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THE FSCA CONDUCT STANDARD FOR BANKS AS A MEANS TO REFORM THE INTERNAL FINANCIAL CONSUMER COMPLAINT RESOLUTION MECHANISMS OF SOUTH AFRICAN BANKS*

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SUMMARY

The result of South Africa adopting the Twin Peaks model of financial regulation was the establishment of two regulators, namely the Prudential Authority (PA) and the Financial Sector Conduct Authority (FSCA). One aspect of the Financial Sector Regulation Act 9 of 2017 is that it specifically empowers the FSCA to regulate and supervise the internal dispute resolution frameworks that financial institutions are required to implement. The FSCA can publish conduct standards, which standards should be used to assist in achieving the FSCA's objectives. One such objective includes aspects of supervising and regulating the dispute resolution framework of financial institutions. In this regard, the FSCA has produced the Conduct Standard for Banks, which deals, among other things, with certain internal dispute resolution requirements for banks. This article briefly discusses the content and practical enforceability of the Conduct Standard for Banks and considers whether this standard will adequately assist in reforming the internal dispute resolution framework of banks, such that bank customers will be sufficiently protected and treated fairly during the internal dispute resolution process. The change from a voluntary code to a statutory code strengthens the accountability of banks when there is non-compliance. Arguably, the added level of enforceability and level of compliance with set standards for dispute resolution frameworks will ensure that customer complaints are treated more fairly. However, the exact sanction for non-compliance with the provisions remains uncertain and clearer guidance is required. In the end, successful

* This contribution was inspired by the research done for the first author's LLM dissertation, *A Customer–Focused Approach to Dispute Resolution in the South African Banking Sector* (Unisa) 2021. The second author was the supervisor for this dissertation.

implementation of the Conduct Standard for Banks may depend on the extent to which banks decide to implement its provisions.

1 INTRODUCTION

Customer protection is an important aspect to be considered by all financial institutions. Since the adoption of the Twin Peaks model of financial regulation by the South African National Treasury in 2011,[1] the South African financial sector has begun reforming its regulatory framework. One consequence resulting from such reform shifted focus towards ensuring the protection and fair treatment of financial customers.

A key component of financial customer protection is having effective dispute resolution frameworks in place. For post-sale barriers[2] to be removed, financial customers must be able to hold financial institutions accountable for their conduct. For this reason, financial customer complaints must be managed effectively.[3] Accordingly, for complaints from South African financial customers to be dealt with adequately, it is vital that internal dispute resolution frameworks be developed and maintained within the financial sector and, more specifically, the banking sector on which sector this article focuses.

To substantially improve financial customer protection within the banking sector, banks must develop and implement internal dispute resolution frameworks that adequately protect customers' rights. To regulate and supervise the various financial institutions, which also includes oversight of the internal dispute resolution frameworks that each must implement, the Financial Sector Regulation Act (FSR Act)[4] established the Financial Sector Conduct Authority (FSCA)[5] as the market conduct regulator, which is empowered to make conduct standards for banks, among others. One such conduct standard published by the FSCA is the Conduct Standard for

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1 The Twin Peaks model of financial regulation separates the prudential and market conduct regulation within the financial sector. A detailed discussion of the Twin Peaks model falls outside the ambit of this article.

2 This would relate to unreasonable obstacles a consumer would face after acquiring a financial product – e.g., when they change products or switch providers. See the discussion on post-sale barriers by Millard and Maholo "Treating Customers Fairly: A New Name for Existing Principles" 2016 79 *THRHR* 610–612. In simple terms, this relates to barriers present when the customer has already received the service or acquired the product.

3 FSB "FSB Complaints Management Discussion Document: Proposed Requirements For Customer Complaints Management by Regulated Financial Institutions, Aligned to the Treating Customers Fairly (TCF) Framework" (October 2014) https://www.fsca.co.za/Regulatory%20Frameworks/Documents%20for%20Consultation/TCF%20Complaints%20Management%20Discussion%20Document.pdf (accessed 2022-02-02) 1.

4 9 of 2017.

5 The Prudential Authority is the other established regulator and is responsible for ensuring the safety and soundness of financial institutions and supports financial stability. See South African Reserve Bank Prudential Authority "Prudential Regulation" (undated) https://www.resbank.co.za/en/home/what-we-do/Prudentialregulation (accessed 2022-02-03).

Banks,[6] which forms the focus of this article, but with reference only to the provisions on internal dispute resolution.

The purpose of this article is twofold. First, it briefly discusses the content and the practical enforceability of the Conduct Standard for Banks. Secondly, it establishes the extent to which the Conduct Standard for Banks will assist in reforming the internal dispute resolution framework of banks to ensure that bank customers do not encounter a post-sale barrier. This article excludes a detailed discussion of all the complaint resolution frameworks available to bank customers but focuses on the importance of the Conduct Standard for Banks in improving the internal dispute resolution framework of banks. Likewise, the article does not contain a discussion of the legal framework applicable to external dispute resolution mechanisms.[7] The Conduct Standard for Banks only includes guidelines concerning a bank's internal complaint process. Consequently, this article does not consider external dispute resolution frameworks, such as the Ombud for Banking Services. The next section provides an overview of the regulatory framework applicable to the internal dispute resolution frameworks of banks.

2 AN OVERVIEW OF THE REGULATORY INSTRUMENTS ASSOCIATED WITH THE INTERNAL DISPUTE RESOLUTION FRAMEWORK OF BANKS

Several regulatory instruments, both legislative and otherwise, determine how dispute resolution in the South African banking sector must take place. The legislation that regulates dispute resolution within the financial sector includes: the FSR Act; the National Credit Act (NCA);[8] and the Financial Advisory and Intermediaries Services Act (FAIS).[9] Once enacted, the Conduct of Financial Institutions Bill (CoFI Bill)[10] will also assist in the regulation of dispute resolution in the broader financial sector, which includes banks. The other regulatory instruments that assist with determining the nature of dispute resolution frameworks of banks are, *inter alia*, the Code of Banking Practice (Banking Code),[11] the General Code of Conduct for Authorised Financial Services Providers and Representatives (Financial

6 Conduct Standard 3 of 2020 (Conduct Standard for Banks) https://www.fsca.co.za/Regulatory%20Frameworks/Pages/Notices.aspx (accessed 2022-02-02).

7 See Koekemoer "An Analysis of Aspects of the Proposed Reform of the Financial Consumer Complaint Resolution Mechanisms in the South African Banking Sector" 2021 *Obiter* 336–351 for a general discussion or outline of the dispute resolution framework (internal and external) for the banking sector.

8 34 of 2005.

9 37 of 2002. This list is not exhaustive, but we merely state the most dominant.

10 The first draft of the CoFI Bill was published for comment in 2018. The second draft was published in September 2020. See http://www.treasury.gov.za/legislation/Government Notices/43741_29-09_NatTreasury.pdf (accessed 2022-02-02).

11 The Banking Association of South Africa "Code of Banking Practice" (2012) https://www.banking.org.za/wp-content/uploads/2019/04/Code-of-Banking-Practice-2012.pdf (accessed 2022-02-03).

Services Providers Code),[12] and the Conduct Standard for Banks. The Banking Code is a voluntary code, while the Financial Services Providers Code and the Conduct Standard for Banks are statutory in nature, as their development and adoption is mandated by legislation. While the Financial Services Providers Code can apply to other non-bank financial institutions, the Banking Code and the Conduct Standard for Banks apply exclusively to banks.[13]

Although each of the regulatory instruments mentioned above assists in regulating dispute resolution in the banking industry, they do not all regulate *internal* dispute resolution frameworks exclusively. The FSR Act, the NCA, the FAIS Act, the Banking Code, and the Financial Services Providers Code also provide guidelines for *external* dispute resolution frameworks,[14] while the CoFI Bill and the Conduct Standard for Banks aim to regulate *internal* dispute resolution exclusively. However, until the CoFI Bill is enacted, the Conduct Standard for Banks is the only instrument with a statutory foundation that regulates internal dispute resolution in the banking industry.

3 CURRENT FRAMEWORK: INTERNAL COMPLAINT RESOLUTION FRAMEWORKS

3 1 The Banking Code

It is mandatory for the members of the Banking Association of South Africa (BASA) to subscribe to the Banking Code. The Banking Code sets out the minimum standards that consumers may expect from their bank's service and conduct.[15] Considering that the Banking Code is not a statutory code (it is a voluntary code), the exact legal nature of the Banking Code is debated. Du Toit argues that since some of the provisions of the Banking Code were derived from trade usage, such provisions could be considered as implied by law in the contractual relationship between the bank and its customer.[16] Du Toit supports his contentions with the fact that the Banking Code is universally observed by the banking sector since all banks that are members of BASA must adhere to it.[17] In addition, he argues that there is a strong indication that a trade usage exists by virtue of the mere fact that all major banks in any event adhere to the Banking Code.[18] Interestingly, as Du Toit points out, the earlier version of the Banking Code[19] specifically stated that none of its provisions would create either a trade custom or a tacit contract,

12 GN 80 in *GG* 25299 of 2003-08-08.

13 Clause 1 of the Banking Code.

14 The Financial Services Ombud Schemes Act 37 of 2002 previously applied, but this Act was repealed in its entirety by Schedule 4 of the FSR Act.

15 Preamble to the Banking Code 2012 par 1.

16 Du Toit "Reflections on the South African Code of Banking Practice" 2014 *TSAR* 568.

17 Du Toit 2014 *TSAR* 571.

18 Du Toit 2014 *TSAR* 570.

19 Code of Banking Practice (2004) https://www.banking.org.za/wp-content/uploads/2019/04/Code-of-Banking-Practice-2012.pdf.

whereas the current version of the Banking Code contains no such provision.[20]

The Banking Code is an important regulatory instrument for banks and, although only voluntary, it arguably guarantees that banks conduct themselves in a fair, transparent, accountable and reliable manner when dealing with customers.[21] Thus, the Banking Code should rightly be regarded as "one of the most important influences on the modern bank and customer relationship in South Africa".[22] The Banking Code has four objectives, namely: (1) promoting good banking practice, which is done through setting standards for a bank when dealing with customers; (2) increasing transparency to enable customers to better understand the products and services they receive from their banks; (3) promoting bank-customer relationships that are fair and open; and (4) inspiring confidence within the South African banking system.[23]

Dispute resolution is dealt with in clause 10 of the Banking Code, which provides a basic framework to be followed for both internal and external dispute resolution. As far as internal dispute resolution is concerned, the Banking Code merely provides a brief outline of what a customer can expect from their bank when a complaint is lodged. This includes that a bank will inform its customer of how to lodge a complaint, and that it will further advise what the customer should do if they are unsatisfied with the outcome of their dispute resolution; it also sets out the timelines within which the complaint ought to be attended to by the bank.[24] One of the shortcomings of the Banking Code is that it does not provide *specific* procedures that banks must follow in managing these complaints and provides no time limit within which a complaint must be resolved, leaving this decision on the exact process to follow up to individual banks. Accordingly, there is no set internal dispute resolution standard that all South African banks must follow, and this has the potential to give rise to a fragmented process across different banks. Put differently, South African banks currently might be following different internal dispute resolution procedures. Moreover, the Banking Code applies to commercial banks in general, but the Financial Services Providers Code applies to institutions providing financial products that fall within the definition of the FAIS Act, which may in some instances also include banks. The provisions relating to the internal dispute resolution frameworks for financial service contained in the Financial Services Providers Code are briefly discussed next.

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20 Du Toit 2014 *TSAR* 569.

21 These are the four principles set as the standard for banks when dealing with their clients; see Preamble to the Banking Code 2012.

22 Du Toit 2014 *TSAR* 568.

23 Clause 2 of the Banking Code.

24 Clause 10 of the Banking Code.

3 2 Financial Services Providers Code

In accordance with the provisions of the FAIS Act,[25] the FAIS Registrar[26] must produce a code of conduct to be followed by all authorised financial services providers, as defined in the Act. The Financial Services Providers Code was published on 8 August 2003,[27] and it applies to all financial services providers and representatives.[28] Section 16 of the FAIS Act sets out details on how the code of conduct must be drafted, and the objectives that the code of conduct aims to achieve. It is submitted that it is apparent, from a reading of the Financial Services Providers Code, that it has been drafted in accordance with the requirements set out in section 16 of the FAIS Act.

Dispute resolution is dealt with in Part XI of the Financial Services Providers Code. All financial services providers must ensure that they have a satisfactory system and procedures in place to attend to internal complaints, which includes having an adequate complaints policy to which customers have access and of which customers are aware.[29] With regard to the handling of internal complaints, the Financial Services Providers Code requires that financial services providers: (1) request that all complaints be in writing (no verbal complaints are allowed); (2) keep a record of the complaints received for the past five years; (3) manage complaints fairly and speedily; (4) investigate the complaint received; and (5) respond to the customer concerning the resolution of their complaint.[30]

Even though the Financial Services Providers Code contains more detail concerning internal dispute resolution than the Banking Code, it applies only to specific products provided by banks and not to the banking industry as a whole. However, with the enactment of the CoFI Bill, the FAIS Act together with its subordinate legislation (such as the Financial Services Providers Code) will be repealed[31] and thus the Financial Services Providers Code will have to be replaced by either one or a multiple of codes. It is hoped that having the Conduct Standards for Banks operating in practice will assist when a new conduct standard in respect of financial services providers is drafted by providing one instrument that regulates all activities of a bank, including those previously regulated under the FAIS Act.

4 CONDUCT STANDARDS

The FSCA is empowered in terms of the FSR Act (and, in the future, the Act to follow the CoFI Bill)[32] to publish conduct standards.[33] Such conduct

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25 S 15 of the FAIS Act.

26 See s 2 of the FAIS Act.

27 See GN 80 in *GG* 25299 of 2003-08-08.

28 As defined in s 1 of the FAIS Act.

29 S 17 of the Financial Services Providers Code.

30 S 16(1) of the Financial Services Providers Code.

31 See Part 11 of Schedule 5 of the second draft of the CoFI Bill http://www.treasury.gov.za/legislation/GovernmentNotices/43741_29-09_NatTreasury.pdf (accessed 2022-02-02).

32 The making of conduct standards is dealt with in Ch 11 Part 1 of the COFI Bill.

standards may relate to financial institutions,[34] key persons or representatives of financial institutions,[35] and contractors.[36]

Section 106(2) of the FSR Act sets out the various objectives that conduct standards must aim to achieve; these include the fair treatment and education of financial customers.[37] The FSR Act also sets out the types of matter to which a conduct standard may relate.[38] The list of matters includes: (1) the prevention of abusive practices by financial institutions;[39] (2) the "fair treatment of customers", which includes the appropriateness of products and services, marketing and promotion of products and services, reporting requirements and, relevant to this study, dispute resolution;[40] and (3) financial education programmes for customers.[41] The FSR Act also provides that different standards may be made in relation to different types of financial institution or that will relate to different circumstances.[42] Although it is not clear from the FSR Act exactly what circumstances would require conduct standards to be made, the FSR Act states that a conduct standard may be made in relation to "existing actions, activities, transactions and appointments".[43] The circumstances intended in this subsection should become clearer as and when the FSCA publishes additional conduct standards.[44]

FSCA conduct standards may also declare specific conduct relating to financial products and services to be "unfair business conduct".[45] Conduct that may be declared as "unfair" includes conduct that is contrary to the fair treatment of financial customers[46] and conduct that may mislead[47] or cause prejudice to financial customers.[48]

Much like the FSR Act, the CoFI Bill also contains provisions empowering the FSCA to create and implement conduct standards.[49] The provisions in the CoFI Bill relating to the creation of conduct standards mirror those contained in the FSR Act. The first draft of the CoFI Bill[50] contained detailed

33 S 106 of the FSR Act.
34 S 106(1)(*a*) of the FSR Act.
35 S 106(1)(*b*) and (*c*) of the FSR Act.
36 S 106(1)(*d*) of the FSR Act
37 S 106(2)(*b*) and (*c*) of the FSR Act.
38 S 106(3) of the FSR Act.
39 S 106(3)(*b*) of the FSR Act.
40 S 106(3)(*c*) of the FSR Act.
41 S 106(3)(d) of the FSR Act.
42 S 110(1) of the FSR Act.
43 S 110(2) of the FSR Act.
44 To date, the FSCA has published 18 conduct standards. See FSCA "Standards" (undated) https://www.fsca.co.za/Regulatory%20Frameworks/Pages/Standards.aspx (accessed 2023-03-14).
45 S 106(4) of the FSR Act.
46 S 106(4)(*a*) of the FSR Act.
47 S 106(4)(*b*) of the FSR Act.
48 S 106(4)(*c*) of the FSR Act.
49 The making of conduct standards is dealt with in Ch 11 Part 1 of the COFI Bill.
50 The first draft Conduct of Financial Institutions Bill, 2018 was published for comment in December 2018 http://www.treasury.gov.za/twinpeaks/SKM_C364e18121411550.pdf (accessed 2022-02-02).

provisions relating to the conduct standards that the FSCA may develop. After consulting various stakeholders, National Treasury reported concerns raised that such detail may be disadvantageous to the intended framework, and that it could potentially conflict with the provisions of the FSR Act relating to such conduct standards.[51] For this reason, these detailed provisions were removed from the revised second draft of the CoFI Bill,[52] which simply empowers the FSCA to make conduct standards as provided for by the FSR Act,[53] which conduct standards are aimed at achieving the objectives of both the CoFI Bill and the FSR Act.[54] The CoFI Bill further confirms that the matters in respect of which conduct standards may be made by the FSCA are those as set out in sections 106 and 108 of the FSR Act.[55] One such conduct standard, which has already been published by the FSCA, is the Conduct Standard for Banks, which is briefly discussed next.

5 THE CONDUCT STANDARD FOR BANKS

5 1 The creation of the Conduct Standard for Banks

The FSCA became operational, replacing the Financial Services Board (FSB), on 1 April 2018. Unlike the FSB, the FSCA's mandate includes, but is not limited to, the oversight of the banking sector.[56] The FSCA regards it as important to create a supervisory regulatory framework against which to measure the conduct of banks.[57] It is submitted that part of the foundation for this supervisory regulatory framework is the Conduct Standard for Banks.

The FSCA published the Conduct Standard for Banks on 3 July 2020, and the Conduct Standard applies to all banks[58] in the provision of financial products and services to their customers.[59] Thus far, this is the only conduct standard published by the FSCA with respect to *banks*.[60] In 2021, the South

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51 Response document supporting the revised Conduct of Financial Institutions Bill September 2020 http://www.treasury.gov.za/public%20comments/2020%2010%2008%20COFI%%20Document%20V4_FINAL%20published%20(commentators%20updated).pdf (accessed 2022-02-02) 6–7.

52 The Second Draft Conduct of Financial Institutions Bill was published for comment in September 2020 http://www.treasury.gov.za/public%20comments/2020%2010%2008%20CoFI%20Bill%20(version%20published%20for%20comment)%20(slightly%20updated).pdf (accessed 2022-02-02).

53 Clause 67 of the second draft Conduct of Financial Institutions Bill.

54 Clause 67(2) of the CoFI Bill.

55 Clause 67(3) of the CoFI Bill.

56 FSCA "Regulatory Strategy of the Financial Sector Conduct Authority: October 2018 to September 2021" https://www.fsca.co.za/Documents/FSCA_Strategy_2018.pdf (accessed 2022-02-02).

57 FSCA https://www.fsca.co.za/Documents/FSCA_Strategy_2018.pdf 16.

58 The definition of a "bank", as contained in section 1 of the Conduct Standard for Banks, includes a bank as defined in the Banks Act 94 of 1990 ("the Banks Act"), a mutual bank as defined in the Mutual Banks Act 124 of 1993, and a co-operative bank as defined in the Co-operative Banks Act 40 of 2007.

59 See clause 2 of the Conduct Standard for Banks.

60 The FSCA published conduct standards relating to retirement funds, hedge funds, and capital markets. See https://www.fsca.co.za/Regulatory%20Frameworks/Pages/Standards.aspx (accessed 2022-02-04).

African Reserve Bank (SARB) published a report[61] that recorded the number of banks in South Africa at the time as 69.[62] Each of these banks must comply with the Conduct Standard for Banks. The Conduct Standard for Banks does not replace any of the financial sector laws currently applicable to banks, but is in addition to existing financial sector laws.[63] Since the FAIS Act is limited in its application to banks, and its provisions only apply to deposit transactions and not to other lending products and services offered by commercial banks,[64] the Act does not prescribe either the conduct of the banking industry as a whole, or the monitoring of the broader banking sector. With the implementation of the Conduct Standard for Banks, the entire banking sector will, for the first time, be monitored and regulated by a single legal instrument.

The Conduct Standard for Banks incorporates the Treating Customers Fairly Principles (TCF Principles).[65] The TCF Principles were adapted from principles initially created in the United Kingdom,[66] and are aimed at ensuring the fair treatment of financial customers.[67] Although a detailed discussion of the TCF Principles is not required for purposes of this article, these principles warrant a brief discussion, since they form the foundation of many South African financial sector laws, and they are likewise arguably the basis upon which the Conduct Standard for Banks was drafted.

There are six TCF Principles, which were also adopted by the South African financial sector. The first principle provides that customers should be confident that the fair treatment of customers is central to the culture of the financial institutions with which they are dealing.[68] The second principle requires that, where products and services are marketed and sold, they must be designed to meet the needs of customers and should be targeted at these customers.[69] The third principle aims to ensure that customers receive clear information and that they should always remain adequately informed.[70] The fourth principle prescribes that, when giving advice, a financial institution must ensure that each customer's individual circumstances are considered, and that useful advice is given. The fifth principle requires customers' expectations to be met when financial institutions provide financial products

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61 SARB "Selected South African Banking Sector Trends, August 2021" https://www.resbank.co.za/content/dam/sarb/publications/prudential-authority/pa-statistics-selected-trends---monthly/2021/August%202021.pdf (accessed 2022-02-02).

62 This figure is made up as follows: 18 registered banks; 4 mutual banks; 5 co-operative banks; 13 local branches of foreign banks; and 29 foreign banks with approved local representative offices.

63 FSCA "Statement Supporting the Conduct Standard for Banks" https://www.fsca.co.za/Regulatory%20Frameworks/Pages/Notices.aspx./ (accessed 2022-02-02).

64 S 1 of the FAIS Act.

65 FSCA https://www.fsca.co.za/Regulatory%20Frameworks/Pages/Notices.aspx.

66 Millard and Maholo 2016 *THRHR* 594.

67 *Ibid.*

68 FSB "Treating Customers Fairly Roadmap" (2011) https://www.fscamymoney.co.za/Treating%20Customers%20Fairly/TCFRoadmapFinal231Mar2011.pdf (accessed 2022-02-02) 7.

69 *Ibid.*

70 *Ibid.*

and services. The sixth and final principle requires financial institutions to remove unreasonable post-sale barriers for customers.[71] The final principle relates directly to the dispute resolution procedures available to customers, which forms the topic of this article.

The alignment of the Conduct Standard for Banks with the TCF Principles is evident if one considers the fact that the main objective of the Conduct Standard for Banks is to treat customers fairly,[72] and to ensure that customers have access to appropriate dispute resolution frameworks. Moreover, the Conduct Standard for Banks specifically mandates banks to conduct their business "in a manner that prioritises the fair treatment of financial customers".[73]

5 2 Implementation and Enforcement of the Conduct Standard for Banks

The Conduct Standard for Banks was signed into law on 3 July 2020, but the implementation was staggered, taking place over a period of a year from the date of publication, with some of the provisions of the Conduct Standard for Banks coming into effect on 3 March 2021,[74] while others only became effective from 3 July 2021.[75] Despite the Conduct Standard for Banks having been implemented fully from 3 July 2021, it may still take some time for the banking sector to become completely compliant with it.

The FSCA requires banks to create and implement regulatory measures to ensure that the fair treatment of customers remains their primary concern, and that these measures are continuously being implemented.[76] To monitor the banks' compliance with the Conduct Standard for Banks, the FSCA will identify potential risks and engage with the affected bank(s) to avoid or mitigate such risks.[77] In cases where harm to customers may already have occurred, the Statement Supporting the Conduct Standard for Banks provides that the FSCA may seek redress.[78] It is, however, not clear what redress may be sought in such cases.

In contrast with the Banking Code (a voluntary code of conduct), the Conduct Standard for Banks is, as defined in the FSR Act, a regulatory instrument,[79] and therefore a financial sector law[80] that must be adhered to.

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71 FSB https://www.fscamymoney.co.za/Treating%20Customers%20Fairly/TCFRoadmapFinal231Mar2011.pdf 7.

72 Clause 2(5) of the Conduct Standard for Banks.

73 Clause 2(4) of the Conduct Standard for Banks.

74 Clauses 3, 4, 5 and 6 of the Conduct Standard for Banks.

75 Clauses 7, 8, 9 and 10 of the Conduct Standard for Banks.

76 Clause 6 of the Financial Sector Conduct Authority: Statement Supporting the Conduct Standard for Banks FSCA https://www.fsca.co.za/Regulatory%20Frameworks/Pages/Notices.aspx.

77 Financial Sector Conduct Authority: Statement Supporting the Conduct Standard for Banks https://www.fsca.co.za/Regulatory%20Frameworks/Pages/Notices.aspx.

78 Clause 6 of the Financial Sector Conduct Authority: Statement Supporting the Conduct Standard for Banks https://www.fsca.co.za/Regulatory%20Frameworks/Pages/Notices.aspx.

79 See the definition of "regulatory instrument" as contained in section 1 of the FSR Act.

In the event of non-compliance with the Conduct Standard for Banks, the FSCA may issue a written directive to the bank,[81] requiring the bank to remedy its non-compliance[82] within a specified period.[83] Once a directive to comply has been issued by the FSCA, the bank must comply with it.[84] Should the bank fail to comply with such a directive within the specified time, the High Court may make an order in respect of such directive.[85] The High Court may make an order requiring the bank either to perform its obligations or pay compensation.[86] Moreover, the FSCA is empowered in terms of section 152 of the FSR Act to commence legal proceedings against a financial institution that fails to comply with the financial sector laws, which laws, it is submitted, include the Conduct Standard for Banks. If it appears to the High Court that a financial institution has engaged in, is engaging in, or intends to engage in conduct that contravenes a financial sector law, and that there is a risk of substantial or irreparable damage resulting from such conduct, the High Court may make an order.[87]

The FSR Act also empowers the FSCA to impose administrative penalties on persons who contravene financial sector laws.[88] If the offender does not pay the administrative penalty, the FSCA may file a copy of the administrative penalty order with the court (presumably the High Court). Once the administrative order has been filed at court, it can be enforced as though it were a civil court judgment handed down by that court.[89]

In summary therefore, where a bank does not comply with the provisions of the Conduct Standard for Banks, it may be directed to do so by the FSCA, and thereafter be subjected to an order of the High Court, with the possibility of a fine being imposed on the contravening bank.

Although the FSR Act provides a detailed framework for the enforcement of conduct standards and sets out several steps that may be followed in the case of non-compliance with any such conduct standards, it is silent on the exact penalties that financial institutions may face should they fail to comply with these. Section 149 of the FSR Act is also unclear on what types of order the High Court may make when there has been non-compliance with an FSCA directive – for example, whether a fine may be imposed on a non-compliant bank or whether its licence[90] could be suspended or revoked because of such non-compliance. Ultimately, a compliance framework, such as the Conduct Standard for Banks, can only be successful if its provisions are fully and consistently implemented and complied with by the financial institutions it was created to govern. To ensure the successful

80 See the definitions of "financial sector law" as contained in section 1 of the FSR Act.
81 S 144(1) of the FSR Act.
82 S 144(3) of the FSR Act.
83 S 147 of the FSR Act.
84 S 149(1) of the FSR Act.
85 S 149(2) of the FSR Act.
86 S 149(3) of the FSR Act.
87 S 152(2) of the FSR Act.
88 S 167(1) of the FSR Act.
89 S 170 of the FSR Act.
90 See Ch 8 of the FSR Act regarding the licensing of financial institutions.

implementation of and compliance with the Conduct Standard for Banks, and to discourage non-compliance, there must be significant and far-reaching consequences for banks that do not comply with its provisions. The banking sector collectively must also be seen as complying with the provisions of the Conduct Standard for Banks.

5 3 The Conduct Standard for Banks and Internal Dispute Resolution

The Conduct Standard for Banks prescribes a number of general obligations that apply to banks, including the obligation of a bank to conduct its business in "a manner which prioritises the fair treatment of customers"[91] and which is also aimed at achieving the TCF Principles.[92] The Conduct Standard for Banks also sets out requirements relating, *inter alia*, to the culture and governance of a bank,[93] the design and suitability of financial products and services offered by the bank,[94] and advertising undertaken by the bank.[95]

The part of the Conduct Standard for Banks specifically relevant to this study is the clause relating to customer complaints.[96] The Conduct Standard for Banks refers to a complaint as:

> "[a]n expression of dissatisfaction that the bank is in breach of a law, an agreement or a code of conduct and that the bank's actions have caused the complainant harm, prejudice or distress or that the bank has treated the complainant unfairly."[97]

To manage internal complaints, the Conduct Standard for Banks prescribes obligations for banks to establish and operate an effective internal dispute resolution framework that will guarantee that adequate processes and standards be implemented to safeguard the fair treatment of banking customers.[98] This Conduct Standard directs that such dispute resolution framework must: (1) be proportionate, considering the bank's risks and business;[99] (2) be appropriate taking into account the bank's "business model, financial products, financial services and financial customers";[100] (3) allow for a complaint to be considered within a reasonable time, while taking into account that the bank needs time to investigate a complaint;[101] and (4) ensure that no unreasonable barriers are imposed on customers lodging complaints against a bank.[102]

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91 Clause 2(4) of the Conduct Standard for Banks.
92 Clause 2(5) of the Conduct Standard for Banks.
93 Clause 3 of the Conduct Standard for Banks.
94 Clause 4 of the Conduct Standard for Banks.
95 Clause 6 of the Conduct Standard for Banks.
96 Clause 8 of the Conduct Standard for Banks.
97 Clause 1 of the Conduct Standard for Banks.
98 Clause 8(1) of the Conduct Standard for Banks.
99 Clause 8(1)(*a*) of the Conduct Standard for Banks.
100 Clause 8(1)(*b*) of the Conduct Standard for Banks.
101 Clause 8(1)(*c*) of the Conduct Standard for Banks.
102 Clause 8(1)(*d*) of the Conduct Standard for Banks.

The internal dispute resolution framework of a South African bank must follow the processes as prescribed by the Conduct Standard for Banks – that is, the framework must: (1) ensure that the bank has an adequate complaints management system; (2) provide for monitoring and analysis of aggregate complaints; (3) include effective referral processes; and (4) include processes to ensure that complainants are informed of what processes are followed by the bank and the outcome of such processes.[103] The Conduct Standard for Banks recommends the minimum requirements expected of the banks when designing and implementing an internal dispute resolution framework. These include provision for, *inter alia*: (1) the objectives, principles and responsibilities for dealing with internal complaints;[104] (2) performance standards that are required and any reward strategies that may be implemented;[105] (3) the procedures that must be followed when handling internal complaints and the time frames to be adhered to;[106] (4) a set of coherent procedures that deal with "escalation, decision-making, monitoring, oversight and review processes",[107] (5) the reporting and record-keeping requirements;[108] and (6) communication channels between the bank and the customer, as well as between the bank and the relevant ombud schemes.[109]

The Conduct Standard for Banks also prescribes practical elements of the process that must be followed by the bank when handling internal complaints. Upon receipt of a complaint, the bank must acknowledge receipt of the customer's complaint and provide the customer with information regarding the process that will be followed by the bank in dealing with the complaint.[110] Upon receipt of a complaint, banks must also provide the customer with the contact details of the person(s) who will be dealing with the complaint,[111] an approximate time frame for the handling of the complaint,[112] details of any review or escalation processes available to the customer,[113] and details of the ombud whom the customer may approach following unsuccessful resolution by a bank.[114] At all times during the dispute resolution process, the customer must be kept adequately informed regarding the progress of the complaint and any decisions that have been made by the bank.[115]

Where a bank rejects a customer's complaint, the bank must give reasons to the customer for its decision and provide the customer with further details on how the customer can escalate their complaint, where need be, to the

[103] Clause 8(3)(i) of the Conduct Standard for Banks.
[104] Clause 8(3)(*a*) of the Conduct Standard for Banks.
[105] Clause 8(3)(*b*) of the Conduct Standard for Banks.
[106] Clauses 8(3)(*c*) and 8(3)(*d*) of the Conduct Standard for Banks.
[107] Clauses 8(3)(*d*) and 8(3)(*h*) of the Conduct Standard for Banks.
[108] Clauses 8(3)(*e*) and 8(3)(*h*) of the Conduct Standard for Banks.
[109] Clauses 8(3)(*f*) and 8(3)(*g*) of the Conduct Standard for Banks.
[110] Clause 8(21) of the Conduct Standard for Banks.
[111] Clause 8(21)(*a*) of the Conduct Standard for Banks.
[112] Clause 8(21)(*b*) of the Conduct Standard for Banks.
[113] Clause 8(21)(*c*) of the Conduct Standard for Banks.
[114] Clause 8(21)(*d*) of the Conduct Standard for Banks.
[115] Clause 8(22) of the Conduct Standard for Banks.

relevant ombud. In accordance with clause 8(7) of the Conduct Standard for Banks, complaints that are received and which are classified as "reportable complaints"[116] must be categorised into a minimum of nine separate categories according to the product or service to which they relate – for example: complaints relating to the design of a product,[117] complaints relating to advertising,[118] complaints relating to advice[119] or complaints in respect of the bank's handling of complaints.[120] Arguably, having these complaints divided into categories may allow the FSCA to detect any broader industry-wide problem, allowing the regulator (the FSCA) to intervene in the event of systemic infringement of consumer rights; and it potentially allows for banks to align their complaint procedures to each other in dealing with each category. In addition to the categories set out in clause 8(7) of the Conduct Standard for Banks, a bank can include additional complaint categories that they deem necessary.[121]

Banks are required to keep accurate records of complaints and should contain the details of the complaint,[122] copies of any documents relating to the complaint,[123] and the category of the complaint,[124] as well as the status of the complaint.[125] They must also keep information in respect of the number of reportable complaints received, the number of those received complaints upheld and the number of complaints the bank rejected; the reasons for all rejections, escalations and referrals to an ombud scheme; the number of complainants that ended in the payment of compensation or goodwill payments; and how many complaints are still outstanding.[126] Once collected, these records must be stored, analysed on an ongoing basis, and used by the bank to improve outcomes and to assist in identifying any potential risks.[127] Again, such information will also assist the FSCA in effectively regulating and supervising the way in which banks implement their complaint resolution frameworks. Arguably, this also assists the FSCA to identify risk factors prevalent in the banking sector that could influence customers – for example, deficiencies in the customer complaint management framework causing harm to customers. Also, the fact that the

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116 Defined in terms of clause 1 of the Conduct Standard for Banks as: "any complaint other than a complaint which has been – (*a*) upheld immediately by the person who initially received the complaint; (*b*) upheld within the bank's ordinary processes for handling customer queries in relation to the type of financial product or financial service complained about, provided that such process does not take more than five business days from the date the complaint is received; or (*c*) submitted or brought to the attention of the bank in such a manner that the bank does not have a reasonable opportunity to record such details of the complaint as may be prescribed In relation to reportable complaints".

117 Clause 8(7)(*a*) of the Conduct Standard for Banks.

118 Clause 8(7)(*c*) of the Conduct Standard for Banks.

119 Clause 8(7)(*d*) of the Conduct Standard for Banks.

120 Clause 8(7)(*h*) of the Conduct Standard for Banks.

121 Clause 8(8) of the Conduct Standard for Banks.

122 Clause 8(14)(*a*) of the Conduct Standard for Banks.

123 Clause 8(14)(*b*) of the Conduct Standard for Banks.

124 Clause 8(14)(*c*) of the Conduct Standard for Banks.

125 Clause 8(14)(*d*) of the Conduct Standard for Banks.

126 Clause 8(15) of the Conduct Standard for Banks.

127 Clause 8(16) of the Conduct Standard for Banks.

analysis will be ongoing ensures a timely intervention with regard to a potential risk.

The responsibility to implement and oversee an effective dispute resolution framework falls on the governing body of the bank.[128] However, this responsibility may be delegated to an appropriate senior person within the bank.[129] In this regard, the Conduct Standard for Banks specifically prescribes that a person who bears responsibility for making any decisions or recommendations relating to complaints must be trained and must have appropriate experience and knowledge of dispute resolution and the fair treatment of customers.[130] To avoid any confusion among customers, the person appointed to oversee and implement the dispute resolution may not be referred to as an ombud,[131] and it is submitted that this could be to ensure a clear distinction between the internal and external dispute resolution frameworks that a client has available to them.

The Conduct Standard for Banks requires that banks regularly review their internal dispute resolution framework, and any changes to the framework must be recorded.[132] Nevertheless, in practice, the review by the bank itself may not provide the best outcomes for customers, and it may become necessary for these internal dispute resolution frameworks to be reviewed instead by an external, independent body or regulator. An external review also ensures that banks align their complaint procedures to that of other banks.

In addition to prescribing the internal dispute resolution processes, the Conduct Standard for Banks directs that banks must also establish an escalation and review process.[133] Such process must allow for the escalation of complicated or unconventional complaints to a senior-level employee of the bank who must be suitably qualified to attend to them.[134] Moreover, the dispute resolution processes implemented by banks must be straightforward and easily accessed by bank customers,[135] and therefore be user-friendly for the customer.

When a bank upholds a complaint and agrees to make a payment or to undertake any other action, the bank must do so within the agreed time frame and without undue delay.[136] In the instance where a bank rejects a complaint, the complainant must receive reasons for such rejection and be advised in detail of any escalation or review processes that are available to them.[137]

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128 Clause 8(4) of the Conduct Standard for Banks.
129 Clause 8(5) of the Conduct Standard for Banks.
130 Clause 8(6)(*a*) and (*b*) of the Conduct Standard for Banks.
131 Clause 8(6)(*c*) of the Conduct Standard for Banks.
132 Clause 8(2) of the Conduct Standard for Banks.
133 Clause 8(10) of the Conduct Standard for Banks.
134 Clause 8(11) of the Conduct Standard for Banks.
135 Clause 8(19) of the Conduct Standard for Banks.
136 Clause 8(12) of the Conduct Standard for Banks.
137 Clause 8(13) of the Conduct Standard for Banks.

6 THE EFFECT OF THE CONDUCT STANDARDS ON THE REGULATION OF THE BANKING SECTOR

Prior to the publication of the Conduct Standard for Banks, no financial sector law specifically regulated internal consumer complaints within the whole banking sector. While certain sub-sectors of the banking sector were regulated by financial sector laws such as the Banks Act, the NCA and the FAIS Act, the area of consumer complaints and dispute resolution in the broader banking sector can at best be referred to as fragmented. Moreover, while banking customers had access to many external dispute resolution mechanisms available in the financial sector, internal dispute resolution lacked uniform regulation and was arguably, ineffectual. Moreover, the fact that banks did not all follow the same internal complaints procedure arguably gave rise to a fragmented approach to internal complaints resolution.

Prior to the creation of the FSCA and its Conduct Standard for Banks, the conduct of banks was governed by the Banking Code, which was a voluntary code. The Banking Code, however, provides little direction in relation to the way banks are required to approach dispute resolution. The Banking Code merely gives a basic outline, providing that the bank concerned will inform its customer how to lodge a complaint or what to do if the customer is not satisfied with the outcome of the complaint.[138]

In contrast, it is evident that the Conduct Standard for Banks provides greater guidance and regulation for banks, as it provides a detailed list of exactly what is required from banks when dealing with their customers and, most importantly, any disputes that may arise, with a specific focus on internal dispute resolution. The Conduct Standard for Banks also requires that a proper, well-maintained and effective internal dispute resolution framework be implemented and that banks follow a number of processes in dealing with customer complaints. Arguably, this will create a more streamlined, standardised process for customers to follow when they wish to lodge a complaint with their bank, and will ultimately result in an improvement in internal dispute resolution across the banking sector.

In publishing the Conduct Standards for Banks, the FSCA has, rather than discouraging banks from implementing and following their own frameworks for the handling of internal dispute resolution, provided banks with a uniform standard against and by which they can measure their performance and continuously improve their internal dispute resolution frameworks in alignment with their own business models. This approach to regulation is what is known as a principles-based approach.[139] By using this approach to financial regulation, rather than placing the banking sector under the burden of following a rules-based approach, the banking sector will align its conduct

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138 Clause 10 of the Banking Code.

139 For a discussion of the various regulatory principles, see the National Treasury "Explanatory Policy Paper Accompanying the Conduct of Financial Institutions Bill" http://www.treasury.gov.za/twinpeaks/CoFI%20Bill%20policy%20paper.pdf (accessed 2022-02-02) 10.

with a set of principles (in this case the Conduct Standard for Banks) to achieve the intended outcome of customer protection, while implementing a uniform standard against which banks can measure their conduct. Moreover, as the TCF Principles constitute the foundation of the Conduct Standard for Banks, the latter is also aligned with international best practice.

7 CONCLUDING REMARKS

This article has discussed the Conduct Standard for Banks and highlighted the differences between it and the Banking Code. While the Banking Code provides a brief, and often vague, set of rules with which banks should comply, the Conduct Standard for Banks provides a detailed, principles-based framework from which banks must develop, maintain and assess their own internal dispute policies. Although the Conduct Standard for Banks is a worthy addition to the financial sector laws and undoubtedly provides an important framework for banks to follow, it is likely to be imperfect. It is difficult, at this stage, to state with certainty the extent to which the Conduct Standard for Banks will be successful in regulating the banking industry as far as dispute resolution is concerned. Much like any new legal measure, several issues may still arise during the implementation of the Conduct Standard for Banks. Moreover, as discussed above, the success of the Conduct Standard for Banks in regulating dispute resolution depends on the degree of compliance by the banks, which, in turn, depends on whether the sanctions that are imposed for non-compliance will deter banks from conduct that contravenes the Conduct Standard for Banks. However, at least, the fact that the Conduct Standard has a statutory basis means that the adoption of its provisions by banks will no longer be voluntary as was the case with the Banking Code.

TACIT CHOICE OF LAW IN INTERNATIONAL COMMERCIAL CONTRACTS: PROGRESS OR STAGNATION IN THE COMMON-LAW JURISDICTIONS?

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SUMMARY

The English common-law rules of private international law have, to a large extent, been replaced by European conflicts-law regulations in the United Kingdom (UK). Nevertheless, English common law remains highly influential in numerous jurisdictions. In many legal systems, the private-international-law rules are based fundamentally on the common-law rules developed by English courts. This is problematic since the common-law rules of private international law may be outdated. This article examines the English common-law choice-of-law rules – more specifically, the rules and principles concerning the determination of a tacit choice of law in international commercial contracts. The traditional common-law position is compared to selected common-law jurisdictions – namely, Australia, Canada, India, Israel and New Zealand. Finally, the article highlights the progress (or lack thereof) in the aforementioned common-law jurisdictions in addressing the issues related to the determination of a tacit choice of law in international commercial contracts.

1 INTRODUCTION

The English common-law choice-of-law rules have been superseded in the UK by the rules contained in the Rome Convention,[1] and later, the Rome I Regulation.[2] Nevertheless, the traditional common-law rules and principles

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[1] The Rome Convention on the Law Applicable to Contractual Obligations (1980) https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:-41998A0126(02)&from=EN. See Bouwers "Brexit and the Implications for Tacit Choice of Law in the United Kingdom" 2018 39(3) *Obiter* 727 733.

[2] The Rome I Regulation on the Law Applicable to Contractual Obligations (2008) http://eur-lex.europa.eu. See Article 24 of the Rome I Regulation: "This Regulation shall replace the Rome Convention in the Member States, except as regards the territories of the Member States which fall within the territorial scope of that Convention and to which this Regulation does not apply." Member States of the European Union include Austria, Belgium, Bulgaria, Croatia, Cyprus, the Czech Republic, Denmark, Estonia, Finland, France, Germany, Greece, Hungry, Ireland, Italy, Latvia, Lithuania, Luxembourg, Malta, the Netherlands,

on choice of law in international commercial contracts remain highly influential in numerous jurisdictions "whose law developed along similar lines".[3] This is somewhat problematic, as there exists considerable uncertainty regarding the common-law choice-of-law rules.

This article examines the English common-law rules and principles on choice of law in international commercial contracts, meaning the rules in force prior to the accession of the UK to the Rome Convention. More specifically, the article focuses on the determination of a tacit choice of law in international commercial contracts. All relevant aspects are taken into account, including the level of strictness of the criteria for inferring a tacit choice of law, the factors that may be taken into account, and the weight of such factors. The common-law position regarding the determination of a tacit choice of law is compared to that under Australian, Canadian, Indian, Israeli and New Zealand private international law. The comparative analysis intends to shed light on whether these common-law jurisdictions have progressed in respect of clarifying the issues related to the determination of a tacit choice of law in international commercial contracts.

2 THE ENGLISH COMMON LAW

As previously mentioned, the traditional English common-law choice-of-law rules have been overtaken by European private-international-law regulations in the UK.[4] Whether this framework will continue in the UK post-Brexit remains to be seen. At present, the European Union (EU) regulations remain in force in the UK. In a notice to stakeholders, the European Commission stated:

> "Since 1 February 2020, the United Kingdom has withdrawn from the European Union and has become a 'third country'. The Withdrawal Agreement provides for a transition period ending on 31 December 2020. Until that date, EU law in its entirety applies to and in the United Kingdom."[5]

In the event that the EU regulations cease to apply in the UK post-Brexit, the UK may have to resort to the traditional common-law position to determine the applicable law.[6] Notwithstanding a possible renaissance in the UK, the common-law rules and principles remain influential in numerous jurisdictions, particularly in the context of choice of law.

Poland, Portugal, Romania, Slovakia, Slovenia, Spain, Sweden, and the United Kingdom. However, Denmark is the only country that continues to apply the Rome Convention.

3 See Collins (ed) *Dicey, Morris and Collins on the Conflict of Laws* II (2012) 1776.

4 See Bouwers 2018 *Obiter* 730: "The impact that EU law has had on the UK is worth mentioning. More precisely, in the commercial arena, it has revolutionised the rules applicable to dispute resolution in a cross-border context, i.e., those that we would identify as rules of private international law". The EU has established a common framework for the jurisdiction of national courts, the determination of the applicable law and the recognition and enforcement of judgments.

5 The European Commission "Withdrawal of the United Kingdom and EU Rules in the Field of Civil Justice and Private International Law" https://ec.europa.eu/info/sites/info/files/file_import/-civil_justice_en_0.pdf (accessed 2020-11-16).

6 See generally, Bouwers 2018 *Obiter* 730 727–746.

2 1 Party autonomy

In the English common law, the legal system by which parties intended their contract to be governed may be termed the proper law of the contract.[7] In *Amin Rasheed Shipping Corporation v Kuwait Insurance Co*,[8] Lord Diplock described the proper law of a contract as "the substantive law of the country which the parties have chosen as that by which their mutually legally enforceable rights are to be ascertained".[9] Frequently cited as the first English authority on party autonomy, the *obiter dictum* of Lord Mansfield in *Robinson v Bland*[10] provided that "[t]he law of the place of contracting can never be the rule, where the transaction is entered into with the express view to the law of another country as the rule by which it is to be governed".[11] The principle of party autonomy has become a significant feature of English private international law.[12] However, a common question is whether the freedom of the parties to select the proper law is completely unfettered.[13] The liberal interpretation of party autonomy starts with the Privy Council decision in *Vita Food Products v Unus Shipping Co Ltd,*[14] where the court held:

> "It is true that in questions relating to the conflict of laws rules cannot generally be stated in absolute terms but rather as *prima facie* presumptions. But where the English rule, that intention is the test, applies, and where there is an express statement by the parties of their intention to select the law of the contract, it is difficult to see what qualifications are possible, provided the intention expressed is *bona fide* and legal, and provided there is no reason for avoiding the choice on the ground of public policy."[15]

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7 The discussion of the English common law is based in part on the article Bouwers 2018 *Obiter* 729 741–745. See, also, Collins *Dicey, Morris and Collins on the Conflict of Laws* II 1777; Graveson *Conflicts of Law* (1974) 405–406; Morris (gen ed) *Dicey and Morris on The Conflict of Laws* (1980) 747–748; North *Cheshire and North Private International Law* (1979) 195. See *Mount Albert Borough Council v Australasian Temperance and General Life Assurance Society* 1938 AC 224 240: "The proper law of the contract means that law which the English court is to apply in determining the obligations under the contract." See also, *Vita Food Products v Unus Shipping Co Ltd* 1939 63 Lloyd's Rep 21 27: "It is now well settled that by English law the proper law of the contract is the law which the parties intended to apply."

8 [1984] AC 50.

9 *Amin Rasheed Shipping Corporation v Kuwait Insurance Co supra* 61–62.

10 1760 2 BURR 1077.

11 As referred to by Morris *Dicey and Morris on The Conflict of Laws* 751. See also Nygh *Autonomy in International Contracts* (1999) 5.

12 Tovey and Spurin "Private International Law Lecture Eleven: The Common Law Rules Governing the Choice of Law in Contract" (11 October 2007) www.nadr.co.uk/articles/articles.php?categories=61 (accessed 2018-07-11) 2; Morris *Dicey and Morris on The Conflict of Laws* 753–754; North *Cheshire and North Private International Law* 199. See, for e.g., *Rex v International Trustee for the Protection of Bondholders Aktiengesellschaft* 1937 AC 500 529; *Vita Food Products v Unus Shipping Co Ltd supra* 27; *Whitworth Street Estates (Manchester) Ltd v James Miller and Partners Ltd* 1970 AC 583 603.

13 North *Cheshire and North Private International Law* 199; Morris *Dicey and Morris on The Conflict of Laws* 753–754.

14 *Supra*.

15 *Vita Food Products v Unus Shipping Co Ltd supra* 27.

Subject to certain limitations,[16] it appears that the contracting parties have a wide discretion to agree expressly upon a governing law.[17] It seems that a choice of law that bears no connection to the parties or the contract will be permitted.[18] However, it is uncertain whether *dépeçage* (selecting different laws to govern parts of the contract) is allowed under the common law – although common-law jurisdictions have started accepting the possibility of *dépeçage*.[19]

At common law, when parties fail to make an express choice of law, "the only certain guide is to be found in applying sound ideas of business, convenience, and sense to the language of the contract itself, with a view to discovering from it the true intentions of the parties".[20] Therefore, in the absence of an express choice, it is possible for the court to determine whether there is an implied or inferred choice of law.[21] However, there has been some uncertainty about the applicable test in the absence of an express selection. In *Amin Rasheed Shipping Corp v Kuwait Insurance Co*,[22] the court stated:

> "[T]he first step in the determination of the jurisdiction point is to examine the policy in order to see whether the parties have, by its express terms or by necessary implication from the language used, evinced a common intention as to the system of law by reference to which their mutual rights and obligations under it are to be ascertained".[23]

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16 See generally, Morris *Dicey and Morris on The Conflict of Laws* 753–756 on mandatory rules and public policy considerations. See also North *Cheshire and North Private International Law* 199–202.

17 Morris *Dicey and Morris on The Conflict of Laws* 753. See, for e.g., an *obiter dictum* in *Whitworth Street Estates (Manchester) Ltd v James Miller and Partners Ltd supra* 603. See also *Rex v International Trustee for the Protection of Bondholders Aktiengesellschaft supra* 529; and Lord Diplock's dictum in *Amin Rasheed Shipping Corporation v Kuwait insurance Co supra* 50 61: "English conflict rules accord to the parties to a contract a wide liberty to choose the law by which their contract is to be governed."

18 See Morris *Dicey and Morris on The Conflict of Laws* 755: "There appears to be no reported case in which an English court refused to give effect to an express selection by the parties, merely because the other factors of the case showed no connection between the contract and the chosen law." See also Graveson *Conflicts of Law* 410: "The limitations imposed by many Continental systems on this doctrine take the form, followed in the earlier English cases of requiring that the contract should have some connection in fact with the chosen law, such as through the place of making or of performance, or the domicile or nationality of the parties; but the English doctrine is probably now free from such restrictions." However, see North *Cheshire and North Private International Law* 202: "The courts should, and do, have a residual power to strike down, for good reason, choice of law clauses totally unconnected with the contract."

19 See, for instance, the legal position in Australia, Canada and New Zealand below.

20 *Jacobs, Marcus & Co v Crédit Lyonnais* 1884 12 QBD 589 601 (CA). See also Collins *Dicey, Morris and Collins on the Conflict of Laws* II 1777; Morris *Dicey and Morris on The Conflict of Laws* 761.

21 Collins *Dicey, Morris and Collins on the Conflict of Laws* II 1777 and 1799; Morris *Dicey and Morris on The Conflict of Laws* 761; North *Cheshire and North Private International Law* 203. See, for e.g., *Amin Rasheed Shipping Corporation v Kuwait Insurance Co supra* 50 61; *Bonython v Commonwealth of Australia* 1951 AC 201 221; *Compagnie d'Armement Maritime SA v Compagnie Tunisienne de Navigation SA* [1971] AC 572 595.

22 *Supra*.

23 *Amin Rasheed Shipping Corporation v Kuwait Insurance Co supra* 61.

In other words, the search must be for the unexpressed intention of the parties.[24] However, in the very same case, Lord Wilberforce came to a different conclusion when[25] he held:

> "What has to be done is to look carefully at all those factors normally regarded as relevant when the proper law is being searched for, including of course the nature of the [contract] itself, and to form a judgment as to the system of law with which that policy in the circumstances has the closest and most real connection."[26]

In practical terms, Lord Wilberforce endorsed a search for an objective connection in the absence of an express choice of law.[27] Therefore, the fine line between a search for a tacit choice of law and a search for the system of law with which the contract has its closest and most real connection is sometimes blurred.[28]

2 2 How strict are the criteria for inferring a tacit choice of law?

The court in *Jacobs, Marcus & Co v Crédit Lyonnais*[29] provided that, in the absence of an express selection, the "true intention" of the parties must be discovered.[30] In order to discover the true or real intention of the parties, rather than a purely hypothetical one, criteria for identifying the choice of law are required to be articulated clearly and stringently.[31] The traditional common-law test, as declared by Lord Diplock in *Amin Rasheed Shipping Co v Kuwait Insurance Co*,[32] required an examination

> "to see whether the parties have, by [the contract's] express terms or by necessary implication from the language used, evinced a common intention as to the system of law by reference to which their mutual rights and obligations under it are to be ascertained."[33]

Marshall opines that the phrase "by necessary implication" suggests a less stringent test than the "clearly demonstrated" criterion of the Rome I

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24 Davies, Bell and Brereton *Nygh's Conflict of Laws in Australia* (2014) 452; Nygh *Conflicts of Laws in Australia* (1991) 272.

25 *Ibid*.

26 *Amin Rasheed Shipping Corp v Kuwait Insurance Co supra* 71.

27 Davies *et al Nygh's Conflict of Laws in Australia* 452; Nygh *Conflicts of Laws in Australia* 272.

28 Collins *Dicey, Morris and Collins on the Conflict of Laws* II 1778 and 1809.

29 *Supra*.

30 *Jacobs, Marcus & Co v Crédit Lyonnais supra* 601.

31 Marshall "Reconsidering the Proper Law of the Contract" 2012 13 *Melbourne Journal of International Law* 501 516; Nygh *Autonomy in International Contracts* 111. See also Graveson *Conflicts of Law* 412: "There is, however, often a 'sense of unreality' in the process of trying to find an intention which may never have existed in respect of the law governing a breach of contract that was never contemplated when the contract was made."

32 *Supra*.

33 *Amin Rasheed Shipping Co v Kuwait Insurance Co supra* 61. See also Marshall 2012 *Melbourne Journal of International Law* 516; Nygh *Autonomy in International Contracts* 111.

