which the relevant actor belongs, but on the nature of the power he or she is exercising." (*SARFU* par 141; see also *Sidumo supra* par 203)

Contrary to Jafta J's claims regarding *Home Affairs*, it appears from a reading of that judgment that Plasket AJA was (in accordance with *SARFU*) mindful of the need to place a greater importance on the nature and impact of the power itself than on the identity of the functionary who exercised the power. In particular, he emphasised that the OPP's main function is to investigate, report on and remedy malfeasance, not to administer. He also stated that the OPP exercises constitutional powers and other statutory powers of a public nature. Overall, Jafta J's criticism of *Home Affairs* suggests that he is sympathetic to the idea that the PP's remedial action should be regarded as administrative action, a question that has yet to be decided by the Constitutional Court.

Jafta J's explicit reason for leaving that question open was that the *audi* principle applied to the case regardless of whether or not the PP's remedial action was to be regarded as administrative action (par 120). This contradicted his earlier statement that the *Home Affairs* decision appeared to be "at variance" with the Constitutional Court's decision in *South African Reserve Bank* (*supra*), where the court "implicitly endorsed the application of the Promotion of Administrative Justice Act (PAJA) in the decision-making process followed by the Public Protector when she takes remedial action" (par 50). Elsewhere in the judgment, he asserted that "PAJA proclaims procedual fairness which is inclusive of the *audi* principle" (par 117). In *South African Reserve Bank*, Khampepe and Theron JJ stated that the fact that the PP did not allow the Reserve Bank or Absa an opportunity to respond to adverse findings against them did not *per se* warrant an inference of bias. They justified this on the basis that "procedural unfairness and bias are two independent grounds of review under PAJA" (*South African Reserve Bank supra* par 170).

The problem with this approach is that sections of PAJA cannot be invoked on a "piecemeal" basis where the action being reviewed does not constitute administrative action. It is also apparent that the requirement of an opportunity to make representations is recognised at common law and has "been applied to non-administrative action under the legality principle on occasion" (Hoexter and Penfold *Administrative Law* 512). For example, the court *a quo* held that the PP should have given the President notice of far-reaching remedial action intended to be taken against him. In arriving at this conclusion, the court made reference to section 7(9)(*a*) of the PP Act, which provides as follows:

> "If it appears to the Public Protector during the course of an investigation that any person is being implicated in the matter being investigated and that such

> implication may be to the detriment of that person or that an adverse finding pertaining to that person may result, the Public Protector shall afford such person an opportunity to respond in connection therewith, in any manner that may be expedient under the circumstances."

The High Court went further by stating:

> "[T]he right to be afforded a reasonable opportunity to make representations on matters that may detrimentally affect one's interests is a well established principle of natural justice and of our common law. It is an important component of the right to just administrative justice and is expressly recognised as such in the Constitution. Whether or not a decision maker has complied with this obligation or not will depend on the facts of the particular case." (par 157)

While the reference to the *audi* principle being rooted in natural justice and the common law is helpful, the court's reference to "the right to administrative justice" – as discussed earlier – is confusing. Ultimately, even though PAJA did not apply, and the case was decided under the legality principle, it is significant that a full bench of the High Court decided that the *audi* principle was applicable even though notice of the remedial action was not required by section 7(9)*(a)* of the PP Act (Hoexter and Penfold *Administrative Law* 575).

In his dissent, Mogoeng CJ disagreed with the majority's view that the PP is obliged to inform a party of any proposed remedial action if that party is likely to be adversely affected by it. In arriving at this conclusion, he pointed out that in civil litigation, judges and magistrates are not under any "*audi*-induced obligation" to inform the parties of any proposed remedies (par 180). This reasoning, however, contradicts the rationale set out by the SCA that a court is an "inaccurate comparator" for the OPP (*South African Broadcasting Corporation v Democratic Alliance* 2016 (2) SA 522 (SCA) par 45).

4 6 AmaBhungane's application

Having been remitted to the Pretoria High Court, amaBhungane's constitutional challenge was heard in September 2021 by the same bench: Mlambo JP and Matojane and Keightley JJ. In bringing the application, amaBhungane sought a prospective declaration together with a year's suspension to allow the Code to be amended in order to align it with the Constitution. AmaBhungane's application highlighted the importance of transparency in political life and submitted that donations can have a profoundly damaging effect on democracy, particularly if they remain undisclosed. AmaBhungane's constitutional challenge was founded on section 1(*d*) of the Constitution (with its emphasis on accountability, responsiveness and openness) as well as on section 96, which forbids members of the executive from "exposing themselves to any situation involving a risk of conflict between their official responsibilities and their private interests" (*AmaBhungane Centre for Investigative Journalism NPC v President of the RSA* [2022] 1 All SA 706 (GP) par 30). The court granted the application and declared the Executive Ethics Code to be unconstitutional and invalid for 12 months to allow for the defect to be remedied (par 54). AmaBhungane subsequently approached the Constitutional Court for a confirmatory order in terms of section 172(2)(*d*) of

the Constitution and, after hearing the matter in May 2022, the court reserved judgment.

4 7 Previous reports from the Office of the Public Protector

It is instructive to include a brief discussion of significant reports compiled by the former PP, Advocate Thuli Madonsela, and the present PP in order to draw comparisons between how those reports were received by the courts and how the courts have responded to the present case concerning the investigation into the CR17 campaign.

Madonsela's report entitled "When Governance and Ethics Fail" investigated allegations of maladministration and abuse of power within the SABC (PP's Report No. 23 of 2013/14). The scale of the maladministration prompted Madonsela to direct not only that remedial action be taken, but also to insist on an implementation plan being implemented within strict timelines. These were not adhered to. The matter was ultimately heard in the SCA, and the resulting judgment meant that the PP's powers to address maladministration and mete out weighty remedial action were increased (*SABC v DA supra*). In *Oudekraal Estates (Pty) Ltd v City of Cape Town* ([2004] 3 All SA 1 (SCA) par 26), the SCA held that until a decision taken by an administrator is set aside by a court in judicial review proceedings, it exists in fact. In *SABC v DA*, Navsa and Ponnan JJA extended the *Oudekraal* principle to apply it to decisions taken by the PP based on her "unique position" in South Africa's "constitutional order" (par 45). At no point did the court criticise Madonsela's findings and remedial action, with the focus of the judgment being placed on the nature of her powers.

The well-known "Secure in Comfort" report regarding the non-security upgrades at Nkandla (PP's Report No. 25 of 2013/14) had far-reaching implications for her own office and that of former President Jacob Zuma. In arriving at her findings, the PP relied on section 96 of the Constitution, the Ethics Act and the Code. In particular, section 96(2)(*c*) prohibits members of the Executive from using "their position ... to enrich themselves or improperly benefit any other person". The PP found that there was a

> "direct connection between the position of President and the reasonably foreseeable ease with which the specified non-security features, asked for or not, were installed at the private residence. This naturally extends to the undue enrichment." (*Economic Freedom Fighters v Speaker of the National Assembly; Democratic Alliance v Speaker of the National Assembly supra* par 9)

At no point in the *EFF* judgment did Mogoeng CJ challenge the PP's findings or her interpretation of the law. He ultimately held that the PP's findings and remedial action are binding in certain circumstances, thus expanding the PP's powers.

Finally, the "State of Capture" report was reviewed by a full bench of the Pretoria High Court at the request of President Zuma (PP's Report No. 6 of 2016/17). In her report, she concluded that the President had contravened the Ethics Act and the Code by exposing himself to a situation involving the risk of conflict between his official duties and his private interests. She submitted that he had also used his position to enrich himself and the Gupta

family. As in the *EFF* case, Mlambo J, writing for a unanimous court, did not challenge the PP's findings and remedial action. In a decision that had profound ramifications for the entire country, he ruled that the PP, in certain circumstances, had the power to direct the President to appoint a commission of inquiry (*President of the RSA v Office of the Public Protector* 2018 (2) SA 100 (GP) par 85). As a result of this ruling, the highly consequential Zondo Commission was ultimately set up. Former President Zuma unsuccessfully challenged the decision in both the SCA and Constitutional Court.

With respect to the current PP, her report entitled "Alleged Failure to Recover Misappropriated Funds" (PP's Report No. 24 of 2017/18) concerned financial support that the South African Reserve Bank (SARB) had previously provided to a number of financial institutions that were in financial distress, including Bankorp Limited, subsequently acquired by Absa. In the High Court, the PP was found to be reasonably suspected of bias and her conduct was held to be procedurally unfair. The PP appealed this decision, arguing that the High Court had wrongly conflated bias and the *audi alteram partem* principle, having "found bias on an *audi* question" (*Public Protector v South African Reserve Bank* (*supra* par 168). In dismissing the appeal, Khampepe and Theron JJ, writing for the majority, disagreed, stating that the "context in which a public official conducts themselves in a procedurally unfair manner may, however, indicate bias on the part of that official" (par 170). The judgment is also notable for upholding a punitive costs order against the PP, in terms of which she was ordered to personally pay 15 per cent of SARB's costs.

The Department of Agriculture in the Free State set up a programme aimed at securing investment in various agricultural projects, one of which was a dairy enterprise in Vrede run by Estina (Pty) Ltd. The project was blighted by irregularities and corruption and the PP launched an investigation culminating in a report (PP's Report No. 31 of 2017/18). In the Pretoria High Court, Tolmay J handed down a damning judgment, setting aside her report (*Democratic Alliance v Public Protector; Council for the Advancement of the South African Constitution v Public Protector* [2019] 3 All SA 127 (GP)). Among the reasons given was that the PP's decision to drastically curtail the scope of her investigation was irrational. He also found that the PP's report was unlawful and unconstitutional, and that the PP had failed to act in accordance with section 6 of the PP Act and section 182 of the Constitution. Tolmay J also ordered the PP to pay 7,5 per cent of the DA's costs and 7,5 per cent of Casac's costs *de bonis propriis*.

The "Report on Allegations of an Irregularity in the Approval of Early Retirement with Full Pension Benefits" (PP's Report No. 24 of 2019/20) has been mentioned above in relation to the allegation that Pravin Gordhan misled Parliament. In this case, the PP alleged that Gordhan, while Minister of Finance, improperly approved Ivan Pillay's early retirement. It was alleged that Gordhan had acted dishonestly in handling the matter and had placed Pillay at an advantage. A full bench of the High Court concluded that the PP's findings and remedial action were irrational. In addition, the court held that she had committed numerous errors of law and chose to set aside her report (*Gordhan v Public Protector* [2020] ZAGPPHC 777).

It is apparent that the report relating to the CR17 campaign is a continuation of a trend that came to define Advocate Mkhwebane's term of office. A series of reports emerging from the OPP have indicated widespread corruption and malfeasance across South Africa, but legal errors have left the courts with little option but to set aside many of the current PP's reports. This was not the case under her predecessor, when the courts generally approved of the PP's reports and chose to expand the powers of her office.

5 Conclusion

The overall theme of this important case is how best to hold the executive to account. The link between the President and Bosasa via the CR17 campaign – exposed as a result of this case – has been immensely damaging to President Ramaphosa's public image and has hampered and undermined his ability to tackle corruption, arguably the most important tenet of his administration's overall policy. The judgment is also significant from an administrative law perspective, adding to the debate about whether the PP's findings constitute administrative action.

While Jafta J elected to keep open the question of whether the PP's remedial action constituted administrative action, he criticised the *Home Affairs* judgment primarily on the basis that Plasket AJA had placed greater emphasis on the identity of the functionary who exercised the power than on the nature and impact of the power itself. He also wrongly implied that PAJA applies to the decision-making process followed by the PP even in a matter not involving administrative action. Although the SCA has held that the PP's decisions do not constitute administrative action, the court *a quo* makes numerous references to the right to just administrative action, which does not apply in cases founded on the principle of legality. It is clear from both these judgments that greater clarity on the question of whether the PP's decisions amount to administrative action is required from the Constitutional Court. It is also clear from an analysis of the judgment (particularly the grounds of review relating to error of law and the *audi* principle) and related judgments that the courts have lost patience with Advocate Mkhwebane as a result of her numerous flawed reports and recommendations.

With regard to amaBhungane's constitutional challenge, the Pretoria High Court has declared the Executive Ethics Code to be unconstitutional and it appears likely that the Constitutional Court will confirm this order in terms of section 172(2)(*d*) of the Constitution. A revised Code will help to promote accountable, transparent and open government by ensuring that members of the Executive are obliged to disclose campaign donations.

The major findings in significant reports such as those relating to Nkandla, the SABC and the State of Capture have stood firm in the face of judicial scrutiny. Unfortunately, this exalted standard has not always been repeated in Advocate Mkhwebane's reports. It is also possible that the courts have drawn comparisons between Advocate Mkhwebane's reports and those of her predecessor when adjudicating matters. In respect of *Public Protector v President of the RSA* (*supra*), as a result of numerous errors, the focus of the judges – and the public – has inexorably shifted from the President and donations to the CR17 campaign to the failings of the former PP herself. The

case can be seen as yet another missed opportunity to hold the executive to account. Had the report been legally unassailable, the real issue at play – donations to the CR17 campaign – might have faced greater legal scrutiny.

