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SECTION 165 OF THE COMPANIES ACT 71 OF 2008: A COMPARATIVE DISCUSSION OF THE CONCEPTS OF RATIFICATION, ACCESS TO INFORMATION AND ALTERNATIVE REMEDIES*

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SUMMARY

The lack of access to company files, company information and other company documents has historically been an obstacle to applicants attempting to institute derivative proceedings on behalf of a company. The information contained in these documents is critical in order to prove wrongful conduct. Section 165(14) of the Companies Act 71 of 2008 provides that the court is the final authority on whether to grant leave to institute proceedings: ratification is merely a factor for the court to consider. The subsection does away with the common-law rule that illegal acts or frauds on the minority (previously commonly known as the exceptions to the rule in *Foss v Harbottle*) are not ratifiable by the company. The availability of an alternative remedy is an important factor to consider when determining whether the derivative action will be in the best interests of the company, especially if the proposed derivative action may result in lengthy and time-consuming litigation. However, the availability of another remedy should not be a deterrent to applicants who wish to institute derivative proceedings.

1 INTRODUCTION

A lack of access to information has proved to be an obstacle for applicants wishing to institute derivative proceedings in terms of section 165 of the Companies Act 71 of 2008 (the 2008 Act). Information is needed to prove alleged wrongful conduct by wrongdoers. A lack of access to information has the potential to disincentivise derivative proceedings in section 165 of the 2008 Act. This article discusses the effect of ratification or approval of the alleged wrong by the shareholders, as provided for in section 165 of the

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

2008 Act, and whether this provision prevents a person from making a demand or applying for leave in terms of the section. The article also explores whether the alternative remedies contained in Chapter 7 of the 2008 Act act as an inhibiting factor to the institution of derivative proceedings and thereby prevent applicants from instituting successful actions based on section 165 of the 2008 Act.

The United Kingdom (UK) was chosen as comparator because company law in the UK has historically had a heavy influence on South African company law. This article discusses comparable provisions of the law in the UK (more specifically the Companies Act 2006 (the 2006 Act)) with the aim of determining whether the UK law may be useful in providing clarity and guidance on the lacunae or defects in our own arrangement. This article concludes with recommendations in the form of proposed amendments to section 165 of the 2008 Act with the aim of ensuring that South Africa provides a more effective and efficient system to protect applicants who seek to institute derivative proceedings.

2 THE SOUTH AFRICAN APPROACH TO ACCESSING INFORMATION, RATIFICATION AND ALTERNATIVE REMEDIES IN RELATION TO DERIVATIVE PROCEEDINGS IN SECTION 165 OF THE 2008 ACT

2 1 Access to information in derivative proceedings

One of the major obstacles for an aggrieved shareholder is difficulty in accessing the information needed to prepare an application to court for the granting of leave to bring proceedings in the name and on behalf of the company. This obstacle is aggravated if the perpetrators of the conduct complained of are in control and have a monopoly over the relevant information. Section 165(9)(*e*) of the 2008 Act permits an applicant shareholder to inspect the company's books but this is only once leave to bring derivative proceedings has been granted by the court.[1] In order for an applicant to present a convincing application, it is submitted that it is imperative that they have full access to the company records. The right to inspect company records under section 165(9)(*e*) of the 2008 Act is not enough. It would be more prudent and legally sound to allow applicants the right of full access to the books to prepare a detailed and comprehensive application. This would be in line with the requirements of section 165(5)(*b*) of the 2008 Act and in the best interests of the company. However, it may be possible in certain circumstances for the applicant to make an application in terms of the Promotion of Access to Information Act.[2]

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1 Cassim "Shareholder Remedies and Minority Protection" in FHI Cassim, MF Cassim, R Cassim, Jooste, Shev and Yeats *Contemporary Company Law* 2ed (2012) 784–785.

2 2 of 2000. See *Davis v Clutchco (Pty) Ltd* 2004 (1) SA 75 (C).

Section 165(4) of the 2008 Act permits an independent and impartial person or committee to investigate the alleged wrongdoing. The glaring shortcoming of this provision is that the independent or impartial person or committee is not equipped with wide investigative powers. The 2008 Act is silent on the extent of the investigative powers, and furthermore there is the real possibility that the independent and impartial person or committee may be appointed by the wrongdoers themselves, which could result in an inadequate and biased report or investigation into the alleged wrongdoing.[3] Under section 266 of the Companies Act 61 of 1973 (the 1973 Act), a more balanced and impartial approach was adopted: the provisional curator was given extensive investigatory powers by the Minister and had to report directly to the court, which prevented any collusion and possible bias.[4]

However, an applicant shareholder may find relief from the obstacle of lack of access to information and possible bias on the part of the independent and impartial person or committee by filing a complaint with the Companies and Intellectual Property Commission (CIPC). The CIPC is empowered in terms of section 168(1) to conduct an investigation and appoint an inspector or investigator.[5] The inspector or investigator has the power, through the CIPC, to access information relevant to the alleged complaint, summon documents, interview relevant individuals, search premises and to make copies of any documents and even to attach and remove items that are relevant to the investigation.[6] The shareholder who made the complaint to the CIPC has a right to view the report provided by the CIPC.[7] The CIPC then has the right to decide whether to pursue derivative proceedings and if it does, this will relieve the applicant of the burden of costs.[8] However, although the CIPC does play this important role, it is imperative that this does not then place an extra burden on the CIPC to monitor the activities of the directors of the company or have its time consumed by dealing with frivolous complaints.[9]

2 2 Ratification in derivative proceedings

Section 66(1) of the 2008 Act provides that the business and affairs of the company must be managed by the board of directors. The board of directors is vested with the authority to exercise all of the powers and perform any of the functions of the company, except to the extent that the Act or the

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3 Cassim "Cost Order, Obstacles and Barriers to the Derivative Action Under Section 165 of the Companies Act 71 of 2008 (Part 2)" 2014 26 *South African Mercantile Law Journal* 243.

4 S 267 and s 260 of the 1973 Act; Cassim "Cost Order, Obstacles and Barriers to the Derivative Action Under Section 165 of the Companies Act 71 of 2008 (Part 1)" 2014 26 *South African Mercantile Law Journal* 243.

5 S 169(1)(*c*) of the 2008 Act.

6 As set out in Part E of Chapter 7 of the Act; see s 169(3) and 176–179 of the 2008 Act.

7 S 170(2)(*b*) of the 2008 Act.

8 S 165(16) of the 2008 Act; see also s 170(1)(*e*); Cassim 2014 *South African Mercantile Law Journal* 244–245.

9 S 169(1)(*a*) of the 2008 Act, which provides that the Companies Commission may refuse to investigate a complaint if it appears to be frivolous or vexatious; Cassim 2014 *South African Mercantile Law Journal* 245.

company's Memorandum of Incorporation (MOI) provides otherwise.[10] The board of directors now has the ultimate power to manage the affairs of the company. The shareholders of the company can ratify the decisions of the board.[11] This was the position under the common law and section 266 of the 1973 Act. The ratification or approval by the shareholders provided for in section 165(14) of the 2008 Act does not prevent a person from making a demand or from applying for leave. In addition, the ratification or approval does not prejudice the outcome of any application for leave, but the court may take that ratification or approval into account in making any judgment or order.

Cassim opines that the court in exercising its discretion should consider the following factors:[12]

a) whether the votes were made by shareholders who were independent and disinterested;
b) whether the shareholder had access to information so as to make an informed decision; and
c) whether the act in question was one that could be ratified (an illegal act or a fraud on the minority is never ratifiable).

It is submitted that the factors provided by Cassim are useful. However, the fact that the court will be the final arbiter in deciding whether to grant leave, and that ratification is merely a factor for the court to consider, ensures greater accountability and confidence in the proceedings. It is further submitted that the role of the court here also ensures that the process is not influenced or undermined by collusion and bias by members or directors who could previously vote to ratify wrongdoing and therefore effectively bring the derivative proceedings to a standstill.

According to Delport, it is possible to formulate an interpretation that the power to ratify still vests with the shareholders, and that section 165(14) merely indicates the effect (or not) of such a ratification. It is submitted that this may have been a persuasive argument but for the fact that this subsection is also found in section 266 of the 1973 Act, under which the shareholders had the ultimate power.[13]

A flaw in the wording of section 165(14) of the 2008 Act is that it refers to shareholder ratification or approval of "any particular conduct of the company". The basis of derivative proceedings is that the wrongful acts are perpetrated against the company and that the applicant institutes derivative proceedings on behalf of the company. This being the case, any approval by

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10 Delport *Henochsberg on the Companies Act 2008* (2018) 596; Cassim "When Companies Are Harmed by Their Own Directors: The Defects in the Statutory Derivative Action and the Courts" (Part 2) 2013 25 *South African Mercantile Law Journal* 318; "When Companies Are Harmed by Their Own Directors: The Defects in The Statutory Derivative Action and the Cures" (Part 1) 2013 25 *South African Mercantile Law Journal* 168–183.

11 S 165(14) of the 2008 Act.

12 Cassim (Part 1) 2013 *South African Mercantile Law Journal* 170 and (Part 2) 2013 *South African Mercantile Law Journal* 318; Cassim in FHI Cassim *et al Contemporary Company Law* 795.

13 Delport *Henochsberg on the Companies Act 2008* 596.

the shareholders must relate to wrongful actions of the perpetrator and not the company's conduct.[14] Furthermore, it is submitted that the Act does not take into consideration a situation where the wrongdoers are the shareholders. Practically, the provisions could result in the wrongdoers ratifying their own wrongful conduct.

The power given to the court to ratify or grant approval is a welcome addition to the 2008 Act as it prevents decisions being influenced by majority rule and allows for unbiased judicial discretion in the dismissal or continuance of the action.[15] However, a court may still be left in the unenviable situation of trying to decide which wrongs are ratifiable and which are not.

2 3 Alternative remedies to derivative proceedings

Chapter 7 of the 2008 Act contains the remedies and enforcement provisions. Part A commences with general principles that are applicable to remedies and enforcement. An alternative method for addressing complaints or preserving rights is set out in section 156 of the 2008 Act. Part C of Chapter 7 deals specifically with alternative dispute resolution (ADR). The 2008 Act also provides for a Companies Tribunal to deal specifically with company law matters.[16] The Companies Tribunal comprises a chairperson, and no more than 10 members, appointed by the Minister. Part F of Chapter 7 sets out the procedures for dispute resolution through the Companies Tribunal.[17]

The 2008 Act also provides for other forms of dispute resolution – namely High Court proceedings, complaints to the Takeover Regulation Panel[18] and, in terms of section 185 of the Act, to the CIPC.[19]

Section 158 of the 2008 Act provides that the remedies in the Act must be used to promote the purpose of the Act. Section 158 states:

> "When determining a matter brought before it in terms of this Act, or making an order contemplated in this Act–
> a) a court must develop the common law as necessary to improve the realization and enjoyment of rights established by this Act; and
> b) the Commission, the Panel, the Companies Tribunal or a court–
> (i) must promote the spirit, purpose and objects of this Act; and
> (ii) if any provision of this Act, or other document in terms of this Act, read in its context, can be reasonably construed to have more than one meaning, must prefer the meaning that best promotes the spirit and purpose of this Act, and will best improve the realization and enjoyment of rights."

A key consideration in the determination of whether a proposed derivative

14 Cassim (Part 2) 2013 *South African Mercantile Law Journal* 320–321.
15 Cassim (Part 2) 2013 *South African Mercantile Law Journal* 318.
16 S 193 of the 2008 Act, which is part of Chapter 8, Part B.
17 S 193(4) of the 2008 Act.
18 S 156(*d*) of the 2008 Act; see also s 187(2) of the 2008 Act.
19 See ss 168–175 and ss 117–120 of the 2008 Act.

action is in the best interests of the company is the availability of an alternative remedy. Cassim opines that the court should refuse to grant leave to institute derivative proceedings if there are alternative measures to address the grievance of an applicant and if these would produce substantially the same result.[20] According to Cassim, this route would prevent the company from entering into litigation proceedings.[21] The availability of internal remedies such as those listed in sections 20(4) and 163 of the 2008 Act (provided the circumstances do not compel the company to litigate against its wishes) would be an important consideration to determine whether it is in the best interests of the company to grant leave to an applicant in terms of section 165 of the 2008 Act.

In *Mbethe v United Manganese of Kalahari (Pty) Ltd*,[22] the court stated that, in addition, section 165(5)(*b*)(iii) of the 2008 Act requires that it be "[i]n the best interests of the company that the applicant be granted leave to commence the proposed proceedings". The court stated that if there were alternative means to obtain the same relief that did not involve the company being compelled to litigate against its wishes, this would be an important consideration in determining whether to grant leave to an applicant.[23] The provisions of sections 20(4) and 163 of the 2008 Act provide an alternative avenue for the relief sought.[24] It is respectfully submitted that if the alternative proposed remedies are not useful or do not provide adequate redress, the applicant should not be prevented from pursuing the derivative action.

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20 Cassim in FHI Cassim *et al Contemporary Company Law* 802.

21 *Ibid*.

22 2017 (6) SA 409 (SCA).

23 *Mbethe v United Manganese of Kalahari supra* 33; *Swansson v Pratt* [2002] NSWSC 583 (3 July 2002) 60.

24 *Mbethe v United Manganese of Kalahari supra* 33–34.
S 163(1) of the 2008 Act provides:
"(1) A shareholder or a director of a company may apply to a court for relief if–
(a) any act or omission of the company, or a related person, has had a result that is oppressive or unfairly prejudicial to, or that unfairly disregards the interests of, the applicant;
(b) the business of the company, or a related person, is being or has been carried on or conducted in a manner that is oppressive or unfairly prejudicial to, or that unfairly disregards the interests of, the applicant; or
(c) the powers of a director or prescribed officer of the company, or a person related to the company, are being or have been exercised in a manner that is oppressive or unfairly prejudicial to, or that unfairly disregards the interests of, the applicant."
In terms of s 163(2) of the Act, the court is entitled to make any interim or final order it considers fit, including an order restraining the conduct in question.
S 20(4) of the Act provides:
"One or more shareholders, directors or prescribed officers of a company, or a trade union representing employees of the company, may apply to the High Court for an appropriate order to restrain the company from doing anything inconsistent with this Act."

3 THE UK APPROACH TO ACCESSING INFORMATION, RATIFICATION AND ALTERNATIVE REMEDIES IN RELATION TO DERIVATIVE PROCEEDINGS

3 1 Access to information in derivative proceedings

Limited access to information within the structures of the company makes it difficult for applicant shareholders in derivative proceedings to provide evidence, documents and information to establish either a *prima facie* case or the alleged wrongful conduct of directors. In the UK, section 261(3) of the 2006 Act provides that the court may require the company to provide the evidence if the applicant succeeds in establishing a *prima facie* case for the granting of permission. It is submitted that the inclusion of this provision does not extend far enough to assist applicants in gaining access to important and relevant information as it pertains to the derivative claim.[25]

3 2 Ratification in derivative proceedings

Ratification continues to be an important factor under the statutory derivative procedure.[26] Section 239(7) of the 2006 Act retains the common-law rules on acts that are not ratifiable by the company, such as illegal acts or fraud on the minority – previously commonly known as the exceptions to the rule in *Foss v Harbottle*.[27] Section 261(3) and (4) of the 2006 Act provides that permission to continue derivative proceedings will be refused if the act or omission has in fact been ratified or authorised by the company. The practical effect of these provisions is that ratification will prevent the derivative claim from proceeding any further.

In instances where no ratification or authorisation has taken place, the court is still required to consider whether to grant leave for the derivative proceedings based on the act or omission.[28] It is submitted that this approach is problematic because it leaves the courts to grapple with the confusion and the predicament that existed in the common law in determining which wrongs are ratifiable and which are unratifiable.[29] This could lead to a situation where a significant amount of time in leave hearings is devoted to whether or not certain wrongs are ratifiable.[30]

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25 S 261(3) provides that a court:
(a) may give directions as to the evidence to be provided by the company, and
(b) may adjourn the proceedings to enable the evidence to be obtained.

26 See Fridman "Ratification of Directors' Breaches" 1992 10 *Company and Securities Law Journal* 252 in relation to how ratification affected derivative actions at common law. His view was that "the mere possibility of ratification was sufficient to deprive a shareholder of the ability to bring a derivative action."

27 Cassim (Part 2) 2013 *South African Mercantile Law Journal* 320.

28 *Ibid*; *Franbar Holdings Ltd v Patel* [2008] EWHC 1534 (Ch).

29 Confirmed in *Franbar Holdings Ltd v Patel supra.*

30 Boyle "The New Derivative Action' 1997 18 *Company Lawyer* 258; see Poole and Roberts "Shareholder Remedies: Corporate Wrongs and the Derivative Action" 1999 *Journal of*

The applicant shareholder would still be prevented from instituting a derivative claim in instances where there has been no formal ratification if the act or omission complained of was capable of being ratified or authorised by the majority of shareholders.[31] In *Singh v Singh*,[32] the court refused to grant the applicant permission to continue a derivative action because he could only receive a remedy for the wrong if he brought a personal action for an unfairly prejudicial act, as the alleged wrong of excessive remuneration had already been ratified by the company. This prevented the possibility of the applicant pursuing a derivative action.[33]

The directors of the company in certain instances may be required to convene a meeting to assess whether the independent shareholders would ratify or approve the act or omission.[34] There has been criticism that convening such a meeting could lead to extensive and prolonged consideration of detailed factors. However, it is submitted that if a time limit were imposed upon such a meeting, this would prevent prolonged meetings and prevent the detailed analysis of irrelevant factors.[35]

The 2006 Act does provide for a significant change to ratification. Section 239 of the 2006 Act now provides that the votes of wrongdoing directors and connected shareholders are to be disregarded when ratifying allegedly wrongful conduct. This addition to the section is important as it creates more confidence in the proceedings by preventing wrongdoers from voting and ratifying wrongful actions in which they participated, as their decision would be tainted by bias and impropriety.[36] It is submitted that the approach adopted in the 2008 Act is a far better one.[37] Section 165(14) provides for shareholder ratification or approval of "any particular conduct of the company". The approval by the shareholders must relate to wrongful actions of the perpetrator and not the company's conduct.[38] The ratification or approval by the shareholders provided for in the subsection does not prevent a person from making a demand or from applying for leave and is not an obstacle to a derivative action. In addition, the ratification or approval does not prejudice the outcome of any application for leave, but the court may take that ratification or approval into account in making any judgment or order. The section also provides the court with the power to ratify or grant

Business Law 109; Keay "Assessing and Rethinking the Statutory Scheme for Derivative Actions Under the Companies Act 2006" 2016 16 *Journal of Corporate Law Studies* 19.

31 Joffe, Drake, Richardson, Collingwood and Lightman *Minority Shareholders: Law, Practice & Procedure* 3ed (2008) 6; see also *Edwards v Halliwell* [1950] 2 All ER 1064; *Burland v Earle* [1902] AC 83 93; Sykes "The Continuing Paradox: A Critique of Minority Shareholder and Derivative Claims Under the Companies Act 2006" 2010 2 *Civil Justice Quarterly* 221.

32 [2014] EWCA Civ. 103.

33 See Akinyera *A Comparison of the UK and US Legal Approaches to Derivative Action* (LLM, University of West London) 2016 37.

34 See generally Sykes 2010 *Civil Justice Quarterly* 221.

35 Ramsay and Saunders "Litigation by Shareholders and Directors: An Empirical Study of the Statutory Derivative Action" 2006 6 *Journal of Corporate Law Studies* 397, 427, 442–433; Sykes 2010 *Civil Justice Quarterly* 221.

36 Tang "Shareholder Remedies: Demise of the Derivative Claim?" 2015 1 *UCL Journal of Law and Jurisprudence* 198.

37 Cassim (Part 2) 2013 *South African Mercantile Law Journal* 318–320.

38 Cassim (Part 2) 2013 *South African Mercantile Law Journal* 320–321.

approval of the ratification to prevent any biased decisions by the shareholders.[39]

3 3 Alternative remedies to derivative proceedings

The consideration as to whether there is an alternative remedy available was an important consideration under the common law.[40] The common law was broad and allowed the court to consider all available remedies including those remedies that could be used by the company to seek redress.[41] The 2006 Act provides that the court must also consider whether there is an alternative remedy or cause of action that the applicant could pursue instead of a derivative claim.[42]

Historically, section 495 of the Companies Act 1985 was the favoured remedy for aggrieved shareholders as opposed to the common-law derivative action.[43] There is the possibility that aggrieved shareholders may continue to use a personal remedy that is now found in section 994 of the 2006 Act rather than the statutory procedure. The courts perhaps will now direct all shareholders who complain of a breach by directors of their fiduciary duties or where action is pursued on behalf of the company to bring their claims under section 994 rather than use the statutory derivative action under section 263. There is also the possibility that the courts will guard against the abuse of the statutory derivative action and instead encourage applicants to institute claims under section 994. In *Mumbray v Lapper*,[44] the applicant shareholder was directly involved in the wrongdoing and the court refused the applicant permission to pursue the derivative action and preferred winding-up on just and equitable grounds[45] or a remedy under section 459 in the 1985 Act. According to Keay, the courts are more likely to prefer alternative remedies where the applicant acts without good faith.[46]

In *Jafari-Fini v Skillglass Ltd*, [47] the court refused permission for a derivative action because the applicant shareholder had a personal action arising out of the same facts as the derivative claim. If the shareholder succeeded in the personal claim, the result would be that the shareholder would be able to regain control of the company and then cause the company

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39 Cassim (Part 2) 2013 *South African Mercantile Law Journal* 318.

40 *Konamaneni v Rolls-Royce Industrial Power (India) Ltd* [2004] EWHC 2071 (Ch); [2005] BCC 216 [2002] 1 WLR 1269 29; Keay and Loughrey "Something Old, Something New, Something Borrowed: An Analysis of the New Derivative Action Under the Companies Act 2006" 2008 124 *Law Quarterly Review* 495.

41 *Barret v Duckett* [1995] BCC 362 [1995] BCC [372]; Keay and Loughrey 2008 *Law Quarterly Review* 495.

42 S 263(3)(*f*) of the 2006 Act.

43 Li *A Comparative Study of Shareholders' Derivative Action* (2007) 35; Boyle *Minority Shareholders' Remedies* (2002) 94.

44 [2005] EWHC 1152 (Ch); [2005] BCC 990.

45 S 122(1)(*g*) of the Insolvency Act 1986.

46 *Barret v Duckett supra*; *Re Portfolios of Distinction Ltd* [2006] EWHC 782 (Ch); [2006] 2 BCLC 261; Keay and Loughrey 2008 *Law Quarterly Review* 495-496.

47 [2005] EWCA Civ 356; [2005] BCC 842.

to institute derivative proceedings.[48] The court noted that if the applicant's personal claim ceased to exist, that would also have terminated the company's right to bring a derivative claim.[49]

In *Airey v Cordell*,[50] the court provided a broad interpretation of an alternative remedy. The court concluded that an alternative remedy included a settlement that also protected the applicant shareholders' interests. The court reached this conclusion based on the fact that the company was a viable concern and that the interests of the company were vested in the interests of the conflicting shareholders. Furthermore, the applicant shareholder desired to remain in the company and therefore it was in his interest that the company be preserved and protected.[51]

In *Hook v Sumner*,[52] the court held that a decision by the applicant to pursue a personal action does not act as a bar to instituting a derivative claim. A member may want to remain a shareholder of the company rather than seek a remedy under the unfair prejudice section of the 2006 Act, which could result in the applicant's share being bought out and the applicant could thereby be forced to exit the company.[53]

In instances where the board of directors can demonstrate that the alleged wrong can be remedied by a personal action brought by the applicant against the wrongdoer, the court can refuse to grant permission.[54] This may occur in cases where a personal action is more appropriate than a derivative action.[55]

It is important to note that the existence of an alternative remedy, such as a personal action by the applicants, will not inevitably rule out the possibility of a derivative action in instances where the claim may be pursued both derivatively and personally.[56] This was evident in *Cullen Investment Ltd v Brown*,[57] where the applicant shareholder initially instituted a personal action against the director for breach of duty when the director deprived the company of an investment opportunity and took the opportunity for his own interest.[58] The director objected to the personal action, claiming the duty was owed to the company and not to the applicant. The applicant then initiated

48 *Jafari-Fini v Skillglass Ltd supra*; [2005] BCC 842 47 and 52.

49 *Jafari-Fini v Skillglass Ltd supra*; Keay and Loughrey 2008 *Law Quarterly Review* 484.

50 [2006] EWHC 2728 (Ch) BusLR 391.

51 *Airey v Cordell supra* 48 and 84; Keay and Loughrey 2008 *Law Quarterly Review* 497.

52 [2015] EWHC 3820 (Ch).

53 See *Clarke v Cutland* [2003] EWCA Civ 810, [2004] 1 WLR 783; *Gamlestaden FastigheterAB v Baltic Partners Ltd* [2007] UKPC 26, [2007] Bus LR 1521; *Montgold Capital LLP v Agnieszka Ilska Ilska* [2018] EWHC 2982 (Ch) 40.

54 Ss 263(3)(*f*) and 268(2)(*f*) of the 2006 Act.

55 *Mission Capital Plc. v Sinclair* (2008) EWHC 1339 (Ch); *Singh v Singh supra*; Akinyera *A Comparison of the UK and US Legal Approaches to Derivative Action* 37.

56 *Barrett v Duckett* [1995] 1 BCLC 243; *Mumbray v Lapper supra*; Akinyera *A Comparison of the UK and US Legal Approaches to Derivative Action* 38.

57 [2015] EWHC 473.

58 *Kiani v Cooper* [2010] EWHC 577 (Ch); [2010] BCC 463; *Ritchie v Union of Construction, Allied Trades and Technicians* [2011] EWHC 3613 (Ch); Keay 2016 *Journal of Corporate Law Studies* 31.

derivative proceedings. The court granted permission.[59] If the court in this case had refused permission to grant a derivative action, then the company would not have been able to recover any damages and there would have been no repercussions for the perpetrator's wrongful actions. Akinyere opines that this illustrates that the court may be willing to grant permission for derivative proceedings where there is the possibility that the company will benefit from the derivative action despite the availability of a personal action.[60]

In the UK, the court is required to consider alternative remedies, but the existence of an alternative remedy does not prevent the institution of derivative proceedings.[61] The alternative remedy, however, must be based on the same cause of action that gave rise to the derivative claim.[62] The courts in the UK must, in terms of section 263(*f*) of the 2006 Act, in permission hearings, consider whether the action that is the subject of the derivative claim could be pursued by the shareholder in his or her own right. This has often led courts to consider whether a shareholder could present a petition under section 994 of the Act based on unfair prejudice and, as a result, this has deprived the applicant of instituting a derivative claim.[63]

According to Cassim, it often occurs that both a derivative action and an unfairly prejudicial petition are founded on breaches of directors' duties.[64] The UK legislation may limit and exclude the availability of the derivative action in these situations. Section 165 does not limit the availability of derivative actions in this manner and the Act provides for a wide range of remedies. In *Mbethe*,[65] the court stated that, in addition, section 165(5)(*b*)(iii) of the Act requires that it be "[i]n the best interests of the company that the applicant be granted leave to commence the proposed proceedings". If there are alternative means to obtain the same relief that do not involve the company being compelled to litigate against its wishes, this would be an important consideration in determining whether to grant leave to an applicant.[66] The alternative remedies are available under the provisions of sections 20(4), 163 and section 185 of the Act.[67]

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59 *Cullen Investment Ltd v Brown supra* 473.

60 Akinyera *A Comparison of the UK and US Legal Approaches to Derivative Action* 38; *Barrett v Duckett supra*; *Mumbray v Lapper supra*; *Parry v Bartlett* (2011) EWHC 3146; [2012] EWHC 2363 (Ch) LTL 28/9/2012.

61 *Lesini v Westrip Holdings Ltd* [2009] EWHC 2526; Cassim "Judicial Discretion in Derivative Actions Under the Companies Act 2008" 2013 4 *South African Law Journal* 805.

62 *Franbar Holdings Ltd v Patel supra*; Cassim 2013 *SALJ* 805.

63 Keay 2016 *Journal of Corporate Law Studies* 39.

64 Cassim 2013 *SALJ* 805.

65 *Supra.*

66 *Swansson v Pratt supra* 60.

67 *Mbethe v United Manganese of Kalahari supra* 33–34.
Section 163(1) of the Act provides:
"(1) A shareholder or a director of a company may apply to a court for relief if–
(a) any act or omission of the company, or a related person, has had a result that is oppressive or unfairly prejudicial to, or that unfairly disregards the interests of, the applicant;
(b) the business of the company, or a related person, is being or has been carried on or conducted in a manner that is oppressive or unfairly prejudicial to, or that unfairly disregards the interests of, the applicant; or

4 CONCLUSION AND RECOMMENDATIONS

It is submitted that free and unhindered access to information by the applicant shareholder at the outset of the derivative proceedings is vital to enable the applicant adequately to prepare a demand to institute derivative proceedings. It is submitted that a lack of access to information and documents such as receipts, invoices, financial records, minutes of meetings and contractual papers is a major obstacle to an aggrieved applicant who wishes to prepare an application to court for the granting of leave to institute such proceedings and may prove to be detrimental to having their demand granted by the court. This situation is further exacerbated if the perpetrators of the wrongful conduct are in control of the required information. Section 165(9)(*e*) of the 2008 Act permits an applicant shareholder to inspect the company's books but this, it is submitted, is insufficient as this is permitted only once leave for the derivative proceedings is granted by the court.[68] Applicants may require access to information and company records at an earlier stage, such as when drafting the demand. Information is needed at an earlier stage to satisfy the court of the veracity of the alleged conduct and is needed by the applicant to determine whether the alleged wrongful conduct is worth pursuing through a derivative action, especially because the applicant runs the risk of having to use their own financial resources to institute the derivative action. It is submitted that early access to company information will assist an applicant in determining whether it is worthwhile expending their own financial resources and potentially being personally liable for any adverse costs order in an unsuccessful derivative claim. Although it is possible for applicants to make an application in terms of the Promotion of Access to Information Act[69] to gain vital information for the drafting of the demand in the proposed derivative action, it would be in line with the objectives of the 2008 Act of transparency and accountability to permit applicants the right of full access to all relevant information in order to prepare a detailed and comprehensive application.

In the UK, section 261(3) of the 2006 Act provides that the court may require that evidence be provided by the company if the applicant succeeds in establishing a *prima facie* case for the granting of permission.[70] However, it is submitted that this provision, like section 165(9)(*e*) in the 2008 Act, is insufficient as it provides for the right to access information only after the

(c) the powers of a director or prescribed officer of the company, or a person related to the company, are being or have been exercised in a manner that is oppressive or unfairly prejudicial to, or that unfairly disregards the interests of, the applicant."

In terms of s 163(2) of the Act, the court is entitled to make any interim or final order it considers fit, including an order restraining the conduct in question.

Section 20(4) of the Act provides:

"One or more shareholders, directors or prescribed officers of a company, or a trade union representing employees of the company, may apply to the High Court for an appropriate order to restrain the company from doing anything inconsistent with this Act."

68 Cassim 2013 *SALJ* 784.

69 2 of 2000.

70 S 261(3) of the 2006 Act provides that a court:

(a) may give directions as to the evidence to be provided by the company, and

(b) may adjourn the proceedings to enable the evidence to be obtained.

initial stage of the proceedings. Information is needed at the outset of the proceedings and section 165 needs to be amended to provide applicants with such a right.

It is therefore submitted that section 165(2) in the 2008 Act should be amended further to read as follows:

> "(2) A person must serve a demand upon a company to commence or continue legal proceedings, or take related steps, to protect the legal interests of the company if the person–
>
> (*a*) is a shareholder, former shareholder, or a person entitled to be registered as a shareholder, of the company or of a related company;
>
> (*b*) is a director or prescribed officer of the company or of a related company;
>
> (*c*) is a registered trade union that represents employees of the company, or another representative of employees of the company; or
>
> (*d*) has been granted leave of the court to do so, which may be granted only if the court is satisfied that it is necessary or expedient to do so to protect a legal right of that other person.
>
> (2A) The demand contemplated in subsection (2) should set out the following–
>
> (*a*) who the alleged wrongdoers are;
>
> (*b*) the facts that gave rise to the wrongdoing;
>
> (*c*) the potential harm that the company could suffer if the demand is not granted; and
>
> (*d*) the potential costs in the derivative litigation proceedings.
>
> (2B) The court in contemplation of subsection (2) may make an order requiring the company or the directors to provide information or assistance in relation to the proceedings or in the drafting of the demand as contemplated in subsection (2A) and may adjourn the proceedings to enable the evidence to be obtained."

In section 266 of the 1973 Act, the statutory derivative action was not limited to so-called "unratifiable wrongs"[71] and could be used even if the wrong complained of was capable of ratification or condonation by the company. In terms of the section, a member was able to initiate proceedings, notwithstanding that the company had in any way ratified or condoned any wrong, breach of trust or breach of faith of any act or omission committed by a director or officer of the company. The remedy in section 266 was limited, however, in that it could only be used where the company suffered a loss as a result of any wrong, breach of trust or breach of faith committed by a director or officer.[72] In the UK, it would not be possible to pursue a derivative claim if the cause of action arose from an act or omission that had been ratified or authorised by the company.[73] Section 263(2)(*c*) of the 2006 Act provides that the court is obliged to refuse permission to grant a derivative action if the cause of action has been ratified by the company. The UK Act, in section 239(7), retains the common-law rules that illegal acts or a fraud on the minority (previously commonly known as the exceptions to the rule in

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71 S 266(1) of the 1973 Act; Blackman "Majority Rule and the New Statutory Derivative Action" 1976 39 *Tydskrif vir Hedensdaagse Romeins-Hollandse Reg* 27.

72 S 266(1) of the 1973 Act.

73 S 263(2)(c) of the 2006 Act.

Foss v Harbottle) are not ratifiable by the company.[74] Even in instances where no ratification or authorisation has taken place, the court is still required to consider whether to grant leave for the derivative proceedings based on the act or omission.[75] This approach is problematic because it still leaves the court with the unenviable burden that existed in the common law of determining which wrongs are ratifiable and which are unratifiable.[76] This may lead to a large proportion of time in the early stages of the proceedings being devoted to determining whether or not certain wrongs are ratifiable.[77]

A commendable inclusion under section 239 of the UK Act is that it prevents the votes of wrongdoing directors and connected members (shareholders) from being recognised in any vote to ratify the wrongful conduct. This provision is important as it prevents wrongdoers from tainting and undermining the voting process by attempting to ratify their own wrongdoing. [78] By excluding the wrongdoing directors and connected shareholders, the Act restores a degree of impartiality and confidence in the ratification process. This addition to the section is important as it creates greater confidence in the proceedings by preventing wrongdoers from voting and ratifying their wrongful actions, as their decisions will clearly be tainted by bias and impropriety.

In the author's view, the approach to the concept of ratification under the 2008 Act is a better one than under the 1973 Act or the UK Act, but it should be amended to inspire greater confidence.[79] Under the 2008 Act, a decision to ratify the wrongful conduct is not an insurmountable obstacle to the institution of derivative proceedings. Section 165(14) of the 2008 Act provides that ratification, although a factor that the court may take into account, is not decisive and does not automatically result in a stay or dismissal of the action. The fact that the court is the final authority on whether to grant leave, and that ratification is merely a factor for the court to consider, ensures greater accountability and confidence in the proceedings. It also ensures that the process is not influenced or undermined by collusion and bias by members or directors who could previously vote to ratify wrongdoing and therefore halt the derivative proceedings. It is submitted, however, that a flaw in the section is that it fails to indicate what factors the court would consider in deciding whether to confirm the ratification by the shareholders. It is submitted that it would have been prudent for the 2008 Act to have inserted certain guiding criteria, such as those postulated by Cassim, to assist the court in determining whether to confirm a ratification or to grant permission to institute proceedings.[80]

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74 Cassim (Part 2) 2013 *South African Mercantile Law Journal* 320.

75 *Ibid*; *Franbar Holdings Ltd v Patel supra*; *Singh v Singh supra*; Akinyera *A Comparison of the UK and US Legal Approaches to Derivative Action* 37.

76 Confirmed in *Franbar Holdings Ltd v Patel supra*.

77 Boyle 1997 *Company Lawyer* 258; see Poole and Roberts 1999 *Journal of Business Law* 109; Keay 2016 *Journal of Corporate Law Studies* 39.

78 Tang 2015 *UCL Journal of Law and Jurisprudence* 198.

79 Cassim (Part 2) 2013 *South African Mercantile Law Journal* 318–320.

80 Cassim (Part 2) 2013 *South African Mercantile Law Journal* 318. The author opines that the court in exercising its discretion should take into account the following factors:
a) whether the votes were made by shareholders who were independent and

It is submitted that a further flaw in section 165(14) of the 2008 Act is that the section refers to shareholder ratification or approval of "any particular conduct of the company". The wording here is misleading and, it is submitted, incorrect. In derivative proceedings, the company has suffered wrongful conduct owing to acts or omissions that were perpetrated against it, and therefore the company seeks recourse against the alleged wrongdoers. Therefore, it is submitted, any ratification or authorisation must relate to "particular conduct of the wrongdoers" ,who may be either the shareholders or directors.

Although the 2008 Act provides that ratification by the shareholders is merely a factor for the court to consider in whether to grant leave, and that ratification by the shareholders will not prevent the institution of derivative proceedings, the Act fails to prevent the wrongdoers from ratifying their own wrongful actions. The court, as indicated, is not bound by the decision of shareholders to ratify wrongful actions but the fact that ratification by the alleged wrongdoers is a factor to be considered by the court in deciding whether to grant leave constitutes a flaw in the process.[81] It is submitted that it should in no way be within the court's purview to consider the view of shareholders who have participated in alleged wrongdoing. It is submitted that a similar provision to the one adopted under the UK Act that prevents alleged wrongdoers from participating in a decision to ratify alleged wrongdoing be incorporated into the 2008 Act to ensure that the court is guided by the views of honest and *bona fide* individuals. The basis of derivative proceedings is that wrongful acts were perpetrated against the company and that the applicant institutes derivative proceedings on behalf of the company. This being the case, any approval by the shareholders must relate to wrongful actions of the perpetrator and not the company's conduct.[82] Furthermore, it is submitted that the Act does not take into consideration a situation where the shareholders are the wrongdoers. Practically, the provisions could result in the wrongdoers ratifying their own wrongful conduct.

It is therefore the author's submission that section 165(14) of the 2008 Act should be amended to read as follows:

> "If the shareholders of a company have ratified or approved <u>any wrongful conduct that has been perpetrated against the company</u>–
>
> (*a*) the ratification or approval–
>
> (i) does not prevent a person from making a demand, applying for leave, or bringing or intervening in proceedings with leave under this section; and
>
> (ii) does not prejudice the outcome of any application for leave, or proceedings brought or intervened in with leave under this section; and
>
> <u>(iii) shall have no force or effect where the ratification or approval is</u>

disinterested;

b) whether the shareholder had access to information to make an informed decision; and

c) whether the act in question is one that can be ratified (an illegal act or a fraud on the minority is never ratifiable).

81 S 165(14)(*b*) of the 2008 Act.

82 Cassim (Part 2) 2013 *South African Mercantile Law Journal* 320–321.

made by shareholders or related shareholders who were associated with the wrongful conduct.

(*b*) the court may take that ratification or approval into account in making any judgment or order. In doing so, the court may have regard to:

(i) whether the shareholders were adequately informed and had proper knowledge of the conduct in question before deciding whether to ratify or approve the conduct; and

(ii) whether the shareholders who ratified or approved the conduct in question were acting in good faith and with proper purposes."

The 2008 Act provides for the use of alternative remedies by an applicant who is seeking redress. Chapter 7 of the Act provides for alternative dispute resolution as a method to resolve disputes that have been instituted in the name of the applicant or for disputes that have arisen within the company. Section 193(4) also provides for the Companies Tribunal to deal with company law matters.[83] There are also other forms of dispute resolution. The 2008 Act provides for dispute resolution through High Court proceedings, complaints lodged with the Takeover Regulation Panel[84] and in terms of section 185 of the Act, with the CIPC.[85]

The possibility of an alternative remedy being available is an important factor to consider when determining whether the derivative action will be in the best interests of the company.[86] This factor becomes even more important if the alternative remedy provides the option of the company not being involved in lengthy and time-consuming litigation.[87] It is submitted that the suitability of an alternative remedy must be based on whether the alternative remedy is able to provide the applicant with the same relief that the applicant would obtain if granted leave to institute derivative proceedings. It is submitted that the alternative remedy must provide the applicant with a realistic chance of seeking the desired redress. It is submitted that the availability of a personal remedy by the applicant under section 163 should not prevent the applicant from being granted leave. It must be borne in mind that a personal action under section 163 and a derivative action under section 165 may overlap in that an applicant may have both a personal action and a derivative action against the wrongdoers. This will often arise where the wrongdoing has infringed the applicant's rights individually as well as in the applicant's capacity as a shareholder, in which case the applicant will institute derivative proceedings on behalf of the company. It is submitted that the availability of a personal remedy under section 163 as described above should not be detrimental to the applicant's chances of being granted leave in derivative proceedings, as a personal action under section 163 is not an alternative remedy to a derivative action. This is so because a successful application under section 163 will yield a reward for a shareholder individually while any award in a successful derivative claim will be paid directly to the company, although a shareholder

83 S 193 is part of Ch 8, Part B of the 2008 Act.

84 S 156(*d*) of the 2008 Act; see also s 187(2) of the 2008 Act.

85 See s 168–175 and s 117–120 of the 2008 Act.

86 Cassim 2013 *SALJ* 802; *Mbethe v United Manganese of Kalahari supra* 33–34.

87 *Swansson v Pratt supra* 60.

may benefit indirectly such as through an increase in share value.[88] It is submitted that our courts, in considering whether there is an alternative remedy available to the applicant, should be cognisant that the availability of a personal action does not qualify as a suitable alternative remedy and a basis for refusing permission to grant leave.[89]

A more limited approach is adopted in the UK. In the UK, the court is required to consider the existence of an alternative remedy such as an unfair prejudice claim under section 994 of the 2006 Act.[90] The existence of an unfair prejudice claim for the applicant does not prevent the court from granting leave.[91] It is submitted that the problem with the position in the UK is that section 260(2)(*b*) of the 2006 Act expressly provides for a derivative action to be brought pursuant to a court order under the unfair prejudice remedy.[92] The implication of this is that the unfair prejudice remedy and the derivative claim are both based on the same cause of action and that they are both founded on a breach of directors' duties. Furthermore, the fact that the court, in permission hearings, must consider whether the action upon which the derivative action is based may be brought under an unfair prejudice claim, greatly undermines the derivative claim as a remedy in its own right; a reading of the section in my view clearly indicates an inherent bias towards the granting of an unfair prejudice claim rather than a derivative action.[93]

In the 2008 Act, the existence of alternative remedies will not limit or undermine the institution of a derivative claim. Section 165 is an individual remedy that is not dependent on the existence or success of an action based on the oppression remedy under section 163 of the 2008 Act. However, it is submitted that the section should clearly indicate that the existence of alternative remedies does not necessarily imply that granting leave for a derivative action will be contrary to the interests of the company.

Therefore, it is the author's submission that section 165(4) of the 2008 Act should be amended to read as follows:

> "(4) If a company does not make an application as contemplated in subsection (3), or the court does not set aside the demand in terms of that subsection, the company must–
>
> (*a*) appoint an independent and impartial person or committee to investigate the demand, and report to the board on-
>
> (i) any facts or circumstances–
>
> (*aa*) that may give rise to a cause of action contemplated in the demand; or

88 Cassim 2013 *SALJ* 802–803.

89 *Ibid*.

90 S 263(3)(f) of the 2006 Act.

91 *Lesini v Westrip Holdings Ltd supra.*

92 Cassim 2013 *SALJ* 805; s 260(2)(*b*) of the 2006 Act provides that a derivative claim may be brought in pursuance of a court order in proceedings under s 994 for the protection of shareholders against unfair prejudice. S 996(2)(c) provides that when a shareholder succeeds in a petition under s 994, one of the orders that may be made by the court is the authorisation of civil proceedings to be brought in the name of and on behalf of the company by such persons as the court may direct.

93 Cassim 2013 *SALJ* 805.

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

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

(iii) whether it appears to be in the best interests of the company to pursue any such cause of action or continue any such proceedings; and, if an alternative remedy is available to the applicant against the proposed defendant, this does not necessarily imply that a derivative action is contrary to the best interests of the company.

(*b*) within 60 business days after being served with the demand, or within a longer time as a court, on application by the company, may allow, either–

(i) initiate or continue legal proceedings, or take related legal steps to protect the legal interests of the company, as contemplated in the demand; or

(ii) serve a notice on the person who made the demand, refusing to comply with it."

INTERPRETING THE PROVISIONS OF THE CYBERCRIMES ACT 19 OF 2020 IN THE CONTEXT OF CIVIL PROCEDURE: A FUTURE JOURNEY

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SUMMARY

It is accepted nowadays that cyberspace is used extensively to commit cybercrimes and cybersecurity offences. Victims of cybercrime can use civil procedure to institute claims for damages. Civil procedure is a branch of law that allows victims of cyberspace crimes to institute claims for damages. This article examines the impact of the Cybercrimes Act 19 of 2020 (Cybercrimes Act) on South African civil procedure. It appears that a contravention of the Cybercrimes Act may result in financial problems for the plaintiff, which then enables the latter to institute a civil claim against the defendants. The authors determine whether contravening the provisions of the Cybercrimes Act gives rise to a cause of action that permits the plaintiff to institute civil proceedings for damages suffered. While the Cybercrimes Act is lauded for its provisions addressing cybercrime, room for improvement is identified. Lastly, the authors conduct a comparative analysis between the provisions of the Cybercrimes Act and the Budapest Convention.

1 INTRODUCTION

Civil procedure is "part of Civil Law", which stems from Justinian's *Corpus Juris Civilis*.[1] Tetley defines "Civil Law" as the legal traditions that come from Roman-Dutch law and which the courts have applied in settling civil disputes.[2] Civil procedure deals with the law relating to procedures applied in civil litigation in our courts. In terms of South African common law, a civil court is vested with jurisdiction (or competence) to hear a matter in respect of monetary claims if a contract was concluded, was to be performed or has been breached within the court's jurisdictional area;[3] or if a delict on which a claim is based was committed within a court's jurisdictional area.[4] The above two grounds are known as *ratione rei gestae,* particularly in the High Court. The magistrates' courts are regarded as "creatures of statute" because their jurisdiction is limited to claims of up to R400 000.[5] This implies that should a civil claim that accrues from a contravention of the stipulations of the Cybercrimes Act be less than R400 000, the plaintiff may refer the claim to a magistrates' court.

Actor sequitur forum rei (a common-law principle that has been applied for decades) is significant in civil procedure.[6] It simply means that the plaintiff follows the defendant because of the doctrine of effectiveness.[7] Thus, the plaintiff must institute civil proceedings in a court that will be able to enforce the judgment. This is the court where the defendant is domiciled,[8] or where the cause of action arises or where the property of the defendant is situated.[9] The *actor sequitur forum rei* principle is significant because when the defendant contravenes provisions of the Cybercrimes Act, the plaintiff who is a victim, must follow the defendant so that the outcome of the court can be enforced.

It is trite law that defamation cases are civil cases that are heard in civil courts. Civil procedure is a branch of law that allows victims of cyberspace crimes to institute claims for damages.[10] Cyberspace is used to commit cybercrimes and cybersecurity offences.[11] The courts dealt with early cyberspace cases in *Le Roux v Dey*[12] and *Manyi v Dlamini*[13] respectively, which then led to the drafting of the Cybercrimes Act, which, *inter alia*,

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1 Tetley "Mixed Jurisdictions: Common Law (Codified and Uncodified)" 2000 *Louisiana Law Review* 678–738.

2 Tetley 2000 *Louisiana Law Review* 683.

3 This is known as *ratione contractus*.

4 This is known as *ratione delicti commissi*.

5 Theophilopoulos, Van Heerden, Borraine and Rowan *Fundamental Principles of Civil Procedure* 4ed (2020) 53.

6 Theophilopoulos *et al Fundamental Principles of Civil Procedure* 56.

7 *Ibid*.

8 Theophilopoulos *et al Fundamental Principles of Civil Procedure* 59.

9 Theophilopoulos *et al Fundamental Principles of Civil Procedure* 75.

10 Roos and Slabbert "Defamation on Facebook: *Isparta v Richter* 2013 6 SA 529 GP' 2014 17 *Potchefstroom Electronic Law Journal* 2845 and 2861.

11 *Le Roux v Dey* (2011) 3 SA 274 (CC); *Manyi v Dhlamini* 2018 ZAGPPHC 563.

12 *Supra*.

13 *Supra*.

prohibits cyberspace crimes such as unlawful access.[14] Section 16 also criminalises the disclosure of "intimate images" without consent. In the case of *Le Roux v Dey*, the court confirmed that the distribution of intimate pictures suggesting that Dr Dey was in a gay relationship amounted to a cause of action.

The Cybercrimes Act imposes severe penalties in order to send a strong message to perpetrators and to show that the legislature intends to protect victims of cybercrimes. For example, section 23 provides for sanctions such as fines or imprisonment when the Cybercrimes Act is contravened. The Act's stipulations also fetter the right to freedom of expression, which many use as a defence when publishing derogatory statements on social media.[15]

The Cybercrimes Act addresses, *inter alia*, unlawful access,[16] unlawful interception of data,[17] unlawful interference with data,[18] cyber fraud,[19] cyber forgery and uttering[20] and malicious communications.[21]

It is evident that a contravention of the provisions of the Cybercrimes Act, more often than not, causes damages to a victim (or plaintiff). It is for this reason that the authors argue that some provisions should be incorporated into the Cybercrimes Act to allow plaintiffs who suffer damages as a result of an infringement to pursue civil proceedings. The authors also examine the Cybercrimes Act in light of both superior courts and the lower courts by looking at the relevant rules of these courts. Lastly, the authors conduct a brief comparative analysis between the Budapest Convention[22] and relevant stipulations of the Cybercrimes Act to see whether lessons can be gleaned for application in South African civil procedure.

2 DEFINING CYBERCRIMES AND CYBER DEFAMATION

It is important to point out that the Cybercrimes Act does not define cybercrimes. However, the courts and authors offer different definitions. Cybercrime involves the commission of a crime using a computer, a computer network or a networked device.[23] A computer may become the "object" of a crime when theft of the computer hardware or software occurs.[24] It may also become the "subject" of a crime when it is used as an instrument to commit crimes such as fraud, theft, denial of service attacks,

14 S 2 of the Cybercrimes Act.
15 *Manuel v Economic Freedom Fighters* (2019) 5 SA 210 (GJ) par 2.
16 S 2 of the Cybercrimes Act.
17 S 3 of the Cybercrimes Act.
18 S 5 of the Cybercrimes Act.
19 S 8 of the Cybercrimes Act.
20 S 9 of the Cybercrimes Act.
21 Part II of the Cybercrimes Act.
22 Council of Europe *Convention on Cybercrime* CETS 185 (23 November 2001) (Adopted: 23/11/2001; EIF: 01/07/2004).
23 Cassim "Formulating Specialised Legislation to Address the Growing Spectre of Cybercrime: A Comparative Study" 2009 *PER* 37/360.
24 *Ibid.*

identity theft, cyberbullying or cyber defamation.[25] Thus, a computer may be used in the commission of a crime or be the target.[26] The development of new accessible technologies and the expansion of the Internet have also resulted in new forms of criminal behaviour.[27] The cybercrime problem has now become a global problem, with cybercriminals and hackers exploiting the Internet for monetary gain.

Cyber defamation involves the act of intentionally insulting or defaming another individual or party through a virtual medium.[28] The Internet has facilitated the sharing of ideas and opinions globally. This makes it easier to cause harm through false statements in cyberspace. The law on defamation is said to apply to speech on the Internet.[29] Therefore, people can no longer express their opinions on social networking sites without bearing the consequences. The law of defamation enables the plaintiffs to institute civil proceedings.

3 RELEVANT PROVISIONS OF THE CYBERCRIMES ACT IMPACTING CIVIL PROCEEDINGS

It is submitted that the objectives of the Cybercrimes Act are, *inter alia*, to create and impose penalties on cybercrime, to criminalise the distribution of data messages that are harmful, to provide for interim protection orders, and to regulate jurisdiction further in respect of cybercrime. The provisions of the Cybercrimes Act also regulate powers to investigate cybercrimes (and aspects relating to mutual assistance in respect of the investigation of cybercrimes) and establish a 24/7 point of contact. An obligation is also placed on electronic communications service providers and financial institutions to assist in the investigation of cybercrime.

South Africa's National Executive may also enter into agreements with foreign states to promote measures to address the detection, prevention, mitigation and investigation of cybercrimes. (However, as alluded to in the introduction, this article only addresses those sections or provisions of the Cybercrime Act that the authors view as affecting civil proceedings.) When a defendant unlawfully obtains a plaintiff's confidential data or personal information and commits cyber fraud by using such data, the *facta probanda* and *facta probantia* (that confirm a plaintiff's data was used to commit cybercrimes such as cyber fraud) must be pleaded to illustrate the cause of action. This is notwithstanding that the Cybercrimes Act is mum about civil proceedings.

It is for this reason that the authors wish to convince the legislature to

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25 *Ibid.*

26 Cassim "Addressing the Growing Spectre of Cyber Crime in Africa: Evaluating Measures Adopted by South Africa and Other Regional Role Players" 2011 *Comparative and International Law Journal of Southern Africa* 24.

27 Brenner "Cybercrime Investigation and Prosecution: The Role of Penal and Procedural Law" 2001 *Murdoch University Electronic Journal of Law* 1–16.

28 Van der Merwe, Roos, Pistorius, Eiselen and Nel *Communications Technology Law* (2021) 491.

29 Van der Merwe *et al Communications Technology Law* 503.

incorporate a provision that specifically addresses civil proceedings.

Section 9 of the Cybercrimes Act is also significant for potential civil proceedings. When a perpetrator forges a plaintiff's signature to commit a cyberspace crime, such a crime affects the dignity or the good reputation of the plaintiff and such plaintiffs suffer damages as a result. For example, when cybercriminals forge the signature of a plaintiff and implicate such a plaintiff in cybercrime, the good standing and reputation of the plaintiff may be tainted by such implication, particularly if the plaintiff is a professional with a good reputation and is running his own business. Such a plaintiff may lose clients as a result of being implicated in forgery.

It appears that the *facta probanda* and *facta probantia* must be pleaded to prove the cause of action.[30] This means that all relevant or "material facts" that prove or tend to prove that the plaintiff is implicated in the forgery must be incorporated in the pleadings because they amount to a cause of action.[31] Swales argues that "electronic evidence" that affirms *facta probanda* and *facta probantia* ought to be incorporated into the court papers.[32] He further asserts that cybercriminals may manipulate a plaintiff's data or use the plaintiff's electronic signature to commit cybercrime, and he affirms that electronic evidence is real evidence.[33] In an instance of cyber forgery, forged data is regarded as real evidence. Section 9 of the Cybercrimes Act is significant because the Uniform Rules of Court compel parties to plead the cause of action.[34] Thus, *facta probanda* and *facta probantia* must be pleaded in terms of the Uniform Rules of Court.[35]

If this is not done, rule 23 may be invoked. Rule 23 provides for "exceptions and applications to strike out".[36] Just as is the case in the High Court, the rules in the magistrates' courts also compel parties to proceedings to plead and articulate the cause of action. Rule 17 of the Magistrates' Courts Rules is similar to rule 22 of the Uniform Rules of Court. They both force parties to articulate and incorporate *facta probanda* and *facta probantia*. If this does not happen, rule 19 of the Magistrates' Courts Rules may be employed. Thus, parties can file an exception or application to strike out. This may be prejudicial to the plaintiff because they may not be able to recover their damages if the exception or application to strike out is successful. This was illustrated in the case of *Law Society of the Cape of Good Hope v Randell*.[37]

The employment of rule 23 of the Uniform Rules of Court or rule 19 of the

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30 Broodryk *Eckard's Principle of Civil Procedure in the Magistrates' Courts* 6ed (2019) 26.

31 *Ibid*.

32 Swales "Electronic Evidence" in Papadopoulos and Snail ka Mtuze *Cyberlaw @SA the Law of the Internet in South Africa* 4ed (2022) 435.

33 *Ibid*.

34 Rule 22 of the Uniform Rules of Court, 2009; Rule 17 of the Magistrates' Courts Rules, 1 October 2022.

35 Rule 22 of the Uniform Rules of Court, 2009.

36 Rule 23 of the Uniform Rules of Court, 2009 deals with exceptions and applications to strike out. Rule 19 of the Magistrates' Courts Rules is similar to rule 23 of the Uniform Rules of Court, 2009.

37 (2013) 3 SA 437 (SCA).

Magistrates' Courts Rules in section 9 of the Cybercrimes Act implies that the plaintiff who is a victim of a contravention of the said section may not be able to recover their damages. This is why it is important for the plaintiff to ensure that the cause of action is articulated in the pleadings. This may mean that the same facts used in criminal proceedings may be used in civil proceedings. The case of *Du Toit v Van Rensburg*,[38] as old as it is, is a classic example of courts allowing parties to institute civil proceedings while criminal proceedings are pending.

However, defences are available to a defendant in civil proceedings that may hinder the success of a plaintiff's case when they are raised. For instance, the defendant may raise *lis pendens*[39] or *res judicata*[40] as a special plea.[41] The Supreme Court of Appeal strictly applied the principle of *lis pendens* in *Caesarstone Sdot-Yam v World of Marble and Granite 2000 CC*.[42]

The court held that when all the requirements of *lis pendens* are met, the court will readily dismiss the second proceedings.[43]

Broodryk asserts that

> "the defendant may raise the special defence that an action is already pending between the same parties (or their successors in title) which arises from the same cause of action or in relation to the same subject-matter in dispute."[44]

Pete *et al* concur with Broodryk:

> "[Y]ou cannot sue me for this. You are already suing me for the same reason regarding the same thing. The pending action may be in the same or in different court."[45]

Theophilopoulos *et al* aver that "the court may at its discretion stay the second action subject to the completion of the first".[46]

In addition, the courts may also grant an order for the stay of civil proceedings because the matter is pending, as was the case in *VJ Logistics Services v Fuchs Lubricant*.[47] The defendant, in that case, argued that if the material facts used in the criminal proceedings were also invoked in civil proceedings, he could incriminate himself. The court confirmed the decision in *Du Toit v Van Rensburg*.[48]

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38 (1967) 4 SA 433 (C) 436.
39 Theophilopoulos *et al Fundamental Principles of Civil Procedure* 205.
40 Theophilopoulos *et al Fundamental Principles of Civil Procedure* 123.
41 Broodryk *Eckard's Principles of Civil Procedure in the Magistrates' Courts* 161.
42 2013 (6) SA 499 (SCA).
43 *Caesarstone Sdot-Yam v World of Marble and Granite 2000 CC supra* par 19–29.
44 Broodryk *Eckard's Principles of Civil Procedure in the Magistrates' Courts* 174.
45 Pete, Hulme, Du Plessis, Palmer, Sibanda and Palmer *Civil Procedure: A Practical Guide* 3ed (2017) 212.
46 Theophilopoulos *et al Fundamental Principles of Civil Procedure* 246.
47 [2020] ZAGPJHC 396 par 3.
48 *Supra*.

Unlike the courts have done, the Cybercrimes Act does not spell out that parties may sue simultaneously in the civil courts while the defendant is facing criminal proceedings. The authors view this as a gap in the Cybercrimes Act because the defences raised as special pleas in civil proceedings may prejudice a plaintiff. For this reason, the authors suggest that there be a specific provision in the Cybercrimes Act that confirms the decision in *Du Toit* to allow a plaintiff to recover damages suffered as a result of a contravention of section 9 without having to worry about the defences that a defendant may raise as a special plea.

Rule 22 provides that the defendant must deny, admit, or confess and avoid the facts comprising the cause of action. When a defendant admits a contravention of section 9 that resulted in a plaintiff suffering damages, such a plaintiff will be entitled to an award of compensation after bringing a civil claim. It is important to interpret the provisions of section 9 in the context of civil procedure. Section 9 provides:

> "(1) Any person who unlawfully and with the intention to defraud, makes–
> *(a* false data; or
> *(b)* a false computer program,
> to *the actual or potential prejudice of another person,* is guilty of the offence of cyber forgery.
> (2) Any person who unlawfully and with the intention to defraud, passes off–
> *(a)* false data; or
> *(b)* a false computer program,
> to *the actual or potential prejudice of another person*, is guilty of the offence of cyber uttering." (own emphasis)

The construction of this provision demonstrates that the consequence of cyber forgery is *prejudice suffered* by the plaintiff, which may result in the loss of large amounts of money; this constitutes a cause of action, and such plaintiff may institute civil proceedings against the defendant. A classic example of the relevance of civil proceedings to this particular provision is the case of *Fourie v Van der Spuy*,[49] where there was unlawful interception conducted by hackers into an attorney's trust account.[50] The thieves gave an instruction to the victims, who were attorneys, pretending to be their clients. The client was unhappy about this, and he sued the attorneys.[51] The court had to decide whether or not the client was implicated in the cybercrime because he refused to provide his laptop to the attorneys.[52] The court concluded that the attorneys failed to honour their duty to check the authenticity of the instructions.[53] Damages were accordingly awarded to the client.

In another case, *Global & Local Investments Advisors (Pty) Ltd v Fouche,*[54] Fouche had concluded "a written mandate" with Global that any

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49 *Fourie v Van der Spuy* (2020) 1 SA 560 (GP).
50 *Fourie v Van der Spuy supra* par 1–5.
51 *Ibid*.
52 *Fourie v Van der Spuy supra* par 8.
53 *Fourie v Van der Spuy supra* par 30 and 31.
54 2021 (1) SA 371 (SCA).

withdrawal instruction would be in writing and signed by Fouche.[55] Hackers sent emails with instructions to withdraw, but these emails did not have Fouche's signature and ended with the word "Nick".[56] The Supreme Court of Appeal held that the withdrawal instruction given by hackers was indeed "fraudulent". According to the court, Fouche was entitled to repayment of the money that had been withdrawn by cyber thieves. It is observed that section 9 is silent as to whether a plaintiff may concurrently institute civil action after opening a criminal case against the defendant. It is the authors' view that there should be an amendment to the Cybercrimes Act to allow parties to use both criminal and civil proceedings concurrently.

Section 19 of the Cybercrimes Act provides for penalties when it is proved that there is a contravention of the said provisions.[57] The relevant provision for present purposes is section 19(4). This subsection gives the courts the discretion to impose penalties for a contravention of section 9 (among others) where a penalty is not prescribed in respect of that offence by any other law.[58] This provision does not refer to damages or compensation that may be awarded to the plaintiff when section 9 is contravened and where there is a civil claim based on the same cause of action. The authors submit that this provision should be amended to allow courts to award damages suffered as a result of a contravention of section 9 of the Cybercrimes Act and that plaintiffs should not need to worry about the defences that may be raised as a special plea in civil proceedings. The authors have identified this as a gap that must be corrected in the Cybercrimes Act.

Section 16 is crucial in interpreting the provisions of the Cybercrimes Act in the context of civil proceedings: the consequences of a breach of section 16 may have dire consequences for the plaintiff. He or she may suffer damages that destroy his or her standing and good reputation, as was the case in *Le Roux v Dey*.[59] Section 16 states:

> "(1) Any person (**'A'**) who *unlawfully and intentionally discloses*, by means of an electronic communications service, a data message of *an intimate image* of a person (**'B'**), *without the consent* of B, is guilty of an offence.
>
> (2) For purposes of subsection (1)–
>
> *(a)* **'B'** means–
>
> (i) the person who can be identified as being displayed in the data message;
>
> (ii) any person who is described as being displayed in the data message, irrespective of the fact that the person cannot be identified as being displayed in the data message; or
>
> (iii) any person who can be identified from other information as being displayed in the data message; and
>
> *(b)* **'intimate image'** means a depiction of a person–
>
> (i) real or simulated, and made by any means in which–
>
> *(aa)* B is nude, or the genital organs or anal region of B is displayed, or if B is a female person, transgender person

[55] *Global & Local Investments Advisors (Pty) Ltd v Fouche supra* par 2.
[56] *Global & Local Investments Advisors (Pty) Ltd v Fouche supra* par 3.
[57] S 19 of the Cybercrimes Act.
[58] S 19(4) of the Cybercrimes Act.
[59] (2011) 3 SA 274 (CC).

or intersex person, their breasts, are displayed; or

(bb) the covered genital or anal region of B, or if B is a female person, transgender person or intersex person, their covered breasts, are displayed; and

(ii) in respect of which B so displayed retains a reasonable expectation of privacy at the time that the data message was made in a manner that–

(aa) violates or offends the sexual integrity or dignity of B; or

(bb) amounts to sexual exploitation." (own emphasis)

Section 16 of the Cybercrimes Act is just as significant as section 9 because the consequences of a contravention of this section may result in a plaintiff incurring damages that give rise to a cause of action that may allow parties to institute civil proceedings against the defendant who publishes intimate images on social media and cyberspace without obtaining permission from the plaintiff.[60]

The case of *Le Roux v Dey* is a classic example of the application of section 16; here, schoolchildren distributed manipulated pictures of bodybuilders into which they inserted Dr Dey's picture, insinuating that he was involved in a gay relationship.[61] Dr Dey was very unhappy about this, and he sued the defendants. The court agreed that the pictures damaged his dignity.[62]

The Supreme Court of Appeal confirmed that the distribution of the photographs amounted to a cause of action that entitled Dr Dey to compensation.[63]

In the recent case of *Ramokgopa v Nxumalo*,[64] although not dealing with section 16 of the Cybercrimes Act *per se*, the court considered WhatsApp messages that were distributed at the University of Cape Town and in which the plaintiff was labelled as a rapist and an assaulter. The WhatsApp group to which the plaintiff belonged informed him that he would no longer belong to the group because he was a rapist.[65] The court confirmed that WhatsApp is an electronic instrument used to communicate with others.[66] This case illustrates that section 16 applies where it is proved that a breach of this kind results in substantial damages. Thus, the person who distributes derogatory statements or intimate images on WhatsApp is, in reality, breaching section 16 of the Cybercrimes Act.

In *Manyi v Dhlamin*i,[67] harmful comments such as "horny stinky donkey" that humiliated and degraded the dignity of the plaintiff were distributed on Whatsapp.[68] The High Court awarded damages to the plaintiff in the amount

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60 *Isparta v Richter* 2013 (6) SA 529 (GNP) par 12, 13 and 14.

61 *Le Roux v Dey supra* par 13–14.

62 *Ibid*.

63 *Le Roux v Dey supra* par 78.

64 [2022] ZAWCHC 175.

65 *Ramokgopa v Nxumalo supra* par 6, 13, 14, 31–34.

66 *Ramokgopa v Nxumalo supra* par 31–34.

67 *Supra*.

68 *Manyi v Dhlamini supra* par 5.

of R50 000 because it was satisfied that the plaintiff had indeed suffered damages. This case shows that there should be a provision under section 16 of the Cybercrimes Act for a simultaneous civil claim for damages when there is a violation in this regard. The point is made because, for various reasons, criminal proceedings or trials may take a long time to be finalised.

The plaintiff should be allowed to institute proceedings while the matter is pending in the criminal courts, and the defendant should not be permitted to raise a special plea as a defence on the grounds that the matter is still pending before the criminal courts. This should be incorporated into the provisions of the Cybercrimes Act.

Authors such as Iyer,[69] Milo,[70] Nel[71] and Skibell[72] argue that publishing derogatory statements on social media such as Facebook, Twitter, and other means of social media enables the plaintiff to argue successfully in civil proceedings for damages.[73] Iyer asserts that the plaintiff may use the *actio iniuriarum* to claim damages that arise from cyber defamation.[74] In addition, insults posted on Facebook are viewed as derogatory and affect the "personality rights" and good reputation of a plaintiff.[75] Iyer refers to the Cybercrimes Act and argues that publishing harmful data is viewed as a criminal offence.[76]

It is important to interpret the provisions of section 17 of the Cybercrimes Act in the context of civil procedure. Section 17 states:

> "Any person who *unlawfully and intentionally*–
> *(a)* attempts;
> *(b)* *conspires* with any other person; or
> *(c)* aids, abets, induces, incites, *instigates*, instructs, commands or procures another person, to commit an offence in terms of Part I or Part II of this Chapter, is guilty of an offence and is liable on conviction to the punishment to which a person convicted of actually committing that offence would be liable." (own emphasis)

The construction of this provision shows that the intention of the legislature is to enable a civil action based on a civil claim that stems from the consequences of a contravention of section 17.

It is, however, noted that this stipulation does not expressly indicate

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69 Iyer "An Analytic Look into the Concept of Online Defamation in South Africa" 2018 *Speculum Juris* 125–134.

70 Milo "It's Hard for Me to Say I'm Sorry: Apology as a Remedy in the South African Law of Defamation" 2015 *Journal of Media Law* 11–16; Milo "Case Law, South Africa: *Manuel v Economic Freedom Fighters and Others*" (6 June 2019) https://inforrm.org/2019/06/06/case-law-south-africa-manuel-v-economic-freedom-fighters-the-legal-consequences-of-fake-news-dario-milo/ (accessed 2021-06-06) 1.

71 Nel "Defamation on the Internet and Other Computer Networks" 1997 *CILSA* 154–174; Nel "Rath v Rees 2006 CLR 429 (C)" 2009 *De Jure* 341–352.

72 Skibell "Cybercrimes & Misdemeanors: A Reevaluation of the Computer Fraud and Abuse Act" 2003 *Berkeley Technology Journal* 909–944.

73 Iyer 2018 *Speculum Juris* 125–134; Milo 2015 *Journal of Media Law* 11–16; Nel 1997 *CILSA* 154–174; Nel 2009 *De Jure* 341–352.

74 Iyer 2018 *Speculum Juris* 127–134.

75 *Ibid*.

76 *Ibid*.

that civil proceedings should be capable of running concurrently with criminal matters. It is the view of the authors that the Cybercrimes Act should clearly state that a plaintiff may institute civil proceedings when they suffer damages as a result of a contravention of this provision.