Regulation.[34] It is submitted that the former criterion does not go far enough in the pursuance of legal determinability.[35]

2 3 Indicators of a tacit choice of law

The court in *Vita Food Products*[36] stated that, if a choice of law is not expressed, it must "be presumed from the terms of the contract and the relevant surrounding circumstances".[37] To determine whether the relevant intention of the parties is present, the court can infer a choice of law from the terms of the contract, and from the general circumstances of the case.[38]

There are a number of factors from which a court may infer a choice of law. For instance, the use of a standard form that is known to be drafted with reference to a particular system of law may indicate the existence of a tacit choice of law.[39] In *Amin Rasheed Shipping Corp v Kuwait Insurance*,[40] the litigation concerned a claim under an insurance policy that closely followed the wording of the Lloyd's policy schedule to the Maritime Insurance Act, 1906.[41] In finding that English law governed the contract, the court held:

> "There is a strong line of authority from the end of the last century to the present day, showing that the use of a standard form may be a powerful indication of the parties' deemed intention, and a strong connecting link to a particular system of law. The importance attached to this factor arises from the consideration that the terms of a standard form contract may only be interpreted by reference to the system of law under which the standard form has evolved, and that the parties must be deemed to have intended a uniform and predictable interpretation by reference to that system."[42]

However, Nygh believes that "the use of an English standard form, even as peculiarly English as a Lloyd's marine policy, cannot by itself be a useful indicator of a real intention" of the parties in respect of the proper law of the

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34 Marshall 2012 *Melbourne Journal of International Law* 516. See also Bouwers "Tacit Choice of Law in International Commercial Contracts: The Position in South African Law and Under the Rome I Regulation" in Hugo and Möllers (eds) *Transnational Impacts on Law: Perspectives From South Africa and Germany* (2017) 69 74–75 for a discussion of the Rome I Regulation.

35 See Nygh *Autonomy in International Contracts* 111: "In that case, a single factor, such as a choice of jurisdiction clause, may suffice."

36 *Supra*.

37 *Vita Food Products supra* 27.

38 Graveson *Conflicts of Law* 412; Morris *Dicey and Morris on the Conflict of Laws* 761. See *Compagnie d'Armement Maritime SA v Compagnie Tunisienne de Navigation SA supra* 595: "[I]t requires the consideration together of the terms and nature of the contract, and the general circumstances of the case." See also *Rex v International Trustee for the Protection of Bondholders Aktiengesellschaft supra* 529.

39 See, for e.g., *Whitworth Street Estates (Manchester) Ltd v James Miller and Partners Ltd supra* 592–595. See also Morris *Dicey and Morris on the Conflict of Laws* 763: "The fact that the form or wording of a contract has been approved or prescribed by the authorities of a given country or by the head office of a commercial undertaking with branches in a number of countries may be a pointer towards the proper law."

40 *Supra*.

41 Sykes and Pryles *Australian Private International Law* 3ed (1991) 605.

42 *Amin Rasheed Shipping Corp v Kuwait Insurance supra* 53.

contract.[43] An express choice of law in related transactions,[44] and the inclusion of language or terminology appropriate to a particular system of law, may also signify a tacit choice of law.[45] Other factors from which a choice may be inferred include the residence of the parties, the nationality of the parties, and the currency in which payment is made.[46] A choice of law in *favorem negotii* (a principle of interpretation whereby an agreement is construed in a manner that sustains its validity) may also be added in this regard.[47] The existence of any of the above-mentioned factors is a mere indication pointing to a common intention of the parties; the inference that a court draws from their existence should depend on all the circumstances of the case.[48]

At common law, the courts have attached considerable weight to the presence of an agreement in the contract stipulating that any dispute shall be submitted to the courts of a particular country, perceiving it as signalling a choice of law.[49] Similarly, a localised arbitration clause also permits the inference that the law of that country was intended as the proper law of the contract.[50] In *Hamlyn v Talisker Distillery*,[51] for instance, Lord Herschell LC stated:

> "[T]he language of the arbitration clause indicates very clearly that the parties intended that the rights under that clause should be determined according to the law of England. The parties agree that any dispute arising out of their contract shall be 'settled by arbitration by two members of the London Corn Exchange, or their umpire, in the usual way,' it seems to me that they have indicated as clearly as it is possible their intention that that particular stipulation, which is a part of a contract between them, shall be interpreted

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43 Nygh *Autonomy in International Contracts* 115.

44 North *Cheshire and North Private International Law* 206. See also Morris *Dicey and Morris on the Conflict of Laws* 764: "[T]he legal or commercial connection between one contract and another may enable a court to say that the parties must be held implicitly to have submitted both contracts to the same law." See, for e.g., *Re United Railways of the Havana and Regla Warehouses Ltd* 1960 2 All ER 332.

45 *Rex v International Trustee for the Protection of Bondholders Aktiengesellschaft supra* 553–554; *Whitworth Street Estates (Manchester) Ltd v James Miller and Partners Ltd supra* 603–608; *Compagnie d' Armement SA v Compagnie Tunisienne de Navigation SA supra* 594. See also Graveson *Conflicts of Law* 427–428; Morris *Dicey and Morris on the Conflict of Laws* 762–763; and North (*Cheshire and North Private International Law* 205) who states that the use of a particular language is a relatively unimportant factor.

46 Morris *Dicey and Morris on the Conflict of Laws* 764; North *Cheshire and North Private International Law* 205–206.

47 Morris *Dicey and Morris on the Conflict of Laws* 765: "[T]he court may incline towards applying a system of law under which the contract would be valid because, so it is said, the parties cannot be assumed to have intended to contract under a law by which their agreement would be invalid. The importance of this argument should not be exaggerated, because the court may find that the intention of the parties was in fact directed towards a law under which, in the event, their contract – or part of it – turned out to be void. It is therefore dangerous to put too much reliance on the argument." See also North *Cheshire and North Private International Law* 206.

48 Morris *Dicey and Morris on The Conflict of Laws* 764.

49 Graveson *Conflicts of Law* 417; Morris *Dicey and Morris on the Conflict of Laws* 761; North *Cheshire and North Private International Law* 203.

50 *Ibid*.

51 1894 AC 202.

> according to and governed by the law, not of Scotland, but of England, and I am aware of nothing which stands in the way of the intention of the parties thus indicated by the contract they entered into, being carried into effect."[52]

This presumption is based on the principle *qui eligit judicem eligit ius* (an express choice of a tribunal is an implied choice of the proper law), which has generally resulted in English courts treating an express choice of a court or arbitral tribunal as an implied choice of the proper law.[53] The principle was pushed to its extreme in *Tzortzis and Sykias v Monarch Line A/B*,[54] where Salmon LJ stated that an arbitration clause raises "an irresistible inference which overrides all other factors".[55] However, this was refuted in *Compagnie d'Armement Maritime SA v Compagnie Tunisienne de Navigation SA*,[56] where the court held that a contract containing an arbitration clause was not necessarily a conclusive factor pointing toward a tacit choice of law, although it was a "weighty" indication that the parties intended the law of that place to govern the contract.[57] Although the court did not go as far as the *Tzortzis* case, it still placed considerable emphasis on a choice of arbitration clause.[58]

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52 *Hamlyn v Talisker Distillery supra* 208. See also *Spurrier v La Cloche* 1902 AC 446 450; *Kwik Hoo Tong Handel Maatschappij v James Finlay & Co Ltd* 1927 AC 604 608–610.

53 North *Cheshire and North Private International Law* 203–204. See also Graveson (*Conflicts of Law* 417) who writes that English courts have generally treated the choice of arbitrators as an automatic choice of the proper law. A choice of jurisdiction clause contains a powerful implication that the law of that country should be applied. See also Morris *Dicey and Morris on the Conflict of Laws* 761: "If they (the parties) agree that the courts of a given country shall have jurisdiction in any matters arising out of a contract, they can – in the absence of evidence to the contrary – be assumed to have intended those courts to apply their own law and thus to have selected that law as the proper law of the contract."

54 1968 1 Lloyd's Rep 337.

55 *Tzortzis and Sykias v Monarch Line A/B supra* 341. See also Graveson *Conflicts of Law* 418–420; Morris *Dicey and Morris on the Conflict of Laws* 762; North *Cheshire and North Private International Law* 204.

56 *Supra*.

57 *Compagnie d'Armement Maritime SA v Compagnie Tunisienne de Navigation SA supra* 596. See also Graveson *Conflicts of Law* 420–424; Morris *Dicey and Morris on the Conflict of Laws* 762; North *Cheshire and North Private International Law* 204–205.

58 For instance, Lord Reid remarked at 584 (*Compagnie d'Armement Maritime SA v Compagnie Tunisienne de Navigation SA supra*): "[T]he fact that the parties have agreed that arbitration shall take place in England is an important factor and in many cases it may be the decisive factor. But it would in my view be highly anomalous if our law required the mere fact that arbitration is to take place in England to be decisive as to the proper law of the contract." Lord Wilberforce observed at 600: "Always it will be a strong indication; often, especially where there are parties of different nationality or a variety of transactions which may arise under the contract, it will be the only clear indication. But in some cases it must give way where other indications are clear." Finally, Lord Diplock stated at 604: "The fact that they have expressly chosen to submit their disputes under the contract to a particular arbitral forum of itself gives rise to a strong inference that they intended that their mutual rights and obligations under the contract should be determined by reference to the domestic law of the country in which the arbitration takes place, since this is the law with which arbitrators sitting there may be supposed to be most familiar. But this is an inference only. It may be destroyed by inferences to the contrary." See, also, *Bangladesh Chemical Industries Corp v Henry Stephens Co Ltd* 1981 2 Lloyd's Rep 389 (CA) 392, in which the court acknowledged that an arbitration clause choosing London as the seat of arbitration no longer automatically led to the inference that English law was the law chosen by the parties.

3 AUSTRALIA

Subsequent to British settlement in 1788, the various British colonies recognised in Australia were subject to the common law as developed by British courts.[59] The modern Australian system "has increasingly developed an independent common law, distinct from that applied in the courts of the United Kingdom".[60] Nevertheless, in the realm of private international law, Australia is still greatly influenced by English common-law rules relating to the determination of the applicable law.[61] Therefore, Australian "choice of law rules are principally the product of the common law".[62]

3 1 Party autonomy

Following the traditional English-law rule,[63] Australian courts refer to the "proper law of the contract" to describe the law that creates and governs an international commercial contract.[64] In the leading case of *Akai Pty Ltd v The People's Insurance Co Ltd*,[65] the court held that the proper law of the contract is the system of law that the parties intended to apply.[66] Therefore, the principle of party autonomy is generally accepted in Australian private international law.[67] The Australian Law Reform Commission (ALRC) has also recommended that the parties' right to choose the law governing their

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The court did state, however, that an arbitration clause in the contract "is of the very first importance".

59 The discussion on Australia is based in part on Bouwers *Tacit Choice of Law in International Commercial Contracts: A Global Comparative Study* (2021). See Mills "Australia" in Basedow, Rühl and Asensio (eds) *Encyclopedia of Private International Law* vol 3 (2017) 1879.

60 See Mills in Basedow *et al Encyclopedia of Private International Law* 1880: "[T]he relationship between the common law systems has become one of mutual influence rather than deference."

61 Mills in Basedow *et al Encyclopedia of Private International Law* 1882.

62 Tilbury, Davis and Opeskin *Conflict of Laws in Australia* (2002) 727.

63 Graveson *Conflicts of Law* 405-406; Morris *Dicey and Morris on the Conflict of Laws* 747–748; North *Cheshire and North Private International Law* 195. See *Mount Albert Borough Council v Australasian Temperance and General Life Assurance Society supra* 240: "The proper law of the contract means that law which the English court is to apply in determining the obligations under the contract." See also *Vita Food Products v Unus Shipping Co Ltd supra* 27: "It is now well settled that by English law the proper law of the contract is the law which the parties intended to apply."

64 See, for instance, *Dundee Ltd v Gilman & Co Pty Ltd* (1968) 70 SR (NSW) 219; *John Kaldor Fabricmaker Pty Ltd v Mitchell Cotts Freight (Australia) Pty Ltd* (1989) 18 NSWLR 172; *Akai Pty Ltd v The People's Insurance Co Ltd* (1996) 188 CLR 418; *Engel v Adelaide Hebrew Congregation Inc* (2007) 98 SASR 402.

65 *Supra*.

66 *Akai Pty Ltd v The People's Insurance Co Ltd supra* 440–442. See also Mortensen *Private International Law in Australia* (2006) 389.

67 Davies *et al Nygh's Conflict of Laws in Australia* 441–442; Marshall 2012 *Melbourne Journal of International Law* 505–506; Mortensen *Private International Law in Australia* 389; Mortensen, Garnett and Keyes *Private International Law in Australia* 3ed (2019) 443; Nygh *Conflicts of Laws in Australia* 272; Tilbury *et al Conflict of Laws in Australia* 714–715. See, for e.g., *US Surgical Corp v Hospital Products* (1983) 2 NSWLR 157 189–190; *Akai Pty Ltd v The People's Insurance Co Ltd supra* 440.

contract should be upheld.[68] However, the extent to which parties may exercise their choice of law is uncertain. On the one hand, there is authority in support of the view that a choice of law must have some connection to the parties or the contract.[69] On the other hand, it has been argued that a connection between the chosen law and the parties (or contract) is not essential.[70] The latter view is supported by the ALRC.[71] On the issue of *dépeçage*, the court in *Wanganui-Rangitikei Electric Board v Australian Mutual Provident Society*[72] held:

> "The whole theory which lies at the root of private international law, however difficult that theory may be in application, is that the law of one country, and one country alone, can be the proper or governing law of the contract."[73]

However, subsequent case law suggests that the courts are willing to accept the possibility of admitting *dépeçage*.[74] Concerning the choice of a non-national system of law, Sykes and Pryles state that "Anglo-Australian courts and writers have generally taken the view that a contract must be governed by an existing system of law of a nation state or part of a nation state".[75] There is no indication that an Australian court will be prepared to accept a direct choice of a non-state system of law in international commercial contracts.[76]

The manner in which the parties may express their choice is by stating explicitly that the law of a specific country shall be the proper law of the contract.[77] For instance, in *Akai*, the court gave effect to a choice of law clause in the contract that stipulated that the insurance policy should be governed by the law of England.[78] Where the parties to the contract express

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68 Australian Law Reform Commission *Choice of Law* (Commonwealth of Australia 1992) 84.

69 See *Re Helbert Wagg & Co* [1956] CH 323 341; *Kay's Leasing Corp v Fletcher* (1964) 64 SR (NSW) 195 205; *Queensland Estates Pty Ltd v Collas* [1971] QD R 75 80–81. See also Mortensen *et al Private International Law in Australia* 445; Nygh *Conflicts of Laws in Australia* 274.

70 See *Vita Food Products v Unus Shipping Co Ltd supra* 290; *BHP Petroleum Pty Ltd v Oil Basins Ltd* [1985] VR 725 747; *Re Bulong Nickel Pty Ltd* (2002) 42 ACSR 52 66. See also Mortensen *et al Private International Law in Australia* 445–446; Nygh *Conflicts of Laws in Australia* 274; Sykes and Pryles *Australian Private International Law* 597–598.

71 Australian Law Reform Commission *Choice of Law* 85.

72 (1934) 50 CLR 581.

73 *Wanganui-Rangitikei Electric Board v Australian Mutual Provident Society supra* 604.

74 See *Tomkinson v First Pennsylvania Banking & Trust Co* [1961] VR 277 282–285; *Samarni v Williams* [1980] 2 NSWLR 389. See also Mortensen *et al Private International Law in Australia* 453–454; Sykes and Pryles *Australian Private International Law* 584–589.

75 Sykes and Pryles *Australian Private International Law* 594.

76 Sykes and Pryles *Australian Private International Law* 594–595.

77 Davies *et al Nygh's Conflict of Laws in Australia* 445–448; Mills in Basedow *et al Encyclopedia of Private International Law* 1882; Mortensen *Private International Law in Australia* 389; Nygh *Conflicts of Laws in Australia* 272; Tilbury *et al Conflict of Laws in Australia* 734.

78 *Akai Pty Ltd v The People's Insurance Co Ltd supra* 423. See also *Dundee Ltd v Gilman & Co Pty Ltd supra* 219.

such an intention, subject to certain limitations,[79] the courts will give effect to the chosen law as the proper law of the contract.[80] In *John Kaldor Fabricmaker Pty Ltd v Mitchell Cotts Freight (Australia) Pty Ltd*,[81] the court held that "[t]here is no question but that when the parties make an express choice of law, then ordinarily that choice will be effective".[82] However, giving effect to a choice of law is considerably more difficult where the parties fail to expressly choose the governing law.[83]

It is often problematic to determine whether a contract is one in which the parties' choice of law can be inferred or one in which an intention is imputed by reference to the closest and most real connection to the contract.[84] There has been some uncertainty about the applicable test in the absence of an express choice of law. In some Australian cases, where there has been no express choice of law by the parties, the court did not embark upon a search for an implied intention and immediately proceeded to determine the objective proper law.[85] However, in *John Kaldor Fabricmaker Pty Ltd v Mitchell Cotts Freight (Australia) Pty Ltd*,[86] Brownie J held:

> "The correct view is that the proper law of the contract is determined by the substantive view, or the inferred intention of the parties, where that inference can be drawn. Where that inference cannot be drawn, then and only then should the court go on to impute an intention to the parties, by reference to the system of law having the closest and most real connection with the transaction."[87]

In *Akai Pty Ltd v The People's Insurance Co Ltd*,[88] the majority of the High Court of Australia appeared to be of the same view, stating:

> "It is not a question of implying a term as to choice of law. Rather it is one of whether, upon the construction of the contract and by the permissible means of construction, the court properly may infer that the parties intended their contract to be governed by reference to a particular system of law."[89]

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79 See, for e.g., Mortensen *et al Private International Law in Australia* 446–447 for a discussion of overriding mandatory rules and public-policy considerations. See also Sykes and Pryles *Australian Private International Law* 596–600.

80 Mortensen *Private International Law in Australia* 390. See also ALRC 81; Davies *et al Nygh's Conflict of Laws in Australia* 445–447; Mortensen *et al Private International Law in Australia* 443; Nygh *Conflicts of Laws in Australia* 272; Sykes and Pryles *Australian Private International Law* 596; Tilbury *et al Conflict of Laws in Australia* 734.

81 *Supra*.

82 *John Kaldor Fabricmaker Pty Ltd v Mitchell Cotts Freight (Australia) Pty Ltd supra* 185.

83 Marshall 2012 *Melbourne Journal of International Law* 511.

84 Mortensen *Private International Law in Australia* 394.

85 See, for e.g., *Boissevain v Weil* (1949) 1 KB 482 490–491*; Busst v Lotsirb Nominees Pty Ltd* (2003) 1 Qd R 477, (2002) QCA 296; *Attorney-General of Botswana v Aussie Diamond Products Pty Ltd* (No 3) (2010) WASC 141 207. See also Mortensen *et al Private International Law in Australia* 448–449; Sykes and Pryles *Australian Private International Law* 601–602.

86 *Supra*.

87 *John Kaldor Fabricmaker Pty Ltd v Mitchell Cotts Freight (Australia) Pty Ltd supra* 185.

88 *Supra*.

89 *Akai Pty Ltd v The People's Insurance Co Ltd supra* 441.

Both cases exemplify that the court is required to look for an implied choice of law before moving onto an objective determination as to what the proper law should be.[90]

3 2 How strict are the criteria for inferring a tacit choice of law?

The ALRC notes that there exists considerable uncertainty over the extent to which a court may infer a choice of law by the parties.[91] At common law, the courts have shown a willingness to search for the inferred intention in the contract, even in circumstances where it was unlikely that the parties gave choice of law much thought.[92] This enthusiasm suggests a low level of strictness applied in inferring a choice of law. However, in *John Kaldor Fabricmaker Pty Ltd v Mitchell Cotts Freight (Australia) Pty Ltd*,[93] the court stated that there is no reason why the actual choice of law of the parties should not be effective, provided that the choice is properly inferred.[94] Similarly, in *Akai Pty Ltd v The People's Insurance Co Ltd*,[95] the court held:

> "It is not a question of implying a term as to choice of law. Rather it is one of whether, upon the construction of the contract and by the permissible means of construction, the court properly may infer that the parties intended their contract to be governed by reference to a particular system of law."[96]

Both cases provided that the parties' choice of law must be "properly inferred", which seems to support the fact that the court must be certain that a choice of law exists. Furthermore, Australian authors Mortensen, Garnett and Keyes propose that where the parties have no common intention as to the proper law, or they have failed to leave conclusive evidence of that intention, a court must look to objective factors in order to determine the

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90 Davies *et al Nygh's Conflict of Laws in Australia* 451–452; Mortensen *Private International Law in Australia* 394; Sykes and Pryles *Australian Private International Law* 600–601. See Mortensen *et al Private International Law in Australia* 447: "If there is no effective express choice of law, the court is required to determine whether there is an actual but unexpressed choice of law." See also *John Kaldor Fabricmaker Pty Ltd v Mitchell Cotts Freight (Australia) Pty Ltd supra* 186: "[T]he proposition that if the parties expressly agree that their contract will be governed by the law of a particular country, that choice is ordinarily effective, I see no reason in logic why the actual choice of the parties should not also be ordinarily effective, provided that that actual choice can properly be inferred. … [S]o long as the distinction is kept firmly in mind, it seems right that, in the absence of expressed actual intention, inferred actual intention should take precedence over imputed intention, that is, the assumption that the parties did not actually address their minds at all to the question of the proper law of the contract."

91 Australian Law Reform Commission *Choice of Law* 83.

92 Davies *et al Nygh's Conflict of Laws in Australia* 451; Marshall 2012 *Melbourne Journal of International Law* 516; Nygh *Autonomy in International Contracts* 111. See, for e.g., *Amin Rasheed Co v Kuwait Insurance Co supra* 60–65.

93 *Supra*.

94 *John Kaldor Fabricmaker Pty Ltd v Mitchell Cotts Freight (Australia) Pty Ltd supra* 186.

95 *Supra*.

96 *Akai Pty Ltd v The People's Insurance Co Ltd supra* 441.

proper law.[97] The phrase "conclusive evidence" corresponds with the threshold outlined in *Akai* and *John Kaldor*, and, it may be argued, represents a high level of strictness to be applied when inferring a choice of law.[98]

It is not clear what test or level of strictness is supported by the ALRC. On the one hand, the Commission recommends that:

> "The parties' right to choose the law to govern their contract should be upheld provided that the choice is express or can be clearly inferred from the circumstances. If the indicators are not clear, the court should not be free to infer the choice but should apply an objective test of the proper law."[99]

The fact that a choice of law must be "clearly inferred" is consistent with a high level of strictness. On the other hand, the ALRC states that "[i]t seems desirable to limit the inquiry into intent to cases where it is reasonably clear that there was an original intention".[100] Nygh opines:

> "If the tacit choice need only to be established 'with reasonable certainty', the court need only be satisfied that it was more likely than not that the parties intended a particular legal system to apply."[101]

This approach reflects the traditional common-law position, and is, to some extent, less strict than the recommendation set out by the ALRC and the threshold in the *John Kaldor* and *Akai* cases.[102]

3 3 Indicators of a tacit choice of law

The traditional common-law approach allows a tacit choice of law to be inferred by the terms of the contract or the general circumstances of the case. For example, in *Amin Rasheed Shipping Corp v Kuwait Insurance Co*,[103] the majority of the judges held that the test for determining whether there exists a tacit choice of law involves an examination of the contract

> "in order to see whether the parties have, by express terms or necessary implication from the language used, evinced a common intention as to the system of law by reference to which their mutual rights and obligations under it are to be ascertained."[104]

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97 Mortensen *Private International Law in Australia* 394; Mortensen *et al Private International Law in Australia* 448: "Where the parties' intentions in this respect are not expressly or by implication to be found in the contract, a court must look to objective factors in order to determine the proper law of the agreement."

98 Marshall 2012 *Melbourne Journal of International Law* 516.

99 ALRC (fn 68) 84.

100 ALRC (fn 68) 83.

101 Nygh *Autonomy in International Contracts* 111: "In that case a single factor, such as a choice of jurisdiction clause, may suffice."

102 Nygh (*Autonomy in International Contracts* 111) states that the approach reflects the Anglo-Commonwealth law.

103 *Supra*.

104 *Amin Rasheed Shipping Corporation v Kuwait Insurance Co supra* 61.

The majority of the Australian High Court in *Akai Pty Ltd v The People's Insurance Co Ltd* cited this view with approval;[105] the court held that the determination of a tacit choice of law "requires consideration of the terms and nature of the contract and 'general circumstances of the case'".[106] Therefore, in deciding whether the parties have made a tacit choice of law, an Australian court must examine the terms of the contract and its surrounding circumstances.[107]

There are no conclusive presumptions in searching for an unexpressed choice of law.[108] Therefore, no one factor should be regarded as decisive of the parties' common intention.[109] Furthermore, there is no limit to the factors that a court may take into account in drawing inferences about the parties' intention.[110] Nevertheless, a factor that the courts have relied upon in determining whether a tacit choice of law exists is the use of a standard form that is known to be drafted with reference to a particular system of law.[111] Similarly, the use of technical terms or language in the contract may be a factor to be taken into account in searching for a tacit choice of law. Where the contract is drafted in a language that is understood by reference to the law of a particular country, it may be possible to infer that the parties intended the law of that country to govern the contract.[112] Other indications from which a choice of law may be inferred are instances of an express choice of law in a related transaction between the parties.[113] A choice may

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105 *Supra*.

106 High Court in *Akai Pty Ltd v The People's Insurance Co Ltd supra* 441, citing remarks of the Judge in *Codelfa Construction Pty Ltd v State Rail Authority (NSW)* (1982) 149 CLR 337 347–353. See, also, *Merwin Pastoral Co Pty Ltd v Moolpa Pastoral Co Pty Ltd* (1933) 48 CLR 565 574, where the court held it must consider the contract as a whole and the circumstances surrounding the contract.

107 Mortensen (*Private International Law in Australia* 394–5) states that it is incumbent on the court to consider the contract as a whole and the circumstances surrounding the contract; Mortensen *et al Private International Law in Australia* 448; Nygh *Conflicts of Laws in Australia* 277.

108 Nygh *Conflicts of Laws in Australia* 272.

109 Marshall 2012 *Melbourne Journal of International Law* 518; Mortensen *et al Private International Law in Australia* 448. See also Mortensen (*Private International Law in Australia* 394) who writes that where the parties' have not expressly stated the governing law, no one factor can be considered as conclusive of the parties' intentions; Nygh *Autonomy in International Contracts* 114: "If the search is for the real intention of the parties, or perhaps more correctly, the likely real intention of the parties, none of the above factors could be considered conclusive."

110 Mortensen *Private International Law in Australia* 394; Mortensen *et al Private International Law in Australia* 448.

111 Marshall 2012 *Melbourne Journal of International Law* 518: a Lloyd's Policy of Maritime Insurance or Lloyd's Standard Form of Salvage Agreement are common examples of the use of a standard form. See also Australian Law Reform Commission *Choice of Law* 83; Sykes and Pryles *Australian Private International Law* 605.

112 ALRC 83; Mortensen *Private International Law in Australia* 395; Mortensen *et al Private International Law in Australia* 448. See, for e.g., *Amin Rasheed Shipping Corporation v Kuwait Insurance supra* 64–67.

113 Marshall 2012 *Melbourne Journal of International Law* 518–523. Although an Australian court has not yet dealt with this proposition, Marshall believes that there is no reason why this should not be the case under Australian law. See also Australian Law Reform Commission *Choice of Law* 83; Sykes and Pryles *Australian Private International Law* 605; Nygh *Autonomy in International Contracts* 116: "In cases where the parties have specifically

also be inferred based on the validation principle.[114] With regard to the validation principle, it is suggested that courts are inclined to apply a system of law under which the contract will be valid, in preference to one that would render the transaction invalid.[115] However, as with the other indicators that may point to a tacit choice of law, the validation principle is only one factor that must be considered with all others.[116]

A notable indicator of a tacit choice of law is the inclusion of a choice-of-forum clause in the contract. The question is whether the inclusion of a clause selecting a court or arbitral tribunal should by itself be regarded as an expression of choice, or merely an indicator of the unexpressed choice of the parties.[117] As previously discussed, the courts at common law have attached significant weight to the presence of a choice-of-forum clause as indicating that the parties intended the law of that place to be the proper law of the contract.[118] Australian law seems to have adopted the same approach in this regard. In Australian case law, the courts have considered a clause selecting a particular court or arbitral tribunal as a strong indicator that the parties intended the law of that place to be the proper law of the contract.[119] In *Akai Pty Ltd v The People's Insurance Co Ltd*,[120] for example, the court held that "a submission, in the contract, to the exclusive jurisdiction of the tribunals of a particular country, may be taken as an indication of the

negotiated the choice of law clause in a related contract, it will be legitimate to infer that they intended the same law to apply to their other contracts."

114 Marshall "Australia" in Girsberger, Kadner Graziano and Neels (eds) *Choice of Law in International Commercial Contracts: Global Perspectives on the Hague Principles* (2021) par 41 par 41.12; Nygh *Conflicts of Laws in Australia* 277. See also *Tipperary Developments Pty Ltd v Western Australia* [2009] WASCA 126, (2009) 38 WAR 488 [72].

115 Sykes and Pryles *Australian Private International Law* 603. See also Nygh *Autonomy in International Contracts* 119; Nygh *Conflicts of Laws in Australia* 277: "This principle of validation has been invoked to uphold a contract which was invalid according to one of two possible applicable laws." See, for e.g., *Monterosso Shipping Co Ltd v International Transport Workers' Federation* [1982] 3 All ER 841 (CA), where the court held that the contract was governed by Spanish law, under which the contract would be valid, rather than English law, under which it would be unenforceable.

116 Nygh *Conflicts of Laws in Australia* 277: "It can only be decisive in situations where there is established otherwise a substantial connection with the legal system upholding validity and where there are no preponderant factors pointing the other way." See also Nygh *Autonomy in International Contracts* 119; and Sykes and Pryles (*Australian Private International Law* 603) who state that there have been instances where the factor was considered relevant but not decisive.

117 Davies *et al Nygh's Conflict of Laws in Australia* 452; Nygh *Autonomy in International Contracts* 116.

118 See also Nygh *Autonomy in International Contracts* 116; Tilbury *et al Conflict of Laws in Australia* 738; Sykes and Pryles *Australian Private International Law* 602: "A clause providing for the submission of disputes to a court or to arbitration in a particular country was said to raise the inference that the law of that country was intended to be the proper law of the contract."

119 See for e.g., *John Kaldor Fabricmaker Pty Ltd v Mitchell Cotts Freight (Australia) Pty Ltd supra* 185; *Oceanic Sun Line Special Shipping Co Inc v Fay* (1988) 165 CLR 197; *Akai Pty Ltd v The People's Insurance Co Ltd supra* 442 and 436–437. See also Davies *et al Nygh's Conflict of Laws in Australia* 452; Marshall 2012 *Melbourne Journal of International Law* 519; Mortensen *Private International Law in Australia* 394–395; Mortensen *et al Private International Law in Australia* 448; Nygh *Autonomy in International Contracts* 116.

120 *Supra*.

intention of the parties that the law of that country is to be the proper law of the contract".[121] Although courts in Australia have not gone as far as stating that a choice of forum or localised arbitral tribunal should by itself be regarded as an expression of a choice of law, they attach considerable weight to the existence of such a clause.[122]

4 CANADA

Private law in Canada falls within the legislative authority of the provinces.[123] The Canadian conflict of laws, with the exception of private international law in Quebec,[124] is inherited from English law.[125] Therefore, the majority of Canadian provinces[126] follow the English common-law rules and principles relating to the determination of the applicable law.[127] Furthermore, English precedents "in this area have historically had persuasive value in Canada".[128]

4 1 Party autonomy

Canadian courts refer to the "proper law of the contract" to describe the law applicable to an international commercial contract.[129] Under the proper law of the contract, the parties are entitled to select a law to govern their

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121 *Akai Pty Ltd v The People's Insurance Co Ltd supra* 441–442. See also *Lewis Construction Co Pty Ltd v Tichauer Société anonyme* [1966] VR 341 346.

122 Davies *et al Nygh's Conflict of Laws in Australia* 452; Marshall 2012 *Melbourne Journal of International Law* 519; Mortensen *Private International Law in Australia* 394–395; Mortensen *et al Private International Law in Australia* 448; Nygh *Autonomy in International Contracts* 116–117.

123 The discussion on Canada is based in part on Bouwers *Tacit Choice of Law in International Commercial Contracts: A Global Comparative Study*. Blom "Canada" in Basedow *et al Encyclopedia of Private International Law* 1950.

124 Quebec's private international law is codified in Book Ten of the 1991 Civil Code of Quebec.

125 Blom in Basedow *et al Encyclopedia of Private International Law* 1951.

126 British Columbia, Alberta, Saskatchewan, Manitoba, Ontario, New Brunswick, the Prince Edward Island, Nova Scotia, Newfoundland, Labrador and the three Northern territories (Yukon, the Northwest Territories and Nunavut) have inherited English private international law; see Blom in Basedow *et al Encyclopedia of Private International Law* 1950.

127 Blom in Basedow *et al Encyclopedia of Private International Law* 1950–1955; Pitel and Rafferty *Conflict of Laws* (2010) 270; Walker *Halsbury's Laws of Canada: Conflict of Laws* (2016) 636.

128 Pitel and Rafferty *Conflict of Laws* 270.

129 See, for e.g., *Montreal Trust Co v Stanrock Uranium Mines Ltd* [1966] 1 OR 258, 53 DLR (2d) 594 (H.C.J.) 611; *Drew Brown Ltd v The 'Orient Trader'* [1974] SCR 1286 1288; *Eastern Power Limited v Azienda Communale Energia and Ambiente* [1999] CanLII 3785 par 30; *Richardson International Ltd v Mys Chikhacheva (The)* [2002] 4 FCR 80, 2002 FCA 97 CanLII par 28; *Hawkeye Tanks & Equipment Inc v Farr-Mor Fertilizer Services Ltd* 2000 SKQB 514 CanLII par 28; *JP Morgan Chase Bank v Lanner (The)* [2009] 4 FCR 109, 2008 FCA 399 CanLII par 25; *Snap-On-Tools Canada Ltd v Korosec* [2002] BCSC 1844 CanLII par 10; *Miller Farm Equipment (2005) Inc v Shewchuk* (2009) SKQB 170 CanLII par 60. See also Blom in Basedow *et al Encyclopedia of Private International Law* 1955; Pitel and Rafferty *Conflict of Laws* 270; Walker *Castel and Walker: Canadian Conflict of Laws* 2 6ed (2005 update issue 2015) section 31.5.

agreement.[130] Subject to certain limitations,[131] the principle of party autonomy is generally accepted in Canadian private international law.[132] Party autonomy is supported by the fact that *dépeçage* appears to be admitted in Canadian law.[133] However, it is uncertain whether the parties may select the law of a place that does not have any connection with the parties or the contract.[134] Whether the parties are able to choose a non-national system of law to govern their agreement is also unclear. However, Pitel and Rafferty state that

> "[t]he orthodoxy is that the choice must be that of a legal system – the law of a country. Other commercial principles can be made terms of the contract by reference, but not through a choice of law clause."[135]

Parties may go about selecting the proper law of the contract by inserting an express choice-of-law clause in their contract.[136] In the absence of an express choice of law, the court must consider whether a tacit (or implied) choice of law can be inferred. If not, the court will assign an objective proper

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130 Blom in Basedow *et al Encyclopedia of Private International Law* 1955; Pitel and Rafferty *Conflict of Laws* 271; Walker *Halsbury's Laws of Canada: Conflict of Laws* 637; Walker *Castel and Walker: Canadian Conflict of Laws* 2 section 31.5–31.6.

131 See, for e.g., Walker *Halsbury's Laws of Canada: Conflict of Laws* 637; Walker *Castel and Walker: Canadian Conflict of Laws* 2 section 31.8–31.9. See also Pitel and Rafferty *Conflict of Laws* 272–273 on the *bona fide* requirement: "This limitation is in part motivated by a concern that the parties not be allowed to choose a law with no connection to the transaction solely to avoid the application of the law that would otherwise apply." Secondly, a choice must be legal. It may be that under the law of the forum, certain choices are outlawed. With regard to public policy, this limitation overlaps with the *bona fide* requirement "in that it is also concerned with attempts to avoid the otherwise applicable law". A detailed discussion of the extent of the limitations is beyond the scope of this study.

132 Pitel and Rafferty *Conflict of Laws* 271; Walker *Halsbury's Laws of Canada: Conflict of Laws* 637; Walker *Castel and Walker: Canadian Conflict of Laws* 2 section 31.8.

133 Pitel and Rafferty *Conflict of Laws* 276–277; Walker *Halsbury's Laws of Canada: Conflict of Laws* 638.

134 Castel *Canadian Conflict of Laws* 3ed (1994) 555: "If … the parties expressly selected as the proper law a legal system with which the transaction had not connection at all, it is unclear whether effect would necessarily be given to their choice." See also Walker *Halsbury's Laws of Canada: Conflict of Laws* 637; Walker *Castel and Walker: Canadian Conflict of Laws* 2 section 31.8: "One possible example of *mala fides* is where the parties select the law of a country with which the contract has no connection whatever, although there are cases in which such choices of law have been treated without question as valid because they were made for good reason ... If the parties are from different jurisdictions the choice of a 'neutral' law is readily characterized as *bona fide*."

135 Pitel and Rafferty *Conflict of Laws* 274. Saumier ("Canada" in Girsberger *et al Choice of Law in International Commercial Contracts* par 67 par 67.17) states: "There is statutory support in Canada for the designation of non-State law in the arbitration context. However, there is no equivalent source for such an option before the courts."

136 *Drew Brown Ltd v The 'Orient Trader' supra* 1288; *O'Brien v Canadian Pacific Railway Company* (1972) CanLII 807 (SKCA) par 14; *Richardson International Ltd v Mys Chikhacheva (The) supra* par 28; *Snap-On-Tools Canada Ltd v Korosec supra* par 10; *Vasquez v Delcan Corp* [1998] 14741 (ON SC) par 31; *World Fuel Services Corporation v The Ship "Nordems"* 2011 FCA 73 CanLII par 86. See Walker *Halsbury's Laws of Canada: Conflict of Laws* 637; Walker *Castel and Walker: Canadian Conflict of Laws* 2 section 31.5–31.6. See also Pitel and Rafferty (*Conflict of Laws* 272) who say that the courts will give effect to the parties' choice-of-law clause contained in the contract.

law to the contract.[137] However, some commentators question whether the court should be allowed to infer a choice of law. Castel opines that "it would be better to consider two possibilities only: where there is an express selection and where there is no express selection".[138] He argues that a distinction between an express choice of law and an inferred choice of law is artificial; had parties intended to select the proper law, they would have included one in their contract.[139] There is also some confusion in Canadian case law. For instance, in *Richardson International Ltd v Mys Chikhacheva (The)*,[140] the court held that the process for determining the proper law of the contract, required a court to

> "[d]etermine whether there is an express choice of law by the parties. If there is none, then the Court must determine whether the proper law can be inferred from the terms of the contract and the surrounding circumstances, an exercise that requires the Court to determine the system of law that has the closest and most real connection to the contract."[141]

Although it was acknowledged that the proper law of the contract may be inferred in the absence of an express choice of law, the court blurred the line between the subjective determination of the proper law (which reflects the real intentions of the parties) and the objective determination of the proper law (where there is no real choice of law). Despite the apprehension and confusion surrounding the application of a tacit choice of law, Canadian law recognises the possibility of such a choice.[142] Before turning to the question of which system of law has the closest and most real connection to the contract, Canadian courts accept that it must first examine whether the parties have tacitly chosen a system of law.[143]

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137 Castel *Canadian Conflict of Laws* 553; Pitel and Rafferty *Conflict of Laws* 275; Walker *Halsbury's Laws of Canada: Conflict of Laws* 647; Walker *Castel and Walker: Canadian Conflict of Laws* 2 section 31.11–31.12.

138 Castel *Canadian Conflict of Laws* 553. See also Pitel and Rafferty *Conflict of Laws* 275; Walker *Halsbury's Laws of Canada: Conflict of Laws* 642.

139 Castel *Canadian Conflict of Laws* 553. See also Pitel and Rafferty *Conflict of Laws* 275; Walker (*Halsbury's Laws of Canada: Conflict of Laws* 642) writes: "The notion that there exists an intermediate category of cases – between those in which the governing law is expressly chosen, and one in which it is objectively determined – has been criticized because it would be artificial to impute a choice of law to parties who have not turned their minds to the issue." However, see Walker *Castel and Walker: Canadian Conflict of Laws* 2 section 31.9.

140 *Supra*.

141 *Richardson International Ltd v Mys Chikhacheva (The) supra* par 28.

142 Castel *Canadian Conflict of Laws* 556; Pitel and Rafferty *Conflict of Laws* 274; Walker *Halsbury's Laws of Canada: Conflict of Laws* 643; Walker *Castel and Walker: Canadian Conflict of Laws* 2 section 31.9.

143 *Eastern Power Limited v Azienda Communale Energia and Ambiente* [1999] CanLII 3785 par 30; *Hawkeye Tanks & Equipment Inc v Farr-Mor Fertilizer Services Ltd supra* par 21–30; *Imperial Oil Ltd v Petromar Inc* [2002] 209 DLR (4th) 158 par 28; *JP Morgan Chase Bank v Lanner (The) supra* par 25; *Miller Farm Equipment (2005) Inc v Shewchuk supra* par 28; *Snap-On-Tools Canada Ltd v Korosec supra* par 10–11; *World Fuel Services Corporation v The Ship "Nordems"* 2011 FCA 73 CanLII par 86. The court in *Snap-On-Tools* held: "It has been suggested that there are three ways in which the proper law of the contract can be identified: (1) by express selection by the parties; (2) by selection inferred from the circumstances; or failing either of these, (3) by judicial determination of the system of law with which the transaction has the closest and most real connection. However, the

4 2 How strict are the criteria for inferring a tacit choice of law?

There is little guidance in Canadian private international law on how strict the criteria are for inferring a choice of law. Although Canadian courts acknowledge the possibility of a tacit choice of law, the courts have not yet expressed a definitive view on the extent to which a court may infer a choice of law.[144] In *O'Brien v Canadian Pacific Railway Company*,[145] Culliton C.J.S. held:

> "The general principles to be followed in determining the law governing a contract, or a particular issue within the contract, such as arbitration proceedings, may be stated as follows: (1) if the intention of the parties as to the law governing is expressly stated in the contract, then in general that law governs; (2) if the intention of the parties as to the law governing the contract, or a particular matter therein, is not expressly stated, but may properly be inferred … then the intention so inferred, in general, governs."[146]

The author is of the view that the phrase "properly be inferred" translates to a high threshold that must be met before a court can infer a choice of law.[147] The statement of the Chief Justice in *O'Brien* was subsequently referred to in another case, namely, *Snap-On-Tools Canada Ltd v Korosec*.[148] However, this deviates from the traditional common-law test, where courts have shown a willingness to search for the inferred intention in the contract, even in circumstances where it was unlikely that the parties gave choice of law much thought.[149] It is unclear whether in future Canadian cases involving tacit

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second category of cases – selection inferred from the circumstances – recreates the original dilemma. On the one hand, it seems artificial to impute a selection to parties who may not have turned their minds to the issue of choice of law; on the other hand, it seems unfair to impose an objectively identified choice of law on parties who appear to have implicitly chosen a different governing law without stating so expressly. Where the parties have not expressed a choice as to the proper law and no such choice can be inferred from the circumstances of the case, the proper law of their contract is the system of law with which the transaction has the closest and most real connection."

144 *Eastern Power Limited v Azienda Communale Energia and Ambiente* [1999] CanLII 3785 par 30; *Hawkeye Tanks & Equipment Inc v Farr-Mor Fertilizer Services Ltd supra* par 21-30; *JP Morgan Chase Bank v Lanner (The) supra* par 25; *Imperial Oil Ltd v Petromar Inc supra* par 28; *Miller Farm Equipment (2005) Inc v Shewchuk supra* par 28; *Snap-On-Tools Canada Ltd v Korosec supra* par 10–11; *World Fuel Services Corporation v The Ship "Nordems"* 2011 FCA 73 CanLII par 86.

145 *Supra*.

146 *O'Brien v Canadian Pacific Railway Company supra* par 14 and par 16–21.

147 Walker (*Castel and Walker: Canadian Conflict of Laws* 2 section 31.9) states: "An implied intention, strictly so called, can only be found if the terms of the contact, interpreted in the light of the surrounding circumstances, leave no room for doubt that the parties intended a particular system of law to govern their contract." See also Walker *Castel and Walker: Canadian Conflict of Laws* 2 section 31.10 as referred to by Saumier (in Girsberger *et al Choice of Law in International Commercial Contracts* par 67.20) where he states: "[I]n the case of doubt about the parties' intention, the court's inquiry should shift to identifying the proper law in the absence of choice as opposed to any attempt to impute a choice."

148 *Supra* par 10.

149 Marshall 2012 *Melbourne Journal of International Law* 516; Nygh *Autonomy in International Contracts* 111. See, for example, *Amin Rasheed Co v Kuwait Insurance Co supra* 60–65.

choice of law a court will follow the traditional common-law test, or whether a higher threshold will be sought.

4 3 Indicators of a tacit choice of law

Castel states that in the absence of an express choice of law by the parties the proper law may be "inferred from the circumstances".[150] It appears from the indicators highlighted by Castel[151] that the word "circumstances" refers to an examination of the terms of the contract and its surrounding circumstances in determining whether a choice of law may be inferred. This is reiterated by the courts. In *O'Brien v Canadian Pacific Railway Company*,[152] the court held:

> "If the intention of the parties as to the law governing the contract, or a particular matter therein, is not expressly stated, but may properly be inferred from the terms and nature of the contract and the surrounding circumstances, then the intention so inferred, in general, governs."[153]

A similar view was expressed by the court in *Richardson International Ltd v Mys Chikhacheva (The)*.[154] Therefore, a Canadian court must examine the terms of the contract and the factors surrounding the contract in order to determine whether a tacit choice of law may be inferred.

Numerous factors have been taken into account in assessing whether parties have tacitly chosen the proper law.[155] For instance, the use of a standard form that is known to be drafted with reference to a particular system of law has been considered as a factor that may assist the court in inferring a tacit choice of the proper law.[156] This factor was highlighted by the court in *Richardson International Ltd v Mys Chikhacheva (The)*.[157] Similarly, the court in *Richardson International Ltd* also refers to the use of legal terminology.[158] Furthermore, where a contract is drafted in the language of,

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150 Castel *Canadian Conflict of Laws* 553. See also Walker *Castel and Walker: Canadian Conflict of Laws* 2 section 31.9.

151 See Castel *Canadian Conflict of Laws* 556–558. For e.g., references to a jurisdiction clause, the terminology in which the contract is drafted, and the form of the documents involved, refer to the terms of the contract. On the other hand, references to preceding transactions refer to the circumstances surrounding the contract.

152 *Supra*.

153 *O'Brien v Canadian Pacific Railway Company supra* par 14. See also *Snap-On-Tools Canada Ltd v Korosec supra* par 10.

154 *Supra* par 28: "First, the Court must determine whether there is an express choice of law by the parties. If there is none, then the Court must determine whether the proper law can be inferred from the terms of the contract and the surrounding circumstances."

155 Castel *Canadian Conflict of Laws* 556–558; Pitel and Rafferty *Conflict of Laws* 274–275; Walker *Halsbury's Laws of Canada: Conflict of Laws* 643; Walker *Castel and Walker: Canadian Conflict of Laws* 2 section 31.10–31.11.

156 Castel 3ed *Canadian Conflict of Laws* 557; Walker *Halsbury's Laws of Canada: Conflict of Laws* 643; Walker *Castel and Walker: Canadian Conflict of Laws* 2 section 31.10.

157 *Supra* par 36, where the court held: "the legal terminology and form of the document appears to favour American law, as the agreements in their original form were drafted by American lawyers."

158 *Ibid*.

or uses terminology that is understood by reference to the law of, a particular country, it may be possible to infer that the parties intended the law of that country to govern the contract.[159] Other factors from which the courts are prepared to infer a tacit choice of law include a connection with preceding transactions[160] and the validation principle.[161] Pitel and Rafferty describe the concept of preceding (or related) transactions:

> "If the contract in question is one of a series of related contracts, and those other contracts have the same applicable law, the court can infer that the parties intended the contract to use that same law. Similarly, if there have been previous similar contracts between the parties, it can be inferred that the parties meant the law previously applied to apply again."[162]

With regard to the validation principle, there is support for the proposition that if the contract or some of its terms are void or invalid under one system of law but not under another system of law, the parties must be taken to have intended to contract with reference to the law by which the contract would be valid.[163] However, the validity of the contract should only be an indication of the parties' intentions and not a general presumption. This is outlined in *Etler v Kertesz*,[164] where the court held: "Under certain circumstances such a consideration might have some weight viewed together with all other evidence from which [such] intention might be inferred."[165]

As with other choice-of-law aspects, Canadian courts are guided by the English law in addressing the role of forum clauses. For instance, in evaluating the presence of an arbitration clause in the contract, the court in *Richardson International Ltd v Mys Chikhacheva (The)*[166] held:

> "As Castel, supra, writes … 'If the parties agree that arbitration shall take place in a particular legal unit, the court will usually, although not always, conclude that the parties have impliedly chosen the law of the legal unit of arbitration as the proper law. Similarly, if the parties agree that the courts of a particular legal unit shall have jurisdiction over the contract, there is a strong inference that the law of that legal unit is the proper law.' In this case, the arbitration clause reads as follows: Any dispute which might arise from or in relation to this contract, if not settled by negotiations, shall be settled by arbitration in accordance with UNCITRAL arbitration rules presently in force. Place of arbitration shall be Seattle, Washington USA, the appointing authority

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159 Castel *Canadian Conflict of Laws* 557; Walker *Halsbury's Laws of Canada: Conflict of Laws* 643; Walker *Castel and Walker: Canadian Conflict of Laws* 2 section 31.10.

160 Castel *Canadian Conflict of Laws* 557; Walker *Halsbury's Laws of Canada: Conflict of Laws* 643; Pitel and Rafferty *Conflict of Laws* 275.

161 Castel *Canadian Conflict of Laws* 558; Walker *Halsbury's Laws of Canada: Conflict of Laws* 643.

162 Pitel and Rafferty *Conflict of Laws* 275.

163 Castel *Canadian Conflict of Laws* 558; Walker *Halsbury's Laws of Canada: Conflict of Laws* 643. See, for e.g., *Imperial Life Assurance Co of Canada v Segundo Casteleiro Y Colmenares* 1967 SCR 443 448; *Morguard Trust Company v Affkor Group Ltd* 1984 CanLII 781 (BC CA) par 30–31; *Nike Infomatic Systems Ltd v Avac Systems Ltd* 1979 CanLII 667 (BC SC) par 22–24.

164 1960 OR 672 CanLII 128.

165 *Etler v Kertesz supra* par 142.

166 *Supra*.

> shall be the President of the Chamber of Commerce in Seattle. The number of arbitrators shall be three (3) and the language used for all documents and proceedings shall be English. Parties desire to execute the award of arbitration voluntarily. Court of arbitration shall base its award on the respective contract. In my view, this clause is indicative of the parties' implied intention to have American law apply. Though not determinative, the arbitration clause is highly persuasive."[167]

In reaching this view, the court referred to the English case of *Compagnie d'Armement Maritime SA v Compagnie Tunisienne de Navigation SA*,[168] where an arbitration clause was seen as a "weighty indication" that the parties intended the law of the place of arbitration to govern the contract.[169] The views expressed in *Richardson International Ltd* and *Compagnie d'Armement Maritime SA* were again echoed in *JP Morgan Chase Bank v Lanner (The)*,[170] where the court held:

> "In the CP3500 contract, there is no explicit choice of law clause; however, there is an arbitration clause stating that any arbitration between the parties is to be decided in accordance with the law of the State of Washington. Even where an arbitration clause only selects the forum of the arbitration, British and Canadian courts normally take this clause as indicative of the proper law of the contract."[171]

Canadian law places considerable emphasis on a choice-of-forum or localised-arbitration clause. Although the Canadian courts refer specifically to arbitration clauses as "highly persuasive" and normally indicative of the parties' intentions, Canadian authors, guided by English law,[172] view a clause selecting a particular court as having jurisdiction over the contract as a strong pointer that the parties intended the law of that place to be the proper law of the contract.[173]

5 INDIA

Indian private international law is inherited from the English common law. According to Biswas:

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167 *Richardson International Ltd v Mys Chikhacheva (The) supra* par 33–34.

168 *Supra*.

169 *Compagnie d'Armement Maritime SA v Compagnie Tunisienne de Navigation SA supra* 596. See *Richardson International Ltd v Mys Chikhacheva (The) supra* par 34–35, where, in referring to the *Compagnie d'Armement* case, the court remarked that "both Lords Diplock and Wilberforce commented on the persuasive value of the arbitration clause in the absence of a contrary intention in the contract. Lord Diplock [at page 609] was of the view that: 'an arbitration clause is generally intended by the parties to operate as a choice of the proper law of the contract as well as the curial law and should be so construed unless there are compelling indications to the contrary in the other terms of the contract.' No contrary intention appears on the face of the marketing contract."

170 *Supra*.

171 *JP Morgan Chase Bank v Lanner (The) supra* par 31.

172 Graveson *Conflicts of Law* 417; Morris *Dicey and Morris on the Conflict of Laws* 761; North *Cheshire and North Private International Law* 203.

173 Castel *Canadian Conflict of Laws* 556; Pitel and Rafferty *Conflict of Laws* 274; Walker *Halsbury's Laws of Canada: Conflict of Laws* 643; Walker *Castel and Walker: Canadian Conflict of Laws* 2 section 31.11.

> "The Regulating Act 1773 … was the first parliamentary Act of the British Government to apply in India. This Act applied in India from 1773 until the entering into force of the Independence Act 1974 … during which period India successfully adopted the common law system. Thus the development of the Indian legal system has mostly followed the same trajectory as that of England."[174]

Therefore, there is no statute on the choice of law in international commercial contracts.[175] Instead, Indian courts tend to follow and apply the traditional English common-law rules relating to the proper law of the contract.[176] Although the Indian judiciary is not bound to English precedent, the courts are likely to follow English decisions in this regard.[177]

5 1 Party autonomy

The term "proper law" is defined in *Indian General Investment Trust v Raja of Khalikote*,[178] as "the law which the Court is to apply in determining the obligations under the contract".[179] It is well established in English private international law that if the parties have chosen a law to govern their contract, then that would be the proper law of the contract.[180] Indian law also takes this view. In the leading case of *National Thermal Power Corporation v Singer Company*,[181] the court stated that the proper law of the contract refers

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174 The discussion on India is based in part on Bouwers *Tacit Choice of Law in International Commercial Contracts: A Global Comparative Study*; and see Biswas "India" in Basedow et al *Encyclopedia of Private International Law* 3 2155 2157. See also Agrawal and Singh *Private International Law in India* (2010) 49–51; Diwan and Diwan *Private International Law: Indian and English* 4ed (1998) 61–62; Khanderia "Indian Private International Law vis-à-vis Party Autonomy in the Choice of Law" 2018 *Oxford University Commonwealth Law Journal* 1 6; Neels "The Role of the Hague Principles on Choice of Law in International Commercial Contracts in Indian and South African Private International Law" 2017 22 *Uniform Law Review/Revue de Droit Uniforme* 443 444; Setalvad *Conflict of Laws* 2ed (2009) 674 and 679.

175 Agrawal and Singh *Private International Law in India* 93; Biswas in Basedow *et al Encyclopedia of Private International Law* 3 2159; Setalvad *Conflict of Laws* 674 and 679.

176 Agrawal and Singh *Private International Law in India* 93; Biswas in Basedow *et al Encyclopedia of Private International Law* 3 2159; Setalvad *Conflict of Laws* 674. See also Neels 2017 *Uniform Law Review/Revue de Droit Uniforme* 444: "The Indian courts often follow developments in the English conflict of laws, although, of course, the Indian courts are not bound to English precedent."