Paul Swanepoel
(University of KwaZulu-Natal)

NOTES ON THE LEGAL LIABILITY OF MINING COMPANIES FOR THE PUMPING OF EXTRANEOUS WATER FROM DEFUNCT UNDERGROUND WORKINGS: LEGAL UNCERTAINTIES ILLUSTRATED BY

Ezulwini Mining Company Pty Ltd v Minister of Mineral Resources and Energy [2021] ZAGPPHC 4

1 Introduction

In 2015, the 193 United Nations (UN) member states adopted the UN 2030 Agenda for Sustainable Development, which includes a set of 17 Sustainable Development Goals (SDGs) to be reached by 2030 (UNGA "Transforming Our World: The 2030 Agenda for Sustainable Development" Resolution adopted by the General Assembly (25 September 2015) A/Res/70/1). The SDGs represent a global call for action towards social inclusion, economic development and environmental sustainability. Meeting the SDGs by 2030, however, requires unprecedented cooperation and collaboration among various stakeholders on various levels, ranging from governments, non-governmental organisations and the private sector, including the mining sector. Although it is not the main aim of this contribution to unravel the linkages between the respective SDGs and mining, the country's mining sector is expected to incorporate relevant SDGs into their operations, business practices and decisions.

It is trite that the mining industry, through all its activities and stages, has contributed to many of the challenges that the SDGs set to address, including the displacement of communities, worsening economic and social inequality, and environmental degradation that impacts water security, for example. Nevertheless, in pursuance of the SDGs, South Africa's mining sector is expected to prioritise the protection of the environment, over exploitation and pollution. In fact, successful advancement of the SDGs also requires substantial and ongoing partnership or collaboration between stakeholders. This is particularly true for interconnected or neighbouring mines, for example.

To guide and ensure sustainable and responsible mining, the South African legislature promulgated a comprehensive environmental management and regulatory framework for the country, including the Mineral and Petroleum Resources Development Act (28 of 2002) (MPRDA), the National Environmental Management Act (107 of 1998) (NEMA) and the National Water Act (36 of 1998) (NWA). However, as is discussed in more detail below, regulatory shortcomings, and therefore legal uncertainty, are

apparent. This contribution presents the issue of environmental obligations and liabilities to pump extraneous water after mine closure. Naturally, legal uncertainties inherently inhibit the realisation of some of the SDGs, including, for example, SDG 6 (to ensure the sustainable management of water) and SDG 9 (to promote sustainable industrialisation).

The 2021 case of *Ezulwini Mining Company Pty Ltd v Minister of Mineral Resources and Energy* ([2021] ZAGPPHC 4) (*Ezulwini* case) stimulated a much-needed discourse in environmental liability scholarship, and more specifically, as it relates to the dewatering or pumping of extraneous water from defunct underground workings. Although the final court order cannot be criticised, the court did not address a key question – namely, what is the legal liability of a holder of a mining authorisation with regard to pollution, ecological degradation, or the pumping and treatment of extraneous water after mine closure? Uncertainties arise from the wording and interpretation of section 43 of the MPRDA and section 24R of NEMA and the relevance and mobilisation of environmental authorisations or licences, respectively. The uncertainties are multiplied if there are interconnected and neighbouring operating mines. Clarity on these aspects may not only contribute towards attaining social, financial and environmental goals as set out in the SDGs but may ultimately also enhance future legal discourse in the development of environmental liability law.

This case note, therefore, maps the facts of the *Ezulwini* case to illustrate the legal uncertainties regarding (a) applications for authorisations in the case of partial mine closure and (b) the continued liability for the pumping of extraneous water if mines are interconnected.

The discussion is structured as follows: heading 2 explores the facts of the *Ezulwini* case and contextualises the environmental legal liability question at hand. The discussion under heading 3 identifies an important but unanswered liability question that was excluded from the court's deliberations. As a result, challenges and uncertainties related to the environmental liability of pumping extraneous water after mine closure persist. Under heading 4, this note studies the judicial interpretation of legislative provisions and traces recent developments in the said legal liability discourse. In an attempt to provide clarity on the liability question, the discussion under heading 5 suggests possible regulatory instruments to determine and regulate the legal liability of mining companies. The discussion then draws to a close, ending on a positive note for the pursuit of the SDGs in a regional context.[1]

2 Facts of the *Ezulwini* case

In 2014, Ezulwini Mining Company Pty Ltd (the applicant, Ezulwini) acquired the underground and surface operations of an existing gold and uranium mine in Gauteng (*Ezulwini supra* par 4). Two years later, in 2016, Ezulwini ceased its underground mining operations, as the underground mine was no

[1] This work is based on research supported wholly by the National Research Foundation of South Africa Projects UID 96046P and UID 129352. The NRF is thanked for their financial contribution. Any opinion, finding and conclusion or recommendation expressed in this material is that of the author(s) and the NRF does not accept any liability in this regard.

longer economically viable (*Ezulwini supra* par 4). The surface mining-related operations are, however, ongoing. When they still undertook underground mining, Ezulwini, as well as its predecessors, pumped groundwater from the underground workings. This dewatering initially took place pursuant to permits in terms of the repealed Water Act (54 of 1956), and more recently, in terms of a water use licence (WUL) issued in terms of the NWA (*Ezulwini supra* par 4). Notwithstanding that Ezulwini ceased its underground mining operations in 2016, Ezulwini has continued to pump and treat the water from the underground workings at a cost of R21.1 million per month (*Ezulwini supra* par 4). What followed was Ezulwini contending that the continued pumping of this groundwater is financially and physically impossible to sustain. Ezulwini therefore wished to cease the pumping of water from the defunct underground workings (*Ezulwini supra* par 4).

In 2017, Ezulwini applied for two authorisations to cease the pumping of the defunct underground workings: One was an application for an environmental authorisation in terms of section 24 of NEMA, read with the Environmental Impact Assessment (EIA) Regulations (GN R982 in *GG* 38282 of 2014-12-04, as amended); the other was an application in terms of section 50 of the NWA, for the amendment of the WUL that is currently issued to Ezulwini (*Ezulwini supra* par 4). In addition, Ezulwini submitted an application to the Regional Manager pursuant to section 43(3) of the MPRDA for a partial closure certificate for its underground workings (although this application for a partial closure certificate was subsequently withdrawn) (*Ezulwini supra* par 4). In 2018, Ezulwini's application for the authorisations was refused (*Ezulwini supra* par 4). Although an appeal was brought against this decision, the decision was upheld in 2019. As a result, the appeal decision effectively put Ezulwini in exactly the same position it was in before its applications for the environmental authorisations in 2017. (In fact, the appeal decision provided no guidance as to whether Ezulwini's application should have been granted or will be granted in future.) In light of the financial consequences, especially as a significant time period has lapsed since the initial applications, Ezulwini sought alternative legal remedies to enable it to cease the pumping of underground water.

It was against this background, and on advice received from their legal advisor, that Ezulwini brought the present application – that is, for a declaration that neither an environmental authorisation in terms of NEMA and the EIA Regulations, nor an amendment to the WUL was required to cease the pumping of water from the defunct underground workings. Ezulwini contended that an environmental authorisation in terms of NEMA and the EIA Regulations is not required, because cessation does not constitute the activity contemplated by activities 22 and 34 in Listing Notice 1 under the EIA Regulations (*Ezulwini supra* par 4 and the discussion under heading 3.1 below). It was also reasoned that an amendment to its WUL would not be required to cease pumping, because although Ezulwini's existing WUL provides for a statutory entitlement or right to pump underground water, it does not create any legal obligation to do so. The legal advice further included that, even if an environmental authorisation and an amendment to the WUL were indeed required to cease the pumping of underground workings, Ezulwini would be entitled to cease the pumping in the absence thereof based on *inter alia* financial and physical constraints. As

a further alternative, it was reasoned that the neighbouring mine (South Deep Mine), represented by GFI Joint Venture Holdings (Pty) Ltd and Gold Fields Operations Ltd, should be ordered, jointly and severally, to cover the costs of pumping underground water from Ezulwini. The latter relief is based on the fact that GFI Joint Venture Holdings (Pty) Ltd and Gold Fields Operations Ltd (Gold Fields) are the principal beneficiaries of the continued pumping of the underground water at Ezulwini (*Ezulwini supra* par 4).

Nevertheless, Gold Fields opposed the application and brought a counterapplication. The counterapplication was for a declaration that Ezulwini remained responsible for the pumping and treatment of extraneous water from its underground workings until at least the time that the Minister issued a closure certificate in terms of section 43 of the MPRDA, or such longer period as is contemplated in section 24R of NEMA. Section 43(1) of the MPRDA provides:

> "The holder of a prospecting right, mining right, retention permit or mining permit remains responsible for any environmental liability, pollution or ecological degradation, and the management thereof, *until the Minister has issued a closure certificate to the holder concerned*." (Emphasis added)

In turn, section 24R of NEMA provides:

> "Every holder, holder of an old order right and owner of works remain responsible for any environmental liability, pollution or ecological degradation, the pumping and treatment of polluted or extraneous water, the management and sustainable closure thereof notwithstanding the issuing of a closure certificate by the Minister responsible for mineral resources in terms of the Mineral and Petroleum Resources Development Act, 2002, to the holder or owner concerned."

In its judgment, the court granted Gold Fields's application for declaratory relief (*Ezulwini supra* par 56). The counterapplication, therefore, *inter alia* brings to the fore the proper interpretation of section 43 of the MPRDA and section 24R of NEMA.

In the interpretation exercise, it is noted that the court did not address the question of whether an environmental authorisation and WUL amendment were indeed required for the cessation of pumping of extraneous underground water.

3 A fundamental liability question apparently left out by the court

3 1 Environmental authorisation

Although from the facts above it is clear that Ezulwini went out of its way to determine and clarify its legal position, the judgment leaves it yet to be determined whether the applicant (or any other mine in a similar position), would require an environmental authorisation and WUL amendment to cease pumping water from defunct underground workings. In fact, the judgment apparently precluded any deliberation on the matter.

Section 24 of NEMA requires those that undertake any of the activities listed in the 2014 EIA Regulations and Listing Notices to obtain an environmental authorisation before the commencement of such specific listed activities (GN R982 in *GG* 38282 of 2014-12-04; the Listing Notices are published in GN R983–985 in *GG* 38282 of 2014-12-04, as amended). Listing Notice 1 provides for activities that trigger a basic assessment, while Listing Notice 2 provides for activities that trigger a scoping and environmental impact report (S&EIR) (Regulations 19 and 21 in GN R982 in *GG* 38282 of 2014-12-04 respectively). Although the pumping of water is mentioned in sections 43(1) and 43(5) of the MPRDA, and in sections 24N(7)(*f*) and 24R(1) of NEMA, as well as in Appendix 5 of the 2014 EIA Regulations, it is not expressly listed as an activity that requires environmental authorisation. Notably, the cessation of pumping water is not expressly mentioned anywhere in the foregoing provisions.

The above notwithstanding, the court noted that the foregoing provisions aim to regulate the cessation of pumping water and require that the consequences thereof be considered and reported to the competent authorities (*Ezulwini supra* par 22). Furthermore, the court opined that the cessation of pumping water may only take place once the reports (basic assessment report, environmental management programme and, where applicable, the closure plan) are approved, and after the Department of Mineral Resources and Energy (DMRE) has issued a closure certificate (*Ezulwini supra* par 22). Seemingly, the court assumed that the aforementioned provisions relating to pumping also include the cessation thereof. However, the stated provisions do not mention cessation of pumping of water, nor the required compilation of reports, but instead, indicate who bears the liability for pumping of extraneous water.

With regard to whether cessation requires an environmental authorisation, activity 22 in Listing Notice 1 is relevant. Ezulwini argued in its pleadings that it was advised that an environmental authorisation is not required in such an instance because the cessation of pumping extraneous water does not constitute, or trigger, listed activity 22 of Listing Notice 1 (*Ezulwini supra* par 5). Activity 22(i) of Listing Notice 1 requires an environmental authorisation when decommissioning any activity that requires a closure certificate in terms of section 43 of the MPRDA.

The court, *obiter*, also referred to Appendix 5 of the 2014 EIA Regulations. Appendix 5 sets out details with regard to the content of a closure plan. Item 1(h) of the Appendix to the 2014 Regulations requires a closure plan to include "the process for managing any environmental damage, pollution, pumping and treatment of extraneous water or ecological degradation as a result of closure". The court held that Ezulwini's conduct – "taking out of service, such as the complete re-watering of the underground mine area of the defunct mine" – amounted to decommissioning that triggers activity 22 of Listing Notice 1 and therefore requires a closure certificate in terms of section 43 of the MPRDA (*Ezulwini supra* par 42).

It is argued here that the court was correct in its view that the cessation of pumping water triggers activity 22 of the EIA Regulations of 2014, especially when the concepts of "decommissioning" and "mining operations" are considered. Decommissioning generally means to "take out of active service

permanently or dismantle partly or wholly, or closure of a facility to the extent that it cannot be readily re-commissioned" (item 2 of Listing Notice 1 Schedule GN R983 in *GG* 38282 of 2014-12-04 as amended; see also Watson, Humby, Hermanus and Moodliar "Terrestrial and Deep Seabed Mining" in King, Strydom and Retief (eds) *Fuggle & Rabie's Environmental Management in South Africa* 3ed (2018) 899). Clearly, the cessation of pumping of underground water by Ezulwini will satisfy the requirements of "decommissioning". Naturally flowing from this, the question emerges as to whether the said decommissioning relates to the activity that requires a closure certificate in terms of section 43 of the MPRDA. Section 43(3)(*b*) of the MPRDA provides for the application for a closure certificate "upon cessation of the prospecting or *mining operations*" (emphasis added. Application for a closure certificate is regulated by regulation 57 of the MPRDA Regulations published in GN R527 in *GG* 26275 of 2004-04-23). A mining operation means "any operation relating to the act of mining and matters directly incidental thereto". The pumping of water is vital for mining operations to take place safely. In fact, failure to pump water may result in flooding of the mine, adversely affecting productivity and the surrounding environment (Watson *et al* in King, Strydom and Retief (eds) *Fuggle & Rabie's Environmental Management* 896). *In casu*, the applicant itself (Ezulwini) stated that applicants and their predecessors pumped the groundwater in order to undertake the underground mining operations. (This view was reaffirmed by South Deep, which argued that there was enormous and rapid flow of water into the mine, which would fill its mining area if not pumped). Based on the foregoing analogy, it is argued herein that the pumping of water constitutes a "mining operation" or an "operation" directly incidental to a "mining operation". Therefore, cessation of pumping water (which constitutes a mining operation or matters directly incidental thereto) from the defunct mine requires a closure certificate, thereby constituting activity 22 of the Listing Notice 1. Therefore, Ezulwini requires an environmental authorisation to cease pumping of water, notwithstanding the continuing surface operations.