In the case of *Heroldt v Willis,*[77] a wife published derogatory statements on Facebook. The wife labelled the husband a bad father and indicated that he was not supporting his children.[78] The court agreed with the husband that the statements made on Facebook were indeed derogatory and damaged his reputation.[79] An interdict was granted to force the wife to remove the statements on Facebook.[80]

In the case of *Manuel v Economic Freedom Fighters*, derogatory statements were published on Twitter.[81] Although this case did not specifically deal with the construction or contravention of section 17, it shows that those who instigate and conspire against plaintiffs in cyberspace, such as social media, may be held accountable. The court noted that the plaintiff in this case averred:

> "The statement is highly defamatory of him, as well as Mr Kieswetter and other members of the panel, as the statement implies that he:
> (a) is corrupt,
> (b) is nepotistic,
> (c) conducted 'secret interviews' and participated in a secretive process to select the new SARS Commissioner;
> (d) conducted an unlawful appointment process, which led to the appointment of Mr Kieswetter as the SARS Commissioner, who was not deserving of the appointment;
> (e) made previous unlawful appointments to positions at SARS during his tenure as Minister of Finance;
> (f) is connected to a 'white capitalist establishment' that acts contrary to the best interests of SARS."[82]

The court agreed that the respondent ought to apologise to the applicant. In addition, the court awarded compensation in favour of the applicant. It is submitted that the decision of the court is correct, and it falls within the ambit of the construction of the provisions of section 17 of the Cybercrimes Act. It is submitted that the plaintiff should also not be prevented from simultaneously instituting a claim for damages in civil proceedings. The authors suggest that there is a need to amend this provision to incorporate a reference to simultaneous civil proceedings.

It is noteworthy that Part VI of the Cybercrimes Act (which provides for orders to protect a claimant who is the subject of malicious communications) only addresses criminal sanctions. Although the Cybercrimes Act was

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77 (2014) JOL 31479 (GSJ) par 43–47.

78 *Ibid*.

79 *Heroldt v Willis supra par* 45–47.

80 *Ibid*.

81 *Manuel v Economic Freedom Fighters* (2019) 3 All SA 584 (GJ) par 1–18; Milo https://www.inforrm.org/2019/06/06/case-law-south-africa-manuel-v-economic-freedom-fighters-the-legal-consequences-of-fake-news-dario-milo/.

82 *Manuel v Economic Freedom Fighters supra* par 35.

designed to deal with criminal proceedings, it is however apparent that the consequences of contraventions may result in substantial damages to a plaintiff. A plaintiff should thus be allowed to institute civil proceedings simultaneously. It is the authors' view that this should be incorporated into the provisions of the Cybercrimes Act, so a plaintiff is able to institute both criminal and civil proceedings in terms of the Cybercrimes Act without having to worry about the civil procedure defences.

4 A BRIEF COMPARATIVE ANALYSIS OF THE CYBERCRIMES ACT AND THE BUDAPEST CONVENTION

The Council of Europe's Convention on Cybercrime was opened for signature on 23 November 2001 in Budapest, hence known as the Budapest Convention. It strives to encourage countries to combat cybercrime. It has been described as the first international treaty on crimes that are committed via the Internet and other computer networks.[83]

It strives to advance a common criminal policy aimed at the protection of society from cybercrime by adopting appropriate legislation and fostering international cooperation.[84]

Article 8 addresses computer-related fraud and incorporates the use of legislative and other measures to address criminal offences resulting in loss of property to another person. Article 13 addresses sanctions and measures and incorporates the employment of effective and proportionate criminal or non-criminal sanctions, including monetary sanctions.[85] It is submitted that the use of the phrase "non-criminal sanctions" is wide enough to include civil sanctions or remedies in article 13. Moreover, article 13's provisions are akin to section 23[86] of the Cybercrimes Act because they both seek to prohibit cybercrimes by imposing sanctions, fines and even imprisonment where necessary. However, article 13 refers to "non-criminal" sanctions or measures, meaning that civil proceedings may be invoked where there is evidence that the cause of action arose from a cybercrime.

Unlike article 13, section 23 does not specifically refer to "non-criminal" sanctions. It is submitted that section 23 should follow a similar approach and expressly incorporate a provision that refers to civil proceedings. This would entrench the decision taken by the courts in the *Du Toit* and *Heroldt* cases,[87] empowering plaintiffs to sue without worrying about civil procedure defences that may be raised as a special plea. This is because defendants may raise a special plea available in civil proceedings (such as *res judicata*)

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83 Cassim "Addressing the Growing Spectre of Cyber Crime in Africa: Evaluating Measures Adopted by South Africa and Other Regional Role Players" 2014 *CILSA* 423.

84 Cassim 2011 *CILSA* 126.

85 Art 13.2 of the Budapest Convention.

86 S 23 states: "[A]ny person or electronic communications service provider that is convicted of an offence referred in section 20(9) or (10), 21(7) or 22(4) or (8), is liable on conviction to a fine or to imprisonment for a period not exceeding two years or to both a fine and such imprisonment."

87 *Supra.*

when a plaintiff institutes a civil claim stemming from a cause of action that arises from a contravention of the provisions of the Act. The defence raised may hinder the plaintiff from recovering damages suffered.

Article 35 of the Convention addresses the use of a 24/7 point of contact to promote effective cooperation.[88] National 24/7 points of contact that are adequately capacitated and manned with properly trained and equipped personnel can be used to transmit requests and responses for assistance from member states and reduce challenges associated with delays associated with requests for assistance by member states.

If the States Parties are able to use expedited means of communication as envisaged under article 25 (such as a fax, email or even phone call) and the requested state also communicates its response through the same expedited means of communication, then the problem of delay with requests for assistance by member states should also be minimised. Similarly, South Africa needs to ensure that the 24/7 points of contact are adequately manned and resourced.

Ambrose *et al*[89] assert that the Budapest Convention is significant for civil proceedings because evidence is an aspect of litigation in civil proceedings.[90] The Convention provides a way to ensure that evidence is obtained in matters concerning cybercrimes.[91] Thus, *facta probanda* and *facta probantia* must be pleaded in terms of the rules.[92] This means that the same cause of action used in criminal proceedings may also be used in civil proceedings. The pleaded facts thus form part of civil litigation, and in terms of rule 21 of the Uniform Rules of Court, these may be requested to substantiate a civil claim whose cause of action arises from cybercrimes.[93]

It is therefore evident that the doctrine of effectiveness is promoted by ratification of the Budapest Convention. South Africa has adopted the Budapest Convention but has not ratified it. South Africa has, to a certain extent, complied with the Budapest Convention because the stipulations of the Cybercrimes Act are drafted to prevent unlawful computer crimes. It is submitted that South Africa should consider incorporating in section 23 of the Act a specific provision that allows for "non-criminal sanctions". This will bring the Cybercrimes Act in line with the Budapest Convention.

5 CONCLUSION

The Cybercrimes Act was enacted to create "new crimes" in the form of the cybercrimes highlighted in the article and to place a positive obligation on the State to deal with these crimes. The President assented to the Cybercrimes Act on 1 June 2021 and it is now in operation.

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88 This is similar to Ch 6 of the Cybercrimes Act.

89 Ambrose, Browne, Kean, Laurenti, Lidbetter, McMeel, Naish, Owens, Pertoldi, Scott and Taylor *Blackstone's Civil Practice* (2021) 1106.

90 *Ibid*.

91 *Ibid*.

92 *Ibid*.

93 Rule 21 deals with the request for further particulars.

It has been observed that there is a common gap in the provisions of sections 9, 19 and 16 of the Cybercrimes Act insofar as the institution of civil proceedings is concerned. This is why the authors express the view that the provisions of the Cybercrimes Act should include the possibility of instituting simultaneous action in civil proceedings without a plaintiff needing to worry about defences raised as a special plea that may stop them from recovering substantial amounts of money lost as a result of the contravention of the above-mentioned stipulations.

The gap that has been identified is that the Act does not articulate whether civil proceedings may be instituted simultaneously with criminal proceedings. It is submitted that the plaintiff should be allowed to institute civil proceedings while criminal proceedings are pending. Perpetrators should not be allowed to raise civil procedure defences to raise a successful special plea.

The case law (such as *Heroldt v Willis, Le Roux v Dey*, and *Manuel v Economic Freedom Fighters*)[94] illustrates that the South African courts follow a strict approach to cyberspace matters. The authors also argue that cyber criminals cause misery to their victims because the damage caused by cyber fraud, theft, forgery and distribution of personal data without consent costs the victim a lot of money and causes damage to their reputation.

Trial proceedings may take up to three years before being finalised in practice, and by that time, attorneys' costs paid by a plaintiff may have reached very large amounts. Thus, plaintiffs are prejudiced by long and expensive trial proceedings. Therefore, the gap should be addressed by the legislature. Although courts allow civil proceedings to run simultaneously, as in the *Du Toit* case, the Cybercrimes Act does not refer to this. This leaves room for the employment of defences that may prejudice a plaintiff. These may prevent a plaintiff from claiming the damages resulting from a breach of the Cybercrimes Act. The future journey suggested in this article is the modification of the Cybercrimes Act expressly to allow for civil proceedings claims when these are based on the same cause of action or the same material facts that must be pleaded in terms of the rules of the superior and lower courts for criminal proceedings.

Lastly, it is concerning that the Cybercrimes Act does not address non-criminal sanctions as the Convention on Cybercrime does. It is submitted that the Cybercrimes Act should also introduce non-criminal sanctions into its provisions and that South Africa should ensure that the 24/7 points of contact are adequately resourced and effective.

94 *Supra.*

THE NATURE OF RIGHTS AND ACCESS TO THE INTERNET*

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SUMMARY

The question of whether a right to Internet access exists often centres around whether it "should" be a right and not whether it "could" be a right. Although some proponents of Internet-access-as-a-right might hold lofty and praiseworthy ideals, something does not become a right simply by being proclaimed as a right. That would be a superficial and hollow perception of the nature of rights. The admirable desire to grant a "rights" status to access to the Internet is as seductive as it is problematic. The Internet is a medium that enables the exercise of other rights but access to the Internet is not a right in itself. Moreover, the Internet as a medium is not intrinsic to being human. To proclaim access to the Internet as a right therefore unthoughtfully diminishes the very nature of rights. The proposition is perilous, given the context of South Africa's struggle to ensure rights for all who live here, and it cheapens those rights that have been won.

1 INTRODUCTION

The Internet has arguably become the most important communication platform in our contemporary world.[1] Therefore, the question whether access to the Internet could and should be considered a legal right has become increasingly relevant, but whether such access can be considered a right remains open for debate.

The focus of this article is two-fold. First, the article discusses the nature of rights and various philosophical perspectives on the nature of rights. Secondly, this article delves into whether access to the Internet *could* be considered a right, as well as whether it *should* be considered a right.

When referring to rights, the terms "human rights" and "natural rights" are often used interchangeably. However, these terms do have vastly different interpretations and meanings, which are discussed below.

This article analyses whether there exist compelling semantic, conceptual and constitutional grounds to suggest that access to the Internet should be a

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* This contribution is based on research conducted for the author's dissertation titled "A Comparative Inquiry Into Internet Neutrality in South Africa" (LLM dissertation, University of Pretoria) 2021.

1 Papadopoulos and Snail *Cyberlaw@ SA III: The Law of the Internet in South Africa* (2012) 1.

right. A comprehensive analysis of each and every theoretical framework of rights is beyond the scope of this article. From the outset, discussion is limited to the concept of rights from a natural law perspective. This article mainly and broadly focuses on the theory of natural law, as it developed from Greek and Roman natural rights to the Hobbesian and Lockean theories of rights, and on to how this has affected contemporary South African jurisprudence.

2 WHAT ARE NATURAL RIGHTS?

Although the focus of post-1994 jurisprudence in South Africa placed a heavy emphasis on human rights, the concept of natural rights remains central to our understanding of justice and the law.[2] It is therefore necessary to consider that the Constitution states in section 7(1) that the rights contained in the Bill of Rights are the cornerstone of our democracy and that the Bill of Rights enshrines the rights of all people.

The term "right" simply means to be entitled to a particular thing, any deprivation or denial of which will constitute an injustice.[3] The concept of natural rights or *ius naturale* dates back to ancient Greece and has been developed throughout history.[4] The detailed history of the development of human thought regarding natural rights is worthy of extensive study in itself but, as mentioned previously, is not discussed here in any detail. Instead, a synopsis of certain highlights in its development is given.

2 1 Greek and Roman natural rights

During the early development of the concept, natural rights were seen as having a divine foundation.[5] They were, therefore, seen as being both objective and universal.[6] Aristotle was an early writer who referred to natural rights. He drew a distinction between *nature* and *law*, stating that the law might differ from community to community but nature, or rather the law of nature, was consistent and the same in every community (*polis*).[7]

The *polis* in Aristotle's view developed from early forms of human associations such as villages and households.[8] It is important to note that the *polis* or political society that Aristotle described differs vastly from political society as we know it today. In contrast with modern states, the *polis* did not have a monopoly on the use of force to administer laws.[9]

Aristotle argued that the community and its laws pre-existed the individuals within the community.[10] In his view, the community as a grouping

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2 *Soobramoney v Minister of Health* (Kwazulu-Natal) 1997 (12) BCLR 1696 (CC) par 8 and 9.
3 Ashford "Human Rights: What They Are and What They Are Not" Political Notes No. 100 (1995) www.libertarian.co.uk (accessed 2021-03-04) 1–3.
4 Miller "Aristotle and the Origins of Natural Rights" 1996 *The Review of Metaphysics* 873.
5 Le Bel "Natural Law in the Greek Period" 1949 2 *Nat L Inst Proc* 3 8.
6 *Ibid*.
7 Miller 1996 *The Review of Metaphysics* 877.
8 Miller 1996 *The Review of Metaphysics* 878.
9 Berent "The Stateless Polis: A Reply To Critics" 2006 5 *Social Evolution & History* 141 142.
10 Miller 1996 *The Review of Metaphysics* 879.

of people came first; without the community, the individuals did not exist.[11] In Aristotle's view, natural rights are derived from living within the *polis* and through rational thought.[12] This diverges from the traditional view that natural rights are obtained from a Creator and rather posits that natural rights are obtained by living within a community. Aristotle believed people were first and foremost social and political beings predisposed to living within groups.[13]

He argued that "rights" should be constituted to be sovereign over all matters and that these "rights" or laws should be binding on both the individuals and the "magistrates" or interpreters of the law.[14] Despite placing great emphasis on individualism, Aristotle believed that the individual could not exist outside of the *polis*; justice or the application of natural rights could only be achieved within the *polis*.[15] The natural rights that Aristotle argued for were enforceable against all other individuals in the *polis*, including the rulers within the *polis*, but these rights were not enforceable against the *polis* itself.[16]

In Aristotle's view, the natural law and natural rights existed independently of human laws and all within the *polis* were subject to them. In short, natural rights existed without governments mandating or approving their existence. Although Aristotle's work was more philosophical in nature than concrete legal work, it did provide the foundation upon which the concept of natural rights could be further developed by those to follow.[17]

The Roman philosopher Cicero built on the work by Aristotle and said that natural rights contributed to the well-being of society as a whole. Cicero expressly stated that rules and societal customs were not, in their nature, *laws*.[18] Rather, he argued that laws were a reflection of what was objectively just and true. Therefore, any rules enacted by the community (or by rulers of the community) that were not objectively just or moral could not be considered as law. He maintained that justness and morality were determined through rationality and that all people had reason in common.[19] Therefore, because all people had the ability to reason, human nature was, at its core, a reflection of natural law.

In his great work, *De Legibus,* Cicero defines the word "law" as having two senses. First, he states that the law can be defined as that which society places in writing to command and prohibit certain actions.[20] Cicero viewed

11 *Ibid*.
12 *Ibid*.
13 Miller 1996 *The Review of Metaphysics* 877.
14 Mirhady "Aristotle and the Law Courts" 2006 23 *Polis: The Journal of the Society for Greek Political Thought* 302 310.
15 Miller 1996 *The Review of Metaphysics* 879.
16 *Ibid*.
17 *Miller 1996 The Review of Metaphysics* 874.
18 West "Cicero's Teaching on Natural Law" 1981 32 *St John's Review* 74 76.
19 West 1981 *St John's Review* 77.
20 *Ibid*.

this as the superficial meaning of the word "law".[21] Instead, Cicero argued that the law was derived from nature itself.[22]

Since Cicero viewed natural rights as being derived from nature and objectively true, he viewed natural rights as a universal concept that was applicable to all societies all over the world.[23] He grounded the natural law and natural rights in God, reason and nature. Natural law, according to Cicero, was created by God, placed in nature, and discoverable through reason.[24]

Despite drawing a clear distinction between the concept of law in the popular sense of the word and what Cicero deemed to be its true meaning, Cicero argued that there existed an interplay between the two meanings.[25] The popular opinion of the law had to be shaped by the true natural law definition in order to achieve the ultimate public good and benefit.

Cicero viewed the law as an objective, fixed set of rules but believed that its interpretations vary and change over time as "philosophers" gain more wisdom through reason.[26] Therefore, according to Cicero, although natural rights were universal – a *ius gentium* as it was phrased by him – and they were discoverable, they were not always clear or applied similarly in all societies.[27] Although natural law and natural rights are not always clear to us, they are unchangeable and therefore not subject to the whims of the rulers of people.

In Cicero's view, governmental authorities (or the State) existed in order to uphold the natural law and to protect natural rights.[28] Since natural rights existed objectively and unchangeably, a state that did not uphold these rights was not considered a legitimate state. The State, therefore, did not determine which rights existed, and which did not, because rights existed universally.[29]

Both Aristotle and Cicero built the foundation for the concept of natural rights to be further developed and crystallised.

2 2 Hobbes and Locke

The theory of natural rights led to the wide-scale adoption of modern nation states; and English philosopher John Locke provided the modern foundation for inalienable individual rights within the framework of a nation state.[30]

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21 *Ibid*.
22 *Ibid*.
23 Levy "Natural Law in the Roman Period" 1949 2 *Nat L Inst Proc* 43 50.
24 West 1981 *St John's Review* 78.
25 West 1981 *St John's Review* 77.
26 West 1981 *St John's Review* 80.
27 Levy 1949 *Nat L Inst Proc* 45.
28 West 1981 *St John's Review* 78.
29 Levy 1949 *Nat L Inst Proc* 46.
30 Myers *From Natural Rights to Human Rights – And Beyond* The Heritage Foundation: Special Report No. 197 (2017) 7.

Locke wrote that rights are that which rightly and morally belongs to each individual and therefore cannot be taken away from the individual without an injustice being caused.[31] It is important to note that Locke wrote his famous work against a backdrop of the sovereignty of monarchy, where the sovereignty of the individual was a foreign concept.[32]

Locke argued that natural rights did not come into existence through human creation.[33] These rights were not produced by humans; rather, they are in existence and belong to all human beings by virtue of being and living within the state of nature.[34] Universally, all individuals have these rights in common, and they do not differ from individual to individual. Therefore, according to Locke, these rights exist regardless of whether they are acknowledged by different states or authorities, because these rights exist in the state of nature.

Natural rights, according to Locke, arise from what he described as the state of nature. The state of nature was a device used by Locke to clarify natural rights. The state of nature, according to Locke, is the perfect state of equality and freedom.[35] This state of nature is described as a space within which all people are equal and able to conduct their affairs and make their decisions as they deem fit, provided that this is done within the bounds of the laws of the state of nature.[36]

However, in view of the fallibility of human nature, Locke argued that natural rights are, in essence, uncertain and not guaranteed.[37] Locke therefore submitted that there is a need to create a political society that protects the natural rights and freedoms to be enjoyed by each individual. The natural rights that Locke identified include the right of free speech, the right to freedom of religion, the right of assembly, and the broad right of press freedom.[38]

To protect these rights, Locke found that a second class of rights is necessary.[39] These additional rights are not natural rights but they are needed to ensure that natural rights are protected within political society. These include limitations on state power to protect fundamental natural rights.[40]

Locke described human beings as social beings who are living within communities as social beings, and therefore distinct social contracts were

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31 Locke *Second Treatise of Government: An Essay Concerning the True Original, Extent and End of Civil Government* (2014) 4.

32 Faulkner "Preface to Liberalism: Locke's First Treatise and the Bible" 2005 67 *The Review of Politics* 451 452.

33 Locke *Second Treatise of Government* 2.

34 *Ibid*.

35 *Ibid*.

36 Dunn "The Contemporary Political Significance of John Locke's Conception of Civil Society" (1996) *The Jerusalem Philosophical Quarterly* 105 103.

37 Locke *Second Treatise of Government* 40.

38 Locke *Second Treatise of Government* 4.

39 Locke *Second Treatise of Government* 45.

40 Locke *Second Treatise of Government* 48.

necessary to protect the natural rights of all people from violations by others.[41]

The enjoyment of the natural rights described by Locke is, however, limited by the law of nature.[42] The law of nature creates obligations for each individual because of the equality in the state of nature.[43] As all are equal and independent, no individual should harm another individual's life, health, liberty or possessions.[44] In the state of nature, individuals are entirely free to dispose of their possessions but are not free to destroy themselves or others and their possessions. Liberty, therefore, does not equate to licence to abuse others because it is prohibited by the law of nature.[45]

The rights that are protected are, in Locke's view, expressed mainly as negative restrictions rather than positive entitlements. This entails that one is obligated to refrain from infringing on the pursuits of others to fulfil their rights because the rights themselves do not guarantee compliance with the rights. Locke's ambit of natural rights is therefore limited to that which is necessary for the civil authority to ensure the protection of rights and nothing more. The authority of the State to ensure natural rights is limited to the natural rights themselves and cannot, in his view, be elaborated or expanded upon.[46]

Thomas Hobbes was another seventeenth-century English philosopher who played a fundamental part in developing the theory of natural rights.[47] Hobbes's most famous political philosophy work is *Leviathan,* first published in 1651.[48] Unlike Locke, Hobbes believed that the state of nature should be avoided at all costs. Hobbes posits the question of how life would be without the State or any authority.[49]

According to Hobbes, within the state of nature, each individual will act in their own interest and therefore be their own judge, jury, and executioner in any potential dispute. Should the state of nature exist, life would be, in Hobbes's words, "[s]olitary, poor, nasty, brutish, and short".[50]

Despite disagreeing on the state of nature, Hobbes and Locke held similar views on the fact that natural law and natural rights were not to be confused with the law of man. Hobbes provided for a number of laws of nature that are *eternal and immutable*, yet which are weak and incapable of enforcing themselves in the state of nature.[51] Hobbes accordingly argued for the necessity of state authority to protect these rights that exist universally but which need to be protected.[52]

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41 *Faulkner* 2005 *The Review of Politics* 454.
42 Locke *Second Treatise of Government* 4.
43 *Ibid*.
44 *Ibid*.
45 *Ibid*.
46 Locke *Second Treatise of Government* 117.
47 Strauss *The Political Philosophy of Hobbes: Its Basis and Its Genesis* (1963) 155.
48 Hobbes *Leviathan* (2006) 1–10.
49 Hobbes *Leviathan* 177.
50 Hobbes *Leviathan* 110.
51 Hobbes *Leviathan* 138.
52 Hobbes *Leviathan* 86.

The natural rights that Hobbes listed gave freedom to individuals, yet Hobbes made a clear distinction between liberty and power.[53] Hobbes argued that should an external hindrance exist that restricts voluntary action, this is a lack of freedom, but when an internal hindrance exists to restrict voluntary action, this is rather a lack of power.[54] This was an early notion of the idea of negative rights that prohibit action and the impediment of rights.

In Hobbes's view, natural rights existed within the state of nature, but they were threatened by human nature. It was, therefore, necessary to create the authority of a civil government or state to ensure that these rights are protected and upheld.[55] Hobbes held that there were two main rights that should be protected, namely the right of the individual to pursue a peaceful life and the right of the individual to protect that pursuit of a peaceful life by any means necessary.[56]

Both Locke and Hobbes are seen to have held strong individualistic positions, albeit for vastly different reasons. Both writers believed that a form of civil government or a state is necessary so as to protect certain inalienable rights. This position led to the adoption of individual natural rights within the constitutional and legal frameworks around the world and, because of the focus on individuals, paved the way for human rights to be adopted the world over.

The development discussed above provides the basis for the liberal democracies of the world and the constitutionalism we enjoy. Had it not been for this foundational development, many freedoms we currently enjoy would not have existed.

2 3 From natural rights to human rights

The concept of natural rights morphed into the modern term "human rights" through three distinct generations of rights.[57]

In the United States Declaration of Independence of 1776, the founders of the United States of America stated that there are certain rights derived from the law of nature (natural rights) and from the Creator of nature. The second paragraph of the Declaration reads:

> "[W]e hold these truths to be self-evident, that all men are created equal, that they are endowed by their Creator with certain unalienable Rights that among these are Life, Liberty and the pursuit of Happiness. – that to secure these rights, Governments are instituted among Men, deriving their just powers from the consent of the governed."[58]

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53 Undersrud "On Natural Law and Civil Law in the Political Philosophy of Hobbes" 2014 35 *History of Political Thought* 683 686.

54 Hobbes *Leviathan* 47.

55 Undersrud 2014 *History of Political Thought* 691.

56 *Ibid*.

57 Vasak "A 30-Year Struggle; The Sustained Efforts to Give Force of Law to the Universal Declaration of Human Rights" 1977 11 *The Unesco Courier* 29.

58 Jefferson *Copy of Declaration of Independence* (1776).

The idea that "all men" hold "certain inalienable rights" means that all human beings possess these rights.[59] All human beings have these rights owing to our very existence as human beings, which makes them inalienable regardless of any personal characteristic such as race, sexual orientation or class but, most importantly, regardless of which time they lived in. As proposed by political theorist Maurice Cranston, these rights apply to all people at all times and in all situations.[60]

The American founders placed great emphasis on the fact that these inalienable rights stem from a higher authority.[61] The rights espoused by the American founders are first-generation rights that closely relate to natural rights.[62]

The most prominent and early use of the term "human rights" was shortly after the Second World War in the Universal Declaration of Human Rights, which was adopted by the United Nations General Assembly in 1948.[63] The adoption of this document served as a statement of intent by the adopting countries, but it had no provisions to enforce the 30 listed and adopted rights.[64] Yet, despite not factually being applied by all adopting nations, the Universal Declaration of Human Rights to this day still functions as a foundational document, informing international law and indeed domestic laws around the world.[65]

The important distinction between natural rights and human rights is that the inalienability of natural rights does not come from the State; rather, it is secured by State authority.[66] The State secures these rights through creating and maintaining the political society in which rights can be exercised or protected.

Human rights are conceived of as the fulfilment of human needs and not as natural rights given to individuals owing to the distinctive value of being human.[67] Although human rights have been used interchangeably with natural rights, the contemporary use of the term "human rights" does not have the same meaning as "natural rights" does.[68]

2 4 Three generations of human rights

One of the most generally accepted categorisations of human rights is into three distinct generations of human rights. The first classification of human rights into three distinct generations of rights was made in 1977 by Karel Vasak.[69] Vasak categorised human rights into: first, civil and political rights;

59 Kleyn and Viljoen *Beginner's Guide for Law Students* (2010) 112.
60 Cranston *Human Rights, Real and Supposed* (2002) 49.
61 Myers *From Natural Rights to Human Rights* 4.
62 Myers *From Natural Rights to Human Rights* 2.
63 Myers *From Natural Rights to Human Rights* 12.
64 Cranston *Human Rights, Real and Supposed* 4.
65 Myers *From Natural Rights to Human Rights* 1.
66 Myers *From Natural Rights to Human Rights* 15.
67 Myers *From Natural Rights to Human Rights* 13.
68 Myers *From Natural Rights to Human Rights* 1.
69 Vasak 1977 *The Unesco Courier*.

secondly, economic, social, and cultural rights; and, thirdly collective or solidarity rights.[70]

Two years later, in 1979, Vasak used the three concepts of the French Revolution, namely liberty, equality and fraternity (*liberté, egalité, fraternité)* to illustrate the three generations of rights that he identified.[71]

2 4 1 First-generation rights

The concept of human rights in its initial phase was identical to natural rights. These first-generation rights are described as civil and political rights.[72] They are what writers such as Locke and Hobbes wrote about and are the rights that were developed by these seventeenth- and eighteenth-century legal scholars. As the authority and influence of states grew, the necessity for these civil and political rights became increasingly important.[73] These universal rights focused on the individual and the concept of non-intervention, which essentially protected individuals from the states that governed their activity.[74]

The key characteristic of these rights is that they are so called negative rights.[75] Negative rights ensure that individuals are not subjected to the actions of other individuals or authority; they prohibit the use of force or coercion when consent is not given.[76] Negative rights protect against the action of other individuals or the State. In short, negative rights exist until they are negated through another's action.

It is, however, important to note that first-generation rights are not completely negative. Although first-generation rights generally require states or individuals to refrain from particular actions, some first-generation rights require positive action from state authorities to ensure that these rights are guaranteed.[77] For example, in order to ensure the right to life, which is a negative right, states around the world are required to act positively through state-sponsored protection to protect this right.

The concept of first-generation rights finds its roots in the United States of America Bill of Rights and the French Declaration of Rights of Man and of the Citizen.[78] Both these documents built on the ideas enshrined in the *Magna Carta* and elaborate on further rights.

First-generation rights include the right to life, the right to equality, the right of free speech, and the right to freedom of religion, as well as political voting rights.[79]

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70 Vasak 1977 *The Unesco Courier* 29.

71 Macklem "Human Rights in International Law: Three Generations or One?" 2015 3 *London Review of International Law* 12.

72 Macklem 2015 *London Review of International Law* 5.

73 Macklem 2015 *London Review of International Law* 6.

74 Myers *From Natural Rights to Human Rights* 10.

75 Myers *From Natural Rights to Human Rights* 7.

76 Vasak 1977 *The Unesco Courier* 29.

77 Myers *From Natural Rights to Human Rights* 11.

78 Vasak 1977 *The Unesco Courier* 30; Myers *From Natural Rights to Human Rights* 4.

79 Vasak 1977 *The Unesco Courier* 29.

The potential right to Internet access does not fit into this categorisation of rights, not only because when first-generation rights were crystallised the Internet did not exist, but because it does not share similar characteristics to civil or political rights.

2 4 2 Second-generation rights

The International Covenant on Economic, Social, and Cultural Rights,[80] which was adopted by the United Nations General Assembly in 1966, is a central document in the establishment of second-generation rights.[81]

Second-generation rights are considered to be mainly economic and social rights.[82] These rights shifted the focus away from liberties and highlighted the outcomes of rights.[83] Second-generation rights endeavoured to achieve particular tangible outcomes that, at least in theory, attempted to advance living standards of individuals. They include the right to housing, the right to health care, the right to adequate working conditions, and the right to education.[84]

These rights characteristically impose a positive obligation on states or governments to promote the outcomes that these rights are aimed at, unlike first-generation rights, which are mostly negative rights.[85]

2 4 3 Third-generation rights

Third-generation rights are a new addition to the legal vocabulary. Third-generation rights aim to address modern societal issues and challenges that are deemed not to be addressed by first- and second-generation rights. Third-generation rights are often referred to as solidarity or collective rights.[86]

In contrast with first- and second-generation rights, third-generation rights can be seen as group rights. Clear examples include references to "women's rights" or "minority rights". These rights encompass a broad range of second- and third-generation rights that are deemed not to have been protected for these particular classes or groups.[87]

2 5 Liberty rights versus entitlement rights

With the development of rights into three distinct generations, there seems to have come about a clear distinction to be drawn between liberty rights and

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80 UNGA *International Covenant on Economic, Social and Cultural Rights* 993 UNTS 3 (1966).
81 Myers *From Natural Rights to Human Rights* 15.
82 Whelan and Donnelly "The West, Economic and Social Rights, and the Global Human Rights Regime: Setting the Record Straight" 2007 *Human Rights Quarterly* 908 909.
83 Myers *From Natural Rights to Human Rights* 12.
84 Myers *From Natural Rights to Human Rights* 14.
85 Whelan and Donnelly 2007 *Human Rights Quarterly* 919.
86 Engle "Universal Human Rights: A Generational History" 2006 12 *Ann Surv Int'l & Comp L* 219 254.
87 Engle 2006 *Ann Surv Int'l & Comp L* 260.

entitlement rights.[88] Liberty rights protect the right to act freely, whereas entitlement rights are claims to goods and services from others.[89] Broadly speaking, first-generation rights are liberty rights – that is, they place a negative obligation upon others, including the State, not to infringe upon them, whereas second- and third-generation rights are generally claims to goods and services such as housing and health care.

For rights to be of any effect, not to mention substantial benefit, they have to be able to be applied universally.[90] The right to adequate housing is of little benefit when it cannot be guaranteed. The South African Constitution famously states that the rights it guarantees should be achieved through the State, which "must take reasonable legislative and other measures, within its available resources, to achieve the progressive realisation of each of these rights".[91] These rights are therefore not universal because they are not guaranteed to all. In contrast, the right to freedom of expression or the right to life is universal.[92]

Natural or human rights cannot be justified as being universal if rights are not universal claims to services, goods or amenities.[93] Although these claims are noble and commendable ideals, they should not be included in the same category as natural rights, as this reduces the status of ideas and the universality of rights will suffer as a consequence.[94]

For any person, anywhere in the world, deprivation of natural or human rights, by very definition causes a severe injustice.[95] Should we consider access to the Internet to be a human right, then not only would 56,1 per cent of the world's population be facing a grave injustice by not having this right fulfilled, but the whole of mankind prior to the creation of the Internet in the 1960s would have been victim to a grave human-rights violation. Moreover, it is the author's opinion that there is no guarantee that the Internet will not sooner or later disappear as a relevant technology. The recognition of claims to entitlements as natural rights causes severe damage to such rights and their universality.[96]

The universal enactment of liberties as human rights is a practical possibility. Broadly speaking, liberties only require individuals to respect the freedoms of others.[97] No claims can be made that cannot physically be fulfilled. Similarly, the universality of rights is closely tied to the fact that these rights cannot be surrendered despite the fact that they can obviously be unjustly infringed.[98]

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88 Penney "Internet Access Rights: A Brief History and Intellectual Origins" 2011 38 *Wm Mitchell L Rev* 10 24.

89 Penney 2011 *Wm Mitchell L Rev* 16.

90 Myers *From Natural Rights to Human Rights* 28.

91 Ss 24(*b*), 25(5), 26(2) and 27(2) of the Constitution of the Republic of South Africa, 1996.

92 Engle 2006 *Ann Surv Int'l & Comp L* 230.

93 Ashford "Human Rights: What They Are and What They Are Not" Political Notes No. 100 3.

94 *Ibid*.

95 Engle 2006 *Ann Surv Int'l & Comp L* 258.

96 Myers *From Natural Rights to Human Rights* 28.

97 Ashford "Human Rights: What They Are and What They Are Not" Political Notes No. 100 2.

98 Van Staden "Spontaneous Order or Central Planning? A Brief Overview of the Libertarian Approach to Law" 2021 84 *THRHR* 54.

It is, however, important to mention that although entitlement rights should not be seen as natural or human rights, they could be considered as rights of a different kind, namely legal rights. Legal and natural rights are different sets of philosophical entities and equating the two should be avoided.

3 WHAT ARE LEGAL RIGHTS?

A common definition of legal rights is an interest that is recognised by law and protected by the rule of justice. The two main elements, therefore, are legal recognition as well as legal protection.[99] Although natural rights may also be considered legal rights (in that they are legally recognised as well as legally protected), not all legal rights are natural rights.[100]

Every natural right forms part of the innate existence of every human being, and natural rights held by one individual (a natural person) are the same as those held by all other natural persons. That is why these rights are said to be universal rights. A so-called legal right, on the other hand, is created or received by or bestowed upon an individual person through operation of law. The number, nature and content of legal rights held by any one individual person may vary significantly from those held by other individuals. Legal rights are subject to change as may be deemed necessary from time to time. Natural rights, in contrast, cannot be changed or amended because of their universal nature.[101]

It is worth pointing out that legal rights are social constructs and that the content of legal rights is open to determination. Moreover, legal rights are connected to a particular time, place and context. To illustrate this point, it is trite that various countries guarantee the legal right to a nationality. This right is not rooted in the inherent necessity of a human being to have a nationality in order to exist, but rather came about with the emergence of nation states during the past three centuries. The legal right to nationality exists because it enables the fulfilment of other rights that are guaranteed by nation states.

Legal rights, which go beyond the scope of natural rights, are used as instruments to attempt to achieve certain material outcomes. Many second- and third-generation human rights (as discussed earlier in this article) go beyond the scope of natural rights; through legal recognition and protection of such rights, nation states attempt to solve societal challenges.[102]

However, the mere fact that a legal right exists does not guarantee that the individual will necessarily enjoy the fulfilment of that right. The debate regarding legal rights versus natural rights and how they should be viewed and differentiated (if they should be differentiated at all) boils down to the age-old academic discussion and debate on the significance of natural law

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99 Campbell "Legal Rights" (2017) https://plato.stanford.edu/archives/win2017/entries/legal-rights/ (accessed 2019-06-17).

100 Engle 2006 *Ann Surv Int'l & Comp L* 222.

101 Engle 2006 *Ann Surv Int'l & Comp L* 239.

102 Vasak 1977 *The Unesco Courier* 29.

and legal positivism, respectively. The question of whether rights exist and belong to all human beings by virtue of our humanity, or whether rights exist because of governments or societies that create these rights, remains the central point of legal philosophical controversy and will likely remain so for many years to come.

4 INTERNET ACCESS AS A RIGHT

Despite the lofty ideals of some authors, it should be noted that the Internet remains a communication method – like television, postal services, and the radio.

Owing to the Internet's enormous influence on and societal benefit for humanity, the question of whether or not access to the Internet should be considered a right has naturally gained prominence throughout the media and academia.[103] The question often centres around whether it "should" be a right and not whether it "could" be a right. Although some proponents of this suggestion might hold lofty and praiseworthy ideals, something does not become a right simply through being proclaimed as a right. That would be a superficial and empty concept of rights.

In order to determine whether access to the Internet should be considered a right, three main questions have to be answered, namely:

1. Can the right of access to the Internet exist as a *natural* right?
2. Can the right of access to the Internet exist as a *legal* right?
3. If the right of access to the Internet *can* exist as a legal right, *should* it exist as a legal right?

4 1 Can the right of access to the Internet exist as a natural right?

To address the research topic of this article, it is important to define properly what rights entail and whether access to the Internet could be considered a right. If the definition of natural rights, as discussed above, is applied to accessing the Internet, it is clear that it is difficult to consider access to the Internet to be a natural, inalienable right that all human beings intrinsically possess by virtue of their humanity.

The author submits that the existence of a right to something depends on whether it fulfils the common characteristics of a right. As is clear from the development of natural rights, the core characteristic of natural rights is their universality. A right must be susceptible to universal application in order for it to be considered a natural right.[104] The question therefore is whether a right of access to the Internet has universal and intemporal application.

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[103] Skepys "Is There a Human Right to the Internet?" 2012 5 *Journal of Politics and Law* 15.

[104] Engle 2006 *Ann Surv Int'l & Comp L* 258.

It seems quite impossible to consider access to the Internet as a natural right when measuring it against the universal nature of natural rights.[105] The Internet has only existed for the past 70 years, and it has only been extensively used for the past 30 years.[106] Moreover, it is uncertain how long the Internet will retain its current powerful technological role since further technological developments and improved communication methods are bound to take place.

Prior to the advent of the Internet, the right of access to the Internet was non-existent and therefore beyond the reach of any human being. Some writers, however, have argued that new rights can "come into existence".[107] This view, however, is philosophically problematic because of the universal nature of rights. If certain things are capable of becoming rights at any given time, they are similarly capable of ceasing to be rights.[108]

Without giving recognition to the universal nature of natural rights, natural rights lose their influence and *raison d'etre*.[109] Rights are both important and influential if they are considered universal. If rights are not universally applicable, they cannot be considered inalienable, and if rights are not inalienable, they do not have the desired protection that we seek through their application – that is, the protection afforded by any universal right.[110]

There exists a profound danger in declaring that a right to Internet access exists. The author similarly argues that an alleged right to housing or health care sets a dangerous precedent both socio-economically and philosophically. As Eric Sterner correctly points out, a right to Internet access cannot logically exist as it is "a right based on the nature of the technology rather than that of the claimant".[111]

Claiming that there exists a right to access the Internet is a material claim and not a universal claim of entitlement.[112] The claim that Internet access is a right is therefore a claim for the Internet as a technology and a physical tool. Recognising a claim to a technology and physical tool would seriously degrade and weaken the nature of rights because the fulfilment of this particular right would only materialise and exist sporadically, as and when access is achieved.

In 2017, the United Nations passed a resolution that emphasised the importance of Internet access for the fulfilment of various human rights.[113] It

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105 Ashford "Human Rights: What They Are and What They Are Not" Political Notes No. 100 3; Sterner "The Folly of Internet Freedom: The Mistake of Talking About the Internet as a Human Right" 2011 *The New Atlantis* 134–139.

106 Greenstein *How the Internet Became Commercial: Innovation, Privatization, and the Birth of a New Network* (2015) 159; *Ashford* "Human Rights: What They Are and What They Are Not" Political Notes No. 100 3.

107 Shestack "The Philosophic Foundations of Human Rights" 2017 *Human Rights Quarterly* 215.

108 Myers *From Natural Rights to Human Rights* 28.

109 Sterner 2011 *The New Atlantis* 134–139.

110 Hart *Essays on Bentham: Jurisprudence and Political Philosophy* (1982) 162.

111 Sterner 2011 *The New Atlantis* 134–139.

112 *Ibid*.

113 United Nations Human Rights Council *The Promotion, Protection and Enjoyment of Human Rights on the Internet* (2016).

is argued that access to the Internet is not a right in itself, but rather an enabler of rights.[114] Access to the Internet facilitates the exercise of various rights such as the right to freedom of expression, the right of equality and various legal rights aiming at the material benefit of individuals.[115] However, these rights do not stand and fall on the strength of access to the Internet alone. They are, and always have been, available – with or without access to the Internet – and certainly will still be so should the Internet ever disappear.

4 2 Can a right to access the Internet exist as a legal right?

Legal rights create legal obligations.[116] Legal rights are, therefore, rights that are deemed sufficiently valuable to protect through legislation.[117] Many natural rights are codified into legal rights through constitutions or statutes, but not all legal rights are natural rights.

Societies and states around the world classify various differing things as legal rights. Various rights in South Africa are granted protection through "ordinary" legislation rather than particular constitutional protection. Many rights are protected through legislation, and effectively so. An example is the statutory cooling-off period that is applied to various transactions in different jurisdictions. South Africa grants a cooling-off period when credit agreements are entered into, but not all foreign jurisdictions grant this protection.[118] In South Africa, this cooling-off period is considered a right as it is determined to be beneficial to society, valuable and consequently worth legal protection.

The right to Internet access could, therefore, be promulgated to be protected as a legal right, but the author submits that it should not be. In making this legislative decision, the question remains to be discussed whether the right to Internet access should be protected as a legal right. This discussion follows below.

4 3 Should the right of access to the Internet exist as a legal right?

The question of whether access to the Internet *should* be a guaranteed right is a policy decision facing countries around the world. Policy decisions are subject to various factors – including, but not limited to, resource considerations.

In South Africa, we already see enshrined in the Constitution various rights that cannot be considered natural rights, but which are legal rights, and more specifically entitlement rights, recognised through the Bill of

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114 Cerf "Internet Access Is Not a Human Right" (2012-01-04) *New York Times*.

115 *Ibid*; Papadopoulos and Snail *Cyberlaw@ SA III: The Law of the Internet in South Africa* 251.

116 Hart *Essays on Bentham: Jurisprudence and Political Philosophy* Ch 5.

117 Campbell https://plato.stanford.edu/archives/win2017/entries/legal-rights/.

118 S 16(3) of the Consumer Protection Act 68 of 2008.

Rights.[119] These include housing, environmental, health care, food, water and social security and educational rights.[120] These rights are not universal natural rights but are rights that are enshrined and elevated in our Constitution.

On a practical level, therefore, it is possible to elevate the right to Internet access to the same level through a constitutional amendment. Alternatively, the right could be guaranteed through the promulgation of legislation, which would, however, not grant the same protection against amendments as a right enshrined in the Constitution would.

A further challenge to guaranteeing a right of access to the Internet arises from serious resource limitations in South Africa. Just as the right to housing, although protected, cannot completely and universally be guaranteed by the Constitution owing to practical restrictions, similarly, a right of access to the Internet will not easily be guaranteed owing to similar resource limitations. The Constitutional Court has on various occasions held that constitutional rights such as adequate housing (a second-generation right) continues to exist despite the South African government's failure to fulfil its obligations to ensure the right.[121] The author, however, submits that these decisions by the Constitutional Court have watered down the inherent value of these rights. As discussed earlier in this article, the value of a right is determined by its universality; that a right cannot be universally ensured hollows out the right.

Moreover, the right of access to the Internet may already be sufficiently protected by other rights. The right to privacy, the right to freedom of expression, and the right of access to information all indirectly touch on access to the Internet.[122] These rights, particularly those in relation to Internet access, also bear reference to the right or freedom to seek, receive and impart information.[123] That being said, as much as the right to Internet access may be protected through various other existing constitutional rights, the right to access the Internet is as protected by these rights as the right to access postal services is.

The legal and political philosophy of cyber libertarianism strongly contends that as a broad principle, the Internet should be a space that maximises individual liberty and usage freedom.[124] Overregulation and governmental involvement limits the individual freedom of Internet users.[125] Therefore cyber libertarianism militates against overregulation and rather supports the foundational characteristics of the Internet for the maximisation of individual freedom.[126]

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119 As discussed previously in this article.

120 Ss 24, 26, 27 and 29 of the Constitution of the Republic of South Africa,1996.

121 *Government of the Republic of South Africa v Grootboom* 2000 (11) BCLR 1169 (CC).

122 Penney 2011 38 *Wm Mitchell L Rev* 18; Papadopoulos and Snail *Cyberlaw@ SA III: The Law of the Internet in South Africa* 276.

123 Papadopoulos and Snail *Cyberlaw@ SA III: The Law of the Internet in South Africa* 276.

124 Dahlberg "Cyber-Libertarianism 2.0: A Discourse Theory/Critical Political Economy Examination" 2010 6 *Cultural Politics* 331 336.

125 Penney 2011 38 *Wm Mitchell L Rev* 18.

126 Penney 2011 38 *Wm Mitchell L Rev* 17.

As Sterner argues, rights are seriously cheapened when they are based on the existence of the technology rather than on our intrinsic humanity.[127] Elevating access to the Internet to the level of a right therefore risks weakening the concept of rights in South Africa, which can hardly be afforded given our history of gross rights violations. The attainment and fulfilment of hard-won rights in our country's constitutional rights-based dispensation cannot afford further degradation.

The South African Constitution famously proclaims a variety of rights, subject to what is referred to as "progressive realisation". Progressive realisation as argued for in the Constitution is a misnomer. The gist of this constitutional caveat is that the rights that our Constitution enshrines are viewed as goals and not fundamental realities inherent to each person. Those rights in the Constitution (the achievement of which are qualified behind the wall of progressive realisation) merely boil down to lofty ambitions to achieve material goals. They are therefore not rights. They are promises, and promises are not universal; nor are they intrinsic to being human.

5 CONCLUSION

It is clear that the term "right" has developed considerably since the dawn of human philosophy. Three distinct generations of right have appeared, which led to different theories of rights. Addressing the heart of the debate of whether anything could be considered a right, the author submits that a right could and should only exist if it can be universally applied and granted. Only by adopting this approach do rights retain the societal value that renders them worthy of protection.

Although the Internet has arguably been the most efficient and effectual enabler of human rights the world has ever seen and has undoubtedly strengthened the ability to preserve a variety of rights, access to the Internet cannot and should not be considered a fundamental right. The admirable desire to grant Internet access the status of a right is as seductive as it is problematic. The Internet is a medium that enables other rights and is not the object of a right in itself. Moreover, the Internet as a medium is not intrinsic to being human. To proclaim access to the Internet as a right therefore gravely diminishes the very nature of rights.

[127] Sterner 2011 *The New Atlantis* 134.

COMPENSATION FOR WRONGFUL CONVICTION IN SOUTH AFRICA

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SUMMARY

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

1 INTRODUCTION

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

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

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

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

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

3 *Ibid.*

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

18 2020 (2) SACR 229 (SCA).

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

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

2 UNDERSTANDING WRONGFUL CONVICTIONS IN SOUTH AFRICA

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

19 51 of 1977.

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

21 *Supra.*

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

23 *S v Makwanyane supra* par 54.

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

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

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

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

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

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

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

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

27 S 133 of the Criminal Justice Act 1988.

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

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

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

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

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

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

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

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

33 [2004] ZAECHC 35.

34 *S v Tanatu supra* par 37.

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

3 MEASURES IN PLACE TO ADDRESS INSTANCES OF WRONGFUL CONVICTION

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

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

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

37 *Supra.*

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

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

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

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

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

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38 *Supra*.

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

40 *Ibid*.

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

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

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

44 *Ibid*.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

61 *Ibid*.

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

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

3 2 The Criminal Procedure Act route

Section 327 of the CPA provides:

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

74 *Liesching v S supra* par 59.

75 *Liesching v S supra* par 60.

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

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

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

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

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

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76 *Ibid*.

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

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

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

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

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

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

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

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

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

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

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

5 COMPLYING WITH ARTICLE 14(6) OF THE ICCPR

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

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

85 Par 42.

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

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

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

89 *Ibid*.

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

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

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

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

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

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

92 See s 74 of the Constitution.

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

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

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

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

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

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

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

100 S 5 of the Demobilisation Act 99 of 1996.

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

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

103 S 35 of the CPA.

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

105 S 73(2A) of the CPA.

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

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

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

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

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106 S 8 of the CPA.

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

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

109 S 18 of the CPA.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Section 8(3) of the Constitution provides:

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

Section 39(2) of the Constitution states:

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

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

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

Section 39(3) provides:

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

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

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

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

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

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

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

125 Par 196.

126 *Ibid*.

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

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

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

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

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

The court added:

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

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

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

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

131 Par 13.

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

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

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

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

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

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

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

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

135 *Supra*.

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

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

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

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

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

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

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

6 CONCLUSION

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

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

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

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

LOCATION, LOCATION, LOCATION! AN ANALYSIS OF THE LEGAL GROUNDS FOR REQUIRING ALTERNATIVE ACCOMMODATION TO BE PROVIDED CLOSE TO THE EVICTION SITE

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SUMMARY

This article explores the notion of "location" in respect of the State's housing duty, especially in respect of emergency housing. Throughout, the term "location orders" are used to describe orders in which the State is required to provide emergency housing at or near a specific location. It is important to determine the legal justification for such orders, to ensure legal certainty. To answer this question, this article first sets out the facts of the most recent case in which such an order was made (*Commando v Woodstock Hub (Pty) Ltd*. Secondly, it considers the legal framework applicable to the question. Thirdly, the paper considers the history of location orders in our Constitutional Court's jurisprudence and how they came about. Thereafter, it explores the court's justifications for such orders. It considers under what circumstances courts are likely to grant such orders. This is applied to the *Commando* decision, to determine whether the decision was in line with the current approach. Final remarks are provided in the conclusion.

1 INTRODUCTION

Location, location, location! This is an effective tagline in real estate advertisements.[1] Everyone wants to live in a good location. For those who are unable to afford real estate, it is no different. Where one lives matters.[2] This is especially the case where one has connections with a place and the

[1] Struyk "The Factors of a 'Good' Location" (10 March 2022) https://www.investopedia.com/financial-edge/0410/the-5-factors-of-a-good-location.aspx (accessed 2022-03-16).

[2] Van Wyk "Can SPLUMA Play a Role in Transforming Spatial Injustice to Spatial Justice in Housing in South Africa?" 2015 30 *SAPL* 26 28; Fick "Airbnb in the City of Cape Town: How Could the Regulation of Short-Term Rental in Cape Town Affect Human Rights?" *StellLR* 2021 32(3) 455 464.

community that lives there. Being torn from such a space can have devastating effects on one's livelihood and wellbeing.[3]

This was recently confirmed by the Cape Town High Court. On 6 September 2021, in *Commando v Woodstock Hub (Pty) Ltd* (*Commando*),[4] the Cape Town High Court ordered the City of Cape Town (the City) to provide persons facing eviction with alternative accommodation "in a location which is as near as feasibly possible to where the applicants are currently residing".[5]

This article explores the notion of "location" in respect of the State's housing duty, especially in respect of emergency housing. Throughout, the term "location orders" is used to describe orders in which the State is required to provide emergency housing at or near a specific location. To ensure legal certainty it is important to determine the legal justification for such orders.

To answer this question, this article first sets out the facts of the *Commando* case. Secondly, it considers the legal framework applicable to the question. Thirdly, the article considers the history of location orders in our Constitutional Court's jurisprudence and how they came about. Thereafter, it explores the court's justifications for such orders. It considers under what circumstances courts are likely to grant such orders. These circumstances are compared to the *Commando* decision, to determine whether the decision was in line with the current approach. Final remarks are provided in the conclusion.

2 FACTS OF THE CASE

Briefly, the facts of the case are that a group of persons (the Bromwell Street evictees) were renting housing in Bromwell Street, Woodstock.[6] Most, if not all of them, had lived there their entire lives and were paying rent according to their means.[7] The erf on which all the housing was located was sold to a developer for R3.15 million and an eviction order was granted in 2016 in terms of the Prevention of Illegal Eviction From and Unlawful Occupation of Land Act (19 of 1998).[8] The eviction order did not deal with the possible homelessness that its execution might cause.[9] Several occupiers were unable to secure alternative accommodation.[10] Owing to gentrification, rentals in Woodstock had increased beyond the means of the occupiers.[11] After several abandoned court proceedings and unsuccessful discussions with the City,[12] the occupiers applied to court for the suspension of the

3 Strauss and Liebenberg "Contested Spaces: Housing Rights and Evictions Law in Post-Apartheid South Africa" 2014 13 *Planning Theory* 428 444.

4 [2021] 4 All SA 408 (WCC).

5 Par 169.2.

6 *Commando supra* par 3.

7 Par 2–3.

8 *Commando supra* par 3.

9 *Commando supra* par 11.

10 *Commando supra* par 9, 24.

11 *Commando supra* par 127, 133.

12 *Commando supra* par 7–15.

execution of the eviction order and for the City to provide alternative accommodation, within three months, in a location as near as possible to the eviction site.[13] They further requested that the court require the City to engage meaningfully with the occupiers and report on available alternative accommodation within two months.[14] Later, they amended their application to challenge the constitutionality of the City's emergency housing plan to the extent that it did not afford the occupiers alternative accommodation nearby.[15]

The court's primary focus in this matter was the constitutionality of the City's emergency housing programme. Several reasons are provided for declaring the City's emergency housing programme and its implementation unconstitutional. These include that the City's implementation was inconsistent and arbitrary, that the City's implementation violated the right to equality before the law, and that the City had given undue preference to social housing in the single housing project that was before the court.[16]

A big issue before the court was the fact that, in terms of one of its housing programmes (see City of Cape Town Transport and Urban Development Authority *Woodstock, Salt River and Inner City Precinct: Affordable Housing Prospectus* (2017) (the Woodstock Affordable Housing Programme)), the city had given preferential treatment to occupiers that it had displaced (as opposed to persons evicted in private eviction matters.[17] The City had removed persons (the Pine Road "evictees") from an informal settlement in Woodstock as part of its plan to use that land for social housing.[18] While the Bromwell Road evictees were offered remote informal structures, the Pine Road "evictees"[19] were relocated to a nearby site and were given brick buildings to live in.[20] This was the case even though the Bromwell Street evictees had faced eviction more than a year before the City's "evictees" and should therefore have been first in line to receive the alternative accommodation in Woodstock.[21] The court found this to be an irrational differentiation and therefore unconstitutional.[22] The court based this finding on *City of Johannesburg Metropolitan Municipality v Blue Moonlight Properties 39 (Pty) Ltd* (*Blue Moonlight* CC).[23]

Consequently, the court declared the City's emergency housing programme unconstitutional, particularly in relation to how it affected

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13 *Commando supra* par 15–16.

14 *Commando supra* par 16.

15 *Commando supra* par 66.

16 *Commando supra* par 158.

17 *Commando supra* par 150-158.

18 *Commando supra* par 150. "Social housing is housing which is subsidized to a greater or lesser extent, depending on the financial circumstances of the applicant, and is not free. It appears that as at September 2017 it was generally available in the inner City of Cape Town for households with a monthly income of between R 3501 and R 15 000." See par 19.

19 These persons were not evicted in the legal sense because no eviction order was granted. They moved voluntarily.

20 *Commando supra* par 152.

21 *Commando supra* par 156.

22 *Commando supra* par 150–158. Irrational differentiations violate s 9(1) of the Constitution of the Republic of South Africa, 1996 (the Constitution).

23 2012 (2) SA 104 (CC); see *Commando supra* par 156, and discussion of this case in 4 1 below.

persons who face homelessness owing to eviction from the inner city and surrounds (including Woodstock and Salt River).[24] Relying on one Supreme Court of Appeal (SCA) decision and one Constitutional Court (CC) decision,[25] the court found that it would be just and equitable to require the City to provide alternative accommodation in Woodstock, Salt River or the Inner-City Precinct in a location "as near as feasibly possible" to the eviction site.[26]

Despite this order, the court found that "as a matter of law, neither the applicants nor any other evictees in the City have a right to demand to be placed in temporary emergency housing in the area or location in which they live."[27] The court continued to say that this would be a violation of the separation of powers doctrine.[28] The court found:

> "These are by definition matters of State and policy which require careful and weighty consideration, by those functionaries who are empowered by law and who are equipped with the necessary expertise, to deal with them. They are not matters which a Court can or should pronounce on. That would be in clear breach of the doctrine of separation of powers and would constitute an impermissible intrusion into the domain of the executive and legislative arms of State. Were a Court to ascribe such a power to itself it would place an impossible burden on the State, as it would result in it having to accommodate evictees who are going to be rendered homeless, in virtually every suburb or area in which they live. For obvious reasons this is untenable."

Despite clearly setting out why location orders should not be granted, the court seemed to justify its order with the following statement:[29]

> "This matter has not been decided on that basis, but on the basis of whether it is rational or reasonable for the applicants to be told that they must take up emergency housing either in a TRA or an IDA on the outskirts of the City, or alternatively in an informal settlement, whilst other similarly-placed persons do not face the same choice, because they may have the good fortune of being afforded 'transitional' housing or (as was promised by the City's Mayoral Member for urban development), 'temporary' housing, in the inner City and its surrounds."

It is unclear how this justified the court's intrusion into the domain of the executive. The court itself did not explain this. In fact, in discussing the separation of powers issue it indicated that if a court "holds that the state has failed to do so it is obliged by the Constitution to say so, and insofar as that may constitute an intrusion into the domain of the executive, it is one mandated by the Constitution." [30] A declaration of unconstitutionality is a far cry from a location order.

This case creates a lot of questions. While on the one hand it is found that no duty to provide alternative accommodation nearby exists, on the other, a duty is found in this matter. The legal grounds for this finding are unclear.

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24 *Commando supra* par 161, 169.1.

25 Although stating that they were two CC decisions.

26 *Commando supra* par 162, 169.2.

27 *Commando supra* par 159, relying on *Joe Slovo Community, Western Cape v Thubelisha Homes* 2010 (3) SA 454 (CC) (*Joe Slovo*) par 254.

28 *Commando supra* par 159.

29 *Commando supra* par 160.

30 *Commando supra* par 126, referring to the Constitution.

Clarity is important when courts find that the State has a duty to provide alternative accommodation close to the place from where the occupiers were evicted.

To determine when this duty arises, the following section considers the legal framework relevant to location orders. The origin of the location order is then explored. The court bases its order on case law, not on its own reasoning. For that reason, it is important to see what the past reasoning of the courts has been in relation to location orders. This may give insight into when such orders would be granted and what duty lies with the State.

3 THE LEGAL FRAMEWORK

The South African Constitution protects against eviction from one's home in terms of section 26(3) of the Constitution. This section provides that no person may be evicted from their home unless such eviction is in terms of a court order. Such an order may only be granted if the court finds that the eviction would be just and equitable, considering all of the relevant circumstances.[31] Furthermore, section 26(1) and (2) of the Constitution gives everyone a right of access to adequate housing and places a duty on the State to fulfil this right progressively, within its available resources, by taking reasonable legislative and other measures.

The interpretation of this section by the Constitutional Court has led to the finding that the State's housing duty includes a duty toward persons in emergency housing situations who face homelessness.[32] This includes persons who are evicted.[33] They must be provided with at least temporary alternative accommodation, should the State's resources allow such.[34] Consequently, the State must have an emergency housing plan, setting out how it will fulfil this duty.[35] Such a plan must be flexible to cater for emergencies.[36] In response, the State has adopted the Emergency Housing Programme under the National Housing Act.[37]

Section 26 of the Constitution does not say anything about the location of the alternative accommodation. In fact, nowhere in South African legislation, policies or housing programmes is it stated that alternative accommodation should be close to the eviction site. In addition, no international instruments require that alternative accommodation be provided close to the eviction site.

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31 S 26(3) read with s 172(1)(*b*) of the Constitution. This section is given effect to by the Prevention of Illegal Eviction From and Unlawful Occupation of Land Act 19 of 1998. See Wilson "Breaking the Tie: Evictions From Private Land, Homelessness and a New Normality" 2009 126 *SALJ* 270 271.

32 *Government of the Republic of South Africa v Grootboom* 2001 (1) SA 46 (*Grootboom*) par 24; Wilson 2009 *SALJ* 286.

33 As was the case in *Grootboom.*

34 *Blue Moonlight* CC *supra* par 96; *Port Elizabeth Municipality v Various Occupiers* 2005 (1) SA 217 (CC) (*PE Municipality*) par 28.

35 *Grootboom supra* par 42, 43, 68.

36 *Grootboom supra* par 43.

37 The National Housing Code was adopted in terms of s 4 of the National Housing Act 107 of 1997. It is a policy that contains the State's housing programmes, including the Emergency Housing Programme (EHP). See Socio-Economic Rights Institute of South Africa A Resource Guide to Housing (2011) 44.

The author could also not find any foreign jurisdictions in which this was required.

The only reference to location in international law is in General Comment 4 of the International Covenant on Economic Social and Cultural Rights[38]. This Comment provides that the location of the housing forms part of the consideration of whether it is adequate.[39] It states that adequate housing is located so that it "allows access to employment options, health-care services, schools, childcare centres and other social facilities."[40] Hence, alternative housing that allows such access would be adequate in terms of the Covenant regardless of whether it is close to the place from where a person is displaced.

4 THE ORIGIN OF THE LOCATION ORDER

The court, in *Commando*, justified its decision to grant a location order on the basis that this had been done in two previous Constitutional Court cases (*sic*). It went on to cite *City of Johannesburg v Changing Tides 74 (Pty) Ltd*[41] (*Changing Tides*) (an SCA decision) and *Blue Moonlight* (a Constitutional Court decision). Unfortunately, the court did not explain how these cases justified such an order in the specific circumstances of the case and what the justification for such orders was in the cited cases.

To try to determine what the justification may be, these cases are considered in 4 1 of this section. The aim is to determine the grounds on which the location orders were granted in these cases so as to determine whether these grounds applied in *Commando.* As is seen below, these cases do not expressly provide legal justification for location orders. Hence, in order to try to tease out a legal justification, 4 2 of this section explores earlier cases in which the significance of the location of alternative accommodation orders was discussed.

4 1 Cases in which location orders were granted

The Constitutional Court case relied upon in *Commando* as precedent for granting a location order is *Blue Moonlight* CC. This was not an ordinary eviction matter. The court had found that part of one of the City of Johannesburg's programmes, the Inner City Regeneration Strategy,[42] was unconstitutional for excluding private evictees from the emergency housing that was offered through that plan.[43] The programme focused on

38 (UNGA 993 UNTS 3 (1966).

39 ICESCR General Comment 4 par 8(f), discussed in Strauss and Liebenberg 2014 *Planning Theory* 443.

40 ICESCR General Comment 4 par 8(f).

41 2012 (6) SA 294 (SCA).

42 Wilson "Litigating Housing Rights in Johannesburg's Inner City: 2004–2008" 2011 27 *SAJHR* 127 134.

43 *Blue Moonlight* CC *supra* par 104, confirming the SCA decision; see *City of Johannesburg Metropolitan Municipality v Blue Moonlight Properties 39 (Pty) Ltd* 2011 (4) SA 337 (SCA) (*Blue Moonlight* SCA) par 77. The *Blue Moonlight* case was based on the right to equality, s 9(1) of the Constitution; *Blue Moonlight* CC *supra* par 87.

"regenerating" the city by fixing "bad buildings".[44] These were dilapidated buildings in the inner city that were considered unsafe for human occupation.[45] In terms of the programme, persons evicted by the City from "bad buildings" in the inner city were provided with emergency accommodation.[46] However, no person who faced homelessness due to a private eviction from a "bad building" in the inner city could receive emergency housing through this programme.[47] The city argued that evictees from "bad buildings" faced a particular threat.[48] Their lives were threatened owing to the unsafe buildings they occupied. This, according to the City, justified dealing with them outside of its normal emergency housing plan,[49] and entailed the City providing them with alternative accommodation close to the eviction site.[50] Private evictees could still be assisted through the State's general emergency housing programme.[51] However, this programme entailed that the City apply for funding from the provincial government and did not guarantee a swift response and accommodation nearby.[52]

The court found the programme to be unconstitutional to the extent that it excluded the occupiers (who were private evictees from a "bad building") from receiving alternative accommodation. This finding was based on the right to equality before the law in section 9(1) of the Constitution.[53] The court ordered the City to provide the occupiers with accommodation "as near as possible" to the eviction site.[54] No explanation was provided as to the justification for the location order. In fact, the idea that the City must provide the unlawful occupiers with alternative accommodation "as near as possible" to the eviction site was simply taken from the SCA order.[55] From the SCA decision it is evident that this idea was similarly copied from the High Court decision without further explanation.[56] It is noted that the Constitutional Court order relied on by the court in *Commando* provides no reasoning for this order but simply confirms the order made by the High Court.

The Constitutional Court's only mention of location in the *Blue Moonlight* order is made when setting out the facts. The court states:

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44 *Blue Moonlight* CC *supra p*ar 78; see Centre on Housing Rights and Evictions (COHRE) *Any Room for the Poor? Forced Evictions in Johannesburg, South Africa* (2005) 46; on the background regarding the existence of these buildings, see Wilson 2011 *SAJHR* 131–134.

45 *Blue Moonlight* CC *supra* par 78; COHRE *Any Room for the Poor?* 46.

46 *Blue Moonlight* CC *supra* par 78.

47 *Blue Moonlight* CC *supra* par 79.

48 *Blue Moonlight* SCA *supra* par 21.

49 *Blue Moonlight* CC *supra* par 78–81.

50 The buildings identified for emergency housing were all located in the inner city, see Tugwana "City Buildings Converted" (28 August 2007) https://www.joburg.org.za/media_/Mediastatements/Pages/2007%20Press%20Releases/2007-08-28;-City-buildings-converted-.aspx (accessed 2022-03-15).

51 *Blue Moonlight* CC *supra* par 81.

52 *Blue Moonlight* CC *supra* par 82.

53 *Blue Moonlight* CC *supra* par 87.

54 *Blue Moonlight* CC *supra* par 104.

55 *Blue Moonlight* CC *supra* fn 91.

56 See order cited at the start of the SCA decision. The wording in both the SCA and High Court orders differs slightly from that in the Constitutional Court order in that the earlier wording required the accommodation to be "as near as *feasibly* possible" (emphasis added).

> Most of them do not have formal employment and make their living in the informal sector in the central business district. The location of the building is crucial to the Occupiers' income. The majority of them say that they would not be able to afford the transport costs necessitated by living elsewhere.[57]

This seems to provide factual justification for the order but does not ground it in the law.

Even the High Court decision provides no reasoning. The High Court addresses the desirability of the City providing alternative accommodation nearby without grounding it in law:

> The occupiers sought orders to be placed effectively close to where they presently live. ... In my view the City should avoid disrupting the lives of the occupants unduly, particularly where children are enrolled in nearby schools or employment is in close proximity.[58]

Interestingly, the High Court stated that the City cannot be obliged to spend more money than usual simply because someone was able to occupy land unlawfully in a more expensive area. Nevertheless, it found that alternative accommodation should be "within a reasonable radius, having regard to the circumstances and the cost of available transport".[59]

A possible justification for the order could be that alternative accommodation provided to the state evictees was in the inner city.[60] Hence, a finding that private evictees from bad buildings should be treated the same would mean that they must also be accommodated in the available inner-city buildings. This would have the effect that location orders should be limited to exceptional circumstances, such as where the State is unconstitutionally providing nearby alternative accommodation only to a certain group) and might not be justified in ordinary eviction matters.

In fact, the only other Constitutional Court matter in which a location order was granted confirms this notion that exceptional circumstances should exist. In 2012, the Constitutional Court in *Pheko v Ekurhuleni Metropolitan*[61] (*Pheko*) dealt with an unlawful eviction from and demolition of homes.[62] In this matter, the municipality had authorised the eviction from and demolition of the homes of several people in terms of the Disaster Management Act.[63] The municipality had declared the area "a local state of disaster" because of the "dolomite instability of the area".[64] The court found that the evacuations and demolitions effected without a court order amounted to a violation of

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57 *Blue Moonlight* CC *supra* par 6.

58 *Blue Moonlight Properties (Pty) Ltd v Occupiers of Saratoga Avenue* SGHC (unreported) 2010-02-18 2006/11442 (*Blue Moonlight* HC) par 181.

59 *Blue Moonlight* HC *supra* par 182. This coincides with the *Joe Slovo* decision (*supra* and see discussion below).

60 The buildings identified for emergency housing were all located in the inner city; see Tugwana https://www.joburg.org.za/media_/Mediastatements/Pages/2007%20Press%20Releases/2007-08-28;-City-buildings-converted-.aspx.

61 2012 (2) SA 598 (CC).

62 *Pheko supra* par 3.

63 57 of 2002; see *Pheko supra* par 8–11.

64 *Pheko supra* par 8.

sections 26(3) and 10 of the Constitution.[65] As a remedy, the court required the State to provide alternative accommodation "in the immediate vicinity" of the area.[66]

No reasons were provided for the finding that the land must be in the immediate vicinity of the area. However, in a letter to the municipality, the occupiers objected to being relocated far away owing to it being too far from where they "work, attend school, and access basic services".[67] This was only mentioned by the court in a footnote. Based on the facts of the case, the location order does, however, make legal sense, since the eviction was unlawful. Hence, the location order was almost like a reinstatement. It is unclear why the court did not simply require the municipality to provide them with the means to rebuild their homes, since the court based its order on the fact that there was no disaster.[68] The only reason could be that the court did in fact believe that the area was not suitable for occupation.[69]

This, therefore, seems like another exceptional circumstance where a location order was granted – that is, an unlawful eviction where return to the property might be unsafe. Based on these two Constitutional Court cases, it seems clear that such orders should be reserved for exceptional circumstances and should not be granted in normal eviction matters.