177 See Agrawal and Singh *Private International Law in India* 93; Khanderia 2018 *Oxford University Commonwealth Law Journal* 6; Neels 2017 *Uniform Law Review/Revue de Droit Uniforme* 444; Setalvad *Conflict of Laws* 679.

178 AIR 1952 Cal 508. See Agrawal and Singh *Private International Law in India* 94.

179 *Indian General Investment Trust v Raja of Khalikote supra* par 38.

180 Diwan and Diwan *Private International Law: Indian and English* 509. See, for e.g., Graveson *Conflicts of Law* 405–406; Morris *Dicey and Morris on the Conflict of Laws* 747–748; North *Cheshire and North Private International Law* 195. See also *Mount Albert Borough Council v Australasian Temperance and General Life Assurance Society supra* 240: "The proper law of the contract means that law which the English court is to apply in determining the obligations under the contract"; and *Vita Food Products v Unus Shipping Co Ltd supra* 27: "It is now well settled that by English law the proper law of the contract is the law which the parties intended to apply."

181 (1992) SCR (3) 106. See Agrawal and Singh *Private International Law in India* 93: "The Supreme Court in *National Thermal Power Corporation v Singer Company*, has traced the

to the legal system by which the parties intended their contract to be governed.[182] In the absence of any express or tacit intention of the parties, the court will apply the law with which the contract has its closest and most real connection.[183]

In an earlier decision, the Supreme Court in *British Indian Steam Navigation Co Ltd v Shanmughamavilas Cashew Industries*[184] held: "It may not be permissible to choose a wholly unconnected law", which meant that the law chosen by the parties must have had some connection to the contract.[185] This appeared to limit the scope of party autonomy in Indian law. However, this view was not upheld in *National Thermal Power Corporation v Singer Company*.[186] The court stated that the only limitation on the proper law of the contract is "that the intention of the parties must be expressed bona fide and it should not be opposed to public policy".[187] Although it appears from this *dictum* that the parties are permitted to choose a neutral, unconnected system of law to govern their rights and obligations under the contract, the matter remains unsettled.[188] It is also unclear whether a splitting-up (*dépeçage*) of the applicable law, or choice of a non-national system of law (such as the *lex mercatoria* or the general principles of

current legal position with regard to the proper law of the contract in all its perspectives generally as well as the Indian contract." See also Govindaraj *The Conflict of Laws in India: Inter-Territorial and Inter-Personal Conflict* (2011) 57.

182 *National Thermal Power Corporation v Singer Company supra* 117. See also Agrawal and Singh *Private International Law in India* 93; Khanderia 2018 *Oxford University Commonwealth Law Journal* 6; Neels "Choice of Forum and Tacit Choice of Law: The Supreme Court of India and the Hague Principles on Choice of Law in International Commercial Contracts (an Appeal for an Inclusive Comparative Approach to Private International Law)" in UNIDROIT (ed) *Eppur Si Muove: The Age of Uniform Law. Essays in honour of Michael Joachim Bonell to celebrate his 70th birthday* (2016) 358 365; Setalvad *Conflict of Laws* 305; Wadhwa (ed) *Mulla on the Indian Contract Act* 13ed (2011) 4.

183 Biswas in Basedow *et al Encyclopedia of Private International Law* 3 2159; Diwan and Diwan *Private International Law: Indian and English* 520; Govindaraj *The Conflict of Laws in India. Inter-Territorial and Inter-Personal Conflict* 58; Setalvad *Conflict of Laws* 676. See, for e.g., *Delhi Cloth & General Mills Co Ltd v Harnam Singh* AIR 1955 SC 590, [1955] 2 SCR 402; *Rabindra v Life Insurance Corporation of India* AIR 1964 Cal 141.

184 (1990) 3 SCC 481.

185 See also Agrawal and Singh *Private International Law in India* 93; Khanderia 2018 *Oxford University Commonwealth Law Journal* 7–8; Setalvad *Conflict of Laws* 675.

186 *Supra*.

187 *National Thermal Power Corporation v Singer Company supra* 108.

188 Contrast *Rabindra v Life Insurance Corporation of India supra* par 25; *British Indian Steam Navigation Co Ltd v Shanmughamavilas Cashew Industries supra* par 31 with *Swedish East Asia Co Ltd v BP Herman & Mohatta (India) Pvt Ltd* AIR 1962 Cal 601 par 14; *Max India Ltd v General Binding Corporation* 2009 (112) DRJ 611 (DB) par 31. See Agrawal and Singh *Private International Law in India* 94; Biswas in Basedow *et al Encyclopedia of Private International Law* 3 2159; Govindaraj *The Conflict of Laws in India: Inter-Territorial and Inter-Personal Conflict* 56; Khanderia 2018 *Oxford University Commonwealth Law Journal* 8–9 and 13. Setalvad (*Conflict of Laws* 675) states that a choice of law that has no connection to the contract should be upheld as being a valid choice of law. See also Neels 2017 *Uniform Law Review/Revue de Droit Uniforme* 445: "In the private international law of contract of India, there seems to be no clarity on whether a connection between, on the one hand, the contract and the parties and, on the other, the chosen law is required."

international commercial law), will be allowed in Indian private international law.[189]

The principle of party autonomy is echoed in the provisions of section 28(1)(b)(1) of the Arbitration and Coalition Act, 1996 (applying to international commercial arbitrations), which provides: "The arbitral tribunal shall decide the dispute in accordance with the rules of law designated by the parties as applicable to the substances of the dispute."[190] Setalvad states that this represents "legislative approval to the principle of complete party autonomy in the choice of the proper law, and the principle can be applied in all cases where the proper law of a contract has to be determined".[191]

According to the English common law, the parties to a contract may exercise their choice by explicitly or impliedly choosing a system of law with which to govern their contract.[192] In the absence of an express or tacit choice of law, the court must determine the system of law with which the transaction has the most real connection.[193] This view is supported in Indian law. In *National Thermal Power Corporation v Singer Company*,[194] the Supreme Court acknowledged that the determination of the proper law involves the need to examine the possibility of these three situations.[195] In the first instance, parties may expressly select a law with which to govern their agreement by means of an express clause in the contract.[196] For example, in *National Thermal Power Corporation v Singer Company*,[197] the parties inserted a clause stating "the laws applicable to this Contract shall be the laws in force in India".[198] In the absence of an express choice of law, the court must determine whether a tacit choice of law may be inferred. If not, a court must assign a proper law to the contract.[199]

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189 See Khanderia 2018 *Oxford University Commonwealth Law Journal* 13–14.

190 See the Arbitration and Coalition Act, 1996 http://www.wipo.int/edocs/lexdocs/laws/en/in/in063en.pdf.

191 Setalvad *Conflict of Laws* 675.

192 See discussion under heading 2 1 above.

193 Govindaraj *The Conflict of Laws in India: Inter-Territorial and Inter-Personal Conflict* 56.

194 (1992) 3 SCC 511.

195 *National Thermal Power Corporation v Singer Company* (1992) SCR (3) 106.

196 *Delhi Cloth & General Mills Co Ltd v Harnam Sing*h *supra*; *Dhanrajamal Gobindram v Shamji Kalidas & Co* AIR 1961 SC 1285, [1961] 3 SCR 1020 par 35; *State Aided Bank of Travancore Ltd v Dhrit Ram* LR 69 IA 1, AIR 1942 PC 6 par 4; *Swedish East Asia Co Ltd v BP Herman & Mohatta (India) Pvt Ltd* AIR 1962 Cal 601 par 14. See also Agrawal and Singh *Private International Law in India* 93; Diwan and Diwan *Private International Law: Indian and English* 520; Setalvad *Conflict of Laws* 674; Wadhwa *Mulla on the Indian Contract Act* 4.

197 *Supra*.

198 *National Thermal Power v Singer Company supra* 114.

199 *National Thermal Power v Singer Company supra* 108; *State Aided Bank of Travancore Ltd v Dhrit Ram supra* par 4; *Delhi Cloth & General Mills Co Ltd v Harnam Singh supra*; *Dhanrajamal Gobindram v Shamji Kalidas & Co supra* par 35; *Swedish East Asia Co Ltd v BP Herman & Mohatta (India) Pvt Ltd* AIR 1962 Cal 601 par 15. See also Agrawal and Singh *Private International Law in India* 93; Biswas in Basedow *et al Encyclopedia of Private International Law* 3 2159; Diwan and Diwan *Private International Law: Indian and English* 512; Govindaraj *The Conflict of Laws in India: Inter-Territorial and Inter-Personal Conflict* 57; Neels in UNIDROIT (ed) *Eppur Si Muove* 365; Setalvad *Conflict of Laws* 674; Wadhwa *Mulla on the Indian Contract Act* 4.

5 2 How strict are the criteria for inferring a tacit choice of law?

There was previously little guidance in Indian private international law on the appropriate level of strictness in the criterion for inferring a tacit choice of law. However, it would seem that the court in *National Thermal Power Corporation v Singer Company*[200] has definitively answered this question. Although the decision dealt primarily with issues relating to arbitration,[201] and remarks concerning tacit choice of law were obiter, Neels states that "they are nevertheless formulated in such a way as to provide an authoritative rendition of Indian private international law in this regard".[202] Agrawal and Singh affirm that the court in the *National Thermal Power Corporation* case

> "has traced the current legal position with regard to the proper law of contract in all perspectives generally as well as the Indian contract. It has laid down in clear terms Indian law in the area of international contracts where parties have expressly chosen the applicable law, where the law is inferred, and where there is no expressly chosen … applicable law."[203]

According to the court in the present case, in the absence of an expressly stated proper law, a court should only give effect to a choice of law if it can be "clearly inferred".[204] The court also provides that in the absence of an express provision, the "true intention" of the parties must be discovered.[205] From the particular wording used in the case, it seems that the court endorses a high level of strictness in the criteria for a tacit choice of law.[206]

5 3 Indicators of a tacit choice of law

According to the court in *Dhanrajamal Gobindram v Shamji Kalidas & Co*,[207] where the parties to a contract fail to express their intention as to the proper law, then "the rule to apply is to infer the intention from the terms and nature of the contract and from the general circumstances of the case".[208] This view is supported by the Supreme Court in *National Thermal Power Corporation v*

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200 *Supra*.

201 Neels in UNIDROIT (ed) *Eppur Si Muove* 365.

202 *Ibid*.

203 Agrawal and Singh *Private International Law in India* 93; Govindaraj *The Conflict of Laws in India: Inter-Territorial and Inter-Personal Conflict* 57. See also Neels in UNIDROIT (ed) *Eppur Si Muove* 365: "Prominent authors accept the exposition in this case as reflecting positive law in India."

204 In *National Thermal Power Corporation v Singer Company supra* 118, the court held: "The expression 'proper law of a contract' refers to the legal system by which the parties to the contract intended their contract to be governed. If their intention is expressly stated or if it can be clearly inferred from the contract itself or its surrounding circumstances, such intention determines the proper law of the contract."

205 *National Thermal Power Corporation v Singer Company supra* 119.

206 Neels in UNIDROIT (ed) *Eppur Si Muove* 366.

207 *Supra*.

208 *Dhanrajamal Gobindram v Shamji Kalidas & Co supra* par 37. See also *General Indian Investment Trust v Raja of Khalikote* AIR 1952 Cal 508.

Singer Company.[209] The court stated that "[i]f their intention is expressly stated or if it can be clearly inferred from the contract itself or its surrounding circumstances, such intention determines the proper law of the contract".[210] It is clear from these *dicta* that a court is not only bound to the terms of the contract but must examine the surrounding circumstances when searching for a tacit choice of law.

There is little guidance in Indian private international law on which indicators may be taken into account in determining whether the parties have tacitly chosen a system of law to govern their contract. That being said, one factor that may assist the court in searching for a tacit choice of law is the validation principle. Under the principle, if there are two competing systems of law that may be applicable to the contract, and the contract happens to be valid under one and invalid under the other, the inference is that the parties intended to contract with reference to the system of law by which their agreement would be valid.[211] Nygh states that "[t]here may … be room for the application of the principle of validation as a guide to the tacit choice of the parties" in certain instances.[212] He believes that applying it more generally, however, creates a peremptory rule, which may not have anything to do with the real intention of the parties.[213] An Indian court has yet to express any opinion on the validation principle or the weight that should be attached to this indicator.

One factor that has consistently been the subject of discussion is the inclusion of a forum clause in the contract. However, the weight that has been attached to this factor has varied from case to case.[214] For instance, in *Dhanrajamal Gobindram v Shamji Kalidas & Co*,[215] the Supreme Court of India stated:

> "Where there is no expressed intention … then the rule to apply is to infer the intention ... In the present case, two such circumstances are decisive. The first is that the parties have agreed that in case of dispute the Bombay High Court would have jurisdiction, and an old legal proverb says, "*Qui eligit judicem eligit jus*." If Courts of a particular country are chosen, it is expected, unless there be either expressed intention or evidence that they would apply their own law to the case. The second circumstance is that the arbitration clause indicated an arbitration in India. Of such arbitration clauses in agreements, it has been

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209 *Supra*.

210 *National Thermal Power Corporation v Singer Company supra* 108. See also Agrawal and Singh *Private International Law in India* 94; Diwan and Diwan *Private International Law: Indian and English* 512; Neels in UNIDROIT (ed) *Eppur Si Muove* 366; Wadhwa *Mulla on the Indian Contract Act* 4.

211 Govindaraj *The Conflict of Laws in India: Inter-Territorial and Inter-Personal Conflict* 57.

212 Nygh *Autonomy in International Contracts* 119.

213 Nygh *Autonomy in International Contracts* 119. See Govindaraj *The Conflict of Laws in India: Inter-Territorial and Inter-Personal Conflict* 57.

214 See Neels in UNIDROIT (ed) *Eppur Si Muove* 369: "The decisions of the Supreme Court reflect two opposing interpretations of Indian private international law in respect of the relationship between choice of forum and tacit choice of law." See also Neels 2017 *Uniform Law Review/Revue de Droit Uniforme* 446.

215 *Supra*.

> said on more than one occasion that they lead to an inference that the parties have adopted the law of the country in which arbitration is to be made."[216]

The court was clearly of the view that the inclusion of a clause selecting a court or arbitral tribunal may by itself be presumed to be the unexpressed choice of law of that particular forum. This view was to be reinforced in *British Indian Steam Navigation Co Ltd v Shanmughamavilas Cashew Industries*,[217] where the court held: "If there is no express choice of the proper law of the contract, the law of the country of the chosen court will usually, but not invariably, be the proper law."[218] However, these observations are not supported in the more recent decision of the Supreme Court in *National Thermal Power Corporation v Singer Company*.[219] In dealing with the relationship between choice of forum and tacit choice of law, the court held:

> "In such a case, selection of courts of a particular country as having jurisdiction in matters arising under the contract is usually, but not invariably, an indication of the intention of the parties that the system of law followed by those courts is the proper law by which they intend their contract to be governed. However, the mere selection of a particular place for submission to the jurisdiction of the courts or for the conduct of arbitration will not, in the absence of any other relevant connecting factor with that place, be sufficient to draw an inference as to the intention of the parties to be governed by the system of law prevalent in that place. This is specially so in the case of arbitration, for the selection of the place of arbitration may have little significance where it is chosen, as is often the case, without regard to any relevant or significant link with the place. This is particularly true when the place of arbitration is not chosen by the parties themselves, but by the arbitrators or by an outside body, and that too for reasons unconnected with the contract. Choice of place for submission to jurisdiction of courts or for arbitration may thus prove to have little relevance for drawing an inference as to the governing law of the contract, unless supported in that respect by the rest of the contract and the surrounding circumstances. Any such clause must necessarily give way to stronger indications in regard to the intention of the parties."[220]

The court was quite clear in its assessment of choice-of-forum clauses. Although a choice-of-forum clause may "be an indication of the intentions of

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216 *Dhanrajamal Gobindram v Shamji Kalidas & Co supra* par 37.

217 *Supra*.

218 *British Indian Steam Navigation Co Ltd v Shanmughamavilas Cashew Industries supra* par 23. See also *Modi Entertainment Network v W S G Cricket Pte Ltd* (2003) 4 SCC 341 par 16, where the court referred to the *dictum* in *British Indian Steam Navigation Co Ltd v Shanmughamavilas Cashew Industries*. However, Neels in UNIDROIT (ed) *Eppur Si Muove* at 367 remarks in respect of the statement in the *British Indian Steam Navigation* case: "The statement is isolated (the remainder of the paragraph deals with jurisdictional issues) and also goes unmotivated; it is furthermore unclear whether it refers to the determination of a tacit choice of law, the objective proper law, or both. In any event, the statement does not form part of the *ratio decidendi* as the contract contained an express choice of English law."

219 *Supra*.

220 *National Thermal Power Corporation v Singer Company supra* 119. See *Shreejee Traco (I) Pvt Ltd v Paperline International Inc* (2003) 9 SCC 79, where the court referred to *National Thermal Power Corporation v Singer Company*, and reaffirmed the principles set out in relation to choice of forum and tacit choice of law. See, generally, Neels in UNIDROIT (ed) *Eppur Si Muove* 365-366.

the parties", there must be "other relevant connecting factor(s) with that place".[221] According to the court, the mere presence of a forum clause is not "sufficient to draw an inference as to the intention of the parties" and may, in certain instances, "have little relevance for drawing an inference as to the governing law of the contract".[222] Neels correctly interprets the *dictum* in *National Thermal Power*, stating "[a] choice of forum provision may nevertheless be seen as an indication of a tacit choice of law, on condition of corroboration by other pointers to such an intention".[223] Nevertheless, the uncertainty in respect of the relationship between choice of forum and tacit choice of law persists.[224]

6 ISRAEL

The Israeli legal system is an uncodified one, which has been influenced by civil and common-law systems to form a "mixed or hybrid" system of law.[225] Prior to the establishment of the State of Israel in 1948, the land was under the control of the British, by way of the British Mandate for Palestine.[226] During the British Mandate, certain parts of English law were transplanted to the territory.[227] After 1948, the Knesset[228] "enacted statutes modelled on

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221 *National Thermal Power Corporation v Singer Company supra* 119. See also Neels in UNIDROIT (ed) *Eppur Si Muove* 366.

222 *National Thermal Power Corporation v Singer Company supra* 119.

223 Neels in UNIDROIT (ed) *Eppur Si Muove* 366.

224 Neels in UNIDROIT (ed) *Eppur Si Muove* 369: "[I]t is respectfully submitted that the Supreme Court of India, when the opportunity presents itself in the future, considers reconfirming the interpretation of the private international law of India in respect of the relationship between choice of forum and tacit choice of law in conformity with the approach as convincingly formulated by Thommen and Agrawal JJ. in *National Thermal Power Corporation*." See also Neels 2017 *Uniform Law Review/Revue de Droit Uniforme* 446: "Nevertheless, in two twenty-first-century decisions by the … [Supreme Court], the previously accepted view is encountered yet again." See, for e.g., *Modi Entertainment Network v WSG Cricket PTE Ltd* (2003) 4 SCC 341 par 16; *Shreejee Traco (I) Pvt Ltd v Paperline International Inc supra* par 7.

225 The discussion on Israel is based in part on Bouwers *Tacit Choice of Law in International Commercial Contracts: A Global Comparative Study*. Einhorn ("Israel" in Basedow *et al Encyclopedia of Private International Law* 3 2193 2195) states: "Important parts of Israeli law can only be understood in light of the historical developments that had taken place especially since the 19th century, during the occupation of the Land of Israel by the Ottoman Empire (1517–1917) and during the British Mandate (1917–1948)."

226 See Einhorn in Basedow *et al Encyclopedia of Private International Law* 3 2195. See also Omer-Man "This Week in History: The British Mandate for Palestine" (29 July 2011) www.jpost.com/Features/In-Thespotlight/This-Week-in-History-The-British-Mandate-for-Pale-stine, (accessed 2018-12-20): "On July 24, 1922, the Council of the League of Nations – the predecessor of the United Nations Security Council – gave its blessing to The British Mandate for Palestine ... The British Mandate put Palestine and Transjordan under British control with a mandate to oversee the creation of a Jewish homeland ... It was not until the 1947 United Nations Partition Plan (UN General Assembly Resolution 181) that the idea of a Jewish State was ever formalized by either the League of Nations or its successor, the United Nations. By that time, the British had long realized the difficulty of ruling over Jewish and Arab populations with conflicting claims to the land. The British eventually sought to end the Mandate, the result of which was UN Resolution 181. The British Mandate for Palestine, after 26 years, came to an end in mid-May 1948. Hours later, the Jewish State of Israel was born."

227 See Einhorn in Basedow *et al Encyclopedia of Private International Law* 2195.

continental law, especially German and Swiss law".[229] However, the Knesset did not adopt any legislation regulating private international law.[230] Therefore, reliance was placed on article 46 of the Palestine Order in Council (1922).[231] According to article 46, Israeli courts could turn to the "common law, and the doctrines of equity in force in England" to fill gaps in Israeli law.[232] However, article 46 was repealed in 1980, when the Knesset enacted the Foundations of Law.[233] This Law provides: "Where the court, faced with a legal question requiring decision, finds no answer to it in statute law or case-law or by analogy, it shall decide it in the light of the principles of freedom, justice, equity and peace of Israel's heritage."[234] Despite the severing of English common-law ties, "choice of law rules for contracts witnessed no drastic changes since its importation from English common law".[235]

6 1 Party autonomy

Following the traditional English-law rule, reference is made to the "proper law of the contract" to describe the law that creates and governs an international commercial contract.[236] Therefore, the principle of party

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228 The Knesset is the legislative authority and the sole authority with the power of legislation in Israel. See www.knesset.gov.il.

229 Einhorn in Basedow *et al Encyclopedia of Private International Law* 2195.

230 *Ibid*.

231 Text available at www.un.org/unispal/document/mandate-for-palestine-the-palestine-order-in-lon-council-mandatory-order/.

232 See article 46 of the Palestine Order in Council 1922: "The jurisdiction of the Civil Courts shall be exercised in conformity with the Ottoman Law in force in Palestine on November 1st, 1914, and such later Ottoman Laws as have been or may be declared to be in force by Public Notice, and such Orders in Council, Ordinances and regulations as are in force in Palestine at the date of the commencement of this Order, or may hereafter be applied or enacted; and subject thereto and so far as the same shall not extend or apply, shall be exercised in conformity with the substance of the common law, and the doctrines of equity in force in England, and with the powers vested in and according to the procedure and practice observed by or before Courts of Justice and Justices of the Peace in England, according to their respective jurisdictions and authorities at that date, save in so far as the said powers, procedure and practice may have been or may hereafter be modified, amended or replaced by any other provisions. Provided always that the said common law and doctrines of equity shall be in force in Palestine so far only as the circumstances of Palestine and its inhabitants and the limits of His Majesty's jurisdiction permit and subject to such qualification as local circumstances render necessary." See also Einhorn in Basedow *et al Encyclopedia of Private International Law* 2195; Einhorn "Israel" in Girsberger *et al Choice of Law in International Commercial Contracts* (2021) par 27 par 27.04; Vitta "Codification of Private International Law in Israel?" 1977 12 *Israel Law Review* 129.

233 5740–1980. See Einhorn in Basedow *et al Encyclopedia of Private International Law* 2195; Einhorn in Girsberger *et al Choice of Law in International Commercial Contracts* par 27.04.

234 See the Foundations of Law 5740–1980. See also Einhorn in Girsberger *et al Choice of Law in International Commercial Contracts* par 27.04.

235 Karayanni *Conflicts in a Conflict: A Conflict of Laws Case Study on Israel and the Palestinian Territories* (2014) 193. See also Einhorn in Basedow *et al Encyclopedia of Private International Law* 2195.

236 Karayanni *Conflicts in a Conflict* 193. See Einhorn *Private International Law in Israel* 2ed (2012) 78; Einhorn in Basedow *et al Encyclopedia of Private International Law* 2195. See also Einhorn in Girsberger *et al Choice of Law in International Commercial Contracts* par

autonomy is generally accepted in Israeli private international law.[237] The parties are afforded a significant amount of autonomy in selecting the applicable law. It appears that it is permitted for parties to make a choice of law that bears no connection to the contract or the parties.[238] Furthermore, the parties are able to choose different laws for different parts of the contract.[239] Lastly, a choice of law, or any modification to a choice of law, may be made at any time.[240] However, it is uncertain whether the parties will be allowed to choose a non-state law.[241]

In respect of the parties' choice of law, Karayanni states: "If the parties were considered to have evinced an explicit or implicit intention that a certain law will govern their relationship, then this law was deemed to be the proper law of the contract."[242] It appears that Israeli private international law allows for an express choice, as well as a tacit choice of law.[243]

6 2 Tacit choice of law

Unlike in many other jurisdictions, Israeli private international law provides no further guidance on the determination of a tacit choice of law. In the absence of an express or tacit choice of law, "the law of the state with which the contract is most closely connected" shall apply.[244]

27.33: "Although there is no statutory provision concerning party autonomy regarding international commercial contracts, nevertheless, under general principles of law, Israeli PIL recognizes the right of parties to a contract to design their private affairs as they wish. Party autonomy includes the parties' right to agree upon the law that will apply to their contract. Showing respect for their choice also achieves another very important principle of private law – protecting the reliance interest of the parties, that is, their expectation that the agreement that they made will be upheld."

237 Einhorn *Private International Law in Israel* 78. See also Einhorn in Basedow *et al Encyclopedia of Private International Law* 2195; Einhorn in Girsberger *et al Choice of Law in International Commercial Contracts* par 27.33; Karayanni *Conflicts in a Conflict* 193.

238 Einhorn in Basedow *et al Encyclopedia of Private International Law* 2199. See also Einhorn *Private International Law in Israel* 78: "For example, parties may wish to choose a law that they regard as neutral, that is, the law of neither party." See also Einhorn in Girsberger *et al Choice of Law in International Commercial Contracts* par 27.35.

239 Einhorn *Private International Law in Israel* 78; Einhorn in Girsberger *et al Choice of Law in International Commercial Contracts* par 27.34.

240 See Einhorn *Private International Law in Israel* 78: "If a choice of law is made after the contract has already been concluded, such choice has retrospective effect as of the time of its conclusion, to the extent that the rights of third parties are unaffected."

241 Einhorn *Private International Law in Israel* 78–79. See also Einhorn in Girsberger *et al Choice of Law in International Commercial Contracts* par 27.38: "It is submitted that, in principle, the answer should be positive, at least for clear sets of rules. Thus, parties should be allowed to have their contract governed by Jewish law (halakha), or by sets of rules such as the UNIDROIT principles or PECL. The choice of lex mercatoria may be too vague."

242 Karayanni *Conflicts in a Conflict* 193. See also Einhorn in Girsberger *et al Choice of Law in International Commercial Contracts* par 27.41.

243 Einhorn *Private International Law in Israel* 78; Einhorn in Basedow *et al Encyclopedia of Private International Law* 2195; Einhorn in Girsberger et al *Choice of Law in International Commercial Contracts* par 27.41.

244 Einhorn in Basedow *et al Encyclopedia of Private International Law* 2199. See also Einhorn (n 234) 80; Einhorn in Girsberger *et al Choice of Law in International Commercial Contracts* par 27.76; Karayanni *Conflicts in a Conflict* 193. See also Einhorn in Girsberger *et al Choice of Law in International Commercial Contracts* note 46: "Cf *Efrima v HP Capital Ltd.*, CA (Tel-

7 NEW ZEALAND

Great Britain's colonisation of New Zealand in 1841 led to the transplantation of English law and English legal tradition in the newly formed colony.[245] The influence of English law is still visible today, especially in the field of private international law.[246] There are two significant reasons for the country's reliance on traditional English common-law rules in this branch of law. First, "[s]ince there are not many reported (and unreported) private international law cases in New Zealand, case-law from comparable Anglo-common law jurisdictions, such as the United Kingdom … have significant persuasive value".[247] Secondly, New Zealand does not have an abundance of academic literature on private international law.[248] Therefore, "reference is traditionally made to the leading English law texts" on the subject.[249]

7 1 Party autonomy

In respect of its choice-of-law rules in international contracts, New Zealand is guided by the English common law.[250] Therefore, reference is made to the proper law of the contract to describe the law applicable to an international commercial contract.[251] The proper law of the contract refers to the legal system by which the parties intended the contract to be governed.[252] Subject

Aviv) 2385/00, tak-District 2002(2) 6350 (27 June 2002); cf also *Beit Amzaleg Ltd. v Africa Israel Investments Ltd* CC (District Court, Central) 10007-02-09, Nevo electronic database (7 September 2011), concerning contracts made with a real estate agent concerning his services with respect to the acquisition of real estate in the Czech Republic and in Romania. Based upon the identity of the parties in each case, the places where the negotiations took place and where contract was concluded, the currency, etc. the Court held that in the first case Czech law applied and in the second – Israeli law; *Steinhauer v Aharon*, Civil Case (Magistrate Court, Haifa) 33760-12-09, Nevo electronic database (23 September 2013)."

245 The discussion on New Zealand is based in part on Bouwers *Tacit Choice of Law in International Commercial Contracts: A Global Comparative Study*. See Schoeman "New Zealand" in Basedow *et al Encyclopedia of Private International Law* 3 (2017) 2369 2370.

246 Angelo *Private International Law in New Zealand* (2012) 34; Schoeman in Basedow *et al Encyclopedia of Private International Law* 3 2370. See, also, Hook "New Zealand" in Girsberger *et al Choice of Law in International Commercial Contracts* (2021) par 42, par 42.01.

247 Schoeman in Basedow *et al Encyclopedia of Private International Law* 3 2369. See, also, Angelo *Private International Law in New Zealand* 34: "Much of the private international law on obligations is covered in New Zealand by the common law and essentially by that of England." See, also, Schoeman in Basedow *et al Encyclopedia of Private International Law* 3 2370.

248 Schoeman in Basedow *et al Encyclopedia of Private International Law* 3 2370.

249 See Schoeman in Basedow *et al Encyclopedia of Private International Law* 3 2370.

250 See also Angelo *Private International Law in New Zealand* 34; Hook in Girsberger *et al Choice of Law in International Commercial* par 42.01; Schoeman in Basedow *et al Encyclopedia of Private International Law* 3 2370 and 2373.

251 See Schoeman in Basedow *et al Encyclopedia of Private International Law* 3 2373. See also Angelo *Private International Law in New Zealand* 35: "The proper law will govern matters of legality of performance, discharge and interpretation of the contract."

252 Angelo *Private International Law in New Zealand* 35; Schoeman in Basedow *et al Encyclopedia of Private International Law* 3 2373. See *Mount Albert Borough v Australasian Temperance and General Mutual Life Assurance Society, Limited* [1937] NZLR 1124 (PC) 1131.

to certain limitations,[253] the principle of party autonomy is generally accepted in New Zealand private international law. It appears that the parties are able to choose different laws for different parts of the contract, thereby permitting *dépeçage*.[254] However, there is no judicial authority or academic opinion on whether parties may choose a particular legal system that bears no connection to the parties or the contract.[255] Finally, the possibility of a non-state law has not been settled by a New Zealand court.[256]

Parties may choose the proper law of the contract by inserting an express choice-of-law clause in their contract.[257] In the absence of an express choice of law, the court must consider whether a tacit choice of law can be inferred. If not, the court will assign an objective proper law to the contract.[258] However, it appears as though New Zealand law does not clearly distinguish the determination of a real (albeit tacit) choice of law from the objective determination of the applicable law.[259] Hook, in reference to *McConnell Dowell Constructions Ltd v Lloyd's Syndicate 369*,[260] states that the court uses "the concepts of 'inferred choice' and 'closest and most real connection' interchangeably".[261] Furthermore, in *Chevalier Wholesale Produce Ltd v Joes Farm Produce Ltd*,[262] the court held: "In the absence of

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253 See Angelo *Private International Law in New Zealand* 35: "If the parties have expressed their intention that the contract be governed by the law of a particular country, then the courts will honour that intention 'provided the intention expressed is bona fide and legal, and provided there is no reason for avoiding the choice on the ground of public policy'. The choice will be *bona fide* if there was not clear intention on the part of the parties by their choice to evade fraudulently the application of the law of a country which would otherwise be applicable." See also Schoeman in Basedow *et al Encyclopedia of Private International Law* 3 2373.

254 *Club Mediterranée v Wendell* [1989] 1 NZLR 216 (CA) 218–219. See also Hook in Girsberger *et al Choice of Law in International Commercial Contracts* par 42.07.

255 However, see Hook in Girsberger *et al Choice of Law in International Commercial Contracts* par 42.10: "The chosen law need not be connected to the parties or their transaction ... There are no cases in New Zealand in which a choice of law agreement was not respected because it was not sufficiently closely connected to the parties or the contract."

256 See, generally, Howarth "*Lex Mercatoria*: Can General Principles of Law Govern International Commercial Contracts?" 2004 10 *Canterbury Law Review*. See also Hook in Girsberger *et al Choice of Law in International Commercial Contracts* par 42.12: "New Zealand law probably does not allow for the possibility of a choice of non-State law. Although there is no New Zealand authority on the matter, it is likely that a New Zealand court would be guided by English precedent to conclude that parties must choose the law of a country."

257 Angelo *Private International Law in New Zealand* 35; Schoeman in Basedow *et al Encyclopedia of Private International Law* 3 2373.

258 Angelo *Private International Law in New Zealand* 35; Hook in Girsberger *et al Choice of Law in International Commercial Contracts* par 42.13; Schoeman in Basedow *et al Encyclopedia of Private International Law* 3 2373. See *New Zealand Basing Ltd v Brown* [2016] NZCA 525, [2017] 2 NZLR 93 (CA) [30]; *McConnell Dowell Constructors Ltd v Lloyd's Syndicate 396* [1988] 2 NZLR 257 (CA) 272–273.

259 See Hook in Girsberger *et al Choice of Law in International Commercial Contracts* par 42.15 and 42.16.

260 [1988] 2 NZLR 257 (CA) 272–273: "The Question is one of inferred intention of the parties in the circumstances, or what is the system with which the transaction has the closest and most real connection."

261 Hook in Girsberger *et al Choice of Law in International Commercial Contracts* par 42.16.

262 HC Auckland CIV 2010-404-4227, 17 November 2011.

an express choice of law in a contract, the proper law of the contract is that system of law with which the contract is most closely connected. This is an objective test, not a search for the parties' subjective implicit intentions."[263] Hook is of the view that "New Zealand courts have largely failed to distinguish the concept of a tacit choice from the position where there is no choice of law".[264]

7 2 How strict are the criteria for inferring a tacit choice of law?

There is little guidance in New Zealand private international law on the level of strictness in the criteria for inferring a choice of law. Although academics acknowledge the possibility of a tacit choice of law,[265] there is no definitive view in this regard.

7 3 Indicators of a tacit choice of law

In the absence of an express choice of law, Angelo states, "the proper law will be determined in accordance with the intention of the parties as may be gleaned from the contract and its circumstances".[266] This means that a court, in deciding whether the parties have made a tacit choice of law, is not confined to the written agreement, but may take account of considerations surrounding the contract.

Owing to the confusion between a tacit choice of law and the determination of the objective proper law, New Zealand private international law does not contain clear examples from which a tacit choice of law may be inferred. In the context of the objective proper law, reference is made, *inter alia*, to the legal provisions of a particular legal system,[267] the place of performance of the contract,[268] and jurisdiction clauses.[269] The weight that a

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263 *Chevalier Wholesale Produce Ltd v Joes Farm Produce Ltd supra* par 19.

264 Hook in Girsberger *et al Choice of Law in International Commercial Contracts* par 42.18.

265 Angelo *Private International Law in New Zealand* 35: "Where the parties have not expressly identified the governing law for their contract, the proper law will be determined in accordance with the intention of the parties." See also Schoeman in Basedow *et al Encyclopedia of Private International Law* 3 2373.

266 Angelo *Private International Law in New Zealand* 35. See also Hook in Girsberger *et al Choice of Law in International Commercial Contracts* par 42.18; Schoeman in Basedow *et al Encyclopedia of Private International Law* 3 2373. See *Chevalier Wholesale Produce Ltd v Joes Farm Produce Ltd supra* par 19. See, for e.g., *Amin Rasheed Shipping Corp v Kuwait Insurance Co supra* 61. The majority of the English court held that the test for determining whether there exists a tacit choice of law involves an examination of the contract "in order to see whether the parties have, by express terms or necessary implication from the language used, evinced a common intention as to the system of law by reference to which their mutual rights and obligations under it are to be ascertained".

267 *Bexhill Funding Group Ltd v MBA Ltd* HC Wellington CIV 2003-485-205, 19 February 2008 par 33 as referred to by Hook in Girsberger *et al Choice of Law in International Commercial Contracts* note 42; *Chevalier Wholesale Produce Ltd v Joes Farm Produce Ltd supra* par 22.

268 *Bexhill Funding Group Ltd v MBA Ltd supra* par 33 as referred to by Hook in Girsberger *et al Choice of Law in International Commercial Contracts* note 43.

court will attach to these factors in the determination of a tacit choice of law is unclear. This uncertainty extends to the relationship between choice of forum and a tacit choice of law.[270]

8 COMPARISON AND CONCLUDING REMARKS

The principle of party autonomy in respect of international commercial contracts is commonly accepted in private international law systems. The legal systems of Australia, Canada, India, Israel and New Zealand generally recognise the principle, albeit to varying degrees. It is also uncontroversial that parties may exercise their autonomy by expressly selecting a law to govern their agreement. At English common law, there has been some uncertainty about the applicable test in the absence of an express selection, and the line between finding a tacit choice of law and the system of law with which the contract has its closest connection is blurred.[271] This uncertainty persists in the jurisdictions under discussion insofar as a tacit choice of law is concerned. Although all countries recognise the possibility of a tacit choice of law, there is confusion and apprehension regarding its application. For instance, in Australian case law, there are times when the courts have immediately proceeded to determine the objective proper law in the absence of an express choice of law.[272] In Canadian law, the courts have blurred the lines between the subjective proper law (which reflects the parties' true intentions) and the objective determination of the proper law.[273] There is also a debate in Canadian academic circles whether tacit choices of law should be permitted.[274] Similarly, it appears that New Zealand law does not clearly distinguish a tacit choice of law from the objective determination of the applicable law.[275] Finally, it seems that Israeli law provides no guidance other than that its private international law allows both express and tacit choices of law. It is submitted that legal systems must be mindful of distinguishing a tacit choice of law from an objective determination of the applicable law – and a strict threshold for the determination of a tacit choice of law may assist the courts in avoiding this confusion.

Although all legal systems examined in this article recognise the possibility of a tacit choice of law, the criteria for detecting such choices are far from certain. As mentioned, the Israeli system does not provide any guidance in this regard. Likewise, the New Zealand legal position does not offer any clarity regarding the level of strictness in the criteria for determining

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269 See *Chevalier Wholesale Produce Ltd v Joes Farm Produce Ltd supra* par 19.

270 Schoeman in Basedow *et al Encyclopedia of Private International Law* 3 2373: "An arbitration clause does not necessarily indicate an implied choice of law – it is one of the factors to be taken into account when inferring a choice." See also Hook in Girsberger *et al Choice of Law in International Commercial Contracts* par 42.18: "Jurisdiction clauses or arbitration agreements, too, may be a relevant factor, but they would not automatically indicate a tacit choice of law."

271 See discussion under heading 2 1 above.

272 See discussion under heading 3 1 above.

273 See *Richardson International Ltd v Mys Chikhacheva (The) supra* par 28.

274 See under heading 4 1 above.

275 See under heading 7 1 above.

a tacit choice of law. Nevertheless, it remains to be seen whether the traditional English common-law rules will guide these systems in this regard. At common law, it appears that there is a low threshold for the determination of a tacit choice of law.[276] However, this article supports a strict test for the determination of a tacit choice of law. A high threshold will have the effect of limiting "the court's discretion in determining the existence of a tacit choice of law, thereby promoting legal certainty and predictability of decision. It will also dissuade courts from readily deducing a tacit agreement, particularly where the parties did not have a true common intention in respect of choice of law".[277] The private international law systems of Australia,[278] Canada[279] and India[280] all contain a threshold that appears to satisfy a strict test for the determination for a tacit choice of law. This seems to deviate from the traditional common-law position. Although a case is made that the courts in these jurisdictions endorse a strict test for the determination of a tacit choice of law, perhaps further clarity is needed.

It seems that Australian, Canadian, Indian and New Zealand law permits the courts to infer an intention in light of the terms of the contract and the circumstances of the case. However, there is uncertainty concerning the indicators of a tacit choice of law. Owing to confusion between a tacit choice of law and determination of the objective proper law, New Zealand does not contain clear examples of factors from which a tacit choice of law may be inferred. Judicial and academic support for comparable factors can be found in Australian, Canadian and Indian law. These include: the use of a standard form that is known to be drafted with reference to a particular system of law; an express choice of law made in related transactions between the parties; the use of technical terms or language characteristic of a legal system; reference to provisions or the legislation of a legal system in the contract; and the validation principle. It is submitted that these factors are only indicators "that [point] to a common intention of the parties; the inference that a court draws from their existence should depend on all the circumstances of the case".[281] Fixed criteria or a single factor cannot automatically indicate a real (albeit tacit) choice of law.[282] This is especially

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276 See under heading 3 2 above.

277 See Bouwers "Tacit Choice of Law in International Commercial Contracts: An Analysis of Asian Jurisdictions and the Asian Principles of Private International Law" 2021 26(1) *Uniform Law Review/Revue de Droit Uniforme* 14 41. See also Bouwers *Tacit Choice of Law in International Commercial Contracts: A Global Comparative Study* 228–229: "In this way, a search for a hypothetical intention, as opposed to the real (or actual) intention of the parties will be avoided. The sum effect of a strict criterion for the determination of a tacit choice of law is that the legitimate expectations of the parties are protected."

278 See heading 3 2 above. The courts have used phrases such as "properly inferred", while Australian authors propose that there should be "conclusive evidence" of a tacit choice of law.

279 See heading 4 2 above. Canadian courts have made use of the phrase "properly be inferred" when referring to a tacit choice of law.

280 See heading 5 2 above. An Indian court uses the phrase "clearly inferred" when referring to a tacit choice of law. It also stated that the "true intention" of the parties must be discovered.

281 Bouwers *Tacit Choice of Law in International Commercial Contracts: A Global Comparative Study* 247.

282 *Ibid*.

relevant regarding choice-of-forum clauses. However, the role of forum clauses has not been adequately addressed. Notwithstanding the fact that courts in Australia and Canada apparently endorse a strict test for the determination of a tacit choice of law, these jurisdictions still attach significant weight to the presence of a forum clause in the contract as indicating a choice of law.[283] This corresponds with the traditional common-law approach, where courts have attached considerable weight to the presence of a choice-of-forum clause.[284] In Indian law, the position remains unclear. On the one hand, there is support for the view that the inclusion of a forum clause should only be a factor in the determination of a tacit choice of law. In the Indian case of *National Thermal Power*, the Supreme Court was quite clear in its assessment of choice-of-forum clauses. Although the court accepts that a choice-of-forum clause may "be an indication of the intentions of the parties", there must be "other relevant connecting factor(s) with that place".[285] According to the court, the mere presence of a forum clause is not "sufficient to draw an inference as to the intention of the parties" and may, in certain instances, "have little relevance for drawing an inference as to the governing law of the contract."[286] It is submitted that this is the correct view.[287] Unfortunately, support for the traditional common-law approach regarding choice-of-forum clauses can be found in more recent Indian court decisions.[288]

The English common law remains highly influential. The jurisdictions under discussion still appear to be guided by English case-law jurisprudence and traditional common-law rules regarding choice of law. As previously mentioned, this is problematic since the common-law rules may be outdated. From the examination of selected common-law jurisdictions, it is apparent that many issues regarding the determination of a tacit choice of law remain stagnated and need judicial clarity or legislative reform. This would enhance legal certainty and predictability of decisions when courts in these jurisdictions are tasked with determining the existence of a tacit choice of law.

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283 See under headings 3 3 and 4 3 above.

284 See under heading 2 3 above.

285 *National Thermal Power Corporation v Singer Company supra* 119. See, also, Neels in UNIDROIT (ed) *Eppur Si Muove* 366.

286 *National Thermal Power Corporation v Singer Company supra* 119.

287 See Bouwers *Tacit Choice of Law in International Commercial Contracts: A Global Comparative Study* 245: "A choice of forum or arbitral tribunal for dispute resolution and the choice of law applicable to the contract should be distinguished. This is justified on the ground that the parties may have chosen a particular forum because of its neutrality, experience, convenience, or expertise and not necessarily for the application of its domestic law. In any event, the forum will determine the law of the contract in terms of the applicable rules of private international law. Parties who submit to a court or tribunal's jurisdiction do not intend thereby that the forum should abandon its choice of law process and mechanically apply the *lex fori*. Although it is a relevant factor in the determination of a tacit choice of law, the inference that a court draws in a particular case should depend on all the circumstances surrounding the agreement. A choice of court or localised arbitral tribunal should therefore not on its own be taken to indicate a choice of law by the parties."

288 See heading 5 3 note 224.

PROTECTING THE RIGHT TO IDENTITY AGAINST CATFISHING: WHAT'S THE CATCH?

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SUMMARY

Catfishing is a common social media phenomenon affecting a person's right to identity. It involves using a person's image without their consent to create a fake social media profile. Catfishing has legal implications because a person's image is a facet of the right to identity and using an image without a person's consent interferes with their right to identity and dignity. While catfishing is a novel legal issue in South Africa, courts and legislators in the United States (US) have addressed catfishing. In the US states of California and Oklahoma, catfishing is tackled through statutory interventions directed at online impersonation and catfishing. Accordingly, victims of catfishing have remedies in addition to the existing causes of action related to common-law torts and breaches of the right to publicity. This comparative study analyses the remedies available to US victims of catfishing to ascertain whether South African victims have adequate statutory and common-law remedies against catfishing, to protect their identity from interference with their subjective right, and from assaults to their dignity.

1 INTRODUCTION

Social media platforms are currently grappling with the conundrum of fake profiles.[1] Users can freely decide how to present themselves online without anyone monitoring the accuracy of that representation, which contributes to

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1 The definition of "social media" used throughout this article is as recorded in s 1 of the Films and Productions Act 65 of 1996 (amended by s 1 of the Films and Productions Amendment Act 11 of 2019); see Simmons and Lee "Catfishing: A Look into Online Dating and Impersonation" in Meiselwitz (eds) *Social Computing and Social Media Design, Ethics, User Behaviour, and Social Network Analysis* (2020) 3; Armstrong ("16 % of All Facebook Accounts Are Fake or Duplicates" https://www.statista.com/chart/20685/duplicate-and-false-facebook-accounts/ (accessed 2021-02-07)) reported that 16% of all Facebook accounts are fake or duplicates.

the prominence of fake profiles online.[2] Catfish accounts are a type of fake profile created using another person's images. There is a correlation between the fake-profile conundrum faced by platforms and the lack of mechanisms for verifying the accuracy of information or images provided by users when creating profiles on social-media platforms. On the face of it, a catfish account appears harmless and can simply be reported to the platform and removed. However, these accounts present a legal issue because they involve using another person's image without their authority.

A catfish is a fictitious social media persona created using another person's pictures for deceptive purposes.[3] Catfishing is a form of online impersonation that involves using other people's images to create fake online profiles.[4] It is often used to entice online users into romantic relationships or as a harassment tool, among other things. There are three parties involved in this practice: the creator of the catfish persona that uses another person's photographs without permission, the person whose images are misappropriated, and a third party who is deceived by the catfish persona.[5] The person who has their image misappropriated is as much a victim as the third party who is duped by the catfish account.[6] However, the present discussion focuses only on the person whose images are used without their consent in the creation of a catfish profile.

Image is a legally protected aspect of personality. A person's appearance or image is a facet of their identity, which is protected at common law. In South Africa, using any facet of a person's identity, including their image, without consent violates their right to identity; this occurs by misappropriation or by falsification.[7] The right to identity is aimed at protecting a person's identity features against unlawful interference. Catfishing would fall within the scope of the right to identity because it involves using a person's images without consent.

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2 Kahn "Social Intermediaries: Creating a More Responsible Web Through Portable Identity, Cross-Web Reputation, and Code-Backed Norms" 2010 XI *The Columbia Science and Technology Law Review* 176 177; Mangan and Gillies *The Legal Challenges of Social Media* (2017) 2.

3 Smith, Smith and Blazka "Follow Me, What's the Harm: Considerations of Catfishing and Utilizing Fake Personas on Social Media" 2017 27 *Journal of Legal Aspects of Sport* 32 33.

4 Reznik "Identity Theft on Social Networking Sites: Developing Issues of Internet Impersonation" 2013 29 *Touro Law Review* 455; Kambellari "Online Impersonation: I Have a Right to be Left Alone v. You Can't Mandate How I Use My Privacy Toolbox" 2017 *The University of Illinois Timely Tech Online Journal* https://ssrn.com/abstract=3351507 1.

5 Derzakarian "The Dark Side of Social Media Romance: Civil Recourse for Catfish Victims" 2017 50 *Loyola of Los Angeles Law Review* 741 744; Koch "To Catch a Catfish: A Statutory Solution for Victims of Online Impersonation" 2017 88 *University of Colorado Law Review* 234 262; Santi "Catfishing: A Comparative Analysis of U.S v. Canadian Catfishing Laws and Their Limitations" 2019 44 *Southern Illinois University Law Journal* 90.

6 Derzakarian 2017 *Loyola of Los Angeles Law Review* 744.

7 *Kumalo v Cycle Lab (Pty) Ltd* [2011] JOL 27372 (GSJ) par 19; *Grutter v Lombard* 2007 (4) SA 89 (SCA) par 8. Notably, the court in *Kumalo v Cycle Lab (Pty) Ltd supra* par 19 acknowledges the academic debate surrounding the unauthorised use of a person's image and whether it is a privacy-related issue or an identity-related issue. McQuoid Mason "Invasion of Privacy: Common Law v Constitutional Delict Does It Make a Difference?" 2000 14 *Acta Juridica* 227 23 is a proponent for the position that using a person's image without consent is an infringement of their privacy. This discussion is beyond the scope of the present article.

Social media users in the US also experience catfishing. In contrast to South Africa, US state courts have encountered the catfishing phenomenon and had the opportunity to address it through privacy and publicity law.[8] In addition, victims in California are protected by an anti-impersonation statutory provision and in Oklahoma by the Catfishing Liability Act.[9] Although the focus of this article is limited to the laws of California and Oklahoma, it is noteworthy that since 2020, the US Congress has been considering the "Social Media Fraud Mitigation Bill",[10] which is legislation that purports to prohibit people from creating and using fake social media accounts or profiles to send fraudulent emails and other electronic messages.[11] It is the author's opinion that the statutory and common-law remedies in California and Oklahoma provide sufficient recourse to victims of catfishing and allow for more than one legal remedy to redress the harm they suffer from unauthorised use of their images.

In this light, this article's main aim is to ascertain the adequacy of the legal remedies available to South African victims of catfishing. The article begins with a brief historical outline of catfishing on social media, and thereafter it traces the legal history of catfishing and its legal definition. The article then analyses the legal remedies for the infringement of the right to identity through catfishing in South Africa. The South African remedies are compared to the remedies available to US victims in California and Oklahoma who have both statutory and common-law remedies. The analysis includes a consideration of the South African Cybercrimes Act[12] with regard to possible statutory protection of a person's identity against catfishing online.

2 THE SOCIAL MEDIA NET

2 1 Many fish in the sea

Catfishing did not originate on social media. People concealing their identity by pretending to be another person is a longstanding practice offline.[13] However, the advent of social media presented a unique opportunity for

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8 Generally, see The American Law Institute *The Restatement of the Law, Second, Torts* (1977) https://cyber.harvard.edu/privacy/Privacy_R2d_Torts_Sections.htm (accessed 2021-07-18), which sets out the law of torts as followed in various US states. The privacy torts are found in section 625; see also Meltz "No Harm, No Foul? 'Attempted' Invasion of Privacy and Tort of Intrusion Upon Seclusion" 2015 *Fordham Law Review* 3438. The state of California subscribes to the Restatement of Torts and also has a statutory right of publicity found at California Civil Code §3344. Similarly, the state of Oklahoma subscribes to the Restatement of Torts and also has a statutory right of publicity in OK ST T 12 §1449.

9 OK ST T 12 §1450.

10 H R 6587 Social Media Fraud Mitigation Bill of 2020.

11 The Bill also criminalises using another person's identity without consent to threaten or cause financial or physical harm through social media communication. See https://www.congress.gov/bill/116th-congress/house-bill/6587/all-actions?s=1&r=8&overview=closed for more information on the Bill (accessed 2021-08-21).

12 19 of 2020.

13 Pearl "How Catfishing Worked Before the Internet" (2015) https://www.vice.com/en/article/5gk78n/how-did-people-catfish-before-the-internet (accessed 2021-02-17).

impersonation because social media has made different identities easily accessible to those who wish to conceal their true identity. Moreover, the different Internet-based tools have had few measures in place to actively monitor and verify user profiles for accuracy.[14] In addition, many people using the Internet and its tools sought visibility, and freely uploaded their images online to attain that visibility.[15] It is easy to find people's images online through the search engine Google.[16] Consequently, catfish creators have access to more images and identities online, as well as people to deceive, resulting in an expansive freedom to recreate themselves online with few restrictions.

Social media platforms have selective verification mechanisms because identity is only authenticated under limited circumstances. For instance, some platforms verify the identities of popular users or offline public figures by requesting formal identification, after which the user's name is assigned a verification symbol for all to know that the user is authentic.[17] This type of verification occurs after an account and profile have been created but accommodates only well-known users such as politicians, businesses, well-known brands and celebrities, leaving regular users unprotected.[18]

Regular users' identities are verified by requiring a valid email address.[19] It is submitted that this is inadequate because it assumes that users provide accurate information when creating an email address.[20] This implies that there is no certainty that the identity of the user behind an email address provided on a social media account is accurate since email service providers also do not authenticate user identity.[21] There is thus a gap in verification procedures at the account-creation stage. Some platforms prohibit impersonation, while others expressly require users to use their real names when signing up.[22] User identity is also verified when other users report an

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14 Koch 2017 *University of Colorado Law Review* 251.

15 Dixon "Number of Social Media Users Worldwide From 2018 to 2027" (2022) https://www.statista.com/statistics/278414/number-of-worldwide-social-network-users/ (accessed 2022-06-19).

16 Koch 2017 *University of Colorado Law Review* 251.

17 The common verification mark for popular users and verified accounts is a blue check mark. Platforms such as Instagram https://help.instagram.com/733907830039577/?helpref=uf_share, Facebook https://www.facebook.com/help/196050490547892/?helpref=uf_share, Twitter https://help.twitter.com/en/managing-your-account/about-twitter-verified-accounts#requirements, TikTok https://support.tiktok.com/en/using-tiktok/growing-your-audience/how-to-tell-if-an-account-is-verified-on-tiktok and Tinder https://www.tinderpressroom.com/tinder-introduces-safety-updates use a blue check mark to illustrate a verified account. Ndyulo *Protecting The Right to Identity Against Catfishing* (LLM Thesis, Rhodes University) 2021 36.

18 Shorman and Allaymoun "Authentication and Verification of Social Networking Account Using Blockchain Technology" 2019 11 *International Journal of Computer Science and Information Technology* 1 3–4.

19 Koch 2017 *University of Colorado Law Review* 251.

20 Zarsky and Gomes de Andrade "Regulating Electronic Identity Intermediaries: The Soft eID Conundrum" 2013 74 *Ohio State Law Journal* 1352; Koch 2017 *University of Colorado Law Review* 251.

21 Zarsky and Gomes de Andrade 2013 *Ohio State Law Journal* 1352.

22 Zarsky and Gomes de Andrade 2013 *Ohio State Law Journal* 1352–1354; Koch 2017 *University of Colorado Law Review* 250–251. It is noteworthy that in some instances, using

account to question the authenticity of the user's identity, or when a victim of catfishing brings the impersonation to the platform's attention.[23]

It is not easy to differentiate a catfish account from authentic accounts because catfish accounts generally mimic the behaviour of authentic accounts.[24] This can be contrasted with parody and fan accounts, which are allowed by some platforms on condition that the account is transparent about being a parody or fan account.[25] A catfish creator is able to imitate an authentic account because they deceive other users; to succeed, they must behave in a similar manner and familiarly to other users.[26] For example, catfish profiles make themselves convincing by using more than one picture of the victim and also by using videos, if these can be found online.[27]

a real name is not favourable because some users rely on the protection that anonymity on social media affords them to express views that may endanger them.