3 2 WUL amendment

It is common cause that Ezulwini and its predecessors pumped water pursuant to the now-repealed Water Act (54 of 1956) and a WUL issued in terms of the NWA. As already mentioned, the court did not address the issue of whether the WUL amendment is required for the cessation of pumping water from the underground workings. The question, therefore, persists as to whether Ezulwini needs to amend its WUL to cease pumping water. Section 50 of the NWA provides for the formal amendment of the WUL and states that the responsible authority may amend a licence condition "if the licensee or successor-in-title has consented to or requested that amendment or substitution" (s 50(1)(*a*) of the NWA). It is therefore argued here that Ezulwini must apply for a WUL to cease pumping water from the defunct mine. Therefore, Ezulwini would remain responsible and liable to pump extraneous water unless this obligation is altered pursuant to an environmental authorisation or WUL amendment. As neither of these authorisations was granted, nor an indication given as to whether such authorisations may or will ever be granted in future, it seems as if Ezulwini

(and other mines in similar positions) may be liable for the pumping of water from its defunct underground workings in perpetuity. As this may not necessarily be financially or otherwise viable, it is essential to revisit and critically discuss the source of the environmental liability for the pumping of extraneous water. It is also important to trace recent developments in this legal discourse, and to suggest possible and appropriate answers or remedies.

4 The regulatory framework for environmental liability and the pumping of extraneous water

4 1 Section 43 of the MPRDA and section 24R of NEMA

As suggested by the *Ezulwini* judgment, the sources of responsibility for the pumping of extraneous water can be traced to section 43 of the MPRDA and section 24R of NEMA. In its interpretation of section 43 and section 24R, it becomes evident that the court only focused on the first part of the sections, and not on their entirety. The court focused only on the provisions that stipulate that holders of mining rights (among others) "remain responsible for the pumping and treatment of extraneous water". If, however, the provisions are read in full, an additional element comes to light. Section 43 of the MPRDA states further that such holders remain responsible *until* a closure certificate is issued. In turn, section 24R of NEMA seems to create a continuous liability in stating that *notwithstanding* the issuing of a closure certificate, a holder of rights will remain responsible for the pumping of water. Clearly, the two provisions that refer respectively to closure certificates are not aligned and provide contradictory guidance on the liability question.

An attempt was made by the drafters of the Mineral and Petroleum Resources Development Bill [B13-2013] to remedy this situation by amending section 43 of the MPRDA. The section was then envisioned to read "*despite* [own emphasis] the issuing of a closure certificate," the holder will remain liable for the pumping of water. However, this Bill was withdrawn, and no other amendments were proposed to align the two sections.

In addition to the apparent inconsistency in the legislative provisions, another challenge presents itself in section 43(12) of the MPRDA. The latter also places an obligation on interconnecting mines to pump water and allows the Minister of Mineral Resources and Energy and the Minister of Forestry, Fisheries and the Environment to apportion the liability among such interconnecting mines for the pumping of water.

A judicial interpretation of these legislative provisions, therefore, necessitates a brief reference to history. In fact, the reason for the introduction of sections 43 of the MPRDA and 24R of NEMA has a historical connection to the so-called Klerksdorp, Orkney, Stilfontein and Hartbeesfontein basin (KOSH) cases and are therefore briefly referred to as background. (These cases have been discussed extensively by other authors. See, for e.g., Bosman "Water Quality Management" in King,

Strydom and Retief (eds) *Fuggle and Rabie's Environmental Management* 3ed (2018) 1013; Kotze and Lubbe "How (Not) to Silence a Spring: The Stilfontein Saga in Three Parts?" 2009 16(1) *The South African Journal of Environmental Law and Policy* 49–77; Mofokeng "Good Corporate Governance Affirms the Board (Led by the Chairperson) as the Focal Point of Governance and the Courts Have No Mandate to Undermine This Principle" 2020 6(1) *Journal of Corporate and Commercial Law & Practice* 66 71.)

4 2 Case law leading to the introduction of sections 43 and 24R

The case of *Harmony Gold Mining Company Limited v Regional Director: Free State Department of Water Affairs and Forestry* ([2006] ZASCA 66) (the first *Harmony* case) dealt with the interpretation of section 19 of the NWA. Section 19(1) of the NWA provides that an obligation to take measures to prevent pollution rests upon an owner of the land on which any activity or process was undertaken, or any situation exists. The precedent, however, established is that the obligation to take "reasonable measures" to prevent pollution in terms of section 19(1) of the NWA is not confined to measures that can be effected on one's own land, but extends to land owned, controlled or used by another. The then-Department of Water Affairs, therefore, issued a section 19(3) directive that the five interconnected mines should continue pumping water because if one of the mines stopped pumping, the others would flood. Harmony, however, tried to avoid its responsibility to pump by first selling their shares to another company (*Harmony Gold Mining Company Ltd v Regional Director: Free State Department of Water Affairs, Harmony Gold Mining Company Ltd v Regional Director: Free State Department of Water Affairs* [2012] ZAGPPHC 127), and when they could not get out of their responsibility, all the directors resigned (*Minister of Water Affairs v Stilfontein Gold Company Limited* [2006] 5 SA 333 (W) par 1 and *Kebble v Minister of Water Affairs* [2007] SCA 111 (RSA) par 3). The court, however, held the directors personally liable. The mine disregarded the court order to pump water and was held to be in contempt of court (*Minister of Water Affairs v Stilfontein Gold Company Limited supra* and *Kebble v Minister of Water Affairs supra* par 1). A subsequent court overturned the court's contempt-of-court decision in that the directives' phrasing would have been unclear (*Kebble v Minister of Water Affairs supra*). As a result, the uncertainty as to who is responsible for pumping water in the case of interconnected mines remained a challenge.

The KOSH cases, therefore, illustrate that (a) there may be a responsibility to pump water to prevent pollution (but also flooding of other mines); and (b) section 19 of the NWA may also be used to order the pumping of extraneous water, especially when water may be polluted. Neither of these sections exclude the liability to pump extraneous water after a closure certificate has been issued. In fact, both section 19 of the NWA and section 28 of NEMA place a general duty of care on the owner of the land, or former owner of the land, to prevent pollution and ecological degradation, even if the mine, for example, is no longer the holder of the

land. The uncertainty as to how and when a mine needs to continue to pump water, therefore, remained unclear.

It is necessary to determine whether the existing governance instruments address the liability for continuous pumping of extraneous water in case of the partial or final closure of a mine.

5 Determining liability: Regulatory instruments

5 1 Environmental impact assessments and environmental management programmes

It is common cause that, during the application for an environmental authorisation, or an EIA (a basic assessment if listed in GN R983; and an EIA if listed in GN R984), the EIA practitioner needs to address the impacts of the specific project – mostly only with regard to construction, and again in the case of modification and closure. The EIA is focused on the development footprint of the project and is set to address the cumulative impact of the specific project. The EIA therefore does not necessarily look forward towards *inter alia* the operational phase, where new mines may be established that were not foreseen, or where a mine prematurely closes or where the mine becomes insolvent. As a result, the authors of this note are not convinced that an EIA is the most appropriate instrument to determine the legal liability of mining companies to pump extraneous water from defunct underground workings.

The environmental management programme (EMPr) seems more appropriate to address the interconnection of mines. The purpose of an EMPr is to describe how negative environmental impacts will be managed, rehabilitated and monitored. Regrettably, however, an EMPr is focused on the life cycle of the activity of the specific mine and is not necessarily outward-looking as to the cumulative impact of all the mines (including future mines) in the region, which may include the pumping of water in interconnected workings, for example. An EMPr has to be amended to address modifications and closure, while an amendment to the EIA will still focus on the initial phases of the activity. The EMPr is, however, also not outward-looking and still focuses on the mine area. In 2017, Appendix 5 of the EIA Regulations was amended (GN 326 in *GG* 40772 of 2017-04-07) to state that the EMPr should include "1(1)(h) the process for managing any environmental damage, pollution, pumping and treatment of extraneous water or ecological degradation as a result of closure". This amendment still focuses on the mine itself and does not include regional mines. New EMPRs, post 2017, must comply with this amendment, while existing EMPrs would have to be amended to comply with this Appendix. Closure plans and EMPrs may be amended before or after an audit (reg 36 of the EIA Regulations as amended).

In May 2021, the 2014 EIA Regulations' Appendix 4 (GNR 982 in *GG* 38282 of 2013-12-04), which refers to the EMPr, was amended to indicate that the EMPr should also address closure activities. According to the amended Appendix 4 (GN 517 in *GG* 44701 of 2021-06-11), the EMPr must

now address: in terms of item 1(d)(iv), the "rehabilitation of the environment after construction and in the case of a closure activity, closure"; in terms of item 1(f)(ii), the "rehabilitation of the environment after construction and in the case of a closure activity, closure"; and in terms of item 1(f)(iii) how to "comply with any applicable provisions of the Act regarding closure in the case of a closure activity". However, the liability problem remains, as this only speaks to those activities that can be foreseen and not those that may happen after the fact, such as the pumping of water after mine closure, which may affect neighbouring mines. The National Mine Closure Strategy discussed in the following paragraph attempts to address some of these issues.

5 2 National Mine Closure Strategy

As has been alluded to, the challenge with liability for impacts emanating from mine closure is usually exacerbated where the connecting mines do not all close at the same time, especially when they are interconnected. To address regional mining closure impacts, the Department of Mineral Resources and Energy published for public comment a draft National Mine Closure Strategy 2021 (Mine Closure Strategy) (GN 446 in *GG* 44607 of 2021-05-21).

The Mine Closure Strategy acknowledges the social, economic and environmental impact of the closure of mines, as well as the challenges with interconnected mines, and states:

> "the key problem area is where mines are interconnected, or their safety, health, social or environmental impacts are integrated, which results in a cumulative impact and the socio-economic impacts post mine closure."

The closure of a mine will, therefore, often impact on the remaining mines in that region – that is, environmentally, economically, and socially (Mine Closure Strategy 5). The key challenges include surface and groundwater contamination, among others. The Mine Closure Strategy focuses on regional mine closure rather than on individual mine closure plans, which now have to be submitted with the application for a mining right. It is argued here that the idea or concept of a regional closure plan is laudable. The Mine Closure Strategy aims to re-align the EMPr, social and labour plans, and corporate social investment to prevent overlap and over-spending. However, although interconnectedness and water are mentioned, how mine closure plans will have to address this issue of pumping extraneous water is not explicitly spelt out. Seemingly, future closure plans will need to address water management and water infrastructure, but they do not address the lingering pumping-of-water dilemma. ("Water management" in the Appendix1 of the Mine Closure Strategy refers to "the use of water supply or pump mine water for catalysing" and water infrastructure to "post-mining responsibility for the funding of retained mine water" and "post-mining operation of mine water treatment utilities".)

5 3 Financial regulations

As indicated, neither the draft Strategy, nor the amended EIA Regulations addresses the cumulative impact of pumping of water by different neighbouring mines. As a result, there is still uncertainty with regard to who has the responsibility to pump water and for how long. This uncertainty is doomed to continue owing to the wording of sections 43 of the MPRDA and 24R of NEMA. It seems mines can be held liable in perpetuity for the pumping of water if section 24R is to be applied. The liability in terms of sections 43 and 24R does, however, not exclude liability in terms of section 19 of the NWA and by implication then also section 28 of NEMA. If the mine closure plan includes continued liability in terms of such other legal provisions, the question remains as to who would carry the financial liability? It remains uncertain if existing mine closure plans could be updated to ensure regional mine closure, once the draft Strategy is finalised.

As indicated, the MPRD Bill, 2013 was withdrawn. It contained a clause that the financial provision would be excluded from insolvency. As the MPRDA was not amended and, based on the KOSH cases, it may, therefore, still be possible for directors to hide behind insolvency and not contribute to the pumping of extraneous water. The Department of Forestry, Fisheries and Environment, however, published for comment new regulations relating to financial provisioning for the mitigation and rehabilitation of environmental damage caused by reconnaissance, prospecting, exploration, mining and production operations. (GN 2272 in *GG 47112* of 2022-07-11) These regulations may address some of the challenges mentioned above. The aim of the draft regulations is, among others, to "facilitate environmentally sustainable mining" (draft Regulation 2(e)), which implies, if read with some of the other measures in the regulations, that not only environmental issues but also socio-economic issues need to be addressed in the closure plan (par 3.2.2.2 of Appendix 2 includes "the social context that may influence closure activities and post-mining land use or be influenced by closure activities and post-mining land use"; par 3.5.2 refers to "a description of the sustainable end state, objectives and targets, which objectives and targets must reflect the local environmental and socio-economic context, the regulatory and corporate requirements and stakeholder expectations"; and par 3.5.3 requires "a description and evaluation of alternative closure and post-closure options where these exist, that are practical within the socio-economic context"). In addition, the Minister responsible for mineral resources and the Minister responsible for water should be able to use the financial provisioning to rehabilitate the mine or address the latent environmental risks of the mining, should the authorisation holder default (draft Regulations 2(c)–(d)). Regulation 6 indicates the aims of financial provisioning as follows:

> "The financial provision must guarantee the availability of sufficient funds for–
> (a) progressive rehabilitation;
> (b) decommissioning and closure activities; and

(c) the mitigation and management of latent environmental impacts including the ongoing pumping and treatment of polluted or extraneous water, where relevant; to ensure that–

(i) a reconnaissance, exploration, prospecting, mining or production area can be brought to the approved sustainable end state at the scheduled or unscheduled closure of operations; and

(ii) latent impacts post-closure are mitigated, rehabilitated and managed."