However, this reasoning is challenged by the other case relied on by the court in *Commando* – that is, the SCA case of *Changing Tides.* This matter was a straightforward eviction matter, in which the occupiers had faced homelessness.[70] The State's housing programme was not found to be unconstitutional in that case. As is the Constitutional Court cases, no reasoning is provided for the order that alternative accommodation must be "as near as feasibly possible" to the eviction site.[71] As with *Blue Moonlight*, the wording was copied from the decision of the court *a quo* .[72] This is the likely reason for the order mirroring that of *Blue Moonlight*. The order in *Changing Tides* was specifically amended to take into account the decision in *Blue Moonlight* SCA, which was handed down just three months prior to the *Changing Tides* High Court decision.[73] The High Court had held itself bound by the *Blue Moonlight* SCA decision,[74] probably because of the principle of *stare decisis.*[75] The High Court's decision was despite the

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65 *Pheko supra* par 44. S 10 of the Constitution concerns the rights to have your dignity respected and protected.

66 *Pheko supra* par 53.

67 *Pheko supra* par 9, fn 9.

68 *Pheko supra* par 34–46.

69 For further discussions on the case, see Strauss and Liebenberg 2014 *Planning Theory* 438-439; Kotze *Effective Relief Regarding Residential Property Following a Failure to Execute an Eviction Order* (master's thesis, University of Stellenbosch) 2016 87-95.

70 *Changing Tides supra* par 10.

71 *Changing Tides supra* par 65.

72 See the High Court order quoted in *Changing Tides supra* par 6.

73 *Changing Tides supra* par 4.

74 *Ibid*.

75 The principle that courts are bound by previous decisions, especially of higher courts, see *Gcaba v Minister for Safety and Security* 2010 (1) SA 238 (CC) par 58–62 (referring to several other cases); see also Pretorius *A Critical Analysis of Recent Supreme Court of Appeal Judgments That Have Deviated From the Stare Decisis Principle* (higher diploma

difference between the cases and the fact that the *Changing Tides* case did not involve the court declaring the State's housing programme to be unconstitutional. Nevertheless, this matter involved the same municipality whose emergency housing programme had been declared unconstitutional in *Blue Moonlight*. Since the *Blue Moonlight* matter was on appeal at that stage, one can accept that a new emergency housing programme had not been adopted. Therefore, the court was still dealing with the exceptional circumstance of an unconstitutional housing programme in which the State had unjustifiably provided nearby accommodation to one group of people at the expense of another.

From the above, it is evident that the cases relied on by the *Commando* court, as well as the other Constitutional Court case in which a location order was granted, do not provide much clarity regarding the legal grounds for such an order. At most, a factual explanation that alternative accommodation far from the eviction site would make it difficult to access their schools and jobs was provided. The cases do seem to suggest that such an order would only be granted in exceptional circumstances, such as where the State had unconstitutionally excluded an entire segment of the population from a plan involving the provision of nearby accommodation or had unlawfully evicted persons from their homes.

4 2 Earlier cases dealing with the location of alternative accommodation

Since no legal justification for the location orders was provided by the courts that granted them, this section considers earlier Constitutional Court and SCA cases in which the location of alternative accommodation was discussed, although no location order was granted. While the Constitutional Court, in granting the location orders discussed above did not expressly rely on these cases, they may still shed some light on the court's reasoning.

In 2004, the Constitutional Court first dealt with the location of alternative accommodation in the case of *PE Municipality.* This matter involved the eviction of 68 people from an unused, undeveloped piece of land.[76] They had been living there for between two and eight years.[77] The eviction was brought by the municipality following a petition by the neighbours insisting that the municipality evict the occupiers on the basis that the informal settlement increased crime in the area.[78] The occupiers argued that they would only move if they were provided with alternative accommodation.[79] The municipality offered alternative accommodation at two sites.[80] One site was rejected by the occupiers as unsafe and overcrowded and the other as being "too far away for them to go to their work and for their children to

thesis, International Institute for Tax & Finance in association with the Thomas Jefferson School of Law) 2012 9–11.

76 *PE Municipality supra* par 1.

77 *PE Municipality supra* par 2.

78 *PE Municipality supra* par 1–2.

79 *PE Municipality supra* par 2.

80 *PE Municipality supra* par 54.

school"[81] – that is, owing to the location of the alternative accommodation. The court seemed to agree with the occupiers that alternative accommodation that is too far away is not suitable. It found that "[w]hat is just and equitable could be affected by the reasonableness of offers made in connection with suitable alternative accommodation or land".[82] In fact, the court did not seem to consider these to be serious offers made by the municipality, finding that "[t]he real question in this case is whether the Municipality has considered seriously or at all the request of these occupiers that they be provided with suitable alternative land".[83]

Importantly, the court places much emphasis on the fact that the occupiers had occupied the property for a long time. It found that

> "[t]he longer the unlawful occupiers have been on the land, the more established they are on their sites and in the neighbourhood, the more well settled their homes and the more integrated they are in terms of employment, schooling and enjoyment of social amenities."[84]

This led the court to find that

> "a court should be reluctant to grant an eviction against relatively settled occupiers unless it is satisfied that a reasonable alternative is available, even if only as an interim measure pending ultimate access to housing in the formal housing programme."[85]

The far-away accommodation did evidently not constituting a "reasonable alternative" in the court's opinion. As a result, the court denied the eviction order, citing the fact that the land is unused and not needed for a productive purpose.[86]

This case highlighted that alternative accommodation far away may not be reasonable if the evictees are settled and integrated in the community. The reasonableness of the offer affects whether the eviction would be just and equitable, as is required by section 26(3) of the Constitution.

In 2007, the SCA, in *City of Johannesburg v Rand Properties (Pty) Ltd*,[87] (*Rand Properties*) found:[88]

> "The shelter that the City is obliged to provide need not necessarily be located within the inner city as demanded by the respondents. … More particularly, the Constitution does not give a person a right to housing at State expense at a locality of that person's choice (in this case the inner city). Obviously, the State would be failing in its duty if it were to ignore or fail to give due regard to the relationship between location of residence and the place where persons earn or try to earn their living but a right of the nature envisaged by the court and the respondents is not to be found in the Constitution."

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81 *Ibid*.

82 *PE Municipality supra* par 30, Strauss and Liebenberg 2014 *Planning Theory* 435.

83 *PE Municipality supra* par 58.

84 *PE Municipality supra* par 27.

85 *PE Municipality supra* par 28.

86 *PE Municipality supra* par 59.

87 2007 (6) SA 417 (SCA).

88 *Rand Properties supra* par 44.

This paints a completely different picture to that of the *Commando* court. The SCA found that there is no duty on the City to provide alternative accommodation close to the eviction site. The location is only a factor to consider. This is similar to what the court in *PE Municipality* found. The court further justifies its reluctance to grant a location order on the basis of the separation of powers doctrine.[89] The *Commando* court, similarly, acknowledged the importance of this doctrine, but still granted a location order without justifying it in relation to the separation of powers implications.[90]

To avoid separation of powers issues, the court in *Rand Properties* found that the location of the alternative accommodation should be determined by the City after consultation with the occupiers.[91] This led to an agreement between the occupiers and the State that it would provide them with alternative accommodation close to the eviction site.[92]

In 2009, the Constitutional Court in the *Joe Slovo*[93] case again addressed the issue of location. This case involved the eviction of unlawful occupiers (of what was known as the Joe Slovo informal settlement) from state land so that state housing could be built on the land.[94] The occupiers were promised that 70 per cent of the homes built would be offered to the them once the project was completed.[95] The State offered to relocate the occupiers to Delft, some 15km away from the original settlement.[96] It offered free transport for children to school and pledged to build more schools and hospitals in the area.[97] The court allowed for relocation but required the municipality to provide transportation to those who needed to reach schools, health care facilities and work places.[98]

In his order,[99] Ngcobo J found that:[100]

> "In the past we have stressed that the government faces an extremely difficult task in addressing the injustices of the past. This is compounded by the limited availability of resources, including the availability of land where decent houses can be built. These factors will invariably compel the government to provide access to adequate housing in areas available to it. And these areas will invariably not be located close to the areas from which people are being relocated. This is a consequence of our history. All that the government can and should do is, as far as is possible, have regard to the proximity of schools and employment opportunities when it seeks to relocate people for the purposes of providing them with decent houses.

89 *Rand Properties supra* par 44–45.
90 *Commando supra* par 159.
91 *Rand Properties supra* par 78.
92 *Occupiers of 51 Olivia Road, Berea Township and 197 Main Street Johannesburg v City of Johannesburg* 2008 (3) SA 208 (CC) par 24–26.
93 *Supra*.
94 *Joe Slovo supra* par 8.
95 *Joe Slovo supra* par 32; this was made an order of court.
96 *Joe Slovo supra* par 254.
97 *Ibid*.
98 Par 11.6 of the order; see *Joe Slovo supra* par 7.
99 While the judges handed down a single decision on the points on which they concurred, five wrote their own separate judgments; *Joe Slovo supra* par 1.
100 Par 255–256.

> In some instances this may be possible, in others it may not. Where this is not possible, all that the government can do is ameliorate the disruptive effect of relocation by providing access to schools and other public amenities as the government has done in this particular case. In this case, the government, consistently with its obligation to promote access to adequate housing, has committed itself to alleviating the consequences of relocation. What must be stressed here is that it is the primary responsibility of the government to provide adequate housing. This responsibility carries with it the authority to determine how and where to provide adequate housing. However, in doing so, the government must act reasonably."

Joe Slovo confirmed that there is no right to alternative accommodation close to the eviction site. Even settled persons may be relocated to a location far away if closer accommodation is not possible. In fact, similar to the International Covenant on Economic Social and Cultural Rights (the ICESCR), the court focused not on whether the alternative accommodation is close to the eviction site but whether it is close to schools and employment opportunities. Where this is not possible, transport should be provided to ensure access to these things. The separation of powers doctrine gives the State authority to determine how it fulfils its duty.[101]

5 THE COURT'S JUSTIFICATION OF THE LOCATION ORDER

The cases above highlight the court's concern for the consequences of displacement faced by evictees. In all of the cases, this was mentioned. However, this is not a legal justification for such orders. This section aims to distil the legal justifications for granting such orders from the cases discussed above. It also seeks to determine when such orders would be granted in the future.

5 1 Exceptional circumstances

The nature of the matters in which location orders have been granted seems to suggest that such orders will only be granted under exceptional circumstances. These include matters in which there was an unlawful eviction or where a state housing programme is found to be unconstitutional for excluding an entire segment of the population from nearby alternative accommodation. Nevertheless, such matters would still require legal justification. In *Pheko*, the justification was probably a type of reinstatement after an unlawful eviction. *Blue Moonlight's* legal justification relates to the fact that the State's programme aimed to provide state evictees with alternative accommodation close to the eviction site,[102] but excluded private evictees. This leads to the conclusion that all evictees should be treated alike, as per s 9(1) of the Constitution. However, not all state evictees were provided with alternative accommodation nearby. The programme focussed

[101] The decision has had its critics. Strauss and Liebenberg criticise the court for not engaging with the "grave consequences" that this order would have, Strauss and Liebenberg 2014 *Planning Theory* 440.

[102] The buildings identified for emergency housing were all located in the inner city; see Tugwana https://www.joburg.org.za/media_/Mediastatements/Pages/2007%20Press%20Releases/2007-08-28;-City-buildings-converted-.aspx.

only on persons evicted from "bad buildings" in the inner city. The declaration of unconstitutionality would therefore not have had the effect that all evictees receive alternative accommodation close to the eviction site – only those in similar circumstances to the state evictees. This highlights the link between location orders and the relevant circumstances of the evictees. Moreover, it is clear from the discussion in the following section that the location orders in *Blue Moonlight* and *Changing Tides* would also have been validated by this legal justification.

5 2 Relevant circumstances

The Constitutional Court, in *PE Municipality*, has suggested another legal justification for requiring the State to provide alternative accommodation close to the eviction site. As indicated, the court found:

> What is just and equitable could be affected by the reasonableness of offers made in connection with suitable alternative accommodation or land.[103]

This is a reference to the standard for evictions in section 26(3). A court may not grant an eviction order without finding that it would be just and equitable. The court criticised the State's offer of alternative accommodation far from the eviction site for not being "serious".[104] Hence, this finding suggests that a location order may be granted so as to ensure that an eviction is just and equitable. In other words, the location of alternative accommodation is a relevant circumstance to be taken into account when determining whether an eviction would be just and equitable. Moreover, the duty lies with the State to make a reasonable offer of alternative accommodation because of its duty to take reasonable legislative and other measures to realise the right of access to adequate housing.[105]

This is in line with the other cases discussed above. In *Rand Properties,* the SCA similarly found that there is no duty on the State to provide alternative accommodation close to the eviction site but the State must have "due regard to the relationship between location of residence and the place where persons earn or try to earn their living".[106] Hence, it is a factor to be considered. In *Joe Slovo*, the court again found that the only duty on the State is to "have regard to the proximity of schools and employment opportunities".[107] Having regard to the location is not the same as providing alternative accommodation in a nearby location. This is confirmed by the fact that the court stated that "[i]n some instances this may be possible, in others it may not".[108]

What is clear is that the City's response to the eviction must be reasonable. When it is required to provide alternative accommodation, its offer must be reasonable. An important question is, therefore, under what circumstances would reasonableness require an offer of alternative

[103] Par 30; see Strauss and Liebenberg 2014 *Planning Theory* 435.
[104] *PE Municipality supra* par 58.
[105] S 26(2) of the Constitution.
[106] *Rand Properties supra* par 44.
[107] *Joe Slovo supra* par 255.
[108] *Joe Slovo supra* par 256.

accommodation that is close to the eviction site. This would depend on the circumstances of the case. To determine the needs of the occupiers, the City would have to engage meaningfully with the occupiers.[109] One of the circumstances that would weigh heavily in favour of offering housing close to the eviction site would be that the occupiers are settled in the community. Being settled means that a person has occupied the land for a long time and is integrated in terms of "employment, schooling and enjoyment of social amenities".[110] This led the court, in *PE Municipality*, to find that "a court should be reluctant to grant an eviction against relatively settled occupiers unless it is satisfied that a reasonable alternative is available".[111]

Another relevant circumstance in determining the reasonableness of the State's offer is the effect thereof on spatial justice. This was argued in *Commando*. In support of their argument that the City's programme was unconstitutional, the occupiers referred to then-Cllr Herron's statement that the City is committed to "reverse the legacy of apartheid spatial planning". He said that this legacy is perpetuated when the State provides housing on the outskirts of the City.[112]

The notion of "spatial justice" links social justice with space.[113] "Spatial justice" acknowledges the geographical element of justice.[114] This entails recognising that geographical inequalities, like segregation, have an effect on people's lives.[115] Where distributive justice focuses on unequal outcomes, spatial justice focuses on the structural causes of these outcomes.[116] Where one is located matters.[117] Geographical inequality is not always problematic. However, it becomes oppressive when it is "maintained over a long time period and [is] rooted in persistent division in society such as those based on race, class, and gender".[118] This applies to geographical inequality throughout South Africa, especially in the urban areas. The cities are segregated along racial and income lines.[119] During (and prior to) apartheid, Black people were removed and excluded from urban land.[120] Even after apartheid, the Black poor have often been evicted from urban areas and relocated far away from the inner city.[121] It has been argued that the post-

[109] *City of Johannesburg v Rand Properties (Pty) Ltd supra* par 78; *Occupiers of 51 Olivia Road, Berea Township and 197 Main Street Johannesburg v City of Johannesburg supra* par 9–23; Wilson 2011 *SAJHR* 148.

[110] *PE Municipality supra* par 27.

[111] *PE Municipality supra* par 28.

[112] *Commando supra* par 67.

[113] Van Wyk 2015 *SAPL* 27. Spatial justice can also be linked to Lefebvre's right to the city; see Lefebvre *Writings on Cities* (1996). This topic falls outside of the scope of this article. See also Fick 2021 *StellLR* 464.

[114] Soja "The City and Spatial Justice" 2009 1 *JSSJ* 1 2;.Van Wyk 2015 *SAPL* 28; Fick 464.

[115] Soja *Seeking Spatial Justice* (2010) 72; Fick 2021 *StellLR* 464.

[116] Soja *Seeking Spatial Justice* 77; Fick 2021 *StellLR* 464.

[117] Van Wyk 2015 *SAPL* 28; Fick 2021 *StellLR* 464.

[118] Soja *Seeking Spatial Justice* 73; Fick 2021 *StellLR* 464.

[119] Strauss and Liebenberg 2014 *Planning Theory* 429; Fick 2021 *StellLR* 465.

[120] Strauss and Liebenberg 2014 *Planning Theory* 429; Madlalate "Dismantling Apartheid Geography: Transformation and the Limits of Law" 2019 9 *CCR* 195 200; Fick 2021 *StellLR* 465.

[121] Strauss and Liebenberg 2014 *Planning Theory* 429; Fick 2021 *StellLR* 465.

apartheid city still resembles the apartheid city.[122] Integration has been slow.[123] This is confirmed by the court in *Commando.*[124]

The Constitution imposes no express duty on the State to ensure spatial justice. Nevertheless, it has been argued that this obligation is implicit in the "spirit, purport and objects" of the Constitution.[125] This is because an important purpose of the Constitution is to redress the injustices of the past. Central to these injustices is the racial segregation effected by the previous government, which caused (ongoing) spatial injustice.[126] This means that redressing past injustices necessarily involves the achievement of spatial justice.[127] The first piece of South African legislation to make specific reference to spatial justice is SPLUMA. It lists spatial justice as a principle of spatial planning.[128] Moreover, the Act requires municipalities to consider spatial justice when developing land use schemes.[129] It grounds this duty on municipalities in section 26 of the Constitution.[130]

An eviction that requires poor Black people to leave the city, exacerbates spatial injustice.[131] It is, therefore, a factor that the court must consider in determining whether the State's offer of alternative accommodation is reasonable. Nevertheless, as a stand-alone factor, spatial justice is unlikely to necessitate a location order. This is due to the separation of powers doctrine. While the State has a duty to achieve spatial justice, it has the prerogative to decide how this should be done. With land in and around the inner city being expensive and sought-after,[132] the City cannot achieve spatial justice immediately and solely through its emergency housing programme. It has to plan how this will be achieved. Such plans may include a range of different types of housing, such as social housing and permanent

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122 Christopher "The Slow Pace of Desegregation in South African Cities, 1996–2001" 2005 42 *Urban Studies* 2305 2305; Seekings "Race, Class and Inequality in the South African City" (2010) *CSSR Working Paper No 283* 15; Parry and Van Eeden "Measuring Racial Residential Segregation at Different Geographic Scales in Cape Town and Johannesburg" 2015 97 *SAGJ* 31 33; Madlalate 2019 *CCR* 200; Fick 2021 *StellLR* 466.

123 Parry and Van Eeden 2015 *SAGJ* 33; Seekings (2010) *CSSR Working Paper No 283* 15. See also, Fick 2021 *StellLR* 466.

124 *Supra* par 128.

125 Strauss and Liebenberg 2014 *Planning Theory* 431; Fick 2021 *StellLR* 464.

126 Soja 2009 *JSSJ* 3 specifically identifies apartheid as a form of "political organization of space [which] is a particularly powerful source of spatial injustice"; See also Strauss and Liebenberg 2014 *Planning Theory* 429–430; Van Wyk 2015 *SAPL* 29; Strauss *A Right to the City for South Africa's Urban Poor* (doctoral thesis, University of Stellenbosch) 2017 182–183; Fick 2021 *StellLR* 464.

127 Strauss and Liebenberg 2014 *Planning Theory* 431; Strauss *A Right to the City* 204 discusses the fact that this is acknowledged in the Preamble to the Spatial Planning and Land Use Management Act 16 of 2013 (SPLUMA); see also Van Wyk 2015 *SAPL* 31; Martin *Does a Right to Have Access to Adequate Housing Include a Right to the City in South Africa?* (master's thesis, University of the Western Cape) 2017 92–93; Fick 2021 *StellLR* 464.

128 Strauss and Liebenberg 2014 *Planning Theory* 434; Van Wyk 2015 *SAPL* 31; Fick 2021 *StellLR* 464.

129 S 6 of SPLUMA; Strauss and Liebenberg 2014 *Planning Theory* 434; Van Wyk 2015 *SAPL* 36; Fick 2021 *StellLR* 464–465.

130 Preamble to SPLUMA; Fick 2021 *StellLR* 465.

131 Strauss and Liebenberg 2014 *Planning Theory* 435.

132 *Commando supra* par 146.

housing.[133] A location order interferes with this planning. While the poorest of the poor should not be excluded from such plans,[134] spatial justice need not be achieved by focusing solely on them. For this reason, a location order based on spatial justice is more likely where other factors also point to a location order. This would especially be the case where people are settled and integrated into their community and their eviction would exacerbate spatial injustice. This is illustrated below, where these principles are applied to the *Commando* case.

As indicated above, the relevant circumstances in *Blue Moonlight* justify a location order. First, the occupiers were settled in their communities. Several had lived there for "many years".[135] Their children were enrolled in nearby schools and they were dependent on the location for an income.[136] Secondly, spatial justice considerations also pointed to a location order since the occupiers were facing eviction from the inner city of Johannesburg, a city characterised by its untransformed landscape.[137]

5 3 Effect of s 26(2) of the Constitution

The State's housing duty is found in section 26(2) of the Constitution. This includes its emergency housing duty, which is fulfilled when it has to execute a location order. This means that the granting of such an order is subject to the internal limitations that section 26(2) places on the State's housing duty. Hence, such an order can only be granted if the State's available resources will allow it. Alternatively, such an order could be granted, but what constitutes "as near as feasibly possible" might be quite far away, depending on the State's resources.

Since location orders constitute emergency accommodation, the accommodation must be available within a short period of time. This means that the State must have existing access to the accommodation. If it is to be land on which the occupiers can settle, the State must already own the land. Otherwise, land or accommodation can be rented or provided by another entity.[138] It is preferable that the municipality own the land because the emergency housing programme states that emergency accommodation should, where possible, be upgradable to permanent housing.[139]

That the State must have land available in the vicinity for a location order to be granted is confirmed in the cases discussed above. In *Blue Moonlight*, the City seemed to have buildings in the vicinity that could be used for

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133 Such as the Woodstock Affordable Housing Programme, under scrutiny in *Commando supra* par 59–61.

134 *Grootboom supra* par 44 – this would perpetuate spatial injustice among socio-economic lines, as referred to in par 119.

135 *Blue Moonlight* CC *supra* par 7.

136 *Blue Moonlight* HC *supra* par 181; *Blue Moonlight* CC *supra* par 6.

137 Strauss and Liebenberg 2014 *Planning Theory* 429; Fick 2021 *StellLR* 465.

138 As was the case in *Dladla v City of Johannesburg* 2018 (2) SA 327 (CC) par 7.

139 See, the EHP par 2.2. The City adheres to this vision, calling the land to be used for emergency housing "incremental development areas" par 37.

alternative accommodation.[140] In *Pheko*, the City acknowledged that it had land in the vicinity.[141]

An important question is when one could say the land is "available". In both *Blue Moonlight* and *Pheko* the municipality argued that the identified land was earmarked for other projects.[142] Similarly, in *Commando*, the land identified was said to be earmarked for other projects.[143] In fact, the court in *Commando* sets out the immense struggle faced by the City and the hundreds of thousands of people needing assistance, and the laudable plans by the city to assist but then easily interferes with these plans.[144] This creates separation of powers issues. Ideally, location orders should not identify a piece of land or an area, but should just confirm the State's duty based on the relevant circumstances to provide alternative accommodation as near as *feasibly* possible, and place on the State the responsibility indicate how it can fulfil this.

5 4 When location orders are not granted

The relevant circumstances and/or the State's limited housing duty may mean that a location order should not be granted. This could be the case where the occupiers are not settled or where the State does not have the requisite resources available.

It is clear from the ICESCR and the *Joe Slovo* case that all alternative accommodation should be close to schools, employment opportunities and social amenities.[145] In other words, even if the State is not required to provide alternative accommodation close to the place from where the occupiers were evicted, the alternative accommodation should still allow access to these things, even if they are not the same amenities that the occupiers were accessing. Should this not be possible, the State should, where possible, ensure access by providing transport to schools, employment opportunities and social amenities.[146] In matters where the occupiers' circumstances favour a location order, transport should ideally provide access to the same schools, jobs and amenities that the occupiers accessed prior to eviction.

6 APPLICATION TO THE CASE

The previous section aimed to determine the legal justification(s) for location orders. From the cases in which location orders were granted, it seems that such orders should only be granted under exceptional circumstances. Nevertheless, in considering the other relevant case law, it could be argued that location orders may be granted if the relevant circumstances require it.

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140 *Blue Moonlight* CC *supra* par 79.

141 *Pheko supra* par 50.

142 *Blue Moonlight* CC *supra* par 79; in *Pheko* the land belonged to another State department, par 50.

143 *Commando supra* par 39–41.

144 *Commando supra* par 28–34.

145 Strauss and Liebenberg 2014 *Planning Theory* 443–444.

146 *Joe Slovo supra* par 256 and ICESCR General Comment 4 par 8(f).

This is most likely to be the case where the occupiers are settled and integrated into the area. Whichever justification is relied on, assessing the reasonableness of the distance of the alternative accommodation from the eviction site must be guided by the State's available resources. Discussion under the following subheading considers whether the location order in *Commando* could have been justified because the facts mirrored those in *Blue Moonlight*. The subsequent subheading considers whether the location order in *Commando* could have been justified based on the relevant circumstances of the case.

6 1 Exceptional circumstances

The *Blue Moonlight* order was made in the context of exceptional circumstances. The court had found that part of one of the City of Johannesburg's programmes was unconstitutional for excluding private evictees from the emergency housing offered through that plan. The programme provided persons evicted by the City from "bad buildings" in the inner city with emergency accommodation, whereas private evictees from similar buildings could not receive emergency housing.

If the facts of the *Commando* case were to closely resemble those in *Blue Moonlight*, the doctrine of *stare decisis* would justify a location order.[147] Hence, if the same exceptional circumstances existed, the *Commando* court was justified in granting the location order. However, if the facts were not sufficiently similar, the court should have shown how the order under the current circumstances was justified.

In both cases, the courts had before them a single municipal housing programme that which treated private evictees differently from state evictees. In *Blue Moonlight*, the court declared the specific housing programme to be unconstitutional to the extent that it excluded the occupiers in the case before it. In *Commando*, however, instead of focusing on the validity of the relevant programme (the Woodstock Affordable Housing Programme), the court declared the municipality's entire emergency housing programme to be unconstitutional. What is even more confusing is that the programme under consideration, in *Commando*, was not an emergency housing programme – it dealt with social housing.[148]

Nevertheless, emergency housing was involved because the plan entailed removing informal settlements from land that was earmarked for social housing in terms of the programme, and housing the occupiers elsewhere.[149] The alternative land on which these occupiers were to be housed was well-located.[150] The municipality did not seem to follow its own rules regarding the provision of emergency accommodation,[151] potentially to avoid

147 That is, courts are bound by previous decisions, especially of higher courts, see *Gcaba v Minister for Safety and Security* 2010 (1) SA 238 (CC) par 58–62 (referring to several other cases); see also Pretorius *Supreme Court of Appeal Judgments That Have Deviated From the Stare Decisis Principle* 9–11.

148 Woodstock Affordable Housing Programme 9.

149 Woodstock Affordable Housing Programme 25.

150 *Ibid*.

151 *Commando supra* par 151.

resistance from the occupiers. This is similar to *Blue Moonlight*, in which the City's inner city regeneration programme had focused on providing emergency accommodation to state evictees from "bad buildings" outside of its normal emergency housing plan.[152] There was no evidence before the court in *Commando* that the City was treating its other evictees differently. Hence, it would have made more sense to declare only the offending part of the Woodstock programme to be unconstitutional, as was done in *Blue Moonlight.*

While the court's finding in *Commando* might not justify declaring the municipality's entire housing emergency housing programme unconstitutional,[153] the question is still whether the facts are sufficiently

[152] *Blue Moonlight* CC *supra* par 78–81.

[153] The court's other reasons for declaring the emergency housing programme unconstitutional do not seem to justify such a finding either. The one is that the City does not have an emergency housing programme of its own; instead, it applied the national emergency housing programme (par 138–139). This is a comprehensive programme adopted as part of the National Housing Code. It is unclear why the City was required to adopt its own separate programme.

The second reason is that the City's implementation of its housing programme was inconsistent and arbitrary (*Commando supra* par 138). This was primarily based on the fact that the City had applied its programme flexibly to try to accommodate specific needs and that it was addressing emergency housing situations as they arose, with the resources it had available (*Commando supra* par 140–145, 149). The court referred to the fact that the City maintained that it had a policy that evictees from the City and surrounds could not be provided with alternative accommodation in the inner city. They could only be housed in one of the city's designated emergency housing areas.

The court then continued to refer to statements and situations that did not support this policy. The court relied heavily on statements made by a former mayoral member who had since left both the City's employ and the political party governing the City. It also cited the fact that the occupiers had been offered alternative accommodation in Kampies, which was not designated for emergency housing. Statements made by politicians cannot be taken as part of the City's housing programme. Furthermore, the fact that the City had been flexible and tried to accommodate the occupiers closer by, albeit not in a designated emergency housing area, is in line with its constitutional mandate. The City made an exception to its policy so as to try to accommodate the needs of the occupiers. The court criticised the city for not indicating "how determinations and placements are made by its officials in emergency housing eviction cases i.e., how and on what basis it is decided which evictees must go where, and how allocations of emergency housing in such instances are made."

The City cannot be faulted on its approach. Flexibility is a key requirement in an emergency housing programme, as set out by the Constitutional Court in *Grootboom* (*supra* par 43). Furthermore, the nature of providing emergency housing within constrained resources is that people will be assisted on a first-come-first-serve basis and that some might get better accommodation than others (*cf Commando supra* par 149). The real problem here is probably not the location of emergency housing but the fact that such housing is not temporary, as should ideally be the case (*Commando supra* par 141, and see also below Conclusionary remarks under heading 7).

The final reason for the finding of unconstitutionality is perhaps the court's best justification. That is that the city gave undue preference to social housing in the inner city (*Commando supra* par 158). Nevertheless, this finding was a single sentence added on to the end of the findings. It did not take into account that it had only one of the city's housing projects before it. This programme had the specific aim of creating social housing (Woodstock Affordable Housing Programme 10). A finding that the City's stance never to provide emergency housing in the inner city is unconstitutional, based perhaps on spatial justice, could have been more sound. Nevertheless, even though the City was reluctant to provide emergency housing in the inner city, the same project under fire in court included areas for emergency housing. In addition, the shelters within the inner city and surrounds also qualify as emergency housing.

similar to that of *Blue Moonlight* to justify a location order. As explained, in *Blue Moonlight*, the City had, in terms of its plan, given state evictees from "bad buildings" well-located alternative accommodation, while it refused to provide the same to private evictees from "bad buildings". It was treating people in exactly the same circumstances differently and the court forced it to treat them similarly, provided that the City had the available resources. In *Commando*, the City, in terms of its plan, was moving people (the Pine Road "evictees'" from land needed for housing purposes to well-located alternative land. It refused to treat evictees from private land that was to be commercially developed (the Bromwell Street evictees) in the same way. Unlike in *Blue Moonlight*, the Bromwell Street evictees were not in exactly the same circumstances as the Pine Road "evictees". The *Blue Moonlight* case dealt with a programme focused on a unique type of evictee – persons evicted from bad buildings, of which the persons before the court formed a part. *Commando* did not deal with a similarly unique type of evictee. The court could not have similarly found that the Bromwell Street evictees are in exactly the same circumstances as the Pine Road evictees and should be treated similarly.

The facts of the *Commando* case might, therefore, not have been sufficiently similar to that of *Blue Moonlight* to justify the granting of a location order based on precedent. Should this be the case, justification for the location order in *Commando* would have to be based on the second potential legal justification – the relevant circumstances of the case.

6 2 Relevant circumstances

As indicated, the Constitution provides that the court may only grant an eviction order if, based on the relevant circumstances, it would be just and equitable. The decisions analysed above indicate that the reasonableness of the State's alternative accommodation offer would weigh in the balance. Two factors are likely to influence the reasonableness of the State's offer heavily.

The first, and probably the most important, is the degree to which the occupiers are settled in their community – in other words, the extent to which they have become integrated in respect of nearby jobs, schools and social amenities. The more integrated they are, the more important the location of the alternative accommodation relative to the eviction site would be. In *Commando*, the occupiers were well settled in the community. They had stayed there for many years – some all of their lives. These circumstances weigh in favour of a location order.

The second factor that may influence the reasonableness of the State's offer is spatial justice. As indicated above, this, as a stand-alone factor, is unlikely to justify a location order, since it is the State's prerogative to choose how to fulfil this duty. Nevertheless, when combined with other factors, this factor may shift the balance in favour of a location order. In the *Commando* scenario, spatial justice was a very important consideration. During apartheid, Woodstock was one of the only areas close to the inner

city that was allowed to remain mixed-race.[154] This means that the people being evicted in this case (or their ancestors) managed to resist the spatial injustices perpetrated during apartheid, only to face eviction during an era that should be characterised by spatial justice and transformation. Such injustice cannot be allowed and strongly endorses a location order under the circumstances.

6 3 Effect of s 26(2) of the Constitution

While the abovementioned factors may weigh on the side of a location order, this can only be granted to the extent that the City has the available resources. In *Commando,* the City had offered alternative accommodation in Wolwerivier, some 30km away from Woodstock. There was no public transport from Wolwerivier to Cape Town. The daily commute by taxi would cost R60 per day and several hours of travel.[155] The question is, therefore, whether the City could afford alternative accommodation closer to Woodstock. If so, then the Wolwerivier offer would not have been reasonable.

The court found that the City could afford it. As in *Blue Moonlight* and *Pheko* the court found that the City owned land close to the eviction site.[156] The City had announced that it was making five properties available in the area for inclusionary and affordable housing in terms of the Woodstock Affordable Housing Programme.[157] Part of one of these properties, as well as two further properties were earmarked for emergency housing.[158] The court explained further that the City had not placed any evidence before it regarding its financial position.[159] Moreover, despite arguing that it could not afford emergency accommodation nearby, it had provided such to its own "evictees".[160] This put its arguments in doubt.[161]

As in *Blue Moonlight* and *Pheko*, the properties identified by the court as available were already earmarked for other beneficiaries.[162] As discussed above, a court should be hesitant to interfere with the State's existing housing plans. This may create separation of powers issues. In this situation, however, the emergency housing is earmarked for an emergency that developed after the instant application was launched. The applicants in the instant matter should, therefore, have enjoyed preference. The City cannot reserve land earmarked for emergency housing for its own evictees.

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154 *Commando supra* par 129;.Garside "Inner City Gentrification in South Africa: The Case of Woodstock, Cape Town" 1993 30 *GeoJournal* 29 31; Gregory "Creative Industries and Neighbourhood Change in South African Cities" in Knight and Rogerson (eds) *The Geography of South Africa* 2019 203 205; Fick 2021 *StellLR* 467.

155 *Commando supra* par 23.

156 *Commando supra* par 17, 39–41, 44–47, 51–53.

157 *Commando supra* par 58–61.

158 *Commando supra* par 60–61.

159 *Commando supra* par 146.

160 *Commando supra* par 155; the "evictees" were not evicted as such because they moved willingly – see par 150–158.

161 *Commando supra* par 155.

162 *Commando supra* par 61.

If the City could not afford alternative accommodation close to the eviction site, it should have ensured access to such.[163] The court found that the city was unwilling to provide public transport from Wolwerivier.[164] Nevertheless, the City did indicate that "should it be required" it would ensure that a bus stop be added at the site.[165] The court did not seem to be persuaded that the City was committed to this proposal.

Furthermore, if the City could not afford alternative accommodation in or near Woodstock, then the alternative accommodation should at least be close to other employment opportunities, schools and social amenities, as required by the ICESCR and *Joe Slovo*. There were no schools in Wolwerivier.[166] The court states that the closest school would be in Du Noon (12km).[167] Without public transport 12km[168] is too far to commute. Hence, Wolwerivier might not have constituted adequate housing. If no housing opportunities closer to schools, jobs and social amenities were available, the City would at least have been required to provide public transport to these things, something that the court was not convinced it was prepared to do.

From the above it seems as though the location order granted in *Commando* was justified. That said, courts should be hesitant to grant location orders that specify the area in which the alternative accommodation should be provided. This matter involved special circumstances in which the emergency had arisen years before and an offer outside of Woodstock would not have been reasonable based on the circumstances. There was evidence that the City had land earmarked for emergency housing in the vicinity and there was no evidence before the court that there were other emergency housing situations that had arisen prior to the launch of the instant application.

7 CONCLUSIONARY REMARKS

The aim of this article was to determine the court's justification for requiring the State to provide alternative accommodation close to the eviction site in eviction matters. Ascertaining this assists in establishing when such orders should be granted.

Two possible legal justifications for location orders were identified. The first is that such an order should only be granted under exceptional circumstances. The second is that it should be granted if the relevant circumstances require it. This is most likely to be the case where the occupiers are settled and integrated into the area. Whichever justification is relied on, assessing the reasonableness of the distance of the alternative accommodation from the eviction site must be guided by the State's available resources. Courts should be hesitant to find that land nearby is available simply because it is owned by the State.

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163 As decided in *Joe Slovo.*

164 *Commando supra* par 23.

165 *Commando supra* fn 10.

166 *Commando supra* par 23.

167 Par 23. This might be incorrect as the area might be closer to Melkbosstrand.

168 Or even 7km.

The *Commando* location order can most probably be justified on the second potential ground – the relevant circumstances of the matter. The occupiers were settled in the community and spatial justice considerations supported that they not be moved from the area. Moreover, the City seemed to have the requisite available resources.

Based on the findings in this paper, there are a few things to consider.

First, considering that the more settled a person is the more important alternative accommodation nearby would be, one has to accept the possibility that unlawful occupiers may be treated differently among themselves depending on how integrated they are in the community. Often with group evictions the occupiers have not all been occupying the land for the same amount of time. This might mean that those who are not integrated into the community need not be offered alternative accommodation close to the place from where they are evicted.

Secondly, the effect of long-term unlawful occupation on the State's housing duty highlights the significance of moratoriums on the protection of land against unlawful occupation and delays in eviction proceedings. Such factors could result in the occupiers being settled once the final decision is made, triggering the State's duty to provide alternative accommodation nearby. Importantly, allowing the protection of land against eviction or speedy eviction proceedings does not mean that homeless persons should remain without a roof over their heads. The State has a general duty toward the homeless regardless of whether they occupy land unlawfully. It simply means that a homeless person cannot choose where the State should assist them with access to housing by unlawfully occupying land in a specific area.

Thirdly, this article highlights that alternative accommodation provided in emergency housing situations is not really temporary. Rather, it is substandard permanent housing. When emergency housing is truly temporary, its location should not play that big of a role. Location has become so important in eviction matters because the State has failed to keep emergency housing temporary. There is a general housing failure on the side of the State owing to the enormous backlog in the availability of permanent housing.

CLAIMS FOR A STATEMENT AND DEBATEMENT OF ACCOUNT: PRINCIPLES AND PROCESS

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SUMMARY

Where a party is owed a sum of money by another party but is unable to quantify the claim because the relevant information and documentation is in the hands of the debtor, the first-mentioned party will in certain circumstances be entitled to demand, and if necessary institute legal proceedings to compel, the alleged debtor to furnish a *statement of account*, followed by engagement in a *debatement of the account*. However, creditors have no general right to demand that a debtor either provide a statement of account or engage in a debatement. This article examines the circumstances in which a creditor has such a right and the powers of the court in this regard.

1 INTRODUCTION

A party who believes that another party owes them a sum of money, whether contractually or in the form of damages or otherwise, usually has a straightforward course of action and a clear legal remedy to enforce their rights. If demand does not elicit payment, legal proceedings can be instituted to claim the specific amount. If the ensuing proceedings result in judgment for a specific sum of money, the judgment creditor can enforce it in the usual way, up to and including sequestration of the debtor's estate, or liquidation where the debtor is a company.

In some circumstances, however, a person may believe that they are owed money, but may have insufficient information to quantify the amount of the debt because the requisite documentation is in the possession of the debtor. The creditor is then in a quandary, for they are unable to specify in any legal process what monetary amount is allegedly due to them.

Thus, in *Victor Products (SA) (Pty) Ltd v Lateulere Manufacturing (Pty) Ltd*,[1] Moll J said:

> "The question which, therefore, arises is whether in our law a plaintiff who alleges a breach of a contract as a result whereof he has suffered damages, the amount whereof he is unable to prove, is entitled, upon alleging that the

[1] 1975 (1) SA 961 (W) 963A.

> defaulting party is in possession of the requisite information, to claim an enquiry as to such damages and payment of such damages as are found to be due to him."

The answer to that question was pithily expressed in a headnote to a reported decision, as follows:[2]

> "There is no general principle of law that when one party does not know how much he is owed by another he can call upon the latter to render an account."

Thus, it is only in some – but not all – circumstances that a creditor may, as a matter of law, be entitled to require the debtor to provide a statement of account, to be followed by a debatement of the account. If the debtor is unwilling to participate in an extra-judicial process of this nature (or if the creditor is not inclined to pursue the matter extra judicially), the creditor will, in certain circumstances, be entitled to institute legal proceedings, asking the court to make an order requiring the debtor, in the first instance, to provide a statement of account of all moneys received and outlaid by him for the account of the creditor, to be followed in a second phase by a debatement of the account in open court. Payment of the monetary amount (if any) finally found to be due in such a judicial process, with the outcome recorded in a judgment of the court, can then be enforced in the usual way.

It has been held[3] that a claim for the rendering of an account (which was a process known to Roman-Dutch law)[4] is only a means to an end – namely, to ascertain the amount of the debtor's indebtedness, and to secure a judgment for the amount. A later judgment has pointed out that

> "[t]he right to account is at once two distinct concepts. It is both substantive and procedural. It is a right as well as a remedy."[5]

The proposition has been judicially rejected[6] that where a plaintiff claims a statement of account, debatement thereof, and payment of what is determined to be due, an order to render an account constitutes the judgment of the court, and that the subsequent debatement and order for payment constitutes execution of the judgment.[7]

The right to compel a person to furnish a statement of account and thereafter to engage in a debatement of the account is founded on the principle that a person who, as a matter of law, is entitled to an account, but does not receive it, or who receives an inadequate account, has a legal right to press their claim for a due and proper account via a judicial process.[8]

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2 *Rectifier and Communications Systems (Pty) Ltd v Harrison* 1981 (2) SA 283 (C).

3 Per Solomon J in *Krige v Van Dijk's Executors* 1918 AD 110 117.

4 *Doyle v Fleet Motors PE (Pty) Ltd* 1971 (3) SA 760 (A) 762B; *Victor Products v Lateulere Manufacturing supra* 963A.

5 *Doyle v Board of Executors* 1999 (2) SA 805 (C) 813D

6 See the dicta in *South African Iron and Steel Corporation Ltd v Abdulnabi* 1989 (2) SA 224 (T) 234B in regard to the judgment in *HR Holfeld (Africa) Ltd v Karl Walter & Co GmbH (2)* 1987 (4) SA 861 (W).

7 In *Brown v Yebba CC t/a Remax Tricolor* 2009 (1) SA 519 (D) 525E, par 29 it was held that a final judgment "ought not to occur until there has been a proper debatement of the accounts".

8 *Doyle v Fleet Motors supra* 767H.

The claim for such an account may be asserted in legal proceedings commenced by notice of motion where there are no disputes of fact, or by way of action if there are such disputes. Thus, for example, there may be a dispute as to whether, at the relevant time, the parties were in partnership; the relevance in this regard is that partners are subject to a fiduciary duty and such a duty is then a legal basis for the right to demand a statement and debatement of account.

Where a party fails to assert their legal right to a statement of account or has not instituted legal proceedings that compel the alleged debtor to make discovery of all relevant documents, the claimant has no legal right to demand that the alleged debtor produce documents relevant to the alleged debt.[9] Moreover, as has been judicially pointed out, to claim the production of "supporting vouchers" in respect of an account that has not yet been rendered is to put the cart before the horse.[10] In other words, a court

> "cannot simply order the production of documents which the applicant says will be relevant to an account, in circumstances where there is no account and there is no claim for one to be rendered."[11]

A court will not rule that a person is entitled to an account where the claimant has failed to assert their right to such an account,[12] save where such a claim is made and upheld in terms of the Promotion of Access to Information Act[13] or where a partner is demanding to have sight of the partnership books[14] or where a trust beneficiary is demanding an accounting from a trustee.[15]

Although debatement is ancillary to the rendering of an account, a court order for the rendering of an account is not a precondition for debatement;[16] in other words, an extra-judicial process is capable of generating an agreed account and ancillary legal disputes in relation to the account so produced can be resolved via debatement of that account in open court.

It has, however, been held that

> "[t]he right to debate an account is not to be confused with the right to receive the same. The two are not coextensive."[17]

Thus, for example, a ratepayer is entitled, in terms of the Local Government Municipal Systems Act,[18] to receive a municipal account but that does not in itself give him a right to debatement of the account.[19] Hence, an aggrieved ratepayer will have to seek a legal remedy of another kind.

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9 *Lias Mechanicos Building & Civil Engineering Contractors (Pty) Ltd v Stedone Developments (Pty) Ltd* 2015 (4) SA 485 (KZD) par 17.

10 *Ibid*.

11 *Ibid*.

12 *Lias Mechanicos v Stedone Developments supra* par 18.

13 2 of 2000.

14 *Lias Mechanicos v Stedone Developments supra* par 16.

15 As in *Doyle v Board of Executors* 1999 (2) SA 805 (C).

16 *Dale Street Congregational Church v Hendrickse* 1992 (1) SA 133 (E) 143C.

17 *Moila v City of Tshwane Metropolitan Municipality* [2017] ZASCA 15 par 10.

18 32 of 2000.

19 *Moila v City of Tshwane Metropolitan Municipality supra* par 11.

2 THE SUBSTANTIVE CONTENT OF THE DUTY TO ACCOUNT

If the party demanding a statement and debatement of account has instituted legal proceedings to secure an appropriate court order in this regard, and is successful in persuading the court to grant such an order, the judicial order for an accounting should specify with appropriate particularity the nature and extent of what is required in the statement of account, and when and in what manner the subsequent debatement is to take place.

Significantly, the duty to account is additional to and separate from a requirement to make discovery in terms of the Rules of Court,

> "this duty being in no way affected by an action pending between the principal and the agent and by the fact that the principal could obtain similar rights under the Rules of Court."[20]

As to the content of an agent's duty to account, the following proposition has been quoted with judicial approval, namely that an agent

> "must at all times be ready with correct accounts of all his dealings and transactions carried on during the currency of the mandate. It is not enough for him to say: 'Here are my books and vouchers – you are free to use them to make up your own accounts.' In addition he is obliged to allow inspection by the principal of all relevant vouchers and entries in the agent's books, this duty being in no way affected by an action pending between the principal and the agent and by the fact that the principal could obtain similar rights under the Rules of Court. *Pothier* gives details of the proper method of keeping the account. Under receipts, he says, the agent must include, besides money and property which has actually come into his hands, damages for what has been lost or has deteriorated through his fault (only, however, if damages have been suffered thereby ...), and fruits or interest he should have received. Under expenses he will include his necessary payments (and remuneration, if any). The balance of the money entries will be the sum which he must pay over to the principal, or which the principal must pay to him."[21]

In addition, as was noted above, the claimant is entitled in terms of the Rules of Court, to require the defendant, at a specified stage of the litigation process, to make discovery of relevant documents and, if the claimant believes that the documents so provided are incomplete, the remedy is to call for further and better discovery.[22]

In a reported decision,[23] the court rejected a defendant's contention that too many documents over too long a period were being called for in a demand for discovery. It was held that, if the documents were in the defendant's possession and were relevant, they ought to be made available for inspection. Similarly rejected in the same decision was the defendant's objection to the production of documents on the grounds that some were confidential; the court held that the defendant had chosen to enter into a fiduciary relationship with the plaintiff and that the latter was entitled to satisfy itself as to what transactions fell within their agreement.

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[20] *Doyle v Board of Executors supra* 814A–B.

[21] *Doyle v Board of Executors supra* 814A–C.

[22] *Rellams (Pty) Ltd v James Brown & Hamer Ltd* 1983 (1) SA 556 (N).

[23] *Ibid*.

3 ESSENTIAL AVERMENTS

In the leading decision on statements and debatement of account, *Doyle v Fleet Motors PE (Pty) Ltd,*[24] the Appellate Division held[25] that, to ground a claim for a statement of account, the plaintiff should aver:

(a) their right to receive an account and the basis of such right, whether by contract or by fiduciary relationship or otherwise;

(b) any contractual terms or circumstances having a bearing on the account sought; and

(c) the defendant's failure to render an account.

In that decision, it was held[26] that, if such averments are proved,

> "ordinarily the Court would in the first instance order only the rendering of an account within a specified time. The degree or amplitude of the account to be rendered would depend on the circumstances of each case. In some cases it might be appropriate that vouchers or explanations be included. As to books or records, it may well be sufficient, depending on the circumstances, that they be made available for inspection by the plaintiff. The Court may define the nature of the account. The Court might find it convenient to prescribe the time and procedure of the debate, with leave to the parties to approach it for further directions if need be."

It has been held[27] that from that juncture,

> "[o]rdinarily the parties should first debate the account between themselves. If they are unable to agree upon the outcome, they should, whether by pre-trial conference or otherwise, formulate a list of disputed items and issues. These could be set down for debate in Court. Judgment would be according to the Court's finding on the facts. The Court may, with the consent of both parties, refer the debate to a referee in terms of sec. 19 *bis* (1)(*b*) of the Supreme Court Act, 59 of 1959."

4 ENTITLEMENT TO THE RELIEF CLAIMED

An initial question is whether, on the facts of the particular matter, the aggrieved debtor, *as a matter of law*, is entitled to a statement and debatement of account in respect of the disputed debt. This falls to be determined on the basis of the principles, summarised above, laid down by the Appellate Division in *Doyle v Fleet Motors PE (Pty) Ltd*. Creditors thus have no general right to a statement and debatement of account,[28] but it seems that there will always be such a right where the persons concerned are in a fiduciary relationship. Thus, in *Doyle v Board of Executors*,[29] Slomowitz AJ said:

> "Although the case [at hand] involves an *inter vivos* trust, the question at issue is one such as might arise in all circumstances in which persons stand in a fiduciary position to others."

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[24] *Supra*.

[25] *Doyle v Fleet Motors PE (Pty) Ltd supra* 762F–G.

[26] *Doyle v Fleet Motors PE (Pty) Ltd supra* 762G–763B.

[27] *Doyle v Fleet Motors PE (Pty) Ltd supra* 762F–763B.

[28] *Rectifier and Communication Systems v Harrison supra* 287H. .

[29] *Supra* 808E–F.

A cause of action or claim for relief by way of a statement of account, in circumstances outside the ambit of these principles, will be excipiable.[30] Once the right has been established, however,

> "the principle to be applied is that a plaintiff, who is entitled to an account and receives one which he avers is inadequate, is entitled to press his claim for a due and proper account."[31]

Conversely, however:

> "If plaintiff's claim ought to have been a simple one for payment of an amount of money then an order for rendering and debatement of account ... is similarly out of order."[32]

If the aggrieved creditor has received sufficient briefings from the debtor, they may not be entitled to a statement of account, but only to a debatement, and then only if they can show either that they were owed a fiduciary duty encompassing this entitlement (as distinct from merely being in a fiduciary relationship) – as, for example, where they are or were in partnership,[33] or where the claimant is exerting the right as a trust beneficiary against a trustee, or where the debtor had bound themselves contractually to engage in such a debatement, or where the debtor is statutorily obliged to provide a statement of account and to engage in a debatement.[34]

In this regard, it is established that there is no fiduciary relationship between persons merely because they are debtor and creditor respectively,[35] as in the ordinary relationship between a banker and its client.[36]

5 AN AGENT OR TRUSTEE'S DUTY TO ACCOUNT

As to the duties of an agent (and it has been held that the duties of good faith owed by an agent are no different to those of a trustee),[37] the court in *Doyle v Board of Executors*[38] quoted with approval from Kerr's *Law of Agency*[39] where the common-law principles were summarised as follows:

> "An agent is obliged to 'account for everything in good faith'. It is his duty 'where the business in which he is employed admits of it, or requires it, to

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30 As in *Victor Products v Lateulere Manufacturing supra*.

31 In support of this principle, the court in *Doyle v Fleet Motors supra* 815A cited the decisions in *Krige v Van Dijk's Executors supra* (no page reference given), and *Mia v Cachalia* 1934 AD 102 107.

32 *Narayanasamy v Venkatrathnam* 1979 (3) SA 1360 (D) 1362A.

33 See *Absa Bank Bpk v Janse van Rensburg* [2002] ZASCA 7 par 16.

34 *Absa Bank Bpk v Janse van Rensburg supra* par 15; *see also Rectifier and Communications Systems v Harrison supra* 289 H.

35 See *Absa Bank Bpk v Janse van Rensburg supra* par 16; see also *Victor Products v Lateulere Manufacturing supra* 963B where Moll J said, "Allegations which do no more than to indicate a debtor and creditor relationship would not justify a claim for a statement of account".

36 *Standard Bank of SA Ltd v Oneanate Investments (Pty) Ltd* 1995 (4) SA 510 (C) 530G–631B and the authorities there cited.

37 *Doyle v Board of Executors supra* 813D.

38 *Supra* 814C–F.

39 Kerr,*Agency* 3ed 186.

> keep regular accounts of all his transactions on behalf of his principal, not only of his payments and disbursements, but also of his receipts; and to render such accounts to his principal at all reasonable times, without any suppression, concealment, or overcharge'. This involves an agent in keeping the principal's property separate; in keeping his accounts up-to-date and allowing the inspection of his books; in giving information when necessary; and, when the transaction is complete, in rendering an account and handing over any balance in his hands plus anything to which the principal is entitled."

The duty of an agent to account to his principal goes further than merely providing an accounting expressed in terms of bookkeeping principles. As Slomowitz AJ said (emphasis as in the original):

> "Inextricably bound up with this by no means exhaustive compendium of obligations is the agent's duty to *give an accounting* to his principal of all that he knows and has done in the execution of his mandate and with his principal's property. I have chosen to emphasise the obligation to give an accounting because I in no way read the authorities to contain this duty within generally accepted bookkeeping principles. That is the least of it. What is owed is, as I have already said, a substantive legal duty. The agent must explain himself. He must justify his actions and conduct. If this, by circumstance, falls to be done in Court, then, to put it in evidential terms, he bears the onus of demonstrating the proper discharge of his office."[40]

It has been held that an agent's duty to account is not satisfied by the formal process of discovery of documents in the course of litigation, for that would be "wholly inadequate".[41] Nor is it a discharge of the duty to account "to begin with unexplained and unvouched opening balances".[42]

Even if a person is, in principle, entitled to a statement and debatement of account, a reckoning that has already taken place between the parties may be such that the debtor is no longer entitled to demand a debatement of that account.[43] Thus, it has been held:

> "If it appears from the pleadings that the plaintiff has already received an account which he avers is insufficient, the Court may enquire into and determine the issue of sufficiency, in order to decide whether to order the rendering of a proper account. Where the issue of sufficiency and the element of debate appear to be correlated, the Court might, in an appropriate case, find it convenient to undertake both enquiries at one hearing, and to order payment of the amount due (if any). In general the Court should not be bound to a rigid procedure, but should enjoy such measure of flexibility as practical justice may require."[44]

If the debtor has paid an amount that has since become disputed, their remedy (if they believe that no such payment was due or that they have overpaid what was due) does not lie in a debatement of account, but in a *condictio indebiti*[45] for, as a judge has remarked, there is no reason that a creditor should be legally obliged to assist a debtor to determine the amount of the latter's claim.[46]

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40 *Doyle v Board of Executors* 1999 (2) SA 805 (C) 813G–I.

41 *Doyle v Board of Executors* 1999 (2) SA 805 (C) 815A.

42 *Doyle v Board of Executors* 1999 (2) SA 805 (C) 815H.

43 As was held to be the case in *Absa Bank Bpk v Janse van Rensburg supra* par 10.

44 *Doyle v Fleet Motors PE supra* 763B–D.

45 *Absa Bank Bpk v Janse van Rensburg supra* par 13.

46 *Absa Bank Bpk v Janse van Rensburg supra* par 16.

A claim for debatement cannot succeed if the debt itself is non-existent – for example, if it has prescribed.[47] If the aggrieved party is not, as a matter of law, entitled to a statement and debatement of account, then, as noted above, they may, in appropriate circumstances, be able to frame their cause of action as a *condictio indebiti,*[48] in which event the onus of proof is that applicable to such a claim.

6 CONCLUSION

In the 1943 decision in *Maitland Cattle Dealers (Pty) Ltd v Lyons*,[49] Millin J said:

> "[N]obody is entitled to sue at common law for an account unless the person sued stands in a fiduciary relationship to him, or some statute or contract has imposed upon him the duty to give an account. Likewise in *Victor Products (SA) (Pty) Ltd v Lateulere Manufacturing (Pty) Ltd* 1975 (1) SA 961 (W) at 963 Moll J said: 'The right at common law to claim a statement of account is, of course, recognised in our law, provided the allegations in support thereof make it clear that the said claim is founded upon a fiduciary relationship between the parties or upon some statute or contract which has imposed upon the party sued the duty to give an account. Allegations which do no more than to indicate a debtor and creditor relationship would not justify a claim for a statement of account.'"[50]

These dicta remain accurate statements of current law.

As was noted, above, certain fiduciary relationships, such as agency, inherently embody a common-law duty to provide an accounting. Where there is no such specific duty, a general fiduciary relationship is usually the basis on which a creditor can, at common law, require an account from the debtor, followed, if necessary, by a debatement. A duty to account may also arise, explicitly or implicitly, from a contract between the parties, and in some instances the duty may have a statutory basis.

The specifics of the duty to account will vary from case to case, and the court that grants an order to account can – and should – provide directives in this regard. If it does not, the parties may have to approach the court to request an amplification of its original order in this regard.

In *Doyle v Fleet Motors*,[51] the law reports record that counsel put forward an argument as to what an "account" entails in this context. Although this argument was not explicitly endorsed in the judgment, counsel's propositions arguably accurately reflect the law in this regard. Thus, counsel contended:

> "By 'account', in the context of this form of action, is meant a full account or 'accounting' by a defendant of his administration or management by disclosure of all moneys received or disbursed by him over the relevant period supported by proper vouchers. An order will be granted unless it is shown that he has thus fully accounted ... Alternatively, if the said statement can be said to be formally in order, our Courts exercise a jurisdiction to determine whether

47 As was held or conceded to have occurred in *Absa Bank Bpk v Janse van Rensburg supra* par 13–14.

48 *Absa Bank Bpk v Janse van Rensburg supra* par 13.

49 1943 WLD 1 19.

50 Cited with approval in *Rectifier and Communication Systems v Harrison supra* 286D.

51 *Supra* 761B–D.

> an account, which an accounting party is obliged to render, is correct or not ... 'Correct' in the sense that it has been drawn up in accordance with the true agreement between the parties and includes a reference to every relevant transaction."

It seems clear that once a duty to account is established, there are several dimensions to the rendering of the requisite "account" – namely, its ambit and detail and its compliance with the agreement between the parties or with the implicit requirements flowing from their legal relationship or with the requirements of the applicable statute.

It seems, therefore, that compliance with a duty to "account" goes substantially further than is involved in the "discovery" of documents in terms of the Rules of Court. Arguably, a proper account is more than just the list of documents (which need not be in any particular order) that is required to be made available for inspection at a given stage in the litigious process.[52] Arguably, an "account" in this context requires (although no court has yet gone as far as to say so) that, taken as a whole, the account must be comprehensible and informative on its face. Thus, for example, the recording of a particular outlay by way of a bookkeeping entry (even if supported by an invoice) may arguably require at least a brief narration to make this item in the account comprehensible in the context of the parties' particular commercial arrangements.

A litigant who is entitled to require his opponent to provide a statement of account, and thereafter to participate in a debatement of the account, has a significant procedural and strategic advantage over a litigant who has no right to demand an account, in that the statement of account will take place at the outset of the litigation, in contrast with the bilateral discovery of relevant documents by all the parties which takes place toward the end of the pre-trial phase of the proceedings. Moreover, a party who is entitled to a statement of account will (it is submitted) be entitled to an order for costs if the demand is rejected, but later upheld by the court, even if the eventual debatement shows that no moneys are owing.

A claimant who wishes to be given, but is not entitled to, a statement of account will have to formulate particulars of claim as best they can, on the available information, and aver that a specific amount is owing to them by the other party. Having done so, they can then, later in the litigation process, compel the other party to make discovery of all relevant documents in their possession. The claimant will have to try to piece together from those documents what amount (if any) can be proved to be owing to them.

As indicated earlier in this article, a duty to account is most commonly a facet of a fiduciary duty. Where there would be no such duty at common law in the particular circumstances, there is scope for a contract draftsperson to write such a duty into a contract at the negotiation stage, and the draftsperson would often do the client a great favour by taking the opportunity to do so.

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[52] As to a trustee's duty to account, see Cameron, De Waal and Wunsh *Honoré's South African Law of Trusts* 5ed (2002) 331–334.

JUDICIAL SCRUTINY OF DERIVATIVE MISCONDUCT IN SOUTH AFRICAN EMPLOYMENT LAW: A CAREFUL APPROACH TO THE DUTY TO SPEAK

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SUMMARY

The concept of derivative misconduct has in the past come to the aid of employers in disciplining employees who are reticent about disclosing information that would support the prosecution of an offence. Though dismissal based on derivative misconduct is designed to target the perpetrators of the original misconduct, the justification is wide enough to encompass those innocent of it, but who through their silence make themselves guilty of a derivative violation of trust and confidence. In applying the concept of derivative misconduct, South African labour courts have placed too much emphasis on the unilateral duty of good faith owed by the employee to the employer rather than the reciprocal nature of the duty and the true realities of South African industrial relations. The ground-breaking judgment of the Constitutional Court in *National Union of Metalworkers of South Africa (NUMSA) obo Nganezi v*

Dunlop Mixing and Technical Services (Pty) Limited (2019) 40 ILJ 1957 (CC) crafted significant principles in relation to the application of derivative misconduct within the context of collective bargaining. This article seeks a critical unpacking of the legal quagmire, which has not been fully addressed by the Constitutional Court, and to provide a way forward that may be adopted by employers to promote a spirit of fairness in the employment relationship.

1 INTRODUCTION

For almost two decades, South African labour dispute resolution forums have struggled to craft important details in respect of the application of derivative misconduct and the duty of good faith. Accordingly, South African labour courts have placed too much emphasis on the unilateral duty of good faith[1] owed by the employee to the employer and too little on the reciprocal nature of the duty and the true realities of South African industrial relations. Consequently, South African labour courts have missed an opportunity to reflect on the ramifications of the unilateral approach, which does not uphold the principle that the employment relationship is based on fairness as a cornerstone. In her dissenting judgment Savage AJA emphasised the realities of the workplace environment, stating that imposing an expansive duty upon an employee to act in good faith towards his or her employer, with a duty to "rat" on fellow employees, must therefore be a careful process, one that ensures an appropriate regard to the context and tensions inherent in the workplace.[2]

The ground-breaking judgment of the Constitutional Court in the *NUMSA* case[3] crafted significant principles in relation to the application of derivative misconduct within the context of collective bargaining. In this regard, the Constitutional Court probed the impact of disclosure within the context of industrial action, stating that the imposition of a unilateral duty to disclose would undermine the collective bargaining power of workers by requiring positive action in the interests of the employer without any concomitant obligation on the part of the employer to give something reciprocally similar to the workers in the form of guarantees for their safety and protection before, when, and after they disclose.[4]

Despite the Constitutional Court pronouncement on the reciprocal nature of the duty of good faith within the context of industrial action, the court did not provide significant details of what would constitute a sufficient guarantee of safety to an employee. The court also failed to state whether the duty of

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1 In the case of *Western Platinum Refinery Ltd v Hlebela* (2015) ILJ 2280 (LAC) par 8, the court held no new category of dismissal had been created by the judgments in *ABI, Chauke, and RSA Geological Services*; rather the judgments elucidate the principle that an employee who is bound implicitly by a duty of good faith towards the employer breaches that duty by remaining silent about knowledge possessed by the employee regarding the business interests of the employer being improperly undermined.

2 *National Union of Metalworkers of South Africa (NUMSA) obo Nganezi v Dunlop Mixing and Technical Services (Pty) Ltd* (2018) 39 ILJ 2226 (LAC) par 101.

3 *National Union of Metalworkers of South Africa (NUMSA) obo Nganezi v Dunlop Mixing and Technical Services (Pty) Limited* (2019) 40 ILJ 1957 (CC).

4 *NUMSA v Dunlop* (CC) *supra* par 73.

good faith imposes an absolute duty upon employees to make a disclosure or speak either against their fellow employees or implicate themselves if they have been directly involved in the commission of misconduct. This article seeks a critical unpacking of the legal quagmire, which has not been fully addressed by the Consitutional Court, and to provide a way forward that may be adopted by employers to promote a spirit of fairness in the employment relationship. In so doing, this article first provides a comprehensive overview of the origins, meaning and judicial development of derivative misconduct as a concept. Secondly, this article provides an analysis of the all-encompassing duty of mutual trust and confidence and how the Constitutional Court in *Dunlop* scrutinised the application of the duty of good faith. Lastly, this article provides a way towards fairness.

2 THE ORIGINS, MEANING AND JUDICIAL DEVELOPMENT OF DERIVATIVE MISCONDUCT

The concept of derivative misconduct was suggested, without being decided on, in the case of *Food & Allied Workers Union v Amalgamated Beverage Industries Ltd (FAWU v ABI)*.[5] The origins of the concept lie in an *obiter dictum* (non-binding statement) by Nugent J:

> "In the field of industrial relations, it may be that policy considerations require more of an employee than that he merely remain passive in circumstances like the present, and that his failure to assist in an investigation of this sort may in itself justify disciplinary action."[6]

However, the genesis of derivative misconduct in South African labour jurisprudence can be attributed to the *Chauke* case.[7] Cameron JA, in a unanimous Labour Appeal Court judgment, defined derivative misconduct as occuring when there has been a proved act of misconduct necessitating disciplinary action, but the management is unable to pinpoint the perpetrator or perpetrators.[8]

The notion of derivative misconduct was also considered, without being decided on, by Grogan J in the case of *RSA Geological Services.*[9] In this

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5 (1994) 15 ILJ 1057 (LAC).

6 *FAWU v ABI supra* 1063.

7 *Chauke v Lee Service Centre t/a Leeson Motors* (1998) 19 ILJ 1441 (LAC).

8 *Chauke v Lee Service Centre supra* par 33.

9 *RSA Geological Services v Grogan NO* (2008) 29 ILJ 406 (LC). In this case, the dismissed respondent employees were laboratory assistants who processed and analysed samples of kimberlite in the applicant employer's laboratories to determine if the samples were diamondiferous. These tests reflected the quantity of diamond in the samples and were distributed to the employer's clients to enable them to invest resources appropriately. The tests required meticulous execution for accuracy. Any diamonds discovered were registered and stored and the remnants of the samples were retained as discarding the remnants would have resulted in a distortion of the results and subsequently any reports to clients. In April 2002, a secret informer advised management that kimberlite was being discarded down boreholes. It was common cause that the kimberlite came from the samples that had been discarded. The amount of discarded sample was in excess of 400 kilograms. The employees were interviewed and urged to cooperate with the investigation to identify the perpetrators of the misconduct. The employer supplied the employees with an anonymous

case, the court held that a two-stage enquiry should be followed when considering the evidence and inferences to be drawn as follows:[10]

- The first stage is to determine whether the facts, and inferences drawn from the facts, constitute *prima facie* proof that all of the employees had participated in the misconduct and had been aware of it.
- The second stage of the enquiry is to assess whether the employees had effectively rebutted these facts and inferences or whether the employer had succeeded in elevating its *prima facie* proof to conclusive evidence sufficient to discharge its onus of proving the fairness of the dismissal on a balance of probabilities.

The court articulated the following prerequisites for the application of the concept of derivative misconduct. It would have to be shown:[11]

1. first, that the employee knew or could have acquired knowledge of the wrongdoing;
2. secondly, that the employee failed without justification to disclose that knowledge to the employer, or to take reasonable steps to help the employer acquire that knowledge.

Pillay J found the employees guilty of the primary misconduct on the basis of overwhelming evidence presented by the employer and which demanded an answer from employees.[12] A compelling explanation would have been that discarding samples was serious misconduct; anyone who was involved would not have let others know about it.[13]

As a result, in the case of *Hlebela*,[14] the doctrine of derivative misconduct was reconsidered and developed in detail by the Labour Appeal Court. Sutherland J laid down the self-evident dimensions of the concept of derivative misconduct as follows:

a) The undisclosed knowledge that the employee is alleged to have must be actual knowledge (which may be established by inferences) and not imputed or constructive knowledge. Actual ignorance of facts, arising from incompetence or negligence, does not fall within the scope of derivative misconduct.
b) The employee must deliberately fail to disclose the knowledge.
c) The duty to disclose is not affected by the seriousness of the primary misconduct, and the duty to disclose applies equally to serious and less serious forms of misconduct.
d) Whether dismissal is an appropriate sanction may be determined by the seriousness of the primary misconduct, as well as the effect of the non-disclosure by an employee in the position of the charged employee on the ability of the employer to protect itself against the primary

number to call to provide information. However, the employees collectively refused to assist the employer as they denied knowing anything of the misconduct.

10 *RSA Geological Services v Grogan NO supra* par 22 and 23.

11 *RSA Geological Services v Grogan NO supra* par 29.

12 *RSA Geological Services v Grogan NO supra* par 32–33.

13 *Ibid*.

14 *Western Platinum Refinery Ltd v Hlebela supra* par 4–8.

misconduct; that is, these factors may serve as mitigating or aggravating factors rather than in the determination of guilt of the derivative misconduct.

e) The employee's rank is irrelevant in determining culpability in respect of the derivative misconduct, but may serve as a mitigating or aggravating factor, depending on the role fulfilled by the employee in respect of security or adherence to procedures.

f) Mere (actual) knowledge of the primary misconduct triggers the employee's duty to disclose, and the duty is not dependent on a request by the employer. Where a request is made by the employer, this may aggravate the culpability for non-disclosure.

g) An employee charged with derivative misconduct must be a witness to the primary misconduct and must not be a perpetrator thereof.

h) Worker solidarity is not a defence to the charge of derivative misconduct.

i) The view that a breach of the duty of good faith would occur where an employee could have acquired knowledge of the primary misconduct is too wide. An employee would be guilty of misconduct based on negligence rather than derivative misconduct in circumstances where the employee is negligently ignorant of circumstances of which they ought to have been aware. Negligent ignorance of such knowledge does not fall within the scope of derivative misconduct.

j) Where non-disclosure is capable of justification, this is not a defence to the charge of derivative misconduct. It may provide mitigation of culpability only.

k) Derivative misconduct may be an appropriate charge where those employees who have knowledge of the primary misconduct can be distinguished from the perpetrators.