23 The user reporting function involves reports made by other users regarding suspicious accounts. In essence, users are meant to police one another on platforms so that service providers do not have to do so. Consequently, the reporting function is made available for users to report a variety of potential violations of service terms. In most instances, a platform will request proof of identity from the reported account once a report for catfishing has been lodged. According to Clanton ("We Are Not Who We Pretend to Be: ODR Alternatives to Online Impersonation Statutes" 2014 *Cardozo Journal of Dispute Resolution* 328), if the impersonation was reported by the victim, then the platform will require the victim to prove their identity. Notably, platforms such as Facebook and Twitter https://help.twitter.com/en/rules-and-policies/twitter-impersonation-and-deceptive-identities-policy (accessed 2022-11-01) do not monitor user accounts for authenticity.

24 Dunlop *App-ily Ever After: Self-Presentation and Perception of Others on the Dating App Tinder* (M.A, University of Central Florida) 2018 55; Zarsky and Gomes de Andrade 2013 *Ohio State Law Journal* 1343–1344; Heck "'Catfish' Added to the Sea of Litigation" 2017 21 *TYL* 411.

25 Nel (*Information and Communications Technology Law* (2016) 506) mentions that parody and satire are forms of protected speech in South African law. However, she suggests that parody and satire accounts may have a defamatory effect on the victim. As such, parody accounts are likely to be dealt with under the law of defamation since they tend to mimic famous people. In *Laugh it Off Promotions CC v SA Breweries International (Finance) BV t/a Sabmark International* 2005 (2) SA 46 (SCA) par 35, the court defined parody as an imitative literary or artistic work with a comical effect making the work seem ridiculous. Parody accounts are used to mimic famous or popular people. *Cele v Avusa* ([2013] 2 All SA 412 (GSJ) par 51) is an example of a case where mimicry used a politician's image to comment on statements he made publicly.

26 It is worth noting that catfishing is different from identity theft. Cassim ("Protecting Personal Information in the Era of Identity Theft: Just How Safe Is Our Personal Information From Identity Thieves?" 2015 18 *FER/PELJ* 69 72) notes that identity theft is the acquisition, without consent, of personal information to commit theft or fraud. The type of personal information envisaged includes identity numbers, medical aid numbers, addresses, financial account information and biometric information such as fingerprints. The personal information is usually used fraudulently to create bank accounts, obtain credit facilities and purchase goods under the victim's name (73–74). This is different from catfishing because catfishing is not necessarily intended to harm the victim, but to deceive others online. However, catfishing may be used to commit fraud and identity theft.

27 Hartney "Likeness Used as Bait in Catfishing: How Can Hidden Victims of Catfishing Reel in Relief" 2018 19 *Minnesota Journal or Law, Science & Technology* 278.

2 2 Casting the net

Social media platforms are beneficial for maintaining interpersonal relationships,[28] communicating,[29] and e-commerce activity, but these Internet tools present various legal challenges.[30] One of those challenges is conduct that undermines individual identity online.[31] This challenge was brought on by the emergent culture of maintaining an online presence and the increased user traffic on social media websites. Over time, the emphasis on social media websites has shifted from merely maintaining contact with users known offline, to boosting popularity, encouraging users to widen their networks and sphere of interaction online by connecting with people they have never met.[32] Consequently, one of social media's main attractions is the ability to connect with many people and gain popularity without having to accurately present oneself.[33]

Today, how a person presents their profile is important for social and commercial reasons.[34] Some users tweak their true identities to fit the personalities they have recreated online to make friends, profit or as mere artistic expression. There is a high probability that the most attractive profiles will become the most popular, so it is important for some users to carefully curate their profiles to make a good impression, since impressions are vital online.[35] Another important consideration is that some users may lack the confidence to appear as themselves online and may wish to conceal their true identity altogether. It is, therefore, not surprising that some users might find it alluring to depict themselves as someone else online by using another person's images and a fictitious name.

Although there is seemingly no legal issue in a user inaccurately presenting themself online, there is room for abuse. Catfishing is an example of users overstepping boundaries to exercise certain freedoms online. Indeed, platforms allow users to explore and express their personalities online, although there are limits to enjoying this freedom. The limit is that in

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28 Kaplan and Haenlein "Users of The World, Unite! The Challenges and Opportunities of Social Media" 2010 *Business Horizons* 59 63.

29 Hart "Social Media Law: Significant Developments" 2016 72 *Business Lawyer* 235 235.

30 Pelletier ("The Emoji That Cost $20,000: Triggering Liability for Defamation on Social Media" 2016 52 *Washington University Journal of Law & Policy* 229–230 and 232) lists examples of legal challenges recognised by US courts; Hartney 2018 *Minnesota Journal of Law, Science & Technology* 277 278.

31 Clanton "We Are Not Who We Pretend to Be: ODR Alternatives to Online Impersonation Statutes" 2014 16 *Cardozo Journal of Conflict Resolution* 323 324.

32 Boyd and Ellison "Social Network Sites: Definition, History, and Scholarship" 2008 *Journal of Computer-Mediated Communication* 211–213. The emphasis on being popular on social media began on the platform www.Friendster.com, which is no longer functional.

33 Boyd and Ellison 2008 *Journal of Computer-Mediated Communication* 216.

34 Zarsky and Gomes de Andrade 2013 *Ohio State Law Journal* 1337.

35 Boyd and Ellison 2008 *Journal of Computer-Mediated Communication* 219; Roos "Privacy in the Facebook Era: A South African Legal Perspective" 2012 *SALJ* 385; Zarsky and Gomes de Andrade 2013 *Ohio State Law Journal* 1338; Clanton 2014 *Cardozo Journal of Conflict Resolution* 326.

concealing their own identity, or in crafting a new online persona, a user cannot impersonate another person or portray themself as another person.[36]

Catfishing has legal implications because it involves using, without consent, another person's image, which is a protected legal interest. The catfish creator uses another person's image attached to fictitious personal information such as a fake name and surname, location and biography.[37] The combination aims to create the false impression that the account belongs to the person depicted in the image. The use of a person's image in this manner interferes with aspects of their personality, which is cause for concern.

3 THE CATCH

3 1 A historical overview of catfishing

The release of "Catfish: The Documentary" and similarly titled television series drew attention to the act of impersonating another person on social media using their image. The documentary followed Nev Schulman's endeavour to meet a catfish creator who deceived him on Facebook.[38] The term "catfish" was coined on this documentary when the husband of a catfish creator likened fake social media accounts to using catfish to keep codfish alive and fresh during exportation.[39] According to the analogy, the nature of online communications is mysterious because a person never knows with whom they are communicating. Fake accounts keep people on their toes and encourage caution. The television series and documentaries on catfishing were created for entertainment and only cast light on the effects of catfishing on the misled third party. These media did not consider the impact of catfishing on the victim's personality rights and the legal consequences that flow from misusing a person's identity features. This article considers the victim's rights and the remedies available for the injury they have suffered.

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36 Instagram, Facebook, Tinder and Twitter are examples of platforms that have rules against impersonation in their terms of service.

37 Clanton (2014 *Cardozo Journal of Conflict Resolution* 326) notes the difference between imposter and fake accounts. Fake accounts are profiles that appear real but depict a person who does not exist, while imposter profiles impersonate an existing person by using an aspect of their personality without consent. Catfishing would fall in the latter category because although the combination of fake name and another person's image do not accurately represent a living person, it is still a misappropriation of a person's image for a purpose to which they did not consent.

38 The series follows a similar plot in which Schulman helps misled third parties uncover the identity of the catfish. To access the show, see "Catfish: The TV Show" (2012) https://www.mtv.com/shows/catfish-the-tv-show (accessed 2021-05-01). See Heck 2017 *TYL* 411; Hartney 2018 *Minnesota Journal or Law, Science & Technology* 278.

39 Harris "Who Coined the Term 'Catfish'?" (2013) https://slate.com/culture/2013/01/catfish-meaning-and-definition-term-for-online-hoaxes-has-a-surprisingly-long-history.html (accessed 2021-05-01).

3 2 A legal definition for catfishing

Catfishing is not yet expressly regulated in South African law. There is no formal legal definition for catfishing in South Africa. Similarly, the US does not explicitly address and define catfishing federally.[40] However, catfishing is a recognised legal problem, and some states in the US have codified laws to address catfishing.[41] Some US courts have also had to adjudicate matters concerning catfishing.[42]

In the US, catfishing is defined as one of two forms of online impersonation[43] – that is, either logging into a person's online profiles using their personal information and pretending to be them,[44] or creating a fictitious account using another person's image and likeness.[45] Catfishing is usually the latter because a catfish creator misappropriates the victim's image or likeness to construct a fake persona online.[46]

The common denominators found in most authoritative definitions of catfishing include the creation of a fake profile on social media, using a combination of another person's pictures and a fake name, in order to mislead others.[47] Most catfish accounts use images of a person who exists offline, accompanied by fabricated personal information like a name, date of birth, location, and interests.[48] It follows that a suitable legal definition of

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40 Santi 2019 *Southern Illinois University Law Journal* 85.

41 Reznik 2013 *Touro Law Review* 455 457; Smith, Smith and Blazka 2017 *Journal of Legal Aspects of Sport* 36–37; Derzakarian 2017 *Loyola of Los Angeles Law Review* 742; Santi 2019 *Southern Illinois University Law Journal* 86.

42 *In re Rolando S* 197 Cal App 4th 936 was not dealt with as a catfishing case – that is, where an actual person had been impersonated. Rather, the matter related to the unauthorised use of personal identifying information of another person. Under Cal Penal Code § 30.5, using another person's identification information amounts to identity theft. *Calsoft Labs Inc v Panchumarthi* 2020 WL 4032461 2 is a case where the court dealt with catfishing, where the plaintiffs had impersonated the defendant by using his email account.

43 According to Reznik (2013 *Touro Law Review* 457–458) and Derzakarian (2017 *Loyola of Los Angeles Law Review* 742) Oklahoma, California, New York, Texas, Louisiana, Hawaii, Mississippi, New Jersey, Washington and Wyoming are the few states that address online impersonation.

44 In *In re Rolando S* 945 fn 6, the court differentiates between two types of online impersonation that are legally recognised in the state of California. The first is Cal Penal Code §528.5(a), which makes it an offence to credibly impersonate an actual person through or on an Internet website or by other electronic means. The court stated that this provision could be violated by posting comments on a blog while impersonating another person. The second is Cal Penal Code §530.5(a), which makes it an offence to intentionally obtain a person's personal identifying information and use that information for an unlawful purpose. The court found the defendant guilty of contravening §530.5(a) by gaining access to the victim's Facebook profile and impersonating her.

45 Heck 2017 *TYL* 411; Kambellari 2017 *The University of Illinois Timely Tech* 1; *Calsoft Labs, Inc v Panchumarthi supra* 2.

46 OK ST T 12 §1450 Subsection B; Cal Penal Code §528.5(a); Koch 2017 *University of Colorado Law Review* 237 and 239. *People v Love* 2019 WL 3000836 1 and 3, and *People v Faber* 15 Cal App 5th Supp 41 51, are examples of cases where someone has been lured by a catfish account.

47 Pelletier 2016 *Washington University Journal of Law & Policy* 232; Hartney 2018 *Minnesota Journal or Law, Science & Technology* 281; *Zimmerman v Board of Trustees of Ball State University* 940 F. Supp. 2d 875 (S.D. Ind. 2013) 891.

48 Derzakarian 2017 *Loyola of Los Angeles Law Review* 753–754.

catfishing would have to accommodate these aspects. Moreover, an appropriate definition would also consider that catfishing affects protected elements of personality. The following definition is suggested: "Catfishing is the creation of a fake social media profile on an Internet-based communication platform, using fake identification information and another person's pictures without consent, to mislead or defraud other users."

4 SOUTH AFRICAN INTERVENTIONS AGAINST CATFISHING

Personality rights are subjective rights innately linked to the right-holder and cease to exist upon death.[49] Under the common law, there are three categories of personality interest:[50] *corpus* encompasses the rights related to a person's physical body; *dignitas* protects the rights related to a person's self-worth and dignity;[51] and *fama* protects the rights related to a person's good name or reputation.[52] A range of rights is protected under these interests, but *dignitas*, in particular, encompasses identity, privacy and all the rights not covered by *corpus and fama*.[53]

The South African law of delict prescribes that wrongful conduct amounting to the intentional or negligent harm of another person entitles the victim to damages as compensation for the harm they have suffered at the hands of the wrongdoer.[54] Conduct that unlawfully and intentionally infringes on a personality interest is an *iniuria*,[55] which entitles a victim to claim satisfaction under the *actio iniuriarum*.[56] Under the *actio iniuriarum*, where there is voluntary unlawful conduct, delictual liability attaches either a statement or an action[57] that causes actual or potential harm[58] to a personality interest.[59] To succeed in a claim based on the *actio iniuriarum*, it

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49 *Universiteit van Pretoria v Tommie Meyer Films (Edms) Bpk* 1977 (4) SA 376 (T) 381F–G; Midgley "Delict" *LAWSA* 15(3) par 80; Neethling "Personality Rights: A Comparative Overview" 2005 *Comparative and International Law Journal of Southern Africa* 211; Neethling, Potgieter and Roos *Neethling on Personality Rights* (2019) 17.

50 Neethling, Potgieter and Visser *Law of Delic*t (2015) 341.

51 *Khumalo v Holomisa* 2002 (5) SA 401 (CC) par 27; Neethling *et al Neethling on Personality Rights* 271.

52 Loubser, Midgley, Jabavu, Linscott, Mukheibir, Niesing, Perumal, Singh and Wessels *The Law of Delict* 3ed (2017) 86; Neethling *et al Neethling on Personality Rights* 197.

53 *O'Keeffe v Argus Printing and Publishing Co Ltd* 1954 (3) SA 244 (C) 247F–248A; *Jansen van Vuuren v Kruger* 1993 (4) SA 842 (A) 849E–F; Neethling *et al Neethling on Personality Rights* 272; Neethling and Potgieter *Delict* 8ed (2021) 16.

54 Loubser and Midgley *et al The Law of Delict* 25.

55 *Delange v Costa* 1989 (2) SA 857 (A) 860I–861A; *Dendy v University of the Witwatersrand* 2005 (5) SA 357 (W) par 27; Neethling *LAWSA* 20(1) par 395; Neethling *et al Neethling on Personality Rights* 72.

56 *Matthews v Young* 1922 AD 492 503; *O'Keeffe v Argus Printing and Publishing Co supra* 247C–E; *DE v RH* 2015 (5) SA 83 (CC) par 3 fn 5; Neethling *et al Neethling on Personality Rights* 92.

57 *Country Cloud Trading CC v MEC*, *Department of Infrastructure Development, Gauteng* 2015 (1) SA 1 (CC) par 20–21; Loubser and Midgley *et al The Law of Delict* 31.

58 Loubser and Midgley *et al The Law of Delict* 75.

59 *Matthews v Young supra*; Loubser and Midgley *et al The Law of Delict* 83.

is sufficient for a victim to show only that they suffered injury to their personality without patrimonial harm.[60]

An infringement of the right to identity is an assault to *dignitas*, which also entitles a person to claim damages for the injury caused to their personality.[61] Catfishing is an example of conduct interfering with a person's online use and enjoyment of their personality rights, namely their right to identity, because it involves the misuse of their image.

Image is a facet of a person's right to identity,[62] which protects the aspects of a person that distinguish them from others.[63] A catfish creator impairs this interest by downloading another person's pictures to use them without permission in connection with nefarious purposes. Since the right to identity is a subjective right, its infringement is wrongful or unlawful.[64] It is important to establish the type of conduct envisaged in the infringement of the right to identity.

4 1 The right to identity

Identity is a personality interest that is closely interconnected to privacy, and both are protected in the common law.[65] However, in *Grütter v Lombard,*[66] the Supreme Court of Appeal (SCA) recognised the right to identity as a separate personality right.[67] South African law accepts that the right to identity is concerned with the use of identity features of a person that set them apart from others.[68] The facets of a person's identity include, among others, their name, image, likeness, voice and signature.[69]

Wrongfulness, in a breach of the right to identity, is established when a person misappropriates the facets of another person for commercial gain, using them to place the person in a false light, inconsistent with their true identity.[70] The link between these infringements of identity in South Africa and the US "false-light" and "misappropriation" privacy torts was first drawn in *Universiteit van Pretoria v Tommie Meyer Films (Edms) Bpk.*[71] These

60 Loubser and Midgley *et al The Law of Delict* 86.

61 *O'Keeffe v Argus Printing and Publishing Co Ltd supra* 249D.

62 For example, in *Grütter v Lombard* 2007 (4) SA 89 (SCA) par 8, *W v Atoll Media (Pty) Ltd* [2010] 4 All SA 548 (WCC) par 48–49, and *Kumalo v Cycle Lab (Pty) Ltd supra* par 15, the courts highlight which aspects of personality make up the right to identity. See Neethling *et al Law of Delict* 373.

63 *Grütter v Lombard supra* par 9; *Kumalo v Cycle Lab (Pty) Ltd supra* par 15; Cornelius "Commercial Appropriation of a Person's Image: *Wells v Atoll Media (Pty) Ltd* (unreported 11961/2006) [2009] ZAWCHC 173 (9 November 2009)" 2011 14(2) *PER/PELJ* 182 199.

64 Neethling *et al Neethling on Personality Rights* 55.

65 *Bernstein v Bester NO* 1996 (2) SA 751 (CC) par 65; *Khumalo v Holomisa supra* par 27; *Dendy v University of Witwatersrand Johannesburg* 2005 (5) SA 357 (W) par 12.

66 *Supra*.

67 *Grütter v Lombard supra* par 7 and 8; Neethling *et al Neethling on Personality Rights* 351.

68 *Grütter v Lombard supra* par 8 and *Kumalo v Cycle Lab (Pty) Ltd supra* par 15; Mashinini "The Impact of Deepfakes on The Right to Identity: A South African Perspective" 2020 32 *SAMLJ* 407 414.

69 *Kumalo v Cycle Lab (Pty) Ltd supra* par 18.

70 Neethling *et al Neethling on Personality Rights* 352.

71 *Supra* 386H–387.

infringements amount to an interference with a person's subjective right because they constitute a disturbance of a person's enjoyment of the features of their identity.[72]

In the landmark case of *Grütter v Lombard*,[73] where the SCA recognised the independence of the right to identity, the court had to decide whether Grütter was entitled to an order prohibiting Lombard from using his name. In this decision, the court set out the features of infringing the right to identity. Grütter and Lombard were attorneys running separate legal practices under a joint name. After the termination of their agreement, Lombard continued using the joint name.[74] The court held that Lombard's continued use of Grütter's name without consent was an infringement of Grütter's identity by falsification because it created the false impression that Grütter was still associated with the practice.[75] Moreover, the continued use also amounted to an infringement of identity by misappropriation for a commercial purpose because Lombard would use Grütter's name to attract clients who would approach the practice for his services.[76] According to the SCA, there was no legal justification for the misrepresentation created by Lombard's continued use of Grütter's name, which entitled him to assert that potential clients did not act on the false impression created.[77]

Another matter illustrating how identity may be infringed is *Kumalo v Cycle Lab (Pty) Ltd,*[78] where the court held that using a person's image for advertising without consent was unacceptable and was an infringement of identity by falsification and misappropriation for commercial gain.[79] In this case, the plaintiff was a celebrity, and the defendant used her picture without consent to advertise women's cycling products.[80] The court held that identity was infringed when a person falsified another's true identity, which occurred when a person misappropriated an identity feature for advertising without consent.[81] The appropriation creates a false impression that the person consented to the conduct or supports the advertised business or service.[82] The court highlighted the interrelatedness of identity and privacy and held that both rights could be infringed upon simultaneously.[83]

It is important to point out that, in South African law, the misappropriation of a person's identity facets has to be for a commercial purpose.[84] This is different from the equivalent tort in the US, which is discussed later in this article. In both *Grütter v Lombard* and *Kumalo v Cycle Lab (Pty) Ltd*, the

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72 Neethling *et al Neethling on Personality Rights* 353.
73 *Supra*.
74 *Grütter v Lombard supra* par 2–3.
75 *Grütter v Lombard supra* par 13.
76 *Ibid*.
77 *Ibid*.
78 *Supra*.
79 *Kumalo v Cycle Lab (Pty) Ltd* par 17.
80 *Kumalo v Cycle Lab (Pty) Ltd* par 2–5.
81 *Kumalo v Cycle Lab (Pty) Ltd* par 17 and 22.
82 *Kumalo v Cycle Lab (Pty) Ltd* par 17.
83 *Kumalo v Cycle Lab (Pty) Ltd* par 18 and 19. It is noteworthy that the SCA made the same point in in *Grütter v Lombard supra* par 8.
84 Cornelius 2011 14(2) *PER/PELJ* 182 196.

plaintiff's name and image respectively were appropriated in circumstances that involved patrimonial gain. Catfishing is not always carried out for commercial gain since some users create catfish accounts to exercise anonymous expression, to find romantic partners, or to make friends because they are insecure about their own appearance.

A catfish creator misappropriates a person's images by downloading the images without consent and using them in the creation of a fake social media profile. The creator then falsifies the victim's identity by generating a false impression that the victim is the person controlling the account. The fallaciousness of the impression created relies on it being irreconcilable with the victim's identity.[85] Indeed, a catfish account cannot be said to reflect the victim's true identity because it is a fake persona created with a deceitful intent. However, the fake persona relies on using pictures of a person who exists offline and may be recognised by people who know them.

It is worth mentioning that the account's behaviour online is not the focus, although it may be relevant in considering the entire impression that the account creates about the victim. For example, this may injure a victim's subjective sense of dignity. However, the wrongfulness of an infringement on the right to identity does not depend on the victim's subjective sense of dignity. Rather, it depends on whether there has been an obstruction of the victim's subjective right and whether the conduct in question goes against public norms.[86]

In South Africa, using a person's image in catfishing unjustifiably interferes with their right to identity and infringes their *dignitas* because it involves a disturbance of the victim's use and enjoyment of their own identity and their right to control the use of their identity.[87] Moreover, public norms as reflected by the common-law right to identity seek to protect a person against having the features of their identity misused to contradict their true identity without consent.[88]

There is an argument to be made that, by agreeing to participate on social media and posting their images on a public platform, a person reconciles themselves with the possibility of having their images downloaded by others and used for various purposes.[89] However, the fault with this contention is that, when users sign up to social media platforms, they do not expect that another person will use their images to create fake profiles because some platforms prohibit impersonation. In addition, with regard to the level of

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85 Neethling *et al Neethling on Personality Rights* 353.

86 *Ibid*.

87 In *Kumalo v Cycle Lab (Pty) Ltd* (*supra* par 17, 22–23), the court found that using the plaintiff's image in an advertisement without her consent was misleading in that it generated a false impression about her. This amounted to an infringement of her identity. Therefore, the unauthorised appropriation and further use of her image was wrongful and constituted an *iniuria*.

88 Neethling *et al Neethling on Personality Rights* 352 and 355; Cornelius 2011 *PER/PELJ* 199.

89 The *volenti non fit iniuria* rule may only find application in limited circumstances. According to Neethling *et al Neethling on Personality Rights* 359, misappropriation of images in the public interest may justify the limitation of a person's right to identity. See for instance *Cele v Avusa supra* par 50–51.

publicity to which a person exposes themselves, the court's opinion in *Kumalo v Cycle Lab (Pty) Ltd* is persuasive in the present discussion because a person's social standing is irrelevant when deciding whether their identity has been misused.[90] That a victim of catfishing had uploaded the images to a public platform does not negate the fact that they are legally entitled to prevent others from misappropriating their image and using it to falsify their identity.[91] Therefore, the right to identity appropriately protects a person's ability to control the use of their image, and other facets of identity, both on- and offline, irrespective of the level of publicity to which they are exposed.[92]

It is important to consider opposing views, which may contend that fake social media profiles are a form of expression. It can be argued that catfishing is a form of expression[93] that may find protection under section 16 of the Constitution.[94] However, catfishing interferes with a subjective right protected by the common-law notion of *dignitas* and indirectly by the constitutional right to human dignity. The discussions in *Bool Smuts v Herman Botha*[95] and *Kumalo v Cycle Lab (Pty) Ltd*[96] highlight that conduct affecting a personality right and the right to freedom of expression requires a balancing exercise to be undertaken.

4 2 Balancing dignity and freedom of expression in the context of catfishing

As briefly mentioned above, *dignitas* is an all-embracing concept that includes all aspects of personality not covered by *corpus* and *fama*.[97] The Constitutional Court in *Khumalo v Holomisa*[98] differentiated between common-law *dignitas* and the constitutional right to human dignity. *Dignitas* is concerned with subjective self-worth.[99] In contrast, the right to human dignity in the Constitution is not limited to individual self-worth. Instead, it affirms the objective worth of all human beings in society.[100] O'Regan J emphasised that human dignity included the intrinsic worth of human beings that all people shared, as well as the reputation of each person. Therefore,

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90 In *Kumalo v Cycle Lab (Pty) Ltd* (*supra* par 24), the court found that a reasonable person would find the defendant's conduct offensive. It is worth noting that the plaintiff in this case was a celebrity who profited off her identity. This position is further supported by the court's view in *Heroldt v Wills* 2013 (2) SA 530 (GSJ) par 44–45, where the court emphasised that even celebrities enjoy the same human rights as all people, and their right to *dignitas* is also legally protected.

91 *Grütter v Lombard supra* par 13.

92 *Kumalo v Cycle Lab (Pty) Ltd supra* par 15; Cornelius 2011 *PER/PELJ* 199; Milo and Stein *A Practical Guide to Media Law* (2013) par 9.3; Mashinini 2020 *SAMLJ* 414.

93 Trager and Dickerson *Freedom of Expression in the 21st Century* (1999) 17–18; Currie and De Waal *The Bill of Rights Handbook* (2014) 342; Nel 2007 *CILSA* 208–209.

94 Constitution of the Republic of South Africa, 1996.

95 *Bool Smuts v Herman Botha* [2022] ZASCA 3.

96 *Supra*.

97 *O'Keeffe v Argus Printing and Publishing Co supra* 48A.

98 2002 (5) SA 401 (CC).

99 *Khumalo v Holomisa supra* par 27.

100 *Ibid.*

the value of human dignity covered both personal self-worth and the public's perception of the worth of an individual.[101]

In *Khumalo v Holomisa*, the Constitutional Court balanced freedom of expression with personality rights. According to O'Regan J, the role of freedom of expression cannot be understated in our legal system; however, it does not override the value of the dignity connected to individual reputation. As a foundational constitutional value, human dignity does not yield to freedom of expression.[102] Social media users are aware of their right to freedom of expression and they use multiple methods of expressing themselves on social media.[103] Creating fake profiles is one way for a person to express themselves online or to protect their identity to exercise their right to freedom of expression. Yet, freedom of expression is not an absolute right and can be limited, even on social media.[104]

When a catfish creator has misappropriated a person's image and created a fake profile, the continued existence of the profile contributes to the false impression created about the victim and increases the harm suffered. The impression created is that the account is the victim, regardless of how the account conducts itself online, because the catfish uses the victim's image and physical appearance (features that individualise them) as their own. This portrays the victim in a false light and enables other users to mistake the catfish for the victim. Using a person's identity to paint them in a false light is a way of infringing their identity and impairing their dignity.[105]

In addition, the Constitutional Court in *Khumalo v Holomisa* emphasised that truth was central to balancing dignity and freedom of expression.[106] This article has established that catfishing affects a person's dignity because their image is used to create a false impression of them online. Since the law is concerned with protecting against falsehoods,[107] prohibiting others from using a person's image in a manner that portrays them falsely and inaccurately is a justifiable limitation of expression.

Under the common law, using any facet of a person's identity without consent and creating a false impression of them enables the victim to bring a delictual claim for damages under the *actio iniuriarum.* Catfishing would fall under the scope of this remedy because the cause of action arises from the unauthorised use of a person's image in the creation of a catfish account that portrays them in a manner that cannot be reconciled with their identity.

In the event that the aforementioned remedies might not be available to a victim of catfishing, a final prohibitory interdict compelling the catfish creator

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101 *Ibid*.

102 *Khumalo v Holomisa supra* par 25.

103 Freedom of expression is a right protected in s 16 of the Constitution of the Republic of South Africa, 1996 and is a cornerstone of our democracy. Fake profiles online are a manifestation of freedom of expression to some degree. However, freedom of expression is not an unlimited right and has to be balanced against other rights when there is conflict.

104 Iyer "An Analytical Look Into the Concept of Online Defamation in South Africa" 2018 32 *Speculum Juris* 124 125.

105 *Grütter v Lombard supra* par 13.

106 *Khumalo v Holomisa supra* par 36 and 37.

107 In *Modiri v Minister of Safety and Security* (2011 (6) SA 370 (SCA) par 22), the court in an *obiter dictum* said that the publication of untruths could never be in the interest of the public.

to stop using the victim's images for the fake account.[108] For a court to grant an interdict, there must be a clear right, an actual or threatened infringement of that right and there must be a lack of any other remedy.[109] It is worth emphasising that in the context of social media, a victim may request a social media platform to take down the account, but there is no guarantee of success in this course of action. Regarding the lack of a remedy, the court in *Heroldt v Wills*[110] held that in the context of social media, there was no guarantee that a social media platform would comply with a take-down request, leaving the victim wanting.[111] Therefore, by granting an interdict in relation to conduct occurring online, a court would be providing a remedy where there was no other.[112] It is also noteworthy that the interdict is not used to compel a social media platform to comply with the take-down request, but to put an end to the infringing conduct. In other words, an interdict would not, in these circumstances, be a last resort and may be a suitable remedy for a victim of catfishing, and an alternative to having to request a take down.

4 3 Possible statutory protection in South Africa

The Cybercrimes Act[113] may possibly provide criminal law protection from online catfishing for the right to identity. Section 8 of the Cybercrimes Act criminalises cyber fraud. Cyber fraud is intentional and unlawful misrepresentation carried out using data or a computer program,[114] or interfering with data or a computer program, or a computer data storage medium, that causes actual or potential prejudice to another person.[115] This provision must be read with section 5(2)(*a*), (*b*) and (*e*) and section 6(2)(*a*).

In section 8(*b*), interfering with data or a computer program means temporarily or permanently deleting, altering data or a computer program, or obstructing, interrupting or interfering with the lawful use of data or a computer program.[116] According to section 6(2)(*a*), interfering with a computer data storage medium or computer system refers to temporarily or permanently altering any resource of a computer storage medium or a computer system. The cyber-fraud provision is intended to create a statutory offence specifically criminalising fraud committed using data or a computer program or by interfering with data or a computer program.[117]

Fraud is generally understood as deceitful conduct that causes another person to suffer some form of prejudice, pecuniary or not.[118] The

108 Loubser and Midgley *et al The Law of Delict* 525.
109 *Setlogelo v Setlogelo* 1914 AD 221 227.
110 *Supra*.
111 *Heroldt v Wills supra* par 38.
112 *Heroldt v Wills supra* par 39.
113 19 of 2020.
114 S 8(*a*) of 19 of 2020.
115 S 8(*b*) of 19 of 2020.
116 S 5(2)(*a*), (*b*) and (*e*) of 19 of 2020.
117 Mabunda "Is It Cyberfraud or Good Ol' Offline Fraud: A Look at Section 8 of the South African Cybercrimes Bill" 2018 2 *Journal of Anti-Corruption Law* 58 59.
118 Burchell *Principles of Criminal Law* 5ed (2018) 742. For more on the history of fraud, see Snyman *Criminal Law* (2014) 523.

perpetrator's advantage in this instance has to prejudice the victim. The law does not criminalise mere deceit; rather, it criminalises deceit if it results in harm to another person.[119] The prejudice envisaged under the offence of fraud may or may not be proprietary. Non-commercial prejudice includes personality interests such as a person's reputation,[120] or dignity.[121]

In the statute's definitions of computer program, computer system and computer data storage medium, social media platforms are not included.[122] It cannot be assumed that these terms include social media platforms because social media platforms are Internet-based tools. In particular, websites are available on both Internet-enabled mobile devices[123] and computers. In other words, social media platforms are available not only through computers or computer systems and cannot themselves be considered computer programs.[124] Although catfishing involves using data such as a person's image represented electronically, this use of data cannot be said to fall within the scope of section 8 because such use of a person's data does not involve deletion, alteration or obstruction or interference.[125] Moreover, catfishing does not involve altering a resource of a computer data storage medium or computer system.[126]

In the author's opinion, cyber fraud may not be applicable to catfishing because catfishing involves a distortion of a person's identity to mislead others for their own advantage.[127] The catfish creator's advantage is prejudicial to the victim only to the extent that it impairs the victim's right to undisrupted enjoyment and use of their identity, causing injury to their dignity. It is unpersuasive to argue that the provision was created with the intention of providing protection for a person whose images are used to create a catfish account. Consequently, whether the Cybercrimes Act is capable of protecting a victim of catfishing depends on the reason behind the creation of an account. If the catfish creator meant to cause harm to the victim, over and above using their image without consent, then the Cybercrimes Act might be useful.

Since South African courts have not yet had the opportunity to decide a matter concerning the scope of section 8's application, it is the author's opinion that section 8 of the Cybercrimes Act may be useful to a third party who is misled by a catfish account, rather than to the victim whose image has been misappropriated and falsified. The provision would not provide a

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119 Burchell *Principles of Criminal Law* 749.

120 In the matter *R v Seabe* 1927 AD 28 33, the court acknowledged that deceit resulting in dishonour or damage to reputation could be considered criminal fraud.

121 Burchell *Principles of Criminal Law* 749.

122 S 1 of 19 of 2020.

123 Note that social media platforms are available on mobile smart phones as a result of the Wireless Application Protocol, defined in s1 of the Electronic Communications and Transactions Act 25 of 2002 as an international standard developed by a company incorporated under the laws of the United Kingdom to enable applications that use wireless communication including access to the internet.

124 Carr and Hayes "Social Media: Defining, Developing and Diving" 2015 23 *Atlantic Journal of Communication* 46 49–50.

125 S 5(2)(*a*)(*b*) and (*e*) of 19 of 2020.

126 S 6(2)(*a*) of 19 of 2020.

127 Snyman *Criminal Law* 524.

remedy for the person whose identity has been infringed because this provision is concerned with harm resulting from acting on a misrepresentation. Also, catfishing is not always carried out with the sole intention of defrauding other social media users. Instead, there are various reasons for catfishing, such as seeking a romantic partner, jest or making friends. Often the person whose images are used is not the target of the deceit.

5 US INTERVENTIONS AGAINST CATFISHING

Owing to the Internet's borderless nature, catfishing is a problem for Internet users globally. The legal issues posed by catfishing are recognised in the US, and US citizens have approached the courts for recourse.[128] Several US states have passed legislation in response to online impersonation or to address online impersonation through common-law rules.[129] Some states deem catfishing or impersonation a criminal offence,[130] while others view it as a civil wrong.[131] Since 2020, US Congress has been considering the "Social Media Fraud Mitigation Bill".[132] The proposed statute, dedicated to addressing conduct such as catfishing, prohibits people from creating and using fake social media accounts or profiles and from sending fraudulent emails and other electronic messages.[133] Since the US does not address catfishing federally, this article considers existing legal interventions addressing catfishing in the states of Oklahoma and California.

The law in the US states of California and Oklahoma has advanced enough to address online impersonation and catfishing. Beyond the common-law right of privacy protections, both states' legislatures have enacted statutory provisions that address online impersonation or catfishing. California's statutory protection is found in Cal. Penal Code §528.5, while Oklahoma's catfishing statute is found in OK. ST. T 12 §1450.

5 1 Statutory protections in the USA

Oklahoma is the only US state to enact a statute dedicated to catfishing.[134] Section 1450B provides that knowingly using features of another person's

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128 See for instance, *Zimmerman v Board of Trustees of Ball State University supra*; *Matot v CH* 975 F Supp 2d 1191 (D Or 2013) and *Kenneth C Griffin, Citadel LLC v Riley Barnes* 2017 WL 6447802.

129 Reznik 2013 *Touro Law Review* 457; Derzakarian 2017 *Loyola of Los Angeles Law Review* 742; Kambellari 2017 *The University of Illinois Timely Tech* 1–2.

130 For example, in California, online impersonation is a criminal offence (Cal. Penal Code §528.5(a)). See also Oklahoma OK ST T 12 §1450, Texas (Tex. Penal Code § 33.07) and New York (N Y Penal Law §190.25(4)).

131 Reznik 2013 *Touro Law Review* 456. States such as Washington (Wash. Rev. Code Ann. § 4.24.790 (West)) and Wyoming (Wyo. Stat. Ann. § 6-3-902 (West)) are examples of states where impersonation is a civil wrong.

132 H R 6587 Social Media Fraud Mitigation Bill of 2020.

133 The Bill also criminalises using another person's identity without consent to threaten or cause financial or physical harm through social media communication. See https://www.congress.gov/bill/116th-congress/house-bill/6587/all-actions?s=1&r=8&overview=closed for more information on the Bill (accessed 2021-08-21).

134 Derzakarian 2017 *Loyola of Los Angeles Law Review* 745.

identity through social media without consent in order to harm, intimidate, threaten or defraud them will attract civil liability for online impersonation.[135] The protected facets of identity include name, voice, signature, and photograph or likeness. "Photograph" includes moving and still images.[136] Section 1450B clearly captures catfishing in its meaning because it highlights the various reasons that a person's identity may be used in connection with a fake social media profile, and the lack of consent in the use of the person's identity. It is the author's opinion that this provision was drafted with an understanding of the nature of catfishing, and of the fact that a catfish will go as far as using another person's images and video content to make the fake account appear accurate.

Section 528.5(a) in California's penal code criminalises online impersonation.[137] However, although online impersonation is a criminal offence, the statute also provides civil recourse against impersonation perpetrated on social media and using other Internet-based tools.[138] Liability attaches when a person knowingly, and without consent, credibly impersonates another person on a website or through electronic means. Included in the definition of "electronic means" is creating a social media account or profile in another person's name. In addition, in terms of section 528.5(b), "credible impersonation" occurs when another person reasonably believes that the defendant is the person who was impersonated. This provision is wide enough to include catfishing since catfishing involves creating a social media profile using an existing person's picture to give the impression that the account belongs to the person in the picture.[139] Moreover, other social media users will reasonably believe that the catfish account is a real account. In the case of *In Re Rolando S*,[140] the court noted that section 528.5 could also be contravened by posting comments on a website posing as another person.[141]

5 2 Common-law protections

US states do not recognise a right to identity. Instead, states protect the features of a person's identity through privacy torts and the right of publicity.[142] Tort law is the US equivalent of the South African law of delict. However, tort law varies from state to state.[143] The right of privacy gives rise

135 OK ST T 12 §1450B.

136 OK ST T 12 §1450A (1).

137 Cal. Penal Code §528.5 (a).

138 Cal. Penal Code §528.5; Santi 2019 *Southern Illinois University Law Journal* 88.

139 According to Derzakarian (2017 *Loyola of Los Angeles Law Review* 753–75), using the picture of a person who exists offline satisfies the requirement of "actual person" in §528.5 (a). However, Hartney (2018 *Minnesota Journal of Law Science and Technology* 286) disagrees and holds that this provision would only be helpful if an actual person, in the sense of using their image and name, is impersonated.

140 197 Cal App 4th 936 (Cal App 5 Dist 2011).

141 *In re Rolando S* 945 fn 6.

142 Skosana *The Right to Privacy and Identity on Social Networking Sites: A Comparative Legal Perspective* (LLM Thesis, University of Pretoria) 2016 89.

143 *Haag v Cuyahoga County* 619 F Supp 262 276–277 (D C Ohio 1985); Witt and Tani *Torts* 2022 1.

to privacy torts,[144] which entitle a plaintiff to a claim for damages for the harm caused by another, and to compel the wrongdoer to stop the harmful conduct.[145]

There are four privacy torts found in the common law or statutes. The four invasions of privacy torts are: (1) publication or disclosure of private facts, (2) unreasonable intrusion into a person's seclusion or solitude or his private affairs, (3) publicity that places a person in a false light, and (4) appropriation of a person's name or likeness for one's advantage.[146] The torts can be found in §625 of the Restatement of Torts (the Restatement).[147]

This article focuses only on the tort relating to publicity that place a person in a false light, and on the appropriation of name or likeness tort because these are the US equivalents of the falsification and misappropriation infringements of identity.[148] The misappropriation tort is sometimes called the right-of-publicity tort and has been codified in statute.[149] A person's identity facets are protected under the right of publicity or the right of privacy. The right of publicity arose from the privacy torts. Privacy and publicity are interconnected legal concepts that protect the features of a person's identity.[150] These are two sides of the same coin. On the one hand, privacy describes the degree of seclusion from the public and a right to privacy protects a person's right to control the publication of personal information.[151] On the other hand, publicity describes a person's degree of public exposure and a right to publicity protects their control over the use of their identity features.[152]

5 2 1 False-light tort

The false-light invasion-of-privacy tort is triggered by exposing an individual to false publicity.[153] In other words, publishing facets of a person's identity,

144 See Bratman "Brandeis & Warren's 'The Right to Privacy' and The Birth of the Right to Privacy" 2002 69 *Tennessee Law Review* 623 for a summary of the development of the common-law right of privacy, which is said to be heavily influenced by the seminal article Warren and Brandeis "The Right to Privacy" 1890 4 *Harvard Law Review* 193.

145 Witt and Tani *Torts* 2.

146 Nathan "Let There Be False Light: Resisting the Growing Trend Against an Important Tort" 2002 *Minnesota Law Review* 713; Amin "A Comparative Analysis of California's Rights of Publicity and the United Kingdom's Approach to the Protection of Celebrities: Where Are They Better Protected?" 2010 1 *Case Western Reserve Journal of Law, Technology and the Internet* 100; Meltz 2015 *Fordham Law Review* 3436; Messenger "Rethinking the Right of Publicity in the Context of Social Media" 2018 *Widener Law Review* 260; and Heise "Reclaiming the Right of Publicity in the Internet Age" 2018 *Charleston Law Review* 364.

147 The American Law Institute *The Restatement of the Law, Second, Torts* (1977) https://cyber.harvard.edu/privacy/Privacy_R2d_Torts_Sections.htm (accessed 2021-07-18).

148 Neethling *et al Neethling on Personality Rights* 352. In the Restatement, these are dealt with under §625E and 625C respectively.

149 For example, in California it is recorded in the California Civil Code §3344 and in Oklahoma it is codified in OK ST T 12 §1449.

150 Greer "International Personality Rights and Holographic Portrayals" 2017 27 *Indiana International and Comparative Law Review* 247.

151 *U S Dept of Justice v Reporters Committee for Freedom of Press* 489 U S 749 763 (1989).

152 Sharman 2006 *Rutgers Law Journal* 991.

153 Nathan 2002 *Minnesota Law Review* 715.

and placing them in a false light, attracts liability for the invasion of privacy.[154] Liability under this tort requires proof that the wrongdoer knew of, or had reckless disregard for, the publication's false nature and the impression they created regarding the plaintiff.[155]

It must be noted that this tort does not rely on publishing private facts. Instead, publicity involves communicating false information about a person.[156] The false-light tort is a sufficient remedy for catfishing because a catfish creator not only appropriates a person's image but also falsely portrays them as the victim through a fake social-media profile. In essence, they expose a victim to publicity that portrays them in an inaccurate light. In California and Oklahoma, a person can only find protection under the false-light tort if a person of ordinary sensibilities would regard the impression created as highly offensive.[157]

5 2 2 Misappropriation tort

The misappropriation tort protects a person's interest in having exclusive use of their own identity. A person's privacy is invaded if a facet of their identity has been used without authority for the benefit of the wrongdoer. The statutory right of publicity broadens the interests protected under the misappropriation tort.[158] Although the enactment of publicity statutes contributed to the impression that modern-day publicity is wholly removed from privacy,[159] this view is inaccurate because publicity statutes expand the scope of privacy.[160] The statutory publicity tort and the common-law misappropriation tort protect a person against the unauthorised use of their identity.[161]

A person from California or Oklahoma may succeed in a claim for the invasion of their privacy by misappropriation without needing to prove an

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154 §625E of the *Restatement of the Law, Second, Torts* (1977).

155 The American Law Institute inserted a cautionary note that there was no legal position regarding negligent publication that places a person in a false light.

156 *The Restatement of the Law, Second, Torts* (1977) §625D, Comment (a).

157 *Grogan v Kokh LLC* 1030; *Flores v Von Kleist* 1259; Derzakarian 2017 *Loyola of Los Angeles Law Review* 758.

158 In California, the California Civil Code §3344 entrenches statutory misappropriation. According to this provision, the right of publicity protects a person's name, likeness, voice, signature and image from unauthorised use for advertising on products or merchandise or services and goods. In Oklahoma, the equivalent provision is found in OK ST T 12 §1449 (A), which similarly provides that using a facet of a person's identity to sell, or advertise products, services, merchandise or goods without consent attracts civil liability.

159 Koehler "'Fraley v. Facebook': The Right of Publicity in Online Social Networks" 2013 28 *Berkeley Technology Law Journal* 963 968.

160 Koehler 2013 *Berkeley Technology Law Journal* 971–972. In the case *Brill v Walt Disney Co* 246 P 3d 1099 1102. (Okla. Civ.App.Div. 3, 2010), the Oklahoman court held that, under the common-law publicity claim, only a person's name and likeness was protected against appropriation, whereas the statutory publicity claim provided recourse to people who have had their name, likeness, signature, voice and photographs appropriated for a commercial purpose.

161 Messenger 2018 *Widener Law Review* 261.

intention to advertise.[162] The recognition of mere misappropriation is useful in the case of catfishing because catfishing does not always involve commercial gain. However, a catfish creator may derive another benefit from using the victim's image without consent, and if the victim can prove that benefit to the court, they are likely to succeed in their claim.

6 SOUTH AFRICAN AND US LAW SIMILARITIES AND DIFFERENCES

South African law does not expressly criminalise catfishing or online impersonation. Whether section 8 of the Cybercrimes Act can be construed as applying to catfishing, and can protect a victim who has had their identity features misused, remains to be seen. South African statutes leave victims of catfishing without a civil or criminal remedy, while US victims in California and Oklahoma are able to turn to statutory provisions. Despite the glaring differences in the statutory position, there are similarities in the common-law remedies available to victims in both South Africa and the two US states.

South African common law recognises that using a person's identity to place them in a false light is an infringement of their identity; this is similar to the position in the US where exposing a person to publicity that places them in a false light is an invasion of their privacy. The difference between the South African and US causes of action, however, is that the South African common law only requires that the use of a person's identity must have placed them in a false light. There is no requirement for insult. The US position is similar to the position expressed in *Kidson v SA Associated Newspaper Ltd*,[163] where the court found that using a married nurse's image in an article portraying her as seeking companionship was insulting.[164] However, years later in *Kumalo v Cycle Lab (Pty) Ltd,* the court expressed the view that the impression created by using another person's image without consent did not have to be degrading, humiliating, or insulting to found a valid claim.[165] Merely using the plaintiff's image in an advertisement to generate a false impression was in itself offensive, thus illustrating that portraying a person in a false light was a sufficient cause of action. Therefore, the effect of creating a catfish account with another person's images does not have to be offensive or degrading for the victim to have a claim. It can be concluded that the unauthorised use of their image and association of their image with a fake account online would be sufficient grounds for action.

The two US states also recognise a misappropriation of name or likeness as a cause of action at common law and in statute. The US states have a statutory claim to supplement the common law and which extends the protection afforded by the common-law tort. The common-law tort allows victims to bring a claim even in the absence of a commercial benefit,

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[162] *Fairfield v American Photocopy Equipment Company* 291 P 2d 194 (Cal 1955)*; Bates v Cast* 316 P 3d 246, 253 (Okla Civ App Div 1, 2013); Derzakarian 2017 *Loyola of Los Angeles Law Review* 756–757.

[163] 1957 (3) SA 461 (W).

[164] *Kidson v SA Associated Newspapers Ltd supra* 467G–468A.

[165] *Kumalo v Cycle Lab supra* par 31.

whereas the statutory claim applies only to identified commercial activities. In contrast, South African common law only recognises the infringement of identity by misappropriation for commercial gain, requiring a victim to show that the defendant misappropriated their identity features for commercial advantage. The commercial gain requirement poses a challenge in catfishing because that is not always the intention behind catfishing. In the instances where catfishing is used to defraud other users, then this would be a useful remedy. However, where no commercial gain arose, it would be difficult for a victim to rely on this remedy.

7 THE ADEQUACY OF THE SOUTH AFRICAN RIGHT TO IDENTITY

Although California and Oklahoma protect the facets of a person's identity through common-law privacy laws, both states offer statutory protections in online impersonation provisions. California criminalises online impersonation,[166] and Oklahoma holds a person who impersonates another through social media liable for damages through its Catfishing Liability Act.[167] Unlike the statutory impersonation provisions of the two US states, the South African Cybercrimes Act does not explicitly encompass online impersonation such as catfishing that involves using one facet of a person's identity in connection with fictitious personal information. In other words, the statute, in its current form and in the absence of an interpretation from a court, does not extend protection to the use of a person's images in the creation of fake social media profiles. In this regard, the states of California and Oklahoma protect identity adequately because they have enacted statutory provisions that encompass impersonation such as catfishing online.

The US states of California and Oklahoma also protect facets of identity through the common-law right of privacy or the statutory right to publicity.[168] At common law, two privacy torts apply to catfishing: the false-light tort and the misappropriation tort.[169] These torts are similar to the infringements of the South African right to identity. Victims of catfishing in South Africa have common-law remedies to redress the harm resulting from the interference with their right to identity. The infringement of the right to identity would enable a victim of catfishing to seek damages through the *actio iniuriarum* against the catfish creator for the unauthorised use of their images and the falsification of their identity. Moreover, a victim can seek an interdict against the catfish creator to stop them from using their image in this harmful manner.

The US states acknowledge that sometimes the facets of a person's identity may not be used in connection with a commercial purpose; and that there may be another non-patrimonial benefit derived from impersonating a person online. In the author's opinion, this recognition of mere

166 Cal Penal Code §528.5 (a).

167 OK ST T 12 §1450B.

168 In Oklahoma OK ST T 12 §1449A, in California Cal Civ Code §3344; Skosana *The Right to Privacy and Identity on Social Networking Sites* 89.

169 Heise 2018 *Charleston Law Review* 364; Messenger 2018 *Widener Law Review* 260.

misappropriation is a vital feature in addressing catfishing and vindicating catfishing victims because catfishing is not always driven by commercial benefit. Social media users sometimes perform acts or participate in conduct without justification because no consequences will flow from their actions. Catfishing is an example of behaviour that is frowned upon and committed without cognisance of its implications on the person whose images are used to create the profile.

Although the law does not concern itself with trivialities and people are expected not to be overly sensitive, one would expect that social media users would also act as sensibly and reasonably online as they would offline. Catfishing is a form of impersonation that occurs online. That the impersonation takes place online does not change the fact that it is unacceptable. Moreover, the rules and convictions that a person lives by offline do not cease to exist online. Therefore, if the unauthorised use of a person's image and falsification of their identity harms their dignity and disturbs their right to identity offline, then catfishing would have the same effect despite it occurring online. It has negative implications for a person's personality and can negatively affect their reputation since a catfish's conduct will be attached to them.

8 CONCLUSION

Some parallels can be drawn between the South African right to identity and the US privacy torts and statutory publicity claims.[170] The US states protect identity features under privacy but the rise of publicity rights has expanded the scope of the common-law protection afforded to a person's identity features. The states of California and Oklahoma have civil and criminal remedies for online impersonation and catfishing, which is adequate remedial action given the variety of harms that may result from catfishing. Moreover, the two US states also offer explicit protection against catfishing and online impersonation, which is different from the position in South Africa where there is uncertainty about whether existing statutory enactments can be interpreted to apply to catfishing victims. Moreover, the South African Cybercrimes Act does not protect a person's identity features as defined in the common-law right to identity. There is uncertainty whether this statute can be useful to a person who seeks reparation for the unauthorised use of their image to create a catfish account. Therefore, to remedy an injury to their identity, South African victims of catfishing may seek damages through the common-law *actio iniuriarum*, or seek an interdict against the catfish creator.

[170] *O'Keeffe v Argus Printing and Publishing Co supra* 249B–C; *Universiteit van Pretoria v Tommie Meyer Films (Edms) Bpk* 386H; *Grütter v Lombard supra* par 7.

THE DOMESTIC VIOLENCE ACT 116 OF 1998: OFFENCES, DEFENCES, ECONOMIC ABUSE, IMMINENT HARM AND THE CRIME OF DOMESTIC ABUSE– WHAT IS NEW?*

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SUMMARY

Recent tragedies relating to gender-based violence have drawn attention to the current state of our relevant law. This article focuses on domestic violence – a species of gender-based violence. It assesses the current state of the Domestic Violence Act 116 of 1998; in particular, it focuses on the offences and defences, as well as on the definition of economic abuse and the concept of imminent harm in relation to domestic abuse. The proposals to amend the definition of these concepts have culminated in the passing of the Domestic Violence Amendment Act 14 of 2021. The bulk of the amendments have not commenced. Nevertheless, this article also comments on the impact that these amendments will have on the thesis of this article. It also sheds some light on the proposed stand-alone crime of domestic abuse.

1 INTRODUCTION

The promise of the Domestic Violence Act[1] (DVA) is a South Africa that is free of violence emanating from a private source. It is hoped that this freedom can be achieved through the use of both civil and criminal sanctions. With this in mind, the DVA consists of a combination of civil and criminal sanctions. For instance, the process of obtaining a protection order (the primary sanction) is purely civil.[2] However, the current legal position is

* This article is based on my LLM dissertation on domestic violence – Sibisi *Critically Evaluating the Machinery of the Domestic Violence Act 116 of 1998 for Combating Domestic Violence in South Africa* (LLM dissertation, University of KwaZulu-Natal) 2017. It is also dedicated to my late son, Okuhleliwe Elamigugu Sibisi, who was born on 21 September 2022 and passed away on the same day.

1 116 of 1998.

2 Sibisi "Understanding Certain Provisions of the Domestic Violence Act: A Practitioner's Perspective" 2016 *DR* 22 23.

that breach of a protection order is a criminal act for which the accused may be prosecuted and sentenced to a fine or imprisonment of up to five years, or both such fine and imprisonment in the case of a first offender.[3]

Much has been said about protection orders and the DVA in general; one might add that it appears that so much effort has been invested in the drafting of the DVA that little attention was paid to how the legislation would be implemented.[4] It therefore comes as no surprise that there are implementation gaps in the DVA. Cases of domestic violence continue to be reported, inducing public shock. It should be mentioned that with the necessary training on implementation, cases of police officers who have gone beyond the call of duty have been reported.[5] However, the implementation of the DVA is not the duty of police officers alone.[6] It is submitted that every instance of domestic violence signifies a failure by the State to eradicate domestic violence. Allowing domestic violence to prevail is a breach of the State's constitutional mandate in section 12 of the Constitution[7] to protect citizens from any form of violence emanating from a private source.[8]

Glaring incidents of domestic violence have incited arguments for the creation of a crime of domestic abuse in its own right.[9] This argument is gaining momentum. Legalbrief reported that, as part of the Women's Day commemoration on 9 August 2019, the President of the Republic of South Africa, President Cyril Ramaphosa, delivered a speech in which he announced, among other measures, that the DVA will be strengthened by recognising domestic abuse as a "crime in its own right".[10] He also announced that the definition of domestic violence would be extended to include economic abuse and to provide for a clearer definition of imminent harm.[11] These announcements draw attention to the current state of the DVA, and in particular the offences for which it provides. These

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3 S 17 of the DVA.