Regulation 6, therefore, clearly states that not only latent environmental impacts should be addressed, but also the pumping and treatment of extraneous water. (The financial plan will have to provide itemised costing, including addressing latent environmental impacts and the pumping and treatment of extraneous water (Regulation 8(1)(f)(i)(cc)).) The financial closure plan should describe, among others, "other mining activities within a 20 km radius of the mining area".

If these regulations had been applicable at the time of the *Ezulwini* case, the obligation to pump would have been clearly indicated, as determined in an environmental risk assessment. (An environmental risk assessment is to be undertaken in terms of Regulation 8(1)(f)(i)(cc) and as set out in Appendix 3. The risk assessment should be described in the financial closure plan as set out in par 3.6 of Appendix 2. Part 2 of Appendix 3 provides for environmental risk assessments in the case of non-scheduled closure.) The Financial Regulations would also have provided for unscheduled closure of operations, which may refer to the partial closure of the mine in the *Ezulwini* case. With the unscheduled closure of mines not being clearly spelled out in the current MPRDA, NEMA and their regulations, the draft regulations further provide for mines that are liquidated or under business rescue and allow the Minister responsible for mineral resources to access the financial provisioning. (The holder of the authorisation is obliged to inform the Minister of a possible liquidation or business rescue in terms of Regulation 16. Also see Regulations 13(4), 14 and 15.) These provisions may address the current lack of regulation and provide clarity on the legal liability described in this note.

6 Concluding remarks

The *Ezulwini* case illustrates the uncertainty as to whether holders of mining authorisations should apply for a closure certificate and an environmental authorisation in the case of the partial closure of a mine. It also highlights the risk involved should one of the mines in a specific area stop its operations and/or withdraw from its pumping responsibilities and/or become insolvent and/or have its directors stage a mass resignation.

The position regarding whether the mine has to apply for an environmental authorisation or an amended WUL remains uncertain as this issue was not addressed by the court. To our mind, as argued under heading 3 above, a mine in a similar position should apply for an environmental authorisation as well as an amended WUL.

The *Ezulwini* case further illustrates the ambiguity of the measures that address the liability for the pumping of extraneous water in the case of interconnected mines before and after closure. The court held that section 43(1) of the MPRDA does indeed provide that the holder of a mining right "remains responsible" for the pumping and treatment of extraneous water until the Minister has issued a closure certificate in terms of the Act. Consequently, the court granted Gold Fields's application for declaratory relief. It seems, therefore, as if it is the court's view that legal liability will stop once a closure certificate is issued. As set out in this note, this is not at all clear in the legislation.

As to which instrument would be a better fit to address the issues of pumping of extraneous water, the EMPr seems to be the appropriate instrument. The draft Financial Regulations, however, also provide for an environmental risk assessment which, in addition to the EMPr and the initial EIA, might provide a better solution to address some of these challenges.

This contribution draws a cautionary conclusion and highlights that legal uncertainty of this nature may be detrimental to the pursuit of the SDGs. In fact, lingering uncertainty may have serious financial, environmental (e.g., water pollution) or social impacts (e.g., food production) if not addressed. This note, however, does not provide a straight-out negative assessment. According to the draft National Mine Closure Strategy, mine closure and rehabilitation should not only focus on the environmental issues, but should also incorporate a socio-economic strategy or plan for the future of the mining area. It may therefore be argued that the Strategy seems to be moving towards the achievement of the SDGs.

Germarié Viljoen
North-West University

John Rantlo
North-West University

Willemien du Plessis
North-West University

THE MANTLE OF THE SHOP STEWARD IS NOT AN EASY ONE TO WEAR

NUMSA obo Motloba v Johnson Control Automotive SA (Pty) Ltd (2017) 38 *ILJ* 1626 (LAC) Revisited

1 Introduction

NUMSA obo Motloba v Johnson Controls Automotive SA (Pty) Ltd (2017) 38 *ILJ* 1626 (LAC) (*Motloba*) raises four discrete, yet interrelated issues that require close examination. The first relates to the constitutional and statutory protection accorded to trade union membership and activities. The second engages the exercise of organisational rights in the workplace. With the demise of the duty to bargain (see e.g., *Ministerial Task Team* "Explanatory Memorandum to the Draft Labour Relations Bill" 1995 *ILJ* 293; Thompson "A Bargaining Hydra Emerges from the Unfair Labour Practice Swamp" 1989 10 *ILJ* 908), created to breathe life into collective bargaining and provide the lifeblood to recognised trade unions in the workplace. The third brings to the surface the recurrent headache for management concerning the dual and contradictory role of the shop stewards on the shop floor. The point of immediate relevance is that, while conducting union activities, a shop steward in theory, at least, operates on equal footing with management. It merits emphasising that the theory becomes murky when the union official is also an employee. (*Re Workers' Compensation Board and Workers' Compensation Board Employees Union* (1990) 15 LAC (4th) 332, 335). Put simply, "the ordinary rules applicable to the normal employer-employee relationship are then somewhat relaxed" (*FAWU v Haverstime Corporation (Pty) Ltd* [2007] BLLR 638 (LC) par 42 (*Haverstime*)). Be that as it may, a shop steward is still an employee of a company with the usual obligation to conform to all workplace rules.

Fourth, and possibly most important, shop stewards' propensity for an "anything goes approach" in their dealing with management. The contentious issue encountered here concerns the tendency of shop stewards to exceed the bounds of acceptable conduct in fulfilling their representational responsibilities. As a result, trade union representatives have been disciplined and in extreme cases dismissed for misconduct. Accordingly, the marginal line separating insubordination and insolence (*CCAWUSA v Wooltru Ltd t/a Woolworths (Randburg*) (1989) 10 *ILJ* 311 (IC) 314H–J (*Wooltru*); *Ngubo v Hermes Laundry Works CC* (1990) 11 *ILJ* 591 (IC); *Sylvania Metals (Pty) Ltd v Mello NO* [2016] ZALAC 52 par 16–17 (*Sylvania Metals*); *Sibanda v Pretorius NO* [2019] ZALCJHB 84 par 30 (*Sibanda*)), the interconnected acts of intimidation and assault (*Walsh v Superintend General: Eastern Cape Department of Health* (2021) 42 *ILJ* 1461 (LAC); *NEHAWU obo Skhosana v Department of Health: Gauteng* [2018] ZALCJHB

201 (*Skhosana*)), disruptive conduct in the course of collective bargaining process (*Adcock Ingram Critical Care v CCMA* (2001) 22 *ILJ* 1799 (LAC) (*Adcock Ingram*); *Mondi Paper Co Ltd v PPWAWU* (1994) 15 *ILJ* 778 (LAC) *(Mondi Paper)*), misconduct at disciplinary or arbitration proceedings (*TAWU obo Meek v Portnet* [1998] 9 BALR 1239 (IMSSA)) as well as the breakdown of the trust relationship and intolerability occasioned by dishonesty (*BIFAWU v Mutual and Federal Insurance Co Ltd* (2006) 27 *ILJ* 600 (LAC) (*BIFAWU*) deserve critical scrutiny.

These four core issues underscore the dual relationship of a shop steward with an employer within the generally adversarial labour-management climate. Having carefully examined the relevant facts and the litigation history, the commentary then deconstructs the critical aspect of *Motloba*. The aim is to get to grips with the dilemma that confronts management decision-makers: how to strike a balance between the right of the shop stewards to exercise their functions as trade union representatives and the right of the employers to discipline shop stewards for acts of misconduct committed in course of his or her union representation duties? Expressed in a slightly different tone, striking a balance between the right of trade representatives to be accorded a wide latitude in the manner they go about carrying out their representation functions, and the concomitant responsibility as shop stewards to scrupulously refrain from abusing their union position.

2 The factual background

In essence, the circumstances leading to the dismissal of the shop steward in *Motloba* demonstrate that the mantle of the shop steward is not an easy one to wear. Motloba had been in the service of the company for almost a decade. In that period, he was a shop steward on an intermittent basis for a period of four years. In the aftermath of a heated exchange with the payroll manager in front of agitated employees concerning the interpretation of the Metal Industry Bargaining Council's collective agreement relating to the calculation of public holiday pay, Motloba was suspended, later charged, and dismissed on account of three disciplinary offences. The first charge focused on the physical and verbal assault of the manager. The second charge concerned serious disrespect, impudence, and/or insolence. The last charge related to threatening and/or intimidating behaviour towards the manager.

The union challenged Motloba's dismissal at the bargaining council. The arbitrator approached the dispute and premised his findings on *Haverstime*. Broadly speaking, the well-established *Haverstime* proposition resonates with what the Donovan Commission understood as the dual role of a shop steward at the workplace to be "more of a lubricant than an irritant" (Donovan Commission para 96). Or, more accurately stated, "an employee, when he approaches or negotiates with a senior official or management, in his capacity as shop steward, does so on virtually an equal level with such senior official or management and the ordinary rules applicable to the normal employer-employee relationship are then somewhat relaxed" (*Haverstime supra* par 65). During his verbal onslaught, Motloba prodded Bezuidenhout in the chest with his finger. While accepting that the manager was

traumatised by the incident, the arbitrator concluded that the probabilities were equipoised. In other words, "the evidence tendered by both parties was credible and reliable and their versions equally probable" (*Motloba supra* par 20). The arbitrator similarly stated:

> "(I)t seems as though the distinguishing factor was Mrs. Bezuidenhout's perception of the situation she had to face. Her perception of what was busy happening appears to have been removed from the actual event as a result of her psychological realm …" (*Motloba supra* par 20)

In sum, the arbitrator was not persuaded that Motloba was guilty of the charge of assault because the employer had failed to prove that the misconducting shop steward acted intentionally and unlawfully. Accordingly, if the employee touched the manager, the mere touching did not amount to an assault.

With regard to the charge of serious disrespect, impudence, and/or insolence, alleged to have been committed by the shop steward against the manager, the arbitrator was of the view that the evidence was unclear. Moreover, the *Haverstime* principle provided a short and direct answer to the preferred charge of serious disrespect, impudence, and/or insolence. While launching into a disruptive verbal outburst directed at the manager, Motloba was acting in a representational capacity. Under those circumstances, Motloba was entitled to wide latitude to criticise management and to do so free from the threat of discipline. It has been said that intemperate language directed against members of management may not amount to insubordination if spoken by a shop steward in the course of performing his/her representational responsibilities (see e.g., *In Re Millenium Construction Contractors, and Construction and General Workers' Union Local 92* (2001) AGAA No 46; 97 LAC (4th) 1 (ACL Sims), 25 May 2001, par 44; *Yellowhead Road & Bridge (Ft George) Ltd and BC Government and Service Employees' Union* [2015] CanLII 28434 (BC LA) 23).

Concerning the charge pertaining to threatening and/or intimidating behaviour, the arbitrator determined that there was no direct evidence to sustain the guilty verdict. There can be no doubt that the manager subjectively felt intimidated by agitated employees and the forward approach of Motloba, however, objectively it could not be said that the latter acted in an intimidating and threatening manner toward Bezuidenhout. In any event, "he was merely performing his duties as a shop steward" (*Motloba supra* par 25), Motloba was entitled to immunity from discipline.

For the above reasons, the arbitrator concluded that the employer had failed to prove, on a balance of probabilities, the charges it levelled against the employee. Therefore, the dismissal of Motloba was procedurally fair but substantively unfair. Considering the critical issue of relief, it was the arbitrator's view that the preferred remedy for unfair dismissal in terms of section 193(1) of the Labour Relations Act 66 of 1995 (LRA) was foreclosed by "the non-reinstatable conditions" in sections 193(2)(*a*)–(*d*) (*Mediterranean Textile Mills (Pty) Ltd v SACTWU* [2012] 2 BLLR 142 (LAC) par 28). According to the arbitrator, reinstatement was impractical given that "there will still be a fair amount of interaction between Mrs Bezuidenhout and Mr Motloba" (*Motloba supra* par 26). The arbitrator then awarded the employee compensation equivalent to 12 months' remuneration.

3 The review proceedings before the LC

Dissatisfied with the arbitrator's decision not to order reinstatement, despite finding that his dismissal was substantively unfair, Motloba filed an application to review and set aside the arbitration award. In turn, the employer launched a cross-review against the arbitrator's conclusion that the dismissal of Motloba was substantively unfair.

The LC decided against Motloba on all points in reversing the arbitrator's award. It held that the arbitrator had committed reviewable irregularity by failing to assess the credibility and reliability of witnesses including the probabilities. On the first charge of physical and verbal assault, the LC concluded that the arbitrator failed to properly apply his mind to the evidence in finding that the probabilities were evenly balanced (*Motloba supra* par 29). The LC held after finding that Bezuidenhout was a credible and reliable witness and her evidence probable, it was not open for the arbitrator to conclude that her "perception of what was busy happening appeared to have been removed from the actual event" (*Motloba supra* par 29).