A period of three years lapsed after *Hlebela*, and before the next chapter on derivative misconduct was deliberated upon by Kathree-Setiloane AJA in the *PRASA* case.[15] Kathree-Setiloane AJA reiterated the test to be applied on a derivative misconduct charge as follows:

> "The employer (PRASA) had to prove on a balance of probabilities that the employee committed the misconduct. This would require the employer to prove the following main elements of derivative misconduct, namely, the employee knew or must have known about the primary misconduct, but elected, without justification, not to disclose what he or she knew."[16]

The AJA further stressed that it was not sufficient that the employees may possibly have known about the primary misconduct.[17] Accordingly, the employer must prove on a balance of probabilities that each and every employee was in possession of information, or ought reasonably to have possessed information, that could have assisted the employer in its investigation. Consequently, without *prima facie* evidence that any of the

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15 *National Transport Movement v Passenger Rail Agency of SA Ltd* (2018) 39 ILJ 560 (LAC).

16 *National Transport Movement v Passenger Rail Agency of SA Ltd supra* par 31.

17 *Ibid*.

employees did have information about the principal misconduct, one cannot conclude that the employees' failure to cooperate necessarily meant that they either did have, or must have had, something to hide.[18]

3 THE ALL-ENCOMPASSING DUTY OF MUTUAL TRUST AND CONFIDENCE

According to Louw,[19] South African courts recognise the existence of an implied term of trust and confidence in the employment contract just as do a number of other common-law jurisdictions. Accordingly, the UK's House of Lords formulated the content of this duty as imposing an obligation that an employer would not, without reasonable and proper cause, conduct itself in a manner likely to destroy or seriously damage the relationship of confidence and trust between employer and employee.[20] In respect of the nature of the duty of good faith, Lord Denning MR reiterated that it is the duty of the employer to be good and considerate to his servants.[21] Sometimes it is formulated as an implied term not to do anything likely to destroy the relationship of confidence between them.[22] Bosch[23] is of the opinion that the implied duty of mutual trust and confidence would be breached if the employer behaved in an uncaring and abusive manner.

Cohen expressed the operation of the duty of mutual trust and confidence as follows:

> "In terms of this obligation contracting parties are required to have regard to the interests of the other party without subjugating their own, in recognition of the fact that the continued and harmonious relationship between employer and employee is imperative for the successful fulfilment of the employment contract. The implied obligation of mutual trust and confidence thus ensures that the employer's interests in deriving the maximum benefit from his or her business are equitably balanced against the interests of the employee in being treated fairly."[24]

The court in the case of *Fijen*[25] recognised the application of the implied term of trust and confidence to employment contracts, and emphasised that the relationship between employer and employee is one of trust and confidence and that any inconsistent conduct entitles the innocent party to cancel the agreement.[26] The court further drew an analogy with English law, stating that in every contract of employment the employer has a duty not, without reasonable and probable cause, to conduct itself in a manner likely

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18 *Ibid*.

19 Louw "The Common Law Is … Not What It Used to Be: Revisiting Recognition of a Constitutionally Inspired Implied Duty of Fair Dealing in the Common Law Contract of Employment" (Part 2) 2018 21 *PER* 12.

20 *Malik v Bank of Credit and Commerce International SA* (1997) 1 ICR 606 par 35.

21 *Woods v W M Car Services (Peterborough) Ltd* (1982) 1 ICR 695–9.

22 *Ibid*.

23 Bosch "The Implied Term of Trust and Confidence in South African Labour Law" 2006 27 *ILJ* 28.

24 Cohen "The Relational Contract of Employment" 2012 *Acta Juridica* 94–95.

25 *Council for Scientific & Industrial Research (CSIR) v Fijen* (1996) 17 ILJ 18 (A).

26 *CSIR v Fijen supra* 20B–D.

to destroy or seriously damage the relationship of confidence and trust between the parties.[27] Following the *Fijen* decision, it is evident that South African courts endorsed the application of the implied term of trust and confidence to employment contracts.[28]

According to Bosch,[29] the implied term is part of the moral code of the employer, representing a normative standard of right and wrong against which the conduct of the employer is to be assessed. Consequently, the implied term has resulted in a restriction of the scope of an employer's express powers under the contract of employment.[30] Chamberlain[31] presented how the implied term operates in practice by providing the following case law examples of breaches of the employer's moral code:

- criticism of an employee's performance that is unjustified and abusive;
- unilaterally and persistently trying to vary an employee's terms and conditions;
- undermining the authority of a supervisor by severely reprimanding her in front of the employees;
- failing to investigate complaints of sexual harassment;
- deceiving employees and tarnishing their reputations by operating a business in a dishonest and corrupt manner;
- disclosing in a reference to a prospective employer a number of complaints against the employee that were not brought to her attention; and
- failing to offer a contractual benefit to an employee that was offered to others.

By implication, the rationale for the all-encompassing duty of mutual trust and confidence in respect of derivative misconduct was suggested without being decided in the *Chauke*[32] case. The court suggested that the relationship between employer and employee is essentially one of trust and confidence; even at common law, conduct clearly inconsistent with that essence warranted termination of employment.[33] Failure to assist an employer in bringing the guilty to book violates this duty and may itself justify dismissal.[34] Accordingly, the effect of this approach targets not only perpetrators of the original misconduct but includes innocent employees who through their silence make themselves guilty of a derivative violation of trust

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27 *Ibid*.

28 *Jooste v Transnet Ltd t/a South African Airways* (1995) 16 ILJ 629 (LAC); *South African Revenue Services v Commission for Conciliation Mediation and Arbitration* (2014) 35 ILJ 656 (LAC).

29 Bosch 2006 *ILJ* 31.

30 Brodie "Mutual Trust and Confidence After Johnson v Unisys" 2002 *Edinburgh L Rev* 258.

31 Chamberlain "The Development and Scope of the Implied Term of Trust and Confidence" (19 January 2019) https://app.croneri.co.uk/feature-articles/implied-term-trust-and-confidence (accessed 2022-04-26) 5.

32 *Chauke v Lee Service Centre supra.*

33 *Chauke v Lee Service Centre supra* par 31.

34 *Ibid.*

and confidence.[35] Grogan submits that trust forms the foundation of the relationship between employer and employee, and derivative misconduct is founded on this notion.[36] In *Hlebela*,[37] the court expressed similar views, stating:

> "Uncontroversially, and on general principle, a breach of the duty of good faith can justify a dismissal. Non-disclosure of knowledge relevant to misconduct committed by fellow employees is an instance of a breach of the duty of good faith."[38]

One may argue that the *Chauke* and *Hlebela* cases failed to appreciate the reciprocal obligation imposed by the duty of good faith. The Constitutional Court in the *Dunlop*[39] case decided correctly when it held:

> "In the context of a strike, the imposition of a unilateral duty to disclose would undermine the collective bargaining of workers by requiring positive action in the interests of the employer without any concomitant obligation on the part of the employer to give something reciprocally similar to the workers in the form of guarantees for their safety and protection before, when and after they disclose."[40]

Notwithstanding the supposition that an employee's failure to assist an employer in bringing the guilty to book violates the duty of mutual trust and confidence and can justify dismissal, South African courts have also imported an implied duty of fair dealing into the common-law employment contract of employment, which is consonant with section 23 of the Constitution of the Republic of South Africa, 1996. In the *Murray* case,[41] the Supreme Court of Appeal expressed the view that to promote the spirit, purport and objects of the Bill of Rights, the common law of employment must be held at all times to impose on all employers a duty of fair dealing with their employees, including employees not covered by the Labour Relations Act (LRA).[42] Louw accordingly argues that the constitutional development of the common law to imply a duty of fair dealing to cases where the LRA does not apply serves to concretise and expand the notion of the importation of fairness into the common law.[43]

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35 *Chauke v Lee Service Centre supra* par 33.

36 Grogan "Derivative Misconduct" 2004 20 *Employment Law Journal* 15.

37 *Western Platinum Refinery Ltd v Hlebela supra.*

38 *Western Platinum Refinery Ltd v Hlebela supra* par 8.

39 *NUMSA obo Nganezi v Dunlop Mixing and Technical Services (Pty) Limited* 2019 (8) BCLR 966 (CC).

40 *NUMSA obo Nganezi v Dunlop Mixing and Technical Services (Pty) Limited supra* par 73.

41 *Murray v Minister of Defence* 2009 (3) SA 130 (SCA).

42 66 of 1995; *Murray v Minister of Defence supra* par 5–6.

43 Louw 2018 *PER* 18.

4 THE DUTY OF GOOD FAITH THROUGH THE JUDICIAL LENS: *DUNLOP* CASE

In 2019, the Constitutional Court in the *Dunlop*[44] case delivered a unanimous landmark judgment on the concept of derivative misconduct.

The Constitutional Court was called upon to determine the reasonableness of the arbitrator's decision that the dismissal of the third category of employees had been substantively unfair. In determining whether or not Dunlop had proved that the employees were guilty of derivative misconduct, the Constitutional Court extensively examined the true nature and scope of the duty of good faith.[45]

In arriving at his decision, Froneman J drew a distinction between a fiduciary duty and the duty of good faith.[46] Froneman J observed that the *Chauke* decision[47] suggested that the rationale for the extension beyond the actual primary misconduct was that;

> "the relationship between employer and employee is in its essentials one of trust and confidence" and non-disclosure could amount to a "derivative violation of trust and confidence."[48]

The justice expressed the view that the violation of the "trust and confidence" referred to in *Chauke* can be interpreted as a breach of the duty of good faith towards the employer that, "uncontroversially and on general principle, can justify a dismissal for non-disclosure of knowledge relevant to misconduct by fellow employees".[49] The court noted that a duty to disclose must flow from the reciprocal duty of good faith that the employee and employer owe one another. The justice made reference to a seminal article by Idensohn in which he sharply criticises the conflation of fiduciary duties with a duty of good faith in our case law:

> "Much of this confusion is due to loose use of imprecise and ambiguous terminology. Terms such as 'good faith', 'trust', 'confidence', 'faithfulness', and 'loyalty' are used interchangeably in descriptions of employee duties without any recognition or acknowledgment that they have functionally different meanings in different contexts, and that those meanings have changed over time. Both fiduciary duties and duties of good faith, for example, require 'loyalty'. For the purposes of fiduciary duties, 'loyalty' has the specific meaning of acting solely and exclusively in the interests of another. In relation to duties of good faith on the other hand, 'loyalty' generally has a narrower, less exacting meaning that merely requires the incumbent to have regard to or take the interests of another into account."[50]

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44 *NUMSA obo Nganezi v Dunlop Mixing and Technical Services (Pty) Limited supra*.

45 *NUMSA obo Nganezi v Dunlop Mixing and Technical Services (Pty) Limited supra* par 49–76.

46 *NUMSA obo Nganezi v Dunlop Mixing and Technical Services (Pty) Limited supra* par 49–69.

47 *Chauke v Lee Service Centre supra*.

48 *NUMSA obo Nganezi v Dunlop Mixing and Technical Services (Pty) Limited supra* par 49.

49 *NUMSA obo Nganezi v Dunlop Mixing and Technical Services (Pty) Limited supra* par 51.

50 Idensohn "The Nature and Scope of Employees' Fiduciary Duties" (2012) 33 ILJ 1539 1550, cited in *NUMSA obo Nganezi v Dunlop Mixing and Technical Services (Pty) Limited supra* par 53.

Froneman J held that a fiduciary duty applies to those persons who have access to, or power in relation to, the affairs of a beneficiary, and that such duties must be exercised for the sole purpose of promoting the beneficiary's interests.[51] Because of the high level of trust and responsibility imposed on an individual with a fiduciary duty, this duty is unilateral.[52]

Froneman J concluded that our law does not imply fiduciary duties into all employment relationships.[53] However, the duty generally arising in an employment relationship is a reciprocal contractual duty of good faith, which itself does not impose an obligation on any employee to disclose information about misconduct of their fellow employees to their employer.[54]

In relation to the submissions by Dunlop that doing away with derivative misconduct in the form that would warrant dismissal goes against the entire march of the court's contractual jurisprudence, which has been towards the greater incursion of the values of morality, good faith and *ubuntu*[55] into the contractual relationship.[56] The Constitutional Court dismissed Dunlop's submission, holding that the principles of *ubuntu* ought to be infused into the employment contract as the employment relationship is an unequal and hierarchical relationship, in which the employer has unfair power over its subordinated employee.[57] In addition, the court highlighted that if the *ubuntu* analogy were to be appropriately applied, it would be in relation not to the subordinated employee but to the employer.[58]

Froneman J also interrogated the impact of the duty to disclose within the context of a strike.[59] The Constitutional Court observed that the fact that a protected strike turned violent does not mean that the right to strike is no longer implicated in the analysis.[60] The right to strike is underpinned by the power play between employer and employees, and employees only have the power to strike if there is solidarity among the employees.[61]

Froneman J expressed the following view:

> "In the context of a strike, the imposition of a unilateral duty to disclose would undermine the collective bargaining power of workers by requiring positive action in the interests of the employer without any concomitant obligation on the part of the employer to give something reciprocally similar to the workers in the form of guarantees for their safety and protection before, when and after they disclose."[62]

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51 *NUMSA obo Nganezi v Dunlop Mixing and Technical Services (Pty) Limited supra* par 55.
52 *Ibid*.
53 *NUMSA obo Nganezi v Dunlop Mixing and Technical Services (Pty) Limited supra* par 62.
54 *Ibid*.
55 A Nguni Bantu term meaning humanity.
56 *NUMSA obo Nganezi v Dunlop Mixing and Technical Services (Pty) Limited supra* par 65.
57 *NUMSA obo Nganezi v Dunlop Mixing and Technical Services (Pty) Limited supra* par 66.
58 *Ibid*.
59 *NUMSA obo Nganezi v Dunlop Mixing and Technical Services (Pty) Limited supra* par 70–76.
60 *NUMSA obo Nganezi v Dunlop Mixing and Technical Services (Pty) Limited supra* par 70.
61 *Ibid*.
62 *NUMSA obo Nganezi v Dunlop Mixing and Technical Services (Pty) Limited supra* par 73.

The Constitutional Court concluded that a correct balance must be adopted in fair labour practices, taking into account the interests of both employer and employee in the context of a violent strike.[63] In the quest to strike the correct balance between employer and employee, Froneman J stressed:

> "The reciprocal duty of good faith should not, as a matter of law, be taken to imply the imposition of a unilateral fiduciary duty of disclosure on employees. In determining whether, as a matter of fact, a unilateral fiduciary duty to disclose information on the misconduct of co-employees forms part of the contractual employment relationship, caution must be taken not to use this form of indirect and separate misconduct as a means to easier dismissal rather than initially investigating the participation of individual employees in the primary misconduct. A failure to appreciate that there are many ways, direct and indirect, for employees to participate in and associate with the primary misconduct, increases this risk. Evidence, direct or circumstantial, that individual employees in some form associated themselves with the violence before it commenced, or even after it ended, may be sufficient to establish complicity in the misconduct. Presence at the scene will not necessarily be required. Even prior or subsequent knowledge of the violence and the necessary intention in relation to association with the misconduct will still be sufficient."[64]

In conclusion, Froneman J underlined that the duty to disclose on the basis of good faith can never be unilateral, it must be accompanied by a reciprocal, concomitant duty on the part of the employer to protect the employee's individual rights, including the fair labour practice right to effective collective bargaining.[65] In the context of a strike, Froneman J held:

> "An employer's reciprocal duty of good faith would require, at the very least, that employees' safety should be guaranteed before expecting them to come forward and disclose information or exonerate themselves."[66]

On this basis, the Constitutional Court upheld the decision of the arbitrator that the dismissal of the third category of employees had been unfair. The article next reflects on the Constitutional Court judgment on the application of the derivative misconduct concept in the workplace.

5 THE RIGHT TO REMAIN SILENT AND THE PRESUMPTION OF INNOCENCE IN PERIL

Regardless of strict workplace rules to secure and sustain an enterprise, employers find it particularly difficult to prove the participation of individuals in impugned conduct where misconduct is alleged to be collective.[67] Nonetheless, no one should be held accountable where no evidence can be adduced to substantiate a claim against individuals solely on the basis of being part of a group.[68] Achieving a fair dismissal for misconduct in

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63 *NUMSA obo Nganezi v Dunlop Mixing and Technical Services (Pty) Limited supra* par 74.

64 *NUMSA obo Nganezi v Dunlop Mixing and Technical Services (Pty) Limited supra* par 75.

65 *NUMSA obo Nganezi v Dunlop Mixing and Technical Services (Pty) Limited supra* par 76.

66 *Ibid*.

67 Maqutu "Collective Misconduct in the Workplace: Is 'Team Misconduct' 'Collective Guilt' in Disguise?" 2014 25(3) *Stell LR* 566.

68 *Ibid*.

circumstances where the primary misconduct has been committed by a group of employees poses evidential difficulties and has birthed the concept of collective misconduct.[69]

Accordingly, an employee bound by the duty of good faith to an employer breaches that duty by remaining silent about knowledge in the employee's possession regarding the business interests of the employer.[70] The duty of faith that an employee owes to an employer includes an obligation to come forward and either identify the perpetrators of misconduct to which that employee is a witness or to provide answers, which includes evidence in the employee's exoneration.[71] It is submitted that an employee's failure to give evidence, either to identify the perpetrators or exonerate himself, is also significant from an evidentiary perspective in that negative inferences can be drawn from such a silence and may justify dismissal.

In an *obiter dictum*, Nugent J held:

> "In the field of industrial relations, it may be that policy considerations require more of an employee than that he merely remained passive in circumstances like the present, and that his failure to assist in an investigation of this sort may in itself justify disciplinary action."[72]

In the *Chauke* case, Cameron JA stated:

> "Though the dismissal is designed to target the perpetrators of the original misconduct, the justification is wide enough to encompass those innocent of it, but who through their silence make themselves guilty of derivative violation of trust and confidence."[73]

However, it is submitted that the presumption of innocence and the right to remain silent is encroached if it cannot protect vulnerable employees from the risk of dismissal where an employee does not identify perpetrators of misconduct or exonerate themself in the face of collective misconduct charges.

Even though an inference from the employee's silence is permissible,[74] it is clear that misconduct created by an employee's failure to identify perpetrators or to exonerate themself unavoidably makes the employee's silence a factor to be taken into account in determining whether or not the employer has established a *prima facie* case.

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69 *NUMSA obo Nganezi v Dunlop Mixing and Technical Services (Pty) Limited supra* par 31.

70 *Dunlop Mixing and Technical Services (Pty) Limited v National Union of Metal Workers Union SA obo Nganezi* (2016) 27 *ILJ* 2065 (LC) par 4.

71 Poppesqou "The Sounds of Silence: Evolution of the Concept of Derivative Misconduct and the Role of Inferences" (2018) 39 *ILJ* 49.

72 *FAWU v ABI supra* par 1063.

73 *Chauke v Lee Service Centre supra* par 33.

74 In *R v Lepage* 1995(1) SCR 654, the court observed that "while it is permissible to conclude from the failure to testify that there is no unspoken, innocent explanation about which the trier of fact must speculate it is not permissible to use silence to strengthen a case that otherwise falls short of proving guilt beyond a reasonable doubt. If the totality of the evidence leads to guilt beyond a reasonable doubt, the accused's silence simply fails to provide any basis to conclude otherwise."

In the case *R v Noble,*[75] the court unequivocally observed as follows:

> "The use of silence to help establish guilt beyond a reasonable doubt is contrary to rationale behind the right to silence. Just as a person's words should not be conscripted and used against him or her by the State, it is equally inimical to the dignity of the accused to use his or her silence to assist in grounding a belief beyond a reasonable doubt. To use silence in this manner is to treat it as communicative evidence of guilt … The failure to testify tends to place the accused in the same position as if he has testified and admitted his guilt."[76]

Similarly, in cases of derivative misconduct, it is submitted that the employer, with its greater resources to investigate workplace misconduct, must not be permitted to use the employee's failure to identify perpetrators, or to exonerate themself, as a weapon against employees to build its own case. If the employer is permitted to establish a *prima facie* case using the employee's failure to exonerate themself, not only does it undermine the presumption of innocence but also creates a reverse onus of proof, which is contrary to the provisions of the Labour Relations Act.[77]

Furthermore, it is submitted that the main concern arising from allowing derivative misconduct dismissal is the failure to identify the principles determining the scope and contents of the presumption of innocence and the right to remain silent and its potential to significantly dilute these constitutionally protected rights. In the *Noble* case, the court stressed the importance of these two constitutionally protected rights.[78]

6 CRAFTING A WAY TOWARDS FAIRNESS

By implication, the duty to speak or disclose information relating to misconduct may be qualified to safeguard employees' interests. Accordingly, one may argue that there are two circumstances in which employees may be required to speak or disclose information in cases of derivative misconduct. First, an employee may be required speak against fellow colleagues, and secondly, an employee may be required to speak and incriminate themself if they were directly involved in the commission of the offence.

In the first category, the notion that there is a general duty to inform the employer of acts of misconduct committed by fellow colleagues remains unsupported in South African as well as English jurisprudence from which our law is derived. In terms of English law, Lord Justice Green in the *Swain* case, stated:

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75 (1997) 146 DLR 385.

76 *R v Noble supra* par 21.

77 66 of 1995. Items 7 and 4 of Schedule 8 (Code of Good Practice: Dismissal) sets out the substantive and procedural requirements for pre-dismissal. The employer bears the evidential burden on a balance of probabilities to prove that an employee is guilty of misconduct.

78 In *R v Noble supra* par 75, the court stressed that the right to silence is an essential right as it guards against the affront to dignity and privacy inherent in a practice that enables the prosecution to force an accused person to supply evidence.

> "I am unable to accept the proposition that there is a general duty to speak. Whether there is such a duty or not must depend on the circumstances of each particular case."[79]

The *Swain* judgment was endorsed by MacFarlane JA in *International Woodworkers of America v Sooke Forest Products Limited* when the court stated:

> "I think the learned judge refrained rightly from any decision as to the general existence or nature of the duty, if any, upon employees to disclose to the employer information regarding improper conduct of other employees. The existence of and the nature of such duty must depend upon the circumstances of the individual case."[80]

In terms of South African jurisprudence, neither the *FAWU*[81] nor the *Chauke*[82] cases uphold the proposition that there is a general duty to speak against acts of misconduct committed by fellow employees. In the *FAWU* case, Nugent JA stressed that in the field of industrial relations, it may be that policy considerations require more of an employee than that they merely remain passive and that their failure to assist in an investigation of this sort may in itself justify disciplinary action.[83]

Conversely, Cameron JA in the *Chauke* case stated that an employee may be under a duty to assist management in bringing the guilty to book, and where an employee has or may reasonably be supposed to have information concerning the guilty, their failure to come forward with the information may in itself amount to misconduct.[84]

In the first circumstance, it is safe to submit that, in safeguarding both the employer's and employee's interest, a balanced and fair approach must be adopted, taking into account, *inter alia*, the particular facts and circumstances of each case, the reciprocal duty of good faith and fair dealings in the employer and employee relationship, and the historical and socio-economic context.

The reciprocal duty of good faith was endorsed by Froneman J in the *Dunlop* case, where the justice remarked that an employer's reciprocal duty of good faith would require, at the very least, that employees' safety should be guaranteed before expecting them to come forward and disclose information or exonerate themselves.[85] Therefore, it may be argued that, to alleviate the potential consequences of being an *impimpi* (snitch), an employer may be required to offer guaranteed effective protection before, during and after disclosure of information by employees.

In this light, it is recommended that employers should consider adopting a workplace disclosure policy to deal with the potential consequences of

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79 (1936) 3 All ER 261, citing *Bell v Lever Brothers Limited* (1932) AC 161.
80 *1968 Carswell EC* 289 par 7.
81 *FAWU v ABI supra* par 1063.
82 *Chauke v Lee Service Centre supra*.
83 *FAWU v ABI supra* par 1063.
84 *Chauke v Lee Service Centre supra* par 31 and 33.
85 *NUMSA obo Nganezi v Dunlop Mixing and Technical Services (Pty) Limited supra* par 76.

disclosing information against fellow employees. Accordingly, it is submitted that a workplace disclosure policy may be a useful mechanism to manage any potential ramification either before, during, or after disclosure of information against a fellow employee, while also regulating effective protection of employees.

In this regard, a workplace disclosure policy may ensure that any wrongdoing disclosed regarding any form of misconduct is dealt with effectively, confidentially, and anonymously by the employer. In terms of such a policy, employees may be encouraged to report any form of suspected unethical, illegal, corrupt, fraudulent, or undesirable conduct committed during the course and scope of employment as the employer is then obliged to provide guaranteed protective measures to such employees in relation to such conduct without fear of victimisation or reprisal.

A workplace disclosure policy may therefore remain the prerogative of the employer to ensure that employees who disclose information are treated in a fair manner and do not suffer any occupational detriment, and that confidentiality is preserved in respect of all matters raised under this policy. Consequently, an employee or employees who make a disclosure of information to the employer will be guaranteed protection from any form of occupational detriment, including termination of employment, discrimination, harassment, bullying, or intimidation and victimisation.

By adopting such a workplace disclosure policy, the employer would endeavour to take reasonable steps to protect an employee or employees from any form of occupational detriment by taking necessary action where such conduct is identified. As such and if warranted, the policy may dictate that the employer allow an employee to perform duties from another workplace, or change to another department, in order to protect the employee from any risk of occupational detriment.

Lastly, a workplace disclosure policy may also provide that in cases where an employee or employees who disclosed information have suffered any form of occupational detriment as a result of the employer's failure or negligence to take reasonable precautionary and preventative measures, either before, during, or after disclosure of information, the employee or employees may claim compensation or recover civil damages.

In the second category of duty to speak, it is submitted that employees may be permitted to exercise the right to remain silent and to a presumption of innocence in order to eliminate the risk of an employee's tendering self-incriminating evidence during a disciplinary hearing. In that regard, in the absence of rules determining the scope and extent of questioning by the employer, protection similar to that enjoyed by an accused person invoking the right to remain silent in a criminal matter would not be out of proportion in labour matters.[86]

In the context of criminal law, the importance of the right to remain silent and the presumption of innocence is of paramount importance and it

[86] *NUMSA obo Nganezi v Dunlop Mixing and Technical Services (Pty) Ltd* (2018) ILJ 2226 (LAC) par 68.

remains a cornerstone in South Africa's constitutional democracy. In addition, the right to remain silent guarantees protection against self-incrimination and unfair deprivation of freedom and liberty, whereas the presumption of innocence ensures that the State must prove the accused's guilt beyond a reasonable doubt. Consequently, an employee cannot be expected to assist an employer to establish a *prima facie* case against them or prove their innocence because statutorily the onus of proof rests with the employer.

7 CONCLUSION

For the past two decades, it is evident that South African labour dispute resolution forums have grappled with finding a fair approach to be adopted in relation to the duty to speak in cases of derivative misconduct. The unilateral approach to the duty to speak failed to take cognisance of fairness as a cornerstone in the employment relationship. Contrary to the unilateral approach, the reciprocal approach adopted by the Constitutional Court in *Dunlop* can be applauded not only for taking cognisance of the realities of the workplace environment but also for ensuring that its judgment was consonant with the right to fair labour practices. In addition, the researchers have identified two categories within the duty to speak – that is, a duty to speak against fellow employees, and duty to incriminate oneself. In the first category, it was suggested that a balanced and fair approach may be adopted. In the second category, it was suggested that employees may be permitted to exercise the right to remain silent and to a presumption of innocence in order to eliminate the risk of an employee's tendering self-incriminating evidence during a disciplinary hearing. However, it remains to be seen whether South African courts will decide on important details of the right to remain silent and presumption of innocence, which are implicated by a finding of derivative misconduct.

A CRITICAL EVALUATION OF WHETHER BENEFITS PROVIDED FOR IN COIDA FALL WITHIN THE AMBIT OF THE CONSTITUTIONAL RIGHT TO ACCESS SOCIAL SECURITY PROTECTED IN SECTION 27(1)(*c*) OF THE CONSTITUTION

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SUMMARY

The right to access social security is a constitutionally entrenched right. Section 27(1)(*c*) of the Constitution provides that everyone has the right to social security, including, if they are unable to support themselves and their dependants, appropriate social assistance. Apart from the concept of social security being inclusive of social assistance, neither the term "social security" nor the term "social assistance" is defined. Conventionally, social security has been regarded as a broad term comprising two primary pillars, namely social insurance and social assistance. Social insurance takes the form of earnings-based insurance schemes, which provide protection against risks such as unemployment and employment injuries. On the other hand, social assistance is synonymous with social grants, which are non-contributory and are provided by the State to categories of society that are in need. Notwithstanding this conventional understanding of social security, the recent Constitutional Court decision in *Mahlangu v Minister of Labour* found it necessary to engage with the question of whether compensation payable in terms of the Compensational for Occupational Injuries and Diseases Act (COIDA) fell within the ambit of the constitutional right to access social security. The majority and minority judgments differed in this respect. The majority found that COIDA benefits constituted a form of social security, but that they fell within the ambit of social assistance. The minority contrarily held that such benefits were not encompassed within the constitutional right to access social security. As both the majority and minority deviated from the conventional understanding of the definition of social security, the focus of this article is to evaluate the ambit of the constitutional right to social security, specifically whether it encompasses benefits payable in terms of COIDA. The conclusion reached is that COIDA benefits are encompassed within the constitutional right to access social security, as it constitutes a form of social insurance. Therefore, as highlighted in this article, the legal principles articulated by both the majority and minority were flawed.

1 INTRODUCTION

The Constitution of the Republic of South Africa, 1996 (the Constitution) provides for a number of socio-economic rights.[1] One such right is the right to access social security. Section 27(1) of the Constitution states that everyone has the right to (*a*) health care services, including reproductive health care; (*b*) sufficient food and water; and (*c*) *social security, including, if they are unable to support themselves and their dependants, appropriate social assistance*. Section 27(2) provides that the State must take reasonable legislative and other measures, within its available resources, to achieve the progressive realisation of each of these rights. The Constitution does not define "social security" but makes specific reference to social assistance being included within this concept. However, the concept of social security is conventionally regarded as comprising two categories. The one is social assistance, while the other is social insurance.[2]

The Compensation for Occupational Injuries and Diseases Act[3] (COIDA) provides compensation for disablement caused by occupational injuries and diseases.[4] The question of whether such compensation falls within the constitutional definition of social security came under the spotlight in the Constitutional Court decision of *Mahlangu v Minister of Labour* (*Mahlangu*).[5] Here, the daughter of a domestic worker employed in a private household sought to claim compensation subsequent to her mother's death. Her mother died while at work performing her duties.[6] Compensation was not payable, as a domestic worker employed in a private household was excluded from the definition of employee in COIDA.[7] A constitutional challenge was launched against the exclusion of domestic workers from this. Reliance was placed on a violation of section 27(1)(*c*), among other constitutional rights, to challenge the unconstitutionality of COIDA.[8]

Although both the majority and minority judgments concluded that section 1(xix)(v) was unconstitutional for its exclusion of domestic workers, they differed on the applicability of section 27(1)(*c*).[9] The majority decision found that compensation received in terms of COIDA constitutes a form of social security.[10] However, surprisingly, it found that it constitutes a form of social assistance and no mention was made of social insurance.[11] This contradicts the conventional understanding that compensation for occupational injuries

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1 Ch 2 of the Constitution.

2 Kalula and Strydom (eds) *Understanding Social Security Law* (2009) 8. See further Govindjee and Dupper "Constitutional Perspectives on Unemployment Security and a Right to Work in South Africa" 2011 *Stellenbosch Law Review* 778.

3 130 of 1993.

4 S 22 of COIDA; see further Strydom (ed) *Essential Social Security Law* (2006) 41, and Olivier, Smit, Kalula and Mhone *Introduction to Social Security Law* (2004) 326–327.

5 (2021) 42 *ILJ* 269 (CC).

6 *Mahlangu supra* par 7–8.

7 *Mahlangu supra* par 8.

8 *Mahlangu supra* par 28.

9 *Mahlangu supra* par 115, 131, 135 and 183.

10 *Mahlangu supra* par 59.

11 *Mahlangu supra* par 52.

and diseases falls into the latter category.[12] Even more unexpected were the two minority judgments that found that compensation payable in terms of COIDA does not fall within the ambit of the constitutional right to access social security.[13]

The right to social security plays an important role in the achievement of social justice. Smit correctly explains that the "building blocks" of social justice are rooted in the Constitution, notably in Chapter 2, which includes the right to access social security.[14] This right aims to assist those in need, thereby helping to solve the challenges of poverty, unemployment and inequality that South African society faces.[15] Steps taken towards achieving social justice assist in improving the quality of lives.[16]

Against this background, it is imperative to determine the scope of this right, specifically whether compensation in terms of COIDA was intended to form part of social security. Understanding "the reach" of this constitutional right[17] will aid litigants who may in future seek to rely on a violation of this right in the context of occupational injuries and diseases sustained.

Based on the foregoing discussion, this article seeks to evaluate whether compensation in terms of COIDA constitutes an element of social security, and if so, determine whether it falls within the ambit of social assistance as found by the majority in *Mahlangu*. The approach adopted in this article is to start by highlighting the relevant aspects of COIDA and the Social Assistance Act[18] (SAA). Secondly, the article considers the ambit of the constitutional right to social security by deliberating on the definition of social security from a domestic and international perspective. Thirdly, it evaluates the decision of *Mahlangu*. Lastly, a conclusion is reached regarding the accuracy of the pronouncements made by both the majority and minority judgments of the Constitutional Court; the conclusion is then used to postulate a better understanding of COIDA's place within the constitutional right to access social security.

2 THE COMPENSATION FOR OCCUPATIONAL INJURIES AND DISEASES ACT

COIDA provides a system of no-fault compensation for employees who are injured in accidents that arise out of and in the course of their employment, or who contract occupational diseases in employment.[19] The Director-General of the Department of Labour is responsible for considering claims

12 Kalula and Strydom *Understanding Social Security Law* 8.

13 *Mahlangu supra* par 171 and 183.

14 Smit "Towards Social Justice: An Elusive and a Challenging Endeavor" 2010 1 *TSAR* 6 and 10.

15 Olivier *et al Introduction to Social Security Law* 28 and 31. See further Olivier, Dupper and Govindjee "Redesigning the South African Unemployment Insurance Fund: Selected Key Policy and Legal Perspectives" 2011 2 *Stellenbosch Law Review* 396–399.

16 Smit 2010 *TSAR* 7.

17 Olivier *et al Introduction to Social Security Law* 13.

18 13 of 2004.

19 Van Niekerk and Smit (eds) *Law@Work* (2019) 517.

and paying out benefits.[20] A compensation fund is established in terms of COIDA and it is from this fund that employees receive benefits.[21] A substantial part of the fund is made up of employer contributions or payments. However, COIDA authorises the Director-General to take certain actions in order to raise money for the fund.[22]

In order to receive compensation in terms of COIDA, the individual applying must qualify as an employee. COIDA defines an employee as a person who has entered into or works under a contract of service, which includes casual employees and persons provided by a labour broker. Importantly, it includes the dependants of a deceased employee.[23] In line with the inclusion of dependants within the definition of employee, COIDA defines who qualifies as a dependant. The definition of a dependant includes a child who is both under and over the age of 18.[24]

If an employee has an accident resulting in disablement or death, the employee or the employee's dependants will be entitled to compensation in terms of COIDA.[25]

The Constitutional Court in *Jooste v Score Supermarket Trading*[26] described COIDA as

> "important social legislation which has a significant impact on the sensitive and intricate relationship amongst employers, employees and society at large."[27]

3 THE SOCIAL ASSISTANCE ACT

The Constitution makes specific reference to social assistance in section 27(1)(*c*). To understand the composition of social assistance, it is important to consider the SAA, which seeks to give effect to this constitutional right. The Preamble explains that the SAA was passed to give effect to the right to access social security by providing uniform norms and standards, to prevent

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20 S 4 of COIDA.

21 S 15 and 16 of COIDA. See further Van Niekerk and Smit *Law@Work* 516.

22 S 5, 18 and 80–83 of COIDA.

23 S 1(xix) of COIDA. Domestic workers employed in private households are excluded from the definition. However, there is a proposed amendment to the definition of employee that includes domestic workers of private households, as per s 1(*h*) of the Compensation for Occupational Injuries and Diseases Amendment Bill (B21–2020).

24 S 1(xv) (*d*)–(*e*) of COIDA. There is a proposed amendment to the definition of dependant in the Compensation for Occupational Injuries and Diseases Amendment Bill (B21–2020), as per section 1(*f*) The proposed amendment has placed limitations on benefits available to children above 18. It states that a child over 18 but below 25 can qualify as a dependant if the child is still receiving a tertiary education. A child of 25 years or older can qualify only if the Compensation Commissioner is of the opinion that the child was at the time of the employee's death wholly or partially financially dependent on the employee (provided there is no widow or widower, child below the age of 18, or child above 18 but below 25.

25 S 22(1) of COIDA.

26 (1999) (2) SA 1 (CC).

27 *Jooste v Score Supermarket Trading (Pty) Ltd supra* par 8.

the proliferation of laws, and in turn provide effective, transparent and accountable social assistance.[28]

The objectives of the SAA include the administration of social assistance, the payment of social grants, and determining the qualification requirements of applicants.[29] The SAA provides for eight types of social grant, namely grants for old age, care dependancy, child support, foster care, disability, social relief of distress, grant in aid and war veterans.[30] Importantly, eligibility for most social grants requires the individual to meet the financial requirements set out in the Social Assistance Regulations.[31] Therefore, an evaluation of the income and assets of the applicant for a social grant is conducted,[32] except for a foster care grant.[33]

The provision of social grants is means tested to ensure that only families in need receive grants.[34]

4 THE CONSTITUTIONAL RIGHT TO ACCESS SOCIAL SECURITY

4 1 What does section 27(1)(*c*) entail?

What is clear from this constitutional right is that it encompasses more than just social assistance, which consists of social grants payable by the State to individuals in need. This is evident from the use of the word "including". While the constitutional right to access social security includes the right to access social assistance, it does not exclusively refer to the provision of social assistance. Aspects other than access to social assistance are included in this constitutional right. It would be helpful if the Constitution provided a definition of social security but, even in the absence of such a definition, there is certainty that it is not only the provision of social assistance that is encapsulated within this right.

It has been said that social security is not a fixed concept. Instead, the definition is flexible and country-specific.[35] To understand the South African definition as postulated in the Constitution, one must consider relevant instruments from both the domestic and international perspective.

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28 Preamble to the SAA.

29 S 3 of the SAA.

30 Ss 4 and 13 of the SAA.

31 Regs 2–4, 6, 8 and 15 of the Regulations as enacted by GoN R898, G. 31356 (c.i.o 22 August 2008), amended by GoN R193, G. 32917(c.i.o 1 January 2010), GoN R556, G.34529 (c.i.o 15 August 2011), GoN R269, G. 35205 (c.i.o 1 April 2012), and , GoN R621, G. 39007 (c.i.o 21 July 2015) in terms of the SAA

32 Kalula and Strydom *Understanding Social Security Law* 70.

33 S 7 of the Regulations in terms of the SAA.

34 In *Khosa v The Minister of Social Development; Mahlaule v The Minister of Social Development* 2004 (6) SA 505 (CC) par 51, the Constitutional Court explained that social grants are made to those in need, including vulnerable persons.

35 Dekker "Social Security: A Conceptual View" 2000 4 *Law Democracy and Development* 1; see further Olivier *et al Introduction to Social Security Law* 14.

4 1 1 Social security defined from a South African perspective

As the Constitution does not provide a definition of social security, clarity on what was intended can be found in the Supplementary Memorandum on the Bill of Rights and Party Submissions (Supplementary Memorandum).[36] It was emphasised that the right of everyone to social security and an adequate standard of living is recognised in most major international human rights instruments, such as the International Covenant on Economic, Social and Cultural Rights (ICESCR)[37] and the Social Security (Minimum Standards) Convention,[38] which provides for minimum standards of social security.[39]

The document discusses the distinction that is often made between social insurance referred to as "the earned benefits of workers and their families" and social assistance regarded as "need-based assistance received from public funds".[40] It was emphasised that the concept of social security is sometimes regarded as being "synonymous to social insurance".[41] While, in a "strict sense", social insurance refers only to contributory social security benefits where there is a direct correlation between an amount paid and the benefit received, there is an overlap in many social insurance schemes which can be contributory or non-contributory.[42] There is also an overlap with needs-based social assistance. Importantly, it was stated that there is a general tendency to give the concept of social security a wider interpretation to align with international trends in order to develop a comprehensive system of social protection.[43] Based on these reasons, it was specifically stated:

> "[T]he right is formulated as the right of access to a social security system, including appropriate social assistance where they are unable to support themselves and their dependants … This covers both contributory and non-contributory social security benefits, including appropriate social assistance from the state."[44]

In keeping with the pronouncements in the Supplementary Memorandum, the White Paper on Social Welfare[45] explains that the concept of social security covers a wide range of public and private measures that provide

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36 Constitutional Committee of Constitutional Assembly "Supplementary Memorandum on the Bill of Rights and Party Submissions" https://www.justice.gov.za/legislation/constitution/history/DRAFTS/SUP09115.PDF (accessed 2022-05-01).

37 993 UNTS 3 (1966). Adopted: 16/12/1966; EIF: 03/01/1976.

38 ILO C102 (1952). Adopted: 28/06/1952; EIF 27 April 1955.

39 Constitutional Committee of Constitutional Assembly https://www.justice.gov.za/legislation/constitution/history/DRAFTS/SUP09115.PDF clause (3.5.1) 20–21.

40 Constitutional Committee of Constitutional Assembly https://www.justice.gov.za/legislation/constitution/history/DRAFTS/SUP09115.PDF (clause 3.5.3) 22.

41 *Ibid*.

42 *Ibid*.

43 *Ibid*.

44 *Ibid*.

45 Department of Welfare "White Paper for Social Welfare" (August 1997) https://www.gov.za/sites/default/files/gcis_document/201409/whitepaperonsocialwelfare0.pdf (accessed 2022-05-01).

cash or in-kind benefits or both. These benefits are required to be provided when an individual is permanently or temporarily unable to earn an income, or where an individual has never had the opportunity or ability to earn an income.[46] Social security benefits are required to be provided to avoid poverty and to allow for the maintenance of children under these circumstances.[47]

The "domains" of social security are described as poverty prevention, poverty alleviation, social compensation and income distribution.[48] There are four elements to the social security system in South Africa. These are stated to be private savings, social insurance, social assistance and social relief.[49] Social insurance is defined as comprising schemes or funds to which employers and employees jointly contribute, such as pension and provident funds, as well as schemes or funds that cover other unexpected events. It is specifically stated that "government may also contribute to social insurance covering accidents at work".[50]

Social assistance is defined as comprising benefits that are provided by the State to people who are unable to provide for their own minimum needs – namely, those with disabilities, elderly people and unsupported parents and children. Social assistance is explained to be a non-contributory form of assistance that takes the form of social grants.[51] It is income tested, as it is reserved for low-income earners.[52]

In the White Paper, social security is broadly defined, and it is apparent that social security entails measures beyond social assistance. The term "social insurance" is specifically mentioned, and it is evident from the manner in which social insurance is defined that the compensation provided in terms of COIDA constitutes an insurance scheme that covers an unexpected event such as an occupational injury or disease.

The Taylor Committee, which was appointed to make recommendations to overhaul the social security system in South Africa, also engaged with the concept of social security.[53] The chairperson of the Committee states in the foreword of the Taylor Committee Report of 2002:[54]

> "While this is not the first time issues of social security have been engaged, this Report is significant for a number of reasons. First, it is one of the most comprehensive inquiries into both public and private forms of social security in

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46 Department of Welfare https://www.gov.za/sites/default/files/gcis_document/201409/whitepaperonsocialwelfare0.pdf ch 7 par 1.

47 *Ibid*.

48 *Ibid*.

49 Department of Welfare https://www.gov.za/sites/default/files/gcis_document/201409/whitepaperonsocialwelfare0.pdf ch 7 par 2.

50 *Ibid*.

51 *Ibid*.

52 *Ibid*.

53 Strydom *Essential Social Security Law* 23.

54 The Taylor Committee "Transforming the Present – Protecting the Future Consolidated Report" (March 2002) https://sarpn.org/CountryPovertyPapers/SouthAfrica/march2002/report/Transforming_the_Present.pdf (accessed 2022-05-01).

> South Africa and seeks to identify those who fall through the system and are without any social protection."[55]

The Report does not provide a definition of social security as it calls for the implementation of a comprehensive social protection framework, which is broader than social security.[56] However, the concept of social security is discussed. The Report explains that in developed countries a distinction is made between social assistance and social insurance. Social assistance is regarded as state-provided basic minimum protection, which seeks to relieve poverty, and which is non-contributory. Social insurance on the other hand is referred to as a mandatory contribution system of "one kind or another".[57]

More importantly, the Committee engages with the meaning of social security from a constitutional perspective. It explains that social security consists not only of public measures. Rather, social, fiscal and occupational welfare measures, whether provided publicly or privately, must be taken into account when developing coherent social security policies. It explains that such an approach is necessary in a country like South Africa. This requires a

> "functional definition of social security to be adopted, which includes all instruments, schemes, or institutions representing functional alternatives for the publicly recognised schemes – that is, all instruments available to society for guaranteeing social security."[58]

In line with this broad understanding of the constitutional right to social security coverage, compensation for employment injuries and diseases provided for in COIDA is one of the chapters discussed in the Report.[59] One of the observations was that there were shortcomings in COIDA as it excluded a number of persons, such as domestic workers and those engaged in non-standard forms of work.[60]

It is apparent that the Committee viewed the constitutional right to social security in broad terms. In other words, it recognised that social security constitutes more than the provision of social assistance. The discussion of compensation for occupational injuries and diseases illustrates that it recognised that the compensation provided in terms of COIDA is an element of social security.

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55 The Taylor Committee https://sarpn.org/CountryPovertyPapers/SouthAfrica/march2002/report/Transforming_the_Present.pdf 36.

56 The Taylor Committee https://darpn.org/CountryPovertyPapers/SouthAfrica/march2002/report/Transforming_the_Present.pdf 40–41 and 154.

57 The Taylor Committee https://sarpn.org/CountryPovertyPapers/SouthAfrica/march2002/report/Transforming_the_Present.pdf 36.

58 The Taylor Committee https://sarpn.org/CountryPovertyPapers/SouthAfrica/march2002/report/Transforming_the_Present.pdf 50.

59 The Taylor Committee https://sarpn.org/CountryPovertyPapers/SouthAfrica/march2002/report/Transforming_the_Present.pdf 113. See further Tshoose *Social Assistance: Legal Reforms to Improve Coverage and Quality of Life for the Poor People in South Africa* (doctoral thesis, University of South Africa) 2016 98, where he explains the broad ambit of the concept of social security.

60 The Taylor Committee https://sarpn.org/CountryPovertyPapers/SouthAfrica/march2002/report/Transforming_the_Present.pdf 113.

Lastly, consideration must be given to the National Development Plan.[61] Chapter 11 of the Plan discusses social protection measures. It explains that the key elements of the social protection system adopted in democratic South Africa includes social assistance, which comprises: cash grants for children, the aged and persons with disabilities; access to free basic services; free education; and statutory social insurance arrangements, such as the unemployment insurance fund and the compensation for occupational injuries and diseases provided for by COIDA.[62] The Plan highlights that the concept of social protection is broader than the concept of social security but makes the point that this broader concept of social protection includes traditional forms of social security measures, namely social assistance and social insurance.[63] It goes further to explain that social insurance assists the unemployed but also covers loss of income owing to work-related injury or illness.[64]

The Plan, which was finalised in 2012, is yet another indication that the constitutional definition of social security comprises both social insurance and social assistance, and that benefits paid in terms of COIDA constitute a form of social insurance.[65]

4 1 2 Social security defined from an international perspective

International law plays an essential role in determining the constitutionality of legislation. Section 39 of the Constitution states that, when interpreting the Bill of Rights, a court must consider international law. Equally, section 233 of the Constitution plays a role. It directs a court when interpreting any legislation to prefer a reasonable interpretation of the legislation that is consistent with international law as opposed to an interpretation that is inconsistent with international law.

The International Labour Organization (ILO) is an important source of international law when interpreting the right to access social security, as well as the legislation (such as COIDA) that gives effect to this constitutional right. This is because one of the ILO's primary objectives is the promotion of social security measures. The ILO headquarters in Geneva has a social

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61 The National Planning Commission "Our Future – Make It Work: National Development Plan 2030" https://www.gov.za/sites/default/files/gcis_document/201409/ndp-2030-our-future-make-it-workr.pdf (accessed 2022-05-01).

62 The National Planning Commission https://www.gov.za/sites/default/files/gcis_document/201409/ndp-2030-our-future-make-it-workr.pdf 356.

63 The National Planning Commission https://www.gov.za/sites/default/files/gcis_document/201409/ndp-2030-our-future-make-it-workr.pdf 357.

64 The National Planning Commission https://www.gov.za/sites/default/files/gcis_document/201409/ndp-2030-our-future-make-it-workr.pdf 357 and 359.

65 Tshoose *Social Assistance: Legal Reforms to Improve Coverage and Quality of Life for the Poor People in South Africa* 26 supports this interpretation of the definition of social security. He explains that legal reforms that seek to improve coverage and quality of life for the poor people of South Africa recognise the benefits payable in terms of COIDA as a form of social insurance. Social insurance schemes such as the one set up in terms of COIDA play an important role through the provision of survivors' benefits upon the death of the breadwinner.

security department; one of its functions is to design sustainable social security schemes.[66] Furthermore, several international standards have been adopted in the field of social security law.[67]

The most important labour standard regulating social security is the Social Security (Minimum Standards) Convention. The Convention itself does not define the term social security but sets out the contingencies for which social security benefits should be provided. Reference is made to the provision of medical care, as well as benefits for sickness, unemployment, old age, employment injury, family, maternity, invalidity and survivor benefits.[68] It is evident that, of these nine contingencies, one relates to an employment injury benefit and another to the payment of survivor benefits.[69] Although South Africa has not ratified this convention, South Africa is a member of the ILO.[70] Apart from this, the Constitution prescribes the consideration of international law.

Another important international instrument is the ICESCR, which was ratified by South Africa in 2015.[71] This covenant requires states parties to take steps to the maximum of their available resources to progressively achieve the full realisation of the rights recognised in the covenant by appropriate means, including the adoption of legislation.[72] One such right is the right to social security, including social insurance. General Comment 19 of the Committee for Economic, Social and Cultural Rights (CESCR) explains that the right to social security encompasses the right to access and maintain benefits, whether in cash or in kind, without discrimination in order to secure protection from, among other things, a lack of work-related income caused by sickness, disability, maternity, employment injury, unemployment, old age, or death of a family member.[73] The committee explained that a country's social security system should provide for the nine principal branches or contingencies of social security as set out in the Social Security (Minimum Standards) Convention.[74] As explained above, occupational injuries are regarded as one of the contingencies for which benefits must be paid. In respect of employment injuries, CESCR explains that a country's social security system should "cover the costs and loss of earnings from the

66 Strydom *Understanding Social Security Law* 323–324.

67 Strydom *Understanding Social Security Law* 326–327.

68 Parts II–X of the Social Security (Minimum Standards) Convention.

69 Parts VI and X of the Social Security (Minimum Standards) Convention.

70 Van Niekerk and Smit *Law@Work* 24.

71 Basson "The Compliance of the South African Social Security System with the International Covenant on Economic, Social and Cultural Rights" 2020 *Obiter* 851.

72 Art 2 of the ICESCR.

73 The Committee for Economic, Social and Cultural Rights (CESCR) "General Comment, No 19" (4 February 2008) https://tbinternet.ohchr.org/_layouts/15/treatybodyexternal/Download.aspx?symbolno=E%2fC.12%2fGC%2f19&Lang=en (accessed 2022-05-01) clause 2; see further Basson 2020 *Obiter* 855.

74 CESCR https://tbinternet.ohchr.org/_layouts/15/treatybodyexternal/Download.aspx?symbolno= E%2fC.12%2fGC%2f19&Lang=en clause 12.

injury or morbid condition and the loss of support for spouses or dependents suffered as the result of the death of a breadwinner".[75]

At the time that the Constitution was enacted, South Africa had re-joined the ILO, and sections 39 and 233 evince the country's objective of aligning itself to international standards. As explained earlier, the Supplementary Memorandum made specific reference to international law in deciding on what the right to access social security should entail. In terms of international law, the payment of benefits for employment injuries forms part of the right to social security.

4 2 Section 27(2)

Section 27(2) of the Constitution provides that the State must take reasonable legislative and other measures, within its available resources, to achieve the progressive realisation of the right to access social security. This places an internal limitation on this right.[76] While the State must implement reasonable measures to achieve this right, this can only be done within the available resources of the State.[77] As stated by Olivier, the inclusion of this section "is an acknowledgement that the right to social security cannot be fulfilled by the State immediately and completely".[78]

A similar limitation is placed on the constitutional right to access housing set out in section 26(1). Section 26(2) mirrors section 27(2). Therefore, the deliberations that took place in the Constitutional Court in *Government of the Republic of South Africa v Grootboom* (*Grootboom*)[79] are relevant to the application of section 27(2). *Grootboom* discussed at length what the State's obligation in terms of section 26(2) entailed.[80] The court explained that, when it comes to reasonable legislative and other measures, the issue is not whether more desirable or favourable measures could have been adopted, or whether public money could have been better spent, as it recognised that a wide range of possible measures could be adopted by the State to meet its obligations.[81] What was important, said the court, was whether it could be shown that the measures that had been adopted were indeed reasonable.[82]

The Constitutional Court explained that with regard to progressive realisation it was about whether accessibility to the right is progressively facilitated. In other words, whether the right is made available to a larger number of people as well as to a wider range of people as time

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75 CESCR https://tbinternet.ohchr.org/_layouts/15/treatybodyexternal/Download.aspx?symbolno=E%2fC.12%2fGC%2f19&Lang=en clause 17.

76 *Khosa v The Minister of Social Development; Mahlaule v The Minister of Social Development supra* par 43.

77 Olivier *et al Introduction to Social Security Law* 141.

78 Olivier *et al Introduction to Social Security Law* 143.

79 2000 (1) SA 46 (CC).

80 Wesson "Grootboom and Beyond: Reassessing the Socio-Economic Jurisprudence of the South African Constitutional Court" 2004 2 *SAJHR* 287.

81 *Grootboom supra* par 41.

82 *Ibid.*

progresses.[83] Progressive realisation is also about the duty on the State to improve the nature and quality of services to which people have access.[84] As stated in *Mazibuko v City of Johannesburg*,[85] a policy that is set in stone and never revisited is unlikely to be a policy that will result in the progressive realisation of rights within the obligations imposed by the Constitution.[86]

What becomes apparent is that, in line with section 27(2), the State has an obligation to provide to a larger group of people the social security measures that are already in place, to improve the nature and quality of social security measures that are on offer, and to broaden the type of social security measures that are available.

5 CONSTITUTIONAL COURT DECISION OF *MAHLANGU v MINISTER OF LABOUR*[87]

5 1 The facts

Ms Mahlangu worked as a domestic worker at a private residence in Pretoria. While undertaking her duties, she fell into her employer's swimming pool and drowned.[88] Subsequent to Ms Mahlangu's death, her daughter, who was financially dependent on her, sought compensation from the Department of Labour.[89] The Department of Labour advised that no compensation was payable as domestic workers of private households did not fall within the definition of employee for the purposes of COIDA. Therefore, a domestic worker and their dependants were excluded from the benefits provided by COIDA.[90] This led to the constitutionality of the definition of employee in section 1(xix)(v) of COIDA being challenged, to the extent that it excluded domestic workers.[91]

In 2019, the High Court declared the section unconstitutional. Following this decision, the matter came before the Constitutional Court for confirmation of the order of invalidity.[92] The basis for challenging the constitutionality of the section was that excluding domestic workers violated their constitutional rights to equality, human dignity and the right to have access to social security.[93]

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83 *Grootboom supra* par 45.

84 Chenwi "Unpacking Progressive Realisation, Its Relation to Resources, Minimum Core and Reasonableness, and Some Methodological Considerations for Assessing Compliance" 2013 *De Jure* 747.

85 2010 (3) BCLR 239 (CC) par 1. In this case, the court considered s 27(2) in relation to s 27(1)(*b*), which provides that everyone has the right to have access to sufficient water.

86 *Mazibuko v City of Johannesburg supra* par 162.

87 *Supra.*

88 *Mahlangu supra* par 7.

89 *Mahlangu supra* par 8.

90 *Ibid*.

91 *Mahlangu supra* par 9.

92 *Mahlangu supra* par 10 and 12.

93 *Mahlangu supra* par 28.

5 2 The majority judgment

The judgment appreciated that the right to social security is an internationally recognised human right.[94] Reference was made to the Universal Declaration of Human Rights, which provides "everyone with the right to security in the event of unemployment, sickness, disability, widowhood, old age or other lack of livelihood in circumstances beyond [their control]".[95] Importantly, the judgment acknowledged that international law regards benefits in terms of COIDA "as a component of the fundamental right to social security".[96] The importance of preferring an interpretation of the Bill of Rights that is consistent with international law was further highlighted.[97]

The scope of the right to access social security as provided for in section 27(1)(*c*) of the Constitution became the focal point.[98] Interestingly, the court zoomed in to the part of the definition that provides "[i]ncluding, if they are unable to support themselves and their dependants, appropriate social assistance".[99] It asked the question whether social assistance includes "social security assistance for those in need of support and sustenance due to an injury or disease that is work-related or the death of a breadwinner as a result of such injury or disease?"[100]

The conclusion reached was that providing benefits to an employee's dependants in terms of COIDA has a similar purpose to providing social grants to those who are unable to support themselves in terms of the SAA.[101] Therefore, the court concluded that "social security assistance in terms of COIDA is a subset of the right of access to social security under section 27(1)(*c*) of the Constitution".[102]

The judgment went further and discussed section 27(2) of the Constitution. It concluded that "COIDA is an example of the very type of legislation that the Constitution envisages as a reasonable legislative measure, within its available resources, to achieve the progressive realisation of [the] right".[103]

The court explained that the obligation under section 27(2) includes the obligation to extend COIDA to domestic workers. In view of the respondent's admission that it had the resources to do this, a failure to do so, constituted a direct infringement of section 27(1)(*c*), read with section 27(2) of the Constitution.[104]

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94 *Mahlangu supra* par 36.
95 *Ibid*.
96 *Mahlangu supra* par 41.
97 *Ibid*.
98 *Mahlangu supra* par 42 and 50.
99 *Ibid*.
100 *Mahlangu supra* par 50.
101 *Mahlangu supra* par 52.
102 *Mahlangu supra* par 59.
103 *Mahlangu supra* par 60.
104 *Mahlangu supra* par 66.

What is glaringly obvious about the majority's decision is that it regarded the terms "social security" and "social assistance" as being equivalent. It failed to recognise that the concept of social security is broader than the provision of social assistance. Even though the court acknowledged that international law recognises COIDA as a form of social security, no consideration was given to the concept of social security. Instead, it found it necessary to equate benefits received by dependants of a deceased employee in terms of COIDA with social grants. As both these benefits in the majority's opinion fell within the concept of social assistance, the conclusion reached was that it amounted to social security.

5 3 The minority judgment

The first minority judgment was penned by Jafta J. He found that the exclusion of domestic workers from the definition of employee in COIDA did not violate their right to access social security in terms of section 27(1)(*c*) of the Constitution.[105] The view held was that a plain reading of the section shows that a person would be entitled to social assistance if they were unable to support themselves, and that it does not require that harm must be suffered as a result of bodily injuries in the course of employment.[106] These conclusions were reached based on the majority's finding that benefits payable in terms of COIDA are similar to social grants and therefore fall within the ambit of social assistance.[107]

Notably, it was explained that the right to compensation for bodily injuries has been part of South African law for a long time, which illustrates that the right regulated by COIDA is different from the socio-economic rights regulated in section 27(1)(*c*) of the Constitution.[108] Further evidence that section 27(1)(*c*) does not envisage compensation in terms of COIDA is the fact that the latter is payable on demand, whereas social assistance under section 27 is not.[109] The view of Jafta J was that if an employee sustains an injury in the course of employment, the only constitutional right that comes into play is the right to security of the person and freedom from violence, which is enshrined in section 12(1)(*c*) of the Constitution.[110] A section 12 right is the right of the employee, not of the employee's dependants. Therefore, the claim that Ms Mahlangu's daughter had was a common-law claim for loss of support.[111]

The second minority judgment penned by Mhlantla J supported Jafta J on the issue of social security. She stated:

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105 *Mahlangu supra* par 135 and 171.
106 *Mahlangu supra* par 171.
107 *Mahlangu supra* par 170.
108 *Mahlangu supra* par 179.
109 *Mahlangu supra* par 180.
110 *Mahlangu supra* par 176 and 179.
111 *Mahlangu supra* par 176.

> "I agree that, based on the plain reading of the section coupled with other key differences between the statutory right juxtaposed against the constitutional right, one cannot merely incorporate COIDA into section 27(1)(c)".[112]

The minority judgments failed to give any consideration to international law and other domestic instruments in reaching the conclusion that compensation payable in terms of COIDA does not form part of the constitutional right to access social security. A proper assessment of the law on social security should have led to a discussion about the broad ambit of the concept of social security and the fact that it rests on two legs. Having found that compensation received in terms of COIDA does not constitute social assistance, a proper evaluation would have revealed that it does constitute a form of social insurance, which falls squarely within the constitutional right to access social security.

5 4 Analysis of the judgment

The majority judgment correctly found that COIDA provisions concern the constitutional right to access social security. The court is further convincing in saying that the extension of COIDA benefits to categories excluded, in this instance domestic workers, amounts to the progressive realisation of the right to access social security, as envisaged in section 27(2). However, where the court went wrong was its attempt to classify benefits received for occupational injuries as a form of social assistance. The court's reasons for concentrating on the part of the definition that deals with social assistance is puzzling to say the least. It is difficult to understand why the court did not focus its attention on the concept of social security referred to in the constitutional definition. There is certainly sufficient material to illustrate that the South African system of social security rests on two pillars, namely social insurance and social assistance. Compensation received in terms of COIDA, whether by an employee who sustains an occupational injury or disease, or the employee's dependants in the case of death arising from the occupational injury or disease, is undoubtedly a form of social insurance. The term "social assistance" is very specific to the provision of social grants, which are provided for in the SAA. The court's likening of the benefits received by a dependant in terms of COIDA to the social grants provided in terms of the SAA was misplaced.

Jafta's interpretation of the circumstances under which an individual qualifies for social assistance was correct. It does not include instances where injuries are sustained during the course of employment. Having rejected the majority's assertions that compensation in terms of COIDA constitutes a form of social assistance, he should have interrogated the definition of social security; relying on aspects such as international law, he should then have reached the conclusion that although COIDA benefits are not a form of social assistance, they fall within the broader concept of social security. Instead, he found that, where an employee sustains occupational injuries, the constitutional right to access social security is not implicated, but that section 12(1)(*c*) of the Constitution is. The case law referred to by

[112] *Mahlangu supra* par 183.

Jafta J in coming to this conclusion has been considered.[113] However, neither *Mankayi v Anglogold Ashanti* nor *Law Society of South Africa v Minister of Transport* dealt with the question of whether benefits provided in terms of COIDA fell within the ambit of the constitutional right to access social security.

In *Mankayi*, the employee (after receiving compensation in terms of the Occupational Diseases in Mines and Works Act (ODIMWA)) instituted a delictual claim against the employer for failing to provide a safe and healthy working environment, and which led to the employee's contraction of tuberculosis.[114] The employer argued that the employee was precluded from instituting such a claim by virtue of section 35(1) of COIDA.[115] The court found that COIDA did not apply to Mankayi as he was required to institute his claim in terms of ODIMWA. Therefore, he was not barred from instituting a common-law claim for damages.[116]

In *Law Society of South v Minister of Transport*, there was a constitutional challenge to provisions in the Road Accident Fund Act.[117] The provisions were challenged on the basis that they limited the right to security of the person, which is enshrined in section 12(1) of the Constitution.[118] The court found that this right applies to victims of motor vehicle accidents.[119]

Neither of these cases serves as authority for the proposition that section 12(1)(*c*) is implicated in instances where an occupational injury or disease is sustained. Furthermore, neither of these cases dealt with the primary issue at play in *Mahlangu*. Therefore, Jafta's reliance on these cases was ill conceived.

Mhlantla J merely deferred to Jafta J's reasons for concluding that COIDA does not fall within the ambit of section 27(1)(*c*). The decision reached by her is thus incorrect for the same reasons expressed in respect of Jafta J's decision.

6 CONCLUSION

This article has demonstrated that the aim of the constitutional right to access social security has always been to provide for a broad array of social security measures. While the right specifically refers to social assistance, the concept of social security contained in section 27(1)(*c*) of the Constitution encompasses elements of social insurance as well. This includes funds to which employees and/or employers contribute to cater for risks such as employment injuries and unemployment. Social insurance is a form of social

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113 In *Mahlangu supra* par 176–178, Jafta J referred to the cases of *Mankayi v Anglogold Ashanti Ltd* (2011) (3) SA 237 (CC) and *Law Society of South v Minister of Transport* [2010] ZACC 25.

114 *Mankayi v Anglogold Ashanti supra* par 2 and 3.

115 *Mankayi v Anglogold Ashanti supra* par 5.

116 *Mankayi v Anglogold Ashanti supra* par 113.

117 *Law Society v Minister of Transport supra* par 1–2.

118 *Law Society v Minister of Transport supra* par 4.

119 *Law Society v Minister of Transport supra* par 63.

security that is separate from social assistance. Social assistance is regulated in the SAA and relates specifically to state-funded social grants.

COIDA's provision for compensation to an employee, which is inclusive of both the person employed and that person's dependants, is a form of social security encompassed within the section 27(1)(*c*) constitutional right. The majority in *Mahlangu* was correct in finding that the challenge launched into the constitutionality of COIDA implicated the constitutional right to access social security. However, it erred in failing to recognise that social security comprises more than just social assistance. Because of the shortcomings in this regard, the majority conflated the concept of social assistance with that of social security. In other words, the majority saw social security and social assistance as synonymous concepts, when they are not. While social assistance is one form of social security, social security is much broader than social assistance. On the other hand, the conclusions reached by the minority were completely out of step with the objectives of the constitutional right to access social security, as well as with international standards.

There is sufficient support for the fact that benefits provided for in terms of COIDA form part of the constitutional right to access social security. It is specifically a form of social insurance. Therefore, it is possible for future disputes relating to the constitutionality of COIDA to be challenged as a violation of the right to access social security provided for in section 27(1)(*c*) of the Constitution.

MANDATORY COVID-19 VACCINATIONS AT UNIVERSITIES IN SOUTH AFRICA: GUIDANCE FROM THE UNITED STATES AND THE EUROPEAN UNION

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SUMMARY

During the past two decades, immunisation has saved millions of lives and prevented countless illnesses and disabilities in South Africa. Vaccination is the most important thing we can do to protect ourselves and our children against ill health. Vaccinations prevent up to three million deaths worldwide every year. However, the World Health Organization (WHO) has listed vaccine hesitancy as one of the biggest threats to global health. Vaccine hesitancy entails people with access to vaccines delaying or refusing vaccination. In addition to vaccine hesitancy, many people are of the view that it infringes on their fundamental human right to bodily integrity. However, this article presents findings that suggest that this right can be limited because everyone has a fundamental right to be protected from the spread of the disease. Tensions have increased as more vaccine mandates are implemented. Businesses continue to review and revise their Covid-19 vaccination policies as new mutations emerge and employers may be asking what they can do if workers refuse to get the jab. Some employers have dismissed employees or put them on unpaid leave. Others have required unvaccinated employees to submit to weekly testing and take other safety precautions. In terms of the Code of Practice: Managing Exposure to SARS-COV-2 in the Workplace, 2022, the identifiable hazard relating to Covid-19 that workers face is the transmission of virus by an infectious person to others in the workplace. The Regulations for Hazardous Biological Agents, 2022 lists SARS-COV-2 as a hazardous biological agent that places legal responsibilities on employers to mitigate the associated risks. Each situation requires special measures to be implemented by employers in order to prevent the transmission of the virus. Universities in South Africa are also faced with this conundrum regarding the mandating of vaccines. This article examines and discusses mandating vaccines in South Africa, especially at universities, with guidance received from international instruments such as the European Union and countries such as United States. Various legislative and policy frameworks are also analysed.

1 INTRODUCTION

It has been argued that "the elimination of communicable diseases through vaccination [is] one of the greatest achievements of public health in the 20th century".[1] Consequently, the Centers for Disease Control and Prevention (CDC), in its guidance for institutions of higher education, stated:

> "Vaccination is the leading prevention strategy to protect individuals from SARS-CoV2[2] (covid-19) disease and end the covid-19 pandemic".[3]

Universities are unique places with a large number of people gathered and living together in close quarters for months at a time.[4] As such, there exists a high risk of Covid-19 infection spread and outbreak on university campuses. Subsequently, in line with current legislative and policy frameworks, including the obligations contained in the Occupational Health and Safety Act (OHS Act),[5] a number of universities in South Africa have made Covid-19 vaccinations mandatory in order to protect the health and safety of employees, students and, by implication, members of the public who come into contact with employees and students.[6] However, whether mandating Covid-19 vaccinations at universities will pass constitutional muster given the competing interests at play is a noteworthy discussion that one must have. In seeking an answer, this article consults not only South African law but also that of the United States and the European Union. The history of pandemics and vaccine hesitancy in Africa is discussed first. The article further discusses and examines the current South African legislative and policy frameworks in respect of vaccinations. Thereafter, an analysis of the United States and the European Union is conducted in respect of their position on mandatory vaccinations. The article concludes by supporting the mandating of Covid-19 vaccinations in South Africa.

2 HISTORY OF PANDEMICS AND VACCINE HESITANCY IN AFRICA

While some of the earliest pandemics faded by wiping out parts of the population, medical and health initiatives were able to halt the spread of other diseases.[7] However, as human civilisations flourished so did infectious

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1 *Bruesewitz v Wyeth LLC* 562 US 223 226 (2011).