4 Parenzee, Artz and Moult *Monitoring the Implementation of the DVA: First Research Report 2000–2001* Based on research conducted by the Consortium on Violence against Women (2001) 22.

5 Smit and Nel "An Evaluation of the Implementation of the Domestic Violence Act: What Is Happening in Practice?" 2002 15(3) *Acta Criminologica* 45 51.

6 The courts are also responsible for implementation of the DVA. Smit and Nel 2002 *Acta Criminologica* 54 point out that the courts do not have enough personnel to manage caseloads. This was in 2002, barely three years after the implementation of the DVA. Recent research indicates that there are still structural issues regarding implementation; Phasha *Exploring Domestic Violence: A Case Study of the Victimisation of Women and Children in Mankweng Policing Area, Limpopo Province, South Africa* (MA dissertation, University of Limpopo) 2021 41.

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

8 S 12(1)(*c*) of the Constitution. See also Ndou "The Powers of the Court in Terms of Section 7(2) of the Domestic Violence Act 116 of 1998: *KS v AM* 2018 (1) SACR 240 (GJ)" 2019 *Obiter* 241.

9 Ncube *Protection Orders in South Africa: The Effectiveness of Implementation and Enforcement for Victims of Gender-Based Violence* (MPhil dissertation, University of Cape Town) 2021 49.

10 Saxby "Domestic Violence Act to be Strengthened" (2019-08-10) https://legalbrief.co.za/policy-watch/legislation-domestic-violence-act-to-be-strengthened/ (accessed 2019-08-14).

11 *Ibid*.

announcements also raise questions about the adequacy of the recognition that the DVA gives to economic abuse as an act of domestic violence, and the definition of imminent harm.

In 2021, the DVA was significantly amended by the Domestic Violence Amendment Act[12] (Amendment Act). However, save for section 19A, the provisions of the Amendment Act will come into operation on a date to be proclaimed by the President in the *Government Gazette*.[13] Nevertheless, the following should be noted: section 26 of the Amendment Act inserts section 19A into the DVA. The latter section came into operation on 28 January 2022, the date on which the Act was published in the *Government Gazette*.[14] Section 19A deals with the issue of directives by the Director-General for Justice on the implementation of the DVA.[15]

This article may be seen as a follow-up to the President's speech alluded to above. It opens by discussing the offences currently provided for by the DVA. This is done with reference to the DVA, case law and existing research. It also considers possible defences to a charge in terms of the DVA. The provisions of the Amendment Act are also discussed insofar as they deal with offences. This is followed by a discussion on the current definition of economic abuse and imminent harm. The Amendment Act is also discussed in this regard. Finally, the article considers the viability of domestic violence as a stand-alone crime and draws conclusions.

2 THE OFFENCES CREATED BY THE DVA

2 1 General

Section 17 of the DVA deals with offences. It currently provides for four offences: (i) contravention of any prohibition, condition, obligation or order imposed in terms of a protection order;[16] (ii) publishing information that may, directly or indirectly, reveal the identity of any party to the proceedings;[17] (iii) publishing of other prohibited content in disregard of a court order;[18] and (iv) wilfully making a false statement in a material respect.[19]

The DVA also indirectly criminalises a failure to report child abuse and endorses the conviction of a husband for the rape of his wife. Sections 4 and 5 of the Prevention of Family Violence Act[20] were not repealed by section 21(1) of DVA. Section 4 of the Prevention of Family Violence Act criminalises the failure of certain persons to report knowledge of child abuse. It should also be noted that section 110(1) of the Children's Act[21] makes it mandatory for certain people to report child neglect or abuse to a designated

12 14 of 2021.
13 S 28(1) of the Amendment Act.
14 S 28(2) of the Amendment Act.
15 S 19A must be read with s 18A and 18B of the DVA. However, the latter await proclamation.
16 S 17(*a*) of the DVA.
17 S 17(*b*) of the DVA.
18 S 17(*c*) of the DVA.
19 S 17(*d*) of the DVA.
20 133 of 1993.
21 38 of 2005.

child protection officer, social worker or police officer,[22] although it is not clear whether failure to heed the Children's Act in this regard is an offence.[23] It is submitted that contravention of these provisions should be criminalised by the Children's Act. Section 5 of the Prevention of Family Violence Act provides for the conviction of a husband for the rape of his wife. Clearly, sections 4 and 5 are indirectly preserved by the DVA.

The offences that relate to publishing information that may, directly or indirectly, reveal the identity of a party to the proceedings, and to publishing any other prohibited content in disregard of a court order, are already provided for elsewhere. They are not unique to the DVA and are not discussed below. However, the offence of wilfully making a false statement in a material respect is discussed. It should be noted that although conduct of this nature may be prosecuted as perjury,[24] or in the manner provided for in section 9 of the Justices of the Peace and Commissioners of Oath Act,[25] false statements are rife in domestic violence matters. For this reason, this offence is discussed alongside the crime of contravening a protection order. It is worth adding that section 9 of the Justices of the Peace and Commissioners of Oath Act criminalises knowingly making or confirming a false statement before a commissioner of oaths, or making a false affirmation. The sentence is the same as for perjury.[26]

2 2 Contravening any prohibition, condition, obligation or order imposed by a protection order

This offence is commonly referred to as "breach of a protection order" or "violation of a protection order".[27] It is the most common of all offences provided for in the DVA. A protection order must prohibit the respondent from engaging in an act of domestic violence. As is seen below, when issuing a protection order, the court must specify the acts of domestic violence that the accused may not commit against the complainant. It is submitted that a prohibition, condition, obligation or order in a protection

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22 The duty to report rests on any correctional official, dentist, homeopath, immigration official, labour inspector, legal practitioner, medical practitioner, midwife, minister of religion, nurse, occupational therapist, physiotherapist, psychologist, religious leader, social service professional, social worker, speech therapist, teacher, traditional health practitioner, traditional leader or member of staff or volunteer worker at a partial care facility, drop-in centre or child and youth care centre, who on reasonable grounds concludes that a child has been abused in a manner causing physical injury, sexually abused or deliberately neglected, to report that conclusion in the prescribed form to a designated child protection organisation, the provincial department of social development or a police official.

23 However, s 305(5) of the Children's Act provides that any owner, lessor, manager, tenant or occupier of premises on which the commercial sexual exploitation of a child has occurred, commits an offence if he or she does not report the exploitation to the police. It is submitted that it must be shown that the person either knew or ought to have known that exploitation was taking place. In the absence of such knowledge, no offence is committed.

24 Burchell *Principles of Criminal Law* 5ed (2016) 876; Kemp, Walker, Palmer, Baqwa, Gevers, Leslie and Steynberg *Criminal Law in South Africa* 3ed (2018) 530.

25 16 of 1963. See also Burchell *Principles of Criminal Law* 881; Kemp *et al Criminal Law* 531.

26 S 9 of the Justices of the Peace and Commissioners of Oath Act.

27 S 17(*a*) of the DVA.

order must be stated in such a way that there is no doubt regarding what is expected of the respondent. Any ambiguity in the order must favour the respondent. A vague protection order contravenes the principle of legality. The principle of legality requires that laws must be clear and not vague.[28] Vagueness is also a factor in an accused person's right to a fair trial.[29]

2 2 1 The elements of the offence

(i) A protection order

There must be a valid protection order or an interim protection order before there can be a breach of a protection order.[30] A final protection order, once issued, is presumed to be valid unless proved otherwise.[31] It is open to the respondent to challenge the validity of a protection order by proving that the process of obtaining it was flawed. Proper process requires that the respondent must have been served with a notice of the application for a protection order and advised of the right to oppose the application on the return date.[32] If a court issues an interim order, a copy thereof must be served on the respondent.[33] An interim protection order, if not served, is of no force and effect.[34] The DVA also requires that the accused must have been served with sufficient information in order to oppose the application. The information envisaged includes affidavits deposed to by the complainant.[35]

The person who serves a protection order must explain the nature of the documents and their consequences. In *S v Mazomba*,[36] the court held that no conviction could follow unless it was shown that the person serving the document had explained the contents of the document to the accused.[37] Failure to comply with these procedural requirements renders a protection order vulnerable to being struck down. During a trial for contravention of a protection order, the original protection order and a return of service must be produced by the prosecution as evidence in court.[38] However, if the State cannot produce the protection order, but the accused admits receiving it, the

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28 Lubaale "Covid-19 Related Criminalization in South Africa" 2020 *SACJ* 684 690.

29 Lubaale 2020 *SACJ* 690.

30 *S v Zondani* 2005 (2) SACR 304 (Ck).

31 *Seria v Minister of Safety and Security* 2005 (5) SA 130 (C) 144D–E, in which the plaintiff's wife had deceived the plaintiff into thinking that they had reconciled while she obtained a final order. This deception was shown to be the reason that the plaintiff did not oppose the application despite being aware of the return date. On the return date, the wife asked the plaintiff to wait in the car while she went inside the court to "withdraw" the application; inside the court, she obtained a final protection order citing the plaintiff's non-attendance.

32 S 5(5) of the DVA requires that the return date must not be less than 10 days after the date of service of an interim order or such other documents as envisaged in s 5(4) of the DVA.

33 S 5(3)(*a*) of the DVA.

34 S 5(6) of the DVA.

35 S 5(3) and (4) of the DVA.

36 *S v Mazomba* [2009] ZAECBHC 1.

37 *S v Mazomba supra* par 9. See also *Todt v Ipser* 1993 (3) SA 577 (A) 589 B–C, where the court noted that judgments are void where there has been no proper service.

38 *Brandt v S* [2006] 4 All SA 136 (NC) 143.

accused may still be convicted for contravening the order. In *S v Bangani*,[39] the State could not produce the original protection order; nevertheless, the court was satisfied that the protection order existed based on the accused's own admission.[40]

Since an interim protection order is valid until the return date, the respondent cannot (under the interim protection order) be convicted for conduct that was committed after the return date. Unless it is confirmed, the interim protection order falls away on the return date. The principle is that the respondent cannot breach an order that has lapsed. In line with the principle of legality, the accused cannot be convicted of conduct that was not a crime at the time of conviction.[41] Even if a new protection order is subsequently obtained, the principle of legality determines that criminal laws should not apply retrospectively.[42]

(ii) Breach or contravention

The second requirement to prove the crime is that the respondent must have contravened a prohibition, condition, obligation or order in the protection order. The respondent is in breach of a protection order if they engage in conduct that is prohibited by the order or fail to conduct themselves in a manner stipulated by a protection order.[43] This is in line with the requirement that a protection order must state what is expected of the respondent. The issuing court must use language such that the respondent understands what is expected of them. Of course, some conduct may easily be inferred without it having to be spelled out.

In *S v Sehume*,[44] the protection order ordered the accused not to "assault, threaten, insult and abuse the applicant in any manner"[45] However, among other things, the accused was convicted of "breaking 2 x window panes, the property of Merriam Sehume [the complainant]".[46] On review, the court held that the conviction for breach of a protection order was incorrect because the order had not interdicted damage to property. In the court's view, this conviction would have been correct had one of the conditions been "not to commit any act of domestic violence".[47] It is submitted that the accused's conduct could not be inferred as being included in the prohibitions in the protection order. However, nothing prevented the prosecution from prosecuting the accused for malicious damage to property.

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39 *S v Bangani* (E) (unreported) 17-10-2007 Case no 255/07.

40 This was confirmed in *S v Ben* (ECG) (unreported) [5 June 2018] Case no CA&R 140/2018 and *S v Ndike* (CA/R 244/2018) [2018] ZAECGHC 103 (25 September 2018). In *Ndike supra* par 3, the court stated: "the accused knewall along what he was charged with. He pleaded guilty to that charge".

41 Lubaale 2020 *SACJ* 690.

42 *Ibid*.

43 Sibisi *Critically Evaluating the Machinery of the Domestic Violence Act* 47.

44 *S v Sehume* (NWHC) (unreported) 01-03-2001 Case no 15/2001.

45 *Sehume supra* par 25.

46 *Ibid.*

47 *Ibid.*

(iii) Unlawfulness

It goes without saying that the conduct of the respondent must be unlawful in order for it to constitute a crime. Breach of a protection order is *prima facie* unlawful. It must be borne in mind that only conduct prohibited by a protection order is unlawful. However, if a protection order does not prohibit conduct, unless such conduct can be inferred from the wording of the order, it will not be unlawful for the purposes of a conviction for breach of a protection order.

(iv) *Mens rea*

Mens rea or culpability in the form of intention must be proved with the accompanying knowledge of unlawfulness.[48] The accused must know that his conduct is wrongful, failing which, there can be no conviction. The accused must have known about the existence and contents of the protection order and contravened it anyway. Only then can it be said that the accused acted intentionally or with the requisite *mens rea*. In *Mazomba*, the court illustrated the position as follows:

> "Since one of the elements that would need to be proved by the state to secure a conviction for such contravention is intent on the part of the accused person, it would be incumbent upon the State to prove that the accused person had intentionally violated the provisions of the protection order after it had been duly and properly served on him and he had been properly advised of, or had become aware of the provisions thereof. Indeed, the certificate in the pro forma return of service of process in terms of Domestic Violence Act no.116 of 1998 … provides that the functionary serving the order must certify that he/she has handed the original of the notice to the respondent and that he/she had explained the contents thereof to the third respondent."[49]

Strict or absolute liability does not apply with respect to the DVA. In terms of our law, strict liability will only apply if the legislature specifically provides so.[50] There is nothing to this effect in the DVA.

2 2 2 The defences

The defences available to a person accused of breaching a protection order are numerous. They range from challenging the validity of the order itself, on substantive or procedural grounds, to defences that exclude any of the above elements. In *S v Molapo*,[51] the erstwhile Orange Free State High Court held that the DVA does not deny defences that are good in law. In this case, the court upheld a claim of private defence for an accused who had sworn at his wife (in breach of a protection order). His wife had called him an "*inkwenkwe*" or "boy". The court held that the complainant had impaired the accused's dignity by calling him a boy and that the accused was justified in

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48 Kemp *et al Criminal Law in South Africa* 216.
49 *S v Mazomba supra* par 9.
50 *S v De Blom* 1977 (3) SA 513 (A).
51 *S v Molapo* (O) (unreported) 10-08-2006 Case no 213/2006.

defending his dignity by swearing at her.[52] It further observed that the "complainant was not kind and considerate, she was insulting and demeaning … Physical wounds heal but those inflicted by words often last forever".[53]

The fact that the complainant obtained a final protection order by blindsiding the accused may also provide the latter with a valid defence. In *Seria v Minister of Safety and Security*,[54] the parties were experiencing marital disputes. The complainant (wife) sought and obtained an interim protection order. Before the return date, the parties "reconciled". The parties agreed that the complainant would withdraw the application on the return date. On the return date, the parties drove to court together, and upon arrival at the court, the complainant asked the respondent to wait in the car while she went inside the court to "withdraw" the application. Inside the court, the complainant obtained a final protection order in the respondent's absence. The respondent learned of the final protection order for the first time when he was arrested. He raised the blindsiding as a defence. The court held that he was entitled to open proceedings afresh and defend the matter.[55]

This discussion is not complete without considering the impact of intoxication on prosecutions for breach of a protection order. Intoxication may impair a person's cognitive and conative functions.[56] Intoxication also increases the propensity to contravene law, peace and order.[57] In *S v Chretien*,[58] the court held that intoxication might provide a complete defence in certain circumstances. If the accused was "dead drunk", to the extent that he lacked the ability to act consciously, his conduct will not amount to unlawful conduct in the legal sense.[59] If the accused is so intoxicated that he cannot appreciate the wrongfulness of his conduct and act in accordance with the appreciation, he lacks *mens rea*.[60] Finally, if the accused is sufficiently intoxicated that he fails to foresee the possible consequences of his intoxication, he lacks the intention to commit a crime. He cannot be convicted for an offence that requires intention. However, he may be convicted for offences that require negligence.[61]

With the above discussion in mind, the Criminal Law Amendment Act[62] is apposite. This Act was passed after the decision in *Chretien*. Section 1(1) provides that if a person knowingly takes an intoxicating substance that impairs his or her faculties to appreciate wrongful conduct and to act in accordance with that appreciation, and commits a crime for which he or she cannot be convicted owing to impaired faculties, that person shall be guilty of

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52 *S v Molapo supra* par 11.
53 *S v Molapo supra* par 13.
54 *Supra* 144D–E.
55 *Seria v Minister of Safety and Security supra* 137.
56 Kemp *et al Criminal Law in South Africa* 197.
57 Kemp *et al Criminal Law in South Africa* 198.
58 1981 (1) SA 1097 (A).
59 Kemp *et al Criminal Law in South Africa* 200.
60 *Ibid*.
61 *Ibid*.
62 1 of 1988.

an offence. Section 1(1) creates an offence in its own right.[63] This means that if a respondent contravenes a protection order in circumstances where they are so intoxicated that they are not criminally liable in light of *Chretien*, they may still be convicted of contravening section 1(1) of the Act. The sentence will be the same as that for a breach of a protection order.[64] Snyman and Hoctor argue that the creation of an offence in section 1(1) was not necessary because, on a proper reading, *Chretien* does criminalise knowingly taking an intoxicating substance that impairs one's faculties to appreciate the wrongfulness of one's conduct, and to act in accordance with that appreciation, and then committing a crime.[65] These authors also argue that section 1(1) has not yielded much in practice.[66]

2 3 Wilfully making a false statement in a material respect

Section 17(*d*) of the DVA criminalises the wilful making of a false statement in a material respect. There are three instances where a victim of domestic violence has to make a statement. The first is in the application for a protection order;[67] the second is when applying for a subsequent warrant of arrest;[68] and the third is when reporting a breach of a protection order.[69] However, section 17(*d*) can only be contravened when a complainant wilfully makes a false statement in a material respect when reporting a breach of a protection order. This is because section 17(*d*) only criminalises the wilful making of a false statement in a material respect in an affidavit referred to in section 8(4)(*a*) – an affidavit alleging breach of a protection order.

It is submitted that the rationale behind only criminalising the making of a false statement made in terms of section 8(4)(*a*) is because such statement initiates the criminal aspects of the DVA. In other words, it brings drastic consequences such as an arrest of the accused. It is submitted that the reason for not criminalising the wilful making of a false statement in the other instances is because those instances only have civil consequences such as the obtaining of a protection order. Furthermore, the respondent does get the opportunity to respond to the allegations against them.

The outcome of limiting the scope of the offence in section 17(*d*) to statements made in terms of section 8(4)(*a*) is that only a complainant who wilfully makes a false statement in a material respect when reporting a breach may be convicted of this offence. The exclusion of statements made when applying for a protection order from the scope of section 17(*d*) must be commended because doing otherwise might have deterred victims from applying for protection orders.[70]

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63 Kemp *et al Criminal Law in South Africa* 201.
64 Hoctor *Snyman's Criminal Law* 7ed (2020) 199.
65 *Ibid*.
66 *Ibid*.
67 S 4(1) of the DVA read with regulation 4 of the Domestic Violence Regulations.
68 S 8(3) of the DVA.
69 S 8(4)(*a*) of the DVA.
70 Unfortunately, the opposite is also true. People do make false allegations when applying for protection orders just because they can and there are no consequences for such conduct.

2 3 1 The elements of the offence

(i) A false statement

The complainant must have wilfully made a statement in terms of section 8(4)(*a*) of the DVA. The statement in question must make unfounded allegations against the accused person or the respondent. While a false statement made when applying for a protection order does not suffice for the purposes of a conviction in terms of section 17(*d*), it may nevertheless lead to civil liability in delict for *contumelia*, discomfort and defamation of character.[71] In *Young v McDonald*,[72] the court held:

> "The very nature of a Domestic Violence Act application brings about the implication of unacceptable and anti-social behaviour by the respondent against the complainant. Rather like defamatory statements, the institution of such proceedings intrinsically impacts injuriously on a respondent's dignity in the broad sense. Any respondent made subject to a protection order in terms of the Act is also made subject to a warrant of arrest, for example. The applicant must have appreciated this as much, and yet, she proceeded recklessly as to the consequences, actuated, as I have pointed out, by improper motives. In my judgment the magistrate correctly found that the alleged *injuria* has been established."[73]

(ii) Wilfulness

The false statement must have been made wilfully. This element relates to the requirement of *mens rea* in the form of intention on the part of the complainant. The complainant must make a false statement with the intention to get the respondent arrested or prosecuted.[74] It has been stated above that a false statement made with the intention of obtaining a protection order is excluded from the ambit of the offence of wilfully making a false statement in a material respect as envisaged in section 17(*d*) of the DVA.

The complainant must have knowledge of the unlawfulness of making a false statement. Without this inherent requirement of *mens rea*, there could never be a conviction. It is difficult to imagine a scenario where a complainant would wilfully make a false statement without knowing that such conduct was unlawful. It is submitted that negligence would not suffice for the purposes of section 17(*d*).

In recent years, the number of people who apply for and obtain protection orders on unfounded allegations is increasing. Respondents who do not appear in court to oppose applications further aid this trend.

71 Sibisi *Critically Evaluating the Machinery of the Domestic Violence Act* 41.

72 *Young v McDonald* WC (unreported) 09-11-2020 Case no A213/2010.

73 *Young v McDonald supra* par 17.

74 Sibisi (*Critically Evaluating the Machinery of the Domestic Violence Act* 52) submits that some complainants willfully make false statements just to get the respondent arrested so that he spends the weekend in custody.

(iii) Materiality

The statement must be false in a material respect. This entails that the statement and the allegations contained therein must have the potential to cause an arrest and subsequent prosecution. It is submitted that if a complainant makes a statement that they were severely assaulted by the respondent, whereas, in fact, they fell and injured themselves, their statement will meet the requirement of materiality because it has the potential to cause the arrest of the respondent and subsequent prosecution.[75]

2 3 2 Defences

There appear to be two defences to the offence of wilfully making a false statement in a material respect. The first is an objective one where the complainant sticks to their version and confirms it as true. This defence is objective because its viability depends on a factual enquiry and the rules of evidence. The second defence is subjective. Here, the complainant concedes that the statement is false and strongly contends that at the time of making the statement they genuinely believed it to be true in all material respects. However, it is submitted that the deponent may still be convicted if the prosecution can prove that the latter was negligent in making the false statement.

2 4 The Domestic Violence Amendment Act[76]

The Amendment Act, once proclaimed, will have an impact on the offences in the DVA. The offences discussed above are retained. The Act makes significant improvements to the sentencing of offenders who contravene protection orders. A first offender may be sentenced to a fine or imprisonment not exceeding five years or both.[77] A second or subsequent offence may result in a sentence of a fine or imprisonment not exceeding 10 years or both.[78] In convictions of wilfully making a false statement in a material respect, an offender may be sentenced to a fine or imprisonment not exceeding two years or both.[79] A fine or imprisonment not exceeding four years is prescribed for a second or subsequent offence.[80] In addition, the Amendment Act criminalises certain conduct by third parties. Failure to attend court and remain in attendance until excused by the court when subpoenaed is an offence for which a third party may be sentenced to a fine or imprisonment not exceeding six months or both.[81]

It is submitted that this latter offence is controversial. Some witnesses may be employed. Court proceedings sit during work hours. A witness may

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75 *Ibid*.
76 14 of 2021.
77 S 17(1)(i)(*aa*) of the DVA as amended.by Act 14 of 2021
78 S 17(1)(i)(*bb*) of the DVA as amended by Act 14 of 2021.
79 S 17(1)(ii)(*aa*) of the DVA as amended by Act 14 of 2021.
80 S 17(1)(ii)(*bb*) of the DVA as amended by Act 14 of 2021.
81 S 17(2) of the DVA as amended by Act 14 of 2021.

have to miss work in order to attend court. The witness is thus presented with two evils: they either risk losing their jobs or going to prison. Witness fees may not be sufficient to cover the costs of travelling to court, or to make up for lost wages and food for the day. The legislature should look into these issues.

3 ECONOMIC ABUSE AND IMMINENT HARM

As stated above, part of the President's announcement on Women's Day 2019 was the planned inclusion of "economic abuse" in the definition of "domestic violence". He also announced the intention to clarify the meaning of "imminent harm". This part of the article turns to the current provisions of the DVA dealing with economic abuse and imminent harm.

3 1 Economic abuse

Section 1(ix) of the DVA defines "economic abuse" as

> "(a) the unreasonable deprivation of economic or financial resources to which a complainant is entitled under law or which the complainant requires out of necessity, including household necessities for the complainant, and mortgage bond repayments or payment of rent in respect of shared residence;
> (b) the unreasonable disposal of household effect or other property in which the complainant has an interest."

In essence, economic abuse is an act of domestic violence for which the complainant may obtain a protection order. Economic abuse includes failing to make regular payments for maintenance, mortgage or rent as per a court order. It also includes failing to pay emergency monetary relief (EMR) to the complainant as ordered by the court issuing a protection order. An order for EMR must be made simultaneously with a protection order. EMR includes relief for loss of earnings,[82] medical and dental expenses,[83] relocation and accommodation expenses[84] or household necessities.[85] It is submitted that there must be a causal connection between an act of domestic violence and the need for EMR. In other words, the need must have been caused by the respondent's abusive behaviour toward the complainant.[86]

The inclusion of economic abuse as an act of domestic violence is commended. The possibility of loss of economic support is one of the leading reasons that victims do not report domestic violence. It is submitted that the possibility of losing financial support is devastating for victims who otherwise have no legal basis for claiming financial support from their abusers – for example, those who are cohabiting.[87] Such victims remain

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82 S 1(x)(*a*) of the DVA.
83 S 1(x)(*b*) of the DVA.
84 S 1(x)(*c*) of the DVA.
85 S 1(x)(*d*) of the DVA.
86 S 1(x) of the DVA. See also Sibisi *Critically Evaluating the Machinery of the Domestic Violence Act* 102.
87 Sibisi *Critically Evaluating the Machinery of the Domestic Violence Act* 100; see Heaton and Kruger *South African Family Law* 4ed (2016) 261; see also Skelton and Carnelley (eds)

passive and endure abuse in return for financial support. The DVA makes it possible for victims of domestic abuse to ask for financial relief as well as EMR; victims may also claim monetary relief for their dependent children.

While the DVA does provide relief from economic abuse, the award of relief is open to abuse. Unscrupulous "victims" may use the relief to bypass the process of obtaining maintenance in a maintenance court.[88] With this in mind, it must be noted that the DVA provides that a court may not refuse to issue a protection order, or impose any terms in the order, only because another legal remedy is available.[89] However, if the court is of the opinion that it is in the interests of justice that the matter be dealt with in terms of any other relevant law, such as the Maintenance Act,[90] it must make an order for interim relief in order to afford the victim sufficient opportunity to seek appropriate relief in the appropriate venue.[91]

Various reservations have been expressed about the provisions relating to economic abuse and EMR. As shown above, some see it as a substitute for maintenance.[92] These provisions are open to abuse by unscrupulous complainants. The DVA does not place an upper limit on the period for which EMR may be obtained; this is left to the discretion of the presiding officer.[93] There is also the long-standing question of who should see to the implementation of EMR. Is it the responsibilitiy of police officers, maintenance officers, maintenance investigators, sheriffs or the department of justice? Parenzee, Artz and Moult[94] bring into question the enforceability of these orders, arguing that one cannot expect police officers to monitor compliance.

The Amendment Act will amend the definition of "economic abuse". The word "reasonable" in the definition of "economic abuse" will be discarded. Economic abuse will include deprivation of financial resources for education expenses to which the complainant is entitled.[95] Economic abuse will also include the disposal of household property in which the complainant has an

Family Law in South Africa (2010) 210–211 where the authors note that the legal position with respect to the duty of support for cohabitants is unclear. Prior to the Civil Union Act 17 of 2006, courts applied different approaches, depending on whether the cohabitants were same sex or opposite sex. In *Langemaat v Minister of Safety and Security* 1998 (3) SA 312 (T), the court found that a duty of support did exist between same-sex couple. However, in the absence of an agreement, courts have not been inclined to make a similar finding with respect to opposite-sex cohabitants. This distinction, which is clearly discriminatory, was influenced by the facts that prior to the Civil Union Act, same-sex cohabitants did not have the option to legalise their union, whereas this option was available to opposite-sex cohabitants who simply elected not to marry. It is submitted that since the promulgation of the Civil Union Act, the discrimination on the grounds of gender can no longer be justified.

88 Sibisi *Critically Evaluating the Machinery of the Domestic Violence Act* 102.

89 S 7(7)(*a*) of the DVA.

90 99 of 1998.

91 S 7(7)(*b*) of the DVA.

92 Parenzee *et al Monitoring the Implementation of the DVA* 27.

93 S 7(7)(*b*) of the DVA.

94 *Monitoring the Implementation of the DVA* 68.

95 Par (*a*) of the definition of "economic abuse" in s 1 of the DVA as amended by Act 14 of 2021.

interest without the latter's consent.[96] It is submitted that in including the deprivation of financial resources for education expenses, the legislature may have had parental responsibilities and rights in mind. It is also not clear why the word "reasonable" was removed from the definition of economic abuse. A respondent may have a valid reason for not providing financially. Courts will probably interpret this provision as if this word is still part of the definition.

The Amendment Act will also extend the categories for which EMR may be awarded.[97] The Act has not addressed some of the concerns discussed above regarding the application and implementation of economic abuse and EMR provisions. For instance, the court could have clarified the maximum period for which the complainant may claim EMR. EMR should not remain in operation forever. To this end, regard must be had to Namibia, where similar relief is valid for six months. Section 15(*e*) of the Namibian Combating of Domestic Violence Act[98] provides that terms relating to maintenance are valid for any period set by the court not exceeding six months. It is submitted that reference to maintenance may be construed as EMR. Further, although, like South Africa, Namibian courts have a discretion under this provision, this discretion is limited to six months.[99]

3 2 Imminent harm

The concept of imminent harm is not defined in section 1 of the DVA. However, it does appear in section 8(4)(*b*). This provision deals with the execution of a warrant of arrest. It provides that if it appears to a police officer that there are reasonable grounds to suspect that the complainant will suffer imminent harm owing to breach by the respondent, the latter must be arrested forthwith. In determining whether the victim will suffer imminent harm, the police officer must take into account

> "(*a*) the risk to the safety, health or wellbeing of the complainant;[100]
> (*b*) the seriousness of the conduct comprising an alleged breach of the protection order[101] and
> (*c*) the length of time since the alleged breach occurred."[102]

It is submitted that imminent harm retains its ordinary meaning. In *Kruger v Minister of Police*,[103] the court held that imminent harm is "the danger of harm of a certain degree of immediacy … that is … impending, threateningly ready to overtake or coming on shortly".[104] In *Seria v Minister of Safety and Security*, the court observed:

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96 Par (*b*) of the definition of "economic abuse" in s 1 of the DVA as amended by Act 14 of 2021.
97 Definition of "emergency monetary relief" in s 1 of the DVA as amended by Act 14 of 2021.
98 4 of 2003.
99 Sibisi *Critically Evaluating the Machinery of the Domestic Violence Act* 107–108.
100 S 8(5)(*a*) of the DVA.
101 S 8(5)(*b*) of the DVA.
102 S 8(5)(*c*) of the DVA.
103 2016 (7K6) QOD 223 (GNP).
104 *Kruger v Minister of Police supra* par 9.

> "If something is possible or even likely it is not true to say that it is 'imminent', which word connotes an event which is both certain and is about to occur. 'Imminent peril' is described in West's Legal Thesaurus Dictionary as 'such position of danger to the plaintiff that if existing circumstances remain unchanged injury to the plaintiff is reasonably certain'... It is safe to say therefore that 'imminent harm' is harm, which is about to happen, if not certain to happen."[105]

It is submitted that the meaning of "imminent harm" is clear. When the President announced in 2019 that the legislature would clarify the meaning of "imminent harm", one speculated that perhaps the concept would be defined in section 1 of the DVA, or a different definition assigned to it in the context of domestic violence. Even the latter speculation is problematic; it is very difficult to think of a definition of "imminent harm" outside of its ordinary meaning as illustrated above. Anything outside the ordinary meaning might lead to the fallacious assumption that every form of breach of a protection order is ground for an arrest.[106]

The Amendment Act has not defined imminent harm. Instead, all references to imminent harm in the DVA will be removed. Does this imply that the police have been given a green light to treat every case of domestic violence as an emergency for which they may arrest? Steyn[107] submits that removal will now make it possible for police to arrest offenders in cases that do not involve physical violence. Steyn further submits that emotional harm and verbal abuse can be indicators of dormant but approaching imminent harm. Whatever the legislature intended, what is clear is that this part of the amendment is a recipe for civil litigation, unlawful arrest and police brutality.

4 DOMESTIC ABUSE AS A CRIME IN ITS OWN RITES

Like many other jurisdictions around the world, domestic violence was not criminalised in South Africa until the passing of the Prevention of Family Violence Act. Prior to this, a victim of domestic violence had to rely on the protection available under the common law. Arguably, as advocated by some authors, domestic violence is still not criminalised, as there is no crime of "domestic violence" or "domestic abuse".[108] What is criminalised is the commission of the various acts in contravention of a protection order. These acts are criminalised only once they are prohibited by way of a protection order. If an act is envisaged in the DVA, but not prohibited in a protection order, then arguably, unless such an act is also a crime in terms of the common law, the respondent has not committed any offence.[109]

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105 *Seria v Minister of Safety and Security supra* 146A–C.

106 This was the position under s 3 of the Prevention of Family Violence Act. This section provided for the arrest following a breach of an interdict. The type of breach was not important for the purposes of an arrest.

107 Steyn *The Essential Need for Empathy: A Study Evaluating the Legislative Provisions Aimed at Protecting Domestic Violence Victims Against Secondary Victimization by the Police* (LLM dissertation, Stellenbosch University) 2021 26.

108 Ncube *Protection Orders in South Africa* 49.

109 *Ibid*.

There is growing argument for a stand-alone crime of domestic violence.[110] This argument is not concrete. It loses sight of the fact that the concept of domestic violence does not refer to a specific act.[111] Instead, it is a grouping of various acts that may be defined as domestic violence in terms of section 1 of the DVA.[112] The argument also fails to address the problems that will be encountered in trying to identify the definitional elements of "domestic violence".[113] This difficulty emanates solely from the fact that the concept represents a group of divergent acts, some involving physical violence and others involving emotional violence. Therefore, if one accepts that domestic violence is not a single act but a series of acts under the umbrella of domestic violence, it should be easy to accept that domestic violence is in a way criminalised in South Africa.

The argument for a stand-alone offence of domestic abuse should not be jettisoned yet. Perhaps it is possible to compress the various criminal acts that comprise acts of domestic violence and label them as "domestic abuse". In that case, if a person is convicted for conduct that is prohibited in a protection order, that person may be convicted of domestic abuse. All that the State has to prove is that the person committed the prohibited conduct. For example: X and Y are in a relationship. X is very abusive towards Y, and the latter obtains a protection order against X. The protection order prevents X from assaulting, swearing or stalking Y or committing any other criminal act against Y, her relatives or her property. Should X assault Y, the former may be convicted of domestic abuse. The same should result if X is convicted of swearing at Y.

So that the record of the accused is not vague, it should also reflect the conduct in respect of which the accused was convicted – for example, "domestic abuse – rape", "domestic abuse – assault" or "domestic abuse – stalking". In this way, those dealing with an accused's criminal record are able to determine the conduct underlying a conviction and to make an informed decision with respect to issues such as the accused's access to children.

5 CONCLUSION

This article has critically discussed the offences currently provided for by the DVA. It has provided original input on what these offences entail in practice. With regard to the President's announcement in 2019, it has also discussed the provisions of the Amendment Act. It has shown that the Amendment Act has done very little to meet the expectations created by the President's announcement. For instance, little has been done to define economic abuse. Equally, the legislature has failed to provide the much-needed clarity

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[110] Parenzee *et al Monitoring the Implementation of the DVA* 5 and 11. See also Furusa and Limberg "Domestic Violence Act: Does It Protect? A Review of Literature Surrounding the South African Domestic Violence Act Focusing on the Socio-Economic and Legal Consequences of the Legislation" (July 2015) www.knowledgeco-op.uct.ac.za (accessed 2016-02) 8.

[111] Ncube *Protection Orders in South Africa* 49.

[112] See *KS v AM* 2018 (1) SACR 240 (GJ) par 18, where the court refers to a "pattern of conduct".

[113] Sibisi *Critically Evaluating the Machinery of the Domestic Violence Act* 128.

regarding EMR. The legislature has also removed all references to imminent harm. This move will create uncertainties and no doubt be a recipe for civil litigation for unlawful arrests and police brutality. The argument for a stand-alone crime of domestic violence has also been considered. While a crime of domestic violence is not practically viable, the argument in favour of a stand-alone crime may assist the criminal justice system in keeping accurate records when a person is convicted for contravening a protection order.

A CRITICAL APPRAISAL OF THE PRINCIPLES RELATING TO MISTAKE AND MISREPRESENTATION AS FACTORS AFFECTING CONSENSUS IN CONTRACTUAL AGREEMENTS IN THE NAMIBIAN CONTEXT: DISCUSSION THROUGH THE USE OF EXAMPLES

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SUMMARY

This article suggests that when those engaging in commercial undertakings have a proper understanding of the principles of the law of contract, particularly, the law pertaining to consensus, they will limit the risks of engaging in conduct that will cause them financial loss. The definitions of mistake and misrepresentation (being factors affecting consensus) need to be amplified to avoid existing confusion between the two terms. Misrepresentation and mistake may lead to different respective outcomes and possible remedies, thus necessitating a proper distinction between the two terms. In this light, the article explores and proposes similarities and differences between mistake and misrepresentation. The article further emphasises the fact that misrepresentation involves some form of incorrect representation of facts, whereas in the case of mistake, there is essentially no incorrect representation. Mistake can be said to involve misapprehension of given information, although such information may not be incorrect. It is submitted that the courts should go further than merely looking at the black-and-white before them; they must also pay attention to the conduct of the parties, the intention of the parties and the resulting consequences.

1 INTRODUCTION

Commercial undertakings have been part and parcel of our daily lives for millenia. Men and women have been buying and selling items – including bartering – even before the trade in money came into being.[1] Thus, people

[1] Valenzuela-Garcia "Barter, Commodity Exchange, and Gift Giving" 2008 *The International Encyclopaedia of Anthropology* 1.

have entered into contractual relationships in the past even if those contractual relationships differ from the ones we know today. We must be cognisant of the fact that society changes over time and this inevitably influences the change in law and as the law evolves, there is a need to constantly revisit the way in which we do things and to take the necessary steps to ensure that our dealings are in conformity with global changes. With global changes in the legislative landscape, the legislature and the judiciary of every jurisdiction is continuously faced with the challenge and responsibility of enacting new laws and/or developing the law as far as its respective mandates are concerned. In the Namibian context, the law of contract is largely based on common-law principles and is informed by decisions made by courts.

Although the principles of the law of contract have been laid down in various court decisions, misrepresentation and mistake as factors affecting consensus seem to be confusing to the extent that some litigators ask courts for relief based on the wrong cause of action. Some cases include the elements of both mistake and misrepresentation; an example of can be seen in the South African case of *National and Overseas Distributors Corporation (Pty) Ltd v Potato Board*,[2] where the court stated as follows:

> "Our law allows a party to set up his own mistake in certain circumstances in order to escape liability under a contract into which he has entered. But where the other party has not made any misrepresentation and has not appreciated at the time of acceptance that his offer was being accepted under a misapprehension, the scope for a defence of unilateral mistake is very narrow, if it exists at all. At least the mistake (error) would have to be reasonable (justus) and it would have to be pleaded."

One other case in which the issues of both mistake and misrepresentation were raised is that of *Total Namibia (Pty) Ltd v OBM Engineering Petroleum Distributors CC.*[3] The court in this case was called upon to determine whether consensus was obtained, and discussed mistake and misrepresentation as factors affecting consensus. The court, however, did not take the opportunity to distinguish between mistake and misrepresentation. One can argue that the reason for this is that the court was not expressly called upon to do so and, furthermore, the facts did not call for such a distinction to be made. However, if the court had expressly taken the opportunity to lay a clearer distinction between mistake and misrepresentation, it could have aided later cases applying the law in accordance with the principle of *stare decisis.*

Cases that involve allegations of both mistake and misrepresentation must be treated carefully, considering that the elements that need to be proved for mistake are not the same as those for misrepresentation and *vice versa*. The leading of wrong evidence can lead to losing out on relief that could have been available if the correct evidence had been properly laid out.

This article discusses with a critical eye the distinction between mistake and misrepresentation as factors affecting consensus. The analysis of different types of mistake and misrepresentation falls outside the scope of

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2 1958 (2) SA 473 (A).

3 [2015] NASC 10.

this article and as such the article simply provides an analytical overview of the two factors affecting consensus. Consisting of seven parts, including this introduction, the article proceeds to heading 2 to provide a descriptive analysis of the concept of "contract". Heading 3 examines the law of mistake as it affects consensus. Heading 4 explains how misrepresentation is applied to show that consensus was obtained in an improper manner. In heading 5, the article alludes to, and critically discusses, the differences between mistake and misrepresentation. Heading 6 outlines the lessons learned and proposes the way forward. Heading 7 draws a conclusion.

2 DEFINITION OF A CONTRACT

A contract is an agreement between two or more persons that has the intention to create legally binding rights and duties.[4] A contract thus sets out the terms upon which the parties to the contract intend to bind themselves. A contract must contain all terms and conditions by which the parties are to abide.[5] This is important because it places both parties in a position to know their rights and obligations. The enforcement of rights and performance of obligations becomes easier and more effective if the parties are well aware of their rights and obligations. A valid contract can be concluded orally or in writing.[6] However, it is advisable for agreements to be reduced to writing to serve as proof. This is extremely important for future reference, in the event of possible disagreements between the parties regarding the conclusion of the contract as well as the terms created in such a contract.

Consensus is the cornerstone of any agreement. If the party claiming performance is unable to establish the conclusion of the agreement and subsequent breach of contract, the claim will not succeed. Hence, the first step in proving the existence of an agreement requires establishing that there was *consensus ad item* between the parties. This means that there must have been *animus contrahendi*, which is the intention to contract. In principle, there must be an express or implied intention to contract. In order for the parties to be said to have reached consensus, they must agree regarding all the material aspects of the contract and each party must be well aware of the other's intention. Thus, apart from *animus contrahendi*, common intention and communication of this intention are two elements of consensus. Common intention relates to the parties being on par regarding the terms of the contract, whereas communication of intention is communicated through offer and acceptance.[7] All contracts must therefore meet all three requirements of consensus to avoid the contract being vulnerable to allegations of dissensus.

There are certain factors that may cause the parties not to reach consensus or, even where consensus has been reached, it may be argued

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4 Hutchison, Pretorius, Naude, Du Plessis, Eiselen, Floyd, Hawthorn, Kuschke, Maxwell and De Stadler *The Law of Contract* 4ed (2017) 6.

5 Hutchison *et al The Law of Contract* 246.

6 *Geomar CC v China Harbour Engineering Company Ltd Namibia* [2021] NAHCMD 455.

7 Awarab "Consensus as a Requirement of a Valid Contract from a Namibian Perspective: Issues and Solutions" 2022 5(1) *International Journal of Law Management & Humanities* 521.

that consensus was reached in an improper manner. Mistake, misrepresentation, duress and undue influence may negatively affect a party's intention to conclude an agreement. Although all four factors have an impact on consensus, the focus of this article is limited to discussions relating to mistake and misrepresentation.

3 THE LAW OF MISTAKE

The scenario described below provides some of the elements to be found in a contract of sale. Consider this example in relation to the principles relating to the law of mistake.

X was the owner of three different residential properties located in Windhoek. The three houses were located next to each other in Pioneerspark, extension 1, Summer Street, with erf numbers, 60, 61 and 62 respectively. Upon retiring, X, who was working as a law professor at a local university, decided to sell two of the three properties, namely erven 60 and 61, and relocate to Swakopmund on the West Coast of Namibia to be close to his children and wife. X decided to keep the house on erf 62 as it was bigger in size and could accommodate his family should they wish to spend family time in Windhoek. Erven 61 and 62 were both 500m^2 in size. X placed an advertisement in the local newspaper, indicating the sale of the two properties. Y saw the advertisement and contacted X with an offer to purchase one of the houses. Y's intention was to purchase the house located at erf 61. However, X was of the view that Y's intention was to purchase the property located at erf 60, because the price Y offered for the purchase of the property was below what X expected. The parties exchanged the paperwork, and the agreement of purchase and sale was thus concluded. Upon receiving the purchase price, X was unhappy and called Y, who explained that he was under the impression that the price N$ 1.6 million (which he had paid) was the purchase price of the house located at Erf 61. The actual purchase price of the house at erf 61 was N$ 2 million, while that of erf 60 was N$ 1.6 million. X refused to accept the amount of N$ 1.6 million received from Y and wanted the contract to be set aside, stating that there was no agreement between him and Y. Y on the other hand maintained that an agreement had been signed, he had performed, and therefore X must also perform by effecting the transfer of the property into his name.

There are various issues in this example that need to be determined.

First, was consensus obtained between the parties? Secondly, did X breach the agreement? And thirdly, what are the possible remedies Y has against X?

Consensus is an agreement between two or more parties regarding the material facts or the essential elements of an agreement.[8] In terms of the above example, it is clear that the agreement that the parties purported to conclude is that of sale. In a contract of sale, the parties must agree on the essential elements of a sale – namely, the merx and the purchase price.[9]

[8] Fouche *Legal Principles of Contracts and Commercial Law* 8ed (2015) 40.

[9] *Westinghouse Brake v Bilger Engineering (Pty) Ltd* [1986] ZASCA 10.

Furthermore, we can establish from the example that two items were on sale, namely, erven 60 and 61 with two different prices. In addition, it is clear that the parties "reached" an agreement on different items of sale in terms of the same transaction. This resulted from miscommunication. This therefore means that there was no consensus at all; there was actually dissensus. What hampered the parties from obtaining consensus? The parties were mistaken regarding the item of sale and therefore, the factor that made it impossible for parties to reach consensus is mistake. One party (the seller) had a clear knowledge of the property he was selling. The other party (the buyer) also knew what he was buying. The fact that the parties were in agreement regarding the fact that they concluded a commercial undertaking cannot be debated. The mistake, however, comes from the fact that the parties were not in agreement regarding the subject matter of the sale.

Hutchison explains mistake as referring to the situation where a party to a contract acts while under an incorrect impression regarding some or other facts that relate to the contract between the parties.[10] Fouche states that a mistake relates to a misunderstanding regarding the facts, events or circumstances of the contract, which misunderstanding can be from one or both parties.[11]

If a party successfully proves the existence of a mistake, the contract can be set aside on that basis.[12] In order for a party to prove successfully the existence of a mistake, they must establish two important elements, namely materiality and reasonableness.[13] In other words, only a material and reasonable mistake negates consensus, with the result that the contract may be set aside. The section below provides a snapshot of what materiality and reasonableness comprise.

3 1 Materiality

A mistake cannot be relied upon lightly; certain requirements must first be pleaded successfully. In order to succeed in a claim based on mistake, a party is required to show that the mistake is material. A material mistake relates to material aspects of the contract. When one reads an agreement, it is often possible to distinguish between material facts and immaterial facts. A party relying on mistake must show that the mistake being raised relates to the material facts of the purported agreement. The question that is normally raised with regard to a material mistake is whether the mistake in question goes to the root of the contract. In other words, would X have entered into the contract if he had not been "mistaken" about a particular aspect or fact of the contract. If this question is answered in the negative then the mistake is material and thus the contract can be set aside as void *ab initio*, provided that the other requirement(s) of mistake are met. For instance, in a contract of sale, if X's mistake relates to the item of sale or the purchase price, such a mistake will be regarded as a material mistake, thus negating consensus. It could therefore be correct to say that a

10 Hutchison *et al The Law of Contract* 84.
11 Fouche *Legal Principles of Contracts and Commercial Law* 52.
12 Fouche *Legal Principles of Contracts and Commercial Law* 55.
13 See Fouche *Legal Principles of Contracts and Commercial Law* 52–53.

misunderstanding regarding the essential elements of a particular contract will qualify as a material mistake.

An immaterial mistake does not relate to the material or essential elements of the contract. In other words, it does not affect any of the elements of a contract.[14] The effect of an immaterial mistake is that a party could still have entered into the contract even if their decision to contract was affected by an immaterial mistake. Thus, although an immaterial mistake may influence or affect the contracting party's decision in concluding a contract, it does not do so to the extent of affecting the elements of consensus. Hence, the existence of such a mistake is "immaterial" to the process of obtaining consensus and the subsequent conclusion of the contract.

In the scenario given above, X's mistake was material since the mistake related to the subject matter of the sale, namely, the immovable property. In other words, there was a misunderstanding regarding an essential element of the contract of sale as one party had the intention to sell erf 60 while the other party was of the view that he was buying erf 61. The subject matter of the sale is an essential element of the contract of sale. Since the mistake pertains to the essential elements of the contract, such a mistake is material and therefore negates consensus.

3 2 Reasonable mistake

The second leg to be met when relying upon the existence of a mistake is proving that it was a reasonable mistake, also known as *iustus* error. In the absence of this requirement, any person can claim that they were mistaken about one or any material fact of the contract, in order to get out of the contract. The reasonableness requirement, therefore, sets a safeguard and aims to protect contracting parties who have performed or intend to tender performance. The reasonable requirement therefore places a much stricter burden on a party who alleges that they were mistaken as to a particular fact of the contract. A "reasonable man" test is therefore employed to determine whether the "mistake" in question indeed qualifies as a mistake sufficient to negate consensus. The question to be asked therefore is whether a reasonable person in the same shoes as the party alleging mistake could be mistaken about the same facts. In other words, would any reasonable person finding themself in a similar position to that of the contracting party possibly be mistaken regarding a particular fact or facts of the contract? If the answer is in the affirmative, the mistake raised by the contracting party is reasonable and therefore the contract can be set aside on that basis. A contracting party who claims that they were under a misapprehension as to a particular fact or fact must plead such and must indicate that the mistake was reasonable.[15] The party alleging mistake must show grounds indicating that the mistake was reasonable and thus that any other reasonable person could be mistaken about what they claim to have been mistaken about.

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14 Hutchison *et al The Law of Contract* 89.

15 *National and Oversees Distributors Corporation (Pty) Ltd v Potato Board supra*.

In the case of *Botha v Road Accident Fund*,[16] the court cited with approval the following statement of Christie:[17]

> "However material the mistake, the mistaken party will not be able to escape from the contract if his mistake was due to his own fault. This principle will apply whether his fault lies in not carrying out the reasonably necessary investigations before committing himself to the contract, that is, failing to do his homework; in not bothering to read the contract before signing; in carelessly misreading one of the terms; in not bothering to have the contract explained to him in a language he can understand; in misinterpreting a clear and unambiguous term, and in fact in any circumstances in which the mistake is due to his own carelessness or inattention."

If courts do not meticulously apply their minds to the facts before them, it could be easy for someone to interpret a term of a contract carelessly and raise a defence of mistake with the aim of escaping liability. Taking it a step further, a party may even act negligently by failing to understand the terms of the contract properly and claim that they were mistaken owing to the "misrepresentation" of the other party, thus aiming to escape contractual liability.

The "dirty hands" principle holds equally true for the concept of mistake. In other words, a party cannot conduct themself in an unethical fashion and thereafter raise "mistake". For instance, before entering into a contract, a party needs to take active steps to acquaint themself with the contents of the agreement before binding themself to the purported agreement. In the case of *George v Fairmead (Pty) Ltd*,[18] the court relied on the principle of *caveat subscriptor,* stating that "he who signs must be aware". In other words, a contracting party cannot be negligent in their affairs relating to the contract and want the contract to be set aside based on alleged misapprehension caused by their own negligence.

However, the court in the case of *Sonap Petroleum* (*South Africa*) (*Pty*) *Ltd v Pappadogianis*[19] stated that "if his mistake is due to a misrepresentation, whether innocent or fraudulent, by the other party, then, of course, it is the second party who is to blame, and the first party is not bound". In other words, if a party fails to understand the true facts as a result of misrepresentation committed by the other contracting party, the mistaken party will be allowed to resile from the contract. The party whose conduct (whether innocent or fraudulent) amounts to misrepresentation will thus be held accountable for his or her actions and liable for any claims that may arise because of such misrepresentation. Hence, before instituting action based on either mistake or misrepresentation, it is important to investigate and determine the conduct of the contracting parties during negotiations and ultimate conclusion of the contract.

Regardless of the form the parties give to their understanding of the particular facts, their subsequent conduct and the resulting consequences, any misunderstanding complained of will not succeed as a mistake if it is

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16 (463/2015) [2016] ZASCA 97; 2017 (2) SA 50 (SCA) (2 June 2016).

17 Christie and Bradfield *Christie's the Law of Contract in South Africa* 6ed (2011) 329–330.

18 1958 (2) SA 465 (A).

19 1992 (3) SA 234 (AD).

not material and reasonable. In other words, the courts are required not simply to accept the arguments and rely on claims by the parties. Courts have a duty to look at the substance of an alleged "mistake" and make a ruling as to whether it is material and reasonable and can therefore negate consensus.

3 3 The consequences of mistake on consensus

The conclusion of any contract is based on "agreement" or "consensus" between the parties. In other words, the parties to a contract must consent to the material facts or aspects of the contract before a binding and legally enforceable agreement is formed. In the absence of an agreement between the parties, one cannot speak of a valid contract giving rise to rights and obligations. Mistake that is material thus negates consensus.

4 THE LAW OF MISREPRESENTATION

Before discussing the elements of misrepresentation, consider the following example:

Wayne is the owner of a double-storey house located at Brand Street, Auasblick, Windhoek, Namibia. The house has four bedrooms, a spacious dining area, a kitchen, a courtyard and two garages. The property is valued at N$ 1.8 million and has only had one owner (that is, the current owner) since it was constructed six years ago. Wayne and his wife, Teressa, and their two minor children aged three and five have resided in the property for the past six years. One fateful night, while driving from Swakopmund on their way to Windhoek, the family of four is involved in a car accident and Wayne sustains serious head and spine injuries and is rushed to the Lady Pohamba hospital in Windhoek. After being in a coma for a period of six weeks, Wayne recovers. On regaining consciousness, Wayne is told that his wife and two children have succumbed to their injuries and that their bodies have been kept in the state mortuary awaiting his recovery for burial to be conducted. Although emotionally distraught, Wayne handled the news well and the burials take place a week after Wayne's recovery. Wayne can no longer stand the thought of living in his big house all by himself and decides to sell the property and move to Swakopmund on the coast to start a new life. Wayne is cognisant of the fact that the new life at the coast could be very costly and therefore requires a good sum of money.

Simon, a teacher, who recently got married, has been wanting to purchase a house in Windhoek and start a family. Simon rents a backyard flat in Auasblick, where he lives with his wife Joy. One Saturday morning, Simon goes for a jog and meets Wayne as he is driving out of his yard. Simon compliments Wayne on his beautiful house. Wayne starts telling Simon about how he lost his wife and is therefore selling his house. Seeing that he has caught Simon's attention and that he is interested in purchasing the house, Wayne starts to provide finer details about the house to Simon, stating that he is selling the house for N$ 4 million. Furthermore, Wayne informs Simon that the house has eight bedrooms, each with built-in cupboards. Moreover, the house has an inside kitchen and an outdoor

kitchen, good for hosting guests. In addition, he indicates that the house has four garages of which two are underground. The last item he indicates to be on the property is an indoor swimming pool with a heating system, making its use ideal during both summer and winter months. Excited about the finer details regarding the house, Simon offers to purchase the house. This offer is accepted by Wayne. Simon goes back home and tells his wife the good news. Simon thereafter transfers the sum of N$ 4 million into the bank account of Wayne. Three weeks after paying the purchase price, Simon and Joy decide to move into their new "dream house". Upon arriving at the property, Simon and Joy realise that the details given by Wayne before the conclusion of the contract do not correlate with the reality. Simon communicates his dismay to Wayne and demands the return of the purchase price.

In the example above, one needs to establish whether or not Wayne's conduct amounts to misrepresentation and whether such misrepresentation negates consensus. The other issue that needs to be determined is whether Simon could be entitled to any remedies.