Two points are apparent from the arbitrator's failure to have regard to the evidence. First, it was obvious that the manager feared for her safety because of Motloba's conduct. The LC also castigated the arbitrator for concluding that the employer failed to establish that there was an intention to assault. In this regard, the arbitrator disregarded the unchallenged evidence of the company's witness to the effect that she had heard Bezuidenhout exclaiming "Excuse me" shortly after witnessing Motloba pointing his finger in Bezuidenhout's direction (*Motloba supra* par 29). It was also clear from Bezuidenhout's evidence that when the irate shop steward had pointed his finger at her, she countered angrily: "Excuse me", as a direct result of the latter's finger having touched her (*Motloba supra* par 29). Second, in finding that there was no evidence of intent to assault, the LC found that the arbitrator gave Motloba the benefit of a defence to which he tendered no evidence (*Motloba supra* par 31). Had the arbitrator undertaken careful and conscientious scrutiny of the evidence in accordance with the mandated review threshold (*Sidumo v Rustenburg Platinum Mines Ltd* (2007) 28 *ILJ* 2405 (CC) par 110; *Head of Department of Education v Mofokeng* (2015) 36 *ILJ* 2802 (LAC) par 30–33. See generally, Myburgh "Determining and Reviewing Sanctions After *Sidumo*" 2010 31 *ILJ* 1 and Myburgh "The LAC's Latest Trilogy of Review Judgments: Is the *Sidumo* Test in Decline?" 2013 34 *ILJ* 1; Murphy "An Appeal for an Appeal" 2013 34 *ILJ* 27; Fergus "The Distinction Between Appeals and Reviews – Defining the Limits of the Labour Court's Powers of Review" 2010 31 *ILJ* 1556; Murphy "The Reasonable Employer's Resolve" 2013 34 *ILJ* 2486; and Murphy "Reviewing an Appeal: A Response to Judge Murphy and the SCA" 2014 35 *ILJ* 47), he would have regard to the evidence showing that immediately after the incident, Bezuidenhout told both her colleagues about the physical contact by Motloba. The arbitrator also ignored the corroborating evidence by both these fellow employees that the shop steward was aggressive and angry as a consequence of the accusation by members of the union that he had acceded to the employer's method of calculating the public holiday payment.

4 In the LAC

Giving the judgment of the LAC, Phatshoane AJA reiterated the principle formulated in the considerable body of authority that a shop steward should fearlessly pursue the interest of his or her constituency and ought to be protected against any form of victimisation for doing so (*Motloba supra* par 48. See also *NUM* v *Black Mountain Mining* [2010] 3 BLLR 281 (LC(par 42; *Adcock Ingram Critical Care supra* par 15; *SACTWU v Ninian & Lester (Pty) Ltd* (1995) 16 *ILJ* 1041 (LAC); *Mondi Paper supra*; *BIFAWU supra* par 19–21). Nevertheless, this was no licence to resort to defiance and needless confrontation. Assaults and threats thereof were not conducive to harmony or productive negotiation. It was improper to hold that when one acts in a representative capacity "anything goes".

Two strands of reasoning can be discerned from Phatshoane AJA's opinion. First, the arbitrator miscomprehended the nature of the enquiry he was enjoined to undertake in holding that the incident was in relation to an issue of relevance to industrial relations (*Motloba supra* par 41). The incident complained of did not arise during the course of the negotiations or within the context of the collective bargaining process (*Motloba supra* par 49). Second, Phatshoane AJA concluded that reliance by the arbitrator on *Harvestime* was plainly wrong and had correctly been found by the LC as amounting to a gross irregularity (*Havestime* supra par 42). In effect, the gross irregularities committed had a distorting effect on the outcome of the arbitration and vitiated the award (*Motloba supra* par 54). In short, the appeal had to fail.

5 Constitutional and statutory safeguards accorded to shop stewards

Section 23(2) of the Constitution of the Republic of South Africa 1996 constitutes the cornerstone of several rights and protections afforded to shop stewards. The elevation of the right to fair labour practices to the status of a fundamental right in the South African Constitution has afforded significantly stronger protection to job security and trade union rights (*NEHAWU v UCT* (2003) 24 *ILJ* 95 (CC) par 40–41). The major objectives of the LRA leave no doubt that the drafters had a discerning grasp of the reality that the protection of trade unionists and their activities extends to action short of dismissal, otherwise, the employer could make life miserable for the trade union member or representative without going as far as dismissing him or her (see e.g., *Kabeni v Cementile Products (Ciskei) (Pty) Ltd* (1987) 8 *ILJ* 442 (IC) and *Simelane v Audell Metal Products (Pty) Ltd* (1987) 8 *ILJ* 438 (IC)). The relevant provisions of the LRA thus prohibit action against employees because they are trade union members by preventing or deterring them from being or seeking to become members or penalising them for doing so (s 5(2)(*a*)). In the same breath, for participating in trade union activities, whether by means "velvet glove of bribery" (a case in point offering of reward to non-strikers: *NUMA obo Members v Elements Six Productions (Pty) Ltd* [2017] ZALCJHB 35); *NUM v Namakwa Sands (A Division of Anglo American Corporation Ltd)* (2008) 29 *ILJ* 698 (LC); *FAWU v Pet Products* [2007] 7 BLLR 781 (LC) [2007] 7 BLLR 781 (LC)) "… or the

mailed fist of coercion" (Bercusson *Current Law Statutes Annotated* vol 2 (1978) cited in Bowers and Honeyball (eds) *Textbook on Labour Law* 4ed (1996) 346).

Leaving aside for the moment against action short of dismissal provided by section 5, there is a robust and explicit statutory employment protection in section 185 of the LRA (Van Niekerk "'In Search of Justification' The Origins of the Statutory Protection of Security of Employment in South Africa" 2004 25 *ILJ* 853). Section 185 of the LRA provides that every employee has the right not to be unfairly dismissed and subjected to unfair labour practices. In its operational context, the right not to be unfairly dismissed serves as a safeguard against employment vulnerability and precariousness (*Sidumo v Rustenburg Mines Ltd* (2007) 28 *ILJ* 2405 (CC) par 74 (*Sidumo*)). At the same time, it infuses the ethos of fairness (*Woolworths (Pty) Ltd v Whitehead* (2000) 21 *ILJ* 571 (LAC) 599H–I; *BMW (SA) (Pty) Ltd v Van der Walt* (2000) 21 *ILJ* 113 (LAC) 117I and 124H; *Sidumo supra* par 63; *NEHAWU supra* par 38–40; *CWIU v Algorax (Pty) Ltd* (2003) 24 *ILJ* 1917 (LAC) par 69; *BMD Knitting Mills Pty) Ltd v SACTWU* (2001) 22 *ILJ* 2264 (LAC) 2269I–2270B)) into the inherently unequal employer-employee relationship (see e.g., *In R*e *Certification of the Constitution of the RSA, 1996* 1996 (4) SA 744 (CC) par 66; *R (on the application of UNISON) v Lord Chancellor* 2017 UKSC 51 par 6. See further Davies and Freedland, *Kahn-Freund's Labour and the Law* 3ed (1983) 18; Wedderburn *The Worker and the Law* (1986) 5).

The keystone of shop stewards' protection against arbitrary or unfair treatment by their employers, and disparate disciplinary treatment lies in the Code of Good Practice, Schedule 8 to the LRA. Item 4(2) fair procedure addresses the tricky question of disciplinary action against shop stewards. It stipulates that

> "Discipline against a trade union representative or an employee who is an office-bearer or official of a trade union should not be instituted without first informing and consulting the trade union."

The effect of Item 4(2) is the imposition of legal restraints on the employer's disciplinary power over trade union representatives. The Donovan Commission summed up the role of a shop steward in elegant terms:

> "the steward plays a vital role in a complex and un-coordinated bargaining situation. It is often wide of the mark to describe [them] as 'trouble-makers'. Trouble is [often] thrust on them. In circumstances of this kind they may be striving to bring some order into a chaotic situation, and management may rely heavily on their efforts to do so .... For the most part the steward is viewed by others, and views himself as an accepted, reasonable and even moderating influence; more of a lubricant than an irritant". (*Royal Commission on Trade Unions and Employers' Association, Report*, London, Her Majesty's Stationery Office, Juin 1968, 346 par 96–110. See also Banks "The Reform of British Industrial Relations: The Donovan Report and the Labour Government's Policy Proposals" (1969) 24 *Industrial Relations* 333).

Sight must therefore never be lost that the special protection accorded to trade union activities should not operate as a cloak or a pretext for conduct that may ordinarily warrant discipline and dismissal. Moreover, a shop steward is an employee in the first instance like any other (*NUMSA v*

Assmang Machadodorp Chrome Works (Pty) Ltd [2018] ZALJHB 93 par 9) and does not enjoy any other special privileges outside the scope of the provisions of section 141 of the LRA, or section 15, which regulates time off for union activities.

6 Organisational rights

In any discussion about trade union representatives, the first port of call is organisational rights. The concept of organisational rights encompasses several rights afforded to a trade union under sections 12 to 16 of the LRA. The LRA grants trade unions organisational rights to equip them to function more effectively and to build support at the workplace. Organisational rights are subject to conditions and threshold requirements in order to ensure the orderly exercise of the rights and that work is not unduly interrupted. The trade union must be registered, it must be sufficiently represented in the workplace, and it must form part of a bargaining council that has jurisdiction over the business of the employer (see generally, *MATUSA v Central Karoo District Municipality* [2019] 2 BLLR 159 (LC)). The LRA in section 213 defines the workplace as a place, or places, where employees of the employer work. It was held in *Chamber of Mines of SA obo Harmony Gold Mining Co v AMCU* ([2014] 3 BLLR 258 (LC) that an employer must first take into consideration the membership across the workplace as well as whether members seeking organisational rights represent a sufficient number of employees in that workplace (see also *NUMSA v Lufil Packaging* (*Isithebe*) 2020 (6) BCLR 725 (CC)).

The LRA makes provision for the right of access to the premises of the employer, the right of trade union membership to be deducted by way of a stop order, and of particular importance the right to elect a shop steward (ss 12, 13, and 14 of the LRA). The representative union's constitution governs the election, nomination, and removal of shop stewards (s 14(3) of the 1995 LRA. See also *Mhlekude v SAA* (2016) 38 *ILJ* 577 (LAC)). More importantly, trade union representatives are accorded space to assist in grievance and disciplinary proceedings, monitoring the employer's compliance with work-related provisions of the LRA and any other relevant legislation (ss 14(4)(*a*) and 14(4)(*b*) of the LRA). It should be noted that the LRA does not place any express limitation on the functions performed by shop stewards (for extended analysis, see Apfel *Trade Union Representatives and the Boundaries of Lawful Trade Union Activities* (LLM Thesis, UJ) 2014 22. Therein lies the minefield on the shop floor.

Section 15 makes provision for the right to leave for an employee who is an office-bearer of a representative trade union or a federation to which the representative trade union is affiliated. A shop steward is permitted to take "reasonable time" off work during working hours to perform functions as a representative and to be trained with regard to any subject relevant to his functions. Section 16 of the LRA makes provision for the disclosure of information, it states that an employer has the duty to disclose all information that is relevant to the trade union representative to allow the trade union to effectively carry out its functions. The organisational rights contained in sections 14, 15, and 16 only apply if a representative trade union enjoys majority representation at the workplace.

At this juncture, it is convenient to consider the freighted issue of majoritarianism. Incidentally, this taps into the talking point of contemporary labour law discourse. The aftermath of Marikana has triggered intense reflection on the trajectory of collective bargaining, the resurgence of adversarialism, and the prevalence of violent strikers. The soul-searching is evident in the pages of law journals (for a sampling of prominent works: Du Toit *et al Labour Relations Law: A Comprehensive Guide* 6ed (2015) 69; Brassey "Labour Law After Marikana: Is Institutionalised Collective Bargaining in SA Wilting? If so, should we be Glad or Sad?" 2013 34 *ILJ* 823; Ngcukaitobi "Strike Law, Structural Violence and Inequality in the Platinum Hills of Marikana" 2013 34 *ILJ* 836; Rycroft "Strikes and the Amendments to the LRA" 2015 36 *ILJ* 1; and Rycroft "The Legal Regulation of Strike Misconduct: The *Kapesi* Decisions" 2013 34 *ILJ* 859; Theron, Godfrey and Fergus "Organisational and Collective Bargaining Rights Through the Lens of Marikana" 2015 36 *ILJ* 849; Fergus "Reflection of the (Dys)Functionality of Strikes to Collective Bargaining: Recent Developments" 2016 37 *ILJ* 1537; Makama and Kubjana "Collective Bargaining Misjudged: The Marikana Massacre" 2021 *Obiter* 39; Manamela and Budeli "Employees' Right to Strike and Violence in South Africa" 2013 *CILSA* 308; Van Eck and Kujinga "The Role of the Labour Court in Collective Bargaining: Altering the Protected Status of Strikes on Grounds of Violence *National Union of Food Beverage Wine Spirits & Allied Workers v Universal Product Network (Pty) Ltd* (2016) 37 ILJ 476 (LC)" 2017 20 *PER/PELJ* 1; Subramanien and Joseph "The Right to Strike Under the Labour Relations Act 66 of 1995 (LRA) and Possible Factors for Consideration that Would Promote the Objectives of the LRA" 2019 22 *PER/ PELJ* 1; Gericke "Revisiting the Liability of Trade Unions and/or Their Members During Strikes: Lessons To Be Learnt From Case Law" 2012 75 *THRHR* 566; Tenza "An Investigation Into the Causes Violent Strikes in South Africa: Some Lessons From Foreign Law and Possible Solutions" 2015 19 *LDD* 211).