2 SARS-CoV-2 means severe acute respiratory syndrome coronavirus 2, the virus responsible for causing the coronavirus disease 2019 (COVID-19).

3 See for e.g., Centers for Disease Control and Prevention "Guidance to Educational Institutions" (2019) https://www.cdc.gov/coronavirus/2019-ncov/community/colleges-universities/considerations.html (accessed 2021-12-18).

4 *Klaassen et al v The Trustees of Indiana University* (2021) (USDC IN/ND case 1:21-cv-00238-DRL-SLC document 34 filed 07/18/21 page 81 of 101).

5 85 of 1993, as amended.

6 These include the University of Johannesburg, University of the Free State, Rhodes University, University of the Western Cape and University of the Witwatersrand.

7 See for e.g., Roos "How 5 of History's Worst Pandemics Finally Ended" (March 2020) https://www.history.com/news/pandemics-end-plague-cholera-black-death-smallpox (accessed 2022-01-20) 1.

disease. Large numbers of people living in close proximity to each other and to animals, often with poor sanitation and nutrition, provided fertile breeding grounds for disease. New overseas trading routes spread novel infections far and wide, creating global pandemics. The five worst pandemics affecting human civilisation are described below.[8]

2 1 Plague of Justinian

The Plague of Justinian arrived in Constantinople, capital of the Byzantine Empire, in 541CE. It was carried over the Mediterranean Sea from Egypt.[9] Plague-ridden fleas hitched a ride on the black rats that snacked on the grain. The plague decimated Constantinople and spread like wildfire across Europe, Asia, North Africa and Arabia killing an estimated 30 to 50 million people, perhaps half of the world's population. People had no real understanding of how to fight it, other than trying to avoid sick people. As to how the plague ended, the best guess is that the majority of people in a pandemic somehow survive and those who survive have immunity.[10]

2 2 Black Death and the invention of quarantine

The plague never really went away and when it returned 800 years later, it killed with reckless abandon. The Black Death, which hit Europe in 1347, claimed an astonishing 20 million lives in just four years.[11] As to how to stop the disease, people still had no scientific understanding of contagion, but they knew that it had something to do with proximity. Forward-thinking officials in the Venetian-controlled port city of Ragisa decided to keep newly arrived sailors in isolation until they could prove they were not sick. At first, sailors were held on their ship for 30 days, which became known as *trentino* in Venetian law. As time went on the Venetians increased the forced isolation to 40 days or a quarantine, the origin of the word quarantine and the start of its practice in the Western world.[12]

2 3 The Great Plague of London: Sealing up the sick

London never really caught a break after the Black Death. The plague resurfaced roughly every 10 years from 1348 to 1665, amounting to 40 outbreaks in just over 300 years.[13] With each new plague epidemic, 20 per cent of the men, women and children living in the British capital died. By the early 1500s, England imposed the first laws to separate and isolate the sick.[14] Homes stricken by the plague were marked with a bale of hay strung

8 *Ibid*.
9 *Ibid*.
10 *Ibid*.
11 *Ibid*.
12 *Ibid*.
13 *Ibid*.
14 *Ibid*.

to a pole outside. If you had infected family members, you had to carry a white pole when you went out in public. The Great Plague of 1665 was the last, and one of the worst, of the centuries-long outbreaks, killing 100 000 Londoners in just seven months.[15]

2 4 Smallpox: A European disease ravages the new world

Smallpox was endemic to Europe, Asia and Arabia for centuries – a persistent menace that killed three out of ten people it infected and left the rest with pockmarked scars. The death rate in the Old World paled in comparison to the devastation wrought on the population in the New World when the smallpox virus arrived in the fifteenth century with the first European explorers.[16] The indigenous people of modern-day Mexico and the United States had no natural immunity to smallpox and the virus cut them down by the millions. Centuries later, smallpox became the first virus epidemic to be ended by a vaccine. It took nearly two more centuries, but in the 1980s the World Health Organization (WHO) announced that smallpox had been completely eradicated from the face of the earth.[17]

2 5 Cholera: A victory for public health research

In the early nineteenth century, cholera tore through England, killing thousands. The prevailing scientific theory was that the disease was spread by foul air known as "miasma". While cholera has largely been eradicated in developed countries, it remains a persistent killer in third-world countries that lack adequate sewerage treatment and access to clean drinking water.[18]

2 6 Mass vaccinations

In the nineteenth century, the first vaccination drives against smallpox took place, especially in the Cape, but these were not extreme projects and ultimately not very successful at eradicating the disease.[19] Vaccination by injection was devised only at the very end of the eighteenth century, which meant that for many decades it was quite novel and open to popular doubt. From the start of vaccinations in South Africa, Muslims avoided it on both political and religious grounds, while many Africans saw it as part of a government plan to kill them.[20] It was only in the twentieth century that it gained wider acceptance. For South Africa's veteran Aids activists, the current Covid-19 vaccination drive evokes memories of the first roll-out of

15 *Ibid*.

16 *Ibid*.

17 *Ibid*.

18 *Ibid*.

19 See for e.g., Davis "Epidemics in South Africa: Key Lessons on Mass Vaccination Drives Learnt From History" (July 2021) https://www.dailymaverick.co.za/article/2021-07-04-epidemics-in-south-africa-key-lessons-on-mass-vaccination-drives-learnt-from-history/ (accessed 2022-01-11) 3.

20 *Ibid*.

antiretroviral treatment (ART) in the mid-2000s. ART came with many challenges as people were confused about its safety. However, the South African HIV programme had many lessons for Covid-19 vaccination drives.[21] It taught South Africans to be innovative and take the vaccines to people and not rely on centralised sites.

2 7 Vaccine hesitancy in Africa

Vaccine hesitancy in Africa is often rooted in distrust, shaped by a long history of inequality. An effective pandemic response includes addressing those doubts.[22] Some fears are rooted in colonialism, oppression and exploitation, which can easily be stirred up in situations like a mandatory vaccination drive, especially in light of the world's vaccine inequity, where some countries have been able to buy up a disproportionate number of vaccines. Hesitancy could mean a longer road to herd immunity and slower economic recovery through a second and third wave.[23] For months, many African governments have struggled to secure vaccines in a system where wealthy countries take the lion's share, which has shone a spotlight on global inequalities. For most of the region, the challenge continues. However, as campaigns have rolled out across the continent, the lingering issue of distrust is coming into sharp focus. The reasons vary. In South Africa, distrust of the weakening, overburdened public health systems, and the government that manages it, runs deep. So does scepticism that people's lives here really matter to the foreign companies and countries behind most Covid-19 research. These are concerns rooted in a long history of inequality.[24]

The continent's lower number of deaths, compared with many other regions, has given many Africans a false sense of immunity. As recently as December 2021, around a quarter of Africans surveyed felt vaccines will not be safe, according to the Africa Centers for Disease Control and Prevention. A recent survey found that only 61 per cent of South Africans would get a vaccine, lower than any of the other 14 countries surveyed.[25] Some concerns about the vaccine safety stem from its quick development, spooked by unverified claims of death following immunisation in Europe. These worries can be countered with accurate targeted information.[26] For decades, groups like Rotary International worked to overcome polio vaccine rejection in Nigeria by working with local health workers and volunteers who were known and trusted by their communities and who helped carry out the

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21 *Ibid*.

22 See for e.g., Lawal "Behind Vaccine Doubts in Africa, A Deeper Legacy of Distrust" (March 2021) https://www.csmonitor.com/World/Africa/2021/0304/Behind-vaccine-doubts-in-Africa-a-deeper-legacy-of-distrust (accessed 2022-01-11) 2; Cooper, Van Rooyen and Wiysonge "COVID-19 Vaccine Hesitancy in South Africa: How Can We Maximize Uptake of COVID-19 Vaccines?" 2021 20(8) *Expert Review of Vaccines* 921.

23 See for e.g., Lawal https://www.csmonitor.com/World/Africa/2021/0304/Behind-vaccine-doubts-in-Africa-a-deeper-legacy-of-distrust 2.

24 *Ibid*.

25 *Ibid.*

26 *Ibid*.

door-to-door immunisation push across the country. The country is now declared polio- free. In South Africa, people are afraid because they need information.[27] They need help to understand the science, how vaccines work, and how they are tested. An earlier study on South Africans' vaccine confidence found that the most common reasons for doubts were fear of side effects and concerns about effectiveness. Targeting people with accurate information is now especially important. Activists argue that vaccine scepticism will decline as more Africans are vaccinated, seeing for themselves how a safe and effective procedure (when more broadly offered) could ease restrictions on movement and help reopen economies.[28] Nonetheless vaccinations remain one of the most successful, cost-effective public health interventions.

3 CURRENT LEGISLATIVE AND POLICY FRAMEWORK

3 1 Legislation

3 1 1 The Constitution of the Republic of South Africa[29]

(i) Section 12: Right to bodily integrity

Section 12 of the Constitution deals with the right to freedom and security of persons. This right includes the right not to be deprived of freedom without reason and not to be ill-treated by any persons, as well as the right to protection from violence against one's bodily integrity. Section 12(2)(*a*) deals with the right to make decisions concerning reproduction while section 12(2)(*b*) deals with security and control over the body.[30] The court in *National Coalition for Gay and Lesbian Equality v Minister of Justice*[31] noted that section 12(2)(*b*) tests the ability to give a distinct meaning to "bodily and psychological integrity".[32] Section 12(2)(*b*) creates a sphere of individual inviolability with two components, of which "security in" and "control over" one's body are not synonymous.[33] The former denotes the protection of bodily integrity against physical invasions by the State and others, while the latter guarantees the freedom to exercise autonomy or the right to self-

[27] See for e.g., NDoH "Strategies to Address COVID-19 Vaccine Hesitancy and Promote Acceptance in South Africa" (2021) https://sacoronavirus.co.za/2021/04/12/strategies-to-address-covid-19-vaccine-hesitancy-and-promote-acceptance-in-south-africa/ (accessed 2022-01-13) 2.

[28] *Ibid*.

[29] Constitution of the Republic of South Africa, 1996.

[30] Govindjee and Vrancken *Introduction to Human Rights Law* (2016) 99.

[31] [1998] ZACC 15; 1999 (1) SA 6; 1998 (12) BCLR 1517 par 22.

[32] The issue was whether a law criminalising sodomy unfairly discriminated against homosexuals. The Constitutional Court stated that all of its efforts to interpret our basic law are informed by the recognition that to understand "the other" one must try, as far as is humanly possible, to place oneself in the position of the "other".

[33] Woolman and Bishop "Freedom and Security of the Person" in Woolman and Bishop (eds) *Constitutional Law of South Africa* (2014) ch 40.

determination with respect to the use of one's body.[34] This section assumes that individuals are capable of taking decisions that are in their own interests and of acting as responsible moral agents.[35] The decision in the Constitutional Court in *S v Jordan (Sex Workers Education and Advocacy Task Force as Amicae Curae)*[36] suggests that the court may not be especially sympathetic to uses of body that the majority of South Africans find morally repugnant. *S v Jordan*, when viewed through the lens of section 12(2)(*b*), supports the right to bodily autonomy and is concerned, not with the welfare of the individual, but with the preservation of an individual's integrity.[37]

(ii) Section 36: limitation clause

Rights contained in the Bill of Rights are not absolute and may be limited by specific limitation clauses whereby individual rights are subject to limitations set out in individual sections – for example, the provisions of section 9 on equality.[38] In addition, the Constitution provides a general limitation clause in section 36, which provides that all rights in the Bill of Rights may be limited in terms of a law of general application and that "limitations must be reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom".[39] Any limitation must therefore be reasonable and may only be made with good cause. Limits should also restrict rights as little as possible.[40] The courts are empowered to test the validity of a limitation in terms of section 36.[41] Section 36 provides for certain factors that must be considered by the courts when determining whether a limitation is reasonable and justifiable:

a) the nature of the right;
b) the importance of the limitation;
c) the nature and extent of the limitation;
d) the relation between the limitation and its purpose; and
e) less restrictive means to achieve the purpose.[42]

These factors are not limited and other factors that the court may deem necessary may also be taken into account. When the nature of the right is considered, the courts will have to consider the content of the right, the importance of the right and the interest that is protected.[43] The Constitution

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34 Woolman and Bishop in Woolman and Bishop (eds) *Constitutional Law of South Africa* 40–85.
35 *Ibid*.
36 *S v Jordan (Sex Workers Education and Advocacy Task Force as Amici Curiae* [2002] ZACC 22; 2002 (6) SA 642; 2002 (11) BCLR 1117.
37 *S v Jordan (Sex Workers Education and Advocacy Task Force as Amici Curiae supra* par 80–81.
38 Rautenbach and Malherbe *Constitutional Law* (2018) 323.
39 *Ibid*.
40 Rautenbach and Malherbe *Constitutional Law* 324.
41 Rautenbach and Malherbe *Constitutional Law* 325.
42 Rautenbach and Malherbe *Constitutional Law* 324.
43 Rautenbach and Malherbe *Constitutional Law* 326.

also requires that, rather than limiting the rights of an individual, less restrictive means be considered to achieve the purpose of the limitation.[44]

(iii) What do these sections of the Constitution mean for mandating vaccines?

A plain reading of section 12(2) makes it evident that every person has the important right to make decisions on health and medical interventions and treatments, which undoubtedly include acceptance or rejection of vaccines.[45] However, constitutional rights are never one-dimensional and rights may be limited when there are justifiable grounds for doing so.[46] As discussed above, section 36 of the Constitution provides for the limitation of constitutional rights insofar as it is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom, and having regard to the five factors listed in the limitation clause.[47] *In S v Manamela (Director-General of Justice Intervening)*,[48] it was held that the five factors do not form an exhaustive list or automatic checklist. The courts are encouraged to conduct an overall assessment in order to arrive at a judgment based on proportionality.[49] According to the Lex-Atlas: Covid-19 (LAC19) project,[50] a scholarly report and analysis of national legal responses to Covid-19 around the world, proportionality requires that a measure infringing protected rights by a non-state actor must:

a) be prescribed by law;
b) pursue a legitimate aim (that is, a "compelling state interest" or a suitable aim);
c) be necessary in a democratic society (that is, that there be a "pressing social need"; that the measures be rationally connected to that aim; and that they be the least restrictive alternative for achieving the policy); and
d) be proportionate in the narrow sense that it strikes a fair balance between the importance of the goal and the burden it places on the individual.

The right to bodily integrity can thus be limited by legislation that passes the stringent test of being both "reasonable" and "justifiable".[51] The two-stage

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44 *Ibid*.

45 See for e.g., Calitz "Constitutional Rights in South Africa Protect Against Mandatory COVID-19 Vaccination" (April 2021) https://www.hhrjournal.org/2021/04/constitutional-rights-in-south-africa-protect-against-mandatory-covid-19-vaccination/ (accessed 2022-01-15) 4.

46 *Ibid*.

47 *Ibid*.

48 (2000) ZACC 15.

49 See for e.g., Calitz https://www.hhrjournal.org/2021/04/constitutional-rights-in-south-africa-protect-against-mandatory-covid-19-vaccination/ 1.

50 King and Ferraz "Legal, Constitutional and Ethical Principles for Mandatory Vaccination Requirements for Covid-19" (1 November 2021) https://lexatlas-c19.org/vaccination-principles/#b-proportionality (accessed 30-03-2023) par 32.

51 See for e.g., Calitz https://www.hhrjournal.org/2021/04/constitutional-rights-in-south-africa-protect-against-mandatory-covid-19-vaccination/ 1.

approach is set out in the case of *S v Zuma*.[52] First, it needs to be determined whether there has been a contravention of a guaranteed right in the Constitution, and secondly whether the contravention is justified under section 36. The test of reasonableness involves the weighing up of competing rights and values based on proportionality.[53] In *S v Makwanyane*,[54] it was further held that a right should not be taken away altogether under the guise of limitations and should be limited as little as possible. From the above it is evident that there is no absolute limitation of the right envisaged in section 12 and that the courts ought to consider broader societal and governmental interests when balancing competing rights.[55] There have been judicial pronouncements on section 12. In *Minister of Safety and Security v Gagra,*[56] the court relied on the public interest; it conducted a balancing act of rights to conclude that the respondent was forced to undergo surgery, despite the fact that he had never consented to surgery. Similarly in the case of *Minister of Health of the Province of the Western Cape v Goliath,*[57] the court compelled the surviving respondents to receive treatment for tuberculosis against their will.

These decisions show that in some instances the public interest outweighs individuals' right to bodily and psychological integrity.[58]

3 1 2 Occupational Health and Safety Act

In terms of section 8(1) of the Occupational Health and Safety Act (OHS Act),[59] every employer shall provide and maintain, as far as is reasonably practicable, a working environment that is safe and without risk to the health and safety of its employees. This obligation applies not only in respect of employees but extends to the general public in terms of section 9 of the OHS Act, which states that every employer shall conduct its undertaking in such a manner as to ensure, as far as reasonably practicable, that persons other than those in its employment who may be directly affected by its activities are not thereby exposed to hazards to their health or safety. The terms "hazard" and "risk" are often used interchangeably and are confused. However, in occupational-health-and-safety terms, they refer to two completely different concepts. In terms of section 1 of the OHS Act, a "hazard" means a source of (or exposure to) danger, whereas in terms of the Occupational Health and Safety Amendment Bill of 2020, a "risk" means the probability that personal injury, illness or the death of the employee or any other person or damage to property will occur. Therefore, although Covid-19

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52 (1995) ZACC 1.

53 See for e.g., Calitz https://www.hhrjournal.org/2021/04/constitutional-rights-in-south-africa-protect-against-mandatory-covid-19-vaccination/ 1.

54 (1995) ZACC 13.

55 See for e.g., Calitz https://www.hhrjournal.org/2021/04/constitutional-rights-in-south-africa-protect-against-mandatory-covid-19-vaccination/ 1.

56 (2002) ZAWCHC 9.

57 (2009) (2) SA 248 (C).

58 See for e.g., Calitz https://www.hhrjournal.org/2021/04/constitutional-rights-in-south-africa-protect-against-mandatory-covid-19-vaccination/ 1.

59 85 of 1993, as amended.

can be classified as a hazard (in that it presents a source with a potential for harm in terms of human ill-health in that it spreads through contact and airborne transmission), the level of risk associated with Covid-19 will vary according to the circumstances. In terms of the Code of Practice: Managing Exposure to SARS-COV-2 in the Workplace, 2022 (Code of Practice) issued in terms of section 203(2A) of the Labour Relations Act (LRA)[60], the identifiable hazard relating to Covid-19 faced by workers,[61] is the virus infecting a worker, the virus transmission by an infected person to other workers in the workplace, and the risk of serious illness or death if infected. Furthermore, in workplaces to which the public has access, the hazard includes transmission of the virus by members of the public. The Regulations for Hazardous Biological Agents, 2022[62] list Covid-19 as a listed hazardous biological agent, classed as Group 3, which places legal responsibilities on employers to mitigate the risks associated with Covid-19.

In terms of the Code of Practice, employers will have to conduct a risk assessment in line with their obligations under the OHS Act to determine whether mandatory vaccinations should be implemented for all or some employees. This decision must be based on the operational requirements of the organisation in question. In terms of section 213 of the LRA, "operational requirements" is defined as requirements based on the economic, technological, structural, or similar needs of an employer. The term "and similar needs" is used to refer to situations where workplace functionality and safety or commercial relationships are at risk.[63] Covid-19 is said to have a negative impact on the functionality and safety of organisations, given its classification as a workplace hazard and the above-mentioned associated risks. If an employer makes vaccination mandatory, a premium is placed on public health imperatives and the efficient operation of the employer's business. Therefore, in the interests of broader society for the common good and in alignment with the requirements and duties of the OHS Act, tertiary institutions are required to remove and mitigate against any harm to its employees, service providers, contractors, overseas visitors and students.

In terms of section 1 of the OHS Act, when an employer is looking at "reasonably practicable" measures, the following factors need to be considered:

a) the severity and scope of the hazard or risk concerned;
b) the state of knowledge reasonably available concerning that hazard or risk and of any means of removing or mitigating that hazard or risk;
c) the availability and suitability of means to remove or mitigate that hazard or risk; and
d) the cost of removing or mitigating that hazard or risk in relation to the benefits deriving therefrom.

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60 66 of 1995.[Government Notice R1887 of 2022].

61 In terms of the Code of Practice, "worker" means any person who works in an employer's workplace, including an employee of the employer or contractor, a self-employed person or volunteer.

62 GN R1887 in *GG* 1887 of 2022-03-16.

63 Cohen, Plessis, Godfrey, Roux, and Singlee *Labour Law in South Africa: Context and Principles* (2020) 248.

When looking at the state of knowledge available concerning the mitigation and removal of Covid-19 from workplaces, current scientific evidence shows that Covid-19 vaccination not only protects against severe symptoms of the disease as well as death, but it is a vital means to minimise the spread of the virus and the rate of infection.[64] In fact, vaccination remains the single strongest protection against Covid-19. Professor Linda-Gail Bekker, Deputy Director of the University of Cape Town's Desmond Tutu HIV Centre, an infectious diseases specialist and vaccine scientist, stated, in relation to Covid-19 vaccinations mitigating the risk of Covid-19:[65]

> "We can control the epidemic, fewer people will get infected, fewer people will get severe illness and in the long run we will save lives. Vaccines save lives. The disease is our enemy … the intervention is our friend. The vaccine is yet another important tool in the fight against the pathogen."

Covid-19 vaccines are readily available and easily accessible in South Africa. Therefore, it can be argued that the vaccines constitute the most suitable means to mitigate and remove Covid-19 from the workplace. Protective personal equipment, such as masks, are to be used as a last resort and, before these measures are issued, the employer is first under a duty to remove or reduce any danger to the health and safety of its workers. Only when this is not practicable should protective personal equipment be used. The vaccines are currently free of charge and, accordingly there exists no cost to mitigating and removing the hazard of Covid-19. Furthermore, there is sufficient evidence that Covid-19 vaccines, which are an effective intervention for Covid-19 prevention, are safe and effective with adverse side effects being very rare.[66] Therefore, the benefits, which include the reduction of the risk of being infected, the limitation of the spread of the virus, and the prevention of hospitalisation and death from Covid-19, outweigh the associated costs.

Furthermore, in terms of section 14(*a*) of the OHS Act, every employee shall at work take reasonable care for their own health and safety and that of other persons who may be affected by their acts or omissions. It is, thus, an obligation of every employee to ensure that, through their actions, they take reasonable care of the health of all persons that they come into contact with or who may be affected by their actions.

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64 Vitiello, Ferrara, Troiano and La Porta "COVID-19 Vaccines and Decreased Transmission of SARS-CoV-2" 2021 *Inflammopharmacology* 1357 1360.

65 Thom, Nortie *et al* "If We All Don't Get Vaccinated, the Alternative is Years of Covid-Induced Death and Suffering" (January 2021) https://www.dailymaverick.co.za/article/2021-01-23-if-we-all-dont-get-vaccinated-the-alternative-is-years-of-covid-induced-death-and-suffering/ (accessed 2022-02-10) 2.

66 Maragakis and Kelen "Is the COVID-19 Vaccine Safe?" (January 2022) https://www.hopkinsmedicine.org/health/conditions-and-diseases/coronavirus/is-the-covid19-vaccine-safe (accessed 2022-02-23) 1.

3 1 3 The Code of Practice: Managing Exposure to SARS-COV-2 in the Workplace, 2022

The Code of Practice allows for an employer to make vaccinations mandatory in certain instances as well as to require its employees to disclose their vaccination status and to produce a vaccination certificate. Although the Code of Practice does not definitively answer the question of whether employees can be dismissed if they refuse to take the vaccine even when the employer has adopted a mandatory vaccination policy, it does give some guidance on how to deal with an employee in these instances. If an employee refuses to take the vaccine, the employer must counsel the employee and, if requested, allow the employee to seek guidance from a health and safety representative, worker representative or trade union official, as well as take reasonable steps to accommodate the employee in a position that does not require the employee to be vaccinated. If an employee produces a medical certificate attesting to the fact that they have contra-indications for vaccination, the employer may refer the employee for a medical evaluation for confirmation at the employer's expense. If the employer accepts the medical certificate, or the employee is referred for medical evaluation and that evaluation confirms that the employee has contra-indications for vaccination, it *must* accommodate the employee in a position that does not require the employee to be vaccinated. The Code of Practice, therefore, provides that the employer must reasonably accommodate the employee in accordance with the Code of Good Practice: Employment of People with Disabilities, as published in terms of the Employment Equity Act.[67] This can include adjustments to the job or working environment in order to allow the employee who refuses to be vaccinated to remain in employment by considering the following:

a) the possibility of remote working or of working in isolation at the workplace;
b) adjustment of an employee's duties; and
c) adjustment of an employee's working hours or locations or making other arrangements to ensure the health and safety of the employee.

Where an employer does implement a mandatory vaccination policy and an employee refuses to be vaccinated, employers must follow the correct procedures to ensure fairness when dealing with such employees. This means that the grounds for refusal be considered fully, and that the employee be consulted. However, where the employer is unable to "reasonably accommodate" the employee and the employee continues in their refusal, an employee can be dismissed for incapacity. This is in line with operational incapacity in terms of which the incapacity arises from circumstances other than poor work performance, ill health or injury and which renders the employee incapable of performing their work.[68] This was confirmed by the Supreme Court of Appeal in *NUM v Samancor Ltd (Tubatse Ferrochrome)* where the court acknowledged that incapacity

[67] 55 of 1998.
[68] Cohen *et al Labour Law in South Africa* 240.

should not be confined to incapacity arising from ill health, injury or poor work performance.[69]

In light of the above, it can be argued that the right to bodily integrity may be limited in certain instances if it is reasonable, proportionate, and justifiable – for example, if it is found that certain employees must be vaccinated to protect the health and safety of themselves and those around them.

In *Mulderij v Goldrush Group*,[70] the Commission for Conciliation, Mediation and Arbitration (CCMA) was faced with deciding on the substantive fairness of the applicant's incapacity dismissal for refusing to be vaccinated despite a mandatory workplace vaccination policy. She was identified as a high-risk individual who interacted with fellow employees daily while on duty in confined, uncontrollable spaces. This was found to put the applicant at risk and exposed others to the risk of possible infection. The applicant, however, emphasised her constitutional right to bodily integrity in her refusal to be vaccinated. Commissioner Lungile Matshaka stated:

> "[i]n my own sense of fairness, I can only conclude that the Applicant is permanently incapacitated on the basis of her decision to not getting vaccinated and implication refusing to participate in the creation of a safe working environment."[71]

In *Kok v Ndaka Security and Services*,[72] the CCMA was called to determine whether the suspension of an employee who refused to be vaccinated against Covid-19 constituted an unfair labour practice in terms of section 186(2)(*b*) of the LRA. The employee contended that to compel employees to be vaccinated would be contrary to the Constitution, the National Health Act,[73] and the Consolidated Directives issued by the Minister of Employment and Labour. The applicant was identified as an employee who was required to be vaccinated in terms of the risk assessment that was conducted, in that he worked in close proximity to fellow employees, clients and the public. It was not possible to allow the applicant to work from home nor in an isolated office. The respondent suspended the applicant because he was not willing to be vaccinated and also no longer wished to present weekly negative Covid-19 results. Commissioner Petrus Michael Venter stated:

> "I have very little doubt that the requirement to vaccinate is nothing less than a reasonable practical step that every employer is required and compelled to take."[74]

Therefore, after finding that the respondent followed due procedure in terms of the Consolidated Directive 11 June 2021, the CCMA found that the

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69 [2011] 11 BLLR 1041 (SCA) par 10.

70 GAJB 24054-21.

71 *Mulderij v Goldrush Group supra* par 27.

72 FSWK2448-21.

73 61 of 2003.

74 *Kok v Ndaka Security and Services supra* par 55.

suspension of the applicant was neither unfair nor constituted an unfair labour practice.[75]

3 2 Vaccine policies adopted by universities in South Africa

3 2 1 University of Johannesburg

On 25 November 2021, the University of Johannesburg issued a mandatory vaccination policy. The objectives of mandating vaccines were clearly highlighted in the six-page policy, which acknowledged that the university has limited distance-learning offerings and is an established residential university with contact learning and research.[76] The university was of the opinion that the mandatory vaccination of staff and students would enhance safe and optimal access to its campuses and facilities, which would enable its core functions of teaching, learning, research and community engagement.[77] In terms of clause 1.5, the policy is aligned with the requirements and duties of the OHS Act and emphasises that a mandatory vaccine policy protects the health and safety of the university community and by implication, members of the public who come into contact with employees and students of the university, and or who otherwise participate in any activity on university premises. In terms of clause 3.1, the university stipulates that in order to gain access to its campuses and facilities, employees and students will be required to provide their digital vaccination cards to authorised university officials to confirm their vaccination status. The policy also made provision for employees and students to be approved for exemption from vaccinations, as well as reasonable accommodation for employees in terms of the Department of Employment and Labour directive in 2021.[78] Ultimately the university's mandate is to act in the public interest, which results in the common good for society at large. The universities aim was to mitigate any harm to its stakeholders, including employees, students and external stakeholders of the institution.[79]

3 2 2 University of the Free State

The University of the Free State also mandated vaccines; its guiding principles for implementation were also driven by the fact that the university was a close-contact working environment where instruction occurs primarily

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75 *Kok v Ndaka Security and Services supra* par 58.

76 University of Johannesburg "Mandatory Vaccination Policy" (November 2021) https://www.uj.ac.za/wp-content/uploads/2021/12/covid-19-mandatory-vaccination-policy-19-nov2021.pdf.

77 University of Johannesburg https://www.uj.ac.za/wp-content/uploads/2021/12/ covid-19-mandatory-vaccination-policy-19-nov2021.pdf clause 1.2.

78 The Directives.

79 University of Johannesburg https://www.uj.ac.za/wp-content/uploads/2021/12/ covid-19-mandatory-vaccination-policy-19-nov2021.pdf clause 36.

through face-to-face lecturing and learning.[80] The university believed that it was not economically viable or practical to maintain social distancing indefinitely.[81] As a predominantly residential university as well, the viability of consistent remote working and studying conditions was not aligned with the culture of the university. Like its counterpart, the University of Johannesburg, the University of the Free State strives to provide their employees and students with a safe environment to achieve academic outcomes. Like the University of Johannesburg, it provided for exemptions where there was a legally acceptable basis for refusing a Covid-19 vaccination, including medical objections in terms of section 27 of the Constitution.[82]

3 2 3 Rhodes University

Staff and students at Rhodes University were also required to provide proof of vaccination to access the campus in terms of its policy, which came into effect in January 2022. The university made the vaccination requirement a condition for registration for all students as well as employees.[83] The university also approved a recommendation for an exemption application process and an alternative health status process for those who cannot take the vaccine on medical or other legitimate grounds. However, these staff and students would have to provide a negative Covid-19 test weekly at the cost of the individual.[84]

3 2 4 University of the Western Cape

An interim Covid-19 policy was approved for 2022 by the Council at the University of the Western Cape. It entailed two different mandates. On the one hand, there was a mandate in terms of which all staff and students would have to be vaccinated to enter campus and attend events.[85] However, students who were not vaccinated would be allowed to register for their relevant qualifications but not be permitted to access campus or attend university events. The other mandate was for students from the Faculty of Dentistry, Nursing and Pharmacy among others. These students had to be vaccinated to register at the university.[86] Therefore the "softer" mandate

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80 University of Free State "COVID-19 Regulations and Required Vaccination Policy" (November 2021) https://www.ufs.ac.za/docs/default-source/all-documents/ufs-covid19-regulations-and-required-vaccination-policy-7-dec-2021.pdf?sfvrsn=245b7520_2 clause 5.1.

81 University of Free State https://www.ufs.ac.za/docs/default-source/all-documents/ufs-covid19-regulations-and-required-vaccination-policy-7-dec-2021.pdf?sfvrsn=245b7520_2 clause 5.

82 University of Free State https://www.ufs.ac.za/docs/default-source/all-documents/ufs-covid19-regulations-and-required-vaccination-policy-7-dec-2021.pdf?sfvrsn=245b7520_2 clause 6.8.

83 See for e.g., Career Wise "Universities in South Africa that Require Proof of Vaccination in 2022" (December 2021) https://careerwise.co.za/university-proof-of-vaccination-2022/ (accessed 2022-01-22).

84 *Ibid*.

85 *Ibid*.

86 *Ibid*.

would not apply to those students, as they were required to be vaccinated to register.

3 2 5 University of the Witwatersrand

The Council of the University of the Witwatersrand approved a vaccination policy that came into effect on 1 January 2022, to be reviewed regularly.[87] Staff and students had from 1 January to 1 March 2022 either to be vaccinated or apply for reasonable accommodation. The university could refuse access to campus to any person not vaccinated and/or who had not been reasonably accommodated.[88] Vaccinated members of the university had to provide proof of their vaccination status, which was linked to their staff or student profile to enable seamless access to university's precincts.[89]

It is clear and acknowledged that the above tertiary institutions have mandated vaccination, and have rightfully done so, taking into account the various legislative directives as discussed above. In this light, it is important to discuss and examine the different international stances taken in respect of mandatory vaccinations from our counterparts, namely the United States and the European Union.

4 GUIDANCE FROM THE UNITED STATES AND THE EUROPEAN UNION

4 1 United States

It has been stated by Edwin C Darden that "when individual rights collide with the state's authority to provide for the general welfare, the state almost always wins"[90] and, as such, from the early 1900s in America, "antivaccination lawsuits have been spectacularly unsuccessful".[91] In 1905, following the outbreak of smallpox, the United States Supreme Court made its first pronouncement on the constitutionality of mandatory vaccinations in *Jacobson v Massachusetts*,[92] in which it stated:

> "[T]he liberty secured by the Constitution of the United States to every person within its jurisdiction does not import an absolute right in each person to be, at all times and in all circumstances, wholly freed from restraint."[93]

In this regard, the Supreme Court, holding that mandatory smallpox vaccinations were constitutional to the extent that they did not "go so far

87 *Ibid*.
88 *Ibid*.
89 *Ibid*.
90 Darden "Think Vaccinations Are a Pain? Try Avoiding Them in Court" 2015 *The Phi Delta Kappan* 74–75.
91 Darden 2015 *The Phi Delta Kappan* 74.
92 197 US 11.
93 *Jacobson v Massachusetts supra* 26.

beyond what was reasonably required for the safety of the public",[94] concluded:

> "[I]n every well-ordered society charged with the duty of conserving the safety of its members the rights of the individual in respect of his liberty may at times, under the pressure of great dangers, be subjected to such restraint, to be enforced by reasonable regulations, as the safety of the general public may demand."[95]

Therefore, in terms of *Jacobson v Massachusetts,* the viability of mandatory vaccination programmes would depend on whether it would be seen by the courts as necessary, reasonable, proportional, and safe for the participants.[96]

In 1922, the Supreme Court, in *Zucht v King*,[97] was faced with a challenge to an ordinance of the City of San Antonio, Texas, which provided that no child or other person shall attend a public school or other place of education without having first presented a certificate of vaccination. However, the court held that an ordinance that excludes from public schools or other places of education children or other persons not having a vaccination certificate does not confer arbitrary power, but only "that broad discretion required for the protection of the public health".[98] Therefore, the court, again, found that the interest of protecting the public was greater than the impositions placed on individuals as contained within the ordinance.

Currently, faced with the dangers of the Covid-19, which the Director of the CDC, Dr Robert Redfield, has stated is the greatest public health crisis to have hit the nation in more than 100 years,[99] more than 500 colleges and universities in the United States have mandated Covid-19 vaccination[100] by following the guidance from the CDC as well as the American College Health Association, both of which have recommended that higher institutions require Covid-19 vaccinations for all on-campus students.[101] In July 2021, the United States District Court, Northern District of Indiana, in *Klaassen et al v Trustees of Indiana University*,[102] was faced with the question whether it

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94 *Jacobson v Massachusetts supra* 28.

95 *Jacobson v Massachusetts supra* 29.

96 Blum and Talib "Balancing Individual Rights Versus Collective Good in Public Health Enforcement" 2006 *Medicine and Law* 280.

97 260 US 174 (1922).

98 *Zucht v King supra* 177.

99 See for e.g., Mondeaux "CDC Director: COVID-19 Is Greatest Public Health Crisis in Over 100 years" (2020) https://kslnewsradio.com/1922346/cdc-director-covid-19-is-greatest-public-health-crisis-inover-100-years/ [https://perma.cc/3SBH-HZX7] (accessed 2021-12-18).

100 See for e.g., Thomason and O'Leary "Here's a List of Colleges That Require Students or Employees to Be Vaccinated Against Covid-19" (2021) https://www.chronicle.com/blogs/live-coronavirus-updates/heres-a-list-of-colleges-that-will-requirestudents-to-be-vaccinated-against-covid-19?cid2=gen_login_refresh (accessed 2021-12-18) ("The Chronicle has so far identified 583 such campuses").

101 See for e.g., "American College Health Association Recommends COVID-19 Vaccination Requirements for All On-Campus College Students in Fall 2021" (2021) https://www.acha.org/ACHA/About/ACHANews/ACHARecommendsCOVID19 VaccinationRequirementsforFall2021.aspx (accessed 2021-12-18).

102 *Klaassen et al v The Trustees of Indiana University* No 1:21-CV-238 DRL *supra*.

was constitutional for a public university to mandate that its students receive a Covid-19 vaccine. Indiana University, in its Covid-19 vaccine policy, mandated Covid-19 vaccination for all students unless a student received an exemption on medical or religious grounds. These exempt students would be subject to the conditions of wearing masks and testing for Covid-19 twice a week. Eight exempted students contended that these conditions of attendance violated the due process clause of the Constitution's Fourteenth Amendment, which forbids any state to deprive "any person of life, liberty, or property, without due process of law".[103] The students went on to assert a right to refuse the vaccine, arguing that the mandate infringed on their bodily autonomy and medical privacy.[104]

The District Court correctly posed the question: "how should the law respond to state action that infringes on the People's liberties during such times?"[105] The court went on to quote *Reno v Flores*,[106] in which it was held that the Fourteenth Amendment "forbids the government to infringe ... fundamental liberty interests at all, no matter what process is provided, unless the infringement is narrowly tailored to serve a compelling state interest". The court held that "vaccines address a collective enemy, not just an individual one"[107] and that insisting on vaccinations for its campus communities is rationally related to ensuring the public health of students, faculty and staff.[108] The court stated that the university is not forcing the students to get Covid-19 vaccines.[109] The university is, instead, presenting the students with a choice – get the vaccine or apply for an exemption or deferral, transfer to a different school, forego school for the semester or altogether – but held that this choice does not amount to coercion.[110] The court concluded that, "given over a century's worth of rulings saying there is no greater right to refuse a vaccination than what the Constitution recognizes as a significant liberty",[111] the students' application to extend substantive due process to recognise more than what already and historically exists was declined.

The decision of the District Court in *Klaassen* was taken on appeal to the United States Court of Appeals for the Seventh Circuit. The Appeals Court held:

> "[G]iven *Jacobson v Massachusetts*, 197 U.S 11 (1905), which holds that a state may require all members of the public to be vaccinated against smallpox, there can't be a constitutional problem with vaccination against SARS-COV-2."[112]

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[103] 14th Amendment to the United States Constitution § 1.
[104] *Klaassen et al v The Trustees of Indiana University supra* 48.
[105] *Klaassen et al v The Trustees of Indiana University supra* 35.
[106] 507 U.S. 292 (1993).
[107] *Reno v Flores supra* 302.
[108] *Klaassen et al v The Trustees of Indiana University supra* 57.
[109] *Klaassen et al v The Trustees of Indiana University supra* 53.
[110] *Ibid.*
[111] *Klaassen et al v The Trustees of Indiana University supra* 52.
[112] *Klaassen et al v The Trustees of Indiana University* No 21-2326 (7th Cir 2021) 2.

The court went on to state that "vaccination protects not only the vaccinated persons but also those who come into contact with them, and at a university close contact is inevitable".[113] Therefore, the Appeals Court denied the motion for an injunction pending appeal by holding:

> "If conditions of higher education may include surrendering property and following instructions about what to read and write, it is hard to see a greater problem with medical conditions that help all students remain safe when learning. A university will have trouble operating when each student fears that everyone else may be spreading disease. Few people want to return to remote education – and we do not think that the Constitution forces the distance learning approach on a university that believes vaccination (or masks and frequent testing of the unvaccinated) will make in-person operations safe enough."[114]

Therefore, Blum and Talib have stated:

> "[C]onflict between public and individual interests in public health is shaped by the nature of the threat, or the disease in question. Where the threats to a population are most serious, individual rights must be subordinate to the common good."[115]

4 2 European Union

On 7 December 2018, the Council of the European Union recognised that vaccination is one of the most powerful and cost-effective public health measures developed in the twentieth century and remains the main tool for primary prevention of communicable diseases.[116] In terms of article 12(2)(c) of the International Covenant on Economic, Social and Cultural Rights, "the prevention, treatment and control of epidemic … diseases" is among the obligations contained within the right to health. As such, the European Convention on Human Rights states that the right to physical integrity under article 8 is a qualified right that can be limited "for the protection of health".[117] Many universities across Europe, particularly in Austria, Hungary, and Italy, require their students to present proof of vaccination against Covid-19 to attend in-person activities. However, mandatory vaccination policies have continually been challenged in terms of their alleged violation of the European Convention on Human Rights (the Convention).[118]

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113 *Klaassen et al v The Trustees of Indiana University supra* 3.

114 *Klaassen et al v The Trustees of Indiana University supra* 4.

115 Blum and Talib 2006 *Medicine and Law* 274.

116 The Council of the European Union "Council Recommendation of 7 December 2018 on Strengthened Cooperation Against Vaccine-Preventable Diseases" (2018) https://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX:32018H1228(01) (accessed 2022-02-24).

117 European Court of Human Rights "Guide on Article 8 of the European Convention on Human Rights" (2021) https://www.echr.coe.int/Documents/Guide_Art_8_ENG.pdf (accessed 2022-02-24).

118 Council of Europe *European Convention for the Protection of Human Rights and Fundamental Freedoms, as amended by Protocols Nos. 11 and 14* (4 November 1950) ETS 5. Adopted: 04/11/1950; EIF: 03/09/1953.

Over 20 years ago in *Boffa v San Marino*,[119] the European Court of Human Rights (ECHR) was faced with an applicant who complained that the laws in San Marino making it compulsory for their minor children to undergo vaccinations violated their freedom of thought and conscience as contained in article 9 of the Convention, their right to liberty as guaranteed in article 5 of the Convention, and their right to respect for their private and family life protected by article 8 of the Convention. The ECHR held:

> "as regards the aim of the contested legislation, the interference is based on the need to protect the health of the public and of the persons concerned, and so is justified."[120]

The court thus rejected the complaint stating that the interference of which the applicant complained is proportionate to the aim pursued and is deemed necessary in a democratic society for the protection of health as referred to in article 8 (2) of the Convention,[121] which states:

> "There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic wellbeing of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others."

Thereafter, in *Solomakhin v Ukraine*,[122] the Grand Chamber of the ECHR held that, according to its case law, the physical integrity of a person is covered by the concept of "private life" protected by article 8 of the Convention.[123] A person's bodily integrity concerns the most intimate aspects of one's private life, and compulsory medical intervention, even if it is of minor importance, constitutes an interference with this right.[124] The court went on to hold that compulsory vaccination amounts to an interference with the right to respect for one's private life, which includes a person's physical and psychological integrity, as protected by article 8.[125] The court, however, noted that such interference, as caused by compulsory vaccinations, pursues the legitimate aim of the protection of health. In the court's opinion, the interference with physical integrity could be said to be justified by public health considerations and the necessity to control the spreading of infectious diseases.

In 2021, the Grand Chamber of the ECHR had to make a judgment on whether laws in the Czech Republic requiring compulsory childhood vaccination were compatible with the Convention in *Vavřička v the Czech Republic*.[126] The court held:

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119 26536/95 (1998).
120 *Boffa v San Marino supra* 34.
121 *Boffa v San Marino supra* 35.
122 24429/03 (2012).
123 *Solomakhin v Ukraine supra* 33.
124 *Ibid*.
125 *Ibid*.
126 47621/13, 3867/14, 73094/14 *et al* (2021).

> "With regard to the aims pursued by the vaccination duty, as argued by the Government and as recognised by the domestic courts, the objective of the relevant legislation is to protect against diseases which may pose a serious risk to health. This refers both to those who receive the vaccinations concerned as well as those who cannot be vaccinated and are thus in a state of vulnerability, relying on the attainment of a high level of vaccination within society at large for protection against the contagious diseases in question. This objective corresponds to the aims of the protection of health and the protection of the rights of others, recognised by Article 8."[127]

An interference will be considered "necessary in a democratic society" for the achievement of a legitimate aim if it answers a "pressing social need" and, in particular, if the reasons adduced by the national authorities to justify it are "relevant and sufficient" and if it is proportionate to the legitimate aim pursued.[128] A restriction, in the form of an obligation to vaccinate, may be placed on the applicants' right to physical integrity in order to "protect the health of all members of society, particularly those who are especially vulnerable with respect to certain diseases".[129] Accordingly, the court found that there had been no violation of article 8 of the Convention. The applicants, further, sought to invoke the protection of article 9 of the Convention for their critical stance towards vaccination, not based on religious grounds. However, the court found that a critical opinion on vaccination is not such as to constitute a conviction or belief of sufficient cogency, seriousness, cohesion, and importance to attract the guarantees of article 9.[130] Judge Lemmens, in his partly concurring and partly dissenting opinion, correctly and importantly states:

> "While everyone enjoys fundamental rights in a given society, a fact which must be respected by the State, individuals do not live in isolation. By the nature of things, they are members of that society. Life in society ('living together') requires respect by each member of society for certain minimum requirements … One of these requirements is respect for the human rights of the other members of society ... The Court has since long recognised that in democratic societies it may be necessary to place restrictions on an individual's freedom in order to reconcile the interests of the various individuals and groups and to ensure that everyone's rights are respected."[131]

Having taken guidance from the United States and the European Union above, an analysis and discussion of mandatory vaccines in South Africa is considered below.

5 ANALYSIS AND DISCUSSION OF MANDATORY VACCINES

Dr Hans Kluge, World Health Organization Regional Director for Europe, said in a statement that "[v]accines present our best way out of this

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127 *Vavřička v the Czech Republic supra* 272.
128 *Vavřička v the Czech Republic supra* 273.
129 *Vavřička v the Czech Republic supra* 279.
130 *Vavřička v the Czech Republic supra* 335.
131 *Vavřička v the Czech Republic supra* par 2.

pandemic".[132] In its "Global Vaccine Action Plan" published in 2013, the World Health Organization stated:

> "[I]mmunization is, and should be recognized as, a core component of the human right to health and an individual, community and governmental responsibility."[133]

Mandatory vaccination policies at tertiary institutions are prescribed by law, namely through the Code of Practice: Managing Exposure to SARS-COV-2 in the Workplace, 2022. Their purpose is clearly defined to protect the health and safety of not only employees and students but that of the public at large in line with their obligations under the OHS Act.[134] This presents a legitimate aim in the protection of public health for the common good and for the return of life to normalcy. The measure of mandating vaccinations is rationally connected to a legitimate aim, as demonstrated by scientific evidence and is, therefore, considered a necessary measure to mitigate the risks associated with Covid-19 in a democratic society such as South Africa. Mandating vaccinations can further be argued to be a proportionate measure in the narrow sense in that it strikes a fair balance between the importance of the goal of the protection of human life and the burden it places on the individual in that the risks of Covid-19 far outweigh the risks of vaccination.

Despite the law allowing for mandatory vaccinations, what this looks like in practice will depend not only on the government but also on the private sector. Arguably, vaccines are more invasive than closing mosques or preventing the sale of alcohol.[135] Nonetheless, the complex, multi-layered practicalities of enforcing Covid-19 vaccinations mean that vaccination mandates will have to be developed responsibly. In some contexts, such as frontline health care, a hard-line approach may be warranted, and the limitation of individual rights could be justified.[136] It might not apply in all contexts: some individuals may have valid medical reasons for not being able to take a Covid-19 vaccine, others may object on religious grounds or work in low-risk environments where their decisions not to be vaccinated pose little risk to others. Outside of work environments, vaccine mandates could be used to incentivise rather than enforce vaccinations, without significant intrusions on individual rights.[137]

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[132] World Health Organization "Slow Vaccine Roll-Out Prolonging Pandemic" (2021) https://www.euro.who.int/en/media-centre/sections/press-releases/2021/slow-vaccine-roll-out-prolonging-pandemic (accessed 2022-02-24).

[133] World Health Organization "Global Vaccine Action Plan 2011–2020" (2013) https://www.who.int/teams/immunization-vaccines-and-biologicals/strategies/global-vaccine-action-plan (accessed 2022-02-24).

[134] Ss 8, 9 and 14 of the OHS Act.

[135] Karim "Covid Vaccine Mandates Don't Have to Undermine Your Rights", (September 2021) https://www.wits.ac.za/covid19/covid19-news/latest/covid-vaccine-mandates-dont-have-to-undermine-your-rights.html (accessed 2022-01-25) 2.

[136] *Ibid*.

[137] Karim https://www.wits.ac.za/covid19/covid19-news/latest/covid-vaccine-mandates-dont-have-to-undermine-your-rights.html 2.

6 CONCLUSION

This article has discussed the history of pandemics and vaccine hesitancy in Africa, focusing on South Africa. In addition, the various legislative and policy frameworks in South Africa in respect of vaccinations have been discussed. An analysis and discussion of the United States and the European Union in respect of their position on mandatory vaccinations was also included. At the time of writing, South Africa's daily rate of new infections had been on a steady decline, although a fifth wave is probably on the horizon and a sixth and a seventh also possible.[138] This is true of every country in the world. The pandemic will not end with a bang, but one can expect to see a fading-away. Waves might well continue, and even increase in magnitude. However, fatalities will reduce, and severe illness become less common as vaccination rates improve. Unfortunately, it is quite natural to listen to anecdotal evidence and take it seriously when a person is said to die from a heart attack as a result of the vaccine. However, this is not good evidence of a causal relationship. Evidence-based medicine is rooted in large-scale randomised trials with many thousands of people participating.[139] Both trials and now large-scale rollouts have conclusively shown that vaccines massively reduce people's chances of hospitalisation and death and further that by all standard measures of pharmaceutical safety, that they are not harmful.[140] As South Africans, we must come to terms with the fact that Covid-19 is probably here to stay and that the only way to end this pandemic is to stop the enormous harm it is doing by vaccinating.[141]

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138 Hart and Combrink "We Can't Banish COVID-19. But We Can End the Pandemic With Vaccinations" (September 2021) https://theconversation.com/we-cant-banish-covid-19-but-we-can-end-the-pandemic-with-vaccinations-168294 (accessed 2022-01-26) 2.

139 *Ibid*.

140 *Ibid*.

141 *Ibid*.

SIR WILLIAM BLACKSTONE AND THE DOCTRINE OF SUBJECTIVE RIGHTS*

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SUMMARY

The doctrine of subjective rights forms part of South African jurisprudence. This is not the case in English law, which, for instance, does not clearly distinguish between property, as a legal object, and property rights. However, if one considers Sir William Blackstone's famous definition of property in his *Commentaries on the Laws of England*, it does contain some features of the doctrine: the definition is about the "right of property" and its features. Property as object, and right of property as a right, are distinguished. A right of property has entitlements and operates against third parties. A property right involves a legal relationship between a person and a thing, as well as a legal relationship between a person and third parties. In conclusion, the Blackstonian definition contains features of the doctrine of subjective rights that are useful when analysing property rights in English common law systems.

"Give us the tools, and we will finish the job." - Winston Churchill

1 INTRODUCTION

The doctrine of subjective rights was developed in Europe by the nineteenth-century Pandectists.[1] It was introduced into Afrikaner academia[2] by Prof W A Joubert and the doctrine became accepted as part of South African jurisprudence.[3] Even though the doctrine is not free from criticism,[4] it

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1 Van der Merwe "Things" in Joubert and Faris (eds) *LAWSA* 27 (2014) par 59. For a historical overview of the evolving meaning of subjective rights, see Van der Walt "Skerwe uit die Geschichte van die Leerstuk van Subjektiewe Regte" 1996 *TSAR* 521 626.

2 Joubert *Grondslae van die Persoonlikheidsreg* (1953) 13 119–121; Joubert "Die Realiteit van die Subjektiewe Reg en die Betekenis van 'n Realistiese Begrip Daarvan vir die Privaatreg" 1958 21 *THRHR* 12 98.

3 For instance, by Van Heerden *Grondslae van die Mededingingsreg* (LLD thesis, UOVS) 1958; Van der Merwe *Die Beskerming van Vorderingsregte uit Kontrak Teen Aantasting Deur Derdes* (LLD thesis, UOVS) 1958; Van der Walt *Risiko-Aanspreeklikheid uit Onregmatige Daad* (doctoral thesis, UNISA) 1974; Neethling *Die Reg op Privaatheid* (LLD thesis, UNISA) 1976; Neethling *Persoonlikheidsreg* (1985); Van der Merwe and Olivier *Die Onregmatige Daad in die Suid-Afrikaanse Reg* (1985); Van Warmelo *Regsleer,*

remains a useful tool for the analysis of private law rights[5] and it was also extended to public law during the 1980s.[6]

The doctrine of subjective rights has no home in English law.[7] For instance, English property law does not clearly distinguish between property as an object, and property rights; notions such as right, title and interest are used interchangeably.[8] However, if one considers Sir William Blackstone's famous definition of property in his *Commentaries on the Laws of England*,[9] it does contain some features of the doctrine. William Blackstone's *Commentaries* of 1765 was the first legal treatise to describe comprehensively the English common law as it existed in the mid-eighteenth century.[10] The Blackstonian definition, therefore, pre-dates the works of the

Regswetenskap, Regsfilosofie (1973); Van Zyl and Van der Vyver *Inleiding tot die Regswetenskap* 2ed (1982) ch 2 3 4 10–12; Van der Vyver and Joubert *Persone- en Familiereg* 3ed (1991) 1–32; Van der Vyver "The Doctrine of Private Law Rights" in Strauss (ed) *Huldigingsbundel vir WA Joubert* (1988) 210; Sonnekus and Neels *Sakereg Vonnisbundel* 2ed (1994) 6–19; Van Niekerk "Is Persoonlikheidsregte Subjektiewe Regte?" 1990 15(2) *Tydskrif vir Regswetenskap* 28 29; *Universiteit van Pretoria v Tommie Meyer Films (Edms) Bpk* 1977 (4) SA 381F–383C/D. Scott ("Deliktereg 1985: 'n Besinning oor Teorie, Praktyk en Onderrig" 1985 18 *De Jur*e 122 139) states that the *Tommie Meyer* decision constitutes "'n triomf vir daardie teoretici waarvan Joubert die eerste was, wat die aanwending van die Vastelandse teorie oor subjektiewe regte in ons eie deliktereg bepleit het". See further *Elektrisiteitsvoorsieningskommissie v Fourie* 1988 (2) SA 627 (T) 642A 641G–H; *Anglo Operations Ltd v Sandhurst Estates (Pty) Ltd* 2006 (1) SA 350 (T) 381C–D.

4 See Lewis "Book Review Sakereg" 1991 108 *SALJ* 369; Van der Walt "Kritiese Vrae oor die Leerstuk van Subjektiewe Regte in die Suid-Afrikaanse Regsleer" 1996 28 *De Jure* 43; Kleyn "Dogmatiese Probleme Rakende die Rol van Onstoflike Sake in die Sakereg" 1993 26 *De Jure* 1 7–8. Knobel ("Trade Secrets and the Doctrine of Subjective Rights" 2001 64 *THRHR* 572 579–538) discusses criticism of a general nature and soundly counters such criticism. Specific criticism within the context of property law is discussed under heading 3 below.

5 See Van der Vyver "Expropriation, Rights, Entitlements and Surface Support of Land" 1988 105 *SALJ* 1; Badenhorst "Transfer Development Rights in America: Just Compensation, Fair Compensation or No Compensation" 1987 *TSAR* 214 217–219; Badenhorst, *Die Juridiese Bevoegdheid om Minerale te Ontgin in die Suid-Afrikaanse Reg* (LLD thesis, University of Pretoria) 1992; Badenhorst "Mineral Law and the Doctrine of Rights: A Microscope of Magnification?" 2006 27 *Obiter* 539.

6 Van Wyk ("Privaatreg, Publiekreg en Subjektiewe Regte" 1980 13 *De Jure* 1) raised the issue whether an individual has subjective rights in public law and whether such rights should be recognised. A theory of public subjective rights has subsequently been developed in public law jurisprudence (see Venter *Die Publiekregtelike Verhouding* (1985); Venter "Publieke Subjektiewe Regte: 'n Beskouing oor die Regsverhouding Tussen Staat en Burger" (Wetenskaplike bydraes van die PU vir CHO) 1980 Reeks H74; Robinson "'n Regsteoretiese Perspektief op die Publieke Subjektiewe Regsleer as Verklaringsmodel van die Publiekregtelike Verhouding"1988 3.2 *SA Publiekreg* 210.

7 Samuel ("'Le Droit Subjectif' and English Law" 1987 46 *Cambridge Law Journal* 264) is of the opinion that it is misleading to view the common law through a "subjective right structure" (273) and maintains that the concept of a subjective right has no place in the common law (284–286).

8 See further Badenhorst "Towards a Civilised Theory of Property Rights in Australian Law" 2019 27 *Australian Property Law Journal* 134 136.

9 Blackstone *Commentaries on the Laws of England* A Facsimile of the First Edition of 1765–1769 (1979) vol 2 ch 1.

10 Selected Editions of Blackstone's Commentaries in the Creighton Law Library Venteicher Rare Book Room Collection https://culibraries.creighton.edu/rarebook/Blackstone (accessed 2022-06-23).

nineteenth-century Pandectists, which makes it even more interesting to analyse.

This article discusses the presence of some of the features of the doctrine that occur in Blackstone's definition. An analysis of the Blackstonian definition within English law is not intended. The article first discusses the doctrine and the importance of being aware that a subjective right involves dual relationships. The article subsequently deals with specific criticism against the doctrine within the context of property law as a prelude to the definition of Blackstone. The subjective right categories are also restated owing to recognition of new legal objects and criticism against the doctrine. A classification of entitlements for purposes of property law is also suggested. The article examines Blackstone's definition of property through a subjective right structure to illustrate which elements of the doctrine are present. Such analysis only focuses on two types of subjective right, namely personal and real rights. The author concludes that the Blackstonian definition of rights to property contains some of the features of the doctrine of subjective rights, which may be used as a tool for rights analysis in the English common law systems.

2 DOCTRINE OF SUBJECTIVE RIGHTS

A legal subject is the bearer of subjective rights (including entitlements), competencies, and legal duties.[11] In terms of this doctrine, a subjective right is the claim of a legal subject as against other persons to a legal object.[12] An entitlement constitutes the contents of a right.[13] A competence is the capacity of a person to exercise the functions of a legal subject.[14] A legal duty is the converse of a subjective right.[15]

That to which a holder of a subjective right has a claim is a legal object.[16] The doctrine traditionally distinguishes between the following legal objects:[17]

a) corporeal things;[18]
b) immaterial (or intellectual)[19] property, namely the products of the human intellect and spirit which have been embodied in some externally perceivable form;[20]

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11 Van der Vyver and Joubert *Persone- en Familiereg* 38. See Knobel 2001 *THRHR* 574.

12 Van der Vyver 1988 *SALJ* 6.

13 *Ibid*.

14 See Joubert 1958 *THRHR* 115; Van der Vyver 1988 *SALJ* 6. For instance, at a certain age, a person of sound mind is competent to execute a will.

15 Joubert 1958 *THRHR* 13.

16 Van der Vyver and Joubert *Persone- en Familiereg* 9.

17 Joubert 1958 *THRHR* 113; Van Zyl and Van der Vyver *Inleiding tot die Regswetenskap* 407; Van der Vyver and Joubert *Persone- en Familiereg* 9; Van der Vyver in *Huldigingsbundel vir WA Joubert* 231–237; Midgley "Delict" in Joubert and Faris (eds) *LAWSA* 3ed 15 (2016) par 80; Knobel 2001 *THRHR* 574. See, however, Devine ("The Object of a Legal Right" 1965–1966 *Acta Juridica* 118–120), who suggests the following legal objects: (a) corporeal things, (b) immaterial property, (c) other rights, and (d) personal qualities.

18 Van der Merwe conventionally defines a "thing" (*LAWSA* 27 par 18) as "a corporeal object external to man which is an independent legal entity susceptible to private ownership and valuable and useful to legal subjects."

c) interests of personality – namely, one's good name, physical integrity, honour and privacy;[21] and
d) performances – in other words, doing something or refraining from doing something.[22]

Subjective rights are classified in accordance with the differing nature of their objects:[23]

a) a right to a corporeal thing is a real right; [24]
b) a right to immaterial (or intellectual) property is an immaterial (or intellectual) property right;[25]
c) a right to an interest of personality is a right of personality; and
d) a right to performance is a personal right;[26]

An entitlement "denotes what a person, by virtue of having a right to a legal object, may lawfully do with the object of his right".[27] The following entitlements, which are not a closed list, can be distinguished:[28]

a) possession – that is, the entitlement to have the legal object under your control;
b) use and enjoyment – that is, the entitlement to use and enjoy the legal object;
c) disposal – that is, the entitlement to determine what may and what may not be done with the legal object;
d) consummation and destruction – that is, the entitlement to consume the legal object or to destroy the legal object in any way; and
e) alienation – that is, the entitlement to transfer the ownership of a legal object to another legal subject.

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19 Like Knobel (2001 *THRHR* 575), the term intellectual property is preferred. Neethling ("Persoonlike Immaterieelgoedereregte: 'n Nuwe Kategorie van subjektiewe regte" 1987 50 *THRHR* 316 318–320) has identified earning capacity and creditworthiness as a fifth object, namely personal immaterial property, that is, intangible products of the human mind or endeavour which relate to one's personality. The corresponding right is a personal immaterial property right.

20 Such as patents and copyright. Knobel (2001 *THRHR* 589–590) argues that trade secrets should also be recognised as an object of an independent subjective right, namely an intellectual (immaterial) property right.

21 Knobel 2001 *THRHR* 575.

22 *Odendaalsrus Gold, General Investments and Extensions Ltd v Registrar of Deeds* 1953 (1) SA 600 (O) 603E; *National Stadium South Africa (Pty) Ltd v FirstRand Bank Ltd* 2011 (2) SA 157 (SCA) par 31; *Absa Bank Ltd v Keet* 2015 (4) SA 474 (SCA) par 21; *Ethekwini Municipality v Mounthaven (Pty) Ltd* 2018 (1) SA 384 (SCA) par 13.

23 Van der Vyver and Joubert *Persone- en Familiereg* 3–14; Van Zyl and Van der Vyver *Inleiding tot die Regswetenskap* 421–429; Knobel 2001 *THRHR* 575.

24 *National Stadium South Africa (Pty) Ltd v FirstRand Bank Ltd supra* par 31; *Absa Bank Ltd v Keet supra* par 21.

25 Like Knobel (2001 *THRHR* 575), the term intellectual property right is preferred.

26 *Odendaalsrus Gold, General Investments and Extensions Ltd v Registrar of Deeds supra* 603E; *National Stadium South Africa (Pty) Ltd v FirstRand Bank Ltd supra* par 31; *Absa Bank Ltd v Keet supra* par 21; *Ethekwini Municipality v Mounthaven supra* par 13.

27 Van der Vyver 1988 *SALJ* 6.

28 Van der Vyver and Joubert *Persone- en Familiereg* 19–20.

A subjective right involves dual relationships: first, the legal relationship between the right holder and the legal object (subject/object relationship), and secondly, the legal relationship between the right holder and third parties (subject/third-parties relationship).[29] In terms of the first relationship, the holder of the right may use, enjoy and dispose of the legal object.[30] The second relationship requires others to refrain from infringing upon the holder's relationship to the legal object.[31]

The importance of the dual relationships of a subjective right is apparent if one considers the theoretical weakness of the personalist theory of the (South African) common law, which is used to distinguish personal and real rights, with reference to the operation of such rights against third parties.[32] In terms of the personalist theory, a real right is said to be absolute in the sense that it operates against the whole world, while a personal right is relative in the sense that it is only enforceable against the other party to the obligation.[33] When it is maintained that a real right operates against the whole world and a personal right against a person, the subject/third-parties relationship of a real right is erroneously compared with the subject/object relationship of a personal right.[34] However, in terms of the doctrine of subjective rights, a real right operates more absolutely than a personal right, by bestowing on the holder a direct power or absolute control over the thing, while a personal right operates only against the other party within the subject/object relationship.[35] In terms of the subject/third-parties relationship, both real and personal rights operate against third parties although the degree of operation differs.[36]

In conclusion, personal or real rights are enforced relatively and absolutely, respectively, within the subject/object relationship while, both rights are absolutely protected against interference from other persons within the subject/third-parties relationship.[37]

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29 Joubert 1958 *THRHR* 114; Van der Vyver in *Huldigingsbundel vir WA Joubert* 214; Knobel 2001 *THRHR* 574.

30 Midgley in *LAWSA* 15 par 80; Knobel 2001 *THRHR* 574.

31 Midgley in *LAWSA* 15 par 80; Knobel 2001 *THRHR* 574–575.

32 Badenhorst 2006 *Obiter* 540.

33 Muller, Brits and Pienaar *Silberberg and Schoeman's The Law of Property* 6ed (2019) 8. See *Odendaalsrus Gold, General Investments and Extensions Ltd v Registrar of Deeds supra* 602H–603B; *Frye's (Pty) Ltd v Ries* 1957 (3) SA 575 (A) 583E; *Cape Explosive Works Ltd v Denel (Pty) Ltd* 2001 (3) SA 569 (SCA) par 16; *XZS Industries v AF Dreyer (Pty) Ltd* [2004] 4 SA 186 196F/G; *ABSA Bank Ltd v Keet supra* par 20; *Majola v Country Cloud Trading* 2019 (5) SA 195 (KZP) par 34 40.

34 Sonnekus and Neels *Sakereg Vonnisbundel* 90–91.

35 See Van der Walt "Personal Rights and Limited Real Rights: An Historical Overview and Analysis of Contemporary Problems Related to the Registrability of Rights" 1992 55 *THRHR* 188–189; Badenhorst "The Distinction Between Real Rights and Personal Rights in the Deeds Registration System of South Africa – Part Two: Pragmatic Distinction Between Real Rights and Personal Rights" 2022 *AJICL*.

36 Muller *et al Silberberg and Schoeman's The Law of Property* 59; Sonnekus and Neels *Sakereg Vonnisbundel* 90–91; Badenhorst 2022 *AJICL*.

37 See Van der Walt 1992 *THRHR* 191–192.

3 CRITICISMS AGAINST THE DOCTRINE OF SUBJECTIVE RIGHTS FROM WITHIN PROPERTY LAW

The first point of criticism against the doctrine is its inability to accommodate the notion of incorporeals.[38] The doctrine restricts the objects of real rights to corporeal things. However, Roman law and Roman-Dutch law recognise not only corporeal objects as things, but also incorporeals (rights).[39] South African legal practice and legislation also recognise incorporeals (rights) and real rights.[40] Such recognition confirms the notion of a subjective right being the object of another subjective right.[41] The construction of a right being the object of another right is inconsistent with the clear distinction that is made by the doctrine between subjective rights and legal objects.[42] If things are not limited to corporeal objects, it becomes difficult to distinguish between real rights, immaterial property rights and personality rights.[43]

The counter-arguments to the first point of criticism include, first, that incorporeals are an exception to the doctrine.[44] With the statutory abolition of mineral rights in South Africa,[45] which have served as the object of real rights in some instances, the number of incorporeals is substantially reduced, while some of the remaining exceptions are merely creatures of statute.[46] Secondly, an incorporeal may simply be recognised as a new legal object with a corresponding new subjective right.[47] In other words, other rights may serve as a legal object.[48] As incorporeals do exist, the pragmatic approach would be to recognise incorporeals as a new legal object. Thirdly in terms of a Romanist or retro approach[49] to the notion of property,

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38 Van der Walt 1992 *THRHR* 170 190–19; Kleyn 1993 *De Jure* 1 8. See further Cloete "Onstoflike Sake in die Nuwe Suid-Afrikaanse Reg" (LLD thesis Pretoria) 2001; Cloete "Die Plek en Rol van Onstoflike Sake in die Nuwe Suid-Afrikaanse Sakereg: 'n Kritiese Oorsig" 2003 *Obiter* 65.

39 Muller *et al Silberberg and Schoeman's The Law of Property* 17.

40 See the examples given by Van der Merwe *Sakereg* (1989) 22; Kleyn 1993 *De Jure* 5; Muller *et al Silberberg and Schoeman's The Law of Property* 19; Cloete "Historiese Onderskeid Tussen Stoflike en Onstoflike Sake in die Suid-Afrikaanse Sakereg: 'n Sinopsis" 2005 38 *De Jure* 316–317.

41 Muller *et al Silberberg and Schoeman's The Law of Property* 19.

42 Van der Merwe *Sakereg* 21. See, however, Kleyn 1993 *De Jure* 8–9 10.

43 Van der Merwe *Sakereg* 21. See, however, Kleyn 1993 *De Jure* 9.

44 See Van der Merwe *Sakereg* 22 62 63; see however Kleyn (1993 *De Jure* 5–6) and Cloete (2005 *De Jure* 295 316–318) who reject this approach.

45 S 110 of the Mineral and Petroleum Resources Development Act 28 of 2002; s 53 of the Mining Titles Registration Amendment Act 24 of 2003.

46 Cloete (2005 *De Jure* 317 n 172) provides examples of such creatures of statutes: mortgages of leases and personal servitudes (in terms of the Deeds Registries Act 47 of 1937); real rights in respect of immaterial property (in terms of the Patents Act 57 of 1978) and attachment of incorporeal things (Rules of the High Court).

47 See, for instance, Badenhorst (1987 *TSAR* 219) who recognises air space, i.e., a cubic entity, as a new object and transfer development rights as the corresponding subjective right. Other examples of such objects are given, namely electricity or nuclear energy (219).