Before answering the above questions, it is important to understand what misrepresentation is. Hutchison postulates that a misrepresentation is a form of misstatement. Ifa statement is incorrect, it is a misrepresentation.[20] In the case of *Redelinghuys v Coffee-Lind*,[21] the court cited with approval the definition provided by AJ Kerr in *The Principles of the Law of Contract* as follows:

> "A representation has been judicially defined as a statement made by one party to the other before or at the time of the contract of some matter or circumstance relating to it. It does not become part of the contract."

Misrepresentation, therefore, refers to a false statement of facts made by one contract party (or his or her agent) to the other contracting party pertaining to the contract. A false representation is not illegal in and of itself. The representation must be material in order to be considered as misrepresentation. The objective test for materiality considers the component of wrongfulness.[22] The contracting party to whom the misrepresentation has been made concludes a contract as a result of the misrepresentation. In other words, the question is: if the misrepresentation had not been made, would the contracting party still have concluded the agreement?

4 1 Requirements of misrepresentation

When a party's choice to enter into a particular contract is affected by a false representation, misrepresentation has taken place.[23] According to our law, parties to a contract are not obliged to disclose to one another any information they may have that could affect the other party's decision to

[20] Hutchison *et al The Law of Contract* 121.

[21] [2018] NAHCMD 368.

[22] Neethling, Potgieter and Visser *Law of Delict* 6ed (2010) 42.

[23] *George v Fairmead (Pty) Ltd supra*; *Du Toit v Atkinson's Motors Bpk* 1985 (2) SA 893 (A).

enter into the contract.[24] Although parties are not forced to disclose information that relates to the contract, the failure to give correct information will result in misrepresentation. This therefore means that wrong information amounts to misrepresentation, but the withholding of information does not necessarily qualify as misrepresentation. The courts occasionally enforce disclosure obligations, but each case is judged on its unique facts and there is no overarching standard for when someone should be held accountable for failing to disclose information, or when doing so is illegal.[25] In the case of *Mutual & Federal Insurance Co Ltd v Oudtshoorn Municipality*,[26] the court held that the obligation to disclose encompasses constructive knowledge, or information that the contracting party would have had access to, and that would have been relevant to the conditions of the agreement at the time of its conclusion.[27] The courts have thus not as yet established any specific principles that govern the disclosure of information relating to the conclusion of contracts and that indicate when such non-disclosure could amount to misrepresentation. One could however argue that if the conduct of the party withholding information qualifies as fraudulent or negligent, non-disclosure may amount to misrepresentation.[28]

Misrepresentation is one of the factors that affects consensus in contractual disputes. On many occasions, the Namibian courts have been called upon to adjudicate on issues pertaining to alleged misrepresentation in contractual disputes. Examples of this can be found in the cases of *Mbekele v Standard Bank Namibia Ltd Vehicle and Asset Finance*,[29] *Matheus v Matheus,*[30] *and Rivoli Namibia (Pty) Ltd v CMC/Otesa Joint Venture.*[31] Commercial transactions are part of our daily lives and thus there is a need properly to understand principles relating to misrepresentation negating consensus.

This section sets out the requirements to be proved for a claim based on misrepresentation. In *Trust Bank of Africa Ltd v Frysch*,[32] Corbett JA set out the requirements by stating:

> "A party who seeks to establish the defence that the contract which he entered into is voidable on the ground of misrepresentation must prove (the onus being upon him) (i) that a representation was made by the other party in order to induce him to enter into the contract; (ii) that the representation was material; (iii) that it was false in fact; and (iv) that he was induced to enter into the contract on the faith of the representation."

The Supreme Court of Namibia in the reported case of *Total Namibia (Pty) Ltd v OBM Engineering Petroleum Distributors CC*[33] cited with approval the

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24 *Speight v Glass* 1961 (1) SA 778 (D).

25 Cupido *Misrepresentation by Non-Disclosure in South African Law* (LLM thesis, Stellenbosch University) 2013 1.

26 1985 (1) SA 419 (A) 432 E.

27 *Mutual & Federal Insurance Co Ltd v Oudtshoorn Municipality supra* 432 E.

28 *Mutual & Federal Insurance Co Ltd v Oudtshoorn Municipality supra* 139.

29 [2011] NAHC 18.

30 [2021] NAHCNLD 19.

31 [2019] NAHCMD 152.

32 1977 (3) SA 562 (A).

33 *Supra*.

elements of contractual misrepresentation as raised in the case of *Sonap v Pappadogianis*:[34]

> "[t]he decisive question in a case like the present is this: did the party whose actual intention did not conform to the common intention expressed, lead the other party, as a reasonable man, to believe that his declared intention represented his actual intention? ... To answer this question, a three-fold enquiry is usually necessary, namely, firstly was there a misrepresentation as to one party's intention; secondly, who made that representation; and thirdly, was the other party misled thereby? ... The last question postulates two possibilities: was he actually misled and would a reasonable man have been misled?"

The South African case of *Novick v Comair Holdings Ltd*[35] neatly set out the requirements of misrepresentation. A misrepresentation comprises:

- a false statement of fact,
- made by one party to the contract, to the other,
- before or at the conclusion of the contract,
- on some matter or circumstance relating to it,
- with the intention of inducing the conclusion of the contract, and
- which actually induces the conclusion of the contract.

Applying these requirements of misrepresentation, it is possible to determine the presence or absence of misrepresentation in the above example relating to misrepresentation.

Wayne made a statement to Simon that the house he was selling had eight bedrooms. However, the house only had four bedrooms. Furthermore, the house had an inside kitchen but no outdoor kitchen as claimed. In addition, Wayne expressly indicated that the property in question had four garages of which two were underground, whereas in reality, the house only had two garages. The last representation made by Wayne was that the property had an indoor swimming pool with a heating system, making its use ideal during both summer and winter months, all of which was untrue.

It is evident that Wayne made false representations to Simon as Wayne's statements were totally incorrect when compared to the reality.[36] Secondly, the false representations were made by Wayne (one party to the contract) to Simon (the other contracting party). The false representations made by Wayne to Simon were made before the conclusion of the contract. The false representations go to the root of the contract as they relate to some of the essential elements of the contract. In a contract of sale, the *merx* is an essential element and thus, the representations regarding the *merx* (a house in this case) will have a bearing on whether the contract will be voidable or valid. One can argue that Wayne intended to persuade or lure Simon to enter into the contract of sale with him and to do so fraudulently. This reasoning would be inferred from the wording, "*Wayne can no longer stand*

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34 *Supra*.

35 1979 (2) SA 116.

36 In the case of *Redelinghuys v Coffee-Lind supra* the court expressly confirmed that one of the requirements which must be met by a person relying on misrepresentation is that the representation was false in fact.

the thought of living in this big house all by himself and decides to sell the property and move to Swakopmund on the coast to start a new life." This could possibly illustrate that Wayne was desperate and was therefore looking for any possible opportunity to sell the property and move. In addition, the facts from the example that relate to "the costly life at the coast" could be construed to suggest that Wayne was looking for a way in which to make money to guarantee him a good life at the coast and that this was a motivating factor for him to act fraudulently.

Several arguments could be advanced against any possible claims of misrepresentation negating consensus. The first counter-argument could be the negligence on the part of the buyer, being Simon in this case. The question therefore could be whether there was any obligation on Simon to take reasonable steps to establish the true facts regarding the representations made by Wayne. In other words, instead of taking Wayne at his word, should Simon not have verified the true facts relating to the representations, especially where such representations relate to the essential elements such as the *merx* of the sale? Secondly, in wanting to uphold the contract, one could use the reasonable man test. Could any reasonable man in the "shoes" of Simon have believed that the property in question had all the items listed in the representations made by Wayne? It is unclear whether a court would be pleased with the advancement of such an argument from a party to a contract who leaves much to be desired. This is principally because of the doctrine that says "you cannot approach the court with 'dirty hands'" – that is, you cannot intentionally make a fraudulent misrepresentation and thereafter turn to the court to have the contract enforced in your favour.

In adjudicating a particular issue, courts do not merely apply the law, in isolation from the circumstances prevailing at the time that the contract was concluded. Thus, in contractual disputes, the courts will be guided by principles of contract, which includes privity of contract, public policy and reasonableness.

The Supreme Court of Appeal in South Africa in the case of *Mohamed's Leisure Holdings (Pty) Ltd v Southern Sun Hotel Interests (Pty) Ltd*[37] said the following:

> "The privity and sanctity of contract entails that contractual obligations must be honoured when the parties have entered into the contractual agreement freely and voluntarily. The notion of the privity and sanctity of contracts goes hand in hand with the freedom to contract. Taking into considerations the requirements of a valid contract, freedom to contract denotes that parties are free to enter into contracts and decide on the terms of the contract."

By interpretation, this means that the courts should not interfere with a contract entered into by parties, where they have entered into the contract by exercising their free will. Looking at the example of Wayne and Simon, the question that could be asked is whether Simon entered into the contract freely and voluntarily. At face value, it may seem that Simon entered into the contract freely and voluntarily. This reasoning may be supported by the fact that Simon was not coerced or unduly influenced by Wayne or his agents to

[37] [2017] ZASCA 176.

agree to the terms of the contract. This line of reasoning is incorrect. This is because, although there was no undue influence or duress, incorrect information was placed before Simon and he agreed to bind himself to the contract based on this incorrect information. This line of reasoning could entitle him to apply to have the contract set aside on the basis of misrepresentation.

The courts also look at the role played by the contracting parties, or their agents, during the negotiations and subsequent conclusion of the contract. In other words, a court would pay attention to the activities of both parties, namely Wayne and Simon in the above example, so as to guide it on whether to enforce the contract or set it aside with subsequent remedies that may follow.

Applying the requirements for misrepresentation, it is evident that Wayne's conduct clearly fits into what amounts to a misrepresentation. Moreover, Wayne's misrepresentation could amount to a fraudulent misrepresentation. Ordinarily, fraudulent misrepresentations would entitle the aggrieved party (Simon in this case) to *restitutio in integrum* and to damages resulting from the misrepresentation and subsequent conclusion of the contract. However, the actions of Simon show signs of negligence in his dealings in terms of the contract. At no point did Simon take any reasonable steps to verify the correctness of the representations made by Wayne. This could easily have been done through visiting the property. Since this was not done, Simon may not wholly rely on misrepresentation in claiming damages. Having the contract set aside and allowing full damages could adversely affect Wayne, and this is undesirable because of Simon's negligence. On the other hand, allowing the contract to stand without holding Wayne liable for his fraudulent misrepresentation could mean that contracting parties are at liberty to make any false representations and go unpunished. The latter approach is contrary to public policy.

The South African Supreme Court of Appeal held:

> "This, without doubt, calls for a balancing and weighing-up of two considerations, namely the principle of pacta sunt servanda and the considerations of public policy, including of course constitutional imperatives."[38]

The best way to deal with Wayne and Simon's contract in terms of the law is to have the contract enforced but allow Simon to claim damages as a result of fraudulent misrepresentation. In this way, the court will uphold the principle of *pacta sunt servanda* on the one hand, while on the other hand also respecting the principles of public policy, which requires one to be truthful and ethical in one's dealings with another.

[38] *Mohamed's Leisure Holdings (Pty) Ltd v Southern Sun Hotel Interests (Pty) Ltd supra* par 21.

4 2 Miscommunication versus misinformation and how it applies to contract law

Miscommunication is not the same as "non-communication" or "communication failure".[39] Miscommunication could therefore mean that information or facts were correctly communicated by one contracting party to another, but that the hearer formulated the wrong picture in respect of the facts so communicated. The incorrectness of the facts received stems from the fact that although from the hearer's end the facts may seem to be correct, they are incorrect from the speaker's end as they are not what the latter meant or intended to communicate. Patnaik further suggests that miscommunication is different from misinformation – in that the latter is a deliberate act on the part of the speaker.[40] In other words, with miscommunication, the speaker or person conveying information is not necessarily at fault or being deliberate in their actions in such communication. Nevertheless, owing to one or other mishap, the information conveyed is not correctly understood, causing dissensus. In contrast, with misinformation, there is a deliberate effort on the part of the person conveying information to mislead the other party, with the former desiring to achieve a "wrongful" result. Thus, the focus in understanding miscommunication is on the hearer, whereas with misinformation it is on the speaker.[41] It is therefore safe to suggest that miscommunication occurs as a result of how the information is understood, whereas misinformation occurs as a result of how the information is communicated. One can even go further and suggest that with miscommunication the hearer is at "fault", whereas in the case of misinformation, the speaker is at "fault".

From the above analysis, the author concludes that mistake is a result of miscommunication, whereas misinformation leads to misrepresentation. It therefore makes sense to hold the misrepresentor liable for their wrongful conduct, while in the case of mistake, neither party can be held liable for any conduct causing the mistake.

5 DIFFERENCES AND SIMILARITIES

Consensus, one of the requirements of a valid contract, is affected by various factors including both mistake and misrepresentation. Although both mistake and misrepresentation affect consensus, mistake prevents the creation of rights and duties, whereas in the case of misrepresentation, rights and duties are created, but the victim of misrepresentation is entitled to set the contract aside provided that they successfully prove the requirements of misrepresentation as discussed under heading 4 of this article. Generally, a mistake is not actionable; however, where there is malicious intent, this can be actionable. Misrepresentation, on the other hand, is actionable. The similarities and differences between the concepts are presented in a tabular form below to indicate the unique nature of each.

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39 Patnaik "Towards an Approach to the Study of Miscommunication" 2012 3(2) *Global Media Journal: Indian Edition* 3.

40 *Ibid*.

41 *Ibid*.

Owing to similarities between mistake and misrepresentation, one could object to a claim of misrepresentation in terms of scenario 2 above and state rather that Simon was mistaken with regard to the elements of the house. This notion cannot be correct, because one contracting party made a representation to the other, and that representation met the other requirements of misrepresentation. In the case of a misrepresentation, one of the contracting parties or their agents acts in a particular manner, which action results in securing consensus in an improper manner. In other words, the misrepresentation relates to passing over untruthful or incorrect information to another, and the latter in turn acts on the strength of such untruthful or incorrect information. This is different from mistake, where there is no wrongful representation *per se*, but the party simply draws their conclusions, which results in a mistake. One could suggest that the party who makes a misrepresentation is aware of the "wrongful" conduct they are engaging in (although this is not the case for innocent misrepresentation), whereas a mistaken party is unaware that their mistake might cause a problem; a mistake does not involve fault.[42]

The similarities and differences between mistake and misrepresentation are summarised as follows:

Mistake	**Misrepresentation**
Mistake is a factor that affects consensus.	Misrepresentation is a factor that affects consensus.
In the case of a mistake, a party does not make any form of wrongful representation of the facts.	In the case of a misrepresentation, a party to the contract makes a wrongful representation intentionally, negligently or innocently.
Mistake is hearer oriented.	Misrepresentation is speaker oriented.
An alleged mistake is made by a contracting party or their agent.	An alleged misrepresentation is made by a contracting party or their agent.
An alleged mistake relates to the material aspects of the contract.	An alleged misrepresentation relates to the material aspects of the contract.
The presence of a mistake prevents the creation of rights and obligations.	Even if misrepresentation is present, rights and obligations are created.
In the wake of a mistake, contracting parties are not required to perform any "obligations" as no obligations have been created in the first place, because of the mistake.	The performance of the obligations in the context of a misrepresentation will depend on the decision of the innocent or misled party.
Mistake does not involve the	Misrepresentation involves the

[42] In the case of innocent misrepresentation, a party who gives the information or makes a representation, is unaware that the information that he or she is conveying to the other party is false. Such a party has in fact take all responsible steps to verify the correctness of the information. Despite the fact that in the end it results that the information given is untrue.

making of a false statement.	making of a false statement.
There is no deliberate effort to hide the true facts in the making of a mistake.	There is a deliberate effort to hide or withhold the true facts in a misrepresentation (unless innocent).
Correct information or facts are conveyed to the other contracting party but the information is not properly appreciated by the hearer thereof.	Misrepresentation involves the conveying of wrong information to achieve a particular end result (usually the conclusion of a contract based on such incorrect information).
Generally, a mistake is not actionable. However, where there is an error of motive, this can be actionable in terms of the law.	Misrepresentation is actionable. Even innocent misrepresentation entitles a party to claim restitutionary damages as was done in the *Phame*[43] case. While an aggrieved party can claim compensatory damages as a result of fraudulent misrepresentation, innocent misrepresentation only gives rise to restitutionary damages.
Once established, mistake renders the contract *void ab initio.*	Once established, misrepresentation renders the contract voidable at the instance of the aggrieved party.

6 LESSONS LEARNED AND THE WAY FORWARD

As is evident in this article, mistake and misrepresentation are two distinct factors affecting consensus in purported contractual agreements. Mistake is a result of miscommunication whereas misrepresentation is caused by misinformation.

This article proposes the following definitions of mistake and misrepresentation.

Mistake in a purported agreement is not simply a misunderstanding of facts; it is a miscommunication of facts. The miscommunication is broad enough to include misunderstanding. The correct view is that because miscommunication occurred, there was a misunderstanding of the facts. This proposed definition in no way suggests that the communicator of the information is at fault or that the receiver or hearer is at fault, as mistake can lie with either of the contracting parties. Instead of casting blame on who caused the mistake, the better view is to establish how the information communicated by one contracting party was understood by the other contracting party. It is important to note that in the process of concluding agreements, the party receiving information (the hearer) has a responsibility to seek clarity on what seems to be unclear or could potentially lead to ambiguity. Both parties have a role to play in the unfortunate road towards dissensus. In the context of a mistake, the concern is not with liability, but simply with proving the existence of a mistake, thus negating consensus. Defining mistake through the lens of miscommunication instead of

[43] *Phame (Pty) Ltd v Paizes* 1973 (3) SA 397 (A).

misunderstanding places a heavier burden on the party communicating the information to the other contracting party – that is, to ensure that they communicate effectively and properly to avoid being misunderstood.

Misrepresentation, on the other hand, can be described as misinformation conveyed by one contracting party to another. Misinformation can include incorrect or incomplete information. In other words, if a contracting party intentionally or negligently, or in some instances innocently, fails to display certain facts, they may be taken to have misrepresented such information to the other party. Similarly, where a party decides knowingly, or out of carelessness, to provide wrong information to the other contract party with the purpose of creating a contract, such a person may be taken to have made a misrepresentation.

Owing to the concept of material non-disclosure, which is often discussed as part of the principles of misrepresentation, it is important to appreciate the clear distinction between mistake and misrepresentation. Material non-disclosure is not pleaded with misrepresentation owing to the striking similarity between the two, whereas this is not the case with mistake.[44]

Whenever faced with the issue of determining the existence of mistake or misrepresentation that negates consensus, the courts should not look at the form presented by the parties but rather pay attention to the substantive aspects. The courts should move away from simply applying the law as it is and get into the arena of developing the law. Applying the law as it is, without an effort to further develop the law, only benefits the parties to the contractual dispute. However, the court's role in developing the law will benefit members of society who will in future either enter into commercial transactions or be affected by commercial transactions in one way or another. Courts have long been faced with the responsibility of determining whether parties in contractual disputes have reached proper consensus, but do little *mero metu* to provide clarity in grey areas in the law of contract as has been done in this article. In some cases, courts unfortunately still fail to apply themselves properly to the facts and issues before them,[45] resulting in a wrong application of the law, and ultimately in either orders for the wrong relief or denying a party who could otherwise be entitled to relief. As was stated in the case of *DE v RH*,[46] the court emphasised that although the legislature is the major engine for law reform, the courts nonetheless bear the obligation to develop the common law in an incremental way. In the case of *Total Namibia (Pty) Ltd v OBM Engineering Petroleum Distributors CC,*[47] the Supreme Court of Namibia, was puzzled by the High Court stance in overlooking significant developments in the law relating to the interpretation of documents. Courts should therefore heed the sentiments shared in the case of *Carmichele v Minister of Safety and Security*,[48] in which the court

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44 See unreported judgment of *Rossouw v Hanekom* [2018] ZASCA 134, wherein one of the contracting parties was found guilty of misrepresentation and material non-disclosure emanating from a contract of sale.

45 In the unreported case of *Rossouw v Hanekom supra*, the Supreme Court of Appeal in South Africa stated that "regrettably, the high court failed to properly apply itself to the issues and the evidence".

46 2015 (5) SA 83 (CC).

47 NASC 10 (30 April 2015).

48 2001 (4) SA 938 (CC).

cautions courts to remain watchful and not be hesitant in developing the common law. How the concepts of mistake and misrepresentation have been understood and applied in contractual disputes in the past is certainly not the same as it is today; confusion between these two factors affecting consensus will continue unless courts provide proper guidance. Case law is an important source of law in contract law, especially in the Namibian context where the general principles of the law of contract are not derived from statute as in some other jurisdictions – such as Tanzania, Ghana, China and Bulgaria to mention a few. Examples of cases such as *DE v RH* and *Total Namibia (Pty) Ltd v OBM Engineering Petroleum Distributors CC* indicate that courts are not as vigilant as they should be in developing the common law of contract, hence the need for this article to call upon courts to take seriously their mandate of developing the common law. It is clear that courts in jurisdictions where there is no legislation governing the general principles of contract, including Namibia, must be proactive in developing the law of contract. Parties cannot always wait for matters to be taken on appeal before correct application or for development of the common law to take place for them to be granted their relief. Courts of first instance must play their part in developing the law.

7 CONCLUSION

It is important to uphold the principles of ethics, good morals and truthfulness in all commercial transactions. Any improper conduct during negotiations and at the time of concluding a contract may invite unwanted claims, which may result in the breaching party paying huge sums of money in damages. When courts are called to determine the validity of contracts and to settle disputes relating to improperly obtained consensus, it is important for them to consider not only all the principles of the law of contract, but to go further and develop the law. Important principles for consideration with regard to contractual disputes include the doctrine of *pacta sunt servanda*, public policy and the requirement of reasonableness. Each case should be dealt with on its own merits and thus a one-size-fits-all approach should not be applied. Commercial transactions are part of our everyday life; where such transactions are entered into, care must be taken for the consequences involved. The definitions of mistake and misrepresentation proposed in this article do not in any form detract from the existing common-law definitions of the two concepts. The proposed definitions simply aim to clarify the existing confusion between mistake and misrepresentation.

SOUTH AFRICA'S RESPONSE TO THE DIGITAL ECONOMY'S DIRECT TAX CHALLENGES – PART 1*

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SUMMARY

International tax rules were developed more than a century ago. At their core is the principle that profits should be taxed where economic activities physically take place and where value is created. Advances in technology and the progression of the fourth industrial revolution have changed how businesses around the world operate and have given rise to the "digital economy". Businesses no longer need to be "physically" present in a jurisdiction but can operate digitally or virtually anywhere in the world. New business models such as e-commerce, payment services, app stores, online advertising, cloud computing and participative network platforms have emerged. The digital economy and these new business models pose various challenges to the effectiveness of rules on the current jurisdiction to tax; businesses are able to derive significant economic benefits from a country without a "taxable nexus" to such country – for example, without the creation of a fixed place of business, permanent establishment or establishing a place of effective management. The digital economy is global in nature and, therefore, policy actions dealing with the global economy need a global approach. The Organisation for Economic Co-operation and Development (OECD) has taken a leading role in developing new direct-tax rules that will address the tax challenges posed by the digital economy and has agreed to develop a two-pillar solution that can be consented to internationally and implemented by countries. Pillar one proposes new rules on tax nexus and profit allocation for large multinational enterprises (MNEs) that meet certain revenue and profitability thresholds. The rules do not require MNEs to be physically present in a jurisdiction. Pillar two proposes mechanisms to ensure large MNEs pay a minimum level of tax (currently set at 15 per cent) regardless of where their headquarters are or the jurisdictions in which they operate. Some countries (such as the United Kingdom (UK), United States of America (USA), India, and Nigeria) have opted to take unilateral measures as they wait for a global solution. These unilateral measures are often uncoordinated and give rise to some undesirable consequences, such as double taxation. South Africa has decided to wait for global consensus and is currently not taxing the digital economy through its direct-tax rules. Although the OECD solutions are helpful proposals on taxing the digital economy and are a step in the right direction, it is submitted that they are not completely suited for South Africa as a developing African country; they do not consider some of South Africa's unique circumstances, such as the prevalence of corruption, semi-skilled tax administration and limited resources. South Africa should not merely adopt the rules blindly but should adapt them to suit its needs as a developing country. South Africa needs to protect its tax base while embracing the digital economy; perhaps, while it waits for a global solution, it could strengthen its source rules as recommended by the Davis Tax Committee. This article is divided into two parts. Part 1 evaluates the suitability

* This article largely forms the basis of the author's PhD study focused on South Africa's response to the direct-tax challenges.

of South Africa adopting the OECD global solutions to the direct-tax challenges posed by the digital economy in a developing African country; Part 2 evaluates whether South Africa's response to these challenges is the best option by considering the approach and consequences of select developed and developing jurisdictions (that is, USA, UK, Nigeria and India) adopting unilateral measures while waiting for an OECD global solution.

1 INTRODUCTION

International tax rules were developed more than a century ago.[1] At the core of international tax rules is the principle that profits should be taxed where economic activities physically take place and where value is created.[2] Advances in technology and the progression of the fourth industrial revolution (4IR)[3] have changed how businesses around the world operate. Businesses no longer need to be "physically" present in a jurisdiction but can operate digitally or virtually anywhere in the world.[4] New business models such as e-commerce, payment services, app stores, online advertising, cloud computing and participative network platforms have emerged.[5] The digital economy and these new business models pose various challenges to the effectiveness of current rules regarding countries' jurisdiction to tax; businesses are able to derive significant economic benefits from a country without a "taxable nexus" to such country – for example, without the creation of a fixed place of business, permanent establishment or establishing a place of effective management.[6]

The digital economy is global in nature and, therefore, policy actions dealing with the global economy need a global approach.[7] The Organisation for Economic Co-operation and Development (OECD)[8] has taken a leading role in developing new rules on direct tax that will address the tax challenges posed by the digital economy, and has agreed to develop a two-pillar solution for international consent and implementation by countries.[9] Pillar one proposes new rules on tax nexus and profit allocation for large

1 OECD *Tax Challenges Arising from Digitalisation – Interim Report* (2018) 3.

2 *Ibid*.

3 The fourth industrial revolution (4IR) refers to the latest industrial revolution where major advances in technology such as artificial intelligence, robotics and the Internet of Things are merging the biological, physical, and digital worlds. See Schwab "The Fourth Industrial Revolution, What It Means, How To Respond" (2016) World Economic Forum https://www.weforum.org/agenda/2016/01/the-fourth-industrial-revolution-what-it-means-and-how-to-respond/ (accessed 2022-06-27).

4 OECD *Addressing the Tax Challenges of the Digital Economy, Action 1 – 2015 Final Report* (2015) 54.

5 OECD (2015) 54.

6 OECD (2015) 66.

7 OECD *Tax Challenges Arising from Digitalisation – Report on Pillar One Blueprint: Inclusive Framework on BEPS* (2020) 3.

8 The OECD is an international organisation that works to develop policies and find solutions to a range of social, economic, and environmental challenges. See www.oecd.org/about (accessed 2022-06-30).

9 OECD/G20 Base Erosion and Profit Shifting Project (BEPS) "Statement on a Two-Pillar Solution to Address the Tax Challenges Arising From the Digitalisation of the Economy" (8 October 2021) https://www.oecd.org/tax/beps/statement-on-a-two-pillar-solution-to-address-the-tax-challenges-arising-from-the-digitalisation-of-the-economy-october-2021.pdf 1

multinational enterprises (MNEs) that meet certain revenue and profitability thresholds,[10] and pillar two proposes mechanisms to ensure large MNEs pay a minimum level of tax (currently set at 15 per cent) regardless of where their headquarters are or the jurisdictions in which they operate.[11] Some countries (such as the United Kingdom (UK), United States of America (USA), India, and Nigeria) have opted to take unilateral measures to tax the digital economy in the meantime as they wait for an OECD global solution. These unilateral measures are often uncoordinated and give rise to some undesirable consequences such as double taxation.[12] South Africa has decided to wait and not introduce any unilateral measures while it waits for a global solution from the OECD.[13]

This article critically reviews South Africa's position in relation to direct-tax challenges arising from the digitalisation of the economy. In Part 1, the article first sets out the challenges that the digital economy poses internationally to direct tax in the context of the current more-than-century-old direct-tax rules; it then sets out the OECD-proposed two-pillar solutions and determines if these proposed solutions are suitable for adoption by South Africa as a developing African country. The article then makes recommendations for South Africa and draws a conclusion. Part 2 (forthcoming) will determine if South Africa's response is the best option by considering its approach and the consequences of select developed and developing jurisdictions (that is, UK, USA, Nigeria and India) adopting unilateral measures while waiting for an OECD global solution.

2 INTERNATIONAL TAX CHALLENGES OF THE DIGITAL ECONOMY

2 1 Fourth industrial revolution and the digital economy

The 4IR refers to the current and developing environment where major advances in technology such as artificial intelligence, robotics and the Internet of Things are merging with the biological, physical and digital worlds.[14] The 4IR is evolving at an exponential pace and has the potential to increase global income levels and the quality of communication for people around the world.[15] The digital economy is a by-product of the 4IR and is fast becoming the economy itself. The OECD has defined the digital economy as

10 OECD (2020).

11 OECD BEPS *Tax Challenges Arising from Digitalisation – Report on Pillar Two Blueprint: Inclusive Framework on BEPS* (2021).

12 Oguttu "A Critique from a Developing Country Perspective of the Proposals to Tax the Digital Economy" 2020 12(4) *World Tax Journal* 799–828 806.

13 Business Tech "There is a Big Problem With South Africa's Plan for Digital Tax" (15 February 2021) https://businesstech.co.za/news/ technology/468144/theres-a-big-problem-with-south-africas-plans-for-digital-tax (accessed 2022-06-29).

14 Schwab https://www.weforum.org/agenda/2016/01/the-fourth-industrial-revolution-what-it-means-and-how-to-respond/.

15 *Ibid*.

> "a broad range of economic activities that include using digitised information and knowledge as the key factor of production, modern information networks as an important activity space, and the effective use of information and communication technology as an important driver of productivity growth and economic structural optimization."[16]

The key features of digitalisation from a tax perspective include mobility in respect of intangibles such as software, users and business functions, heavy reliance on data, network effects,[17] use of multi-sided business models in which the sides of the markets may be in different jurisdictions, tendency of monopoly or oligopoly in certain business models, and volatility because of low barriers to entry and evolving technology.[18]

Digitalisation makes it possible for a business to carry on economic activity without personnel needing to be present.[19] Advances in ICT ensure that distance is not a deterrent to trade and increases the number of customers a business can target and reach.[20] Certain tasks, previously performed by local personnel, can now be performed by automated equipment at a cross-border level. Thus, the growth of customers for a business in a jurisdiction no longer always requires the level of local infrastructure and personnel that would have been needed in a pre-digital age.[21] This means that businesses have flexibility in choosing the location where their substantial business activities will take place.[22]

2 2 Challenges for the direct-tax rules

2 2 1 Rules on the jurisdiction to tax

Before a country can levy tax on an amount, there must be a tax nexus (or connection) between the amount and the country, or a connection between the person who received the amount and the country.[23] The two main principles underlying the taxation of income are "source" and "residency"[24] principles. In terms of the source principle of taxation, persons are taxed on income that originates from the geographical confines of the country irrespective of the residency of the person.[25] The justification for a source

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16 G20 2016 China https://www.mofa.go.jp/files/000185874.pdf.

17 This entails that the decision of a user can have a direct impact on the benefit derived by other users. For e.g., a user using a cellphone network can create congestion of the network and slow down its efficiency for other users.

18 OECD (2015) 55–73. See also OECD (2018) 24–25.

19 OECD (2015) 66. See also Harpaz "Taxation of the Digital Economy: Adapting a Twentieth-Century Tax System to a Twenty-First Century Economy" 2021 46(17) *The Yale Journal of International Law* 57–101 58.

20 OECD (2015) 100.

21 *Ibid*.

22 *Ibid*.

23 Croome (ed) Oguttu, Muller, Legwaila, Kolitz, Williams and Louw *Tax Law: An Introduction* (2013) 26; Olivier and Honiball *International Tax: A South African Perspective* 5ed (2011) 6 and 9.

24 Some jurisdictions use citizenship/nationality and domicile. See Olivier and Honiball *International Tax: A South African Perspective* 6 10.

25 Croome *et al Tax Law: An Introduction* 26; see also Olivier and Honiball *International Tax: A South African Perspective* 9.

basis of taxation is that a taxpayer should contribute towards the costs of running the country that enables the taxpayer to generate income.[26] In terms of the residence principle of taxation, residents are taxed on their worldwide income whatever the source of the income because they have an intrinsic connection to the country.[27] The justification for a residence basis of taxation is that a resident of a country enjoys the protection of the State and as such should contribute towards the cost of the government of the country where the taxpayer resides.[28]

South Africa has adopted a combination of these principles of taxation.[29] In terms of the gross income definition that forms the basis of taxable income on which the tax liability of a person is determined, South African tax residents are required to include their worldwide accrual and receipts to their gross income, while non-residents are only required to include accruals and receipts arising from a South African source.[30] For a company to be tax resident in South Africa, it must be incorporated, established or formed in South Africa or have its place of effective management (POEM) in South Africa.[31] The definition of a resident excludes any person who is deemed to be exclusively a resident of another country for purposes of the application of any double-tax agreement entered into by South Africa.[32] The term "incorporated" is not defined in the Income Tax Act[33] (Act). A company incorporated in terms of section 13 of the Companies Act[34] is resident in South Africa mainly because its formation and incorporation are in South Africa regardless of where the company operates or is managed. "POEM" is also not defined in the Act. Interpretation Note 6[35] regards a POEM as the place where key management and commercial decisions necessary for the carrying on the business of the company as a whole are made in substance.[36] Both incorporation and having a POEM require a company to have some form of physical presence before being considered tax resident, and therefore liable for tax in South Africa on its worldwide receipt and accruals.

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26 Olivier and Honiball *International Tax: A South African Perspective* 9.

27 Croome *et al Tax Law: An Introduction* 27; Olivier and Honiball *International Tax: A South African Perspective* 10.

28 Olivier and Honiball *International Tax: A South African Perspective* 19.

29 Stiglingh (ed) *Silke: South African Income Tax* (2022) 26.

30 *Ibid*.

31 S 1(1)(*b*) of the Income Tax Act 58 of 1962.

32 S 1(1) of the Income Tax Act 58 of 1962.

33 58 of 1962.

34 71 of 2008.

35 SARS "Income Tax Interpretation Note No. 6" Issue 2 (03 November 2015). SARS interpretation notes are not binding on the courts and the Commissioner, as was held in ITC 1675 (2000) 62 SATC 219 AT 229A.

36 SARS Interpretation note 6 4. See also the unreported case of *Oceanic Trust Co Ltd NO v CSARS* case number 22556/09 (WCC) 13 June 2011, where the court held that the place of effective management is the place where "key management and commercial decisions that are necessary for the conduct of the entity's business are in substance made". This definition is consistent with the OECD's commentary on Article 4 of the Organisation for Economic Cooperation and Development Model Tax Convention on Income and on Capital, 2017.

Non-resident companies are liable for direct tax in South Africa if the receipts and accruals they derive are from a South African source.[37] The term "source" is not defined in the Act, and as such is left to be interpreted by the courts.[38] The source of income in South Africa can be determined in terms of statutory rules, treaty provisions or common-law provisions.[39] The statutory rules specify the source of a number of income streams (mostly passive income) such as royalties, dividends and interest.[40] Section 9 (2)(*k*)(ii) of the Act provides that the disposal of a movable asset by a non-resident will be from a South African source if the asset is effectively connected to a permanent establishment (PE)[41] of that non-resident in South Africa. The Act does not deal with the source of services (other than a very limited reference to government public entities in section 9(2)(*h*)) and guidance for this is as per common-law rules.[42] The statutory source rules are to a large extent also found in double-tax treaties with a few exceptions.[43] The profits of a company that is not tax resident in South Africa may be taxed in South Africa if the profits derived by the company are attributable to a PE in South Africa.[44] A PE gives a taxing right to the source country where the PE is situated.[45] Article 5(1) of the OECD Model Tax Convention on Income and on Capital (OECD MTC), read with article 7(1), provides that a PE is a "fixed place of business through which the business of an enterprise is wholly or partly carried on". It includes, *inter alia*, a place of management, an office or a factory but excludes the use of facilities for activities of a preparatory nature such as storage, display or delivery. A PE will also exist if there is a person in another country that acts on behalf of the company and habitually concludes or plays the principal role leading to the conclusion of contracts in the name of the foreign company. A PE, therefore, requires some level of physical presence in a country.[46] Whether a website or the location of a server may be considered for the physical-presence-test element has been considered.[47] A website is not a tangible asset and as such cannot be a fixed place of business for purposes of the meaning of the term "permanent establishment".[48] A server has a physical location that could create a PE if used to conduct business of the enterprise.[49] An MNE

37 Definition of "gross income" in s 1 of the Income Tax Act 58 of 1962.

38 Olivier and Honiball *International Tax: A South African Perspective* 11; Croome *et al Tax Law: An Introduction* 43.

39 Stiglingh *Silke: South African Income Tax* 826.

40 See s 9 of the Income Tax Act 58 of 1962.

41 PE is defined in s 1 of the Income Tax Act with reference to the definition of article 5 of the OECD Model Tax Convention.

42 Stiglingh *Silke: South African Income Tax* 830.

43 Stiglingh *Silke: South African Income Tax* 826.

44 See relevant articles on double tax agreement entered into by South Africa, in terms of OECD Model Tax Convention, article 5 read with article 7.

45 Croome *et al Tax Law: An Introduction* 42; see also Oguttu and Van der Merwe "Electronic Commerce: Challenging the Income Tax Base?" 2005 17 *SA Merc LJ* 316.

46 Oguttu and Van der Merwe 2005 *SA Merc LJ* 316. See also Oguttu and Tladi "E-commerce: A Critique on the Determination of a 'Permanent Establishment' For Income Tax Purposes from a South African Perspective" 2009 1 *Stel LR* 74–94 75; Harpaz 2021 *The Yale Journal of International Law* 61.

47 Oguttu and Van der Merwe 2005 *SA Merc LJ* 317.

48 See par 42.2–42.3 of the commentary on article 5 of the OECD MTC.

49 *Ibid*.

may avoid the creation of a PE by making sure that a server is located outside a country.[50] In the digital space, it is possible for software programs to perform the tasks that a dependent agent would normally perform for an enterprise – for example, processing sales and electronic payments. Since a software program is not a person[51] as defined, it would not be a "person acting on behalf of" and as a result would not create a PE for an enterprise.[52]

In the classic case of *CIR v Lever Bros*,[53] the court held that, in order to determine whether income is from a South African source, it must be established what the originating cause is and then determine the location of the originating cause. If there is more than one originating cause, the dominant cause must be ascertained.[54] If the dominant cause cannot be determined, there may be an apportionment of income.[55] Therefore, in terms of the *CIR v Lever Bros* case, income will be sourced in South Africa if the originating cause of the income is located in South Africa. The originating cause of income from services rendered is the service supplied and it is located where the service is rendered.[56] It may be difficult to locate where digital services are rendered. Various variables may have to be considered – for example, where the input is being produced, the location of the server that provides the input, and the location of the customer receiving the services.[57] Applying the *CIR v Lever Bros* case to the digital economy might be problematic. There could be a problem with determining the location of the originating cause as enterprises without a physical presence in South Africa, and with their servers not located in South Africa, may offer a loophole.

A non-resident company may also be liable for tax in South Africa on some of its income in the hands of its resident shareholder if it is considered to be a controlled foreign company (CFC) of the resident shareholder. A CFC is defined in section 9D of the Act as a foreign company where more than 50 per cent of the total participation rights or voting rights in that company are directly or indirectly held by one or more residents, or the financial results of that foreign company are reflected in the consolidated financial statements (prepared in terms of International Financial Reporting Standards 10) of a resident company. CFC rules are anti-avoidance rules in place to ensure the taxation of profits that are diverted offshore.[58] It is clear from the above rules that the current principles of taxation (that is, residence and source rules) require companies to have some form of physical presence in South Africa before they can be liable for direct-tax in South Africa. As such, South Africa does not currently have a direct-tax[59] measure for taxing the digital economy.

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50 Harpaz 2021 *The Yale Journal of International Law* 62.

51 Article 3 of the OECD MTC defines a "person" as an individual, company and any other body of persons.

52 See also Oguttu and Van der Merwe 2005 *SA Merc LJ* 319.

53 1946 AD 411 442.

54 Olivier and Honiball *International Tax: A South African Perspective* 12.

55 *Ibid*.

56 *CIR v Epstein* 1954 (3) SA 689 (A).

57 See also Oguttu and Van der Merwe 2005 *SA Merc LJ* 305–322 315.

58 Stiglingh *Silke: South African Income Tax* 871.

59 South Africa does tax the digital economy through its value-added tax rules.

2 2 2 Digital economy direct tax challenges

The digital economy poses various direct and indirect tax challenges. The main direct-tax challenges covered in this article are in respect of the tax nexus, tax treatment of data and the characterisation of income in the digital economy.

Tax nexus refers to the connecting factor between income or taxpayer and a particular jurisdiction. As discussed above, the main tax connection between a taxpayer and South Africa is the existence of some form of "physical presence". Digitalisation removes the need for physical presence.[60] Businesses can now operate in a jurisdiction on a large scale without having any physical presence in that jurisdiction,[61] thus making it possible for businesses to conduct substantial business activities and engage with their customers remotely using a website or some other digital means without creating a tax nexus.[62] The ability of a business to operate in a jurisdiction without any physical presence in that jurisdiction thus poses a direct-tax challenge[63] as profits that a digitalised business derives in a market jurisdiction could remain untaxed because there is no tax nexus between the digitalised business and the market jurisdiction.[64]

Business models in the 4IR rely heavily on data.[65] This reliance on data may pose direct-tax challenges both in terms of the tax treatment of the data and the characterisation of income.[66] Different types of income received by non-residents in South Africa have different tax consequences.[67] The digital economy creates income-characterisation problems as it may change the nature of products and services.[68] For example, the supply of a database or the downloading of software may result in income for performance of a service, a royalty for the use of intellectual property, or profit from the sale of a product.[69] It is important to distinguish the different types of income as they have different tax consequences. It may be difficult to determine into which category among the existing categories of income the income from the digital economy falls. For example, one could question whether payments for cloud computing should be treated as royalties, fees for technical services or business profits.[70] The characterisation of income of a transaction can result in different tax treatments.[71] For example, under most South African double-

60 Oguttu and Van der Merwe 2005 *SA Merc LJ* 317.

61 OECD (2015) 98.

62 Hardy "Taxation and the Digital Economy: European and International Initiative to Create a Fair Tax System" (2018) Brussels blog, nautaudutilh.com/en/information-centre/news/taxation-and-the-digital-economy-european-and-international-initiatives-to-create-a-fair-system (accessed 2022-04-13).

63 OECD (2015) 98.

64 Harpaz 2021 *The Yale Journal of International Law* 58.

65 *Ibid.* Data can broadly be referred to as the information that is collected digitally, and which creates value for MNEs.

66 *Ibid*.

67 See also Oguttu and Van der Merwe 2005 *SA Merc LJ* 312.

68 *Ibid.*

69 *Ibid.*

70 OECD (2015) 104.

71 OECD (2015) 106.

tax treaties, business profits would be taxable in South Africa only if attributable to a PE located in South Africa, whereas royalties would be subject to a withholding tax in South Africa if paid by a South African tax resident.[72]

3 SOLUTIONS PROPOSED BY THE OECD

The OECD is the leading figure[73] in the work of addressing the challenges of the digital economy.[74] The OECD began the work on issues raised by electronic commerce in 1997.[75] The OECD found it important to try to create a consensus between business and government in some of the guiding principles that will form a framework at national and international levels for electronic commerce policies.[76] The OECD and the G20 (Group of Twenty),[77] in collaboration with over 125 countries, developed measures to tackle base erosion and profit shifting (BEPS)[78] strategies (BEPS Package). The BEPS Package resulted in the OECD producing 15 actions that serve to equip governments with domestic and international instruments to address BEPS strategies; in July 2013, the OECD released an Action Plan with 15 comprehensive actions[79] to ensure that profits are taxed where economic activities and value are created to generate those profits.[80]

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72 OECD (2015) 107. And s 9(2)(*c*) of the Income Tax Act.

73 There are other players such as the UN but for purposes of this article, the focus is on the OECD.

74 OECD (2015) 98.

75 Ypsilanti "A Borderless World: The OECD Ottawa Ministerial Conference and Initiatives in Electronic Commerce" 1999 *The Journal of Policy, Regulation and Strategy for Telecommunications Information and Media* 23–33 24.

76 Ypsilanti *The Journal of Policy, Regulation and Strategy for Telecommunications Information and Media* 25.

77 The G20 is an international forum for governments and central bank governors from 20 major economies. The members include, among others, South Africa, China, India, the United Kingdom and the United States of America. The G20 was established with the aim of studying, reviewing and promoting discussions on policies in respect of the promotion of international financial stability. See www.dfaf.gov.au/trade/organisations/g20 (accessed 2022-06-30).

78 The OECD provides that BEPS relates to "arrangements that achieve low or no taxation by shifting profits away from the jurisdictions where the activities creating those profits take place or by exploiting gaps in the interaction of domestic tax rules where corporate income is not taxed at all". See OECD *Addressing Base Erosion and Profit Shifting* (2013) 14.

79 The Action plans are: Action 1: Address the Tax Challenges of the Digital Economy; Action 2: Neutralise the Effects of Hybrid Mismatch Arrangements; Action 3: Strengthen Controlled Foreign Companies Rules; Action 4: Limit Base Erosion via Interest Deduction and Other Financial Payments; Action 5: Counter Harmful Tax Practices More Effectively, Taking Into Account Transparency And Substance; Action 6: Prevent Treaty Abuse; Action 7: Prevent the Artificial Avoidance of PE Status; Action 8: Assure That Transfer Pricing Outcomes are in Line With Value Creation With Respect to Intangibles; Action 9: Assure That Transfer Pricing Outcomes are in Line With Value Creation With Respect to Risks and Capital; Action 10: Assure That Transfer Pricing Outcomes are in Line With Value Creation With Respect to Other High Risk Transactions; Action 11: Establish Methodologies to Collect and Analyse Data on BEPS and the Actions to Address It; Action 12: Require Taxpayers to Disclose Their Aggressive Tax Planning Arrangements; Action 13: Re-Examine Transfer Pricing Documentation; Action 14: Make Dispute Resolution Mechanisms More Effective; and Action 15: Develop a Multilateral Instrument.

80 OECD (2018) 17.

In 2015, the OECD/G20 issued Action 1: Addressing the Tax Challenges of the Digital Economy (OECD BEPS Action 1), which formed part of the 15 BEPS Actions, to address BEPS in relation to the digital economy. The OECD BEPS Action 1 discussed, among other issues, direct-tax challenges posed by the digital economy such as the issue of nexus, tax treatment of data, and the characterisation of income; and suggested solutions such as the modification of existing PE rules, withholding taxes on certain digital transactions and an equalisation levy.[81] When the OECD BEPS Action 1 was adopted, countries that were participating in the BEPS Project had not reached an agreement on the recommendations made.[82] Consequently, none of the recommendations were agreed to as international standards but countries could unilaterally introduce any of the recommended solutions into their domestic law provided they did not conflict with existing tax treaties and international obligations.[83]

In 2016, the OECD established the OECD/G20 Inclusive Framework (which includes non-OECD members) to discuss and collaborate on the challenges and implementation of the BEPS Project.[84] On 16 March 2018, the OECD issued an Interim Report entitled the "Tax Challenges Arising From Digitalisation – Interim Report 2018: Inclusive Framework on BEPS, OECD/G20 Base Erosion and Profit Shifting Project" (OECD 2018 Interim Report), which analysed developments of the digital economy, unilateral measures taken by countries to address the broader tax challenges posed by the digital economy, and the implementation of the measures relevant to digitalisation.[85] The OECD 2018 Interim Report recognised the need for a global solution to address the tax challenges of the digital economy.[86] The members of the OECD/G20 Inclusive Framework agreed to review the current existing tax-nexus and profit-allocation rules and work towards the delivery of globally agreed rules that would effectively address the direct-tax challenges posed by the digital economy.[87] On the 23 January 2019, the OECD issued a Policy Note for Addressing the Tax Challenges of the Digitalisation of the Economy in terms of which the OECD/G20 Inclusive Framework agreed to review and develop proposals for taxing the digital economy, grouped into two pillars that would form the basis for consensus.[88] One pillar would focus on the broader tax challenges (nexus data, and characterisation) and the other pillar would deal with the remaining BEPS issues.[89] Accordingly, a programme of work to develop a consensus solution to the tax challenges arising from the digital economy was adopted in May

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81 Significant economic presence deals with the situation where a business uses digital technology to engage in the economic life of a country frequently and in a sustained manner without having a physical presence in that company. The solution will create a taxable presence in a country for a non-resident enterprise that has significant economic presence in such a country through the use of digital economy.

82 OECD (2018) 134.

83 *Ibid*.

84 OECD (2020).

85 *Ibid.*

86 OECD (2020) 10.

87 OECD (2018) 173 and 178.

88 OECD *Addressing the Tax Challenges of Digitalisation of the Economy – Policy Note* (2019) 1.

89 *Ibid.*

2019 and was endorsed by the G20 in June 2019.[90] The programme of work mandated the OECD Secretariat to conduct an economic and tax revenue analysis and impact assessment of the Pillar One and Pillar Two proposals (Economic Impact Analysis).[91] The Economic Impact Analysis provided that Pillar One and Pillar Two could increase global corporate income tax (CIT) revenues by about USD 50 to 80 billion a year and that a consensus based multilateral solution for implementing Pillar One and Pillar Two would be more desirable for increased investment and economic growth than would be the case without an agreement by the Inclusive Framework.[92]

3 1 Pillar One

In 2020, the OECD issued a report on the blueprint for Pillar One (Pillar One Blueprint), which sets out the main aspect of Pillar One and identifies the areas where political decision is needed to complete the solution.[93] Pillar One proposes new tax-nexus and profit-allocation rules for large MNEs that meet certain revenue and profitability thresholds.[94] Among other proposals, it extends taxing rights to jurisdictions where businesses operate and have a sustained presence,[95] albeit remotely without a physical presence.[96] The new taxing right (also referred to as "Amount A") will only apply to MNE groups with a global turnover above 20 billion euros[97] (and profitability above 10 per cent calculated using an averaging mechanism).[98] A market jurisdiction will be allocated the new taxing right in terms of the in-scope MNEs when such MNEs derive at least 1 million euros (250 000 euros for smaller jurisdictions with GDP lower than 40 billion euros) in revenue from that jurisdiction;[99] 25 per cent of residual profit (which is profit in excess of 10 per cent of revenue) will be allocated to market jurisdictions with a nexus using a revenue-based allocation key.[100]

The African Tax Administration Forum (ATAF)[101] suggested that the threshold should be country specific, considering the relative size of the country's economy, to ensure that smaller economies are not excluded from

90 OECD (2020) 3.
91 OECD (2020) 4.
92 OECD (2020) 10–11.
93 OECD (2020) 3.
94 *Ibid.*
95 An activity test will be the base of determining if a business has a sustained presence requiring the application of the new taxing right.
96 *Ibid.*
97 Turnover is to be reduced to 10 billion euros if implementation is successful.
98 OECD/G20 BEPS Project https://www.oecd.org/tax/beps/statement-on-a-two-pillar-solution-to-address-the-tax-challenges-arising-from-the-digitalisation-of-the-economy-october-2021.pdf 1.
99 *Ibid.*
100 OECD/G20 BEPS Project https://www.oecd.org/tax/beps/statement-on-a-two-pillar-solution-to-address-the-tax-challenges-arising-from-the-digitalisation-of-the-economy-october-2021.pdf 2.
101 ATAF is an international organisation that provides a platform for African tax administrations to collaborate and cooperate with each other. See www.ataftax.org.

the nexus rules.[102] The OECD rejected ATAF's suggestion that part of the routine profit of in-scope MNEs be relocated to market jurisdictions or that 35 per cent of residual profits be allocated to market jurisdictions.[103] The Amount A taxing right will be implemented through changes to existing domestic laws and by making use of a multilateral convention (MLC).[104] Model rules are being developed that will be used by countries as a basis to give effect to the new taxing right in their domestic legislation.[105]

3 2 Pillar Two

Pillar Two (referred to as global anti-base erosion (or GloBE)) proposes mechanisms to ensure that large MNEs pay a minimum level of tax (15 per cent) in a jurisdiction in which they operate.[106] Pillar Two applies to MNE groups with consolidated group revenue equal to or exceeding 750 million euros.[107] Taxpayers falling into the scope of the Pillar Two rules calculate their effective tax rate for each jurisdiction in which they operate, and pay a top-up tax for the difference between their effective tax rate per jurisdiction and the 15 per cent minimum rate.[108] Governments can determine their own tax systems and still set their own corporate income tax (CIT) rates but if MNEs are paying less than the 15 per cent global minimum rate, the MNE's country of residence has a right to "top up" the tax.[109] ATAF has proposed that the minimum rate be set at least 20 per cent (not 15 per cent) as most African countries have a statutory CIT rate of between 25 and 35 per cent.[110] This proposal has not been accepted. On 20 December 2021, model rules to implement a global minimum tax were issued with key aspects generally planned to be implemented into domestic law in 2022 and to be effective in 2023.[111]

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102 ATAF "ATAF's Opinion on the Inclusive Framework (Including the Unified Approach) and Pillar Two Proposals to Address the Tax Challenges Arising From the Digitalisation of the Economy https://events.ataftax.org/includes/preview.php?file_id=44&language=en_US https://events.ataftax.org/includes/preview.php?file_id=44&language=en_US (accessed 2022-06-13) 2.

103 ATAF "A New Era of International Taxation Rules – What Does This Mean for Africa?" (8 October 2021) https://www.ataftax.org/a-new-era-of-international-taxation-rules-what-does-this-mean-for-africa (accessed 2022-07-21).

104 OECD (2020) 14.

105 OECD "Pillar One – Amount A: Draft Model Rules for Tax Base Determinations" A public consultation document (18 February 2022 – 4 March 2022) https://www.oecd.org/tax/beps/public-consultation-document-pillar-one-amount-a-tax-base-determinations.pdf 2.

106 OECD (2021) 14.

107 OECD (2021) 15.

108 OECD (2021) 45

109 *Ibid.*

110 ATAF https://www.ataftax.org/a-new-era-of-international-taxation-rules-what-does-this-mean-for-africa. South Africa's CIT rate for years ending on date between or on or after 31 March 2023 is 27 per cent (it was previously 28 per cent).

111 *Ibid.*

4 SOUTH AFRICA'S POSITION

4 1 South Africa's response

South Africa is a developing African country. Although South Africa is not an OECD member and is thus not required to follow OECD policies, it has been awarded OECD observer status[112] in 2004, most of its double-tax agreements follow the OECD Model Tax Convention on Income and Capital,[113] and it is a member of the OECD BEPS Committee and the OECD/G20 Inclusive Framework on BEPS.[114] South Africa has chosen to await a consensus solution and has not yet taken any unilateral measures to tax the digital economy directly.[115] In order to implement the OECD solutions, South Africa will have to incorporate the rules into its domestic laws and ratify any treaty entered into. The OECD solutions are proving slow to implement; and not having unilateral measures in the meantime means that South Africa is losing out on the tax revenue it could be generating from taxing the digital economy using direct tax measures, as opposed to indirect tax in the form of value added tax (VAT).[116]

4 2 Suitability of OECD's solutions

The rules proposed by the OECD recognise that the current direct-tax rules, which require some form of physical presence before a country can tax a company, are insufficient to tax new business models under the digital economy, and as such the OECD has proposed new tax-nexus and profit-allocation rules that do not require physical presence.[117] The implementation of such rules by South Africa would ensure that South Africa does not continue to lose revenue from not having direct-tax rules that allow for the taxation of companies that are not physically present in South Africa but are operating in South Africa digitally. Oguttu notes that it is important for African countries to embrace the OECD BEPS Project, as it has the prospect of curtailing tax avoidance by MNEs, which will result in raising corporate tax revenues for these countries.[118] Valderrama argues that it is not clear how the solutions proposed by the OECD in addressing the challenges of the digital economy are beneficial to developing countries, and argues that it may shift developing countries' focus away from other tax matters unique to

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112 South Africa is able to attend the OECD meetings as an observer.