Majoritarianism is both a premise of, and a recurrent theme throughout, the LRA (*Kem-Lin Fashions CC v Brunton* (2001) 22 *ILJ* 109 (LAC) par 19; *AMCU v Chamber of Mines* (2016) 37 *ILJ* 1333 (LAC) par 105 (*AMCU I*)). Despite the overall effect of limiting minority unions' access to organisational rights, the apex court has reinforced the majoritarian principle (*AMCU v Chamber of Mines* (2017) 38 *ILJ* 831 (CC) par 76 (*AMCU II*). See also retrenchment). It has been held that section 23(1)(*d*) of the LRA furthers the legitimate governmental purpose of promoting collective bargaining by way of a scheme premised on majoritarianism. The LRA makes being "sufficiently representative" the sentinel for collective bargaining between unions and employers (*National Tertiary Education Union v Tshwane University of Technology* [2017] ZALCJHB 91 par 25). Relevantly, section 18(1) provides that an employer and a registered trade union whose members form most of the employees, may establish a threshold of representativeness in respect of one or more of the organisational rights (see e.g., *IMATU v CCMA* [2017] 6 BLLR 613 (LC); *United Association of SA v BHP Billiton Energy Coal SA Ltd* (2013) 34 *ILJ* 2118 (LC); *POPCRU v Ledwaba* (2014) 35 *ILJ* 1037 (LC); *UASA v Impala Platinum Ltd* (2010) 31 *ILJ* 1702 (LC) (2010); *BHP Billiton Energy Coal SA Ltd v CCMA* [2009] 7

BLLR 643 (LC); *OCGAWU v Volkswagen SA (Pty) Ltd* (2002) 23 *ILJ* 220 (CCMA)).

Sight must never be lost that the LRA cannot be read to condone the effective manipulation of the collective bargaining units to muzzle minority trade unions from participating in collective bargaining on behalf of their members employed by a specific employer (Esitang and Van Eck "Minority Trade Unions and the Amendments to the LRA: Reflections on Thresholds, Democracy and ILO Conventions" 2016 37 *ILJ* 771; Cohen "Limiting Organisational Rights of Minority Unions: *POPCRU v Ledwaba* 2013 11 BLLR 1137 (LC)" 2014 17(5) *PER/PELJ* 2209; Kruger and Tshoose "The Impact of the Labour Relations Act on Minority Trade Unions: A South African Perspective" 2013 16(4) *PER/PELJ* 285; Mischke "Getting a Foot in the Door: Organisational Rights and Collective Bargaining in terms of the LRA" 2004 13(6) *CLL* 51). The point is that the emergence of militant trade unions marked by violent strikes and inter-union rivalry disputes can be traced back to the grievous struggle for acquiring organisational rights (see e.g., *Chamber of Mines of SA acting in its own name & obo Harmony Gold Mining Co Ltd v AMCU* (2014) 35 *ILJ* 3111 (LC) par 46; *AMCU I supra; AMCU II supra*).

7 The dual and contradictory role of a shop steward

A partial explanation for why the mantle of the shop steward is not an easy one to wear is because trouble is inevitably thrust upon the incumbent. The basic issue is: the behavioural patterns in the workplace of such a person are, of necessity, somewhat unique and usually of a high profile. The standard of conduct that an employer is entitled to expect from trade union representatives engaged in the conduct of legitimate union business is different from that expected of employees generally. The paradoxical role of a shop steward is succinctly summarised in the Canadian arbitral jurisprudence:

> "The union official, an employee elected by his or her fellow workers to protect and project their interests, is immediately forced into a dual function in the workplace. The elected union official, a cog in the legal mechanism of labour-management relations, is suddenly, and very often with very little preparation, voted into a position of key responsibility. This person, an employee of a company on the one hand, with the need to conform to all the requirements of the supervised workplace, must, on the other hand, conform to a large extent with the wishes and desires of the employees who have elected him/her and also with the policies, procedures and responsibilities of the union he or she represents." (*Canada Post Corporation v CUPW (Fowler and Robinet Grievances)* [1983] CLAD No 44 par 63–64. See also *Canada Post Corporation v Canadian Postal Workers Union* [2010] CanLII 86721 (CA LA) 18–19)

The extent to which an employer is entitled to use its powers of discipline with respect to shop stewards is deeply embedded in the Canadian arbitral debate (see e.g., *Teck Highland Valley Copper* [2016] CanLII 62416 (BC LA) 34–36 (*Teck Highland Valley Copper*); *Re Alcan Smelters and Chemicals Ltd and Canadian Auto Workers, Local 2301* (1996) 60 LAC (4th) 56, 69 (*The Emergency Health Services* 13). It is said that context is key – when a

shop steward deals with a grievance and raises issues, they are, "always on the border of insult" (*Teck Highland Valley Copper supra* par 26). This proposition is articulated in the following fashion:

> "For the purposes of assessing whether or not conduct is insubordinate the standard of conduct that the company is entitled to expect should be different when applied to the acts of union committee men engaged in the legitimate discharge of their duties. For, as Mr. Nickerson for the union put it, a committeeman is, while attempting to resolve grievances between employees and company personnel, always functioning on the border line of insubordination. His role is to challenge company decisions, to argue out company decisions and, if in the discharge of that role he is to be exposed to the threat of discipline for insubordination, his ability to carry out his role will be substantially compromised. This is not to say that a committeeman has a *carte blanche* to ignore at will management instructions and to instruct others not to carry them out. His immunity, if it may be called that, is limited to acts or omissions committed in the discharge of his functions and to acts or omissions which may reasonably be regarded as a legitimate exercise of that function. To put it succinctly, a committeeman is not entitled to punch a foreman in the nose as one of his means of attempting to bring about a settlement of a grievance" (*Re Firestone Steel Products of Canada and United Automobile Workers, Local 27* (1975) 8 LAC (2d) 164 167–168)

Signposts emerging from the Canadian arbitral case law to be applied in determining whether discipline imposed on a union official is justified may be summarised as follows: was the official acting in the capacity of a union representative at the time of the impugned conduct? Could the conduct be properly characterised as malicious in that statements made were knowingly or recklessly false? Was the impugned conduct intimidating or physically threatening? Did the conduct go too far and exceed what might reasonably be considered a legitimate exercise of a union function? In addition, the two-stage test enunciated in *Sun-Rype Products Ltd v Teamsters, Local 213* ([2010] CarswellBC 2047 (*Sun-Rype*)) requires the Labour Board to first assess whether the employee/trade union representative was performing shop steward duties. If the Board finds this, they move to the second prong of the test and ask whether the shop steward's behaviour in performing this duty was legitimate. In explaining this second prong, the illustration given in *Sun-Rype* is particularly informative: "If in fulfilling one's duties, a union official intimidates, bullies, or harasses other employees in the workplace, that will take those actions outside the bounds of acceptable behaviour of a union official" (*Teck Highland Valley Copper supra* par 22).

The fundamental question in the current case was whether Motloba's behaviour crossed the line of legitimate activity and whether such conduct has negatively affected the interests of the employer to render continued employment relationships intolerable.

8 Perennial issues of misconducting shop stewards

8 1 The marginal line separating insubordination and insolence

The need for a cogent distinction between insubordination and insolence arises from the fact that these two forms of nagging conduct are largely defined with reference to each other, or even in contrast with each other (Grogan *Dismissal* 3ed (2017) 285; Teffo "Insolence and Insubordination: The Courts' Views on Employees Gone Rogue" 2016 26(5) *CLL* 45–50. See also *Waste Management (Pty) Ltd v CCMA* [2016] ZALCPE 23 par 4 (*Enviroserve*); *Sylvania Metals supra* par 7). After all, it has been said that even though an employee can simultaneously be both insolent and insubordinate, he/she can be insolent without necessarily being insubordinate (*Wooltru supra* 315D–E). Insolence is generally equated with conduct, which is offensive, disrespectful, impudent, cheeky, rude, or insulting. Such behaviour might be verbal, in writing, or through demeanour, and customarily has the consequences of demeaning the person it is directed at or his or her authority (*Enviroserve supra* par 14). In addition, it was held in *Sylvania* that insolence can transpose to insubordination where there is an outright challenge of the employer's authority. In order for insolence to warrant dismissal it must be serious and wilful (*Sylvania Metals supra* par 18).

It cannot be emphasised enough that insubordination is a blatant manifestation of conduct incompatible with the expansive duty of mutual trust and confidence. In the words of Lord Nicholls, acting in a manner calculated or likely to destroy mutual trust and confidence upon which the employer-employee relationship is anchored (*Malik v Bank of Credit and Commerce International SA* 1998 AC 20; *Malik and Mahmud v Bank of Credit and Commerce International SA* [1997] UKHL 23. See generally, Brodie "The Heart of the Matter: Mutual Trust and Confidence" 1996 25 *ILJ* (*UK*) 121, "Beyond Exchange: The New Contract of Employment" 1998 27 *ILJ* (*UK*) 79; Brodie "Fair Deal at Work" 1999 *OJLS* 83 and Brodie "Mutual Trust and the Values of the Employment Contract" 2001 30 *ILJ* (*UK*) 84; Brooks "The Good and Considerate Employer: Developments in the Implied Duty of Mutual Trust and Confidence" 2001 *UTLR* 26; Bosch "The Implied Term of Trust and Confidence in South African Labour Law" 2006 27 *ILJ* 28, Cohen "Implying Fairness Into the Employment Contract" 2009 30 *ILJ* 2271 and Bosch "The Relational Contract of Employment" 2012 *Acta Juridica* 94; Louw "'The Common Law … Not What It Used to Be': Revisiting Recognition of a Constitutionally Implied Duty of Fair Dealing in the Common Law of Contract of Employment (Part 1)" 2018 *PER/PELJ* 1–25; Raligilia "A Reflection on the Duty of Mutual Trust and Confidence: Off-Duty Misconduct in the Case of *Biggar v City of Johannesburg* Revisited" 2004 *SAJLR* 71).

Insubordination occurs when an employee acts contrary to his or her duty to be a subordinate in a workplace. It should also be appreciated that there is a difference between insubordination and gross insubordination. Suffice it to state that the run-of-the-mill insubordination is premised on the active

response the employee exhibits against the employer's order. By contrast, gross insubordination involves the wilful and serious refusal by an employee to obey a lawful instruction and a direct challenge to the employer's authority (*SAMWU v Ethekwini Municipality* [2019] 1 BLLR 46 (LAC) par 9; *SAMWU v Ethekwini Municipality* (2017) 38 *ILJ* 158 (LAC) par 9; *Msunduzi Municipality v Hoskins* (2017) 38 *ILJ* 582 (LAC) par 14; *Motor Industry Staff Association v Silverton Spraypainters and Panelbeaters* (2013) 34 *ILJ* 1440 (LAC) par 31). Perhaps a point to be made in this regard is that gross insubordination, unlike the usual insubordination, generally warrants a sanction of dismissal.

In the present case, the shop steward's conduct went too far and exceeded what might reasonably be considered a legitimate exercise of a union function. It will be recalled that Motloba levelled an untruthful accusation against his payroll manager in a physically threatening way in the presence of others. As a result of the shop steward's tirade, the payroll manager was diagnosed as suffering from PTSD (posttraumatic stress disorder) (*Motloba supra* par 35 and 50). Yet, Motloba regarded the whole incident as innocuous – "the proverbial storm in a teacup" (*Motloba supra* par 37.13).

8 2 Intimidation and assault

The place of assault and intimidation in the sphere of employment needs to be seen against the backdrop of criminal law. In order to constitute the offence of assault, it has been held that there are three essential components that must be present in the proven version of events. First, there must be the commission of the prohibited conduct itself. Second, there must be knowledge of wrongfulness (or fault). Finally, the unlawfulness of the conduct. (Snyman *Criminal Law* 6ed (2014) 447). The application of physical force is not an overarching legal requirement for the offence of assault. A slight application of force to the body of the complainant suffices. The principle that assault does not require the actual use of force by the assailant was expounded in the case of *Abrahams v Pick 'n Pay Supermarket (OFS)* (1993) 14 *ILJ* 729 (IC). In that case, a store manager who locked workers in a cold room as a disciplinary measure was held to be guilty of assault, and his dismissal was held to be warranted, even though he had not laid a hand on his victims. In *Adcock Ingram*, a case which concerned unlawful threat of violence, the LAC despite the contrary views from the CCMA commissioner and the LC held that the statement: "You can treat this as a threat – there will be more blood on your hands" amounted to assault or intimidation. The shop steward had made the threat in an atmosphere of total mayhem and his remarks were taken as a grave threat by management who walked out (*Adcock Ingram supra* par 18).

Touching base with *Motloba*, there is no question that the conduct exhibited by the combative shop steward in front of an audience amounted to assault and intimidation. By most accounts, he was aggressive in his tone and disrespectful of both the payroll manager's authority and the company in general. In a threatening tone, Motloba accused Bezuidenhout of using his name to lie to his people (*Motloba supra* par 43). The authors find Tlaletis ADJP's denunciation of the shop steward's behaviour largely accurate. The conduct displayed by the combative shop steward was in truth reminiscent of

the kind of belligerence and militancy that has no place in the contemporary labour relations environment (*Motloba supra* par 43). In this regard, moreover, the impugned conduct occurred outside the course of the collective bargaining process, and the shop steward immunity was otherwise inapplicable (*NUMSA v Hernic Ferrochrome (Pty) Ltd* Case No. NW2126-01). The authorities are adamant that dismissal is the appropriate sanction where employees are guilty of assault and intimidation (*Pailprint (Pty) Ltd v Lyster NO* [2019] 10 BLLR 1139 (LAC); *NUMSA obo Nganezi v Dunlop Mixing and Technical Services (Pty) Ltd* (2019) 40 *ILJ* 1957 (CC)) because "we live in a society wracked by violence. Where an employer seeks to combat that evil, even by harsh measures, this court ought not to be astute to find unfairness" *(Scaw Metals Ltd v Vermeulen* (1993) 14 *ILJ* 672 (LAC) 675. See generally, Smit "How Do You Determine a Fair Sanction? Dismissal As Appropriate Sanction in Cases of Dismissal For (Mis)Conduct" 2011 *De Jure* 49). It has also been explicitly stated that "the problem of intimidation in society, and the need for the law to intervene to prevent this from occurring, is generally acknowledged" (Hoctor, Cowling and Milton *South African Criminal Law and Procedure Volume III: Statutory Offences* 2ed Service Issue 21 (2011) HA 1–5 5, 9).