48 Devine 1965–1966 *Acta Juridica* 113 114 119.

49 Kleyn and Boraine (*Silberberg and Schoeman's Law of Property* 3ed (1992) 19) define a thing as "anything whether corporeal or incorporeal, that is of use and/or value to man and that is regarded as *in commercio*)". See also Kleyn 1993 *De Jure* 1 and 13.

corporeality as a characteristic of a thing can be disregarded altogether. In terms of such an approach, rights to corporeal and incorporeal things (other rights) are in both instances real rights. The conventional approach of limiting things to corporeals[50] is, however, theoretically sound as being in line with property law theory.[51]

A second point of criticism is that it is doubted whether the doctrine means, "all rights that relate in any way to a thing are inevitably and automatically real rights".[52] For instance, does a right to claim delivery of a movable thing, or transfer of ownership of land, also constitute a real right because it indirectly relates to a thing? The answer to this point of criticism is that it is possible (within the boundaries of the doctrine) to distinguish between a personal right (which is indirectly concerned with acquiring a thing or land) and real rights (which have a thing or land as a direct object).[53] The personal right (to the delivery of a thing or to a transfer of land) has performance as its object,[54] and is, therefore, a personal right.

The above-mentioned personal rights (that relate indirectly to land) are referred to in conveyancing law and practice as *iura in personam ad rem acquirendam*[55] (personal rights in respect of registrable real rights). Such a right is said to have as its object a further right, such as the right of ownership.[56] Despite being personal in nature, the courts indicate that it is "trite law that rights of the class *iura in personam ad rem acquirendam* become real rights on registration" in the deeds office.[57] The doctrine of subjective rights clearly shows that the act of registration cannot magically convert a personal right (with its corresponding object, namely performance) into a real right (with its corresponding object, namely a thing or land).[58] The Constitutional Court decided in *Ethekwini Municipality v Mounthaven (Pty) Ltd*[59] that a right to claim transfer of land is a personal right.[60] The court held that such personal right is terminated upon registration.[61] The court accepted that acquisition of ownership takes place because of the registration of

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50 See the conventional definition of a thing in fn 18 above.

51 Van der Merwe *Sakereg* 21–22.

52 Van der Walt 1992 *THRHR* 191.

53 *Ibid*.

54 *Ibid*.

55 De Villiers CJ, while dealing with the registrability of a right in the deeds office, mentioned a special category of personal right that exists prior to registration of a real right in *Registrar of Deeds (Tvl) v the Ferreira Deep Ltd* 1930 AD 169 180: "That personal rights, *jura in personam,* are not capable of registration is a truism. The definition of such rights excludes their registration. But that does not apply to the class of personal rights which are known as *jura in personam ad rem acquirendam.* As contracts, with few exceptions, give rise only to personal rights, this class of right, although relating to immovable property, is a personal right until registration, when it is converted into a real right by such registration."

56 Devine 1965–66 *Acta Juridica* 19.

57 *Upper Kubusie Village Managements Board v Nel* [1968] 2 All SA 437 (E) 440; Ex *parte Menzies* 1993 (3) SA 799 (C) 806F–G. In *National Stadium South Africa (Pty) Ltd v FirstRand Bank Ltd supra* par 31, Harms DP (incorrectly) indicates that a personal right "matures into a real right on registration".

58 Badenhorst "Registrability of Burdens to Develop Land and Reversionary Rights in Terms of the Deeds Registration Act 47 of 1937" 2020 *TSAR* 463.

59 2019 (4) SA 394 (CC).

60 *Ethekwini Municipality v Mounthaven (Pty) Ltd supra* par 18.

61 *Ibid*.

transfer of ownership and not because of the registration or conversion of a *ius in personam ad rem acquirendam*.[62] It is correct that *iura in personam ad rem acquirendam* are indeed personal rights, which are not registrable in the deeds office.[63]

As to this second point of criticism, the doctrine illustrates and confirms the importance of distinguishing between the different objects of rights and of the fact that a right indirectly relates to a thing does not make it a real right or detract from the usefulness of the doctrine.[64]

A third point of criticism is raised within the context of the age-old civil law debate whether possession is a subjective right or merely a factual situation.[65] The doctrine is said to be unable to explain the existence and protection of possession as a subjective right.[66] For instance, if possession is recognised as a subjective right, the possession of a thief, which is treated as unlawful possession, would constitute an (unlawful) subjective right to a thing,[67] which constitutes a *contradictio in terminis*. The inability to explain possession as a subjective right is attributed to the terminological inadequacies of the doctrine and is not because possession is not part of property law.[68] Without discussing the intricacies of possession, it is submitted that a distinction should be made between a right of possession and possession as a factual situation. If the right to possession is lawfully acquired, it should be recognised as a subjective right: the entitlement of possession is acquired from the owner of a thing and is contained by a subjective right, namely a real right with a thing as its object.[69] If a person is

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62 *Ibid.*

63 Badenhorst 2020 *TSAR* 460 477.

64 The (incorrect) view is at times held (that a personal right can also pertain to a thing), which complicates the distinction between the said rights. This erroneous view is avoided if the doctrine of rights, which focuses on the object of a right to distinguish between rights, is however, kept in mind.

65 See Muller *et al Silberberg and Schoeman's The Law of Property* 310–311.

66 Van der Walt "The Doctrine of Subjective Rights: A Critical Reappraisal From the Fringes of Property Law" 1990 53 *THRHR* 316 324 325.

67 Van der Walt 1990 *THRHR* 322.

68 Van der Walt 1990 *THRHR* 324. Van der Walt (1990 *THRHR* 325–329) proposes a system based upon subjective relationships rather than subjective rights to resolve the terminological deficiencies.

69 That would be in terms of the following formulation of the subtraction from the dominium test suggested by Badenhorst and Coetser ("Pearly Beach Trust v Registrar of Deeds 1990 4 SA 614 (C)" 1991 24 *De Jure* 376 389): "If a legal transaction involves the transfer of an entitlement of ownership of land to a person other than the owner of land, a subtraction of ownership of such land takes place and the right encompassing the entitlement qualifies as a real right." See, however, Van der Merwe (*Sakereg* 173–176 and 458), who argues that upon the grant of a limited real right, an owner does not transfer entitlements to another person but only agrees to the suspension of some of the owner's entitlements. Sonnekus ("Notariele Binding, Deeltitels en 'n Erfdiensbaarheid om te Parkeer" 2017 *TSAR* 116 134) correctly explains that upon the grant of a limited real (for instance, a servitude) by an owner of land, the grantee of the right acquires limited entitlements while, the exercise of corresponding limited entitlements of the owner are accordingly restricted. Because of the absence of an entitlement of disposition, the holder of a limited real right (for instance, in case of a servitude), in turn cannot grant entitlements to third parties (Sonnekus 2017 *TSAR* 135–136). Upon termination of the limited real right, ownership expands back to its original form by operation of law without the need to retransfer the entitlements back to the owner (see Sonnekus 2017 *TSAR* 134–135).

merely in possession, as in the case of a thief, the protection of possession by the *mandament van spolie* is for policy reasons (and does not contradict the possible recognition of the right of possession as a subjective right).

4 DOCTRINE OF SUBJECTIVE RIGHTS RESTATED

In response to the criticism from within property law against the doctrine and possible extensions of the categories of legal objects, as indicated in the footnotes, the author wishes to propose that subjective rights be classified as follows, with reference to the following legal objects:

a) a right to a corporeal thing is a real right (or property right);
b) a right to incorporeal property[70] is an incorporeal[71] property right;
c) a right to intellectual property[72] is an intellectual property right;
d) a right to personal intellectual property[73] is a personal intellectual property right;
e) a right to aspects of personality is a right of personality; and
f) a right to performance is a personal right.

The following classification of entitlements of ownership have been suggested (within the context of registration of real rights in the deeds office),[74] namely, the entitlements:

a) to use and enjoy (*ius utendi*);
b) to possess (*ius possidendi*);
c) to enjoy fruits (*ius fruendi*); and
d) of disposition (*ius disponendi*),[75] which in turn is made up of the entitlement:
    i of alienation, namely, by sale, exchange or donation;[76]
    ii to encumber ownership of land by, for instance, granting a servitude, a long-term lease or a mortgage in respect of the land; and
    iii to enjoy the fruits of the disposition.

5 BLACKSTONE'S DEFINITION

Chapter one of volume two of Blackstone's *Commentaries* has the heading "Property, in General". This may create the impression that his definition is

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70 For instance, other subjective rights (see fns 17 46), electricity and nuclear energy (see fn 47).

71 It is acknowledged that all subjective rights are incorporeal in nature. The incorporeal label may thus be confusing.

72 See fn 20.

73 See fn 19. Namely, earning capacity and creditworthiness as legal object.

74 See Badenhorst 2022 *AJICL*.

75 Van Der Vyver "Expropriation, Rights, Entitlements and Surface Support of Land" 1988 105 *SALJ* 1 11.

76 Either *inter vivos* or *mortis causa*.

about property and not a right to property.[77] The definition, however, reads as follows:[78]

> "There is nothing which so generally strikes the imagination, and engages the affections of mankind, as the right of property; or that sole and despotic dominion which one man claims and exercises over the external things of the world, in total exclusion of the right of any other individual in the universe."

Features of the doctrine of subjective rights are present in the Blackstonian definition, as discussed below.

First, the definition is about the "right of property" and not the wide (undefined) English law notion of "property". At the outset of chapter one of volume two of his *Commentaries*, Blackstone explains that the previous volume deals with the rights of persons while the second volume is dealing with *jura rerum* (rights of things). According to Blackstone, *jura rerum* are "those rights which a man may acquire in and to such external things as are unconnected with his person".[79] The right of property is thus the "right" of a person to a thing.[80] Because possession is a right or title in English law,[81] possession would simply be a right to a thing.

Secondly, the definition contains some of the features of the right to property: a right of property is solely vested in a legal subject.[82] This type of vesting provides exclusivity to the holder of the right.[83] The description of "despotic" should not be interpreted to mean that the exercise of the right to property is absolute or unrestricted[84] as Blackstone does recognise that restrictions can be imposed on the exercise of rights by the law of the land.[85] The right to a thing is a despotic power over such a thing in terms of the subject/object relationship of a right of property. "Dominion" (which means sovereignty of control over things) denotes some form of legally authorised power over a thing.[86] In other words, it tells us about the existence of some proprietary power between a person and a thing.[87]

Thirdly, things (*res*) are the relevant legal objects.[88] Blackstone states in so many words that "the objects of *dominion* or property are things".[89] Things exist independently, on their own, are external to persons and are legally

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77 See for instance Gray, Edgeworth and Foster (*Property Law in New South Wales* 3ed (2012) 1) who merely accept it is a definition of "property". The Blackstonian definition is quoted as reading: "Property is the sole and despotic …".

78 Vol 2 ch 1.

79 Blackstone *Commentaries on the Laws of England* vol 2 ch 1.

80 Badenhorst 2019 *Australian Property Law Journal* 153–154.

81 See Blackstone *Commentaries on the Laws of England* vol 2 ch 14.

82 Badenhorst 2019 *Australian Property Law Journal* 139.

83 *Ibid*.

84 According to Rose ("Canons of Property Talk, or, Blackstone's Anxiety" 1998 108 *Yale Law Journal* 601 604), the description of property as an exclusive dominion "was in a sense a trope, a rhetorical figure describing an extreme or ideal type rather than reality". See further Rose 1998 *Yale Law Journal* 631.

85 Blackstone *Commentaries on the Laws of England* vol 1 ch 1.

86 *Yanner v Eaton* [1999] HCA 53 par 17 and 18. See Gray *et al Property Law in New South Wales* 3; Badenhorst 2019 *Australian Property Law Journal* 139.

87 Badenhorst 2019 *Australian Property Law Journal* 139.

88 Badenhorst 2019 *Australian Property Law Journal* 153.

89 Blackstone *Commentaries on the Laws of England* vol 1, ch 2.

demarcated.[90] Things, as legal objects, can be corporeal (tangible) or incorporeal (intangible) in nature.[91] The same problem raised earlier with incorporeals would exist if the doctrine of subjective rights were to be applied in English property law. Blackstone also recognises the object of a personal right, namely performance, which entails "to do or not to do a particular" act.[92]

Fourthly, the right to property also involves the exercise of entitlements by virtue of such a right.[93] In an earlier passage of his *Commentaries*, Blackstone states that the right of property "consists in the free use, enjoyment, and disposal of all his acquisitions, without any control or diminution, save only by the laws of the land".[94] This statement seems like a listing of the content (entitlements) of a right of property. This statement is, however, made in volume one, chapter one of his *Commentaries*, which volume deals with the law of persons. Chapter one specifically deals with the "absolute right, inherent in every Englishman" for purposes of the law of persons. The capacity of a person to own and deal with property is thus rather a competency. From the definition, it appears that the exercise of dominion constitutes the exercise of entitlements by virtue of a subjective right. English law recognises incidents of property as the content of a property right.[95]

Fifthly, a property right involves a legal relationship between a person and a thing, as well as a legal relationship between a person and third parties. The first relationship involves the exercise of entitlements by virtue of the right to property ("despotic dominion"), while the second relationship involves the exclusion of all other persons "in the universe" from interfering with the right holder's exercise of property entitlements.[96]

Sixthly, a property right is exercised to the exclusion of third parties ("any other individual in the universe").[97] In English law, property rights are said to be enforceable in respect of a thing (*in rem*), while personal rights are only enforceable against a particular person (*in personam*).[98] This corresponds with the distinction between "absolute" rights and "relative" rights in the personalist theory of civil law.[99] As indicated before, personal and real rights

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90 Badenhorst 2019 *Australian Property Law Journal* 137. Existing outside a person is also a requirement of a thing in South African law (see fn 18).

91 See Blackstone *Commentaries on the Laws of England* vol 2 ch 2.

92 Blackstone *Commentaries on the Laws of England* vol 2 ch 30.

93 Badenhorst 2019 *Australian Property Law Journal* 154.

94 Blackstone *Commentaries on the Laws of England* vol 1 ch 1 III; Krier "Of Property Rights and Rights to Property" 2015 41.3 *Ohio N U L Rev* 589 596.

95 Honoré (*Making Law Bind: Essays Legal and Philosophical* (1987) 165) listed the following incidents of ownership, namely, the right to possess, the right to use, the right to manage, the right to the income of the thing, the right to the capital, the right to security, the rights of transmissibility and absence of term, the duty to prevent harm, liability to execution and the incidents of residuarity, but concedes some overlapping of incidents take place (see further Honoré *Making Law Bind: Essays Legal and Philosophical* 165–75).

96 Badenhorst 2019 *Australian Property Law Journal* 155–156.

97 Badenhorst 2019 *Australian Property Law Journal* 154.

98 See, for instance, Hohfeld "Fundamental Legal Conceptions as Applied in Judicial Reasoning" 1917 26 *Yale Law Journal* 710 714.

99 Honoré "Rights of Exclusion and Immunities Against Divesting" 1960 34 *Tulane Law Review* 453 453.

are enforced relatively or absolutely, respectively, within the subject/object relationship while both rights are absolutely protected against interference from other persons within the subject/third-parties relationship. In English law, there is also a realisation that all rights in a sense operate *in rem*[100] or absolutely. This truth becomes apparent when one focuses on the subject/third-parties relationship that is inherent in a subjective right.

Some of the features of the Blackstonian definition survived in modern law and still serve as identifiers of property or property rights.[101] The High Court of Australia accepted in *Yanner v Eaton*[102] that "property" is a "description of a legal relationship with a thing" (rather than an object) and that it "consists primarily in control over access".[103] This relationship may be broadened to contain the dual relationships of a subjective right. The ability to control access to a thing is based upon the absolute operation of a property right in terms of the subject/object relationship of a subjective right. The theoretical pitfalls in the distinction between rights *in rem* (absolute in their operation) and rights *in personam* (relative in their operation) still occur in English law[104] and can be resolved if the dual relationships of a subjective right are recognised and correctly applied. The Blackstonian definition contains features of the doctrine of rights that are useful in the analysis of property rights in English common law systems.[105]

6 CONCLUSION

Upon examination of Blackstone's definition of property through the lens of subjective rights, it becomes clear that the definition contains features of the doctrine of subjective rights. It is a definition of the right of property to a thing as a legal object. Things may be corporeal or incorporeal. The right of property involves dual relationships: the right of property is an authorised power of control over a thing within the subject/object relationship of a subjective right. The exercise of a right to the exclusion of third parties forms part of the subject/third-parties relationship. A right of property has as its content certain entitlements or incidents. These entitlements are exercised by virtue of the existence of a subjective right. By recognising the dual relationships of a subjective right as part of the property relationship, the pitfalls in the distinction of rights by virtue of their operation against third parties can be avoided. The answer is that personal or property rights are

100 Honoré 1960 *Tulane Law Review* 459.

101 See for instance Gray *et al* (*Property Law in New South Wales* 3–4) who extract the following characteristics of a property right from the Blackstonian definition: (a) a property right involves the exercise of dominion or control; (b) a property right includes the right to exclude others; (c) a property right applies to external things.

102 *Supra* par 17.

103 *Yanner v Eaton supra* par 18.

104 Hohfeld 1917 *Yale Law Journal* 710 714; Edgeworth, Rossiter, O'Connor and Godwin *Sackville & Neave: Australian Property Law* 10ed (2016) 9. Hohfeld 1917 *Yale Law Journal* 713 shows that the phrases "in personam" and "in rem" are ambiguous.

105 See the attempt by Badenhorst (2019 *Australian Property Law Journal* 134) to view Australian property law through the lens of a subjective right structure. See also a similar attempt in respect of Australian mineral law (Badenhorst "Towards a Theory on Publically-Owned Minerals in Victoria" 2014 22 *Australian Property Law Journal* 157).

enforced relatively and absolutely, respectively, within the subject/object relationship while both real and personal rights are absolutely protected against interference from other persons within the subject/third-parties relationship. Some of the features of the doctrine of subjective rights may be used as a tool to analyse property and other rights in English law, which is often said to be rich in detail but poor in principle. Perhaps these features are so universal and logical that they can apply to all legal systems.

EXPLORING THE FEASIBILITY OF CRIMINALISING MATERNAL SUBSTANCE ABUSE IN SOUTH AFRICA

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SUMMARY

With alcohol abuse by pregnant women being a significant problem in South Africa, particularly in the rural areas of the Western Cape province, the country carries one of the world's heaviest burdens of foetal alcohol syndrome (FAS). FAS is regarded as the most severe of the foetal alcohol spectrum disorders. A child affected by FAS may suffer various developmental delays, including behavioural problems, poor language and fine motor skills, overall poor academic performance, mental retardation, and an increased tendency towards aggression and violence. Despite the alarming extent of the problem, maternal substance abuse is not currently a criminal offence in South Africa. This article explores the feasibility of criminalising maternal substance abuse, either by way of an amendment to the Children's Act 38 of 2005 or by introducing a new statutory offence. As South African children are already afforded protection against abuse and neglect in terms of the Children's Act, the prosecution of mothers who abuse substances while pregnant and then give birth to children suffering FAS-related harm could potentially also occur within this ambit. This would require an extension to the definitions of abuse and neglect in the Children's Act and would have no effect on the legal status of a foetus in South Africa. Yet one would face certain challenges associated with the principle of legality: in terms of the *ius strictum* requirement, for instance, courts are expected to apply a strict rather than a broad interpretation to the definition of a crime. Therefore, if it is not provided for clearly enough in the definition of abuse and neglect, courts may be hesitant to include maternal substance abuse in their understanding of these crimes. Moreover, a strict interpretation of the meaning of "child" in the Children's Act would exclude a foetus. In addition, a foetus does not possess legal subjectivity under South African law, which means that it generally does not have any legal rights, nor can it be the victim of any crime. Alternatively, the legislature could opt for introducing a new statutory offence to address maternal substance abuse separately. In this regard, criminalising maternal substance abuse as a materially-defined crime would be the best route to follow. This would restrict prosecution to instances where maternal substance abuse does in fact result in FAS-like effects in the child upon birth. In determining the feasibility of criminalising maternal substance abuse in South Africa, the article also takes a comparative look at United States law in this regard, particularly the position in Alabama and South Carolina. Developments in these states do seem to bode well for a decision to criminalise maternal substance abuse

in South Africa as well. As shown in *Hicks v State of Alabama* 2014 153 So.3d 53 and *Whitner v State* 328 S.C. 1, 492 S.E.2d 777 (1997), maternal substance abusers in the United States may be prosecuted for either a specific statutory offence or general child neglect. However, while the courts in those cases imposed imprisonment, South Africa's already overcrowded prisons coupled with the predominantly socio-economic causes of maternal substance abuse in the local context would warrant alternative sentencing options. These include referral to a rehabilitation centre or diversion. In addition, the United States courts seem to have accepted the view that foetuses should be afforded the same protection as children. As this would stir up a hornet's nest in terms of the abortion debate and the legal status of a foetus in South Africa, following the American example in this respect is not recommended. However, this challenge can be overcome by criminalising maternal substance abuse as suggested above, by providing for prosecution only where the affected child is born alive and presents with FAS-like symptoms.

1 INTRODUCTION

Foetal alcohol spectrum disorders refer to the varied clinical effects an expectant mother's prenatal drug and alcohol use can have on her child.[1] Substance abuse during pregnancy is known to cause developmental delays in children, including behavioural problems, poor language and fine motor skills, and overall poor academic performance.[2] Other effects include mental retardation and an increased tendency towards aggression and violence.[3]

The most severe condition on the spectrum is foetal alcohol syndrome (FAS), which has a lasting impact on a child's health and well-being.[4] Colloquially known as maternal substance abuse, FAS is officially defined as prenatal exposure to alcohol, which causes a wide range of developmental disabilities in a foetus.[5]

From a global perspective, South Africa is among the countries most afflicted by FAS.[6] In recent times, the most heavily affected regions have been those classified as rural,[7] notably rural areas in the Western Cape province.[8] A 2013 study found that at least 20 per cent of women in the

1 Gardner "Should Drinking During Pregnancy Be Criminalised to Prevent Foetal Alcohol Spectrum Disorder?" 2016 9(1) *South African Journal of Bioethics and Law* 26 26; Olivier, Urban, Chersich, Temmerman and Viljoen "Burden of Fetal Alcohol Syndrome in a Rural West Coast Area of South Africa" 2013 103(6) *South African Medical Journal* 402 402.

2 Lester and Lagasse "Children of Addicted Women" 2010 29(2) *Journal of Addictive Diseases* 259 260.

3 Gardner 2016 *South African Journal of Bioethics and Law* 26; Olivier *et al* 2013 *South African Medical Journal* 402–403; Du Toit, Smith and Odendaal "The Role of Prenatal Alcohol Exposure in Abruptio Placentae" 2010 100(12) *South African Medical Journal* 832 832.

4 Olivier *et al* 2013 *South African Medical Journal* 402–403.

5 Williams and Smith "Fetal Alcohol Spectrum Disorders" 2015 136(5) *American Academy of Pediatrics* 358 358.

6 Olivier *et al* 2013 *South African Medical Journal* 402; Gardner 2016 *South African Journal of Bioethics and Law* 26.

7 Olivier *et al* 2013 *South African Medical Journal* 402; Prinsloo and Ovens "An Exploration of the Scope and Impact of Prenatal Substance Abuse in Mitchell's Plain, Western Cape" 2015 16(2) *Child Abuse Research: A South African Journal* 148 148.

8 Olivier *et al* 2013 *South African Medical Journal* 402; Gardner 2016 *South African Journal of Bioethics and Law* 26–27.

Western Cape drank heavily during pregnancy,[9] while research published in 2017 estimated the rate of FAS among rural Grade 1 learners in the province at between 9,4 and 12,9 per cent.[10]

Despite the prevalence of alcohol abuse during pregnancy and the severity of its consequences, maternal substance abuse is not currently a criminal offence in South Africa. Therefore, this article explores the feasibility of criminalising maternal substance abuse, either in terms of existing South African legislation,[11] or by way of a newly created statutory offence. In determining the feasibility of introducing laws to govern maternal substance abuse in the country, the present legal position in South Africa is compared with United States federal and state law on maternal substance abuse, particularly the position in Alabama and South Carolina.

As a backdrop to this investigation, an overview of legal instruments, laws and case law regarding children's rights and the legal position of the foetus in South Africa is first provided.

2 INSTRUMENTS AND LAWS GOVERNING THE RIGHTS OF SOUTH AFRICA'S CHILDREN

2 1 United Nations Convention on the Rights of the Child

The evolution of children's rights in South Africa over the years has mainly been spurred by international obligations, not least the United Nations Convention on the Rights of the Child (UNCRC).[12] The UNCRC specifically states that all States Parties must provide for the rights of children in terms of both basic and family needs.[13] With South Africa having ratified it in 1995, the UNCRC became one of the first legally binding conventions affording human rights to the country's children.[14]

In the Preamble, the UNCRC clearly states its purpose to protect children's rights:

> "Bearing in mind that, as indicated in the Declaration of the Rights of the Child, 'the child, by reason of his physical and mental immaturity, needs special safeguards and care, including appropriate legal protection, *before as well as after birth*'."[15]

Article 3 obligates States Parties to consider the best interests of the child in all actions concerning children and to take all appropriate legislative and administrative measures necessary to ensure children's protection and care.

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9 Olivier *et al* 2013 *South African Medical Journal* 402–405.

10 Van Schalkwyk and Marais "Educators' Relational Experiences with Learners Identified With Fetal Alcohol Spectrum Disorder" 2017 37(3) *South African Journal of Education* 1 1.

11 For e.g., Children's Act 38 of 2005.

12 OHCHR *Convention on the Rights of the Child* E/CN.4/RES/1990/74 (1990). Adopted: 20/11/1989; EIF: 02/09/1990; Abrahams and Matthews *Promoting Children's Rights in South Africa: A Handbook for Members of Parliament* (2011) 24.

13 Preamble to the UNCRC.

14 Dugard *International Law: A South African Perspective* 4ed (2011) 335.

15 Preamble to UNCRC (own italics).

In the South African setting, this is implemented by way of the Constitution of the Republic of South Africa, 1996 (Constitution),[16] as well as the Children's Act.[17]

Also of particular relevance to this contribution are articles 6 and 19 of the UNCRC. The former requires States Parties to "recognize that every child has the inherent right to life" and "ensure to the maximum extent possible the survival *and development of the child*".[18] The latter deals with child abuse and neglect, providing as follows:

> "States Parties shall take all appropriate legislative, administrative, social and educational measures to protect the child from all forms of *physical or mental violence, injury or abuse, neglect or negligent treatment, maltreatment or exploitation, including sexual abuse, while in the care of parent(s)*, legal guardian(s) or any other person who has the care of the child."[19]

2 2 African Charter on the Rights and Welfare of the Child

Out of concern for Africa's children, most of whose situation "remains critical" owing to the continent's unique circumstances (including socio-economic, cultural, traditional and developmental issues),[20] the African Union (AU) adopted the African Charter on the Rights and Welfare of the Child (African Charter) a year after the adoption of the UNCRC. South Africa ratified it in 2000.[21]

Among other provisions, article 4 of the African Charter provides that the best interests of the child must always be taken into account when dealing with any matters that relate to the child. This sentiment has been included both in South Africa's Constitution[22] and the Children's Act.[23] Article 5 of the African Charter goes on to state that governments have a duty to ensure children's survival and development to the fullest extent possible. This, in turn, correlates with the right to life and the State's duty to aid and protect children entrenched in the Children's Act.[24]

2 3 The Constitution of the Republic of South Africa

Constitutional provisions of particular importance to this article are sections 28 and 39.

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16 S 28 of the Constitution.
17 38 of 2005.
18 Own italics.
19 Art 19(1) of the UNCRC (own italics).
20 Preamble to the AU *African Charter on the Rights and Welfare of the Child* (1990) CAB/LEG/24.9/49. Adopted: 01/07/1990; EIF: 29/11/1999.
21 African Commission on Human and Peoples' Rights "OAU/AU Treaties, Conventions, Protocols & Charters" (2019) https://au.int/en/treaties (accessed 2021-05-05).
22 S 28(2) of the Constitution.
23 S 7 of the Children's Act.
24 S 2 of the Children's Act.

In addition to the key provision that a child's best interests must be of paramount importance in all matters that affect the child's life,[25] section 28 also specifically states that every child has the right "to be protected from maltreatment, neglect, abuse, or degradation".[26] This clearly finds relevance in a study of the harmful effects of maternal substance abuse on a child, and therefore also an investigation into the feasibility of criminalising maternal substance abuse in South Africa.

Section 39, in turn, deals with the importance and recognition of foreign law,[27] providing that when interpreting any section of the Bill of Rights, a court may consider foreign and international law in coming to a decision.[28] In seeking statutory solutions to maternal substance abuse in South Africa, therefore, trends in foreign law could provide important guidance, provided that any new laws promote the spirit, purport and objects of the Bill of Rights.[29]

2 4 The Children's Act

The Children's Act[30] essentially gives effect to the rights entrenched in section 28 of the Constitution.[31] It describes numerous rights and responsibilities regarding the care and protection of children,[32] and specifically provides for the regulation and protection of children in the context of all forms of abuse.[33]

Importantly, while the Constitution offers a broad framework in section 28, the Children's Act expands on the rights provided for in that section. As such, it protects against maltreatment and abuse of children[34] and regulates the family environment[35] and care of children.[36] It is an all-encompassing Act with the potential to protect children from exposure to drugs or alcohol in the womb too.[37]

Judging by the definitions offered in the Children's Act, abuse and neglect do not pertain to the physical aspect alone, but extend also to the emotional and psychological aspects.[38] Child abuse is defined as "any form of harm or ill-treatment deliberately inflicted on a child", including physical abuse, sexual abuse, bullying, child labour abuse, and any actions or behaviour that can cause emotional and psychological harm to the child.[39] Neglect is seen

25 S 28(2) of the Constitution.
26 S 28(1)(*d*) of the Constitution.
27 S 39(1)(*b*) and (*c*) of the Constitution.
28 S 39(1) of the Constitution.
29 S 39(2) of the Constitution.
30 38 of 2005.
31 Preamble to the Children's Act 38 of 2005.
32 Ss 18–22 of the Children's Act.
33 Ss 1 and 7(l)(*ii*) of the Children's Act.
34 S 7(l)(*ii*) of the Children's Act.
35 S 7(k) of the Children's Act.
36 S 11 of the Children's Act.
37 The challenging question as to whether a foetus can also enjoy protection in terms of the Children's Act is discussed with reference to civil case law under heading 3 below.
38 S 1 of the Children's Act.
39 *Ibid.*

as the failure to exercise "parental responsibilities to provide for the child's basic physical, intellectual, emotional or social needs".[40] While the Children's Act does not itself define maltreatment, the World Health Organization (WHO) understands it to mean all forms of physical or emotional ill-treatment, sexual abuse, neglect or commercial exploitation.[41]

Other key provisions of the Children's Act for purposes of this article are in sections 18 to 22, which deal with parents' responsibilities and rights towards their children. Above all, a parent has a duty to care for their child,[42] which is defined as safeguarding the child's well-being, and protecting the child from physical, emotional and psychological abuse, maltreatment and neglect.[43] These parental responsibilities are relevant when considering maternal substance abuse. As mentioned earlier, FAS can cause developmental delays that hamper a child emotionally, physically and psychologically.[44] These are all factors included in the definition of abuse in the Children's Act,[45] which could potentially be extended to include children exposed to such abuse in the womb.[46] It is arguable that a mother's knowledge (or otherwise) of the adverse effects of alcohol consumption during pregnancy could be considered in determining whether alcohol-related harm to a foetus would constitute deliberate abuse of the child once the child is born alive. In this regard, Watt and colleagues[47] found that more than half of the women in their study had indeed been warned by medical staff and nurses not to use alcohol during pregnancy.

Finally, section 305 of the Children's Act proceeds not only to lay down a criminal norm,[48] but also provides a criminal sanction[49] for child neglect and abuse. According to section 305(6), anyone who is found guilty of abuse or neglect faces a fine or imprisonment of either 10 years (first offenders) or 20 years (repeat offenders).

3 THE LEGAL POSITION OF THE FOETUS: DEVELOPMENTS IN THE LAW OF DELICT

South Africa has had no criminal cases involving maternal substance abuse. However, a number of civil cases have dealt with the challenges that maternal substance abuse creates, including its potential to afford an unborn foetus legal subjectivity. As the following paragraphs will show, both *Pinchin*

40 *Ibid*.

41 Ward, Artz, Burton and Phyfer "Child Maltreatment in South Africa" (2018) https://www.saferspaces.org.za/understand/entry/child-maltreatment-in-south-africa (accessed 2021-07-01).

42 S 18(2)(*a*) of the Children's Act.

43 S 1 of the Children's Act.

44 Forray "Substance Use During Pregnancy" 2016 5 *F1000Research* 1 2–3.

45 S 1 of the Children's Act.

46 As suggested under heading 3 below.

47 Watt, Eaton, Dennis, Choi, Kalichman, Skinner and Sikkema "Alcohol Use During Pregnancy in a South African Community: Reconciling Knowledge, Norms, and Personal Experience" 2016 20(1) *Maternal and Child Health Journal* 48 48.

48 S 305(1) of the Children's Act.

49 S 305(6) and (7) of the Children's Act.

v Santam Insurance (*Pinchin*)[50] and *Road Accident Fund v Mtati* (*Mtati*)[51] extended the application of the *nasciturus* fiction[52] (normally applied only in matters of succession) to the law of delict and created the possibility of holding someone liable if a causal connection can be established between injuries suffered in the womb and harm suffered after birth. As such, both matters are relevant to the question of liability in maternal substance abuse.

3 1 *Pinchin v Santam Insurance*

Regarded as a leading case in determining the right to claim for harm done to a foetus, *Pinchin* paved the way for a delictual claim for prenatal injuries sustained by a foetus. The matter dealt with an expectant mother who, having been involved in a car accident during her pregnancy, gave birth to a child with cerebral palsy.[53] The court had to decide whether the child was entitled to a claim against the negligent driver owing to harm sustained as a foetus.[54] The matter was the first of its kind to be dealt with in terms of the law of delict, such questions having previously been regulated by the law of succession.[55]

Key in deciding *Pinchin* were the issue of when life of the unborn child starts,[56] and the connection between criminal and civil liability for harming a foetus.[57] Even though the matter was approached under the law of delict, the court relied on authority that found no distinction between a foetus sustaining injuries before birth that result in its death after birth, and a child who is injured directly after birth and subsequently dies.[58] This led the court to find that where a child is harmed in the womb and is born alive, but subsequently dies owing to harm sustained in the womb, this would constitute murder.[59]

This causal connection between harm done to a foetus in the womb and the injuries sustained by the foetus pre-birth and by the child after live birth[60] is particularly important for purposes of this study. After all, the FAS-afflicted child suffers harm while still a foetus in the womb. This causal connection could ultimately not be proved in *Pinchin*,[61] in large part due to the state of medical knowledge at the time. However, following the court's reasoning, one can argue that if it can be proved that there is a causal connection between a mother engaging in substance abuse during pregnancy, and her child's physical and psychological challenges upon live birth, this may constitute a criminal act.

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50 1963 (2) SA 254 (W).
51 2005 (6) SA 215 (SCA).
52 This common-law principle states that a child that was born alive and conceived prior to a testator's death is considered to have obtained rights from the moment it was conceived.
53 *Pinchin supra* 269.
54 *Ibid*.
55 *Ibid*.
56 *Pinchin supra* 270–271.
57 *Pinchin supra* 272.
58 *Ibid*.
59 *Ibid*.
60 *Pinchin supra* 275.
61 *Ibid*.

Perhaps even more significant in *Pinchin*, viewed from a maternal substance abuse angle, was the finding that it would be nearly inconceivable for the intentional administration of a drug that causes defects in a foetus not to raise any action.[62]

3 2 *Road Accident Fund v Mtati*

The question in *Mtati* was whether a child who had sustained brain injuries as a foetus during a collision was entitled to a claim against the Road Accident Fund (RAF).[63] The court found that the driver owed a duty of care towards the child, although still a foetus in her mother's womb at the time of the car crash.[64]

Most of the Appeal Court's examination supported the views in *Pinchin*.[65] The court stated that it would be inappropriate not to extend the *nasciturus* fiction to delictual matters in scenarios where the foetus is harmed while in the womb and is then born alive with injuries sustained because of such prenatal harm.[66] This view was based on the causal connection between injuries suffered in the womb and the damage suffered after birth[67] – a connection that was indeed successfully proved in *Mtati*, unlike in *Pinchin*.

Interestingly, the court in *Mtati* held that scenarios of a child claiming damages from their mother would be impracticable in South Africa.[68] The issue at stake in this article, however, is not whether a child afflicted by FAS should be able to claim damages from their mother, but rather whether the mother should be held criminally liable for her conduct during her pregnancy.

4 CRIMINALISING MATERNAL SUBSTANCE ABUSE

4 1 Elements of criminal liability

To prove criminal liability, six requirements need to be satisfied, namely legality, conduct (which includes causation in consequence crimes), compliance with the definition of the crime, unlawfulness, criminal capacity and culpability.[69] The State has to prove each element beyond a reasonable doubt to secure a successful prosecution. Following a brief reminder of the content of the six elements below, each is discussed with specific reference to maternal substance abuse and the two available options for its possible criminalisation.

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62 *Pinchin supra* 274.
63 *Mtati supra* 218.
64 *Mtati supra* 227.
65 As explained above; *Mtati supra* 219.
66 *Mtati supra* 219.
67 *Mtati supra* 219; *Pinchin supra* 272–275.
68 *Mtati supra* 228.
69 Snyman *Criminal Law* 7ed (2020) 28; Burchell *Principles of Criminal Law* 5ed (2016) 51.

4 1 1 Legality

Snyman defines legality as follows:[70]

> "1. An accused may not be found guilty of a crime, unless the type of conduct with which he is charged:
>
> a) has been recognised by the law as a crime (*ius acceptum* rule);
> b) in clear terms (*ius certum* rule);
> c) before the conduct took place (*ius praevium* rule);
> d) without the court having to stretch the meaning of the words and concepts in the definition to bring the particular conduct of the accused within the compass of the definition (*ius strictum* rule); and
>
> 2. After the conviction an accused may not be sentenced unless the punishment also complies with the four principles set out immediately above under 1a) to d) (*nulla poena sine lege* principle or *nulla poena* principle)."

If any of these requirements is not complied with, it will undermine the principle of legality.

4 1 2 Conduct

In criminal law, conduct is subdivided into acts and omissions,[71] thus implicating both persons who actively committed a criminal act and those who did nothing when the law expected them to act.[72] In the latter regard, there are a number of instances where there is a legal duty to act positively. These include duties that stem from a protective relationship towards another person,[73] such as that of a parent towards their child.[74]

4 1 3 Causation

Crimes are divided into formally defined and materially defined crimes. The former refers to conduct that is prohibited regardless of the result (such as perjury and the possession of drugs), while the latter refers to so-called "result crimes", which cause a specific prohibited outcome (such as murder or culpable homicide, which cause death).[75] Causation is only an element in materially defined crimes.[76]

4 1 4 Unlawfulness

This requirement means that the conduct must have contravened a law without justification for the act.[77] A number of objective factors must be taken

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70 Snyman *Criminal Law* 31.
71 Snyman *Criminal Law* 43; Burchell *Principles of Criminal Law* 77.
72 Snyman *Criminal Law* 49; Burchell *Principles of Criminal Law* 78.
73 Snyman *Criminal Law* 51.
74 Snyman *Criminal Law* 51; *S v B* 1994 (2) SACR 237 (E).
75 Snyman *Criminal Law* 66; Burchell *Principles of Criminal Law* 95.
76 *Ibid*.
77 Snyman *Criminal Law* 80; Burchell *Principles of Criminal Law* 114.

into account when determining unlawfulness, including the values of society as a whole.[78]

Various justifications may be legally raised in criminal matters, including private defence,[79] necessity,[80] consent,[81] official capacity,[82] presumed consent,[83] obedience to orders,[84] and the defence of impossibility.[85] Each justification has its own requirements to succeed. Moreover, the list of grounds of justification is not a closed one,[86] and more grounds can arise in accordance with society's needs.

4 1 5 Criminal capacity

Criminal capacity refers to the presence of certain mental abilities at the time the specified crime is committed,[87] being the ability not only to appreciate the wrongfulness of the conduct, but also to act in accordance with such appreciation of wrongfulness.

4 1 6 Culpability

Pertaining to a person's blameworthiness in committing a crime,[88] culpability can be subdivided into whether the conduct was intentional or negligent.[89]

The test for intention is subjective,[90] requiring the courts to determine an accused's state of mind at the time they committed the offence. Intention, in turn, can be further broken down into direct intention (*dolus directus*),[91] indirect intention (*dolus indirectus*)[92] and foreseeing the possibility of the result (*dolus eventualis*).[93] *Dolus eventualis* refers to a person who does not have the prohibited result as their main aim, but who, in pursuing their main aim, subjectively foresees and accepts that an unlawful act may be committed.[94]

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78 Snyman *Criminal Law* 81; Burchell *Principles of Criminal Law* 114.
79 Snyman *Criminal Law* 85; Burchell *Principles of Criminal Law* 121.
80 Snyman *Criminal Law* 95; Burchell *Principles of Criminal Law* 143.
81 Snyman *Criminal Law* 102; Burchell *Principles of Criminal Law* 208.
82 Snyman *Criminal Law* 107; Burchell *Principles of Criminal Law* 143.
83 Snyman *Criminal Law* 106; Burchell *Principles of Criminal Law* 222.
84 Snyman *Criminal Law* 112; Burchell *Principles of Criminal Law* 190.
85 Snyman *Criminal Law* 116; Burchell *Principles of Criminal Law* 187.
86 Snyman *Criminal Law* 81.
87 Snyman *Criminal Law* 137; Burchell *Principles of Criminal Law* 251.
88 Snyman *Criminal Law* 127; Burchell *Principles of Criminal Law* 341.
89 Snyman *Criminal Law* 129; Burchell *Principles of Criminal Law* 341.
90 Snyman *Criminal Law* 133; Burchell *Principles of Criminal Law* 344.
91 Where a person directs their will to committing a prohibited act, knowing that what they are doing is unlawful, and continue to act so as to achieve the prohibited goal. See Snyman *Criminal Law* 160.
92 Where a person commits a prohibited act out of necessity to obtain their goal. See Snyman *Criminal Law* 160
93 Snyman *Criminal Law* 161; Burchell *Principles of Criminal Law* 349.
94 Snyman *Criminal Law* 161; Burchell *Principles of Criminal Law* 351.

The test for negligence, on the other hand, is mainly objective.[95] The accused's conduct is compared to that of the hypothetical "reasonable person";[96] it will be found to have been negligent if:

> "The reasonable person in the same circumstances would have foreseen the possibility
>
> a) That the particular circumstances might exist;
> b) That his conduct might bring about a particular result;
> c) The reasonable person would have taken steps to guard against such a possibility; and
> d) The conduct of the person whose negligence has to be determined differed from the conduct expected of the reasonable person."[97]

It is plain to see that negligence is much easier for the State to prove than any form of intention.

4 2 Criminalising maternal substance abuse in terms of the Children's Act

4 2 1 Legality

If maternal substance abuse is to be criminalised, the principle of legality dictates that the law must recognise it as a crime.[98] The Children's Act already clearly defines abuse and neglect, and provides a sanction for those who commit these acts against children.[99] It has been suggested that the meaning of "abuse" or "neglect" under the Children's Act[100] could potentially be extended to include the harmful effects of maternal substance abuse.

In terms of the *ius strictum* requirement of the principle of legality, courts are expected to interpret the words and concepts in the definition of a crime in a strict rather than a broad sense.[101] Therefore, if not provided for clearly in the definition of "abuse" and "neglect",[102] a court may be prevented from extending these crimes to include maternal substance abuse.[103] Moreover, a strict interpretation of the meaning of "child" in terms of the Children's Act would exclude a foetus.[104] Ultimately also, a foetus does not possess legal

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95 Snyman *Criminal Law* 183; Burchell *Principles of Criminal Law* 416.
96 Snyman *Criminal Law* 187; Burchell *Principles of Criminal Law* 419.
97 Snyman *Criminal Law* 183; Burchell *Principles of Criminal Law* 419.
98 Snyman *Criminal Law* 31; Burchell *Principles of Criminal Law* 35.
99 S 305(3), (6) and (7) of the Children's Act.
100 See s 1 of the Children's Act.
101 Burchell *Principles of Criminal Law* 40.
102 Snyman *Criminal Law* 36–39; Burchell *Principles of Criminal Law* 35.
103 This was also evident in *Masiya v Director of Public Prosecutions, Pretoria* 2007 (5) SA 30 (CC) par 57, where the Constitutional Court stated that the accused could not be convicted of rape because, at the time of commission of crime, his conduct did not constitute rape, but only indecent assault. The ruling was based on the legal principle that crime cannot be created retrospectively.
104 S 1 of the Children's Act.

subjectivity, which means that it generally does not have any legal rights, nor can it be the victim of any crime.[105]

4 2 2 Conduct

As mentioned, criminalising maternal substance abuse in terms of the Children's Act could occur by including it as a form of abuse or neglect.[106] The element of conduct dictates that, to be convicted, a woman accused of maternal substance abuse will have to meet the definitional requirements of one of these crimes against her child.

Currently, the full definition of "abuse" in the Children's Act reads as follows:[107]

> "'abuse' in relation to a child, means any form of harm or ill-treatment deliberately inflicted on a child, and includes–
>
> (a) assaulting a child or inflicting any other form of deliberate injury to a child;
> (b) sexually abusing a child or allowing a child to be sexually abused;
> (c) bullying by another child;
> (d) a labour practice that exploits a child; or
> (e) *exposing or subjecting a child to behaviour that may harm the child psychologically or emotionally*."

The Children's Act[108] defines "neglect" as:

> "a failure in the exercise of parental responsibilities to provide for the child's basic physical, intellectual, emotional or social needs."

One can safely argue that maternal substance abuse constitutes abuse or neglect insofar as it affects a child's physical, mental and psychological development *once born*.[109] However, it is debatable whether the definitions of abuse and neglect are broad enough to include either exposing or subjecting a *foetus* to behaviour that may harm the child once born, or failure to exercise parental responsibilities to provide for a child's basic needs *while still a foetus*. If so, conduct comprising maternal substance abuse will indeed comply with the definitions of abuse or neglect in terms of the Children's Act.[110]

4 2 3 Causation

The above definition of neglect and specifically subsection (*e*) of the definition of abuse in the Children's Act are both materially defined crimes that require a causal connection between the abusive/negligent conduct and

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105 *Christian Lawyers Association of SA v Minister of Health* 1998 (11) BCLR 1434 (T) 1436; *S v Mshumpa* 2008 (1) SACR 126 (E) 61–62, where the court made it clear that the killing of an unborn foetus did not constitute murder.

106 Ss 1 and 7(l) of the Children's Act.

107 S 1 of the Children's Act (own italics).

108 S 1 of the Children's Act.

109 Williams and Smith 2015 *American Academy of Pediatrics* 358.

110 S 1 of the Children's Act.

the emotional and psychological harm that follows. It follows, therefore, that should maternal substance abuse be included in the definition of abuse or neglect, this will trigger an investigation into the causal link between the act of consuming alcohol by an expectant mother and the subsequent psychological and emotional harm suffered by her child.

As discussed above,[111] the causal connection rule has undergone some development in civil law. Both *Pinchin*[112] and *Mtati*[113] dealt with the causal link between harm done to a foetus in the womb and injuries sustained by the foetus pre-birth and by the child after live birth. In both instances, the court concluded that a claim for delictual damages would become possible where harm is inflicted on a foetus while in the womb, and where the child is then born alive suffering injuries as a result of such prenatal harm.[114]

Thus, if it is proved that a woman who consumed alcohol during her pregnancy gave birth to a child with FAS, the causal connection rule may be satisfied for purposes of prosecution in terms of the Children's Act.

4 2 4 Unlawfulness

To successfully prosecute a woman for maternal substance abuse (if it were to be criminalised as a form of abuse or neglect in terms of the Children's Act), there must be no justification for her conduct during her pregnancy. Like any other accused, a woman accused of maternal substance abuse would have certain grounds of justification at her disposal. For instance, a mother could potentially prove that she was forced to drink while held at gunpoint. In such a case, her conduct would have to comply with all the requirements of necessity to succeed.

4 2 5 Criminal capacity

In prosecuting maternal substance abuse as abuse or neglect under the Children's Act, the State would need to prove that the accused had the necessary criminal capacity at the time of consuming the alcohol. This would mean that, while she was drinking, she must have had the mental ability to appreciate the wrongfulness of her conduct, and to act in accordance with such appreciation of wrongfulness.[115]

4 2 6 Culpability

Based on the definition in the Children's Act,[116] abuse is regarded as a deliberate act by the offender, who must have had a deliberate intention to harm or ill-treat the child. Therefore, for culpability to be present, the fault required is intention and not negligence.[117] Should maternal substance

111 See heading 3.
112 *Supra* 275.
113 *Supra* 7–8.
114 *Pinchin supra* 275; *Mtati supra* 7–8.
115 Snyman *Criminal Law* 137; Burchell *Principles of Criminal Law* 251.
116 S 1 of the Children's Act.
117 Snyman *Criminal Law* 129; Burchell *Principles of Criminal Law* 341.

abuse be prosecuted as abuse in terms of the Children's Act, a mother would only be guilty of abuse if it is proved that she intended her alcohol consumption during pregnancy to result in her child being born alive with FAS. Consequently, an expectant mother who consumes alcohol without intending her baby to be born alive with FAS, or without at least foreseeing and accepting the harmful consequences of her actions (*dolus eventualis*), cannot be found guilty of abuse.

On the other hand, neglect is defined as the failure to exercise parental responsibilities to provide for a child's needs.[118] In this instance, the fault required is negligence, which is determined based on the "reasonable person" test. This means that a conviction of neglect in the above scenario would be possible if the State can prove that a "reasonable mother" would not have consumed alcohol during pregnancy in the way that the woman accused of maternal substance abuse did.

4 3 Creating a new statutory crime for maternal substance abuse

If prosecution in terms of the Children's Act is not possible, the alternative way to criminalise maternal substance abuse would be to create a new statutory offence.

Again, the State would need to prove the presence of all six general elements of criminal liability to secure a conviction of such a newly defined crime.

4 3 1 Legality, conduct, unlawfulness and criminal capacity

In order to comply with the principle of legality, the legislature would have to clearly define the new crime in a statutory provision. Such new provision would need to contain both a criminal norm, stipulating the prohibited conduct, as well as a criminal sanction for contravention of the provision.

Regarding the conduct element, it would be best for the conduct to be criminalised in the form of a prohibition clause that unequivocally prohibits "the consumption of alcohol while pregnant".

In addition, the same rules regarding unlawfulness that apply to all other crimes would apply to the newly created statutory offence of maternal substance abuse. This implies that if a mother prosecuted for this crime manages to raise a successful ground of justification, it would render her conduct lawful.

Likewise, the State would need to prove that the mother had criminal capacity at the time of committing the offence of maternal substance abuse – in other words, that she was able to understand the wrongfulness of alcohol consumption while pregnant, and had the mental ability to act in accordance with such understanding.

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[118] S 1 of the Children's Act.

4 3 2 Causation

When considering the wording for a separate statutory crime of maternal substance abuse, the legislature would need to decide whether to create it as a formally or materially defined crime.

If a formally defined crime, the conduct of deliberate or negligent drinking during pregnancy would be sufficient for a conviction. However, should the legislature opt to create a materially defined crime, the State would bear the onus of proving that the child's physical or psychological harm was indeed caused by the mother's substance abuse during pregnancy. In this regard, the *Mtati* and *Pinchin* rulings, although dealing with the law of delict, have paved the way for this causal link to be proved.

4 3 3 Culpability

In terms of the fault or culpability element, the legislature would need to determine whether fault in the form of intention or negligence is required.

As mentioned above,[119] the current offence of abuse in terms of the Children's Act requires fault in the form of intention ("deliberately inflicted"), while neglect requires negligence ("a failure"). Considering that negligence is far easier to prove, it may be wise to stipulate that a mother who *intentionally or negligently* consumes alcohol while pregnant would be guilty of the newly created crime of maternal substance abuse.

To test for negligence, the accused's actions will be compared to those of a "reasonable expectant mother". In this way, a woman who consumed alcohol during her pregnancy, thereby committing maternal substance abuse, will be found to have acted negligently in her act of consuming alcohol if it is clear that a reasonable woman would have acted differently or taken preventative steps.

4 3 4 Potential phrasing

Based on the above, a new, materially defined offence may be worded as follows:

> "The deliberate or negligent consumption of alcohol, or any other, similarly harmful substance, by an expectant mother, knowing that she is pregnant and knowing the effect that the consumption may have on her unborn child, and which causes physical, psychological or emotional harm to her child once born, is a crime and is punishable with X, Y or Z."

Should the legislature choose to create a formally defined crime, this could read as follows:

> "The deliberate or negligent consumption of alcohol or any other, similarly harmful substance by an expectant mother, knowing that she is pregnant and knowing the effect that the consumption may have on her unborn child, is a crime and is punishable with X, Y or Z."

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[119] See discussion under heading 4 2 6.

5 "PUNISHABLE WITH X, Y OR Z": SENTENCING OPTIONS IN SOUTH AFRICA

Any inquiry into the feasibility of criminalising maternal substance abuse also needs to explore the available sentencing options should the conduct indeed be criminalised.

5 1 Sentences under the Criminal Procedure Act

The Criminal Procedure Act[120] allows for various sentences to be imposed, including imprisonment,[121] a fine,[122] committal "to any institution established by law"[123] and correctional supervision.[124]

Imprisonment is considered non-optimal for perpetrators of maternal substance abuse, as the resultant separation could cause post-traumatic stress and anxiety disorders in children, even where the mother is considered a bad role model.[125] In addition, as many children are hesitant to have any contact with their mothers after imprisonment,[126] the family structure suffers irreparable harm, which goes against the aim of the Children's Act to preserve and strengthen familial relationships.[127] It is also worth considering that many women who abuse alcohol during pregnancy face issues linked to their backgrounds, including mental illness, poverty or poor education.[128] Therefore, imprisoning these vulnerable members of our society would merely serve to punish them, without remedying their issues.

Imposing a fine would be equally inappropriate, as it offers the offender no rehabilitation or reintegration assistance.

A more workable alternative is committing these convicted mothers to an institution, established by law, which includes a treatment centre for alcohol and drug abuse.[129] The Prevention of and Treatment for Substance Abuse Act[130] regulates referrals to a treatment centre arising from a conviction in court, stipulating in section 36(1):

> "A court convicting a person of any offence may in addition or in lieu of any sentence in respect of such offence order that such person be committed to a treatment centre if the court is satisfied that such person is a person

120 51 of 1977.
121 S 276(1)(*b*) of the Criminal Procedure Act.
122 S 276(1)(*f*) of the Criminal Procedure Act.
123 S 276(1)(*e*) of the Criminal Procedure Act.
124 S 276(1)(*h*) of the Criminal Procedure Act.
125 Geldenhuys "When Mommy Goes to Prison" 2015 108(8) *Servamus* 24 24.
126 Geldenhuys 2015 *Servamus* 26.
127 S 2(*a*) of the Children's Act.
128 Jansen van Vuuren and Learmonth "Spirit(ed) Away: Preventing Foetal Alcohol Syndrome With Motivational Interviewing and Cognitive Behavioural Therapy" 2013 55(1) *South African Family Practice* 59 60–61.
129 Ss 276(1)(*e*) and 296 of the Criminal Procedure Act.
130 70 of 2008.

> contemplated in section 33(1)[131] and such order, for the purposes of this Act, must be regarded as having been made in terms of section 35."[132]

The purpose of treatment centres is to rehabilitate and help reintegrate a substance abuser with society.[133] Therefore, it seems a feasible sentence for a woman convicted of maternal substance abuse,[134] affording her a chance to rehabilitate while maintaining ties with her children.

Another sensible option would be correctional supervision, where the offender is put under correctional officers' control and the sentence is dependent on certain conditions.[135] This option would enable the offender to serve her sentence outside prison, undergo substance abuse treatment and receive further guidance on how to be a law-abiding citizen.

5 2 The diversion option

Diversion is the process of moving an accused *child* away from formal court procedures in a criminal matter[136] in order to find a constructive and more positive solution.[137] The Child Justice Act[138] defines a child as:[139]

> "any person under the age of 18 years and, in certain circumstances, means a person who is 18 years or older but under the age of 21 years whose matter is dealt with in terms of section 4(2)."

Section 4(2), in turn, mandates the Director of Public Prosecutions to, among other options, consider for diversion those 18 years or older, but below 21. Therefore, this could serve as an alternative in dealing with women who abuse alcohol during pregnancy while under the age of 21.

The main purpose of a diversion order is to find a solution for child offenders without their receiving a criminal record. Other objectives include encouraging accountability for the harm caused, promoting reintegration with the family and community, preventing stigmatisation, reducing the chance of re-offending, and promoting a sense of dignity and self-worth in the offender.[140]

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131 Meaning "a person who is dependent on substances and – (*a*) is a danger to himself or herself or to the immediate environment or causes a major public health risk; (*b*) in any other manner does harm to his or her own welfare or the welfare of his or her family and others; or (*c*) commits a criminal act to sustain his or her dependence on substances".

132 Which governs the committal of persons to treatment centres after an inquiry.

133 S 2(*d*) of the Prevention of and Treatment for Substance Abuse Act.

134 S 36(1) of the Prevention of and Treatment for Substance Abuse Act.

135 Department of Correctional Services "Community Corrections" (2019) www.dcs.gov.za/?page_id=317 (accessed 2019-10-10).

136 S 1 of the Child Justice Act 75 of 2008.

137 Western Cape Government "What Is Diversion?" (2019) https://www.westerncape.gov.za/general-publication/what-diversion (accessed 2021-11-09).

138 75 of 2008.

139 S 1 of the Child Justice Act.

140 S 51 of the Child Justice Act.

Interestingly, a recent trend is also to provide diversion as an "alternative sentencing option" for adult offenders who commit minor offences.[141] This is normally aimed at first-time offenders who admit guilt, with the purpose of reintegrating them into society as law-abiding citizens,[142] and may be an option to consider should maternal substance abuse be criminalised in South Africa. Diversion of adult offenders who have committed minor offences is done with the consent of the Director of Public Prosecutions.[143]

6 CURRENT LEGAL POSITION ON MATERNAL SUBSTANCE ABUSE IN THE UNITED STATES

While it is conceded that a comparative look at other Commonwealth legal systems would have been more appropriate than a comparison with the United States, no case of maternal substance abuse or its criminalisation has been documented in Commonwealth systems to date. The current trend in some American states, however, is to prosecute women who are proved to have harmed their children by consuming alcohol and/or taking drugs during pregnancy.[144] The paragraphs below offer a brief outline of the law in two of these states, as well as a ground-breaking federal statute.

6 1 Federal law: The Unborn Victims of Violence Act of 2004[145]

The Unborn Victims of Violence Act, which took effect on 1 April 2004, treats crimes perpetrated against a woman and against her unborn child as separate offences.[146] The law came about in response to a public outcry after a man murdered his pregnant wife.[147] The accused was not convicted of any crime regarding the death of the foetus.[148]

Both subsections 1841(a)(*1*) and 1841(2)(*A*) state that a person who causes bodily harm or death to a foetus will be guilty of an offence separate to any offence relating to harming the mother, which separate offence will be subject to the same punishment as would be apply to harm done to the mother.

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141 Western Cape Government "Diversion Programmes for Adults in Conflict With the Law" (2019) https://www.westerncape.gov.za/service/diversion-programmes-adults-conflict-law (accessed 2021-12-14).

142 Schüler Heerschop Pienaar "Diversion: The Role of Diversion in South African Law" (2019) http://www.shplaw.co.za/index.php/blog/22-diversion-the-role-of-diversion-in-south-african-law (accessed 2021-12-14).

143 Schüler Heerschop Pienaar http://www.shplaw.co.za/index.php/blog/22-diversion-the-role-of-diversion-in-south-african-law.

144 Boudreaux and Thompson "Maternal-Fetal Rights and Substance Abuse: Gestation Without Representation" 2015 43(2) *Journal of the American Academy of Psychiatry and the Law* 137 137–138.

145 Pub.L. 108–212.

146 Wilmering "Federalism, the Commerce Clause and the Constitutionality of the Unborn Victims of Violence Act of 2004" 2005 80(4) *Indiana Law Journal* 1189 1190.

147 Boudreaux and Thompson 2015 *Journal of the American Academy of Psychiatry and the Law* 139.

148 Similar to the South African matter of *S v Mshumpa* 2008 (1) SACR 126 (E) 126.

The important contribution of this statute is that it essentially provides for crimes against a foetus, an area of the law that has been hotly contested.[149] South Africa, in turn, does not recognise the unborn child as a separate being from its mother, as a foetus cannot be the bearer of the rights and duties afforded to natural persons.[150] Therefore, providing for crimes against unborn children in South African law would require the definition of a person to be extended to include an unborn child. Such a step would be inadvisable, as it would have disastrous consequences for abortion laws and women's rights.[151] However, the United States statute does point to the possibility of criminally prosecuting South African mothers whose children are born alive (and thus enjoy legal subjectivity) and present with the adverse effects of maternal substance abuse.

The Unborn Victims of Violence Act has to date not been directly applied to instances of maternal substance abuse. However, as the following sections will show, the states that have incorporated the federal legislation into their own codes have extended the aims of the Unborn Victims of Violence Act to provide for the prosecution of expectant mothers who abuse alcohol.[152]

6 2 State law: Alabama

6 2 1 Alabama's chemical endangerment law[153]

Alabama's Code[154] includes the 2006 law entitled Chemical Endangerment of a Child, more commonly known as the chemical endangerment law.

In terms of this law, a child is defined as anyone below the age of 18.[155] On the issue of exposing a child to an environment where controlled substances are produced or distributed,[156] the law states:[157]

> "(a) A responsible person commits the crime of chemical endangerment of exposing a child to an environment in which he or she does any of the following:
>
> 1. Knowingly, recklessly, or intentionally causes or permits a child to be exposed to, to ingest or inhale, or to have contact with a controlled substance, chemical substance, or drug paraphernalia as defined in Section 13A-12-260. A violation under this subdivision is a Class C felony.
> 2. Violates subdivision (1) and a child suffers serious physical injury by exposure to, ingestion of, inhalation of, or contact with a controlled

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149 Wilmering 2005 *Indiana Law Journal* 1201.

150 Mankga "Nasciturus Fiction and the Principles of the Law of Delict Considered in the Light of a Recent Judgement" 2008 48(2) *Codicillus* 50 50.

151 *Christian Lawyers Association of SA v Minister of Health* 1998 (11) BCLR 1434 (T) 1439.

152 Boudreaux and Thompson 2015 *Journal of the American Academy of Psychiatry and the Law* 139.

153 Chemical Endangerment of Exposing a Child to an Environment in Which Controlled Substances Are Produced or Distributed, Alabama Code S 26-15-3.2.

154 Code of Alabama 1975.

155 S 26(1) of the Alabama Code.

156 *Ibid*.

157 Ss 26(15)(1), (2) and (*3*) of the Alabama Code.

substance, chemical substance, or drug paraphernalia. A violation under this subdivision is a Class B felony.

3. Violates subdivision (1) and the exposure, ingestion, inhalation, or contact results in the death of the child. A violation under this subdivision is a Class A felony.

(b) The court shall impose punishment pursuant to this section rather than imposing punishment authorized under any other provision of law, unless another provision of law provides for a greater penalty or a longer term of imprisonment.

(c) It is an affirmative defense to a violation of this section that the controlled substance was provided by lawful prescription for the child, and that it was administered to the child in accordance with the prescription instructions provided with the controlled substance."

Originally, the chemical endangerment law dealt with the endangerment of children once born. However, in recent times, Alabama has extended its application to include unborn children exposed to illicit substances while still in the womb, as is evident from the trend of criminalising maternal substance abuse in that state.[158] This is illustrated in the following discussion of *Hicks v State of Alabama* (*Hicks*).[159]

6 2 2 Hicks v State of Alabama

The *Hicks* matter involved a mother who was convicted in terms of Alabama's chemical endangerment law of the chemical endangerment of her child while still a foetus. Having pleaded guilty, the mother was sentenced to three years' imprisonment, which was suspended, and she ultimately spent a year on supervised probation.[160] In the year of her probation, she appealed to the Supreme Court of Alabama.[161]

Hicks was charged with the chemical endangerment of her child after she was found to have ingested cocaine during her pregnancy.[162] Upon birth, her child had traces of cocaine in his system.[163] The issue in question was whether or not Hicks's cocaine use during her pregnancy constituted the chemical endangerment of a *child*, as she maintained that the definition of a child did not extend to a foetus.[164]

The case was brought on appeal on one aspect only, namely whether Hicks's conduct constituted chemical endangerment.[165] In arguing on Hicks's behalf, counsel made it clear that the legislature had not intended to extend the meaning of child to an unborn foetus, as this would constitute bad public policy.[166] Yet the court of appeal ultimately found that a viable foetus was

158 Boudreaux and Thompson 2015 *Journal of the American Academy of Psychiatry and the Law* 139; Calhoun 2012 "The Criminalization of Bad Mothers" (29 April 2012) https://www.nytimes.com/2012/04/29/magazine/the-criminalization-of-bad-mothers.html (accessed 2021-10-14).

159 *Hicks v State of Alabama* 2014 153 So.3d 53.

160 *Hicks supra* 56.

161 *Hicks supra* 55.

162 *Hicks supra* 56.

163 *Ibid*.

164 *Hicks supra* 55.

165 *Hicks supra* 57.

166 *Ibid*.

included in the definition of a child,[167] insisting that children are to be offered protection from their earliest stages, which included protecting a viable foetus from chemical endangerment.[168]

While the notion of extending protection to a foetus is still foreign in South African law, the implications of Alabama's chemical endangerment law and the *Hicks* case point to an important shift in perspective, namely that exposing a foetus to substances in the womb can in fact be regarded as a crime[169] once the child is born alive.

6 3 State law: South Carolina

6 3 1 Applicable legislation

South Carolina provides for children's rights in terms of its Children's Code;[170] a child is defined there as a person below the age of 18.[171] Child abuse or neglect is defined as follows:[172]

> "'Child abuse or neglect' or 'harm' occurs when
>
> (a) the parent, guardian, or other person responsible for the child's welfare:
>
> *(i) inflicts or allows to be inflicted upon the child physical or mental injury or engages in acts or omissions which present a substantial risk of physical or mental injury to the child*,[173] including injuries sustained as a result of excessive corporal punishment, but excluding corporal punishment or physical discipline which:
>
> (A) is administered by a parent or person in loco parentis;
> (B) is perpetrated for the sole purpose of restraining or correcting the child;
> (C) is reasonable in manner and moderate in degree;
> (D) has not brought about permanent or lasting damage to the child; and
> (E) is not reckless or grossly negligent behaviour by the parents."

The Code further prohibits unlawful conduct towards a child, stating the following:[174]

> "(A) It is unlawful for a person who has charge or custody of a child, or who is the parent or guardian of a child, or who is responsible for the welfare of a child as defined in Section 63-7-20 to:
>
> (1) place the child at unreasonable risk of harm affecting the child's life, physical or mental health, or safety;

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167 *Hicks supra* 59–60.
168 *Hicks supra* 66.
169 Prinsloo and Ovens 2015 *Child Abuse Research: A South African Journal* 158.
170 2020 South Carolina Code of Laws Title 63 South Carolina Children's Code.
171 S 63-7-20(5) of the South Carolina Children's Code.
172 S 63-7-20(6) of the South Carolina Children's Code.
173 Own italics.
174 S 63-5-70 of the South Carolina Children's Code.

(2) do or cause to be done unlawfully or maliciously any bodily harm to the child so that the life or health of the child is endangered or likely to be endangered; or

(3) wilfully abandon the child.

(B) A person who violates subsection (A) is guilty of a felony and for each offense, upon conviction, must be fined in the discretion of the court or imprisoned not more than ten years, or both."

6 3 2 Whitner v State of South Carolina[175]

In the *Whitner* case, a woman pleaded guilty of committing child neglect,[176] after she had used crack cocaine in the third trimester of her pregnancy.[177] Upon birth, her child tested positive for the drug and Whitner was convicted and sentenced to eight years' imprisonment.[178]

The main issue raised on appeal was whether, in determining child neglect, a child included a viable foetus.[179] The Supreme Court of South Carolina answered this question by examining the definition of a child in the Children's Code, namely anyone "under the age of 18".[180] This, the court held, provided sufficient scope to extend the meaning of a child to a viable foetus.[181] The court further based this finding on the fact that South Carolina did in fact grant viable foetuses certain rights and privileges.[182] These rights and privileges, and the scope of child neglect, included protecting viable foetuses from maternal substance abuse during pregnancy.[183]

Whitner's appeal was denied, and she was prosecuted for child neglect instead of a separate crime of maternal substance abuse.[184]

7 CONCLUSION AND RECOMMENDATIONS

Dealing with the issue of maternal substance abuse going forward, South Africa has two options – either to maintain the status quo or follow the example of the American states above and criminalise maternal substance abuse.

Maintaining the status quo will merely result in a further increase in the already high rate of FAS in the country. Moreover, the decision in *Minister of Justice and Constitutional Development v Prince*[185] may exacerbate matters, as the legalised private use of marijuana during pregnancy has not yet been

175 *Whitner v State* 328 S.C. 1, 492 S.E.2d 777 (1997).

176 S 63-5-70 of the South Carolina Children's Code.

177 *Whitner supra* 778–779.

178 *Whitner supra* 779.

179 *Whitner supra* 780–781.

180 *Whitner supra* 779.

181 *Whitner supra* 779–781.

182 *Whitner supra* 779.

183 *Ibid*.

184 *Whitner supra* 786.

185 [2018] ZACC 30. The court found it unconstitutional for the State to criminalise the possession, use or cultivation of marijuana (or "cannabis") by adults for personal consumption in private.

regulated.[186] In our view, this renders the criminalisation of maternal substance abuse in South Africa the most feasible option.

South African children are afforded protection against abuse and neglect in terms of the Children's Act.[187] Despite a current lack of local case law to support this, the prosecution of mothers who abuse substances while pregnant and then give birth to children suffering physical or psychological harm as a result of the abuse could potentially occur within the ambit of the Act's protection against abuse and neglect. Following this route, however, one would be up against certain challenges associated with the principle of legality.[188]

Alternatively, the legislature could opt for a new statutory offence to address the issue of maternal substance abuse independently. In this regard, criminalising maternal substance abuse as a materially defined crime[189] would be the best route to follow so as to restrict prosecution to instances where maternal substance abuse does in fact result in FAS-like effects in a child upon birth.

Of course, once criminalised, the newly created statutory offence of maternal substance abuse would require a suitable sentence. Considering that substance abuse during pregnancy is often linked to the mother's circumstances, including mental illness, poverty or a lack of proper education,[190] a prison sentence does not seem appropriate. Exploring the alternative sentencing options provided for in South Africa, it is concluded that referral to a rehabilitation centre or diversion would be the most suitable sanction. Diversion offers the added benefit that the maternal substance abuser is afforded access to suitable treatment and education programmes and does not end up with a criminal record.