113 Olivier and Honiball *International Tax: A South African Perspective* 270. The court in *CIR v Dowing* 1975 (4) SA 518 (A) 524 held that South Africa must consider the guidelines and interpretations contained in the OECD commentaries on concepts used by the OECD Model Tax Convention.

114 OECD (2020) 3; OECD (2018) 19.

115 Business Tech https://businesstech.co.za/news/technology/468144/theres-a-big-problem-with-south-africas-plans-for-digital-tax. However, it should be noted that, South Africa currently taxes the digital economy through its rules on value added tax, which have the result that consumers are liable for the digital tax, and not MNEs.

116 See also Business Tech https://businesstech.co.za/news/technology/ 468144/theres-a-big-problem-with-south-africas-plans-for-digital-tax.

117 OECD (2020) 64.

118 Oguttu "Tax Base Erosion and Profit Shifting in Africa – Part 1: What Should Africa's Response Be to the OECD BEPS Action Plan?" 2015 48 *CILSA* 516–553 526.

them such as taxation of the informal economy.[119] ATAF notes that the reallocation of profits of MNEs using new tax-nexus rules is a step in the right direction but does not amount to a substantial shift in the allocation of taxing rights between residence- and source-based jurisdictions.[120] ATAF advocates for a substantial shift in the current rules for allocating taxing rights between residence- and source-based countries to allow for a more equitable allocation of taxing rights because the current rules favour residence-based jurisdictions to the detriment of developing African countries, which in most cases are the primary source jurisdictions.[121]

The OECD's main objective is to foster economic development and growth for its member countries.[122] There is a concern that the OECD proposals are possibly better suited to protecting the interests of the OECD members to further its main objective. However, the OECD has asserted that its role is not to make proposals that favour one group over another but is exploring a potential consensus solution that would be suitable for everyone, considering that some compromises would need to be made as it is impossible to please everyone.[123] It has also been questioned whether the OECD Inclusive Framework really provides an equal footing for developing countries or whether the platform includes developing countries as a mere formality and those countries do not really have a say.[124] The more developed countries have more bargaining power than developing countries and may sometimes use this to establish rules more suitable to themselves. For example, the CIT rate of most African countries is between 25 and 35 per cent; setting the global minimum CIT rate at 15 per cent is therefore not really suitable for most developing African countries, including South Africa (with a CIT rate of 27 per cent).[125] Christians is of the opinion that the OECD solutions will favour a few key players and be implemented using guidance and peer pressure.[126] Some of the key players in the process are stakeholders of key multinationals, and as such they have incentives to direct the consensus to their preferred position as far as is possible.[127] Should they not be able to direct the consensus, they have the political and administrative network connections and influence to slow down or even stop

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119 Valederrama "About BEPS Inclusive Framework and the Role of the OECD" (2019) https://globtaxgov.weblog.leidenuniv.nl/2019/11/19/about-the-beps-inclusive-framework-and-the-role-of-the-oecd/ (accessed 2022-06-28).

120 ATAF https://www.ataftax.org/a-new-era-of-international-taxation-rules-what-does-this-mean-for-africa.

121 *Ibid*.

122 OECD "What Is the OECD (Organization for Economic Cooperation and Development)?" (2019) https://corporatefinanceinstitute.com/resources/knowledge/economics/oecd/ (accessed 2022-07-09).

123 Dickinson "The Inclusive Framework Is Considering Radical Proposals, But In the Real World …" (2019) https://www.ictd.ac/blog/oecd-inclusive-framework-tax-proposals-negotiation/ (accessed 2022-06-13).

124 See Christians "OECD Secretariat's Unified Approach: How to Get Things on a Truly Equal Footing" (2019) https://www.ictd.ac/blog/oecd-secretariat-unified-approach-equal-footing/ (accessed 2022-06-13).

125 ATAF https://www.ataftax.org/a-new-era-of-international-taxation-rules-what-does-this-mean-for-africa.

126 *Ibid*.

127 *Ibid.*

a consensus that they really dislike.[128] In response to Christians, Dickenson argues that consensus is made by countries as sovereigns, and not as blocs of countries; as such there is no single European view.[129] Although countries might not be working in blocs, the ATAF is working together with the African Union and African countries in reviewing and implementing the OECD solutions.[130]

Kristen argues that some of the solutions proposed by the OECD may not be suitable for tax systems in Africa because of resource limitations and financial constraints in developing countries.[131] The need for ever-changing tax policies may be a challenge for developing countries as they have developing economies and as such may not be financially equipped to keep up with constantly changing tax policies.[132] The implementation of global solutions may also result in administrative systems incurring major expenses for training staff in order to apply and enforce the rules, which may be a blow for African countries with limited financial resources.[133] The move to global consensus is moving at a fast pace and developing countries may still need to understand the rules and how they will impact their existing tax systems.[134] Global consensus is necessary, but it should not be rushed.[135] The implementation of OECD solutions to digital-economy taxation challenges could pose administrative challenges for African developing countries.[136] African countries may struggle with enforcing compliance with new digital-tax rules as African countries have already announced that some MNEs are ignoring registration requirements for taxes such as VAT imposed in those countries.[137] African countries need also to consider the amount of political interference and corruption in some countries and how the tax administrators may be pressured to "go easy" on some MNEs that may be key players in the economy. This may be dealt with, however, by making sure that the rules adopted are hard to manipulate and are more formulaic.[138]

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128 *Ibid.*

129 Dickinson https://www.ictd.ac/blog/oecd-inclusive-framework-tax-proposals-negotiation/.

130 ATAF Communications https://www.ataftax.org/a-new-era-of-international-taxation-rules-what-does-this-mean-for-africa.

131 Kirsten "Taxing the Digital Economy – Why Is Africa Not Getting Its Fair Share?" (2019) bdo.co.za/en-za/insights/2019/tax/taxing-the-digital-economy-why-is-africa-not-getting-its-fair-share (accessed 2022-04-13).

132 *Ibid*.

133 Rukundo, "Addressing the Challenges of Taxation of the Digital Economy: Lessons for African Countries" (2020) ICTD Working Paper 105 (first published by the Institute of Development Studies in January 2020) 20.

134 Oguttu 2020 *World Tax Journal* 823.

135 Valederrama https://globtaxgov.weblog.leidenuniv.nl/2019/11/19/about-the-beps-inclusive-framework-and-the-role-of-the-oecd/.

136 Rukundo ICTD Working Paper 105 20.

137 *Ibid.*

138 *Ibid.*

5 RECOMMENDATIONS

Rukundo[139] urges African countries to participate in the discussions on global consensus solutions, but to consider that their challenges as African countries are different to those experienced by developed countries and as such solutions should also be unique to African countries.[140] The Davis Tax Committee[141] (DTC) cautioned South Africa against blindly following the lead of developed countries in implementing international tax developments and advised that South Africa should conduct its own research before implementing any solutions. There are measures that are in line with current international tax principles that developing countries can rely on to protect their tax bases while they wait for global consensus; these include strengthening their source rules, imposing withholding tax on service fees arising from digital services, negotiating the services article in the UN model,[142] or applying alternative minimum corporate taxes based on turnover.[143] The DTC recommended the introduction of new source rules in South Africa in the form of an inclusion in section 9 of the Act of rules that cover income from the supply of digital goods and services by non-residents as income sourced in South Africa.[144] The rules could provide that the supply of digital goods and services is sourced where the consumer is based.[145]

The implementation of such rules by South Africa would ensure that South Africa does not continue to lose revenue from not having direct-tax rules that allow for the taxation of companies that are not physically present in South Africa but are operating in South Africa digitally. Oguttu notes that it is important for African countries to embrace the OECD BEPS Project as it has the prospect of curtailing tax avoidance by MNEs and of raising corporate tax revenues of these countries.[146] South Africa should not rush to implement the rules but take time to research them and see how to adapt them in a way that will be suitable for South Africa.

6 CONCLUSION

Business models have changed and adapted owing to the advancement of ICT; as a result, businesses are now able to operate digitally and do not

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139 Rukundo ICTD Working Paper 105 20.

140 *Ibid.*

141 The Davis Committee is a committee that was appointed to review the tax system of South Africa.

142 S 12A of the 2017 UN model double tax convention between developed and developing countries allows countries to levy tax on payments made to non-resident providers of technical services even if the non-resident providers do not have physical presence in the country.

143 Oguttu 2020 *World Tax Journal* 823.

144 Davis Tax Committee "Executive Summary of Second Interim Report on Base Erosion and Profit Shifting (BEPS): OECD BEPS Project From a South African Perspective: Policy Perspectives and Recommendations for South Africa" (2016) https://www.taxcom.org.za/docs/New_Folder3/1%20BEPS%20Final%20Report%20-%20Executive%20Summary.pdf 9.

145 Davis Tax Committee https://www.taxcom.org.za/docs/New_Folder3/1%20BEPS%20Final%20Report%20-%20Executive%20Summary.pdf 10.

146 Oguttu 2015 *CILSA* 516–553 526.

always need to be physically present in a jurisdiction before interacting with customers in that jurisdiction. This puts a lot of pressure on current direct-tax rules that were developed more than a century ago with traditional business models in mind. The current international direct-tax rules require some form of physical presence of a company in a jurisdiction before that jurisdiction can have the right to tax the profits of the company. This has resulted in many companies that operate digitally not being taxed in market jurisdictions where they operate virtually. The OECD has taken a leading role in developing new direct-tax rules that will address the tax challenges posed by the digital economy and has agreed to develop a two pillar solution that can be consented to internationally and implemented by countries. Pillar One proposes new nexus and profit-allocation rules for large MNEs that meet certain revenue and profitability thresholds,[147] and Pillar Two proposes mechanisms to ensure large MNEs pay a minimum level of tax (currently set at 15 per cent) regardless of where their headquarters are or the jurisdictions in which they operate.[148]

South Africa has decided to wait for global consensus and is currently not taxing the digital economy through its direct-tax rules. Although the OECD solutions are helpful proposals in regard to taxing the digital economy and are a step in the right direction, it is submitted that they are not completely suited to South Africa as a developing African country. For example, they do not consider some of South Africa's unique circumstances like the prevalence of corruption, semi-skilled tax administration and limited resources. South Africa should not merely adopt the rules blindly but should adapt them to suit South Africa's needs as a developing country. South Africa needs to protect its tax base while embracing the digital economy; and perhaps while it waits for a global solution, it could strengthen its source rules as recommended by the DTC.

147 OECD (2020).
148 OECD (2021).

GET WITH THE BEAT! THE REGULATION OF UNDERWATER NOISE IN SOUTH AFRICA

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SUMMARY

Anthropogenic noise in the oceans, including from shipping and seismic surveys, is of concern as it often adversely impacts marine life and biodiversity. It is considered to be the number-one ocean pollutant today. The authors review major international legal instruments regarding underwater noise as a marine pollutant and examine them in the South African context. The authors find, *inter alia*, that a distinction between substance-based pollution (such as chemical pollution) and energy-based pollution (such as noise) is currently lacking. It is also found that very little literature is available on the impacts of shipping and seismic noise on small fish, turtles and cetaceans, a state of affairs that calls for a precautionary approach. It is recommended: (1) South African legal instruments that regulate underwater noise should be revised and aligned with international legal frameworks; (2) more scientific research should be conducted on the cumulative impacts of shipping and seismic surveys on the South African marine environment; and (3) the public participation process should be effectively monitored to ensure full compliance with the requirement to consult all affected and interested persons. Doing so would have wider implications for developments in the western Indian Ocean region regarding shipping, port construction and seismic explorations.

1 INTRODUCTION

The noise emitted by commercial ships and seismic surveys used during offshore oil and gas exploration projects are among the most significant sources of anthropogenic underwater noise in the ocean.[1] Commercial shipping is the main source of low-frequency anthropogenic sound. It is an ongoing activity as approximately 80 per cent of consumer goods are transported by sea.[2] It was estimated that sea-borne trade would increase by 3,8 per cent annually between 2018 and 2023, and would increase low-frequency ambient noise.[3] This estimated annual increase was disrupted by the global COVID-19 pandemic as shipping rates decreased significantly in the first quarter of 2020 owing to strict lockdown restrictions.[4] Within the third quarter of 2020, lockdown restrictions were eased and the shipping industry began to recover as demand for essential goods increased and shipping rates soon returned to their pre-COVID-19 levels[5] with, for instance, freight rates from China to South America increasing by 443 per cent in the first quarter of 2021.[6]

The commercial shipping industry has for decades contributed significantly to the growth of the South African economy, with the industry employing 25 000 workers by 1996 and generating approximately ZAR 1.5 billion in revenue.[7]

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1 See Peng, Zhao and Liu "Noise in the Sea and Its Impacts on Marine Organisms" 2015 12 *International Journal of Environmental Research and Public Health* 12304 12306; Kavanagh, Nykänen, Hunt, Richardson and Jessopp "Seismic Surveys Reduce Cetacean Sightings Across a Large Marine Ecosystem" 2019 9 *Scientific Report 1;* Miller, Thompson, Johnston and Santillo "An Overview of Seabed Mining Including the Current State of Development, Environmental Impacts, and Knowledge Gaps" 2018 4 *Frontiers in Marine Science* 1; Jasny "Sounding the Depths II: The Rising Toll of Sonar, Shipping and Industrial Ocean Noise on Marine Life" (2005) https://www.nrdc.org/resources/sounding-depths-ii-rising-toll-sonar-shipping-and-industrial-ocean-noise-marine-life (accessed 2023/06/09) 3.

2 Dotinga and Oude Elferink "Acoustic Pollution in the Oceans: The Search for Legal Standards" 2000 31 *Ocean Development & International Law* 151 153.

3 United Nations Conference on Trade and Development (UNCTAD) *Review of Maritime Transport* (UNCTAD/RMT/2018) 2018 1 and 2. Also see Erbe, Marley, Schoeman, Smith, Trigg and Embling "The Effects of Ship Noise on Marine Mammals: A Review" 2019 6 *Frontier in Marine Science* 1 2.

4 The shipping industry was significantly affected by the pandemic because most factories shut down their production temporarily during the first quarter of 2020, and most ports closed or reduced their staff, which slowed down cargo handling speed, while many shipping lanes reduced the number of operating ships. See Larsen "How COVID-19 Is Affecting the Shipping Industry – and How to Navigate Through the Storm" (21 January 2021) https://blog.greencarrier.com/how-covid-19-is-affecting-the-shipping-industry-and-how-to-navigate-through-the-storm/ (accessed 2021-08-10).

5 See Attinasi, Bobasu and Gerinovics "What Is Driving the Recent Surge in Shipping Costs?" (March 2021) https://www.ecb.europa.eu/pub/economic-bulletin/focus/2021/html/ecb.ebbox202103_01~8ecbf2b17c.en.html (accessed 2021-08-10).

6 United Nations Conference on Trade and Development (UNCTAD) "Container Shipping in Times of COVID-19: Why Freight Rates Have Surged, and Implications for Policymakers" (2021) 84 UNCTAD/PRESS/PB/2021/2.

7 Strauss Daly Attorneys "The Ship Market and Maritime Finance in South Africa: An Overview" (15 September 2016) https://www.golegal.co.za/shipping-law-ship-market-maritime-finance-south-africa-overview/ (accessed 2021-08-16).

This industry is reliant on the seven major operational ports in South Africa,[8] of which Durban is currently the busiest and largest port, accounting for approximately 60 per cent of the country's total shipping revenue.[9] Owing to the anticipated growth of the commercial shipping industry[10] and the heavy reliance of landlocked Southern African Development Community (SADC) states on these ports, their expansion seems inevitable.[11]

Furthermore, the National Ports Authority of South Africa[12] has planned several development projects to expand the ports under government initiatives such as the National Development Plan (NDP),[13] Operation Phakisa[14] and the Comprehensive Maritime Transport Policy (CMTP) of South Africa.[15] Through the implementation of these initiatives, it can be argued that an increase in shipping within the South African maritime domain will also increase the level of low-frequency noise emitted therein. Thus, effective regulation under South African law of noise emitted by ships is imperative.

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8 Namely, Saldanha Bay, Cape Town, Port Elizabeth (Gqeberha), Ngqura (Coega), East London, Durban and Richards Bay. See Koper and Plön *The Potential Impacts of Anthropogenic Noise on Marine Animals: Recommendations for Research in South Africa* EWT Research and Technical Paper No 1 for the Endangered Wildlife Trust, South Africa 2012 21.

9 Sinha "7 Major Ports of South Africa" (1 August 2021) https://www.marineinsight.com/know-more/ports-of-south-africa/ (accessed 2021-09-16).

10 Koper and Plön EWT Research and Technical Paper No 1 54.

11 Draper and Scholvin *The Economic Gateway to Africa? Geography, Strategy and South Africa's Regional Economic Relations* Occasional Paper No 121 for the Economic Diplomacy Programme of the South Africa Institute of International Affairs (SAIIA) (2012) 15–20. The right of landlocked states to access the sea through neighbouring coastal states is recognised by article 125(1) of the 1982 United Nations Convention on the Law of the Sea (LOSC) 1833 UNTS 3; 21 ILM 1261 (1982). Adopted: 10/12/1982; EIF: 16/11/1994. See, for instance, Vrancken and Swanepoel "Landlocked States" in Vrancken and Tsamenyi *The Law of the Sea: The African Union and Its Member States* (2017) 730 and 737–745.

12 Established in terms of s 3(1) of the National Ports Act No 12 of 2005. According to s 11(1) of the Act, "the main function of the National Ports Authority is to own, manage, control, and administer ports to ensure their efficient and economic functioning, and in doing so the Authority must [*inter alia*]–

(a) plan, provide, maintain and improve port infrastructure;

(b) prepare and periodically update a port development framework plan for each port, which must reflect the Authority's policy for port development and land use within such port."

13 Adopted on 15 August 2012.

14 Operation Phakisa is a government initiative that was established in 2014 with the aim of rapidly unlocking the potential of the South African oceans by fast tracking the growth and development of six areas of industry, namely marine transport and manufacturing, offshore oil and gas, aquaculture, marine protection services and ocean governance, small harbours development, and coastal and marine tourism. Operation Phakisa "Operation Phakisa: Moving South Africa's Oceans Economy Forward" (undated) https://www.environment.gov.za/sites/default/files/docs/publications/operationsphakisa_movingSA_oceanseconomyforward.pdf (accessed on 2023-06-09) 1. See also Roux and Horsfield "Review of National Legislations Applicable to Seabed Mineral Resources Exploitation" in Banet (ed) *The Law of the Seabed* (2020) 287 307.

15 Department of Transport *Comprehensive Maritime Transport Policy (CMTP) for South Africa* (2017).

As mentioned previously, as far as the exploration and exploitation of marine non-living resources are concerned, seismic surveys[16] used by the oil and gas industry are the major source of high-intensity underwater noise, and have the ability to cause significant injury to marine life.[17]

South Africa has become a big importer of oil to meet an increasing demand for an adequate supply of energy.[18] For the sake of the country's economic growth and stability, it has become vital to reduce importation costs by increasing the exploitation of local oil and gas resources.[19] Although seismic surveys for the exploration of oil and gas reserves have been used in South Africa since the 1980s, the advance of technology has since made exploitation even more feasible.[20] The exploration of offshore reserves in South Africa is said to be now at its highest level, with multinational companies such as Shell, Total E&P and Exxon Mobil all obtaining exploration licences.[21]

However, because the seismic surveys used by this industry emit high-intensity sound, at source levels of 262 dB with the potential to travel 4 000 kilometres from source, the surveys have given rise to significant controversy,[22] particularly in light of increasing global concerns regarding the impact of seismic-survey noise on marine biodiversity.[23] In addition, fishing

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16 A seismic survey is "the study in which seismic waves generated through compressed air are used to image layers of rock below the seafloor in search of geological structures to determine the potential presence of naturally occurring hydrocarbons". See *Sustaining the Wild Coast NPC v Minister of Mineral Resources and Energy* [2022] ZAECMKHC 55.

17 Duarte, Chaouis, Collin, Costa, Devassy, Eguiluz, Erbe, Gordon, Halpern, Harding, Havlik, Meekan, Merchant, Miksis-Olds, Parsons, Predragovic, A Radford, C Radford, Simpson, Slabbekoorn, Staaterman, Opzeeland, Winderen, Zhang and Juanes "The Soundscape of the Anthropocene Ocean" 2021 371 *Science* 1 5.

18 Surbun "The Regulation of Offshore Seismic Surveys for Petroleum Resources in South Africa's Maritime Realm" 2016 22(1) *South African Journal of Environmental Law and Policy* (*SAJELP*) 129 130.

19 *Ibid*.

20 Petroleum Agency SA "Management of Seismic Surveys in South Africa: From a Regulatory Perspective" (undated) https://www.petroleumagencysa.com/images/pdfs/Seismics.pdf (accessed 2020-07-14). During seismic surveys used by the petroleum industry, air gun arrays are towed on a ship and fired in quick succession, emitting low-frequency sound at high intensity.

21 Surbun 2016 *SAJELP* 131.

22 Purdon "Calming the Waves: Using Legislation to Protect Marine Life From Seismic Surveys" 2018 58 *South African Institute of International Affairs Policy Insights* 1 3.

23 Surbun 2016 *SAJELP* 135; Kavanagh, Nykänen, Hunt, Richardson and Jessopp "Seismic Surveys Reduce Cetacean Sightings Across a Large Marine Ecosystem" 2019 9.19164 *Scientific Reports 2*; Wright "Reducing Impacts of Noise From Human Activities on Cetaceans" 2014 *WWF Report* 30; and Ngema "Seismic Activity Could Be Causing Dolphin Beachings in KZN" (2018-06-13) *IOL News* https://www.iol.co.za/dailynews/seismic-activity-could-be-causing-dolphin-beachings-in-kzn-15454709 (accessed 2021-09-30). Also see Pichegru, Nyengera, Mclnnes and Pistorius "Avoidance of Seismic Survey Activities by Penguins" (24 November 2017) *Scientific Reports* https://www.ncbi.nlm.nih.gov/pmc/articles/PMC5701127/ (accessed 2021-09-30). Also see Bega "Shell's Seismic Surveys on the Wild Coast Will Be Destructive, Scientist Says" (2021-11-12) *Mail & Guardian* https://mg.co.za/environment/2021-11-12-shells-seismic-survey-on-the-wild-coast-will-be-destructive-scientist-says/ (accessed 2023-06-09).

industry stakeholders have expressed concerns that seismic-survey noise might reduce catches and thus affect the profitability of their industry.[24]

Much like the commercial shipping industry, the offshore hydrocarbon extraction industry is also set to expand. This is to be achieved in terms of the Operation Phakisa government initiative established to unlock the ocean's potential to grow the economy by focusing on six key areas, including offshore oil and gas extraction. An increase in the number of seismic surveys conducted to explore potential for offshore hydrocarbons would increase underwater noise. Since both commercial shipping and offshore oil and gas extraction activities are set to increase,[25] this article reviews the major international legal instruments (to which South Africa is bound) that regulate underwater noise emitted by ships and seismic surveys.

Heading 2 below identifies the international instruments ratified by South Africa regulating commercial shipping noise and heading 3 identifies the international instruments applicable to seismic-survey noise. These international instruments are identified to determine South Africa's obligations to prevent or minimise anthropogenic noise in the marine environment. Under heading 4, the United Kingdom's regulations on commercial shipping and seismic-survey noise are discussed to highlight the lessons that South Africa can learn. Heading 5 looks at the South African regulations applicable to commercial shipping noise and heading 6 identifies the South African law regulating seismic-survey noise. Heading 7 highlights case law that has lead to the suspension of seismic surveys in South African waters. Heading 8 then sets out recommendations for the revision of South African legal instruments regulating seismic surveys and commercial shipping.

2 INTERNATIONAL INSTRUMENTS REGULATING COMMERCIAL SHIPPING NOISE

2 1 Global regulation of commercial shipping noise

Under article 21(f) of the United Nations Convention on the Law of the Sea (LOSC),[26] a coastal state has the right to adopt laws and regulations relating to the preservation of its marine environment "and the prevention, reduction and control of pollution".[27] The Convention defines "pollution of the marine environment" as

> "the introduction by man, directly or indirectly, of substances or energy into the marine environment, including estuaries, which results or is likely to result in such deleterious effects as harm to living resources and marine life, hazards to human health, hindrance to marine activities, including fishing and other

[24] Russell *Assessing the Impact of Seismic Surveys on South African Fisheries* Research Report for the Responsible Fisheries Alliance (2018) 8.

[25] Surbun 2016 *SAJELP* 129 130; also see Purdon 2018 *SAIIA Policy Insights* 1 3.

[26] 1833 UNTS 3; 21 ILM 1245 (1982). Adopted: 10/12/1982; EIF: 16/11/1994.

[27] See also art 19(2)(h) regarding wilful and serious pollution from foreign ships during passage.

> legitimate uses of the sea, impairment of quality for use of sea water and reduction of amenities."[28]

This definition does not expressly mention noise as a pollutant, but it also does not expressly mention other sources of pollution, such as the discharge of oil or the dumping of waste. While sound is clearly not a "substance", it is undoubtedly a form of "energy", and its introduction by human beings into the marine environment, directly or indirectly, constitutes pollution for the purposes of LOSC when it results, or is likely to result, in deleterious effects.[29]

The protection of the marine environment is specifically regulated in Part XII of LOSC, under which all states parties are required to preserve and protect the marine environment.[30] Article 194 places an obligation on states parties to safeguard the marine environment by individually and collectively taking all measures "necessary to prevent, reduce and control pollution of the marine environment from any source".[31] Each state party must also ensure that it prevents the spread of pollution emanating from activities performed within its maritime domain into areas beyond that domain.[32] The measures adopted to control pollution from vessels must also include regulations on the "design, construction, equipment, operation and manning of vessels"[33] and the protection and preservation of "rare or fragile ecosystems, ... habitats of depleted, threatened or endangered species", as well as "other forms of marine life".[34]

Unsurprisingly, LOSC does not include specific rules or standards that must be followed by states parties to fulfil their obligation to prevent, reduce or control underwater shipping noise. Thus, it is necessary to read the provisions of LOSC jointly with the provisions of other international instruments that deal more specifically with underwater noise.

The Convention on the International Maritime Organization (IMO Convention)[35] states that the mandate of the International Maritime

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28 Art 1(1)(4) of LOSC.

29 Advisory Committee on Acoustic Impact *Marine Mammals and Noise: A Report to Congress from the Marine Mammal Commission* (2007) 5. See also Osseily, Husseiny and Sweidan "Design and Implementation of Frequency Generator of a Portable Sound Wave Fire Extinguisher" 2020 7(2) *International Journal of Electronics and Communication Engineering* 11; Proelss *United Nations Convention on the Law of the Sea: A Commentary* (2017) 23; European Maritime Safety Agency *Sounds: Status of Underwater Noise From Shipping – Study on Inventory of Existing Policy, Research and Impacts of Continuous Underwater Noise in Europe* (2021) 40; European Marine Board "Addressing Underwater Noise in Europe: Current State of Knowledge and Future Priorities" (October 2021) *Future Science Brief no 7* 24.

30 Art 192 of LOSC. See also art 65 of LOSC, relating to the protection and conservation of marine mammals.

31 Art 194(1) of LOSC.

32 Art 194(2) of LOSC.

33 Art 194(3)(b) of LOSC.

34 Art 194(5) of LOSC.

35 289 UNTS 48 (1948). Adopted: 06/03/1948; EIF: 17/03/1958. Prior to 1982, the title of the instrument was "Convention on the Intergovernmental Maritime Consultative Organisation". The IMO was previously known as the "Intergovernmental Maritime Consultative Organisation".

Organization (IMO) is, *inter alia*, to encourage the general adoption of "the highest practicable standards" relating to "maritime safety, the efficiency of navigation, and the prevention and control of marine pollution from ships".[36] Although the Convention does not specifically mention underwater noise, in 2001, the IMO Assembly identified it as a form of pollution having the potential to degrade the marine environment and affect marine living resources significantly.[37] Furthermore, in 2014, the IMO's Marine Environmental Protection Committee (MEPC) adopted "Guidelines for the Reduction of Underwater Noise From Commercial Shipping to Address Adverse Impacts on Marine Life".[38] The Guidelines list propellers, hulls, and onboard machinery as sources of commercial shipping noise, with propeller cavitation as the main source of underwater shipping noise. Propeller cavitation can be reduced by improving the design of propellers and optimising the propeller's load in a manner that allows water to flow uniformly, thereby reducing the noise emitted.[39] The Guidelines recommend that commercial vessels be mounted with "four-stroke engines" and that hulls be constructed evenly to minimise cavitation.[40] It is noted that the regular maintenance of propellers and hulls can also reduce cavitation.[41]

These guidelines, however, are not binding under international law and therefore do not have to be adopted into the domestic regulations of the IMO member states. This is made clear by paragraph 3 of the Guidelines, which states:

> "These non-mandatory Guidelines are intended to provide general advice about the reduction of underwater noise to designers, shipbuilders and ship operators. They are not intended to form the basis of a mandatory document."[42]

To prevent, reduce and control pollution, IMO member states that are also LOSC states parties may arguably be expected to incorporate the IMO Guidelines into their domestic law[43] in the performance of their duties under articles 194(1) and 211(2) of LOSC.[44]

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36 Art 1(a) of the IMO Convention.

37 IMO Assembly "Guidelines for the Designation of Special Areas Under Marpol 73/78 and Guidelines for the Identification and Designation of Particularly Sensitive Sea Areas" Resolution adopted by the IMO Assembly (29 November 2001) A.927(22) Annex 2 par 2.2.

38 IMO "Guidelines for the Reduction of Underwater Noise From Commercial Shipping to Address Adverse Impacts on Marine Life" Adopted at the sixty-sixth session of the MEPC (7 April 2014) MEPC.1/Circ.833 https://www.ascobans.org/sites/default/files/document/AC21_Inf_3.2.1_IMO_NoiseGuidelines.pdf (accessed 2021-04-21).

39 Par 7.2.1 of IMO Guidelines for the Reduction of Underwater Noise.

40 Par 7.3.1 of IMO Guidelines for the Reduction of Underwater Noise.

41 Par 10 of IMO Guidelines for the Reduction of Underwater Noise.

42 Par 3.1 of IMO Guidelines for the Reduction of Underwater Noise.

43 According to art 1(a) of the IMO Convention, the function of the IMO is to adopt the "highest practicable standards" to deal with matters concerning vessel-based pollution, while art 194(1) of LOSC requires states parties to take "all measures necessary to prevent, reduce and control pollution of the marine environment" and art 211(2) of LOSC requires states parties to adopt vessel-based pollution laws that are consistent with international rules and standards "established through the competent international organisation".

44 This is supported by the fact that the IMO is the "competent international organization" [as mentioned in LOSC] with the responsibility "to promote cooperation amongst States at global, regional, sub-regional levels in areas such as navigation and the protection and

Under the auspices of the IMO, the International Convention for the Prevention of Pollution from Ships (MARPOL)[45] was adopted. MARPOL specifically regulates pollution emitted by ships and places stricter obligations on states parties to prevent it. Among the aims of MARPOL is the need to "achieve the complete elimination of intentional pollution of the marine environment by oil and other harmful substances and the minimisation of accidental discharge of such substances".[46] However, the specific use of the term "substances" without the inclusion of "energy" indicates that noise is not regulated as a marine pollutant by MARPOL.[47] This interpretation is supported by the fact that MARPOL, in its annexes, provides detailed regulations for all substance-based pollutants, but makes no mention of underwater noise.[48] In light of this regulatory gap in MARPOL, it is necessary to examine other international instruments and the extent to which they regulate shipping noise.

In addition to the above-mentioned efforts by the IMO to regulate underwater noise, the International Whaling Commission (IWC), established in terms of the 1946 International Convention for the Regulation of Whaling (ICRW),[49] has identified shipping noise as a form of pollution having the ability to affect cetaceans and other taxa significantly.[50] As part of its efforts to minimise the impacts of shipping noise, the IWC's Scientific Committee drafted the "General Principles for Whale Watching".[51] These principles provide guidance on how shipping vessels (that is, whale-watching ships) must be operated in areas where large populations of cetaceans are

preservation of the marine environment" from pollution emitted by ships. See Beckman and Sun "The Relationship Between UNLOS and IMO Instruments" 2017 2 *Asia-Pacific Journal of Ocean Law and Policy* 201 219; also see Proelss *United Nations Convention on the Law of the Sea: A Commentary* 474–475. The IMO is also recognised as the "only international body" with the authority to develop international "guidelines, criteria and regulations […] for ships routeing systems". See Beckman and Sun 2017 *Asia-Pacific Journal of Ocean Law and Policy* 219. The IMO also acts as the relevant "competent international organization" to guide states in the development of international agreements regulating international shipping and "the protection and preservation of the marine environment, particularly in the areas" without adequate rules and standards. See Beckman and Sun 2017 *Asia-Pacific Journal of Ocean Law and Policy* 220.

45 1340 UNTS 184; 12 ILM 1319 (1973); 17 ILM 456 (1978). Adopted: 02/11/1973; EIF: 02/10/1983.

46 Preamble of MARPOL and also see art 1(1) of MARPOL.

47 Das "Acoustic Habitat Degradation Due to Shipping in the Indian Ocean" in Hufnagel (ed) *Changing Ecosystems and Their Services* (2020) 63.

48 See Annex I (regulating oil discharge), Annex II (noxious liquid substances), Annex III (harmful substances), Annex IV (sewage disposal), Annex V (garbage disposal) and Annex VI (air pollution).

49 161 UNTS 74 (1946). Adopted: 27/06/1946; EIF: 24/03/1957.

50 IWC "Report of the Scientific Committee SC56" (2004) Annex K item 12.2.5.1 (4) https://archive.iwc.int/pages/view.php?search=%21collection73+&k=&modal=&display=list&order_by=title&offset=0&per_page=240&archive=&sort=DESC&restypes=&recentdaylimit=&foredit=&ref=2119 (accessed 2021-04-26).

51 1996 General Principles for Whale Watching as updated by the 2022 General Principles for Whale Watching (IWC 68 (2022) *Revision of General Principles for Whale Watching*) https://iwc.int/private/downloads/RQjCQUOPdaiCUdz3vUu99g/IWC68-General-Principles-for-WW.pdf (accessed 2023-07-03).

present.[52] The principles also require these ships to be designed and constructed in a manner that reduces noise production.[53]

However, these principles are not binding and were specifically drafted to regulate the whale-watching industry; they may therefore not apply to commercial shipping. The IWC's Scientific Committee has acknowledged the need to fill this regulatory vacuum by calling on the IWC and IMO to collaborate in their work to reduce shipping noise.[54] Efforts towards harmonising their work are evident in the formulation of an agreement of cooperation between the two organisations[55] and the IMO granting the IWC observer status.[56] Furthermore, in 2010, the IWC's Scientific Committee endorsed the shipping-noise-reduction goal set by the IMO to reduce shipping noise by 3 decibels (dB) in 10 years and 10dB in 30 years.[57] In addition, the IWC emphasised the need to develop new designs to reduce noise from ship propulsion according to the IMO Guidelines and to work collaboratively with the IMO to meet the internationally recognised goal to reduce noise from commercial shipping.[58]

2 2 Regional regulation of commercial shipping noise

In the sub-Saharan region, marine pollution is regulated by the 1981 Convention and Protocol for Co-operation in the Protection and Development of the Marine and Coastal Environment of the West and Central African Region[59] (Abidjan Convention) and its East African equivalent, the 1985 Nairobi Convention.[60] The Abidjan Convention defines

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52 See IWC "Whale Watching" (undated) accessed at https://iwc.int/management-and-conservation/whalewatching#:~:text=The%20IWC%20General%20Principles%20for,whales%20from%20whale%20watching%20operations.(accessed 2023-07-03). Also see paragraph 1 of the 2022 General Principles for Whale Watching.

53 Paragraph 2(i) of the General Principles for Whale Watching.

54 IWC "Report of the Scientific Committee SC62" (2010) Annex E item 12.4.

55 Entered into in 2009. See IMO "Intergovernmental Organizations Which Have Concluded Agreements of Cooperation With IMO" (undated) https://www.imo.org/en/OurWork/ERO/Pages/IGOsWithObserverStatus.aspx (accessed 2021-09-16).

56 IWC "Chair's Report of the 58th Annual Meeting" (2006) par 16.1.1.2.

57 As accepted at the International Workshop on Shipping Noise and Marine Mammals held by the Okeanos Foundation for the Sea in Hamburg, Germany from 21–24 April 2008 http://whitelab.biology.dal.ca/lw/publications/OKEANOS.%20Wright%20(ed)%202008.%20Shipping%20noise.pdf (accessed 2021-09-16) 1. See Wright, Simmonds and Vernazzani "The International Whaling Commission: Beyond Whaling" 2016 *Frontiers in Marine Science* 3 1 3.

58 IWC "Report of the Workshop on Acoustic Masking and Whale Population Dynamics, 4–5 June 2016, Bled, Slovenia" (2016) IWC/SC/66B/REP-10 3.

59 20 ILM 746 (1981). Adopted: 23/03/1981; EIF: 05/08/1984.

60 UNEP *Convention for the Protection, Management and Development of the Marine and Coastal Environment of the Eastern African Region and Related Protocols* (Nairobi Convention). T-XT8525. Adopted 21/06/1985; EIF: 30/05/1996 https://wedocs.unep.org/handle/20.500.11822/25960.

pollution similarly to LOSC and lists "energy" as a potential pollutant.[61] The Abidjan Convention also places an obligation on its contracting parties to formulate and adopt protocols that prescribe "measures, procedures and standards to prevent, reduce, combat and control pollution from all sources" in the West and Central African region.[62] Contracting parties are also required to enact national laws and regulations to fulfil their obligations under the Convention and "endeavour to harmonize their national policies" accordingly.[63] In addition, contracting parties must cooperate with competent international organisations to "establish and adopt recommended practices, procedures, and measures to prevent, reduce, combat and control pollution from all sources" and ensure that they do not directly or indirectly transfer damage or hazards "from one area to another or transform one type of pollution into another".[64] They are also required to adopt measures to "prevent, reduce, combat and control pollution … caused by dumping from ships".[65]

As established above, the noise emitted by ships is a pollutant regulated by LOSC and because of its definition of pollution, shipping noise is also regulated by the Abidjan Convention. However, much like LOSC, the Abidjan Convention does not contain specific rules or standards on how its contracting parties should "prevent, reduce, combat and control" this pollution. Instead, it includes provisions that are specific to substance-based pollutants such as oil.[66]

Much like the Abidjan Convention, the Nairobi Convention defines pollution similarly to LOSC, but its geographic scope is limited to the Western Indian Ocean (WIO).[67] Furthermore, the Nairobi Convention regulates noise, including shipping noise, in the general sense and does not specify how, for instance, shipping noise should be measured, and nor does it provide guidance on how to reduce or control the effects of shipping noise.[68] Considering the increase in commercial shipping within the WIO, regional policies to effectively regulate shipping noise are required.[69] In this

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61 Art 2 of the Abidjan Convention. See art 4, 8, 11 and 13(2) of the Abidjan Convention for the obligations of contracting parties to "prevent, reduce, combat and control pollution" emanating from their activities in the marine environment.

62 Art 4 of the Abidjan Convention.

63 *Ibid*.

64 *Ibid*.

65 Art 6 of the Abidjan Convention.

66 See art 5 and 6 of the Abidjan Convention. Also see articles 1(2) and 7 of the Abidjan Convention Protocol Concerning Co-operation in Combating Pollution in Cases of Emergency of 1981.

67 Art 2(b), 4, 5 and 6 of the Nairobi Convention.

68 Wildlife Conservation Society, Madagascar & Western Indian Ocean Program "Threats Posed to Marine Life in the Western Indian Ocean from Anthropogenic Ocean Noise and Shipping, Including Ship Strikes" (2018) https://wedocs.unep.org/bitstream/handle/20.500.11822/25668/Ocean_Noise.pdf?sequence=1&isAllowed=y (accessed 2021-04-24) 4 and 5.

69 See Wildlife Conservation Society, Madagascar & Western Indian Ocean Program https://wedocs.unep.org/bitstream/handle/20.500.11822/25668/Ocean_Noise.pdf?sequence=1&isAllowed=y 4. Art 3(a) and (b) of the Charter of the Indian Ocean Rim Association (IORA) state that the objectives of the IORA are, among others, to promote economic growth in a manner that is sustainable for future generations and "to formulate and

regard, the IMO and IWC guidelines may assist in developing region-specific guidelines.[70]

3 INTERNATIONAL INSTRUMENTS REGULATING SEISMIC-SURVEY NOISE

3 1 Global regulation of seismic-survey noise

According to article 77(1) of LOSC, states have the sovereign right to explore for and exploit the non-living natural resources within the seabed and subsoil of their continental shelves.[71] However, this exploration and exploitation cannot be to the detriment of the marine environment.[72] As such, LOSC states parties must take all necessary measures within their financial and technological capabilities to "prevent, reduce or control pollution" emanating from any source.[73] States parties are also required to implement measures to minimise pollution from the devices used and installations made during the process of exploring for and exploiting the marine environment's natural resources.[74] Furthermore, states parties must jointly and individually regulate the design, construction, and operation of these installations and devices.[75]

In addition, LOSC requires its states parties to adopt laws and policies to effectively "prevent, reduce and control pollution [...] arising from or in connection with seabed activities subject to their jurisdiction [...]".[76] In the process of doing so, states parties must ensure that their laws, regulations and measures are not "less effective than international rules, standards and recommended practices and procedures".[77] Article 204 of LOSC places a

implement projects … [on] the protection of the environment"; however, shipping noise regulations are yet to be drafted by the Association.

70 See Wildlife Conservation Society, Madagascar & Western Indian Ocean Program https://wedocs.unep.org/bitstream/handle/20.500.11822/25668/Ocean_Noise.pdf?sequence=1&isAllowed=y 6.

71 Art 76(1) of LOSC defines the continental shelf as "the seabed and subsoil of submarine areas that extend beyond" the territorial sea.

72 Art 208 of LOSC. Also see Proelss *United Nations Convention on the Law of the Sea: A Commentary* 611.

73 See art 192, 193 and 194(1) of LOSC. As mentioned under heading 2 1 above, the LOSC definition of pollution can be interpreted to include noise as a marine pollutant.

74 Art 194(3)(c) of LOSC.

75 *Ibid*.

76 Art 208(1) of LOSC.

77 Art 208(3) of LOSC. Pollution emanating from seabed activities is regulated, *inter alia*, by the provisions of: the IMO's *Convention on Oil Pollution Preparedness, Response and Co-operation* ((1990) 1891 UNTS 78. Adopted 30/11/1990; EIF: 13/05/1995); the IMO's *Protocol on Preparedness, Response and Co-operation to Pollution Incidents by Hazardous and Noxious Substances, 2000* (Adopted: 15/03/2000; EIF: 14/06/2007); the IMO's "Code for the Construction and Equipment of Mobile Offshore Drilling Units, 2009 (2009 MODU Code)" Resolution adopted by the Assembly (2 December 2009) Res. A.1023(26); the IMO's "Guidelines and Standards for the Removal of Offshore Installations and Structures on the Continental Shelf and in the Exclusive Economic Zone" Resolution adopted by the Assembly (19 October 1989) Res. A.672(16); and, the IMO's "Safety Zones and Safety of

duty on its states parties to monitor their exploration and exploitation activities, and observe, measure, evaluate and analyse any possible risks or effects that these activities may pose to the marine environment.[78] This duty is therefore twofold: (i) states must gather data through observance and measurement; and (ii) "the information reflecting the actual state of the marine environment" must then be evaluated and analysed. Through this combined approach, states are able "to assess the risks and effects of pollution".[79] Since both effects and risks of pollution must be monitored, article 204 is preventative. Therefore, to comply with this article and the definition of pollution in article 1(1)(4), states must "include potential harmful effects in their assessments".[80] In support of this, article 206 provides that if states parties have any reason to believe that an exploration or exploitation activity within their jurisdiction is likely to cause "substantial pollution or significant and harmful changes to the marine environment", environmental assessments must be conducted.[81] The environmental assessments referred to in article 206 are environmental impact assessments (EIA) conducted before the execution of planned exploration and exploitation activities to assess the potentially harmful effects they may have on the marine environment.[82] The results of the assessments must subsequently be published or provided to competent international organisations, which will then make them available to all states.[83]

LOSC does not, however, contain detailed requirements on when and how EIAs must be conducted; it only demands that they be conducted.[84] Thus, it is necessary to fill this gap by looking at the provisions of other international instruments.

The Convention on the Conservation of Migratory Species of Wild Animals (CMS)[85] was adopted with the specific aim of conserving and protecting migratory species "for the good of mankind".[86] This aim has been realised

Navigation Around Offshore Installations and Structures" Resolution adopted by the Assembly (18 October 1989) Res. A.671(16).

78 In terms of this duty, all states parties (not just flag or coastal states) are "obliged to monitor the risks or effects of pollution". However, because states must "endeavour" to monitor pollution "as far as practicable", this is a duty to employ best efforts. Thus, states are not required to achieve a specific result but are required to take certain action to monitor the marine environment. See Proelss *United Nations Convention on the Law of the Sea: A Commentary* 1360.

79 Proelss *United Nations Convention on the Law of the Sea: A Commentary* 1361.

80 *Ibid*.

81 Art 206 of LOSC.

82 Proelss *United Nations Convention on the Law of the Sea: A Commentary* 1370.

83 Art 205 of LOSC.

84 Craik *The International Law of Environmental Impact Assessment: Process, Substance and Integration* (2008) 99; Yiallourides "Protecting and Preserving the Marine Environment in Disputed Areas: Seismic Noise and Provisional Measures of Protection" 2018 36 *Journal of Energy & Natural Resources Law* 141 159; Proelss *United Nations Convention on the Law of the Sea: A Commentary* 1370–1371.

85 1651 UNTS 333; 19 ILM 15 (1980); ATS 1991/32; BTS 87 (1990), Cm. 1332 (1979). Adopted 23/06/1979; EIF: 1/11/1983. South Africa is one of 131 parties to the CMS. It ratified the Convention in 1991. See CMS Parties and Range States https://www.cms.int/en/parties-range-states (accessed 2022-09-10).

86 Preamble to the CMS. Also see art II(1) and (2) of the CMS.

through, *inter alia*, the CMS parties' resolutions on seismic surveys and other seabed activities. For example, Resolution 9.19, "Adverse Anthropogenic Marine/Ocean Noise Impacts on Cetaceans and Other Biota" was adopted at the Ninth Meeting of the Conference of the Parties to CMS.[87] Resolution 9.19 was subsequently repealed by Resolution 12.14, "Adverse Impacts of Anthropogenic Noise on Cetaceans and Other Migratory Species" at the Twelfth Meeting of the Conference of the Parties to CMS.[88]

According to Resolution 12.14, parties are "strongly urged" to prevent the effects of underwater emissions on marine species and, when prevention is not possible, to reduce or mitigate such effects.[89] The resolution also endorsed the "CMS Family Guidelines on Environmental Impact Assessments for Marine Noise-Generating Activities".[90] These guidelines stipulate, *inter alia*, how EIAs for seismic surveys must be conducted and the "mitigation and monitoring plans" that must be incorporated by oil and gas stakeholders.[91] However, despite the above-mentioned efforts of the CMS conference parties, their resolutions are soft laws with only persuasive authority; as such, they do not create the same legal obligations as the adopted treaty (CMS).[92]

Similar to the CMS, the Convention on Biological Diversity (CBD)[93] also makes provision for the protection of marine life from pollution. According to article 14(1)(a) of the CBD, conference parties are required to formulate procedures requiring the performance of EIAs when intended projects may "have significant adverse effects on biological diversity".[94] Conference parties are also required to allow the public to participate in the EIA process as much as possible. Furthermore, article 22(2) of the CBD also requires parties to fulfil their obligations under the Convention in conjunction with their obligations under other applicable international instruments on the law of the sea. Thus, CBD conference parties who are also parties to LOSC and CMS

87 UNEP/CMS/Resolution 9.19 (2008). This resolution, *inter alia*, recalled the LOSC obligations to preserve and protect the marine environment, and outlined the duty that parties have "to endeavour to control" the impact of underwater noise on habitats of vulnerable species and areas where "marine mammals or other endangered species may be concentrated". See Resolution 9.19 3, par 1.

88 UNEP/CMS/Resolution 12.14 (2017). Resolution 12.14 recalls the previously mentioned provisions of Resolution 9.19.

89 See Resolution 12.14 4 par 4. Also see 4 par 6, requiring parties to conduct EIAs and ensure that the strategic planning stage of the EIAs also consider a "holistic ecological approach".

90 See Annex to Resolution 12.14 4 par 7.

91 See Annex to Resolution 12.14 5 par 17–19.

92 Wiersema "The New International Law-Makers? Conference of the Parties to Multilateral Environmental Agreements" 2009 31(1) *Michigan Journal of International Law* 231 249–250.

93 1760 UNTS 79; 31 ILM 818 (1992). Adopted: 05/06/1992; EIF: 29/12/1993.

94 Art 2 of the CBD defines biological diversity to include "marine and aquatic ecosystems". Also see UNEP "Marine and Coastal Biodiversity: Impacts on Marine and Coastal Biodiversity of Anthropogenic Underwater Noise and Ocean Acidification, Priority Actions to Achieve Aichi Biodiversity Target 10 For Coral Reefs and Closely Associated Ecosystems, and Marine Spatial Planning and Training Initiatives" Decision XII/23 of the Twelfth Meeting of the Parties to CBD (2014) 2 par 3(g).

must also comply with the previously mentioned obligations on environmental protection under these instruments.

In addition, CBD parties are encouraged to take all practical measures necessary to minimise and mitigate the adverse impacts of anthropogenic noise through, for instance, combining acoustic and habitat mapping of species that are sensitive to sound and spatial planning in areas where such species are most susceptible to noise.[95] Parties are also encouraged to make use of spatio-temporal management systems for marine activities and use their knowledge of population patterns to minimise noise at critical habitats and life-cycle stages.[96]

In addition to the above-mentioned instruments, the United Nations Convention on Environmental Impact Assessment in a Transboundary Context (Espoo Convention)[97] also protects the marine environment from underwater noise by requiring parties to conduct EIAs when they intend to perform projects that may adversely affect the environment and its biodiversity.[98] In Appendix I, "offshore hydrocarbon production" is a listed activity requiring the performance of an EIA before commencement of the activity; and the standards that the EIA must meet are listed in Appendix II.[99] The Espoo Convention also indicates that these EIAs must include a public participation component.

3 2 Regional regulation of seismic survey noise

Contracting parties to the Abidjan Convention have made an effort towards regulating seismic-survey operations, as is evident in the 2017 adoption of the additional protocol "Environmental Norms and Standards for Offshore Oil and Gas Exploration and Exploitation Activities" (2017 Protocol to the Abidjan Convention).[100] Here, pollution is defined to include "energy" as a marine pollutant,[101] and parties are obligated to "prevent, mitigate, combat and control pollution" emanating from offshore exploration and exploitation operations.[102] Furthermore, parties are required to adopt the "precautionary principle" when exploring and exploiting the marine environment for resources to prevent "irreversible damage … to marine and coastal

95 Decision XII/23 2 par 3(e).

96 Decision XII/23 2 par 3(f).

97 1989 UNTS 309, 30 ILM 800 (1991). Adopted: 25/02/1991; EIF: 10/09/1997.

98 Art 2 of Espoo Convention. The provisions of Espoo can be seen as also applying to the marine environment because the Convention's definition of "impact" includes effects that a proposed activity may have on "flora, fauna [and] water". See art 1(vii) of the Espoo Convention. It can also be argued that the Espoo Convention provisions protect the environment from acoustic pollution because by its nature, noise, especially low-frequency noise is transboundary, and its effects can be observed in areas beyond the jurisdiction of its source.

99 The Appendix requires that the EIA include information such as the description and purpose of the activity, as well as the potential impact it may have in the environment.

100 Protocol adopted at the Twelfth Meeting of the Contracting Parties to the Abidjan Convention (27–31 March 2017) UNEP/ABC-WACAF/COP.12/10.

101 See art 1(xvi) of the 2017 Protocol to the Abidjan Convention.

102 See art 4(1) of the 2017 Protocol to the Abidjan Convention.

ecosystems" caused by the introduction of "energy".[103] The Protocol further requires parties to adopt special mitigation measures for sensitive marine areas to ensure that marine species are protected from the adverse effects of seismic surveys.[104] Parties must also conduct EIAs during all stages of the seismic surveys. The Protocol contains a comprehensive list of requirements with which environmental assessments must comply, which includes identifying the potential environmental impacts of the surveys and any mitigation measures that will be implemented to minimise these impacts.[105]

Under the Nairobi Convention, parties are obligated to prevent pollution of the marine environment emanating from any source.[106] Contracting parties are also required to adopt all necessary measures to "prevent, reduce and combat pollution" directly or indirectly resulting from seabed exploration and exploitation activities.[107] Parties must also perform, or require natural or juridical persons conducting seabed projects to perform, EIAs where there is a likelihood that the projects would cause "substantial pollution, or significant and harmful changes" to the marine environment.[108] Furthermore, in terms of the Nairobi Convention's *Protocol Concerning Protected Areas and Wild Fauna and Flora in the Eastern African Region*,[109] parties are also required to regulate activities performed in the marine environment and prohibit activities that have adverse effects on wild endangered species and their habitats.[110] Contracting parties are further obligated to establish protected areas to safeguard marine fauna and flora and their habitats.[111] In such protected areas, parties must, *inter alia*, prohibit the destruction of plants and animals, regulate any activity that is "likely to harm or disturb the fauna or flora, including the introduction of non-indigenous animal or plant species", and regulate and control any activity concerning "the exploration or exploitation of the sea-bed".[112] Apart from prohibiting disturbances to species during sensitive periods such as breeding,[113] the Protocol does not expressly regulate noise emissions.

4 THE UNITED KINGDOM'S REGULATIONS FOR COMMERCIAL SHIPPING AND SEISMIC SURVEY NOISE

The regulations of the United Kingdom (UK) are discussed in this section to identify whether there are lessons that can be learnt from them to develop South African law. The UK's regulations applicable to commercial shipping

103 Art 4(2) of the 2017 Protocol to the Abidjan Convention.
104 Art 14 of the 2017 Protocol to the Abidjan Convention.
105 See Annex IV of the 2017 Protocol to the Abidjan Convention.
106 See art 4 of the Nairobi Convention.
107 Art 8 of the Nairobi Convention. Also see art 12 of the Convention regarding the prevention of environmental damage caused by dredging activities.
108 Art 13 of the Nairobi Convention.
109 T-XT8550. Adopted: 21 June 1985; EIF: 30/05/1996.
110 Art 4 of the Nairobi Convention Protocol.
111 See art 8 of the Nairobi Convention Protocol.
112 Art 10(e), (f) and (g) of the Nairobi Convention Protocol.
113 See art 4(c) of the Nairobi Convention Protocol.

and seismic-survey noise will be relied upon because the UK has a well-established marine sector, especially as far as marine consultancy, marine engineering, and marine science and technology are concerned.[114] Over recent years, the UK has also strengthened its commitment to marine environmental protection to become a global leader in sustainable development.[115] Moreover, the UK has a rapidly growing shipping industry, which plays a vital role in its economy.[116] As mentioned previously, increased shipping activity increases underwater noise.[117]

Lastly, the UK is a state party to the relevant global marine environmental protection instruments that have been ratified by South Africa – namely, LOSC, the CMS and the CBD. Like South Africa, the UK is also a member state of the IMO and the IWC.