8 3 Permanent breakdown of the trust relationship and intolerability

On the facts of *Motloba*, the conduct displayed by the errant shop steward led to the breach of the all-encompassing duty of mutual trust and confidence (Bosch "The Implied Term of Trust and Confidence in South African Labour Law" 2006 27 *ILJ* 28; Maloka "Derivative Misconduct and Forms Thereof: *Western Refinery Ltd v Hlebela* (2015) 36 *ILJ* 2280 (LAC)" 2016 19 *PER/PELJ* 13; Tshoose and Letjeku "The Breakdown of Trust Relationship Between Employer and Employee as a Ground For Dismissal: Interpreting the Labour Appeal Court's Decision in *Autozone*" 2020 *SA Merc LJ* 156–174; Raligilia and Bokaba "Breach of the Implied Duty to Preserve Mutual Trust and Confidence: A Case Study of *Moyo v Old Mutual Limited* (22791) [2019]" 2021 42 *Obiter* 714). The LAC accepted that in the circumstances of the case intimidation and assault were serious enough to justify the sanction of dismissal meted out. It is submitted that the conclusion reached by the LAC, to the effect that dismissal was the only appropriate sanction is not only unassailable but is consistent with established authorities (*Skhosana supra* par 57; *Msunduzi supra* par 29; *Malamlela v SALGBC* (2018) 39 *ILJ* 2454 (LAC) par 28). This brings into the equation the pervasive and interrelated issues of the breakdown of the trust relationship and the intolerability of the continued employment relationship (see generally, Okpaluba and Maloka "The Breakdown of the Trust Relationship and Intolerability in the Context of Reinstatement in the Modern Law of Unfair Dismissal 2021 *Spec Juris* 140 and Okpaluba and Maloka "Incompatibility As a Ground For Dismissal in Contemporary South African Law of Unfair Dismissal: A Review of *Zeda Car Leasing* and Other Recent Cases" 2021 *SA Merc LJ* 238; Rycroft "The Intolerable Employment Relationship" 2013 34 *ILJ* 2271–2287; Le Roux "Reinstatement: When Does a Continuing Employment Relationship Become Intolerable" 2008 *Obiter* 69).

In the instant matter, the tell-tale signs of the irredeemable collapse of the trust relationship and intolerability of the continued employment relationship can be seen from the fact Motloba's outburst and aggressive behaviour action resulted in the psychological breakdown of the payroll manager to the extent that she was petrified of people invading her personal space (*Motloba supra* par 51–52). Moreover, the combative trade union representative was unapologetic, there was an irreversible collapse of the trust relationship foreclosing the prospects of continued employment as intolerable. As aptly noted by the LAC,

> "a simple apology may have resolved the issues. Instead, an obstinate trivialization of [the] incident and the denial that the event was inappropriate pervades the record." (*Motloba supra* par 53)

In short, the shop steward's aggressive conduct went beyond the bounds of legitimate union activity as defined in countless cases and based on modern norms of civility and respect in the workplace.

9 Conclusion

The question of whether a shop steward is entitled to immunity from discipline must depend on the facts of each case. The starting point must be that there must be a recognition that once an employee assumes the mantle of shop steward his or her status in the workplace changes substantially. He or she has a dual role. As an employee, he or she must follow the same rules and policies as his or her fellow employees. However, when acting in his or her representational capacity he or she is an integral part of the collective bargaining regime that governs the workplace. The shop steward is then on an equal footing with members of management when carrying out his union duties. He or she must be free to act assertively and without fear of retribution in the members' interests. In doing so, it is unavoidable that he will be required to take a higher profile than his or her fellow workers. Inevitably from time to time he or she will encounter areas of conflict with members of management (see e.g., *Robertson & Caine (Pty) Ltd v CCMA* (2001) 22 *ILJ* 2488 (LC); *FAWU v Mnandi Meat Products & Wholesalers CC* (1995) 16 *ILJ* 151 (IC)).

Regardless of the individual's degree of tact and diplomacy, it comes with the territory that on occasion he or will be bordering the line between vigorously representing his fellow workers and engaging in insubordination towards members of management. Given this difficult role undertaken, the right of a trade union representative to properly carry out his or her duties must be strictly safeguarded except in the most extreme cases. Mere militancy or over-zealousness should not result in the imposition of discipline. A trade union representative must be able to press his or her point of view with as much vigour and emotion as he or she wishes, even though it may turn out in the end that his or her point of view was wrong.

However, the foregoing considerations do not mean that there are no limits to acceptable behaviour on the part of a shop steward. A balance must be struck between the right of a shop steward to be accorded wide latitude in the manner he or she goes about carrying out his or her union duties and his or her concomitant responsibility as a union official to scrupulously refrain

from the abuse of his or her union position to cloak patent insubordination and defiant challenge of management's right to manage the workplace and carry on production without disruption. Given the delicate balancing required between the right of the employer to be able to manage its workplace and to carry on its operation without interruption and the right of the union official to vigorously push the union's point of view in dealings with the employer, it is impossible, and in our view would be risky, to attempt to set out a definitive test in order to determine when a shop steward's conduct ceases to be protected and becomes disciplinable. Each case must be determined on the basis of the total surrounding circumstances.

Granted that aggressive and loud outbursts, even where that include profanity, by itself does not justify the imposition of discipline on a shop steward, it can be seen from *Motloba* that an "anything goes" approach will not be countenanced. In the instant case, the context within which the culminating incident occurred was the deciding factor. The verbal altercation did not emanate during the course of the negotiations or within the context of the collective bargaining process. In summation, a vociferous and fearless shop steward should act in the best interest of his/her constituency and not in a manner that is improper and unbefitting of the office he or she holds.

TC Maloka
University of Limpopo

R Matsheta
University of Limpopo

CERTAINTY ESTABLISHED: MAJORITARIANISM TRUMPS MINORITY, PASSES CONSTITUTIONAL MUSTER, AND ACCORDS WITH INTERNATIONAL STANDARDS

Association of Mineworkers and Construction v Royal Bafokeng Platinum Limited [2020] ZAAC 1

1 Introduction

South African courts have recognised majoritarianism to mean that the will of the majority is favoured over the will of the minority in serving the legislative goals of advancing labour peace, orderly collective bargaining, and the democratisation of the workplace. Yet a fundamental problem arising from majoritarianism is the possibility that the rights of the minority could be violated.

This case involves the retrenchments in South Africa when a firm elects to dismiss part of its labour force for operational reasons. This procedure frequently arises without warning. Generally, it has devastating consequences and leaves certain employees out of work through no fault of their own. That is exactly what happened in *Association of Mineworkers and Construction v Royal Bafokeng Platinum Limited* [2020] ZACC 1.

Against this backdrop, this case note addresses two issues. First, it explores the constitutionality of procedural fairness during retrenchments; second, it assesses the International Labour Organisation's Committee of the Freedom of Association (ILO-CFA) Report on this matter against the decision of the Committee.

2 Synopsis of the case

A platinum mine run by Royal Bafokeng Platinum Limited (respondent) decided to retrench 103 of its employees, some of whom were Association of Mineworkers and Construction Union (AMCU) members. There was no previous consultation with AMCU, which represented approximately 11 percent of the employees, or with the employees themselves. This was because of a retrenchment agreement concluded between the employer and two other unions at the mine: the National Union of Mineworkers (NUM), the majority union with 75 percent membership, and the United Association of South Africa (UASA) another minority union. The agreement was extended to cover all employees and contained a "full and final settlement clause" in

terms of which all the parties to the agreement waived their rights to challenge the lawfulness or fairness of their retrenchment.

The applicants disputed the fairness of the procedure which led to their dismissal. The challenge to the dismissals was adjudicated before the Commission for Conciliation Mediation and Arbitration (CCMA), then before the Labour Court (LC), the Labour Appeal Court (LAC), and finally the Constitutional Court (CC).

3 The legal issues

The issue at the centre of this matter is whether the right to fair labour practices in section 23(1) of the Constitution of the Republic of South Africa, 1996 (the Constitution) requires an employer to consult with an employee who faces dismissal for operational requirements, or with his or her representatives when that employee or his or her representative is not a party to a collective agreement governing consultation (par 28).

4 Ruling of the CCMA

AMCU took the matter to the CCMA. It later transpired that this was an error as the challenge ought to have been mounted by way of application to the Labour Court under section 189A(13) of the Labour Relations Act 66 of 1995 (LRA). The respondent also raised a point *in limine* that there was a collective agreement, which entitled the respondent to lawfully exclude AMCU from the consultation process. In November 2015 the CCMA issued a jurisdictional ruling that it lacked the requisite jurisdiction to conciliate the matter.

5 Judgment of the Labour Court

AMCU then challenged the fairness of their members' dismissals. At the Labour Court, AMCU approached the Constitutional Court to challenge the constitutionality of sections 189(1) (par 48) and 23(1)(*d*) of the LRA where the collective agreement was extended in terms of that section and prohibited minority union members from striking (par 56). AMCU further sought to have the retrenchment agreement (and its extension) set aside based on the principle of legality, which requires the exercise of public power to be rationally linked to the objectives for which the power was granted. The Labour Court found that sections 23(1)(*d*) and 189(1) did not violate any constitutional rights. Nonetheless, the Labour Court did not pronounce the relief sought by AMCU to have the retrenchment agreement set aside. AMCU appealed against the Labour Court's judgment and sought the same relief on appeal.

6 Judgment of the Labour Appeal Court

In the Labour Appeal Court, AMCU requested that sections 189(1) and 23(1)(*d*) of the LRA be constitutionally interpreted to provide that an employer is obliged to consult with minority trade unions (par 2) irrespective

of whether there is a valid collective agreement between an employer and a majority union which states otherwise (par 16). In short, AMCU's challenge was aimed at the application of the principle of majoritarianism to the retrenchment process.

The LAC found no merit in AMCU's contention that the principle of majoritarianism serves no purpose. It was a deliberate policy choice taken by the legislature to facilitate orderly collective bargaining, minimise the proliferation of unions, and democratise the workplace (par 55). A clear policy decision had been taken by the legislature that the will of the minority cannot trump that of the majority (par 39).

The alternative would mean that an employer must negotiate with each union member in the workplace, regardless of how small, and would result in intolerable disruptive and economic harm. The LAC found that the applicant's argument that majoritarianism has no place in the retrenchment process was baseless (par 61). It further, found that procedural fairness was not a rational requirement *per se* (par 62) and that "there was no general duty on a decision-maker to consult interested parties for a decision to be rational under the Rule of Law". Accordingly, the LAC dismissed AMCU's appeal in its entirety. AMCU then appealed to the Constitutional Court still claiming the relief sought in the LAC.

7 The Constitutional Court decision

In the Constitutional Court AMCU contended that by creating an exclusive consultation regime, section 189(1)(*a*) of the LRA infringes the rights of minority unions and non-unionised employees to fair labour practices guaranteed in section 23(1) of the Constitution in that it excludes them from the very process that determines their fate.

Royal Bafokeng relied on the primacy that collective bargaining is afforded in terms of the LRA and accordingly contended that there is no need to interfere with the principle of majoritarianism. This, they argued, is because the retrenchment process is a collective one and the rights in issue are therefore held collectively.

The Constitutional Court found that the constitutional challenge to section 23(1)(*d*) of the LRA should be dismissed because AMCU had failed to show that the section infringed on any of its members' constitutional rights (par 25–27).

Regarding the challenge and the concerns posed in section 189(1) of the LRA, Froneman J, writing for the majority of the Constitutional Court, found that there was no entitlement to individual consultations under section 189 of the LRA (par 39–43). Furthermore, section 23(1) of the Constitution, which provides that every employee has the right to fair labour practices, does not expressly or by implication guarantee a right to be individually consulted in a retrenchment process (par 204). The Constitutional Court also found (par 101) that:

- Section 23(1) of the Constitution provides that everyone has the right to fair labour practices. This provision does not expressly or impliedly guarantee a right to be individually consulted in the retrenchment process;

- One of the objects of the LRA is to give effect to and regulate the fundamental rights conferred by section 23. That is done in relation to unfair dismissals and unfair labour practices in Chapter VIII of the LRA;
- The right not to be unfairly dismissed or subjected to unfair labour practices is given effect in section 185 of the LRA and its content and application are regulated by the further provisions in the Chapter;
- The procedure for dismissals based on operational requirements is exhaustively set out in section 189 of the LRA;
- Our jurisprudence, since the introduction of the LRA, has consistently interpreted section 189 to exclude any requirement of individual or parallel consultation in the retrenchment process outside the confines of the hierarchy section 189(1) itself creates;
- The consultation process that section 189 prescribes is procedurally fair and accords with international standards; and
- Further, regarding compliance, section 189(1) which deals with procedural fairness does not mean that the outcome may not be challenged on the basis of substantive unfairness.

The Constitutional Court accordingly found that a majority-driven collective bargaining process passes constitutional muster in the context of retrenchment and that no right to further individual or dual consultation outside of the hierarchy prescribed by section 189(1) exists. In the circumstances, the Constitutional Court found that a retrenchment agreement could lawfully be extended across the workplace to apply to persons who were not consulted during the consultation process. The Constitutional Court found that the provisions of section 189(1) of the LRA are neither unconstitutional nor irrational, and it accordingly dismissed AMCU's application for leave to appeal.