In conjunction with South Africa's current substance abuse laws, organisations such as the non-governmental organisation FASfacts, which was established in 2002, could prove extremely valuable in providing alternatives to imprisonment for women who commit maternal substance abuse. The organisation educates the public, with a specific focus on rural and farming communities, on what FAS is and the dangers of alcohol consumption while pregnant and breastfeeding.[191] The FASfacts programme is threefold, comprising (a) training of community mentors to support pregnant women, and so prevent them from drinking while pregnant, (b) presenting day-long awareness sessions on domestic violence and substance abuse, and (c) providing counselling to community members at risk of or affected by substance abuse.[192] The programme has helped lower

186 *Minister of Justice and Constitutional Development v Prince supra* par 129.

187 S 1 of the Children's Act.

188 See discussion under heading 4 2 1.

189 See discussion under heading 4 3 4.

190 Jansen van Vuuren and Learmonth 2013 *South African Family Practice* 60–61.

191 Western Cape Government "Foetal Alcohol Syndrome Awareness Programme" (2019) https://www.westerncape.gov.za/general-publication/foetal-alcohol-syndrome-awareness-programme (accessed 2021-11-08).

192 Western Cape Government https://www.westerncape.gov.za/general-publication/foetal-alcohol-syndrome-awareness-programme.

FAS rates in the Western Cape by equipping rural communities most affected by FAS with the tools to battle this highly preventable problem.[193]

Developments in American federal and state law bode well for a decision to criminalise maternal substance abuse in South Africa as well. As illustrated by the case law discussed in this article,[194] maternal substance abusers in the United States may be prosecuted for a specific statutory offence[195] or general child neglect.[196] However, while imprisonment was imposed in the sample cases from the United States, the overcrowded conditions in South Africa's prisons coupled with the largely socio-economic causes of maternal substance abuse in our local context justify the alternative sentencing options proposed above. In addition, the courts in the United States seem to have readily accepted the view that foetuses should be afforded the same protection as children. As this would stir up a hornet's nest in terms of the abortion debate and the legal status of a foetus in South Africa, following the American example in this respect is not recommended. However, this challenge can be overcome by criminalising maternal substance abuse as suggested above – that is, by providing for prosecution only where the affected child is born alive and presents with FAS-like symptoms.

Criminalising maternal substance abuse may cause expectant mothers to think twice before they use alcohol or other harmful substances during pregnancy. Although this proposed approach will undoubtedly have its critics and challenges, it remains a much better option than turning a blind eye to this growing problem.

193 *Ibid*.

194 See discussion under headings 6 2 2 and 6 3 2.

195 *Hicks supra*. Also see *TW v Calhoun County Department of Human Resources* 206 (361) 2016.

196 *Whitner supra*.

AN EMPLOYER'S ABILITY TO SUBSTITUTE A DISCIPLINARY ENQUIRY SANCTION – PART 1

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SUMMARY

It is common practice for employers to appoint an external chairperson to preside over a disciplinary enquiry which has been convened for purposes of investigating allegations of misconduct against an employee. The external chairperson is ordinarily mandated to decide on guilt, and to the extent that there is a guilty finding, to recommend or impose the appropriate disciplinary sanction.

Employers often tend to have expectations that the external chairperson will, after having found the employee guilty of the alleged misconduct, impose a sanction of dismissal depending on the gravity of the alleged misconduct. The expected outcome of dismissal, however, does not always occur. An external chairperson may impose a sanction short of dismissal after considering an employee's mitigating circumstances. An employer's dissatisfaction with the disciplinary sanction may result in the employer instituting an internal review process to review the external chairperson's disciplinary sanction, whilst in other cases, employers may resort to unilaterally substituting the external chairperson's disciplinary sanction with a sanction of dismissal. The employer's disciplinary code and procedure or the collective agreement regulating the disciplinary procedure in the workplace may or may not make provision for the substitution of the disciplinary sanction. In circumstances where there is no provision for the substitution of the disciplinary sanction, the employer's conduct of substituting the disciplinary sanction raises questions regarding the applicability of the "double jeopardy" principle which means, in an employment context, that an employee should not be subjected to more than one disciplinary enquiry on disciplinary charges arising from the same set of facts.

It is, however, a well-established principle that employers who are classified as organs of state can review their own decisions. This includes decisions of

chairpersons who are appointed to preside over disciplinary enquiries and further decide on the appropriate disciplinary sanction. In the latter case, and in circumstances where the organ of state is dissatisfied with the disciplinary sanction, it may institute review proceedings in the Labour Court to review and set aside the chairperson's decision. This recourse is, however, only available to organs of state and not private-sector employers.

This article seeks to determine whether it is permissible for an employer to substitute an external chairperson's disciplinary sanction, and, if so, the circumstances under which an employer is permitted to do so and the procedure which should be followed in such an instance. The article is written in two parts – Part 1 covers the employer's ability to revisit a disciplinary sanction and Part 2 concentrates on the conflicting judgments involving the South African Revenue Service's conduct of substituting disciplinary sanctions, alternative avenues to the unilateral substitution of a disciplinary sanction and the conclusion.

1 INTRODUCTION

It is well-established that an employer has the right to maintain discipline and order in the workplace. This right encompasses the institution of disciplinary measures if it comes to the employer's attention that an employee has allegedly committed misconduct. The rules of natural justice and fairness dictate that before an employee is found guilty of any misconduct, the employee should be provided with an opportunity to be heard in the form of a disciplinary enquiry.

The concept of a right to a fair hearing is encapsulated in the Code of Good Practice: Dismissal[1] (Code of Good Practice), which requires that an investigation be conducted to determine whether there are grounds for dismissal.[2]

The Code of Good Practice requires that the employee should be provided with an opportunity to state a case in response to the allegations.[3] After the enquiry, the employer should communicate the decision taken and preferably furnish the employee with written communication of that decision.[4] If the decision is to dismiss the employee, the employee should be reminded of his or her right to refer any alleged unfair dismissal dispute to the Commission for Conciliation, Mediation and Arbitration (CCMA) or relevant bargaining council with jurisdiction, or in terms of any procedure established in terms of an existing collective agreement.

The conducting of the investigation into the allegations of misconduct against the employee can be a formal or informal process. A formal process entails conducting a physical disciplinary enquiry where both the employer and employee will respectively call their witnesses to prove or disprove the allegations, as the case may be. In a formal process, a chairperson is appointed internally or externally to evaluate the evidence and decide on guilt or otherwise and further make a recommendation or final finding on the disciplinary sanction to be imposed. On the other hand, an informal

1 8 of 66 of 1995.
2 Item 4(1) of 8 of 66 of 1995.
3 *Ibid.*
4 *Ibid.*

process normally entails the employer requiring an employee to provide oral or written representations in response to the allegations of misconduct, whereafter the employer then considers the representations and decides on the employee's guilt and the appropriate disciplinary sanction, where applicable.

In practice, employers often appoint external chairpersons to preside over disciplinary enquiries about alleged misconduct in respect of their employees. The appointment of an external chairperson to conduct the disciplinary enquiry is, in most instances, determined by an employer's prerogative to make such an appointment. Brassey defines an employer's managerial prerogative as follows:

> "The law gives the employer the rights to manage the enterprise. He can tell the employee what they must and not do, and he can say what will happen to them if they disobey. He must, of course, keep within the contract, the collective agreement and the legal rules that govern him. He must now, also make sure his instructions do not fall foul of [the] unfair labour practice jurisdiction."[5]

However, in other instances, the appointment of an external chairperson may be required in terms of a disciplinary code and procedure, collective agreement, or the contract of employment. In such instances, the external chairperson is provided with certain powers and functions concerning the conducting of the disciplinary enquiry.

In instances where the employer exercises its prerogative to appoint an external chairperson, the employer may require the external chairperson to conduct the disciplinary enquiry and decide the guilt of the employee or otherwise, and if there is a guilty finding make a recommendation to the employer on the appropriate disciplinary sanction, which should be imposed on the employee. Alternatively, the employer may delegate its authority to the external chairperson to impose a final disciplinary sanction on the employee, which sanction the employer would then be bound to implement.

In other instances, there may be a collective agreement in the workplace that regulates, amongst other things, the disciplinary code and procedure. The collective agreement may require the appointment of an external disciplinary chairperson to conduct a disciplinary enquiry and further require him or her, upon reaching a finding of guilt, to make a recommendation on the appropriate disciplinary sanction to the employer or delegate the authority to the external chairperson to impose the final disciplinary sanction, which is to be meted out against the employee. Where there is a collective agreement, trade unions are more likely to negotiate for terms that require the external chairperson to make a final determination on the appropriate sanction, because they would likely want to avoid a situation that would permit an employer to interfere with a sanction.

Practically and in circumstances where an external chairperson has been appointed, it often occurs that an employer may be satisfied with an external chairperson's determination on the guilt of an employee but may seek to overturn the chairperson's recommendation on the appropriate sanction or

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[5] Brassey *The New Labour Law: Strikes, Dismissals and the Unfair Labour Practice in South African Law* (1987) 3.

the final sanction which has been imposed. The overturning of a disciplinary sanction normally occurs where the external chairperson recommends or imposes a disciplinary sanction which is short of dismissal, for example, in the form of a reprimand or a final written warning. In such a case, employers tend to follow a process to substitute the disciplinary sanction with a harsher sanction, which normally amounts to a dismissal. Such a process may or may not be catered for in the disciplinary code and procedure, collective agreement, or the contract of employment, depending on the circumstances.

An employer's conduct of substituting a disciplinary sanction often raises questions regarding the employer's powers to do so in circumstances where the employer has delegated its authority to discipline to an external chairperson, who is essentially clothed as the employer. Where an employer delegates its authority to an external chairperson to not only decide on guilt but to also further decide on the final disciplinary sanction to be imposed, it is generally understood that the external chairperson imposes the sanction as if it were being directly imposed by the employer. In such a case, the external chairperson is generally understood to be authorised as the final arbiter and he or she presides over the disciplinary enquiry with the *persona* of the employer and his or her decision is therefore final and binding on the employer.

The ramifications are distinguishable in instances where the employer mandates and/or delegates an external chairperson to decide on the employee's guilt or otherwise, and if there is a finding of guilt, to recommend an appropriate disciplinary sanction, which is to be imposed by the employer. The recommendation is not final and binding on the employer, which by implication means that the recommendation could be accepted or rejected by the employer. The rejection of an external chairperson's recommendation often occurs in circumstances where the employer is of the view that the external chairperson has recommended a lenient disciplinary sanction in light of the severity of an employee's misconduct or where the disciplinary sanctions imposed in the past for the same or similar transgressions are heavier than the disciplinary sanction recommended by the external chairperson.

In circumstances where an employer elects to intervene and substitute the disciplinary sanction, the employer is likely to impose a harsher disciplinary sanction, which is a sanction of dismissal. Such conduct by the employer raises questions about the substantive and/or procedural fairness of the employee's dismissal; specifically, whether it is fair for an employer to interfere when an externally appointed chairperson has already decided upon a disciplinary sanction and if so, what procedure should be followed.

2 THE EMPLOYER'S RESPONSIBILITY TO MAINTAIN DISCIPLINE AND ORDER IN THE WORKPLACE AND AN EMPLOYEE'S RIGHT AGAINST UNFAIR DISMISSAL

2 1 Challenging the unfairness of dismissals

As a general rule, employees who wish to challenge the fairness of their dismissal should pursue available internal remedies before instituting a claim under the Labour Relations Act (LRA).[6] In the absence of internal remedies, an employee may request the CCMA or relevant bargaining council with jurisdiction to conciliate the dispute within thirty (30) days of the date of the dismissal or the employer's final decision to dismiss or uphold the dismissal.[7]

The fairness of a dismissal for purposes of section 188(1) of the LRA must be construed through the lens of the Code of Good Practice. The Code of Good Practice consists of a set of guidelines rather than rules – which are, in its own words, "intentionally general" – that must be taken into consideration when assessing whether a dismissal is fair.[8] The effect is to create a presumption that the Code of Good Practice should be followed rather than there being a duty to do so.[9] Any action by an employer which is manifestly in conflict with the provisions of the Code of Good Practice might, in the absence of good cause, be regarded as a failure by the employer to take into account the provisions of the Code of Good Practice.[10]

It follows that the Code of Good Practice cannot be afforded an interpretation that is in conflict with the LRA and in the event of such conflict, the LRA must prevail.[11] The Code of Good Practice must not, however, be construed in a manner that supersedes disciplinary codes and procedures that are contained in collective agreements or individual contracts of employment.[12] Accordingly, the Code of Good Practice applies where there are no agreed procedures in place.

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6 Grogan *Workplace Law* 171. If the employee is covered by a collective agreement which requires private arbitration, the collective agreement is binding in terms of s 24 of the LRA. The arbitration award will be subject to review in terms of s 33 of the Arbitration Act 42 of 1965 read with s 157(3) of the LRA. It is also important to note that in terms of s 147(6A) of the LRA, the CCMA is empowered to assume jurisdiction in certain cases where it has been agreed that a dispute must be resolved through private arbitration.

7 S 191 of 66 of 1995.

8 Du Toit, Godfrey, Cooper, Giles, Cohen, Conradie and Steenkamp *Labour Relations Law: A Comprehensive Guide* 6ed (2015) 441.

9 *Highveld District Council v CCMA* [2002] 12 BLLR 1158 (LAC) 16.

10 Du Toit *et al Labour Relations Law: A Comprehensive Guide* 6ed (2015) 441.

11 *Engen Petroleum Limited v CCMA* [2007] 8 BLLR 707 (LAC) 82.

12 In *Denel (Pty) Ltd v Vorster* [2005] 4 BLLR 313 (SCA), the court held that an employer's constitutional right to fair labour practices did not justify departure from a disciplinary procedure incorporated in a contract of employment and could constitute breach of contract. See also *Mangope v SA Football Association* [2011] 4 BLLR 391 (LC), where the court found the termination of the employment unlawful since the employer had failed to follow the procedures stipulated in the employment contract.

2 2 Substantive fairness in dismissals for misconduct

If an employer concludes that an employee's breach of a workplace rule or standard justifies dismissal, the question to be determined by the arbitrator or court is "whether [the] dismissal was an appropriate sanction for the contravention of the rule or standard".[13] The question of the approach to be followed for purposes of an enquiry into the substantive fairness of a dismissal is not novel and is well-established. The determination of whether dismissal is an appropriate sanction involves a consideration of the gravity of the infringement, the employee's circumstances, the nature of the job, the circumstances of the infringement, the consistent application of discipline, and possibly other applicable factors.[14]

2 2 1 The corrective discipline approach

The Code of Good Practice endorses a "corrective" or "progressive" approach to discipline. This approach involves behaviour modification in the workplace through a system of graduated disciplinary measures, such as counselling and warnings.[15] The Code of Good Practice promotes an approach of employers providing informal advice and correction in relation to minor violations of workplace discipline. However, if the conduct is repeated the employee may be given warnings culminating, preferably, in a final written warning.[16] However, the "corrective" or "progressive" discipline approach cannot be applied in respect of all violations of workplace discipline. It is for this reason that the Code of Good Practice endorses this approach in respect of minor or moderate violations where the behaviour of the particular employee can be corrected.

The "corrective" or "progressive" discipline approach is likely not appropriate in circumstances where an employee has committed serious misconduct and where correction is likely not going to occur due to the employee showing no remorse or if the trust in the employment relationship has irretrievably broken down.[17] This implies that an employer may either dismiss as a last resort, in circumstances where an employee is a repeat offender or at the first instance if the contravention of a workplace rule or standard is sufficiently serious.

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13 Item 7(b)(iv) of Schedule 8 of 66 of 1995.

14 See *Anglo American Farms v Komjwayo* (1992) 13 *ILJ* 573 (LAC) 574–575; *Early Bird Farms (Pty) Ltd v Mlambo* [1997] 5 BLLR 541 (LAC); *SACCAWU v Irvin and Johnson Ltd* [1999] 8 BLLR 741 (LAC) 751; *NUM v Amcoal Colliery* [2000] 8 BLLR 869 (LAC); *Cape Town City Council v Masitho* (2000) 21 *ILJ* 1957 (LAC).

15 Item 3(2) of Schedule 8 of 66 of 1995.

16 Item 3(3) of Schedule 8 of 66 of 1995.

17 In *Department of Labour v GPSSBC* (2010) 31 *ILJ* 1313 (LC) 33, the court confirmed that it would serve no purpose for an employer impose a sanction aimed at correction and rehabilitation where an employee believes that they have done nothing wrong. The court held that for rehabilitation to be effective, the employee must acknowledge the wrongfulness of his or her conduct and be prepared and willing to rehabilitate.

2 2 2 The test for assessment of intolerability of the continued employment relationship

The fundamental test is whether the employee's conduct has destroyed the trust relationship or rendered the continued employment relationship intolerable.[18] Although the primary assessment of intolerability lies with the employer and not the employee,[19] the test of intolerability remains objective.[20]

In practice, "serious" or "gross" misconduct refers to misconduct of such gravity that it almost inevitably makes a continued employment relationship intolerable and may justify dismissal even for a first infringement.[21] It is more likely that employers substitute the disciplinary sanction in respect of misconduct of this nature in circumstances where the employer is of the view that an employee has been given a lenient sanction by an externally appointed chairperson.

2 2 3 The employer's discretion on the appropriate sanction

The question of deciding on the fairness of a disciplinary sanction is a question that involves a value judgment in addition to findings of fact and law.[22] The involvement of a "value judgment" in the assessment of fairness suggests that to the extent an employer has been unreasonable in determining the sanction, an arbitrator or court may interfere with an employer's decision to dismiss.

In several decisions, the Labour Court and Labour Appeal Court (LAC) initially adopted a deferential approach when it came to interfering with an employer's decision to dismiss. In *County Fair Foods v CCMA*,[23] the LAC held:

> "If commissioners could substitute their judgment and discretion for the judgment and discretion fairly exercised by the employers, then the function of management would have been abdicated – employees would take every case to the CCMA. This result would not be fair to employers. In my view, interference with the sanction imposed by the employer is only justified where the sanction is unfair or where the employer acted unfairly in imposing the sanction. This would be the case, for example, where the sanction is so excessive as to shock one's sense of fairness. In such a case, the commissioner has a duty to interfere."

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18 Le Roux and Van Niekerk *The South African Law of Unfair Dismissal* 2ed (2004) 199–201; *De Beers Consolidated Mines v CCMA supra* 23–25; *Continental Oil Mills (Pty) Ltd v Singh* (2013) 34 *ILJ* 2573 (LC).

19 *Freshmark (Pty) Ltd v SA Commercial Catering & Allied Workers Union* (2009) 30 *ILJ* 341 (LC) 8.

20 *Engen Petroleum Limited v CCMA supra* 148. See also Rycroft "The Intolerable Relationship" 2012 33 *ILJ* 2271 2287.

21 Du Toit *et al Labour Relations Law: A Comprehensive Guide* 441.

22 *Rustenburg Platinum Mines Ltd v CCMA* [2006] 11 BLLR 1021 (SCA) 32, citing *Carephone (Pty) Ltd v Marcus NO* [1998] 11 BLLR 1093 (LAC) 36 with approval.

23 [1999] 11 BLLR 1117 (LAC) 40–41.

It is important to note that the LAC's finding in *County Fair Foods* is in the context of a CCMA commissioner's decision to interfere with an employer's decision to dismiss an employee and not specifically within the context of an employer's election to interfere with a disciplinary sanction imposed by an externally appointed chairperson. Despite this distinction, this article reveals that the consideration of fairness remains intrinsic in the determination of the reasonableness of an employer's decision to ultimately dismiss.

2 2 4 The reasonable employer test

In *Nampak Corrugated Wadeville v Khoza*,[24] the LAC held that the decision on the appropriate sanction within the discretion of the employer:

> "The determination of an appropriate sanction is a matter which is largely within the discretion of the employer. However, this discretion must be exercised fairly. A court should, therefore, not lightly interfere with the sanction imposed by the employer unless the employer acted unfairly in imposing the sanction. The question is not whether the court would have imposed the sanction imposed by the employer, but whether in the circumstances of the case the sanction was reasonable."

In reaching this conclusion, the LAC in *Nampak Corrugated* relied on the well-known "reasonable employer" test, derived from English law, as the correct test to apply when determining whether a dismissal is fair. In this regard, Lord Denning MR in *British Leyland UK Limited v Swift*,[25] formulated the test as follows:

> "Was it reasonable for the employer to dismiss him? If no reasonable employer would have dismissed him, then the dismissal was unfair. But if a reasonable employer might have dismissed him, the dismissal was fair."

The subsequent LAC decisions after *Nampak Corrugated* rejected the "reasonable employer" test. In *Toyota SA Motors (Pty) Ltd v Radebe*,[26] the LAC referred to the ordinary rule that the court is bound by its own decisions, unless a decision has been arrived at on some manifest oversight or misunderstanding, something like a palpable mistake, a subsequently constituted court has no right to prefer its own reasoning to that of its predecessors. Accordingly, the LAC held that the "reasonable employer" test was such a palpable mistake that permitted it to overrule its decision in *Nampak Corrugated.* The LAC emphasised that a statutory arbitrator is required to determine whether a sanction is fair and not whether the sanction is one which would have been imposed by a reasonable employer.[27]

In *Conisani Engineering (Pty) Ltd v CCMA*,[28] the Labour Court set aside an arbitration award on the basis that the arbitrating commissioner "[substituted] her own judgment on an appropriate sanction for that of the reasonable sanction of the [employer]." This demonstrates that an arbitrating commissioner should not interfere with a reasonable sanction imposed by an

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[24] [1999] 2 BLLR 108 (LAC) 33.
[25] [1981] IRLR 91 93.
[26] [2000] 9 BLLR 243 (LAC) 46.
[27] *Toyota SA Motors (Pty) Ltd v Radebe supra* 50.
[28] [2004] 10 BLLR 995 (LC) 20.

employer with a sanction which he or she would have made had they been in the employer's position.

2 2 5 The applicable test for determining substantive fairness as enunciated in Sidumo

The test to be applied was settled by the Constitutional Court in *Sidumo v Rustenburg Platinum Mines Ltd*,[29] where the court held as follows:

> "There is nothing in the constitutional and statutory scheme that suggests that, in determining the fairness of a dismissal, a commissioner must approach the matter from the perspective of the employer. All the indications are to the contrary. A plain reading of all the relevant provisions compels the conclusion that the commissioner is to determine the dismissal dispute as an impartial adjudicator … Any suggestion by the Supreme Court of Appeal that the deferential approach is rooted in the prescripts of the LRA cannot be sustained."

In *Sidumo*, Navsa AJ further pronounced on the correct approach which an arbitrating commissioner should follow to determine the fairness of an employer's decision to dismiss:

> "In approaching the dismissal dispute impartially a commissioner will take into account the totality of circumstances. He or she will necessarily take into account the importance of the rule that had been breached. The commissioner must of course consider the reason the employer imposed the sanction of dismissal, as he or she must take into account the basis of the employee's challenge to the dismissal. There are other factors that will require consideration. For example, the harm caused by the employee's conduct, whether additional training and instruction may result in the employee not repeating the misconduct, the effect of dismissal on the employee and his or her long-service record. This is not an exhaustive list."[30]

Importantly, the Constitutional Court pointed out that the above factors do not constitute an exhaustive list of the considerations for determining the appropriate sanction. An arbitrating commissioner must, however, make a value judgment on his or her own sense of fairness, taking into account the relevant provisions of the Code of Good Practice and the fact that the burden to prove the fairness of the dismissal rests with the employer.[31]

Following *Sidumo*, the Labour Court in *Theewaterskloof Municipality v SALGA*[32] correctly characterised the correct approach to be followed as described below:

> "[T]he core inquiry to be made by a commissioner will involve the balancing of the reason why the employer imposed the dismissal against the basis of the employee's challenge of it. That requires a proper understanding of both, which must then be weighed together with all other relevant factors in order to determine whether the employer's decision was fair."

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29 *Toyota SA Motors (Pty) Ltd v Radebe supra* 61.

30 *Sidumo v Rustenburg Platinum Mines Ltd supra* 78.

31 GN 602 in *GG* 34573 of 2011-09-02.

32 [2010] 10 BLLR 1216 (LC).

In light of the development of case law, as illustrated above, the current position regarding the approach to be adopted by arbitrating commissioners when determining whether a disciplinary sanction is appropriate is trite. The fact that arbitration proceedings constitute a *de novo* hearing does not alter the approach to be followed. Simply, an arbitrating commissioner is not empowered to determine what he or she would have done if they had been in the position of the employer. An arbitrating commissioner is required to take into account all of the relevant circumstances which led to an employee's dismissal.

2 3 Procedural fairness in dismissals for misconduct

To be fair, a dismissal for misconduct must not only be justified; the employer must also follow a fair procedure before deciding to dismiss the employee.[33] Procedural fairness is therefore the yardstick by which an employer's pre-dismissal actions are measured. The LRA confirms that substantive and procedural fairness are independent requirements for a fair dismissal.[34] However, the courts appreciate that it is not possible in all cases to always draw a rigid line between the requirements of procedural and substantive fairness.

In some cases, a failure to adhere to the principles of natural justice may be sufficiently gross to render the dismissal substantively unfair. However, as a rule of thumb, it is accepted that substantive fairness relates to the reason for the dismissal and the appropriateness of the sanction, and procedural fairness relates to the manner in which the employer arrived at the decision to impose the sanction.[35]

2 3 1 Procedural fairness guidelines emanating from the Code of Good Practice

Although the LRA does not provide any direction on the content of procedural fairness, guidelines are provided in Item 4 of Schedule 8 of the Code of Good Practice.[36] The Code of Good Practice is not meant to replace collective agreements and employers are expected to adhere to disciplinary procedures to which they have agreed.[37]

The Code of Good Practice provides the requirement that the employer should "normally conduct an investigation to determine whether there are grounds for dismissal. Once an investigation indicates possible misconduct, an enquiry should be held."[38] The Code of Good Practice does not necessarily envisage a formal procedure akin to criminal procedure.[39] Although many employers often prefer to adopt formal disciplinary procedures, several small

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33 Grogan *Dismissal* (2010) 214.
34 S 188(1) of 66 of 1995.
35 Grogan *Dismissal* 214.
36 Govindjee and Van der Walt *Labour Law in Context* 2ed (2017) 144.
37 Cohen "Procedurally Fair Dismissals – Losing the Plot?" 2005 *South African Mercantile Law Journal* 32 48.
38 Thompson and Benjamin *South African Labour Law* Vol 1 (2015) AA1–427.
39 *Mutual Construction Co Tvl (Pty) Ltd v Ntombela NO* (2010) 31 ILJ 340 (LAC).

employers continue to utilise relatively informal disciplinary procedures, such as requiring an employee to provide written or oral representations in respect of alleged misconduct. An informal procedure is relatively expeditious and avoids legal complexities.

An informal procedure also does not fall short of procedural fairness requirements. In *Passenger Rail Agency of South Africa v Moreki*,[40] the Labour Court held that nowhere in Item 4 of the Code of Good Practice is there a reference to an informal procedure being applicable only in serious cases or in cases of employees who are not in the upper echelon of employees. This means that even cases involving minor workplace violations committed by junior employees may be subjected to an informal procedure, subject to the dictates of the disciplinary code and procedure, collective agreement, or the contract of employment.

Where the Code of Good Practice refers to an opportunity that must be given by the employer to the employee to state a case in response to any allegations made against that employee, which need not be a formal enquiry, it means no more than that there should be dialogue and an opportunity for reflection before any decision is taken to dismiss.[41]

This approach was followed by the LAC in *JDG Trading (Pty) Ltd t/a Price 'n Pride v Brundson*,[42] where the court expressed the view that the LRA intends to do away with rigid procedural requirements and the principle that an employee need merely be given an opportunity to state a case applies even more strongly where senior managerial employees are involved.

2 3 2 An employer's non-compliance with the disciplinary code and procedure

The courts have generally held that an employer should comply with its own disciplinary process and that a failure to do so in itself renders the process unfair.[43] This approach was, however, overturned by the LAC in *Highveld District Council v CCMA*,[44] where the court held the following:

> "[W]here the parties to a collective agreement or an employment contract agree to a procedure to be followed in disciplinary proceedings, the fact of their agreement will ordinarily go a long way towards proving that the procedure is fair as contemplated in section 188(1)(*b*). The mere fact that a procedure is an agreed one does not, however, make it fair. By the same token, the fact that an agreed procedure was not followed does not in itself mean that the procedure actually followed was unfair."

The *Highveld* decision emphasises that where the actual procedure followed was fair, regardless of the fact that an agreed disciplinary procedure may have not been followed by the employer, does not mean that the actual procedure which was followed was unfair. By implication, this means that if

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40 Unreported judgment (J190/15, JR2361/16) [2017] ZALCJHB 114 (28 March 2017) 31.

41 *Avril Elizabeth Home for the Mentally Handicapped v CCMA* [2006] 9 BLLR 833 (LC).

42 (2000) 21 *ILJ* 501 (LAC) 61–62.

43 Thompson and Benjamin *South African Labour Law* AA1–429.

44 (2003) 23 *ILJ* 517 (LAC) 15, cited with approval in *Ekurhuleni Metropolitan Municipality v South African Municipal Workers Union* [2018] 3 BLLR 246 (LAC) 15.

an employer departs from an agreed disciplinary procedure, the onus rests on the employer to demonstrate that its conduct of doing so was reasonable in the circumstances and that its conduct was not unfair and/or prejudicial to the employee concerned. This decision essentially leaves open two possibilities: (1) it may be that if an employer follows a disciplinary code, even an agreed one, the dismissal may nevertheless be unfair when measured against the requirements of the LRA; and contrariwise, (2) it may be that if an employer departs from an agreed procedure, it may nevertheless still comply with the requirements of fairness in terms the LRA.[45] Accordingly, in terms of the *Highveld* decision, an employer's failure to follow a disciplinary code is not *per se* unfair. This is especially in circumstances where the disciplinary code constitutes a guideline and has not been incorporated into an employee's terms and conditions of employment.

In *Denel (Pty) Ltd v Vorster*,[46] the Supreme Court of Appeal (SCA) confirmed the *Highveld* approach and held that procedures stipulated in a disciplinary code can be departed from in appropriate circumstances. The SCA, however, held that if the disciplinary code has been incorporated in the employee's contract of employment, failure to follow such a disciplinary code may constitute a breach of contract.[47]

3 AN EMPLOYER'S RIGHT TO REVISIT A DISCIPLINARY SANCTION

3 1 The context

Employers often elect to appoint an external chairperson to conduct a disciplinary enquiry. An employer's reason to adopt such an approach may be influenced by a variety of factors, such as the fact that the allegations of misconduct have been levelled against a senior employee, the allegations give rise to factual and/or legal complexities, or an employer might not have a competent employee to chair the disciplinary enquiry, amongst other reasons. In some cases, when employers make such an external appointment, they tend to expect that the final outcome of the disciplinary enquiry will likely result in a dismissal, depending on the severity of the alleged misconduct.

However, despite the employer's expectations, many things could thwart the anticipated outcome of the disciplinary process. For example, an employer might appoint an independent chairperson who, casting a cold and objective eye over the allegations of misconduct and the evidence presented by the employer, reaches a finding of guilt, but nevertheless concludes that dismissal is not appropriate.[48] In some instances, the appointed chairperson may simply impose an unreasonably lenient sanction in respect of gross misconduct which would ordinarily attract summary dismissal.

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45 Grogan *Dismissal* 227.

46 [2005] 4 BLLR 313 (SCA).

47 Thompson and Benjamin *South African Labour Law* AA1–429.

48 Mischke "On Second Thoughts … When Can an Employer Revisit a Disciplinary Hearing?" 2009 19(2) *Contemporary Labour Law* 11 20.

It is therefore very common for employers to be disappointed with the disciplinary sanctions recommended or imposed by externally appointed chairpersons. As a result, employers often take steps to review or substitute disciplinary sanctions which appear to be lenient or do not meet their expectations. In such instances, employees will often raise the defence of "double jeopardy" when senior management unilaterally reviews or reconsiders the decision of an externally appointed chairperson, in the absence of any provision permitting such procedure in terms of the disciplinary code and procedure, collective agreement or the contract of employment, and with the view of imposing a more severe sanction than the one which was recommended and/or imposed by the chairperson.

It is, however, quite rare to find disciplinary codes and procedures which make provision for an employer to review or appeal a chairperson's decision. Such a right is ordinarily afforded to an employee in the event of an adverse finding against them. The absence of a provision empowering the employer to review or appeal a disciplinary sanction in the disciplinary code and procedure tends to give rise to the question regarding where the employer obtains the authority to interfere with the chairperson's finding on the appropriate sanction, let alone to create a process which does not form part of the contractual relationship between the parties.

However, it is legally permissible for an employer to regulate its own disciplinary code and procedure and further reserve the right of appeal in its discipline code and procedure. Similarly, an employer may incorporate a right of review in respect of a chairperson's findings on sanction. However, this is not common in practice. The controversial issue arises when the employer has not reserved its right to appeal or review in terms of an existing disciplinary code and procedure but nevertheless proceeds to review or substitute a disciplinary sanction imposed by an external chairperson.

The broad question which then arises is: can an employer revisit the outcome of its own disciplinary enquiry? More specifically, consideration must be drawn to whether it is legally permissible for an employer to effectively reopen the disciplinary process, to review that process, or simply overturn the disciplinary sanction imposed. Another issue to be considered is whether it is legally permissible for the employer to scrap one disciplinary process and initiate another process on the same disciplinary charges against the same employee.[49]

The latter situation possibly necessitates the application of the "double jeopardy" principle, which essentially means that a person should not be tried twice for the same offence.[50] Strictly speaking and in the employment context, the "double jeopardy" rule applies in situations where the employee is subjected to more than one disciplinary enquiry on disciplinary charges arising from the same set of facts. As a result, it is generally considered unfair for an employer to subject an employee to a second disciplinary enquiry in respect of the same disciplinary charges for the purpose of achieving a more desirable outcome before a different chairperson.

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[49] Mischke 2009 *Contemporary Labour Law* 11 20.

[50] Grogan *Dismissal* 251.

3 2 The "double jeopardy" principle and the approach of the Labour Appeal Court

The basic point of departure is that subjecting an employee to more than one disciplinary enquiry on the same disciplinary charges would be a contravention of the "double jeopardy" rule.[51] This principle is applied strictly by the criminal courts where it is expressed that criminal proceedings may not be retried if the accused has already been found guilty and convicted of the same offence (*autrefois convict*) or where he or she has been charged with and acquitted of the same offence (*autrefois acquit*).[52] Similarly, in civil law, the *res judicata* principle is well-established, which means that a claim that has been determined by a competent court cannot be reheard, subject to an appeal.[53] The public policy considerations underlying these defences include reaching finality in disputes, achieving certainty in respect of the parties' respective legal positions, and avoiding undue burdens on the justice system.[54]

In determining issues of "double jeopardy," our labour courts initially followed these criminal law principles.[55] If an employee successfully showed the elements of *autrefois convict* or *autrefois acquit*, a further disciplinary enquiry or the overturning of a disciplinary sanction would not be permitted.[56]

Van Niekerk *et al* explain that the "double jeopardy" defence, in an employment context, is to the effect that once an employer has imposed a disciplinary sanction, the matter may not be re-opened to allow the employer to revise the sanction, and in particular, to impose a more severe sanction.[57]

Since "double jeopardy" relates to instances where new disciplinary proceedings are instituted, it does not apply to internal appeal hearings since these constitute extensions of the disciplinary proceedings which have already been instituted and do not constitute new proceedings in the strict sense.[58] The same applies to internal reviews of disciplinary proceedings, provided they are permitted by disciplinary codes and procedures or company practices.[59] This will be the case, for example, where the chairperson of a disciplinary enquiry is only mandated to make a recommendation on the appropriate disciplinary sanction, which management may either accept or reject.

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51 Mischke 2009 *Contemporary Labour Law* 11 20.

52 Ponelis "Double Jeopardy – When Can an Employee Be Recharged for the Same Offence?" 2011 21(3) *Contemporary Labour Law* 21 26.

53 Mischke 2009 *Contemporary Labour Law* 11 20. See also *Mitfords' Executor v Edben's Executors* 1917 AD 682.

54 Ponelis 2011 *Contemporary Labour Law* 21 26.

55 *Ibid.*

56 *Mondi Paper Co v PPWAWU* (1994) 15 *ILJ* 778 (LAC).

57 Van Niekerk, Christianson, McGregor, Smit and Van Eck *Law@Work* (2008) 253.

58 Ponelis 2011 *Contemporary Labour Law* 21 26.

59 *Samson v Commission for Conciliation, Mediation and Arbitration* (2010) 31 *ILJ* 170 (LC). See also *Rustenburg Base Metal Refiners (Pty) Ltd v Solidarity* (2009) 30 *ILJ* 378 (LC).

3 2 1 The yardstick is fairness – the Van der Walt judgment

The controversial issue regarding an employer's ability to substitute a disciplinary sanction has been explored by the courts for a number of years. The first decision traditionally cited is *BMW SA (Pty) Ltd v Van der Walt*.[60] In this case, the employee was charged with undervaluing scrap equipment, which he had subsequently acquired from BMW at a reduced cost. BMW's finance department had mistakenly given the scrap equipment a "nil evaluation". After such, the employee discovered that the scrap equipment was valued at approximately ZAR15 000.00, and therefore arranged to have it removed from the company premises for repairs. The employee arranged for the scrap equipment to be purchased by a "non-existent" company, which he owned.

The employee was found guilty on a charge of a "misrepresentation" in respect of his conduct in relation to when he had removed the scrap equipment. The LAC noted that the employee's conduct to conceal the nil evaluation was disgraceful and held that where there is calculated silence in the face of a duty to speak, one has to do with that species of fraudulent misrepresentation known as fraudulent concealment or fraudulent non-disclosure.[61]

In this matter, there had been two disciplinary enquiries. At the first enquiry, the employee had been charged with three counts of fraud. It was concluded that the employee had not made himself guilty of any transgression, save for a "misrepresentation by him when removing the equipment for repairs".[62] No disciplinary sanction was imposed on the employee. Based on this outcome, the LAC inferred that the employer did not consider the employee to have committed any disciplinary offence.

Shortly after the conclusion of the first disciplinary enquiry, new information pertaining to the employee's conduct came to the employer's attention. This information related to a quotation which the employee had received marked for his attention. This information brought home to the employer the enormity of the employee's deception.[63] The fact that the employee had attempted to sell the equipment to another company resulted in the employer viewing the situation from a different perspective.[64] This demonstrated fraudulent intent far beyond making a mere misrepresentation.[65]

In respect of the employer's conduct of holding a second disciplinary enquiry, the LAC held as follows:

> "Whether or not a second disciplinary enquiry may be opened against an employee would, I consider, depend upon whether it is, in all the circumstances, fair to do so. I agree with the dicta in *Amalgamated Engineering Union of SA & Others v Carlton Paper of SA (Pty) Ltd* (1988) 9 ILJ

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60 (2000) 21 *ILJ* 113 (LAC).
61 *BMW SA (Pty) Ltd v Van der Walt supra* 17.
62 *BMW SA (Pty) Ltd v Van der Walt supra* 9.
63 *BMW SA (Pty) Ltd v Van der Walt supra* 11.
64 *Ibid*.
65 *Ibid.*

> 588 (IC) at 596 A – D that it is unnecessary to ask oneself whether the principles of *autrefois acquit* or *res iudicata* ought to be imported into labour law. They are public policy rules. The advantage of finality in criminal and civil proceedings is thought to outweigh the harm which may in individual cases be caused by the application of the rule. In labour law fairness and fairness alone is the yardstick. See also *Botha v Gengold* [1996] BLLR 441 (IC); *Maliwa v Free State Consolidated Gold Mines (Operations) Ltd* (1989) 10 ILJ 934 (IC). I should make two cautionary remarks. It may be that the second disciplinary enquiry is *ultra vires* the employer's disciplinary code (*Strydom v Usko Limited* [1997] 3 BLLR 343 (CCMA) at 350 F–G. That might be a stumbling block. Secondly, it would probably not be considered to be fair to hold more than one disciplinary enquiry save in rather exceptional circumstances."[66]

The LAC's finding, as illustrated above, is of fundamental importance. First, the LAC excluded the application of the principles of *autrefois acquit* or *res iudicata*. The LAC instead adopted the notion of fairness as opposed to upholding the application of these aforementioned legal principles. It is apparent from the above excerpt that the LAC envisaged that an employer could refuse to implement a chairperson's finding and to convene a second disciplinary enquiry if the dictates of fairness make it necessary to do so.[67]

However, despite fairness being the yardstick, the LAC imposed factors that could potentially serve as a limitation to an employer holding a second disciplinary enquiry, namely being the following:

1 the employer's disciplinary prohibiting the holding of a second disciplinary enquiry; and
2 where it would be considered to be unfair to hold a second disciplinary enquiry, save in rather exceptional circumstances.

The former limitation is of considerable importance in circumstances where the provisions of a disciplinary code and procedure may be silent on the employer's ability to revisit a disciplinary sanction that has been imposed.

The majority of the LAC held that BMW had not acted unfairly by holding a second disciplinary enquiry.[68] BMW had acted *bona fide* throughout and it was the employee who had concealed what he had done. The majority noted that it may be that BMW should have seen through the employee's scheme sooner than it did, but that did not make it fair that the employee should effectively get away "scot-free".[69]

The LAC held that although the charges in both disciplinary enquiries involved misrepresentation, the full import of the deception was not realised at the first disciplinary enquiry.[70] It would therefore be unfair to compel an employer to retain an employee in whom it has justifiably lost all confidence.[71] Importantly, the LAC further held that since the loss of confidence justifiably

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66 *BMW SA (Pty) Ltd v Van der Walt supra* 12.
67 Le Roux "Can Employers Review the Outcomes of Disciplinary Procedures?" 2016 25(7) *Contemporary Labour Law* 70 81.
68 *BMW SA (Pty) Ltd v Van der Walt supra* 13.
69 *Ibid.*
70 *Ibid.*
71 *Ibid.*

occurred only after a first disciplinary enquiry had been held, it did not consider that it was unfair to hold another enquiry.[72]

3 2 2 Distinguishing "fairness" from "exceptional circumstances" – Branford decision of the LAC

Following the *Van der Walt* decision, the LAC had to decide the "double jeopardy" issue again in *Branford v Metrorail Services (Durban)*.[73] In this case, Mr Branford was dismissed for making eight fraudulent petty cash claims, in some cases for forging his manager's signature on the petty cash claims. His line manager, upon discovering the offence, called Mr Branford to his office and gave him a "dressing down" and placed a verbal warning into Mr Branford's employee file.[74] One of the factors that influenced the leniency towards Mr Branford was that he had implemented significant cost-cutting measures for the company.

After the verbal warning, an internal audit was conducted into the issue and it was recommended that Mr Branford should be formally charged with fraud, forgery, and dishonesty. Although the auditor's report took a more serious view of the facts, it was common cause that the report was not based on any facts which could be described as "new".[75]

A while after the verbal warning had been issued and on the strength of the auditor's report, Mr Branford was formally charged, and a disciplinary enquiry was convened. Despite protests that Mr Branford had already been disciplined for the same misconduct, the disciplinary chairperson held that he was not being disciplined twice because the disciplinary code provided for more serious penalties for misconduct of a serious nature.[76] Mr Branford was subsequently dismissed and referred an alleged unfair dismissal dispute to the relevant bargaining council. The arbitrator found the following:

> "It is my conclusion therefore that the applicant's argument that he was disciplined twice for the alleged infringements must be sustained … the only appropriate relief herein is that of reinstatement."[77]

On review, the Labour Court held that the first enquiry was a mere discussion between Mr Branford and his line manager and that the arbitrator failed to take into account that Mr Branford was not disciplined for fraud but when the verbal warning was given, it was for a mere irregularity.[78] The Labour Court further held that the arbitrator committed a gross irregularity by not taking into account the fact that the first sanction by the line manager was without any charges being proffered against Mr Branford and that it resulted from a discussion concerning the irregularity.[79] Importantly, the Labour Court found that when the "proper" disciplinary

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72 *Ibid.*

73 (2003) 24 *ILJ* 2269 (LAC).

74 *Branford v Metrorail Services (Durban) supra* 15.

75 *Branford v Metrorail Services (Durban) supra* 4.

76 *Ibid.*

77 *Ibid.*

78 *Branford v Metrorail Services (Durban) supra* 5.

79 *Ibid.*

enquiry was held, Mr Branford was subjected to three disciplinary charges and that, in its view, constituted a proper disciplinary enquiry which was held by Metrorail.[80] Effectively, the Labour Court found that the "double jeopardy" rule was not applicable because the "second" enquiry was in actual fact the first enquiry.

On appeal, the LAC in *Branford* considered the *Van der Walt* decision. The LAC per Wallis JA in the minority judgment held the following:

> "The norm in assessing the fairness of a disciplinary offence is a single disciplinary enquiry conducted in compliance with the employer's disciplinary code. Where there has been compliance with the company's disciplinary code and the first enquiry has adequately canvassed the facts involved, it will be unfair to hold a second enquiry."[81]

As a result of this finding, Wallis JA in the minority judgment further held:

> "In the light of the facts in this case and the current state of the law, it cannot be said that the arbitrator committed a gross irregularity in finding that the dismissal was unfair. Furthermore, I would wish to note that the relative informality with which the first disciplinary enquiry was held does not, in itself, make it *pro non scripto*. There is therefore no basis upon which a court could interfere with the arbitrator's decision. The court a quo was wrong in deciding to interfere with the arbitrator's award."[82]

In the same *Branford* judgment, Jafta AJA (as he then was) with Nicholson JA concurring respectfully disagreed with the findings of Wallis JA in their majority decision. Jafta AJA provided a detailed analysis of the approach which was formulated by the LAC in the *Van der Walt* decision. In this regard, he held:

> "Although during the hearing of this appeal Mr Bingham, for [Mr Branford], contended that the test laid down in Van der Walt's case (*supra*) was that a second enquiry was permissible only in exceptional circumstances, that is not borne out by the dictum in para [12] quote above.[83] In that paragraph it is quite clear that Conradie JA considered fairness alone to be the decisive factor in determining whether or not the second enquiry is justified. The learned Judge of appeal mentioned the issue of exceptional circumstances merely as one of the two caveats and not as the actual or real test to be applied. Therefore, in my view, it is incorrect to contend that the test espoused in Van der Walt is that a second enquiry would only be permissible in exceptional circumstances. The true legal position as pronounced in Van der Walt is that a second enquiry would be justified if it would be fair to institute it."[84]

The LAC in *Branford* followed the *Van der Walt* approach, which means that the position it adopted was that the ultimate test is fairness. The question which then arises is whether fairness is to be interpreted from an employer's or employee's perspective. In *Branford*, the LAC held that the concept of fairness applies to both the employer and employee.[85] It involves the balancing of competing and sometimes conflicting interests of the employer,

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80 *Ibid.*

81 *Branford v Metrorail Services (Durban) supra* 7.

82 *Ibid*.

83 See fn 72 above.

84 *Branford v Metrorail Services (Durban) supra 13.*

85 *Ibid.*

on the one hand, and the employee on the other.[86] The weight to be attached to those respective interests depends largely on the overall circumstances of each case.[87]

In deciding what constitutes fairness, the LAC cited with approval the remarks of Smalberg JA in *National Union of Metalworkers of SA v Vetsak Cooperative Ltd:*[88]

> "Fairness comprehends that regard must be had not only to the position and interests of the worker, but also those of the employer, in order to make a balanced and equitable assessment. In judging fairness, a court applies a moral or value judgment to established facts and circumstances (*Num v Free State Cons* at 446I). And in doing so it must have due regard to the objectives sought to be achieved by the Act. In my view, it would be unwise and undesirable to lay down, or attempt to lay down, any universally applicable test for deciding what is fair."

Jafta AJA applied the fairness test to determine whether Metrorail was entitled to revisit the sanction imposed on Mr Branford. Jafta AJA emphasised the significance of the fact that Mr Branford's line manager had no information indicating that Mr Branford committed fraud when he issued the written warning.[89] Jafta AJA further emphasised that the apparent problem in the matter was that Mr Branford's line manager did not know how to properly discipline an employee.[90] Therefore, he held that it would be unfair for Metrorail to be saddled with a quick, ill-formed, and incorrect decision of its employee who misconceived the seriousness of the matter and hurriedly took an inappropriate decision leading to an equally inappropriate penalty.[91]

The reasoning demonstrated by Jafta AJA is sensible. Few situations can be imagined that can be more unfair to an employer than to compel it to retain the services of a fraudster and forger merely because his line manager ignored the employer's disciplinary code and procedure for reasons of his own.[92] Consequently, the majority in *Branford* found that the employer is entitled to hold a second disciplinary enquiry if it is fair to do so.

3 2 3 The caveat of "exceptional circumstances" apparent from the Van der Walt and Branford decisions

The majority judgment in *Branford* relied on the fairness test as enunciated in the *Van der Walt* judgment. The application of the fairness test to determine whether an employer may hold a second disciplinary enquiry gives rise to the question: what, then, is the correct legal position regarding the application of the "double jeopardy" rule in South African labour law?

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86 *Ibid*.
87 *Ibid.*
88 1996 (4) SA 577 (A).
89 *Branford v Metrorail Services (Durban) supra* 15.
90 *Ibid.*
91 *Ibid.*
92 Grogan *Dismissal* 253.

It was argued on behalf of Mr Branford that an employer may convene a second disciplinary enquiry concerning the same misconduct which is allegedly committed by an employee only in "exceptional circumstances".[93] The court rejected this proposition. According to the majority judgment in *Branford*, the legal position is that a second disciplinary enquiry may be held by an employer in circumstances where it is fair to do so. The reference to "exceptional circumstances" in the *Van der Walt* judgment was merely one of the two "caveats" and not the general test, being fairness.[94]

The *Van der Walt* and *Branford* decisions, however, do not provide much assistance concerning the test to be applied in respect of what could constitute "exceptional circumstances". In the *Van der Walt* decision, Conradie JA merely added the caveat that "it would probably not be considered fair to hold more than one disciplinary enquiry save in rather exceptional circumstances".[95] The "exceptionality" of the circumstances is, therefore, a measure of fairness, not a test in itself.[96] Accordingly, the court's reference to "exceptional circumstances" should not be construed as the actual test to be applied. If exceptional circumstances is the test, it would subject employers to a heavy burden and make it virtually impossible to convene a second disciplinary enquiry.[97]

Grogan argues that the "fairness" criterion seems to open the way to arbitrators to assess the merits of the respective findings of the disciplinary and appeal enquiries and to base the justification for a second disciplinary enquiry on the fact that the disciplinary enquiry was wrong, and the appeal enquiry was right.[98] This is well-illustrated in the matter between *YF and Multichoice Management Services (Pty) Ltd t/a MWeb*,[99] where the employee was charged with sexual harassment after a successful applicant for a learnership complained about his conduct. The disciplinary enquiry chairperson found that the employee was not guilty of the misconduct. The employer was dissatisfied with the outcome and consulted senior counsel regarding the convening of a second disciplinary enquiry.

Having consulted with senior counsel, a second disciplinary enquiry was convened in terms of which the employee was found guilty of *"quid pro quo"* harassment. He was dismissed thereafter. In subsequent private arbitration proceedings, the arbitrator held:

> "Given the facts and circumstances of this case, I am of the view that respondent was fully justified to hold a second enquiry. As I have already recorded, [the] applicant made himself guilty of serious misconduct and [the] respondent had to take measures to prevent similar occurrences. [The] [r]espondent was not satisfied with the finding by the first chairperson. In my view, [the] respondent's disapproval of the finding was, with respect, justified. The evidence clearly showed that [the] applicant was guilty of sexual harassment. It would have been unfair for [the] respondent to be saddled with a decision that was clearly incorrect. Fairness extends not only to an employee

93 *Branford v Metrorail Services (Durban) supra* 13.
94 Le Roux 2016 *Contemporary Labour Law* 70 81.
95 *BMW SA (Pty) Ltd v Van der Walt supra* 12.
96 Grogan *Dismissal* 254.
97 Ponelis 2011 *Contemporary Labour Law* 21 26.
98 Grogan *Dismissal* 255.
99 (2008) 29 *ILJ* 2850 (ARB).

> but also to an employer. As I have already alluded to, [the] respondent was not bound by the finding and recommendation of the first chairperson."[100]

Although the decision in *Multichoice Management Services* does not constitute judicial precedent in circumstances where it is an arbitration award, it does, however, serve as guidance as to what could possibly constitute "exceptional circumstances" since the courts have not provided much clarity on this caveat to the fairness test.

Grogan argues that there is probably no test more precise than fairness with which a particular breach of the "double jeopardy" rule can be assessed.[101] He further submits that apart from "exceptional circumstances", a number of considerations may be suggested, which include (1) whether the disciplinary enquiry was conducted in good faith by the chairperson; (2) whether the chairperson had the power to make a final decision or only give a recommendation;[102] (3) whether the person who countermanded the original decision was in fact conducting a second disciplinary enquiry;[103] (4) whether the first disciplinary enquiry was conducted in terms of the employer's disciplinary code; (5) whether the employer was acting in good faith when it decided to hold a second disciplinary enquiry; (6) whether provision was made in the disciplinary code for a second disciplinary enquiry;[104] (7) whether the second disciplinary enquiry conformed with the principles of natural justice;[105] (8) whether and in what circumstances new and relevant information came into light after the first enquiry;[106] (9) the time between the first and second disciplinary enquiry; (10) the gravity of the employee's offence;[107] (11) the extent to which the sanction imposed by the first chairperson was out of kilter with the sanction prescribed by the disciplinary code and those actually imposed in practice for the particular offence;[108] and (12) whether, in cases where the employee was found not guilty by the first chairperson, the finding was not supported by the evidence.[109]

Grogan contends that the *Van der Walt* and *Branford* decisions make it clear that the "double jeopardy" principle does not apply unless the earlier sanction was imposed by a properly constituted disciplinary enquiry.[110] This is not the case where, as in cases like *Branford*, the first enquiry was not really a hearing at all.[111] The principle may also not apply in cases where the initial tribunal is empowered only to recommend a penalty to a higher authority.[112]

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100 *YF and Multichoice Management Services (Pty) Ltd t/a MWeb supra* 69.

101 Grogan *Dismissal* 255.

102 *Wium v Zondi* [2002] 11 BLLR 1117 (LC).

103 In *PSA obo Venter v Laka NO* (2005) 26 *ILJ* 2390 (LAC), the court held that the review by a departmental head in terms of s 17(1) of the Public Service Act 38 of 1994 did not constitute a second hearing.

104 *Telkom SA v CCMA* [2002] 4 BLLR 394 (LC).

105 *Strydom v USKO Limited* [1997] 3 BLLR 343 (CCMA).

106 *BMW SA (Pty) Ltd v Van der Walt supra*.

107 *Solidarity/MWU obo Van Staden v Highveld Steel & Vanadium* (2005) 26 *ILJ* 2045 (LC).

108 Grogan *Dismissal* 255.

109 *Ibid.*

110 Grogan *Dismissal* 255.

111 *Ibid.*

112 *Wium v Zondi* [2002] 11 BLLR 1117 (LC).

4 REVIEW OF A SANCTION BY HIGHER LEVELS OF MANAGEMENT IN CONTRAVENTION OF DISCIPLINARY CODES AND COLLECTIVE AGREEMENTS

4 1 The effect of disciplinary codes and collective agreements in the workplace

In most cases, the starting point of the enquiry concerning the procedural fairness of a dismissal is the employer's disciplinary code.[113] Where there is no disciplinary code, arbitrators and adjudicators are enjoined by the LRA to have regard to the Code of Good Practice.[114] In circumstances where the employer accepted certain procedural standards to be followed, it will generally be held to its self-imposed standards, even if those standards are stricter than those required by the courts and the Code of Good Practice.[115]

However, in the *Highveld* decision, the LAC held that the mere fact that a procedure is an agreed one does not, however, make it fair.[116] By the same token, the fact that an agreed procedure was not followed does not in itself mean that the procedure actually followed was unfair.[117]

The effect of non-compliance with disciplinary codes and procedures has been an existing debate for several years. In this regard, there is an approach that disciplinary codes and procedures should not be interpreted strictly, but in accordance with equity and fairness.[118] As a result of this approach, courts and arbitrators tend to not sanction minor departures from disciplinary codes and procedures on the pure basis that they constitute guidelines and are therefore not binding in nature.

The other approach is that courts and arbitrators are not bound by disciplinary codes and procedures in circumstances where the disciplinary codes and procedures themselves fail to comply with the requirements of fairness.[119] However, if such a disciplinary code and procedure contains provisions which, on face value, appear unfair, the courts and arbitrators are ready to uphold them if those provisions are the product of genuine collective bargaining between the employer and its employees or their trade union.[120]

4 1 1 The legal status of collective agreements and their relationship with disciplinary codes and procedures

The purpose of the LRA is the advancement of economic development, social justice, labour peace, and the democratisation of the workplace by fulfilling

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113 Grogan *Dismissal* 251.
114 *Ibid.*
115 *Free State Buying Association Ltd t/a Alpha Pharm v SACCAWU* (1998) 19 *ILJ* 1481 (LC).
116 *Highveld District Council v CCMA* (2003) 23 *ILJ* 517 (LAC).
117 *Ibid.*
118 Grogan *Dismissal* 228.
119 *Ibid.*
120 *Ibid.*

the primary objectives of the Act.[121] One of the primary objectives of the LRA is to provide a framework within which employers and employees can collectively bargain to determine wages, terms and conditions of employment, and other matters of mutual interest.[122] Another key objective is to promote collective bargaining.[123] Collective bargaining can be described as the process of seeking to reach an agreement through negotiation between employers and labour on terms and conditions of employment and other matters of mutual interest.

Thompson and Benjamin argue that the scheme of the LRA overshadows other interactions, such as individual employer-employee negotiations and the determination of issues through arbitration and adjudication.[124] Thompson and Benjamin further contend that it is fair to then describe the tangible outcome of the process, the collective agreement, as the optimum regulatory instrument of the LRA.[125]

In *KemLin Fashions CC v Brunton*,[126] the LAC interpreted section 1 of the LRA, which contains the objectives of collective bargaining, as follows:

> "The Act seeks to promote the principle of self-regulation on the part of employers and employees and their respective organisations. This is based on the notion that, whether it is in a workplace or in a sector, employers and their organisations, on the one hand, and, employees and their trade unions, on the other, know what is best for them, and, if they agree on certain matters, their agreement should, as far as possible, prevail."

Collective agreements, as the end product of collective bargaining, play a far greater role in regulating terms and conditions of employment than individual contracts of employment.[127] Collective agreements may regulate rights and obligations between employers and trade unions as well as the terms and conditions of employment of individual employees.[128] These employees will, in the first place, be members of the trade union(s) that entered into the collective agreement.[129] However, collective agreements can also be extended to employees who are not members of the trade union(s) which entered into the collective agreement.[130] Collective agreements are therefore statutory instruments and their legal consequences are specified and regulated by the LRA.[131]

Turning to disciplinary codes and procedures, the Code of Good Practice provides that "all employers should adopt disciplinary procedures that establish the standard of conduct required of their employees" and "an employer's rules must create certainty and consistency in the application of

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121 S 1 of 66 of 1995.

122 S 1(*b*) of 66 of 1995.

123 S 1(*d*) of 66 of 1995.

124 Thompson and Benjamin *South African Labour Law* AA1–157.

125 *Ibid.*

126 Unreported judgment (DA1015/99) [2000] ZALAC 25 (16 November 2000).

127 Du Toit *et al Labour Relations Law: A Comprehensive Guide* 441.

128 *Ibid*.

129 Le Roux "The Role and Enforcement of Collective Agreements" 2006 15(6) *Contemporary Labour Law* 51 58.

130 S 23(1)(*d*) of 66 of 1995.

131 Thompson and Benjamin *South African Labour Law* AA1–161.

discipline".[132] Although codes of good practice are not directly enforceable, section 188(2) of the LRA requires adjudicators and arbitrators to take relevant codes of good practice enacted in terms of the LRA into consideration in establishing whether a dismissal is substantively and procedurally fair.[133]

The wording of the Code of Good Practice makes it clear that the drafters adopted an approach that prefers disciplinary codes and procedures which are adopted in terms of collective agreements. It is further well-established that the LRA emphasises the primacy of collective agreements. This is illustrated by the provision that the Code of Good Practice "is not intended as a substitute for disciplinary codes and procedures where these are the subject of collective bargaining."[134]

Calitz argues that disciplinary codes and procedures embodied in collective agreements are conducive to balancing the power between employers and employees, self-regulation, and democratisation of the workplace as well as consistency and certainty and that employers who unilaterally substitute the sanction of a disciplinary chairperson should not compromise these ideals.[135]

4 1 2 The courts' approaches regarding adherence to disciplinary codes and procedures

The matter between *County Fair Foods (Pty) Ltd v CCMA*[136] is one of the earliest decisions in terms of which the LAC had to decide whether it was fair for an employer to substitute a disciplinary sanction and impose a heavier sanction in the absence of an express provision in the disciplinary code and procedure which provided the employer with such power.

In *County Fair Foods II*, the LAC revisited the issue regarding the substitution of disciplinary sanctions after the *Van der Walt* and *Branford* decisions and adopted a different approach compared to its previous decisions. The substantive issue which gave rise to the dispute in *County Fair Foods II* concerned the dismissal of a certain Mr Joseph Alexander emanating from an assault on a fellow employee. A disciplinary enquiry was conducted by the company's manager, who found Mr Alexander guilty of assault. However, due to the mitigating factors presented, a sanction of a final written warning valid for twelve months and a five-day unpaid suspension was imposed.

Two days later, Mr Alexander was advised that, following consultation with senior management, the company was of the view that the sanction was "contradictory to the principle and precedent of the company."[137] An appeal enquiry was held, and the sanction was altered to one of dismissal. The

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132 Item 3(1) of Schedule 8 of 66 of 1995.

133 Calitz "May an Employer Dismiss an Employee if the Disciplinary Chairperson Imposed a Lesser Sanction? *South African Revenue Service v Commission for Conciliation, Mediation and Arbitration* 2017 38 *ILJ* 97 (CC)" 2019 *Stellenbosch Law Review* 166 185.

134 Item 1(2) of Schedule 8 of 66 of 1995.

135 Calitz 2019 *Stellenbosch Law Review* 166 185.

136 [2003] 2 BLLR 134 (LAC).

137 *County Fair Foods (Pty) Ltd supra* 4.

minutes of the appeal reflected that the sole ground of the appeal was procedural unfairness – the argument being that the first sanction must stand.[138] The CCMA commissioner found the dismissal to have been procedurally unfair and ordered that the employee should be compensated. An application for the review of the arbitration award was unsuccessful before the Labour Court.

In determining the merits of the case, the LAC held the following:

> "The evidence placed before [the] second respondent was that Kemp was appointed by [the] appellant to chair the disciplinary enquiry. No evidence was presented by [the] appellant to contradict the conclusion reached by second respondent that 'Kemp was clearly mandated by the company to make the final determination regarding the outcome of Alexander's disciplinary enquiry'. [The] [s]econd respondent found further that 'the company's disciplinary code and practice does not make provision for intervention or for the overruling of this sanction by a more senior manager than the one appointed to chair the disciplinary enquiry.
>
> [T]he [s]econd respondent correctly found on the basis of Midgley's own evidence that his decision represented the first time that this kind of intervention had taken place within appellant's organisation. In the present dispute, there was no provision in appellant's disciplinary code which could justify the kind of intervention which Midgley initiated in order to ensure the dismissal of Alexander. Alexander's conduct was considered by a properly constituted disciplinary enquiry. The fact that the appellant sought to discipline Kemp for failing to comply with company policy and procedures and dismiss Alexander does not alter this conclusion. This dispute concerned the unfairness of interfering with the decision of the disciplinary tribunal which had properly been appointed by [the] appellant and, to which interference, no express provision was contained in the disciplinary code which could justify the action taken by Midgley."[139]

The crux of the CCMA commissioner's decision was that senior management was not entitled to overturn a decision not to dismiss the employee because the chairperson of the disciplinary enquiry had been mandated by the employer to make a final determination regarding the outcome of the disciplinary enquiry and that the employer's disciplinary code and procedure did not make provision for the overturning of the disciplinary sanction by a more senior manager.[140] On appeal, the LAC endorsed the view that the employer was not entitled to overturn the disciplinary sanction in circumstances where the disciplinary code and procedure further did not make provision for such process. The LAC accordingly held that the CCMA commissioner's decision was not unjustifiable in light of the evidence presented during the arbitration proceedings.

It is worth noting that arbitrators and the courts may be disinclined to endorse the convening of a second disciplinary enquiry unless it is specifically provided for in the employer's disciplinary code and procedure. This approach, however, loses sight of the fact that whether it is permissible to convene a second disciplinary enquiry is a matter of fairness.[141] It should therefore, in principle, be possible to convene a second disciplinary enquiry

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138 *County Fair Foods (Pty) Ltd supra* 5.

139 *County Fair Foods (Pty) Ltd supra* 19–21.

140 Le Roux 2016 *Contemporary Labour Law* 70 81.

141 Ponelis 2011 *Contemporary Labour Law* 21 26.

even if the employer's disciplinary code and procedure does not specifically cater for this eventuality.[142]

It is also important to point out that court decisions regarding an employer's conduct of disregarding disciplinary codes and procedures are inconsistent. In some instances, the courts have permitted deviation in circumstances where fairness prevailed in respect of the process which was followed, while in other cases, the courts have held employers to strict compliance with the disciplinary code and procedure.

In *Leonard Dingler (Pty) Ltd v Ngwenya*,[143] the LAC as per Kroon JA (as he then was) held as follows:

> "Mr MALULEKE referred to authority to the effect that an employer is bound by its disciplinary code. The correct approach is, however, that disciplinary codes are guidelines which can be applied in a flexible manner. See Le Roux & van Niekerk, The Law of Unfair Dismissal in South Africa, at 100 and 155 and the authorities there cited. See, e.g., *Nehawu v Director-General of Agriculture & Another* (1993) 14 ILJ 1488 (IC) at 1500. It was there stated, correctly, that the purpose of the Labour Relations Act of 1956 was the promotion of good labour relations by way of striking down and remedying unfair labour practices. To that end a strictly legalistic approach should yield to an equitable, fair and reasonable exercise of rights; and insistence on uncompromising compliance with a code, to substantial fairness, reasonableness and equity.
>
> In my judgment, and having regard to all the circumstances, the time when and the manner in which the appeal hearing was held, while not strictly in accordance with the appellant's disciplinary code, were substantially fair, reasonable and equitable."

This approach was followed in *Highveld*, where the LAC held that the mere fact that a procedure is an agreed one does not, however, make it fair.[144] By the same token, the fact that an agreed procedure was not followed does not in itself mean that the procedure actually followed is unfair.[145] This approach means that as long as the rules of fairness and natural justice regarding the rights of the employee have been complied with, the content of the relevant disciplinary code and procedure of the employer must not be regarded as binding to the extent that non-compliance therewith necessarily renders the disciplinary proceedings invalid.[146]

In *Solidarity obo Parkinson v Damelin (Pty) Ltd*,[147] a senior employee did not receive a final written warning as required by the disciplinary code and procedure but was instead dismissed for misconduct. Although the disciplinary code and procedure formed part of the employee's contract of employment, the employer believed that it could be *laissez- faire* in respect of its adherence to and compliance with such disciplinary code.[148] In this regard, the Labour Court held the following:

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142 *Ibid.*

143 (1999) 20 *ILJ* 1171 (LAC) 44–45.

144 *Highveld District Council v CCMA* (2003) 23 *ILJ* 517 (LAC).

145 *Ibid.*

146 Jordaan-Parkin "Deviation by Employer From Its Own Disciplinary Code When Conducting Disciplinary Enquiries" 2005 26(3) *Obiter* 734.

147 Unreported judgment (JR2792/12) [2014] ZALCJHB 480 (4 December 2014).

148 Unreported judgment (JR2792/12) [2014] ZALCJHB 480 (4 December 2014) 16.

> "Mr Nel who appeared on behalf of the First Respondent at the hearing before me was at pains to refer to judgments where the need to follow disciplinary processes to the letter in respect of senior employees was less rigorous than in respect of other employees. I do not understand that to mean that you can simply bypass a Disciplinary Code and Procedure that you yourself have drafted when it suits you. This makes nonsense of a Disciplinary Code and Procedure which employees are required to follow and gives *carte blanche* to the employer to act at its will."[149]

In the *Damelin* decision, the Labour Court placed primacy on the incorporation of the disciplinary code and procedure into the employee's terms and conditions of employment. It is for this reason that the Labour Court found that the employer cannot simply decide to disregard the application of the disciplinary code and procedure.

In contrast to *Leonard* and *Highveld* decisions, the employee in *Vorster* had relied on contractual remedies. In the latter case, the employer had unilaterally disregarded its disciplinary code by adopting a different process to that which was agreed for purposes of terminating the employee's employment. Although *Vorster* is not an LAC decision, the SCA (a court of equivalent status to the LAC at the time) held the following:

> "It might be that the construction advanced by the appellant would create a disciplinary regime that was equally acceptable (whether that is so is by no means certain) but that is not the test: through its disciplinary code, as incorporated in the conditions of employment, the appellant undertook to its employees that it would follow a specific route before it terminated their employment and it was not open to the appellant unilaterally to substitute something else."[150]

The distinguishing factor in *Vorster* is that the employee's claim was founded on a breach of contract in circumstances where the terms of the disciplinary code and procedure were incorporated into the employee's terms and conditions of employment – thus assuming a contractual legal effect. This is demonstrated in the SCA's finding as described below:

> "The procedure provided for in the disciplinary code was clearly a fair one – it would hardly be open to the appellant to suggest that it was not – and the respondent was entitled to insist that the appellant abide by its contractual undertaking to apply it. It is no answer to say that the alternative procedure adopted by the appellant was just as good."[151]

Accordingly, the issue before the SCA did not relate to the unfairness of the process which was followed by the employer. On the contrary, it was concerned with a contractual claim found upon common law principles relating to breach of contract, hence the SCA adopted a different approach to the *Leonard Dinger* and *Highveld* decisions.

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149 Unreported judgment (JR2792/12) [2014] ZALCJHB 480 (4 December 2014) 21.

150 *Denel (Pty) Ltd v Vorster supra* 15.

151 *Denel (Pty) Ltd v Vorster supra* 16.