The judgment of the Constitutional Court can be seen as another victory for the principle of majoritarianism in the South African labour relations system.

8 Analysis of the *Association of Mineworkers and Construction v Royal Bafokeng Platinum Limited* [2020] ZACC 1

In terms of sections 189(1) of the LRA:

> "When an employer contemplates dismissing one or more employees for reasons based on the employer's operational requirements, the employer must consult–
>
> (*a*) any person whom the employer is required to consult in terms of a collective agreement;
>
> (*b*) if there is no collective agreement that requires consultation–
>
> (i) a workplace forum if the employees likely to be affected by the proposed dismissals are employed in a workplace in respect of whichthere is a workplace forum; and
>
> (ii) any registered trade union whose members are likely to be affected by the proposed dismissals;
>
> (*c*) if there is no workplace forum in the workplace in which the employees likely to be affected by the proposed dismissals are employed, any

registered trade union whose members are likely to be affected by the proposed dismissals; or

(*d*) if there is no such trade union, the employees likely to be affected by the proposed dismissals or their representatives nominated for that purpose." (par 95)

Section 189(1) creates a cascading hierarchy of persons that an employer is effectively obliged to consult once it contemplates dismissal for operational requirements. This means that it must first comply with subsection (*a*), and if subsection (*a*) does not apply, then (*b*), and if (*b*) does not apply then (*c*) (par 30).

The concept of "majoritarianism", which is a consistent theme under the LRA (par 115), is entrenched through section 23(1) of the LRA and provides that an employer and a majority union can extend the binding nature of a collective agreement (e.g., a retrenchment agreement) to cover all employees within a bargaining unit, including members of another minority union.

AMCU challenged whether this arrangement complied with the right to fair labour practice under section 23(1) of the Constitution. This case went from the Labour Court to the Labour Appeal Court and then to the Constitutional Court.

It is worth noting that the Constitutional Court's full judgment included four judgments: the majority judgment backed by five judges; a minority opposing judgment supported by four judges; and two separate minority judgments by individual judges wishing to express further reasons for their views. One of the latter judgments supported the conclusion reached by the five judges in the majority judgment, and the other supported the conclusion of the four judges in the main minority judgment. The final count was, therefore, six opposed to five judges – a close outcome. Further, the minority judgment would have found section 189(1) of the LRA to be unconstitutional and invalid for failing to impose a legal duty on an employer to consult with all those affected by retrenchment.

This suggests the interesting possibility that concluding a collective agreement on retrenchment with a majority union, which may be extended to cover non-parties, and prior consultation with a minority union, are not necessarily mutually exclusive. Consultation and collective bargaining serve different purposes and vindicate different rights, and the outcomes of the consultation (even with different groups) can then be considered by parties in concluding a subsequent collective agreement.

Despite the views expressed above, the Constitutional Court's majority judgment did not agree that section 189(1) of the LRA is constitutionally invalid and dismissed the challenge to section 23(1)(*d*) of the LRA, which provides for the extension of collective agreements with a majority union to cover all employees within a bargaining unit. The majority judgment found that the consultation process prescribed under section 189 is procedurally fair and accords with international standards (par 126).

The Constitutional Court noted further that since the introduction of the LRA, our jurisprudence has consistently interpreted section 189 to exclude any requirement of individual or parallel consultation in the retrenchment

process outside the confines of the hierarchy created in section 189(1). The majority judgment commented that dismissal for operational reasons involves complex procedural processes requiring consultation, objective selection criteria, and the payment of severance benefits (par 126). The process involves a shared attempt to arrive at an agreed outcome that considers the interests of both the employer and employees. Because it is not dependent on individual conduct and requires objective selection criteria, it is pre-eminently the type of process where union assistance to employees is invaluable, and it would be futile to provide individual consultation.

The Constitutional Court accordingly found that the priority given to collective bargaining in section 189 is not only rational but sound and fair. Recalling that the outcome, in this case, was so close (a six to five majority), it is worth noting what seems to be a growing trend, both in various amendments to the LRA and in court decisions – an attempt to accommodate minority union representation as well as entrenched principles of majoritarianism. This trend acknowledges the interconnectedness between the right to freedom of association, the right to form and join a union, and the rights of unions to organise and engage in collective bargaining, which may be threatened if workers are not permitted to be represented by the union of their choice and are forced to be represented by a union they have chosen not to join.

As commented in the Constitutional Court's minority judgment, this is exactly what happened here as AMCU members were not permitted to be represented by their union in the consultation process. Instead, they were compelled to accept representation by NUM and UASA after the collective agreement had been extended to cover workers who were not members of those two unions. The Constitutional Court's minority judgment endeavours to show that majoritarianism is, or should be, compatible with the existence of minority unions and allow those unions to organise and represent their members in competition with the majority union.

Although the Constitutional Court's majority judgment confirms that it may not be necessary to consult minority unions under section 189(1), it also states there is nothing to prevent employers from electing to do so. If minority unions have a strong presence, employers may be wise to consider doing so in the interests of workplace stability, even when a collective agreement is subsequently concluded with a majority union and extended to cover all employees.

9 The ILO Committee on Freedom of Association (CFA) Report on this matter and the decision of the Committee

The Association of Mineworkers and Construction Union (AMCU) lodged a complaint against the Government of South Africa. The complainant alleged mass dismissals of its members by a metal-producing company in the context of restructuring. It alleged that sections 23(1) and 189(1) of the LRA, on which the dismissals were based, are contrary to ILO Conventions on freedom of association in that they exclude minority unions from retrenchment consultations and do not allow them to make observations in

the event of an extension of collective bargaining agreements. The complaint is contained in an AMCU communication dated 14 April 2020.

It should be noted that South Africa has ratified the Freedom of Association and Protection of the Right to Organise and the Right to Organise and Collective Bargaining Convention. In its communication dated 14 April 2020, the complainant alleged the illegal dismissal of 103 of its members by the Royal Bafokeng Platinum Limited ("the metal-producing company" or "the company") in 2015 and denounced the lack of consultation with the complainant – a minority union – both during the retrenchment consultations and before the extension of the retrenchment agreement to its members in the application of sections 23(1) and 189(1) of the LRA.

The complainant alleged that, in practice, employees facing mass retrenchments have no right to be represented by minority unions of their choice in circumstances where other unions have concluded a collective agreement with the employer; that any retrenchment agreement reached between the employer and a majority union can be extended to minority union members without any participation from the workers' union of choice; and that the national laws governing the subject are thus not in line with the principles of freedom of association.

The complainant for its part alleged that in practice the application of sections 23(1) and 189(1) of the LRA is contrary to the principles of freedom of association and collective bargaining. It argued that it effectively bans minority unions from representing their members in case of mass retrenchments where other unions have entered into a collective agreement with the employer. Further, compelling workers to be represented by a rival union is also incompatible with freedom of association, particularly in the context of the country where the rivalry between the NUM and the complainant is extreme and has on several occasions led to bloodshed. The complainant, therefore, suggested that the right of all minority unions to participate in retrenchment consultations is fundamental to ensuring a fair and equitable result.

The Committee nevertheless noted that the government argued that section 189 of the LRA was drafted to provide the fairest procedure for dismissals for operational reasons in compliance with international standards; that the hierarchy governing the consultation process realises the purposes of the LRA – i.e., the promotion of orderly collective bargaining – and that the recommendations made by the complainant to allow a multiplicity of minority unions to participate in retrenchment consultations would create disorder in the workplace by undermining the principle of majoritarianism and the requirement to conclude consultations expeditiously (396th "Report of the Committee on Freedom of Association" 343rd Session (2021) par 72).

The Committee noted that, according to the Government, the safeguards provided in the above sections of the LRA sufficiently protect individuals and minority union members in the event of retrenchment even if they are excluded from consultations in that retrenchment is an objective process affecting workers in each group notwithstanding their union affiliation. In this specific case, all employees were equally represented by the recognised

unions (396th "Report of the Committee on Freedom of Association" 343rd Session (2021) par 72).

The Committee further noted that from the information submitted by both the complainant and the government, the substance of the case had been subjected to judicial scrutiny by the Labour Court, the Labour Court of Appeal, and the Constitutional Court, all of which found that sections 23(1) and 189(1) of the LRA were in line with the ILO Freedom of Association and Protection of the Right to Organise Convention 87 of 1948 and its Right to Organise and Collective Bargaining Convention 98 of 1949 as they advance majoritarianism, but also provide for safeguards of the rights of minority unions (396th "Report of the Committee on Freedom of Association" 343rd Session (2021) par 72). The courts held that the legislator had chosen a system where a majority trade union, after concluding a collective agreement with an employer, enjoyed the exclusive right to be consulted during a retrenchment process and that the exclusion of minority unions from retrenchment consultations did not mean that their members were not represented.

In addition, the Committee recognised that the main issue in the case was the extent to which minority unions can engage in negotiations with the employer on retrenchments affecting their members in the context of enterprise restructuring under section 189(1) of the LRA and whether, in the complainant's case, its exclusion from the retrenchment consultations was in line with the principles of freedom of association and collective bargaining (396th "Report of the Committee on Freedom of Association" 343rd Session (2021) par 73).

The Committee also noted that the legislation in the country prescribed a system in which the most representative organisation enjoys privileges as regards collective bargaining rights to facilitate orderly collective bargaining. It noted further that section 189(1) of the LRA creates a hierarchy in the consultation process in the case of mass dismissals, where the employer is first obliged to consult any persons required to be consulted in a valid collective agreement. Only in the absence of a collective agreement should the consultations involve a workplace forum. Further, any registered trade union whose members are likely to be affected by the proposed dismissal of the employees, or with their representatives nominated for that purpose (396th "Report of the Committee on Freedom of Association" 343rd Session (2021) par 73).

Furthermore, the Committee cited in this regard that both systems of collective bargaining with exclusive rights for the most representative trade union, and those where several collective agreements can be concluded by several trade unions within a company, are compatible with the principles of freedom of association (*Compilation of Decisions of the Committee on Freedom of Association* 6ed (2018) par 1351).

The Committee consequently concluded that, as drafted, section 189(1) of the LRA is not *per se* incompatible with freedom of association in that, while giving priority in retrenchment negotiations to trade unions that have concluded a collective agreement with the employer, (396th "Report of the Committee on Freedom of Association" 343rd Session (2021) par 73) it also provides for consultations with other unions or directly with the concerned

workers where no collective agreement providing for consultations has been concluded. However, the Committee took due note of the complainant's concerns that forcing workers to be represented by a rival union is incompatible with freedom of association, particularly in case of retrenchment discussions and given the context of strong union rivalry in the country.

The Committee recalled that minority trade unions that have been denied the right to negotiate collectively should be permitted to perform their activities and at least to speak on behalf of their members and represent them in the case of an individual claim.

The Committee further noted that the complainant also denounced the extension of the retrenchment agreement to its members in that it held the members bound to a collective agreement concluded by the employer with another trade union extinguished their right to challenge the fairness of their retrenchment, and alleged that the complainant was not allowed to submit observations on the subject (396th "Report of the Committee on Freedom of Association" 343rd Session (2021) par 75).

In more general terms, the complainant alleged that the extension of collective agreements permitted by section 23(1) of the LRA does not involve an independent agency; that the extensions permitted between employers and majority unions in a secret process lack transparency and exclude minority unions; and that objective, precise, and pre-established criteria must be set to ensure proper protection of the right to freedom of association.

The Committee noted that section 23(1) of the LRA allows for the extension of collective agreements to employees who are not members of the trade union or trade unions party to the agreement if the employees are identified in the agreement; the agreement expressly binds the employees, and the trade union or those trade unions (party to the agreement) have as their members the majority of employees employed by the employer in the workplace. (396th "Report of the Committee on Freedom of Association" 343rd Session (2021) par 75).

The Committee expressed its understanding that these conditions had been fulfilled in the present case and pointed out that when the extension of an agreement applies to workers who are not members of the signatory unions, is not contrary to the principles of freedom of association in so far as it is the most representative organisation that negotiates on behalf of all workers (396th "Report of the Committee on Freedom of Association" 343rd Session (2021) par 73).

Finally, the Committee noted that the arguments advanced by the complainant ignored the very basis of majority representation in collective bargaining to cover all workers, to avoid differing treatment at a single workplace, and to ensure orderly industrial relations. This aside, the conditions for an extension are set out under Collective Agreements Recommendation 91 of 1951, referred to by the complainant, and apply to extension across an entire sector or territory which is quite different from a determination that a collective agreement concluded with a majority representation in each workplace would cover the entire workforce (396th

"Report of the Committee on Freedom of Association" 343rd Session (2021) par 75).

In line with the above, the Committee considered this case closed and declined to examine it further. The Committee's recommendation was that, in light of its conclusions above, it invited the governing body to consider that this case does not call for further examination (396th "Report of the Committee on Freedom of Association" 343rd Session (2021) par 77).

10 Concluding remarks

South African jurisprudence since the adoption of the LRA has consistently interpreted section 189 of the Act to exclude any requirement of individual parallel consultation in a retrenchment process beyond the limits set by the hierarchy in section 189(1). Consequently, the consultation process in section 189 of the LRA is procedurally fair, accords with international standards, and is not unconstitutional. Further, section 23(1)(*d*) of the LRA which provides for the extension of collective agreements with a majority union to cover all employees within a bargaining unit, is also not unconstitutional. The principle of majoritarianism has been considered by South African courts – including in cases of retrenchment – and has undergone a complete "metamorphosis" in its passage from the Labour Court to the Constitutional Court before being confirmed by the ILO Committee on Freedom of Association Report. Legal certainty has been established.

William Manga Mokofe
Advocate of the High Court of South Africa

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.

—