4 1 3 The employer's deviation from a binding collective agreement regulating the disciplinary code and procedure

In *SAMWU obo Abrahams v City of Cape Town*,[152] the South African Municipal Workers' Union (SAMWU) instituted an application for an interdict relating to pending disciplinary proceedings against a large number of its members. SAMWU sought an order declaring the disciplinary proceedings embarked upon by the employer in respect of its members to have been in breach of the collective agreement and further interdicting and restraining the employer from continuing with the said disciplinary proceedings.

The Labour Court, in reaching its decision, relied on the SCA's *dictum* in *Vorster*, which is described below:

> "The procedure provided for in the disciplinary code was clearly a fair one – it would hardly be open to the Appellant to suggest that it was not – and the Respondent was entitled to insist that the Appellant abide by its contractual undertaking to apply it. It is no answer to say that the alternative procedure adopted by the Appellant was just as good." (emphasis added)[153]

The Labour Court further distinguished the LAC's decision in *Leonard Dingler* and the SCA's decision in *Vorster*. In this regard, the Labour Court held the following:

> "The decision in Leonard Dingler (Pty) Ltd v Ngwenya (1999) 20 ILJ 1171 (LAC) does not constitute contrary authority as contended by Respondent. In that matter, the Court had to decide whether a relatively minor deviation from the terms of the disciplinary code would render the disciplinary proceedings in question, invalid. The Court held that disciplinary codes are guidelines which can be applied in a flexible manner. It concluded that having regard to all the circumstances the proceedings in issue, while not conducted strictly in accordance with the disciplinary code, were substantially fair, reasonable and equitable. The judgment patently does not deal with the right of an employee to require strict compliance with the terms of a peremptory disciplinary code. This distinction is crisply set out as follows in *Riekert v Commission for Conciliation, Mediation and Arbitration & Others* (2006) 27 ILJ 1706 (LC) at para [14] :
>
> > "I am of the view that the Applicant herein is entitled to insist that the Third Respondent abide by its contractual undertaking, namely to comply with the disciplinary code and procedure. I believe the Third Respondent failed to do so. However, that is not the issue herein. Rather, the question is whether the Commissioner was justified in his conclusion that the Third Respondent's conduct was procedurally fair notwithstanding the fact that he did not comply with all the terms of its own disciplinary code and procedure. (The Third Respondent conceded both at the arbitration and before me that it had not complied in every respect with its own disciplinary code.)"[154]

In line with the above authorities, the Labour Court held that SAMWU was entitled to insist that the employer complies with the national collective

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[152] (2008) 29 *ILJ* 1978 (LC).

[153] *SAMWU obo Abrahams v City of Cape Town supra* 21.

[154] *SAMWU obo Abrahams v City of Cape Town supra* 22.

agreement and the stipulated procedure for disciplinary enquiries.[155] Accordingly, the Labour Court declared that the disciplinary proceedings against SAMWU's members were in breach of the collective agreement and it, therefore, interdicted and restrained the employer from proceeding with the said disciplinary proceedings.[156]

In *South African Municipal Workers Union on behalf of Mahlangu v SA Local Government Bargaining Council*,[157] the employee was charged as a result of his conduct in terms of which he had been alleged to have displayed gross disrespect by uttering rude and abusive language to the municipal manager and further making aggressive advances towards the same manager.[158]

An external chairperson was appointed to conduct the disciplinary enquiry. The municipality and SAMWU were bound by a collective agreement, part of which prescribed the procedures to be observed for the purpose of conducting disciplinary enquiries.[159]

The external chairperson decided that the employee should be dismissed, and that the dismissal should be suspended for twelve months on the condition that the employee does not repeat the same misconduct. The external chairperson conveyed his "recommendation" to this effect to the municipality. The municipality's management was surprised by the external chairperson's "sanction" and asked him to explain how he had come to his decision. In his response, the chairperson stated the following:

> "Before dealing with the questions raised by the Municipality, I wish to state that my sanction is merely a recommendation to the municipality.
>
> The Municipality has got the right to deviate or not to deviate from the recommended sanction.
>
> In other words it's up to the municipality to accept the recommended sanction or not. It may substitute the recommended sanction with a sanction that it deems fit."[160]

Therefore, the municipality advised the employee regarding his summary dismissal, without affording him an opportunity to be heard before it took the decision to dismiss him. The employee subsequently referred an alleged unfair dismissal dispute to the South African Local Government Bargaining Council (SALGBC) challenging the substantive and procedural unfairness of his dismissal.

The SALGBC commissioner held that it was of the utmost importance that the external chairperson had an unrestricted choice of sanction because the collective agreement provided that he could choose from a number of specified sanctions.[161] SAMWU contended that the dismissal was unfair

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155 *SAMWU obo Abrahams v City of Cape Town supra* 23.

156 *SAMWU obo Abrahams v City of Cape Town supra* 26.

157 (2011) 32 *ILJ* 2738 (LC).

158 *South African Municipal Workers Union on behalf of Mahlangu v SA Local Government Bargaining Council supra* 5.

159 *Ibid*.

160 *South African Municipal Workers Union on behalf of Mahlangu v SA Local Government Bargaining Council supra* 7.

161 *South African Municipal Workers Union on behalf of Mahlangu v SA Local Government*

because the collective agreement had not been followed in the sense that the chairperson's determination should have been final and binding in terms of the disciplinary procedure.[162] The SALGBC commissioner dispensed this argument, citing the well-established principle in *Highveld* that a failure to follow an agreed procedure does not necessarily render a dismissal unfair.[163] Accordingly, the SALGBC commissioner endorsed the sanction of dismissal imposed by the municipality, taking into account the seriousness of the charges on which the employee was found guilty, amongst other things.

On review, the Labour Court held the following:

> "What happened in this case is that the chairperson of the enquiry did make a finding on Mahlangu's guilt on the charges but failed to complete his duties under the code by finalising the sanction. Instead, he contented himself with only making a recommendation to the employer. There is nothing in the [collective] agreement to suggest that the powers given to the chairperson included the power to delegate or re-assign his responsibility to decide a sanction to another party.
>
> The employer also did not invite any representations from the applicants before it decided to take up the chairperson's invitation to determine the sanction itself. As this was clearly a departure from the [collective] agreement, it might reasonably be expected that it would not have assumed this power without obtaining the applicant's consent for such a material deviation from the [collective] agreement. But it did not. In deciding to perform the function which was entrusted to the chairperson, the employer acted in direct breach of the disciplinary procedure and exercised a power it was not entitled to exercise in terms of that procedure. The fact that an employer is responsible for and entitled to take disciplinary action does not mean that it can simply reclaim powers to determine guilt and sanction which it has previously relinquished in terms of a binding [collective] agreement that remains applicable to it. The facts of this case are also distinguishable from the case of *Samson v Commission for Conciliation, Mediation & Arbitration & Others* (2010) 31 *ILJ* 170 (LC), in which there was no collective agreement and there was a well established practice of reviewing disciplinary sanctions internally."[164]

The Labour Court reasoned that the municipality could not unilaterally assume the power to determine the appropriate disciplinary sanction after it had delegated such authority to an external chairperson. The Labour Court further emphasised that the delegation of this power was exercised in terms of a binding collective agreement and the municipality could therefore not unilaterally deviate from the binding terms of the collective agreement. As a result, the municipality's conduct resulted in the employee's dismissal being determined by a person who did not have the requisite authority to do so. Such conduct flagrantly breached the provisions of the collective agreement. Accordingly, the Labour Court held that dismissal would not have occurred had the municipality not acted in the manner which it did. This affected the substantive fairness of the employee's dismissal.

Regarding procedural fairness, the Labour Court held that the fact that SAMWU and the employee were unaware of the exchange between the

Bargaining Council supra 10.

[162] *South African Municipal Workers Union on behalf of Mahlangu v SA Local Government Bargaining Council supra* 12.

[163] *Ibid.*

[164] *South African Municipal Workers Union on behalf of Mahlangu v SA Local Government Bargaining Council supra* 29.

municipality and the chairperson until after the fact, and had no opportunity to make representations to the actual decision-maker – albeit one who had usurped the chairperson's function – on the validity of the chairperson's views on recommending a sanction, nor to make representations whether any different sanction could, or should be imposed, was procedurally unfair.[165] The Labour Court consequently ordered the reinstatement of the employee.

Interestingly, Lagrange J indicated that the municipality was not without an alternative to the extent that it was unhappy with the sanction which was imposed by the external chairperson. In this regard, he held the following:

> "If the employer was unhappy with the sanction the chairperson would have imposed, it would not have been without recourse: it could have applied to review the chairperson's decision."[166]

This suggestion by Lagrange J is founded on the principle that an organ of state can review its own decision "on such grounds as are permissible in law".[167] The municipality (in this case) is an organ of state in terms of section 239 of the Constitution of the Republic of South Africa, 1996 (Constitution). Lagrange J referred to this alternative remedy with reliance on the LAC's decision in *MEC for Finance, KwaZulu-Natal v Dorkin NO.*[168] The permissibility of an organ of state reviewing its own decisions is discussed in detail in Part 2 of this article.

4 2 Increasing sanctions on appeal

In certain cases, an employee may be subjected to a disciplinary enquiry and the chairperson finds the employee guilty of the alleged misconduct but imposes a disciplinary sanction short of dismissal. The employee may be of the view that they are not guilty of misconduct and decide to lodge an internal appeal. Although in such cases, the employee institutes the appeal and not the employer, the question which arises is the following: is the appeal chairperson, to the extent that he or she also finds the employee guilty, entitled to increase the disciplinary sanction which was imposed in the internal disciplinary enquiry?

In *Rennies Distribution Services (Pty) Ltd v Bierman NO*,[169] the Labour Court frowned upon the practice of an appeal chairperson increasing the disciplinary sanction. In this case, the employee had been issued a final written warning for unauthorised absenteeism. The employee was dissatisfied with the outcome and lodged an internal appeal process. In the appeal hearing, the appeal chairperson changed the disciplinary sanction of a final written warning and substituted it with a sanction of dismissal.

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165 *South African Municipal Workers Union on behalf of Mahlangu v SA Local Government Bargaining Council supra* 34.

166 *South African Municipal Workers Union on behalf of Mahlangu v SA Local Government Bargaining Council supra* 33.

167 S 158(1)(*h*) of 66 of 1995.

168 [2008] 6 BLLR 540 (LAC).

169 (2008) 29 *ILJ* 3021 (LC).

The Labour Court recognised that in criminal cases, a court of appeal has the right to interfere with a sentence that has already been imposed.[170] It noted that the court of appeal derives such power from the express provisions of section 322(6) of the Criminal Procedure Act 51 of 1977, which sets out the powers of the court (sitting as a court of appeal) in detail.[171] The Labour Court held that it would be unfair to allow a chairperson in an appeal hearing (as part of a disciplinary process) to simply increase a disciplinary sanction except in circumstances where the disciplinary code expressly allows for such a power.[172]

Importantly, Basson J indicated that he was mindful of the fact that a disciplinary enquiry should not be equated with a criminal trial per the decision in *Avril Elizabeth Home for the Mentally Handicapped v CCMA*.[173] He added that the rationale underlying the reasons why a criminal court on appeal should caution against increasing a sanction is equally valid in respect of disciplinary enquiries.[174]

Therefore, the position from *Rennies* is that an appeal chairperson is permitted to increase a disciplinary sanction on appeal only if such is expressly permitted in terms of the disciplinary code and procedure. Grogan submits that where an appeal tribunal is permitted to increase the disciplinary sanction, the employee should, at the very least, be warned if the chairperson is contemplating increasing the disciplinary sanction so that the employee can either withdraw the appeal or prepare submissions on why the sanction should not be increased.[175]

In *Marina Opperman v CCMA*,[176] Steenkamp J endorsed the *Rennies* decision by emphasising that except where express provision is made for the imposition of a harsher disciplinary sanction on appeal, a chairperson on appeal does not have the necessary power to consider imposing a harsher sanction. Steenkamp J further held that even if there is express provision for such a power, the chairperson on appeal must still adhere to the fundamental principles of natural justice which require that the *audi alteram partem* principle must be afforded to the employee who may be prejudiced by the imposition of a more severe sanction.[177]

The *Rennies* and *Opperman* decisions make it definitively clear that an employer may only impose a harsher disciplinary sanction on appeal only if express provision is made for such in terms of the employer's disciplinary code, subject to adherence to the principles of natural justice.

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170 *Rennies Distribution Services (Pty) Ltd v Bierman NO supra* 20.
171 *Ibid.*
172 *Ibid.*
173 [2006] 9 BLLR 833 (LC).
174 *Rennies Distribution Services (Pty) Ltd v Bierman NO supra* 23.
175 Grogan *Dismissal* 264.
176 (2017) 38 *ILJ* 242 (LC) 18.
177 *Ibid*.

4 3 Conclusion

Based on the consideration of the above authorities, it is evident that the courts adopt different approaches in respect of compliance with the disciplinary codes and procedures. The courts have in the past permitted employers to deviate from strict adherence to the disciplinary code and procedure in circumstances where the employer nonetheless followed a fair process. The difficulty arises when the disciplinary code and procedure has been incorporated into an employee's contract of employment. In this regard, the courts have indeed been consistent by holding the employer strictly bound to the provisions of the disciplinary code and procedure since those provisions constitute contractual terms in such circumstances.

The courts have also upheld the primacy of collective agreements since they constitute a contractual undertaking between the employer and the trade union(s) (acting on behalf of their members). This is because it is contrary to public policy to permit an employer to unilaterally resile from a contractually binding agreement without the consent of the other contracting party. It is for this reason that the courts hold employers bound to disciplinary codes and procedures which are incorporated into collective agreements.

It is further evident that the courts do not permit employers to impose harsher disciplinary sanctions in circumstances where an employee has lodged an internal appeal unless the disciplinary code and procedure makes express provision for the imposition of a harsher sanction and that the employee is warned of the possibility of harsher sanction being imposed and that the employee is provided with an opportunity to make representations. The reason for providing an employee with an opportunity to be heard is rooted in the legal principle of *audi alteram partem*.

CASES / VONNISSE

THE FISCAL AUTONOMY OF SOUTH AFRICAN MUNICIPALITIES TO LEVY RATES: AN APPRAISAL OF

City of Johannesburg Metropolitan Municipality v Zibi [2021] ZASCA 97

1 Introduction

One of the fundamental institutional changes brought about by the Constitution of the Republic of South Africa, 1996 (the Constitution) is the protection of local government's autonomy (see *City of Cape Town v Robertson* 2005 (2) SA 323 (CC) par 58; *The Body Corporate of the Overbeek Building, Cape Town v Independent Outdoor Media (Pty) Ltd* (unreported) 2022-01-21 Case no 4838/2021 par 14–21; Fuo "The Courts and Local Governments in South Africa" in Fessha and Kossler (eds) *Federalism and the Courts in Africa: Design and Impact in Comparative Perspectives* (2020) 103–108). As part of this autonomy, local government, constituted by 257 municipalities, is recognised as a distinct sphere of government with legislative and executive powers that are vested in democratically elected municipal councils (see ss 40(1), 151(1) and (2), and 157 of the Constitution). Municipalities are constitutionally empowered to govern, on their own initiative, the affairs of local communities, subject to national and provincial legislation that is constitutionally compliant (s 151(1) and (2) of the Constitution). National and provincial government are barred from impeding or compromising the ability or right of a municipality to exercise its powers or perform its functions (s 151(4) of the Constitution). The autonomy of local government is also evident from a reading of certain constitutional provisions that protect the original powers and functions of municipalities (this is supported by a joint reading of ss 151, 153(*a*), 156 and 229 of the Constitution; see Fuo in Fessha and Kossler (eds) *Federalism and the Courts in Africa* 105; *City of Cape Town v Robertson supra* par 58–61; *Body Corporate of the Overbeek Building v Independent Outdoor Media supra* par 14–21). For example, section 229 of the Constitution confers original fiscal powers and functions on every municipality (*City of Tshwane v Blom* [2013] ZASCA 88 par 19; Steytler and De Visser *Local Government Law of South Africa* (2019) 13-6). In terms of this section, municipalities have powers to impose and recover rates on property.

Section 229 on municipal fiscal powers and functions provides:

> "(1) Subject to subsections (2), (3) and (4), a municipality may impose – (*a*) rates on property and surcharges on fees for services provided by or on behalf of the municipality; (*b*) if authorised by national legislation, other taxes, levies and duties appropriate to local government or to the category of local government into which that municipality falls …
>
> (2) The power of a municipality to impose rates on property, surcharges on fees for services provided by or on behalf of the municipality, or other taxes, levies or duties – (*a*) may not be exercised in a way that materially and unreasonably prejudices national economic policies, economic activities across municipal boundaries, or the mobility of goods, services, capital or labour; and (*b*) may be regulated by national legislation."

Furthermore, section 156 of the Constitution, read together with Schedules 4B and 5B of the Constitution, gives municipalities original powers over functional matters such as municipal planning, for example. Generally, the legislative, executive and administrative powers of municipalities to govern local communities are referred to as original powers because they are expressly protected in the Constitution (Steytler and De Visser *Local Government Law* 12-19; Fuo in Fessha and Kossler (eds) *Federalism and the Courts in Africa* 105–106). These powers and functions strengthen the autonomy of local government because they cannot be altered or removed without an amendment of the Constitution (Steytler and De Visser *Local Government Law* 12-19; *Fedsure Life Assurance Ltd v Greater Johannesburg Transitional Metropolitan Council* 1998 (12) BCLR 1458 (CC) par 37). Municipalities can take executive, legislative and administrative action in relation to their original powers and functions (Fuo in Fessha and Kossler (eds) *Federalism and the Courts in Africa* 105–106).

Despite their autonomy, the exercise of the original powers and functions of municipalities is subject to supervision and regulation by national and provincial government (see Steytler and De Visser *Local Government Law* 15-5 to 15-57; *City of Johannesburg Metropolitan Municipality v Gauteng Development Tribunal* 2010 (9) BCLR 859 (CC) par 56*; Body Corporate of the Overbeek Building v Independent Outdoor Media supra* par 27–30). For example, section 229(2)(*b*) of the Constitution clearly provides that the power of municipalities to impose rates on property may be regulated by national legislation. In this regard, national government enacted the Local Government: Municipal Property Rates Act (6 of 2004) (MPRA) to regulate the power of municipalities to levy property rates (*City of Johannesburg Metropolitan Municipality v Gauteng Development Tribunal supra* par 43–47). Regulation in this context entails "creating norms and guidelines for the exercise of a power or the performance of a function" (*Minister of Local Government, Environmental Affairs and Development Planning, Western Cape v The Habitat Council; Minister of Local Government, Environmental Affairs and Development Planning, Western Cape v City of Cape Town* 2014 (5) BCLR 591 (CC) par 22). It is essentially a managerial and compliance-driven role that is intended to ensure that municipalities perform their fiscal function effectively. National or provincial government cannot arrogate to itself an original municipal power and function through legislation that purports to regulate such a power or function.

The incidental powers of municipalities protected in section 156(5) of the Constitution further strengthen the autonomous powers of local government. According to this provision, each municipality "has the right to exercise any power concerning any matter reasonably necessary for, or incidental to, the effective performance of its powers and functions". In *City of Cape Town v Robertson* (*supra*), the Constitutional Court took into consideration the original and incidental powers of municipalities when it asserted that in the current constitutional dispensation "the conduct of a municipality is not always invalid only for the reason that no legislation authorises it" (*City of Cape Town v Robertson supra* par 60). The court explained that the power of a municipality may derive from the Constitution or from legislation of a competent authority or from its own laws (*City of Cape Town v Robertson supra* par 60). This reasoning of the court suggests that in order to impose and collect rates on property, for example, a municipality can use its initiative and go beyond what is expressly stipulated in section 229 of the Constitution or the MPRA, provided they do not violate any law that is constitutionally compliant.

In *City of Johannesburg Metropolitan Municipality v Zibi* ([2021] ZASCA 97), the Supreme Court of Appeal (SCA) had to decide on whether the City of Johannesburg was entitled to levy a rate in the form of a penalty on residential property for illegal or unauthorized use, without first changing the category of the property on its valuation roll or supplementary roll from "residential" to "illegal or unauthorized" use and publishing this in the provincial gazette. Based on an interpretation of relevant legal provisions and the application of established legal principles, the majority judgment (written by Mbha JA, with Saldulker JA and Poyo-Dlwati AJA concurring) held that the City's powers to levy a penalty in respect of the use of the property within its jurisdiction was legal, especially since it had levied the penalty as part of a validly adopted property rates policy. In contrast, the minority judgment (written by Schippers JA, with Carelse AJA concurring) concluded that the City was not empowered under section 8 of the MPRA to determine "illegal use" as a category of rateable property, nor to include such category in its rates policies. The minority judgment reasoned that although the respondents' use of their property for an illegal or unauthorised purpose was beyond question, "the sanction for the respondents' illegal use of their property must be sought elsewhere and not in the Rates Act" (*City of Johannesburg Metropolitan Municipality v Zibi supra* par 38–39). The minority judgment argued that the appeal should have been dismissed.

This case note appraises the judgments of the SCA in *City of Johannesburg Metropolitan Municipality v Zibi* (*supra*). It argues that although the reasoning of the majority judgment was correct, it overlooked the transitional arrangements in section 93B of the MPRA that were introduced by section 35 of the Local Government: Municipal Property Rates Amendment Act (29 of 2014) (Property Rates Amendment Act). In relation to the minority judgment, it argues that the position adopted by Justice Schippers was incorrect in that it reflects the closed list of rateable properties that municipalities were required to comply with only after 1 July 2022. In order to achieve the above objective, the remainder of this contribution is structured into four parts. It begins by providing a contextual

background on property rating in South Africa, highlighting the need for legal reform following the transition to constitutional democracy. (Planning law as well as property taxes across the globe are generally linked to political ideology. See Van Wyk *Planning Law* 2ed (2012) 1–2; Franzsen and Olima "Property Taxation in Southern and East Africa: Lessons from South Africa and Kenya" 2003 15 *SA Merc LJ* 309 309.) This is followed by a brief discussion of the MPRA, with attention given to those sections that have been argued in SCA judgments. After this, the author provides an overview of *City of Johannesburg Metropolitan Municipality v Zibi*, focusing on the facts, issue in dispute, and the findings of the majority and minority judgments, as well as their reasoning. The last part of the contribution is an appraisal of the judgments of the SCA.

2 Municipal property rates in historical context

Property rating (taxation) is an important tool used by local authorities to improve revenue generation and efficiently manage urban land (Franzsen and Olima 2003 *SA Merc LJ* 309; Ramakhula *Implications of the Municipal Property Rates Act (No 6 of 2004) on Municipal Valuations* (masters research report, University of the Witwatersrand) 2010 22–23). Often, property rating has failed to meet the desired objectives in African countries because of the retention of inappropriate colonial laws that do not speak to the current reality of many local authorities (Franzsen and Olima 2003 *SA Merc LJ* 309). Although South Africa has a long history of property rates, dating back to 1836, property tax only existed in towns and urbanised White areas in the old order. At the national level, property tax was regulated by several pieces of legislation that promoted racial separation (Ramakhula *Implications of the MPRA* 1). The Natives Land Act, promulgated in 1913, restricted ownership or leasing of land reserves that were established for Blacks, Coloureds and Indians. The series of racially-based national statutes that were adopted before and during apartheid rule meant that White and Black local authorities could not be amalgamated for purposes of uniform property taxation (Ramakhula *Implications of the MPRA* 2). As a result of racial separation, White areas had good infrastructure, better properties and better living environments than Black areas. While Whites willingly paid property rates, Blacks did not see the need to pay, given the poor services that were delivered in their areas (Ramakhula *Implications of the MPRA* 2). In order to better manage those townships that could not be incorporated into homelands and to contain growing uprisings, the State granted such townships full municipal status through the Black Local Authorities Act (102 of 1982). Structures established to manage Black townships lacked political credibility and were often rejected through violent community protests (see De Visser *Developmental Local Government: A Case Study* (2005) 59–60; Craythorne *Municipal Administration* (1997) 3; Ismail, Bayat and Meyer *Local Government Management* (1997) 50–51). Elections to Black local authorities in 1983 ignited a serious wave of urban protests against the policy of apartheid (Wittenberg "Decentralisation in South Africa" (2006) 14–15; Bekink *Principles of South African Local Government* (2006) 24). Attempts by Black local authorities to impose rates and charges for services were met with fierce opposition. By the late 1980s, there was a

general realisation of the need to establish a new, uniform, all-inclusive system of local government, capable of responding to the needs of all South Africans (Ismail *et al Local Government Management* 58–61; Bekink *Principles of South African Local Government Law* 25).

From 1910 until the demise of the apartheid system, municipalities were subject to tight provincial control. The power of municipalities to impose property rates was regulated at the provincial level through various ordinances adopted by the country's four provinces (for a list of these ordinances, see Ramakhula *Implications of the MPRA* 2). Each province had legislation to guide municipal valuations and the implementation of the preferred rating system. The different rating systems used included: flat rating, site rating, composite rating or differential rating (for details on these rating methods, see Ramakhula *Implications of the MPRA* 7–10). Despite the different forms of rating used, municipalities were obliged to collect a prescribed amount of income each financial year (Ramakhula *Implications of the MPRA* 2). The use of different rating systems by provinces led to inconsistencies in the collection of rates across South Africa (Ramakhula *Implications of the MPRA* 7).

During the transition to democracy, government had two main property rating challenges: first, to reform and extend the property rating system that functioned effectively in the hands of former White urban local authorities before 1994 to all properties within a transformed system of non-racial wall-to-wall municipalities; and, secondly, to achieve uniformity in the system of property rating across the entire country (Franzsen and Olima 2003 *SA Merc LJ* 309–310). Against this historical backdrop and a number of transitional legislative arrangements, a series of negotiations between the new democratic government and interested parties led to the finalisation and enactment of the MPRA in 2004 (Steytler and De Visser *Local Government Law* 13-9 to 13-10; Franzsen and Olima 2003 *SA Merc LJ* 317–318. For details on transitional legal arrangements, see Steytler and De Visser *Local Government Law* 13-9 to 13-10). The objectives of the MPRA and provisions relevant to this contribution are set out under heading 3 below.

It is important to note that the transformation of the system of property rates in South Africa is intertwined with the transformation of the system of land planning in the country (for a discussion on the history of land planning in South Africa, and the law and policy reforms that have been implemented since 1993, see Van Wyk *Planning Law* 1–4). Just as the system of rating was not uniform, land-use planning in South Africa was also fragmented. This was mainly because land itself was fragmented for racial purposes. In the current dispensation, local government has been accorded greater powers in relation to land planning and land-use management through the Constitution (Schedule 4B of the Constitution read together with s 156(1) and (2) of the Constitution) and the Spatial Planning and Land Use Management Act (6 of 2013) (SPLUMA) (see s 20(2) of SPLUMA, for example). In terms of the Constitution, municipalities have original competence over "municipal planning". This means that they have legislative, executive and administrative authority in respect of "municipal planning" (ss 156(1)(*a*)–(*b*) and 156(2) of the Constitution). The

exact ambit of the powers of local government over "municipal planning" was the subject of contestation in a number of cases (*City of Johannesburg Metropolitan Municipality v Gauteng Development Tribunal supra*; *Maccsand (Pty) Ltd v City of Cape Town* 2012 (7) BCLR 690 (CC); *Minister of Local Government, Western Cape v Lagoonbay Lifestyle Estate (Pty) Ltd* 2014 (1) SA 521 (CC); *Minister of Local Government, Environmental Affairs and Development Planning, Western Cape v The Habitat Council; Minister of Local Government, Environmental Affairs and Development Planning, Western Cape v City of Cape Town* 2014 (5) BCLR 591 (CC)). The question was finally settled by the Constitutional Court in *Minister of Local Government v Habitat Council* (*supra* par 19). In the *Habitat Council* case, the court concluded that all "municipal planning decisions that encompass zoning and subdivision, no matter how big, lie within the competence of municipalities" (*Minister of Local Government v Habitat Council supra* par 19). The court reasoned that it made perfect sense for municipalities (and not provinces) to be responsible for zoning and subdivision decisions because municipalities are best suited to making those decisions (*Minister of Local Government v Habitat Council supra* par 14). The court pointed out that because municipalities are at the forefront of service delivery, they face persistent demands from citizens for delivery of government services. Based on these considerations, the court reasoned that it is appropriate that municipalities should be responsible for zoning and subdivision decisions because this entails localised decisions, and should be based on information that is readily accessible to municipalities (*Minister of Local Government v Habitat Council supra* par 14). The decision-maker must consider whether services that are primarily provided by municipalities will be available for proposed developments and take into consideration matters like building density and wall heights – matters that are best left for municipal determination (*Minister of Local Government v Habitat Council supra* par 14).

Van Wyk points out that, if one takes into account the historical context of South Africa, it becomes evident that the proper planning and management of land use is pivotal to the creation and maintenance of a satisfactory quality of life for all of South Africa's people (Van Wyk *Planning Law* 1). The current zoning powers of local government ensures that municipalities are able to plan the development of municipal areas. As a commentator puts it: "This is to ensure that nobody operates a chicken farm in the middle of a residential area" and that "no heavy industries open up shops in a commercial area" (Visser "Take Note If You Are Conducting a Business From Your Private Residence" (29 March 2022) https://www.moneyweb.co.za/news/south-africa/take-note-if-you-are-conducting-a-business-from-your-private-residence/ (accessed 2022-03-30)). These are some of the issues a municipal council must consider for proper town planning. Property rating is a tool that municipalities use to generate revenue and manage the use of land within their jurisdictions.

3 Discussion of the MPRA

The Preamble of the MPRA asserts that, among other purposes, it was adopted to regulate the power of a municipality to impose rates on

property; make provision for fair and equitable valuation methods of properties; and make provision for an objections and appeal process. The MPRA affirms the need for municipalities to exercise their power to impose rates on property within a statutory framework that increases certainty, uniformity and simplicity across the country (see Preamble of the MPRA). In terms of section 2 of the Act, a metropolitan or local municipality may levy a rate on property in its area (although there are three categories of municipality in South Africa, district municipalities do not have powers to levy a rate on property). This power must be exercised subject to section 229 and other provisions of the Constitution, the provisions of the MPRA, and a municipal rates policy adopted in terms of section 3 of the MPRA (see s 2 of the MPRA).

Section 3 of the MPRA deals with the adoption and contents of a rates policy. It obliges the council of a municipality to adopt a policy consistent with the MPRA on the levying of rates on rateable property in the jurisdiction of the municipality (s 3(1) of the MPRA). A rates policy adopted in terms of section 3(1) of the MPRA takes effect on the effective date of the first valuation roll prepared by the municipality in terms of the Act and must accompany the municipality's budget for the financial year concerned when the budget is tabled in the municipal council in terms of the Local Government: Municipal Finance Management Act (56 of 2003) (MFMA) (s 3(2) of the MPRA). A municipal rates policy must: treat persons liable for rates equitably; determine the criteria to be applied by the municipality if it levies different rates for different categories of property determined in terms of section 8 of the MPRA, and if it increases or decreases rates; determine, or provide criteria for the determination of, categories of property for the purpose of levying different rates; identify and provide reasons for exemptions, rebates, and reductions; and take into account the effect of rates on public service infrastructure (see generally s 3(1)–(5) of the MPRA).

Section 4 of the MPRA prescribes the public participation process that must be followed by every municipality before it adopts its rates policy. The process is generally aligned with Chapter 4 of the Local Government: Municipal Systems Act (32 of 2000) (the Systems Act), which is exclusively dedicated to facilitating public participation in local government generally. Section 4 of the MPRA outlines the role of the municipal manager and the council in this regard.

Section 5 deals with the annual review of rates policies and prescribes that each municipal council must annually review, and if necessary, amend its rates policy. Any amendments to a rates policy must accompany the municipality's annual budget when it is tabled in the council in terms of the MFMA (see s 5(1) of the MPRA). Any amendments that relate to any of the following matters listed in sections 3(3) to (6) of the MPRA require community participation: equitable treatment of persons liable for rates; determination of the criteria to be applied by the municipality if it contemplates levying different rates for different categories of property, and when it increases or decreases in rates; determination of the criteria for the levying of different rates for different categories of property; and providing exemptions, rebates, and reductions for rates (see s 5(2) of the MPRA).

Every municipality is obliged to adopt and publish by-laws to give effect to its rates policy (s 6(1) of the MPRA). Such a by-law may differentiate between different categories of property; and different categories of owner of properties liable for the payment of rates (s 6(2)(*a*)–(*b*) of the MPRA).

Section 8 of the MPRA deals with differential rates. This section was overhauled following the adoption of the Property Rates Amendment Act, which went into operation on 1 July 2015. In terms of the Amendment Act, the new categorisation framework created in section 8 of the MPRA was supposed to be implemented by all municipalities fully by 1 July 2022.

In this regard, s 93B of the MPRA reads as follows:

> "Transitional arrangement: Differential rates – The provision of section 8 must be applied by a municipality within seven years of the date of commencement of this Act".

S 93B was inserted by s 35 of the Property Rates Amendment Act. See also Steytler and De Visser *Local Government Law* 13-39.) Steytler and De Visser argue that the inappropriate framing of the old section 8(1) and (2) of the MPRA left municipalities with a lot of discretionary powers in relation to differentiation and categories of rateable property (Steytler and De Visser *Local Government Law* 13-36 to 13-40).

Before the 2014 amendment, s 8(1) and (2) of the MPRA read as follows:

> "8. (1) Subject to section 19, a municipality may in terms of the criteria set out in its rates policy levy different rates for different categories of rateable property, which may include categories determined according to the- *(a)* use of the property; *(b)* permitted use of the property; or *(c)* geographical area in which the property is situated.
>
> (2) Categories of rateable property that may be determined in terms of subsection (1) include the following: *(a)* Residential properties; *(b)* industrial properties; *(c)* business and commercial properties; *(d)* farm properties used for– (i) agricultural purposes; (ii) other business and commercial purposes; (iii) residential purposes; (iv) purposes other than those specified in subparagraphs (i) to (iii); (*e*) farm properties not used for any purpose; (*f*) smallholdings used for- (i) agricultural purposes; purposes; (ii) residential; (iii) industrial purposes; (iv) business and commercial purposes; or (v) purposes other than those specified in subparagraphs (i) to (iv); (*g*) state-owned properties; *(h)* municipal properties *(i)* public service infrastructure; *(j)* privately owned towns serviced by the owner; *(k)* formal and informal settlements; *(l)* communal land as defined in section 1 of the Communal Land Rights Act, *(m)* state trust land; *(n)* properties – (i) acquired through the Provision of Land and Assistance Act, 1993 (Act No. 126 of 1993), or the Restitution of Land Rights Act, 1994 (Act No. or 1994); 22 of 25 (ii) which is subject to the Communal Property Associations Act, 1996 (Act No. 28 of 1996); *(o)* protected areas; *(p)* properties on which national monuments are proclaimed; *(q)* properties owned by public benefit organisations and used for any specific public benefit activities listed in Part 1 of the Ninth Schedule to the Income Tax Act; or *(r)* properties used for multiple purposes, subject to section 9."

Owing to this framing, "it was thus competent for a municipality to include in its rates policy the category of 'non-permitted use' of property" (Steytler and De Visser *Local Government Law* 13-36). In contextualising the

amendment of the old section 8 of the MPRA, Steytler and De Visser argue that:

> "The radical amendment of section 8 should be understood again[st] the inherent contradictions it contains as well as the open-ended discretion it afforded municipalities. First, the discretion of municipalities to categorise properties is unregulated. Hence, there is no obligation on a municipality to determine differential rates on property. Moreover, the methods used for categorisation are not exhaustive. The categories listed in section 8(2) are also optional; a municipality does not need to adopt them at all. Secondly, the methods of determining categories of properties are awkwardly expressed because they are set in the alternative. As the three methods are linked by the proposition "or", it indicates that a municipality may use only one of the grounds. This would defeat the object of determining, for example, vacant property as a category, as vacant property would include, by definition, land which is not used for its permitted use. Again, the method of 'geographical areas' could be used in conjunction with the other two methods. However, because section 8(1) permits municipalities to use any other method, a municipality is not prevented from using the listed methods in combination." (Steytler and De Visser *Local Government Law* 13-39)

The amendment of section 8 of the MPRA sought to remedy the problems identified in the above extract (Steytler and De Visser *Local Government Law* 13-40).

In order to manage the discretion municipalities enjoyed under the old section 8, the new section 8 of the MPRA now prescribes a closed list of categories of property and the method by which a property is categorised as falling into one or other of the categories.

The amended s 8 of the MPRA reads as follows:

> "8. Differential rates
>
> (1) Subject to section 19, a municipality may, in terms of the criteria set out in its rates policy, levy different rates for different categories of rateable property, determined in subsection (2) and (3), which must be determined according to the (*a*) use of the property; (*b*) permitted use of the property; or (*c*) a combination of (*a*) and (*b*).
>
> (2) A municipality must determine the following categories of rateable property in terms of subsection (1): Provided such property category exists within the municipal jurisdiction: (*a*) Residential properties; (*b*) industrial properties; (*c*) business and commercial properties; (*d*) agricultural properties; (*e*) mining properties; (*f*) properties owned by an organ of state and used for public service purposes; (*g*) public service infrastructure properties; (*h*) properties owned by public benefit organisations and used for specified public benefit activities; (*i*) properties used for multiple purposes, subject to section 9; or (*j*) any other category of property as may be determined by the Minister, with the concurrence of the Minister of Finance, by notice in the *Gazette*.
>
> (3) In addition to the categories of rateable property determined in terms of subsection (2), a municipality may determine additional categories of rateable property, including vacant land: Provided that, with the exception of vacant land, the determination of such property categories does not circumvent the categories of rateable property that must be determined in terms of subsection (2).
>
> (4)(*a*) Where a municipality can, on good cause, show that there is a need to subcategorise the property categories listed in subsection (2), a municipality must apply to the Minister in writing for authorisation to create one or more of such subcategories. (*b*) Such application must

> (i) be accompanied by a motivation for such subcategorisation; (ii) demonstrate that such subcategorization is not in contravention of section 19; and (iii) reach the Minister at least 15 months before the start of the municipal financial year in which the municipality envisages levying a rate on such subcategorised property."

The new provision limits the method of categorisation to that of either actual or permitted use or a combination of both. By using this method, all properties have to be generally classified as one or other category from the closed list in the revamped section 8(2) of the MPRA (Steytler and De Visser *Local Government Law* 13-40). For example, when the method in section 8(1) is applied to the list in section 8(2), the first category of property is "residential property" which is defined in terms of the actual use or permitted use for residential purposes. It has been suggested that, by using permitted and actual use in relation to the same property, a category of "vacant" or "unused" property can be created (Steytler and De Visser *Local Government Law* 13-40). In addition, a property can be used for multiple purposes and categorised as such by a municipality as set out in section 9 of the MPRA. In terms of section 19 of the MPRA, a municipality is not generally allowed to levy different rates on residential property (see s 19(1)(*a*) of the MPRA and the exceptions in ss 11(2), 21 and 89 of the MPRA). Furthermore, a municipality may not levy additional rates on residential property (s 19(1)(*d*) of the MPRA; see s 22 of the MPRA for exceptions to the rule). However, this can be done for an entire circumscribed area in order to improve or upgrade infrastructure (see Steytler and De Visser *Local Government Law* 13-41 to 13-42).

As indicated above, it was envisaged that municipalities must, from 1 July 2022, comply with the closed list of categories of property and the method by which a property is categorised as falling into one or other of the categories (see s 93B of the MPRA). This means that, before this cut-off date, reliance on the old categories of property and the old method by which property was categorised by a municipality was not illegal.

4 Overview of *City of Johannesburg Metropolitan Municipality v Zibi*

4 1 Facts and issue in dispute

Mr and Mrs Zibi bought immovable property that was transferred into their names on 24 June 2013. The property was zoned as "Residential 1" in terms of the Johannesburg Town Planning Scheme of 1979. The property is a free-standing erf with a house that has five bedrooms. Initially, only they resided in the property with their two minor children. However, in January 2015, they rented out two bedrooms to students and young professionals, therefore using the property as a commune. No authorisation was obtained from the City for commercial use (*City of Johannesburg Metropolitan Municipality v Zibi supra* par 2–6).

Based on several site inspections carried out by officials of the City, the couple was first notified of their contravention (through TP19 Notice) on

4 September 2013. The TP19 Notice called on them to terminate their unauthorised use of the property by 4 October 2013 at the latest. On 28 October 2016, the City, through its attorneys, sent a letter to the couple, notifying them of their wrongful and unlawful use of the property, in violation of the town planning scheme and zoning thereof. The letter stated that five site inspections conducted on the property from 3 August 2014 to 9 October 2016 confirmed that the unauthorised use of the property continued unabated (*City of Johannesburg Metropolitan Municipality v Zibi supra* par 7–8).

On 22 September 2015, the City's town planning law enforcement unit directed the property rates policy finance and compliance unit to impose a penalty tariff as contemplated in the City's Property Rates Policy 2015/2016. From October 2015 to the date of the SCA judgment, the City levied rates on the property in the form of a penalty for illegal and unauthorised use. Before October 2015, the municipality had levied a property rate of R898.01 monthly on the property. However, from October 2015 onwards, the rate escalated to R3 592.05. The penalty tariff of R3 592.05 included the amount charged in respect of property rates. After October, the penalty tariff was claimed monthly as per the tariff provided for in the City's rates policy (*City of Johannesburg Metropolitan Municipality v Zibi supra* par 4 and 9).

The couple were not happy with the increase in the penalty tariff and approached the City's Ombudsman on 11 December 2017 to investigate what they called an incorrect billing on their property. On 31 January 2018, the Ombudsman informed the couple that the increase in their account was due to the implementation of a penalty tariff for using their property contrary to the zoning. On 10 October 2018, the City obtained an order in the Johannesburg High Court interdicting the couple from using the property in contravention of its residential zoning within 30 days of the date of the order. Instead of challenging the interdict, which remained in force, on 26 November 2018, the couple launched an application challenging the City's penalty tariff. They argued that, in terms of the MPRA, before an illegal or unauthorised tariff can be levied, the City was first obliged to update the category of the property on its valuation roll. The City argued that the property rates policy was correctly applied and there was no requirement that there should first be a re-categorisation before the application of a penalty tariff (*City of Johannesburg Metropolitan Municipality v Zibi supra* par 21).

The High Court reasoned that the City was not entitled to levy a penalty rate without first re-classifying the property as an "unauthorised category" and ruled in favour of the couple (*City of Johannesburg Metropolitan Municipality v Zibi supra* par 11–12). The court held that the failure to follow this procedure contravened section 3 of the MPRA as per the reasoning of the court in *Smit v The City of Johannesburg Metropolitan Municipality* ([2017] ZAGPJHC 386). The High Court concluded that the City was only authorised to levy rates on the property based on how it was categorised – that is, in accordance with its "Residential 1" zoning. The court reasoned that if the City wanted to charge the punitive rate, it was required to amend the valuation roll or issue a supplementary roll and comply with the relevant

legislative requirements that are designed to ensure compliance with the *audi alteram* principle, in order to protect ratepayers like the couple against arbitrary increases. Based on this reasoning, the court held that the City's failure to follow this procedure rendered its conduct invalid (*City of Johannesburg Metropolitan Municipality v Zibi supra* par 12–13).

The City appealed to the SCA. The main issue for determination by the SCA was whether a municipality was entitled to levy a rate in the form of a penalty on residential property for illegal or unauthorised use, without first changing the category of the property on its valuation roll or supplementary roll from "residential" to "illegal or unauthorised" use (*City of Johannesburg Metropolitan Municipality v Zibi supra* par 1).

4 2 Majority judgment and reasoning

Based on an interpretation of relevant legal provisions, the majority judgment of the SCA held that the City's action to levy a penalty in respect of the use of the property within its jurisdiction was not *ultra vires* its powers especially since it had done so as part of a validly adopted property rates policy (*City of Johannesburg Metropolitan Municipality v Zibi supra* par 20).

The majority judgment began by examining the legal provisions governing the powers and ability of municipalities to impose rates and tariffs. Justice Mbha explained that the power of municipalities to levy rates on property within their jurisdictions is an original power conferred by section 229(1)(*a*) of the Constitution and regulated by the MPRA as envisaged by section 299(1)(*b*) of the Constitution (*City of Johannesburg Metropolitan Municipality v Zibi supra* par 14). He indicated that the MPRA and other legislation such as the Systems Act and the MFMA constitute part of the suite of statutes that transformed local government in South Africa (*City of Johannesburg Metropolitan Municipality v Zibi supra* par 14). He proceeded to explain how provisions in these statutes further strengthen the powers of municipalities to impose rates. He indicated that in terms of section 2 of the Systems Act, a municipality is an organ of state with a separate legal personality and that section 4(1)(*b*) of the Systems Act gives the council of a municipality the right to govern, on its own initiative, the local government affairs of the local community (*City of Johannesburg Metropolitan Municipality v Zibi supra* par 15). He went further to specify that the object of the MFMA is to secure sound and sustainable fiscal management of municipalities by establishing norms and standards for, *inter alia*, budgeting and financial planning processes (*City of Johannesburg Metropolitan Municipality v Zibi supra* par 15). He explained that the power of a municipality to raise a surcharge over and above a rate it levies in respect of property is grounded in the incidental powers conferred on municipalities by section 156(5) of the Constitution (*City of Johannesburg Metropolitan Municipality v Zibi supra* par 16). He asserted that, because the power of a municipality to levy rates is an original power, it is not dependent on enabling national legislation but on the Constitution. On this front, Justice Mbha concluded that the imposition of a penalty against property owners, as it happened in the case before the court, is necessary and incidental to the effective performance of the City's

functions (*City of Johannesburg Metropolitan Municipality v Zibi supra* par 16).

Justice Mbha noted that, despite the above constitutional provisions, section 75A(1)(*a*) of the Systems Act gives every municipality a general power to "levy and recover fees, charges and tariffs in respect of any function or service of the municipality" (*City of Johannesburg Metropolitan Municipality v Zibi supra* par 17). He indicated that, in terms of section 75A(2) of the Systems Act, fees, charges or tariffs are levied by a municipality by way of resolution passed by the municipal council with a supporting vote of the majority of its members. He pointed out that section 74 of the Systems Act obliges every municipality to adopt and implement a tariff policy on the levying of fees for municipal services provided by or on behalf of the municipality through a service delivery agreement that complies with the provisions of the Act and any other applicable legislation (*City of Johannesburg Metropolitan Municipality v Zibi supra* par 18). He emphasised that section 74 of the Systems Act must be read together with section 3(1) and (2) of the MPRA, which obliges a municipality to adopt a rates policy on the levying of rates on rateable property – which takes effect on the effective date of the first valuation roll prepared by the municipality, and which must accompany the municipality's budget for the financial year concerned (*City of Johannesburg Metropolitan Municipality v Zibi supra* par 18). He indicated that in terms of existing case law the adoption of a rates policy and the levying, recovering and increasing of property rates by a municipal council is a legislative rather than an administrative act (even if a validly adopted rates policy is not considered a legislative act, it still has binding force as an executive policy and can be enforced; see Steytler "The Legal Instruments to Raise Property Rates: Policy, By-Laws and Resolutions" 2011 *SAPL* 484–496; Fuo "Constitutional Basis for the Enforcement of 'Executive Policies' That Give Effect to Socio-Economic Rights in Africa" 2013 16(4) *PELJ* 1–44). In this light, Justice Mbha held that a municipality's action in this regard can only be challenged on the basis of the legality principle, which is an incidence of the rule of law (*City of Johannesburg Metropolitan Municipality v Zibi supra* par 19).

Based on the legal provisions and principles traversed above, Justice Mbha held that it was beyond any doubt that a municipality's powers to levy a penalty in respect of the use of any property within its jurisdiction is not *ultra vires* its powers, provided it does so as part of a validly adopted property rates policy (*City of Johannesburg Metropolitan Municipality v Zibi supra* par 20). He indicated that it was common cause that, in the case before the court, the respondents did not challenge the validity of the relevant property rates policy of the City of Johannesburg, but rather its application. Justice Mbha indicated that the respondents' attack was only directed at the validity of the impugned tariff and that the High Court also did not attack the validity of the property rates policy in question in any manner whatsoever (*City of Johannesburg Metropolitan Municipality v Zibi supra* par 20).

After the above finding, Justice Mbha proceeded to explain how the City had adopted and implemented a rates policy that complied with the requirements of section 8(1) to (3) of the MPRA (see *City of Johannesburg*

Metropolitan Municipality v Zibi supra par 22–35 for details). He noted that, in applying the policy, the City levied different rates for the relevant period 2015/2016. He singled out clause 5 of the City's rates policy, which was reproduced *mutatis mutandis* in the Municipality's 2016/2017, 2017/2018 and 2018/2019 property rates policies.

Clause 5 of the property rates policy provided:

> "(1) The Council levies different rates for different categories of rateable property in terms of section 8 of the [MPRA] Act. All rateable property will be classified in a category and will be rated based on the category of the property from the valuation roll which is based on the primary permitted use of the property, unless otherwise stated. For purposes of levying differential rates in terms of section 8, the following categories of property are determined, in terms of sections 3(3)*(b)* and 3(3)*(c)* of the Act ..." (see *City of Johannesburg Metropolitan Municipality v Zibi supra* par 23).

Clause 5(2) of the City's rates policy contains a list of the various categories of rateable property in respect of which different rates are levied. Out of these, 23 different categories were listed based on the primary permitted use of the property, unless otherwise stated. The last item on the list under *(w)* was for "illegal use" in the 2015/2016 policy. The City's 2016/2017 property rates policy had the same number of categories, except that under item *(w)*, it listed "unauthorised use" in contrast to the "illegal use" that is found in the 2015/2016 rates policy (*City of Johannesburg Metropolitan Municipality v Zibi supra* par 24). Clause 6 of the municipality's property rates policy for 2015/2016 explained the primary permitted use of the rateable property, the reasons for the zoning of the specific property and how each particular category of property would be rated. Clause 6.1 of the City's rates policy defined the illegal-use category as including all properties that are used for a purpose not permitted by the zoning thereof in terms of any applicable town planning scheme or land use scheme; and any properties used in contravention of any of the Council's by-laws and regulations (*City of Johannesburg Metropolitan v Zibi supra* par 24). Clause 6.1(2) stipulated: "The rate applicable to this category will be determined by the City on an annual basis. The City reserves the right to increase this penalty tariff higher than any other tariffs" (*City of Johannesburg Metropolitan Municipality v Zibi supra* par 24). Justice Mbha explained that it was significant to note that the "unauthorised use" category is explained in similar terms in the municipality's 2017/2018 and 2018/2019 property rates policies to the "illegal use" category (*City of Johannesburg Metropolitan Municipality v Zibi supra* par 24). Informed by the norm of statutory interpretation that courts should attribute meaning to the words used in legal documents, and taking into consideration the context in which they were used, by reading the particular provision or provisions in light of the document as a whole and the circumstances attendant upon its coming into existence (*City of Johannesburg Metropolitan Municipality v Zibi supra* par 25), the majority judgment asserted:

> "A simple reading of the penalty tariff in Clause 6, read together with the rest of the municipality's property and rates policy, reveals that it is plainly not applied as a 'category', although it is listed under the heading 'Categories of Property for levying of Differential Rates'. From a mere interpretation of the

> MRPA, read with the policy, it is clear that the penalty charges levied under 'illegal use' or 'unauthorised use' are directed against a landowner's illegal conduct, and not the property (*City of Johannesburg Metropolitan Municipality v Zibi supra* par 26). The municipality's property rates policy states unequivocally, that the 'illegal use' or 'unauthorised use' tariff will be imposed in respect of all properties that are used for a purpose (land use) not permitted by the zoning thereof. The 'illegal use' or 'unauthorised use' category is thus clearly defined with reference to the zoning categories, and not the categories as contemplated in the valuation roll." (*City of Johannesburg Metropolitan Municipality v Zibi supra* par 27)

Based on the above, the majority judgment reasoned that the respondents' reliance on the fact that the penalty tariff is referred to under the heading of "Categories" in clause 5 is misconceived (*City of Johannesburg Metropolitan Municipality v Zibi supra* par 28). The court reasoned that the penalty tariff (and how it is applied) forms part of the concept of the tariff and charges against the property as informed by the City's validly adopted property rates policy. The court was of the view that a reading of the City's property rates policy clearly reveals a distinction between the general property rate for lawful use and a charge for the penalty tariff that is founded on illegal conduct (*City of Johannesburg Metropolitan Municipality v Zibi supra* par 28). The court concluded that in addition to enabling legal provisions, it is clear from the property rates policy that the City correctly reserved to itself the right to claim a higher charge and tariff against landowners that deliberately refuse to bind themselves to the municipality's land-use scheme. Justice Mbha reasoned that this was the only sensible conclusion that could be reached if the penalty provisions, tariffs and charges referred to in the policy are interpreted in the context in which they appear, taken together with the purpose to which the policy is directed, and the objectives of the enabling suite of local government legislation traversed in the judgment (*City of Johannesburg Metropolitan Municipality v Zibi supra* par 29).

The majority judgment agreed with the City that the imposition of a higher tariff regarding rates payable on residential property, which is used for a purpose other than its authorised purpose, does not require a re-categorisation in terms of the MPRA and the municipality's property rates policy (*City of Johannesburg Metropolitan Municipality v Zibi supra* par 33). The penalty validly imposed by the City on the respondents' property only sought to address the non-compliance to zoning scheme to the extent and for the duration of the illegal land use in operation. The court indicated that the High Court failed to appreciate the unreasonable administrative burden that would be placed on the City if a supplementary valuation roll had to be published in respect of every unlawful use of property (*City of Johannesburg Metropolitan Municipality v Zibi supra* par 33). The court held that because the City's policy was validly adopted and applied, the respondents' complaint of an alleged breach of their right to the *audi alteram* procedure could not be sustained (*City of Johannesburg Metropolitan Municipality v Zibi supra* par 35). The majority of the SCA held that the High Court had misdirected itself. It overturned the decision of the High Court and completely set aside its order.

4 3 Minority judgment and reasoning

The minority judgment came to the conclusion that the City was not empowered under section 8 of the MPRA to determine "illegal use" as a category of rateable property, nor to include such category in its rates policies (*City of Johannesburg Metropolitan Municipality v Zibi supra* par 38). Justice Schippers reasoned that although the respondents' use of their property for an illegal or unauthorised purpose was beyond question, the penalty for their illegal use cannot be supported by the MPRA (*City of Johannesburg Metropolitan Municipality v Zibi supra* par 39). He reasoned that the "starting point therefore, is whether the municipality was authorised to determine 'illegal use' as a category of rateable property in terms of section 8(1) of the Rates Act, as it purported to do" (*City of Johannesburg Metropolitan Municipality v Zibi supra* par 50). After this, he proceeded to demonstrate why an analysis of relevant provisions in the Constitution and the MPRA do not support the City's argument.

Justice Schippers reasoned that section 75A of the Systems Act was not applicable in this case because the City did not act under that provision when it determined the illegal use category and imposed the penalty tariff. According to Justice Schippers, the City purported to act in terms of sections 3 and 8 of the MPRA. He affirmed the principle that "a decision deliberately and consciously taken under the wrong statutory provision cannot be validated by the existence of another statutory provision authorising that action" (*City of Johannesburg Metropolitan Municipality v Zibi supra* par 49). After an examination of section 8(1) to (3) of the MPRA, he reasoned that the MPRA does not permit "illegal use" as a category of rateable property for diverse reasons (*City of Johannesburg Metropolitan Municipality v Zibi supra* par 51–52):

First, in his view, "illegal use" is not a use as such, and the so-called illegal use category "is not determined according to the *use* of the property" (*City of Johannesburg Metropolitan Municipality v Zibi supra* par 52 (Judge's emphasis)). He explained that the "category is determined, and the penalty tariff imposed, on the basis of the *conduct* of property owners who use their properties contrary to town planning or land use schemes, or contravene by-laws and regulations" (*City of Johannesburg Metropolitan Municipality v Zibi supra* par 52 (Judge's emphasis)). Secondly, he indicated that the uses of property in section 8(1) of the MPRA plainly constitute lawful uses. He argued that this is supported by the immediate context in that all the categories of rateable property listed in section 8(2) of the MPRA are lawful uses of property (*City of Johannesburg Metropolitan Municipality v Zibi supra* par 53). Accordingly, illegal, unauthorised or non-permitted uses of property should not be categorised for the purpose of levying rates in terms of the MPRA. He reasoned that a municipality cannot grant its approval to the illegal use of property by levying a rate on such property and collecting rates levied on the owner of that property (*City of Johannesburg Metropolitan Municipality v Zibi supra* par 53). Thirdly, he reasoned that it was impossible to determine a value for illegal use and that this was a jurisdictional prerequisite for the exercise of the power to collect rates by a municipality (*City of Johannesburg Metropolitan Municipality v Zibi supra* par 54). Fourthly, he reasoned that the penalty

tariff is not a "rate" as contemplated in section 229(1)(*a*) of the Constitution and that this provision only empowers rates on property as ordinarily understood (*City of Johannesburg Metropolitan Municipality v Zibi supra* par 55). He opined that the penalty tariff was also not a "rate" as defined in the MPRA and did not conform to the established meaning of the term (*City of Johannesburg Metropolitan Municipality v Zibi supra* par 55–56). He explained that the penalty tariff was not a municipal charge, but a sanction directed solely at the conduct of property owners. He opined that there is nothing in the MPRA that authorises a municipality to levy a rate to deter landowners from contravening a statute, by-law, or land-use scheme; or to impose a penalty tariff because the property does not conform with the town-planning scheme (*City of Johannesburg Metropolitan Municipality v Zibi supra* par 57). The fifth reason Justice Schippers advanced for his dissenting judgment is that the "illegal use" category cannot be applied equitably, and so is contrary to the requirement of section 3(3)(*a*) of the MPRA, which provides that a rates policy "must treat persons liable for rates equitably" (*City of Johannesburg Metropolitan Municipality v Zibi supra* par 58). He noted that, in the case before the court, the property was not rated on the same basis as other properties used for the same purpose – that is, "accommodation establishments" (*City of Johannesburg Metropolitan Municipality v Zibi supra* par 58). He reasoned that, if it had been rated on that basis, there could have been no complaint because the respondents would have been treated the same as all other operators of such establishments (*City of Johannesburg Metropolitan Municipality v Zibi supra* par 58). Lastly, he reasoned that, in determining the "illegal use" category and imposing the penalty tariff, the City acted contrary to the prohibition in section 19(1) of the MPRA, to which section 8(1) is expressly rendered subject (*City of Johannesburg Metropolitan Municipality v Zibi supra* par 59–60). Section 19(1) of the MPRA provides that a municipality may not generally levy additional rates on residential property (*City of Johannesburg Metropolitan Municipality v Zibi supra* par 60).

Based on the above reasons, Justice Schippers held that the City had acted beyond the powers conferred by the MPRA in determining an "illegal use" category of rateable property and in imposing the penalty tariff. He held that this violated the principle of legality (*City of Johannesburg Metropolitan Municipality v Zibi supra* par 59–60), and that the action of the City was arbitrary because it was not rationally related to the purpose for which the power to levy rates was given in the MPRA (*City of Johannesburg Metropolitan Municipality v Zibi supra* par 63).

5 Appraisal of *City of Johannesburg Metropolitan Municipality v Zibi*

With very little engagement with the fiscal autonomy of municipalities as guaranteed in the Constitution, Justice Schippers argued that the appropriate starting point of the analysis ought to be whether the City of Johannesburg was authorised in terms of section 8 of the MPRA to determine "illegal use" as a category of rateable property. From this perspective, he concluded that the City was not empowered under section 8 of the MPRA to determine "illegal use" as a category of rateable property,

nor to include such category in its rates policies. Accordingly, he declared the actions of the City illegal and contrary to the dictates of the principle of legality.

The principle of legality is one of the core elements of the foundational value of the rule of law and informs how municipalities should exercise their original fiscal and self-governing powers. The principle of legality dictates that every municipal council should function in terms of the Constitution, as well as the restrictions it imposes on local government (see *Fedsure Life Assurance v Johannesburg supra* par 58; Hoexter *Administrative Law in South Africa* 3ed (2021) 122–123). The same degree of compliance is also expected from every municipality in relation to legislation that is legitimately adopted under the Constitution (Steytler and De Visser *Local Government Law* 13-7 to 13-8). Where a municipal council acts in breach of one of the direct and mandatory provisions of the Constitution, or enabling legislation, such an infringement is subject to a constitutional challenge (Steytler and De Visser *Local Government Law* 13-7 to 13-8). Given the justiciability of the Bill of Rights, any legislative act of a municipal council (such as the setting of rates) must be consistent with the fundamental rights guaranteed in the Constitution (Steytler and De Visser *Local Government Law* 13-7 to 13-8).

Despite the importance of the principle of legality, the minority judgment is flawed in two ways. First, it fails to take into account the transitional arrangements in section 93B of the MPRA, which gave municipalities until 1 July 2022 to comply fully with the methods and differentiation in categorisation of rateable property. As already seen in the discussion of the MPRA under heading 3 above, municipalities enjoyed considerable discretionary powers under section 8(1) and (2) of the MPRA in relation to differentiation and categories of rateable property before the 2014 amendment owing to the inappropriate manner in which these were framed (Steytler and De Visser *Local Government Law* 13-36 to 13-40). This freedom was well articulated by the SCA in *City of Tshwane v Blom* in 2013 as follows:

> "Section 8(2) lists a number of categories of rateable property that may attract different rates. These categories are optional. The municipality may adopt all of them, drop some or include new categories depending on the nature of the objectives its rates policy seeks to achieve. The municipality has a choice. Rates policies entail, by definition, policy choices which lie at the core of municipal autonomy, and as long as the rates policy treats ratepayers equitably and is consistent with the provisions of the Constitution and the Rates Act, there can be no basis for questioning the choices it makes with regard to properties that may be differentially rated with respect to different categories of property. The court a quo therefore erred in finding that the creation of 'non-permitted use' category was improper." (*City of Tshwane v Blom supra* par 18)

Owing to the framing of section 8(1) and (2) of the MPRA before the 2014 amendment, "[I]t was thus competent for a municipality to include in its rates policy the category of 'non-permitted use' of property" (Steytler and De Visser *Local Government Law* 13-36), which is akin to "unauthorised use" or "illegal use" as in the context of the City of Johannesburg. The "unauthorised" and "illegal" use categories used by the City only became

invalid from 1 July 2022, when the closed list of differentiation and categories of rateable property brought about by the Property Rates Amendment Act became mandatory. All municipalities are obliged to use the categories listed in section 8(3) of the MPRA as from 1 July 2022. The position taken by Justice Schippers in this regard was more futuristic and inconsistent with the legal position that was applicable before 1 July 2022.

Secondly, Justice Schippers erred in holding that a penalty cannot be imposed on rates (*City of Johannesburg Metropolitan Municipality v Zibi supra* par 57). He opined that "there is nothing in the Rates Act which authorises a municipality to levy a rate to deter landowners from contravening a statute, by-law, or land use scheme; or to impose a penalty tariff" when the property does not conform with a town planning scheme (*City of Johannesburg Metropolitan Municipality v Zibi supra* par 57). This reasoning fails to take into account the fact that the Constitution gives municipalities significant discretion in exercising their original fiscal powers and functions. This discretionary power is evident from several constitutional provisions that support the autonomy of local government, including sections 151(3) and 156(5) of the Constitution. What is missing in his reasoning is the recognition that, since the power of municipalities to levy rates is an original power guaranteed in the Constitution, its exercise is not dependent on enabling legislation (Steytler and De Visser *Local Government Law* 13-7). In the absence of national legislation, or where such legislation is mute on a rates-related matter, a municipality may act solely on the basis of section 229(1)(*a*) of the Constitution (Steytler and De Visser *Local Government Law* 13-7). This is in line with the reasoning of the apex court in *City of Cape Town v Robertson* (*supra*). In that case, the court explained that in terms of the current constitutional setup, apart from legislation, municipalities derive their powers directly from the Constitution or their own by-laws and policies (*City of Cape Town v Robertson supra* par 60). Therefore, municipalities can use their own initiative to act. They can exercise any power concerning a matter reasonably necessary for, or incidental to, the effective performance of their original fiscal functions, such as property rates. In *Fedsure Life Assurance v Johannesburg* (*supra*), the Constitutional Court explained that the exercise of the original power to levy rates on property amounts to a legislative act, not administrative action that can be subjected to administrative law (see *Fedsure Life Assurance v Johannesburg supra* par 41, 53–59; Steytler and De Visser *Local Government Law* 13-7). As a consequence of this reasoning, since the levying of rates by democratically elected councillors follows a deliberative process, "the setting of rates can no longer be challenged simply on the ground that it is arbitrary" (Steytler and De Visser *Local Government Law* 13-7; see *City of Tshwane v Blom supra* par 19–20).

The author agrees with Justice Schippers's view that a penalty is not a rate on its own. However, the penalty tariff in this case should be seen in the context of the right of every municipality to enforce rates obligations, including through litigation. As part of their self-governing powers, municipalities have discretion in deciding how to enforce the duty of property owners to pay duly levied property rates and also to ensure

compliance with relevant by-laws and policies. As Steytler and De Visser point out, local government laws allow a municipality to:

> "[c]onsolidate any separate accounts of persons liable for payment to the municipality. This empowers a municipality to combine an account for service charges with that for the payment of property rates. Any payment, whether intended for service charges or not, is credited to the combined account. A municipality may also credit a payment against any account of the payer." (Steytler and De Visser *Local Government Law* 13-72)

The above reasoning supports the view that the penalty can be consolidated with the rates charges. From this perspective, it is clear that the action of the City of Johannesburg was not illegal.

A reading of the majority judgment shows that, although Justice Mbha did not mention or take into account the transitional arrangements in section 93B of the MPRA, the majority decision was legally sound. The judgment took into account the fiscal autonomy and incidental powers of local government as guaranteed in the Constitution, as well as the concomitant powers to levy and recover rates. Through a purposive and contextual approach to legal interpretation (*City of Johannesburg Metropolitan Municipality v Zibi supra* par 25), the court held that a simple reading of the penalty tariff in clause 6, read together with the rest of the City's property and rates policy, revealed that it is plainly not applied as a "category", although it is listed under the heading "Categories of Property for Levying of Differential Rates". Justice Mbha reasoned that, from a mere interpretation of the MRPA, read with the City's policy, it was clear that the penalty charges levied under "illegal use" or "unauthorised use" are directed against a landowner's illegal conduct, and not the property (*City of Johannesburg Metropolitan Municipality v Zibi supra* par 26). The court indicated that the City's property rates policy clearly stated that the "illegal use" or "unauthorised use" tariff will be imposed in respect of all properties that are used for a purpose (land use) not permitted by the zoning scheme. The "illegal use" or "unauthorised use" category was thus clearly defined with reference to the zoning categories, and not the categories as contemplated in the valuation roll (*City of Johannesburg Metropolitan Municipality v Zibi supra* par 27). The author argues that even if "unauthorised use" and "illegal use" were listed as a category of property under the rates policy of the City of Johannesburg, this could still have been enforceable given the wide discretion municipalities enjoyed under the old section 8 of the MPRA and under the transitional arrangements in section 93B of the MPRA. This view is supported by the approach adopted by the same court in *City of Tshwane v Blom (supra* par 5–23). In the *Blom* case, the SCA held in a unanimous judgment that it was legally valid for the City of Tshwane to add "non-permitted use" to the list of categories of rateable property in section 8(2) of the MPRA in its rates policy; and to levy a penalty, or higher than normal rate, on such a property (*City of Tshwane v Blom supra* par 16–23). The purposive and contextual approach to interpretation adopted by Justice Mbha also suits the fact that section 93B of the MPRA makes it clear that the categories and differentiations introduced by section 8 only became mandatory from 1 July 2022. This means that until that period, municipalities had time to correct their rates policies to align them with the new requirements. Thus, municipal

discretion under the old section 8 remained in place. The majority judgment could have used section 93B to strengthen its argument.

Section 229(2)(*b*) of the Constitution makes it clear that only national government can regulate the original power of municipalities to levy rates through legislation. Regulation entails a broad managing or controlling function rather than direct authorisation (Fuo "Intrusion Into the Autonomy of South African Local Government: Advancing the Minority Judgment in the Merafong City Case" 2017 50 *De Jure* 324 329–330; *City of Johannesburg Metropolitan Municipality v Gauteng Development Tribunal supra* par 59 and 68). When Parliament exercises its regulatory functions, it can impose limitations on municipalities, provided that such limitations do not transcend framework legislation (Steytler and De Visser *Local Government Law* 13-1). Any conditions imposed by Parliament that compromise or impede the ability of municipalities to discharge their powers or perform their functions is inconsistent with section 156(4) of the Constitution and can therefore be constitutionally challenged (Steytler and De Visser *Local Government Law* 13-1 to 13-12(1)). Even though sections 3 and 8 of the MPRA do not expressly allow municipalities to impose penalties on property rates, the Act "regulates" how municipalities should impose property rates. The key word in this context is "regulation", which has been interpreted to suggest the development of guidelines to support municipalities exercise their powers and functions effectively (Fuo 2017 *De Jure* 329–330; *City of Johannesburg Metropolitan Municipality v Gauteng Development Tribunal supra* par 59 and 68). Since regulations are guidelines, they should be interpreted in a manner that gives municipalities leeway to discharge their functions effectively to the extent that they comply with the Constitution. This approach can be useful in understanding the lawfulness of the approach of the City to impose a penalty on rates.

The call for a purposive and contextual approach to legal interpretation that is consistent with the original fiscal powers of municipalities is important, as seen in this case. This is the same approach that a unanimous bench of the SCA adopted in 2013 in *City of Tshwane v Blom* (*supra* par 14–17). In the *Blom* case, the court relied on the language of section 8 of the MPRA, read it in context (taking into account the purpose of the provision, and the background to the preparation and enactment of the statute) and held that the list of rateable properties in section 8(2) of the MPRA was not closed and that the City of Tshwane had the leeway to adopt "non-permitted" use as a category in its rates policy for the purpose of determining applicable rates (*City of Tshwane v Blom supra* par 14–17). The approach adopted by the majority judgment in *City of Johannesburg Metropolitan Municipality v Zibi* was purposive, contextual and constitutionally compliant. While the majority judgment argued for and adopted a purposive and contextual approach to legal interpretation, the minority judgment adopted a narrower approach that thrust the principle of legality to the centre of its analysis. In addition, both the majority and minority judgments in the *Zibi* matter failed to consider the usefulness of the transitional arrangements in section 93B of the MPRA *vis-à-vis* the action of the City of Johannesburg. Section 93B gave the City discretionary

powers to include in its rates policy the category of “illegal use” or “non-permitted use”. This was an oversight in the historical evolution of the MPRA.

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