4 1 The UK's regulation of commercial shipping noise

Commercial shipping is regulated under the UK's Merchant Shipping Act.[118] However, this Act regulates pollution emitted by ships as far as it relates to the discharge of harmful substances – for example, pollution resulting from the discharge of noxious liquid, sewage, and oil.[119] The Merchant Shipping Act does not expressly mention underwater noise, but the Merchant Shipping and Fishing Vessels Regulations[120] govern the noise levels onboard ships. These regulations control noise to create a safe working environment for seafarers, but do not regulate underwater noise to protect the marine environment and its biodiversity.

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114 Houses of Parliament: Parliamentary Office of Science & Technology *Deep-Sea Mining* (Post-PN-0508) Postnote 508 of September 2015 1; see also UK Parliament Hansard "UK Deep Sea Mining Industry" vol 654 (20 February 2019) https://hansard.parliament.uk/Commons/2019-02-20/debates/19022027000002/UKDeepSeaMiningIndustry (accessed 2021-10-07).

115 See Hogg "World Ocean Day: UK Leads In Marine Protection As Government Signs Up To New '30by30' Commitment" (10 June 2021) https://www.climateaction.org/news/world-ocean-day-uk-leads-on-marine-protection-as-government-signs-up-to-new (accessed 2022-07-15). Also see Department for Environment, Food & Rural Affairs, Foreign, Commonwealth & Development Office and Honorable Lord Goldsmith Press Release "UK Escalates Support For Global Marine Environment at UN Ocean Conference" (29 June 2022) https://www.gov.uk/government/news/uk-escalates-support-for-global-marine-environment-at-un-ocean-conference (accessed 2022-07-16).

116 Hellenic Shipping News Worldwide "New Report Shows Importance of Shipping to UK Economy" (2019-12-28) https://www.hellenicshippingnews.com/new-report-shows-importance-of-shipping-to-uk-economy/ (accessed 2021-10-05). See also Maritime UK "A World-Class Maritime Centre" (undated) https://www.maritimeuk.org/documents/105/Maritime_UK_booklet.pdf 2.

117 Merchant, Brookes, Faulkner, Bicknell, Godley and Witt "Underwater Noise in UK Waters" 2016 *Scientific Reports* 1.

118 21 of 1995.

119 S 128 and 129, and Chapters II and V, as well as Schedule 4 of the Merchant Shipping Act. The Merchant Shipping Act regulates pollution in the same way that MARPOL does, as discussed under heading 2 1 above.

120 The Merchant Shipping and Fishing Vessels (Control of Noise at Work) Regulation No 3075 of 2007.

Similarly, the Maritime and Coastguard Agency's Codes of Practice[121] also regulate noise onboard shipping vessels. These codes collectively regulate the assessment of the risk caused by noise and vibrations on ships, identify measurement methods for noise and vibrations, and call for control mechanisms that can reduce or eliminate noise and vibrations.[122]

Moreover, the Merchant Shipping (Passenger Ship Construction: Ships of Classes III to VI (A)) Regulations also regulate noise emitted by ships.[123] These regulations specifically govern how passenger ships must be constructed to protect human beings from shipping noise.[124]

The above-mentioned legislative instruments regulate shipping noise only as far as it affects human beings. To provide protection also to the marine environment, it would therefore be necessary to amend the instruments. In 2019, scientific research resulted in the creation of the United Kingdom's first shipping-noise map,[125] and it has been noted that this data could assist policymakers in the establishment of further marine-protected areas to reduce the effects of low-frequency shipping noise on marine species.[126]

4 2 The UK's regulation of seismic-survey noise

The UK's Joint Nature Conservation Committee (JNCC) was the first public body to develop guidelines for the mitigation of anthropogenic noise emitted during seismic surveys.[127] Under these guidelines, three key phases of seismic surveys are regulated – namely, planning, mitigation and reporting.[128] The guidelines provide that an oil and gas contractor must apply for authorisation to conduct a seismic survey as part of the planning process.[129] This authorisation is granted by the Minister of the Department of Energy and Climate Change according to the provisions of the Offshore Petroleum Activity (Conservation of Habitats) Regulations of 2001.[130] Upon

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121 United Kingdom Maritime & Coastguard Agency (Marine Information Note) MIN 588 (M + F) "Codes of Practice for Controlling Risks Due to Noise and Vibration on Ships" https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/783146/MIN_588_Codes_of_Practice_for_Controlling_Risks_due_to_Noise_and_Vibration_on_Ships.pdf (accessed 2021-10-06) 1.

122 United Kingdom Maritime & Coastguard Agency https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/783146/MIN_588_Codes_of_Practice_for_Controlling_Risks_due_to_Noise_and_Vibration_on_Ships.pdf 2.

123 Reg No 2515 of 1998.

124 Reg 7–14 and 62 of the Merchant Shipping (Passenger Ship Construction: Ships of Classes III to VI (A)) Regulations of 1998.

125 Whiteley "CEFAS Scientists Create First UK Map of Shipping Noise" (4 March 2019) *BBC News* Inside Out East https://www.bbc.com/news/uk-england-suffolk-47375006 (accessed 2021-10-06).

126 *Ibid*.

127 Wright and Cosentino "JNCC Guidelines for Minimising the Risk of Injury and Disturbance to Marine Mammals From Seismic Surveys: We Can Do Better" 2015 100(1) *Marine Pollution Bulletin* 231; Erbe "International Regulation of Underwater Noise" 2013 41(1) *Acoustics Australia* 15.

128 JNCC Guidelines for "Minimising the Risk of Injury to Marine Mammals From Geophysical Surveys" (2017) 1 and 2.

129 JNCC Guidelines (2017) 3.

130 See reg 4 of the Offshore Petroleum Activity Regulations of 2001.

receiving approval from the Department, the JNCC Guidelines must then be taken into account to minimise the impacts of underwater noise.[131] According to the Guidelines, during the planning phase of the survey, a contractor must consider ways of conducting it in a manner that emits the lowest noise and identify the marine mammals that could potentially be present in the survey area.[132] The Guidelines also provide that areas of significance to marine species (that is, marine habitats and the species that dwell within these areas) should be identified during the planning phase.[133] Concerning the mitigation phase, the Guidelines indicate that passive acoustic monitoring devices and marine mammal observers should be used before the commencement of the survey and during all operations.[134] Before firing an air gun, a pre-shooting search must be conducted to ascertain if there are any marine mammals within the 500-metre mitigation zone.[135] This search must be at least 30 minutes long in waters less than 200 metres deep and at least 60 minutes in waters deeper than 200 metres.[136] If marine mammals are observed within the vicinity of the survey, a soft-start protocol must be implemented with a minimal delay of 20 minutes before the commencement of air-gun shooting.[137] Upon the completion of an oil-and-gas seismic survey, the Guidelines also indicate that the marine-mammal observers should submit a report to the JNCC, and the Department of Energy and Climate Change should establish whether the licensing rules, conditions and JNCC Guidelines were complied with during the survey.[138]

5 SOUTH AFRICA'S REGULATION OF COMMERCIAL SHIPPING NOISE

The Merchant Shipping Act[139] and the Ship Registration Act[140] regulate various aspects of shipping, including the licensing and registration of ships[141] and the requirements to ensure the "safety of ships and life at sea"[142] according to the International Convention for the Safety of Life at Sea (SOLAS).[143] Under the Merchant Shipping Act, cargo or passenger ships

131 JNCC "The Protection of Marine European Protected Species From Injury and Disturbance: Guidance for the Marine Area in England and Wales and the UK Offshore Marine Area" (2010) https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/681834/Protection_Marine_EP_Injury_Disturbance.pdf (accessed 2021-10-06) 45.

132 JNCC Guidelines (2017) 4.

133 JNCC Guidelines (2017) 6. Schedule 1 of the Conservation of Offshore Marine Habitats and Species Regulations 2017 lists all European protected species, and Annex I and II of EC Habitats Directive for habitats and species Council (Directive 92/43/EEC) lists special areas of conservation.

134 JNCC Guidelines (2017) 7.

135 JNCC Guidelines (2017) 11.

136 JNCC Guidelines (2017) 12.

137 JNCC Guidelines (2017) 12 and 14. See also Erbe 2013 *Acoustics Australia* 15.

138 JNCC Guidelines (2017) 18.

139 57 of 1951.

140 58 of 1998.

141 See ss 68–72 of 57 of 1951. Also see s 16 of 58 of 1998.

142 See ch V of 57 of 1951 and s 18(1)(*bb*) of 58 of 1998.

143 1184 UNTS 3 (1974) Adopted: 1/11/1974; EIF: 25/05/1980.

must be inspected by a surveyor appointed by the South African Maritime Safety Authority (SAMSA) to ensure that they have been constructed in a manner that complies with the safety regulations of the Act before a safety certificate to operate at sea can be issued.[144] According to the regulations of the Act,[145] ships must be constructed with watertight subdivided bulkheads, fitted with watertight doors, and installed with fire protection equipment.[146] The regulations also provide that plans and particulars relating to hulls, propellers and other machinery be submitted to, and approved by, the Minister of Transport before a ship is constructed.[147] However, these regulations do not make provision for the construction of propellers and other vessel machinery in a manner that reduces cavitation so as to decrease the noise emitted by ships as envisaged by the IMO.[148] Furthermore, noise is only mentioned in the Crew Accommodation Regulations[149] and SAMSA's 2018 Marine Notice[150] insofar as it relates to the requirement for accommodation spaces to be constructed in a manner that reduces the transmission of noise from vessel machinery and equipment.[151] These regulatory requirements to protect humans on board ships from noise are similar to the provisions of the SOLAS "Code on Noise Levels On Board Ships",[152] because neither of them mentions constructing vessels with a view to reducing underwater low-frequency noise emitted by ships.[153]

Under the Ship Registration Act, a ship's registration may be denied in instances where the ship does not meet safety regulations or poses any risk of pollution.[154] However, the Act does not define pollution or mention underwater noise as a pollutant that could result in the denial of a ship's registration. Pollution emanating from ships is specifically regulated by the Marine Pollution (Prevention of Pollution from Ships) Act (MPPPSA),[155] which was enacted to give effect to MARPOL.[156] In the MPPPSA, emissions from ships are regulated to the extent that they are provided for under MARPOL. Although MARPOL does not expressly define pollution, it does mention that states parties must "prevent the pollution of the marine

144 See ss 190, 191, 192, 193 and 194 of 57 of 1951. See also Annex reg 1 of the Second Schedule of 57 of 1951.

145 The Construction Regulations, 1968 in terms of Act 57 of 1951 (GN R79 in *GG* 1955 of 19-01-1968).

146 Reg 8, 18, 48, 109(1), 111(1), 116(1), 118 and 121 of the Construction Regulations, 1968.

147 Reg 6 and Annex 1 of the Construction Regulations, 1968.

148 See the noise-quieting IMO guidelines mentioned under heading 2 1 above.

149 The Crew Accommodation Regulations, 1961 in terms of Act 57 of 1951 (GN R1064 in *GG* 43 of 1961-11-24).

150 South African Maritime Safety Authority "New Building Procedures – Ships and Boats" Marine Notice No 20 of 2018.(7 June 2018) SM6/5/2/1.

151 See reg 8 and 10 of the Crew Accommodation Regulations, 1961. Also see SAMSA "Record of Particulars: New Building – Non-SOLAS Convention Size Vessel (Class VII, VIIA, VIII, IXA, X, XI &XII)" Appendix D2 to Marine Notice No 20 of 2018 (SM 12/1/5).

152 Resolution of the IMO Maritime Safety Committee (2012) RES MSC.337(91).

153 See, for instance, par 1.2, 4.1, 4.2, 5.1 and Appendix 3 item 2.1 of the Code on Noise Levels On Board Ships.

154 S 18(1)(*aa*) of the Ship Registration Act.

155 2 of 1986.

156 See the discussion on MARPOL under heading 2 1 of this article.

environment by the discharge of harmful substances or effluents containing such substances".[157] MARPOL then defines a harmful substance as

> "any substance which, if introduced into the sea, is liable to create hazards to human health, to harm living resources and marine life, to damage amenities or to interfere with other legitimate uses of the sea."[158]

The exclusion of energy as a pollutant emitted by ships and the sole mention of harmful substances in the MPPPSA indicates that it does not regulate noise emitted by ships.[159]

On the other hand, the provisions of the Marine Living Resources Act (MLRA)[160] protect the marine environment from pollution emitted by ships by requiring the state to exercise its powers under the Act with due regard for the application of the precautionary approach to manage and develop marine living resources,[161] the protection of all species in the marine ecosystem,[162] and the need to preserve marine biodiversity and minimise pollution.[163] The Act further provides that the Minister of Forestry, Fisheries and the Environment may require anyone intending to apply for a commercial or subsistence fishing right first to submit an environmental impact assessment report.[164] The Minister may also determine certain sustainable conservation and management measures that must be applied by an applicant, including the use of a particular type of vessel or gear.[165] The Act also gives the Minister the authority to revoke, suspend or reduce a fishing right if it is necessary to protect "a particular marine living resource".[166] In addition, the Minister may declare an area a marine protected area,[167] *inter alia*, to "conserve and protect marine and coastal ecosystems"[168] or biodiversity,[169] a particular species or population, and its

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157 See Schedule of the MPPPSA; art 1(1) of MARPOL.

158 Schedule of the MPPPSA; art 2(2) of MARPOL.

159 The pollutants that are regulated under the MPPPSA are oil, noxious liquid substances, harmful substances, sewage, and garbage. See Schedule to the MPPPSA; Annex I, II, III, IV and V of MARPOL.

160 18 of 1998.

161 S 2(*c*) of the MLRA.

162 S 2(*e*) of the MLRA.

163 S 2(*g*) of the MLRA.

164 S 18(3) of the MLRA.

165 S 18(7) of the MLRA.

166 S 28(4) of the MLRA.

167 S 22A(1)(*a*) of the National Environmental Management: Protected Areas Act 57 of 2003 (NEMPAA) as inserted by s 5 of the Protected Areas Amendment Act 21 of 2014. The Minister also has the authority to draft regulations on the prevention of marine pollution and the "management and protection of marine protected areas", see s 77(2)(*w*) and (x)(i) of the MLRA.

168 S 22A(2)(*a*) of NEMPAA.

169 S 22A(2)(*b*) of NEMPAA.

habitat.[170] Furthermore, the Minister can also restrict or prohibit any activities that have the potential to affect the environment adversely.[171]

In addition to the MLRA, environmental protection is specifically regulated by the National Environmental Management Act (NEMA).[172] Section 2 of NEMA lists the principles that apply to activities that may significantly affect the environment, and section 2(4)(*a*) specifically provides that sustainable development requires consideration that:

> "(i) … the disturbance of ecosystems and loss of biological diversity are avoided, or, where they cannot be altogether avoided, are minimised and remedied;[173]
> (ii) … pollution and degradation of the environment are avoided, or, where they cannot be altogether avoided, are minimised and remedied";[174] […and]
> (vii) a risk-averse and cautious approach is applied, which takes into account the limits of current knowledge about the consequences of decisions and actions."[175]

Pollution is defined in NEMA as

> "any change to the environment caused by substances, radioactive or other waves or noise, odours, dust or heat [...] emitted from any activity […] engaged in by any person or an organ of state, where that change has an adverse effect on human health or well-being or on the composition, resilience and productivity of natural or managed ecosystems."[176]

The Act further provides that any person "who causes, has caused or may cause significant pollution or degradation of the environment" is required to take "reasonable measures to prevent such pollution or degradation from occurring, continuing or recurring" or where it cannot be prevented to "minimise and rectify such pollution or degradation of the environment".[177] The reasonable measures that must be taken include:

- the ceasing, modification, or control of any act, activity, or process that causes pollution or degradation; or
- implementing any measures necessary to "eliminate any source of … pollution or degradation"; or
- remedying the effects of such pollution or degradation.[178]

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[170] S 22A(2)(*c*) of NEMPAA. The above-mentioned powers of the Minister regarding marine protected areas were previously regulated by s 43 of the MLRA.

[171] S 22(*g*) of NEMPAA. The above-mentioned powers of the Minister regarding marine protected areas were previously regulated by s 43 of the MLRA, which was repealed by s 90(3) of NEMPAA as inserted by s 15 of the Protected Areas Amendment Act.

[172] 107 of 1998.

[173] S 2(4)(*a*)(i) of NEMA.

[174] S 2(4)(*a*)(ii) of NEMA.

[175] S 2(4)(*a*)(vii) of NEMA.

[176] S 1(1)(xxiv) of NEMA.

[177] S 28(1) of NEMA.

[178] S 28(3)(*c*), (*e*) and (*f*) of NEMA.

NEMA also gives persons acting in the public interest *locus standi* to approach the courts for relief from those who have contravened or intend on contravening the environmental protection provisions of the Act.[179]

Furthermore, in 2008, the National Environmental Management: Integrated Coastal Management Act (NEMICMA)[180] was enacted as the marine-environmental-management-specific Act to regulate the preservation and protection of the marine environment in line with NEMA.[181] NEMICMA, therefore, provides that the obligation to prevent or minimise pollution under section 28 of NEMA is also applicable to "the owner or person in charge of a vessel" who plans to undergo an activity that has caused or is likely to cause adverse effects to the coastal environment.[182] NEMICMA gives the Minister of Environmental Affairs the discretion to issue "a written coastal protection notice" when they suspect that any intended activity will or is likely to adversely affect the environment.[183] This notice can prohibit any intended coastal activity in its entirety, or request that appropriate steps be taken to protect the environment, or instruct the person intending to carry out an activity to first investigate and evaluate the impacts of such activity on the environment.[184] NEMICMA assigns the same meaning to pollution as that provided in section 1 of NEMA,[185] and specifically regulates the discharge of effluent and waste by ships.[186] However, it makes no mention of noise as a pollutant emitted by ships.

It can thus be argued that the lack of noise-specific shipping legislation providing for, among other matters, the use of noise-quieting machinery to reduce the noise emitted by ships as envisaged by the IMO leaves a legislative gap, making the realisation of NEMA's environmental management principles difficult.

6 SOUTH AFRICA'S REGULATION OF SEISMIC-SURVEY NOISE

Seismic surveys for the exploration of oil and gas reserves are regulated by NEMA, the NEMA Environmental Impact Assessment Regulations of 2014 (NEMA EIA Regulations)[187] and the Mineral and Petroleum Resources Development Act (MPRDA).[188] The Petroleum Agency of South Africa

179 S 32(1) of NEMA.

180 24 of 2008.

181 S 5(1) and (2) of NEMA.

182 S 58(2)(*b*)(iii) of NEMICMA. The coastal environment is defined as "the environment within the coastal zone" and the coastal zone is defined to include "coastal waters and the exclusive economic zone". Coastal waters are then defined as "marine waters that form part of the internal waters or territorial waters of the Republic" as referred to in ss 3 and 4 of the Maritime Zone Act 15 of 1994. See s 1(1) of NEMICMA.

183 S 59(1) of NEMICMA.

184 S 59(1)(*a*) and (*b*)(i) and (ii) of NEMICMA.

185 See s 1(1) of NEMICMA.

186 Ss 69 and 70 and Schedule 2 of NEMICMA.

187 GN R982 in *GG* 38282 of 2014-12-04.

188 28 of 2002 as amended by the Mineral and Petroleum Resources Development Amendment Act 49 of 2008 (MPRDAA), and the Mineral and Petroleum Resources

(PASA) is the state regulator responsible for granting licences for the exploration and exploitation of offshore oil and gas.[189]

As mentioned previously, section 2 of NEMA lists the principles that relate to the sustainable management of the environment, and these principles are also applicable to seismic surveys because they must also be conducted in a manner that prevents or minimises pollution and the degradation of the environment.[190] To fulfil the environmental management principles set out in section 2, section 24 of NEMA stipulates that the potential impacts of an intended activity that may significantly affect the environment must be investigated and assessed before authorisation is granted.[191] This would include assessing the environment likely to be affected by the intended activity, identifying the mitigation and monitoring measures that can be applied to minimise adverse impacts, and allowing for public participation throughout all the phases of the investigation.[192]

The NEMA EIA Regulations list the activities that require prior authorisation according to section 24 of NEMA. These activities include offshore dredging operations, petroleum extraction processes, and any other operation that requires a prospecting, exploration or mining right.[193] To obtain the environmental authorisation to carry out activities that may adversely affect the environment, an environmental assessment must be conducted, and this assessment must include an EIA and EIA report. The latter must, among other things, outline the location of the proposed activity[194] and give a detailed account of how the proposed activity will be conducted, as well as identify its potential impacts on the environment and any mitigation measures that will be applied to minimise impacts.[195]

As with the provisions of NEMA, under the MPRDA, anyone intending to conduct activities associated with the extraction of oil and gas must acquire the necessary environmental authorisation and a reconnaissance permit, exploration right, or production right[196] before commencing any reconnaissance, exploration, or production operations.[197] The environmental

Development Regulations GN R527 in *GG* 26275 of 2004-02-23. In the future, the MPRDAA may be amended by the Mineral and Petroleum Resources Amendment Bill of 2012 (GN R1066 in *GG* 36037 of 2012-12-27).

189 See ss 70 and 71 of the MPRDA. Also see Petrol Agency SA "What is Petroleum Agency SA?" (undated) https://www.petroleumagencysa.com (accessed 2021-09-30).

190 See s 2(4)(*a*)(i), (ii) and (vii) of NEMA as discussed under heading 4 of this article.

191 See s 24(1)(*a*) of NEMA. Also see s 23(2) of NEMA.

192 S 24(4)(*a*), (*b*), (*c*), (*d*), (*e*) and (*f*) of NEMA.

193 Listing Notice 1 GN R983, Listed Activity 19, 20 and 21; see also Listing Notice 2 GN R984, Listed Activity 17 and 18.

194 Regulation 3(b) of Appendix 3 of the NEMA EIA 2014 Regulations.

195 Regulation 3(g)(v) and (viii) of Appendix 3, also see regulation 3(i) of Appendix 3 of the NEMA EIA 2014 Regulations.

196 S 5A of the MPRDAA. See also s 38A of the MPRDA as inserted by the MPRDAA.

197 According to s 1 of the MPRDA, an exploration operation is defined as "the re-processing of existing seismic data, acquisition and processing of new seismic data or any other related activity to define a trap to be tested by drilling, logging and testing, including extended well testing, of a well with the intention of locating a discovery"; a production operation is defined as "any operation, activity or matter that relates to the exploration, appraisal, development and production of petroleum" and a reconnaissance operation is defined as "any operation

authorisation to conduct these activities will only be granted upon the submission and approval by the Minister of Mineral Resources and Energy of an environmental management plan and environmental management programme.[198] The MPRDA provides further that these documents must include the establishment of "baseline information concerning the affected environment to determine protection, remedial measures and environmental management objectives", an investigation and assessment of the impact that the proposed activity will have on the environment, as well as an indication of how an activity that is likely to cause pollution or environmental degradation will be modified, remedied, controlled or stopped to protect the environment.[199] The Mineral and Petroleum Resources Development Amendment Act (MPRDAA)[200] later repealed the MPRDA provisions relating to environmental management plans and programmes. Under the MPRDAA, to obtain environmental authorisation to commence oil and gas extraction operations, the environmental reports that are required by NEMA must be submitted to and approved by the Minister.[201]

Furthermore, a reconnaissance permit or production right will only be granted by the Minister if they are satisfied that the reconnaissance or production operation will not result in any "unacceptable pollution, ecological degradation or damage to the environment".[202] The above-mentioned interrelationship between the MPRDA and NEMA therefore means that seismic surveys conducted in terms of reconnaissance permits, exploration, or production rights granted under the MPRDA must not only comply with the environmental provisions under NEMA, but also environmental assessment requirements in terms of the NEMA EIA Regulations. This interrelationship also indicates that the noise emitted by seismic surveys authorised under the MPRDA is also regulated in terms of the definition of pollution provided by NEMA. However, a legislative gap remains as far as the adoption of activity-specific regulations is concerned – especially with respect to how EIAs must be conducted to monitor and mitigate noise emitted during seismic operations conducted by the offshore oil and gas industry. It is submitted that such a gap could be filled with regulations similar to the JNCC Guidelines.

7 RECENT LITIGATION TO SUSPEND SEISMIC SURVEYS IN SOUTH AFRICAN WATERS

In December 2021, Shell was scheduled to commence a 3D seismic survey for the exploration of hydrocarbons off South Africa's Wild Coast. However, the public, including environmentalists, expressed great concern regarding

carried out for or in connection with the search for a mineral or petroleum by geological, geophysical and photogeological surveys and includes any remote sensing techniques, but does not include any prospecting or exploration operation".

198 S 74(4)(*a*) of the MPRDA; see also s 79(4)(*b*) as amended by s 57(*d*) of the MPRDAA, and also see s 83(4)(*b*) of the MPRDA as amended by s 61 of the MPRDAA.

199 S 39(3) of the MPRDA.

200 49 of 2008.

201 See s 38B and 57 of the MPRDAA.

202 S 84(1)(*c*) of the MPRDA and s 75(1)(*c*) as amended by s 54 of the MPRDAA.

the potential impact of this survey on South African marine ecosystems and the consequences for community members such as small-scale fishermen who rely on the oceans to make a living.[203] To prevent Shell from commencing its seismic operations off the Wild Coast, environmentalists sought an interdict against Shell based on the fact that the 3D survey had the potential to cause irreparable harm to marine life.[204] This interdict was sought as an urgent remedy pending the outcome of a separate review application regarding the renewal of Shell's exploration right.[205] The review was based on the argument that Shell's exploration activities would be *prima facie* unlawful because it did not apply for, nor receive, the requisite environmental authorisation in terms of NEMA.[206] Furthermore, it was also contended that the granting of an exploration right to Shell amounted to unjust administrative action because the public was not allowed to participate fully in the process nor appeal the decision.[207]

The application for the interdict was, however, unsuccessful, because the court was not satisfied that the applicants had shown that there was a "well-grounded apprehension of irreparable harm if the interim relief is not granted and the ultimate relief is eventually granted" nor that the balance of convenience favoured them.[208] The court further stated that, because the case before it did not concern the full exercise of Shell's exploration right and its implications for the environment, but rather whether the planned seismic survey "should be interdicted pending the final determination of a separate review application", it used its discretion to answer this question in the negative.[209]

Following the dismissal of this application, another interdict was sought against Shell in the Eastern Cape Division of the Grahamstown High Court on 17 December 2021.[210] The application was twofold: 1) to prohibit Shell from proceeding with its seismic survey pending the outcome of the review application; and 2) to suspend the survey until Shell had acquired the

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[203] Bega "Urgent Interdict Filed to Block Shell's Coast Seismic Survey*"* (30 November 2021) https://mg.co.za/environment/2021-11-30-urgent-interdict-filed-to-block-shells-wild-coast-seismic-survey/ (accessed 2021-12-02). See also Dayimani "Shell Blasted: Public Outrage Mounting Over Seismic Survey on Wild Coast" (27 November 2021) https://www.news24.com/news24/southafrica/news/shell-blasted-public-outrage-mounting-over-seismic-survey-on-wild-coast-20211127 (accessed 2021-12-06).

[204] Bega https://mg.co.za/environment/2021-11-30-urgent-interdict-filed-to-block-shells-wild-coast-seismic-survey/.

[205] *Border Deep Sea Angling Association v Minister of Mineral Resources and Energy* [2021] ZAECGHC 111.

[206] *Border Deep Sea Angling Association v Minister of Mineral Resources and Energy supra* par 18 and 19.

[207] *Border Deep Sea Angling Association v Minister of Mineral Resources and Energy supra* par 20.

[208] *Border Deep Sea Angling Association v Minister of Mineral Resources and Energy supra* par 40.

[209] *Border Deep Sea Angling Association v Minister of Mineral Resources and Energy supra* par 41.

[210] *Sustaining the Wild Coast NPC v Minister of Mineral Resources and Energy* [2021] ZAECGHC 118.

requisite environmental authorisation under NEMA.[211] The court granted the interdict on the basis that Shell's intended survey was likely to cause irreparable harm to marine life, thus infringing on the constitutionally protected environmental rights[212] of traditional communities along the Wild Coast – namely, the Amadiba, Dwesa-Cwebe, and Sicambeni. This irreparable harm would then negatively affect the livelihoods of small-scale fishers in these local communities.[213] In addition, the court held that the suspension of the survey was justified because it would unduly infringe on the cultural and spiritual rights of the traditional communities whom Shell failed to adequately consult, and it had failed to adopt sufficient measures to minimise the risk of harm.[214]

Both the Minister of Mineral Resources and Energy and Shell subsequently applied for leave to appeal this decision, but it was dismissed because Bloem J found that the appeal would not have any practical effect. After all, Shell could not conduct its survey before the decision on the review application regarding its environmental authorisation had been passed.[215] If successful, Shell would then only conduct its seismic surveys from "December 2022 to May 2023".

In March 2022, an interdict was sought to suspend a seismic survey by Searcher Goedata UK Limited and Searcher Seismic (Australia) (hereafter, Searcher), off the West Coast.[216] This interdict was sought pending the outcome of an appeal against the granting of a reconnaissance permit to Searcher. The applicants, who are small-scale fishers, argued that the seismic survey should be suspended because the reconnaissance permit was unlawful owing to Searcher's failure to comply fully with the requirement to consult interested and affected persons.[217] It was argued that Searcher's failure to consult small-scale fishing communities and its publication of survey notices in the media in English and Afrikaans specifically excluded poor and illiterate communities from the public participation process.[218] The applicants further argued that the seismic survey posed an "immediate risk to marine and bird life" as well as to their livelihoods, food security and

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211 *Sustaining the Wild Coast NPC v Minister of Mineral Resources and Energy* [2021] *supra* par 1.

212 See s 24 of the Constitution of the Republic of South Africa, 1996.

213 *Sustaining the Wild Coast NPC v Minister of Mineral Resources and Energy* [2021] *supra* par 38, 44, 45 and 52–65.

214 It was expressed, for instance, that the Amadiba community regards the sea as a sacred place with healing properties and where their ancestors reside. Several traditional healers in the area often go to the sea to perform rituals and heal the sick. The community, therefore, indicated that the intended survey had the impact of possibly upsetting their ancestors in a manner that would negatively affect their relationship with the sea. See *Sustaining the Wild Coast NPC v Minister of Mineral Resources and Energy* [2021] *supra* par 14.

215 Omarjee "Shell, Mantashe Lose Court Bid Challenging Wild Coast Seismic Survey Interdict" (17 February 2022) https://www.news24.com/fin24/companies/just-in-shell-mantashe-lose-court-bid-to-challenge-wild-coast-seismic-survey-interdict-20220217 (accessed 2022-03-02).

216 *Adams v Minister of Mineral Resources and Energy* [2022] ZAWCHC 24.

217 *Adams v Minister of Mineral Resources and Energy supra* par 7 and 8.

218 *Adams v Minister of Mineral Resources and Energy supra* par 8, 9 and 14.

cultural rights.[219] The court held that the snoek fish (a source of protein for impoverished communities on the West Coast and of income for small-scale fishers) would be impacted by the survey, in turn negatively affecting the rights of these two groups of people, especially "the right to food as envisaged in section 27(1)*(c)* of the Constitution".[220] It was further added that fishing is a definitive feature of the culture and heritage of communities along the West Coast.[221]

The court held that it would be impossible to determine that the survey would not result in "unacceptable pollution, degradation or damage to the environment without engaging meaningfully with all interested and affected parties", including the small-scale fishers. Moreover, the court indicated that "the consultation process and its results [are] an integral part of the fairness" of an application for a reconnaissance permit.[222] The exclusion of the small-scale fishers and the indigenous communities of the West Coast from the public participation process, therefore, compromised the fairness of the application process. Thus, the court granted the interdict in favour of the applicants.[223]

As mentioned previously, an interdict was granted in December 2021 to prevent Shell from proceeding with its seismic survey off the Wild Coast, pending the review of its exploration right and the subsequent renewals thereof. On 1 September 2022, the Makhanda High Court delivered its judgment[224] in the review application sought under section 6(2) of the Promotion of Administrative Justice Act (PAJA).[225] The applicants contended that the administrative decisions (the exploration right and its renewals) were unlawful on three grounds: 1) they were procedurally unfair; 2) relevant considerations were not taken into account; and 3) applicable legal prescripts were not complied with.[226] In terms of the first ground, it was noted that the decision to grant the exploration right to Shell constituted an administrative action, which, in terms of the Constitution, had to be procedurally fair.[227] However, because the respondents did not consult traditional communities such as the Dwesa-Cwebe, these communities were unaware of the exploration right or its renewals; yet the seismic survey to be conducted in terms of the exploration right was likely to affect, *inter alia*, their spiritual and cultural rights. As a result, the court found that it was

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219 *Adams v Minister of Mineral Resources and Energy supra* par 16, 17 and 24.

220 *Adams v Minister of Mineral Resources and Energy supra* par 29, 30, 31, 32 and 33.

221 *Adams v Minister of Mineral Resources and Energy supra* par 34 and 35.

222 *Adams v Minister of Mineral Resources and Energy supra* par 17 and 39.

223 *Adams v Minister of Mineral Resources and Energy supra* par 50.

224 *Sustaining the Wild Coast NPC v Minister of Mineral Resources and Energy* [2022] ZAECMKHC 55.

225 3 of 2000.

226 *Sustaining the Wild Coast NPC v Minister of Mineral Resources and Energy* [2021] *supra* par 83.

227 *Sustaining the Wild Coast NPC v Minister of Mineral Resources and Energy* [2021] *supra* par 85–87. In terms of s 33(1) of the Constitution, everyone has the right to administrative action that is fair. The Promotion of Administrative Justice Act (PAJA) 3 of 2000 was enacted to give effect to this right.

procedurally unfair.[228] Regarding the second ground, the court held that the respondents failed to take into account relevant considerations – for instance, the potential adverse impact that underwater noise would have on marine and bird life on the Wild Coast – and failed to apply the precautionary approach where there was limited scientific knowledge on this impact.[229] The court also highlighted that the area for which the exploration right was granted is of "special legal status", thus requiring a high level of protection.[230] In respect of the last ground, it was held that the respondents failed to ensure that historically disadvantaged persons actively participated in and benefited from the mineral and petroleum industry.[231] In summation, based on the above-mentioned grounds, the court held that the exploration right was unlawful and the renewals were legally untenable and consequently set them aside according to section 8 of PAJA.[232]

8 RECOMMENDATIONS

South Africa is a known global biodiversity hotspot, which extends into the marine realm;[233] almost the entire exclusive economic zone (EEZ) of South Africa constitutes a large important marine mammal area (IMMA) when individual IMMAs are combined.[234]

Given the expected increase in anthropogenic noise in the marine environment in South Africa owing to government initiatives such as Operation Phakisa, a revision of local legal regulations of underwater noise in line with international law is recommended. As established above, LOSC states parties must prevent, minimise or control pollution in the marine environment emanating from shipping. To fulfil this obligation, it is recommended that South Africa incorporate the IMO Guidelines into law and, as such, adopt noise-specific regulations on the design and construction of ships and equipment with a view to minimising noise emissions. These regulations would include the design of propellers, or the optimisation of propeller loads, to ensure that noise emissions are reduced. Furthermore, as set out in the Guidelines, these regulations would require ships to be fitted with four-stroke engines and hulls to be constructed in a manner that reduces cavitation.

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228 *Sustaining the Wild Coast NPC v Minister of Mineral Resources and Energy* [2021] *supra* par 90–103.

229 *Sustaining the Wild Coast NPC v Minister of Mineral Resources and Energy* [2021] *supra* par 107 132.

230 *Sustaining the Wild Coast NPC v Minister of Mineral Resources and Energy* [2021] *supra* par 130.

231 *Sustaining the Wild Coast NPC v Minister of Mineral Resources and Energy* [2021] *supra* par 133–136. See also s 80(1)(*g*) and 2(*d*) and (*f*) of the MPRDA.

232 *Sustaining the Wild Coast NPC v Minister of Mineral Resources and Energy* [2021] *supra* par 136.

233 Pompa-Mansilla, Ehrlich and Ceballos "Global Distribution and Conservation of Marine Mammals" 2011 108(33) *Proceedings of the National Academy of Sciences* 13600-5 13603.

234 See Marine Mammal Protected Areas Task Force "IMMAs" (undated) https://www.marinemammalhabitat.org/imma-eatlas/ (accessed 2022-03-26).

250 Plön and Rossouw "Focusing on the Receiver: Hearing in Two Focal Cetaceans Exposed to Ocean Economy Developments" 2022 196 *Applied Acoustics* 108890.

Moreover, it has been established that LOSC states parties must adopt laws and policies that effectively prevent and control pollution emanating from seabed activities conducted within their jurisdictions. As a LOSC state party, it is recommended that South Africa develop standards on how EIAs must be performed. As mentioned in the previous section, because of the environmental risk associated with seismic surveys, the failure to fully consult with interested and affected persons during the EIA process has been regarded as a just cause for suspending them and for setting aside exploration rights. Thus, it would be necessary for the standards adopted on EIAs to include requiring the public participation process to match that of the Espoo Convention.

Furthermore, the South African Department of Mineral Resources has been criticised for having limited capacity for "compliance monitoring and enforcement" with regard to terrestrial operations, let alone seabed operations.[235] It has been reported that, in some instances, "environmental compliance monitoring and enforcement is entirely absent".[236] It has also been claimed that the Department has limited experience and knowledge on how to monitor and enforce compliance with "environmental management plans or programmes and conditions of environmental authorisations" associated with "seabed prospecting and mining" activities.[237] It is therefore necessary for seabed activities, including seismic surveys, to be effectively monitored and for the South African regulations to be enforced as envisaged by the CMS and the CBD.

It is also recommended that a shipping noise map similar to that of the UK be developed for the South African marine environment. Such a shipping noise map would then guide South African policymakers on the establishment of additional marine protected areas to protect sensitive marine species and habitats from low-frequency noise. Much like the IMO Guidelines, it is also recommended that the JNCC Guidelines be adopted into domestic law – especially the mitigation measures to minimise the cumulative impact of seismic-survey noise on biodiversity in the South African maritime domain.

The development of South Africa's regulations on underwater noise as recommended would also serve as a leading example for its African counterparts and other developing states.

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235 Banet *The Law of the Seabed* 309.

236 *Ibid*.

237 *Ibid*.

THE CONFLICT BETWEEN CERTAIN CAPITAL ALLOWANCES IN THE INCOME TAX ACT AND THE SPECIAL ECONOMIC ZONES POLICY OBJECTIVES

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SUMMARY

Through various incentives, special economic zones (SEZs) aim to promote industrial capacity development, create jobs and stimulate the South African economy. However, in practice, misalignment of tax legislation requirements with current practices may undermine the success of the SEZ programme. If property developers are unable to claim capital allowances for expenditure incurred on property developments within an SEZ, this acts as a disincentive to investment, which conflicts with the overarching rationale for the SEZ initiative. This study seeks to determine the extent to which current practices prevent property developers from claiming capital allowances for developments in SEZs, and to propose appropriate

remedies. The study presents a doctrinal analysis of the requirements of the SEZ Act and relevant provisions of the Income Tax Act in the context of current practices in SEZ development. The analysis demonstrates that, where the ownership of land designated for SEZ development is retained by government, property developer lessees may be unable to claim capital allowances in respect of expenditure incurred on property developments. This study therefore motivates for the removal of the ownership requirement from building allowance provisions of the Income Tax Act. This would align tax legislation with current practice and the policy objectives of the SEZ programme, as well as address the current inconsistency in the requirements of building allowances.

1 INTRODUCTION

Special economic zones (SEZs) are

> "geographically designated areas of a country set aside for specifically targeted economic activities, which are then supported through special arrangements (which may include laws) and support systems to promote industrial development."[1]

Globally, SEZs share four characteristics: location in geographically delimited areas; the presence of multiple companies; a zone management facility or administration; and a government land policy.[2]

One key objective of SEZs is to increase foreign direct investment.[3] Yet despite their proliferation across southern Africa in recent years, there is a lack of clear evidence that SEZs make a meaningful contribution to industrial output or employment. SEZs have been positioned as oases of efficient administration and infrastructure in the region, while the greater challenge of improving the investment proposition at the national level has not been adequately addressed.[4]

This notwithstanding, the South African government has through its budgetary allocation signalled its continued commitment to promoting economic and industrial development through SEZs.[5] The SEZ programme is one application of government policy to foster economic growth, create

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1 Department of Trade and Industry "Policy on the Development of Special Economic Zones in South Africa: 2012" (23 January 2012) in *GG* 34968 of 2012-01-23 https://www.gov.za/sites/default/files/gcis_document/201409/34968gen45.pdf (accessed 2021-05-10) 9.

2 World Bank Group "Special Economic Zones" (2017) https://openknowledge.worldbank.org/handle/10986/29054 (accessed 2021-08-11) 9.

3 Saggers "A Critical Analysis of the Fiscal Incentives Offered to Particular South African Special Economic Zones" (2015) https://open.uct.ac.za/handle/11427/16869 (accessed 2021-08-10) 13.

4 Makgetla "Learning From Experience: Special Economic Zones in Southern Africa" (2021) https://www.wider.unu.edu/publication/learning-experience-special-economic-zones-southern-africa (accessed 2021-08-10) 19.

5 Haasbroek "Evaluating the Design of Special Economic Zones as a Tax Incentive in South Africa" (2019) https://repository.nwu.ac.za/handle/10394/33003 (accessed 2021-08-10) 11.

jobs, reduce poverty and address underdevelopment.[6] Yet even in South Africa, which contains the largest and best-resourced SEZs in the region, SEZs have not delivered on their promise of economic growth or job creation.[7]

The SEZ proposition is a blend of political, economic and fiscal considerations.[8] Most SEZ propositions incorporate some form of tax incentives. Such incentives are particularly significant for export-oriented undertakings and for investors in developing countries.[9] Tax incentives are the primary means of promoting SEZ investment in South Africa.[10] These incentives have the potential to significantly reduce the tax burden of investors. Income tax incentives are contained within sections 12R and 12S of the Income Tax Act 58 of 1962 (Income Tax Act). Together with Value-Added Tax (VAT) and customs duty exemptions, they offer the greatest benefit to export companies located in an SEZ. This is in line with the government's intention to pursue foreign direct investment and increase export capacity.[11]

2 RESEARCH PURPOSE AND OBJECTIVES

The objective of this study is to consider whether the provisions of the Special Economic Zones Act 16 of 2014 (SEZ Act) and the common practices in the establishment of SEZs conflict with the criteria of the capital allowance provisions of the Income Tax Act, and whether, in so doing, in certain instances they prevent a property developer lessee from claiming capital allowances in respect of capital expenditure incurred. Where the study finds such potentially unintended consequences that may frustrate the policy objectives of the SEZ Act, the study recommends appropriate amendments that seek to remedy these outcomes.

3 LITERATURE REVIEW

3 1 SEZs in South Africa

SEZs were introduced with effect from 2016 as the successor to the Industrial Development Zone (IDZ). The objective of the SEZ regime is to

> "(i) promote industrial agglomeration, (ii) build the required industrial infrastructure, (iii) promote coordinated planning among key government

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6 Department of Trade and Industry "South African Special Economic and Industrial Development Zones" (2018) http://www.thedtic.gov.za/wp-content/uploads/SEZ_brochure.pdf (accessed 2021-02-04) 4.

7 Makgetla https://www.wider.unu.edu/publication/learning-experience-special-economic-zones-southern-africa 6 15.

8 Saggers https://open.uct.ac.za/handle/11427/16869 10.

9 World Bank Group https://openknowledge.worldbank.org/handle/10986/29054 18.

10 Haasbroek https://repository.nwu.ac.za/handle/10394/33003 8.

11 Saggers https://open.uct.ac.za/handle/11427/16869 7.

> agencies and the private sector, and (iv) guide the deployment of other necessary development tools".[12]

As part of this new dispensation, the four pre-existing IDZs – those at Coega, East London, Richards Bay and Saldanha Bay – were granted SEZ status, and a further six SEZs have subsequently been created.[13] The Coega SEZ in the Eastern Cape is the largest in the southern hemisphere.[14] Coega accounts for more than half of all private investment in SEZs in South Africa, while the East London IDZ and Dube TradePort in KwaZulu-Natal account for a further 30 per cent of investment.[15]

The SEZ structure begins with a licensee, which is the entity that applies for SEZ status for a specified area. The licensee must be established as a national or provincial government business enterprise, a municipal entity, or a company in the case of a public-private partnership. Among other things, the applicant must indicate the extent to which it owns or controls the area to be considered for designation as an SEZ.[16]

Once an area has been designated as an SEZ, the licensee must establish an operator to manage the SEZ and must transfer ownership or control of the land within the SEZ to the operator. Only an operator is entitled to develop, operate and manage an SEZ. The operator must provide infrastructure and facilities, adequate security, make recommendations for the granting of applications of businesses to locate within the SEZ, and establish rules and regulations for businesses operating within the SEZ.[17]

3 2 SEZ practices

There is strong (although not conclusive) evidence that normal practice is for the operator to grant leases over land within the SEZ, while government remains the owner of that land[18] and the lessee is responsible for development of the property. This is particularly evident in the Dube TradePort Corporation's recent communication of investment opportunities, where the Corporation as operator company positions itself as the master

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12 Department of Trade and Industry http://www.thedtic.gov.za/wp-content/uploads/SEZ_brochure.pdf 4.

13 *Ibid.*; SARS "Simplified Overview of Special Economic Zones Tax and Customs Incentives" (2019) http://www.thedtic.gov.za/wp-content/uploads/SEZ_Tax.pdf (accessed 2021-02-01) 1.

14 Haasbroek https://repository.nwu.ac.za/handle/10394/33003 27.

15 Makgetla https://www.wider.unu.edu/publication/learning-experience-special-economic-zones-southern-africa 6.

16 Chapter 6 (ss 31–38) of Special Economic Zones Act 16 of 2014.

17 *Ibid.*

18 See, for example, the frequent references to leasing in the promotional material of Coega Development Corporation "One Stop Investor Services" (2021) http://www.coega.co.za/Content2.aspx?objID=91 (accessed 2021-02-02). See also examples of Dube TradePort and Richards Bay practices referred to in Trade & Investment KwaZulu-Natal "KwaZulu-Natal Investment Opportunities 2018/19" (2018) https://www.rbidz.co.za/images/download/KWAZULU NATAL INVESTMENT OPPORTUNITIES (INVESTMENT BOOKLET) 2018.pdf (accessed 2021-02-02).

developer and seeks "prospective developers, investors and tenants" in terms of 49-year leases.[19]

The business model outlined above suggests that in many instances the successful development of specific sites within SEZs depends on the incurral of costs by a third-party developer that is not the owner of the land and that will in turn sublease the development to a tenant. The model thus envisaged by this study is the following:

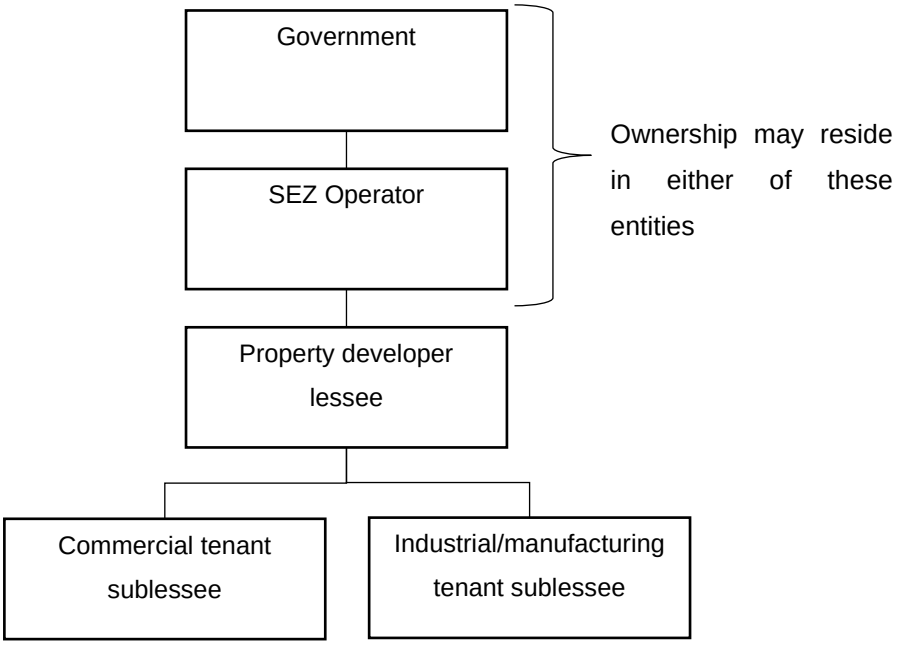

Figure 1: SEZ structure

3 3 SEZ income tax incentives

Whereas IDZs offered only VAT and customs incentives, SEZs offer significant income tax incentives. The primary income tax incentives are:

- a preferential corporate tax rate of 15 per cent, available until the later of 1 January 2031 or 10 years after the approval by the Minister of Finance of that SEZ for the preferential tax rate[20] (although not explicitly stated, it may be surmised that the 15 per cent tax rate was selected in order to

[19] Dube TradePort Corporation "Opportunities | Developments | Dube City | Dube TradePort" (2021) https://web.archive.org/web/20181202072940/http://city.dubetradeport.co.za/Pages/Developments/Opportunities (accessed 2023-07-21).

[20] S 12R of the Income Tax Act.

equalise the return on investment after corporate tax and dividends tax – as it then was at 15 per cent of after-tax distributed profit – for foreign investors, with the standard corporate rate of 28 per cent – reduced to 27 per cent with effect from years of assessment commencing on or after 1 April 2022; however, no adjustment was made to reflect the subsequent increase in the dividends tax rate);[21]

- a building allowance of 10 per cent per annum on new and unused buildings or improvements to buildings (other than residential accommodation) owned by a "qualifying company"[22] (this was probably intended to align with the 10-year time frame of section 12R);[23]
- an additional incentive allowance of 75 per cent of the cost of any new and unused manufacturing asset used by a greenfield or brownfield industrial policy project approved by the Minister of Trade and Industry, increased to 100 per cent if that project is granted preferred status;[24] and
- the waiver of the age criteria for employment incentives.[25]

To be a "qualifying company", the taxpayer must *inter alia* be a tax resident in South Africa and operate from a fixed place of business within an economic zone from which it derives at least 90 per cent of its income. There is no specific requirement that a qualifying company be engaged in a process of manufacture. However, it may not be engaged in certain manufacturing processes, such as those relating to alcohol, tobacco and weapons.[26]

Irrespective of whether it is a "qualifying company", a taxpayer may qualify for section 11(g), 13 or 13*quin* (read with section 12N) capital allowances in respect of costs incurred in the construction, acquisition or improvement of industrial or commercial property if it meets the requirements of one of those sections. It is the availability of these capital allowances that is the focus of this study.

4 RESEARCH DESIGN

The study presents a critical analysis of the current legislation. It is therefore primarily an undertaking of legal interpretive, doctrinal tax research, or establishing *de lege lata.*[27] To the extent that it identifies possible

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21 Saggers https://open.uct.ac.za/handle/11427/16869 30.

22 S 12S of the Income Tax Act.

23 Saggers https://open.uct.ac.za/handle/11427/16869 31.

24 S 12I of the Income Tax Act.

25 S 6(*a*)(ii) of Employment Tax Incentive Act 26 of 2013.

26 S 12R of the Income Tax Act.

27 *De lege lata* means "of the existing law", whereas *de lege ferenda* means "of the law (that is) to be proposed" (Fellmoth and Horwitz "Guide to Latin in International Law" (2009) https://www-oxfordreference-com.ezproxy.uct.ac.za/view/10.1093/acref/9780195369380.001.0001/acref-9780195369380 (accessed 2021-05-10)). See Hutchinson and Duncan "Defining and Describing What We Do: Doctrinal Legal Research" 2012 17 *Deakin Law Rev* https://heinonline.org/HOL/Page?handle=hein.journals/deakin17&id=91&div=8&collection=journals (accessed 2018-06-13) 83–119.

contradictions arising from the application of the current legislation and proposes remedies to these challenges, it engages in reform-oriented research or *de lege ferenda*.[28]

This study was conducted through an analysis of the relevant legislation, as well as of contextual documents that provide insight into the history and practices surrounding SEZs. The relevant provisions of the Income Tax Act pertaining to capital allowances are explored in order to establish the main obstacles to their application in the context of SEZ property developments. These obstacles are shown to be the requirement of ownership and the prohibition of subleasing within those provisions. Whether a lessee may under certain circumstances be considered an owner for income tax purposes is then investigated. The study then presents recommendations to remedy the identified problem, analyses their income tax consequences, and draws conclusions.

5 CAPITAL ALLOWANCE PROVISIONS FOR SEZs

5 1 Analysis of the relevant sections of the Income Tax Act

An analysis of specific provisions in the Income Tax Act is performed in order to determine which provisions could be applicable to the erection of developments by the property developer lessee on leased land situated in SEZs. Although there are also incentives related to VAT, among others, this article focuses on the relevant provisions of the Income Tax Act.

5 1 1 Section 12S

The first capital allowance to consider is contained in section 12S of the Income Tax Act and applies exclusively to SEZs. Section 12S(2) of the Income Tax Act reads as follows:

> "A qualifying company may deduct from the income of that qualifying company an allowance equal to ten per cent of the cost to the qualifying company of any new and unused building *owned by the qualifying company*, or any new and unused improvement to any building *owned by the qualifying company*, if that building or improvement is wholly or mainly used by the qualifying company during the year of assessment for purposes of producing income within a special economic zone, as defined in section 12R(1), in the course of the taxpayer's trade, other than the provision of residential accommodation." (emphasis added)

Section 12S(2) thus allows for a 10 per cent allowance on the cost of a new and unused building, or of a new and unused improvement to any building, that is owned by the qualifying company in an SEZ. It is clear that the

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[28] Hutchinson "The Doctrinal Method: Incorporating Interdisciplinary Methods in Reforming the Law" 2015 8 *Erasmus Law Rev* http://www.elevenjournals.com/doi/10.5553/ELR.000055 (accessed 2018-06-14) 130–138.

building must be owned by the qualifying company. Leasehold improvements would not fall within this provision except by virtue of the application of section 12N of the Income Tax Act.[29]

An operator may thus potentially qualify for the accelerated building allowance of 10 per cent per annum.[30] It is however difficult to see whether any taxpayers other than the SEZ operator were envisaged by this provision. It is clear that a property developer or trader that is not the owner of the building will be unable to claim a section 12S allowance in respect of costs incurred on the erection of the building in an SEZ. Furthermore, a property developer would be excluded from the definition of a "qualifying company" by virtue of the gazetted exclusion of real estate activities.[31] Section 12S would therefore appear to have limited application and does not address the potential problem identified in this study.

5 1 2 Section 11(g)

Where a lessee incurs costs in respect of improvements erected on land not owned by the lessee, section 11(*g*) of the Income Tax Act may provide the lessee with an annual allowance. This section allows a deduction for expenditure actually incurred by a taxpayer, in pursuance of an obligation to effect improvements on land or to buildings, incurred under an agreement whereby the right of use or occupation of the land or buildings is granted by any other person (the lessor), where the land or buildings are used or occupied for the production of income (by the lessee). Section 11(*g*) neither specifically mentions nor disallows subleasing by the lessee. It does, however, specifically require that the lessor be subject to tax on the amount on which the deduction is based.

If ownership of the land of an SEZ is retained by the government of the Republic of South Africa in the national, provincial or local sphere, section 11(*g*) will not find application as the amount incurred to erect improvements to this land will not be subject to tax in the hands of government institutions. Section 11(*g*) therefore only addresses the problem identified in the study where ownership is transferred to a tax-paying SEZ operator.

5 1 3 Section 12N

As a consequence of the requirements of section 11(*g*) and to ensure, *inter alia*, that the leasing of land from the government remains attractive from a tax perspective, section 12N was introduced into the Income Tax Act in

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29 Saggers https://open.uct.ac.za/handle/11427/16869 31.

30 Department of Trade and Industry http://www.thedtic.gov.za/wp-content/uploads/SEZ_brochure.pdf 23.

31 National Treasury "Notice in Terms of Section 12R of the Income Tax Act, 1962, Regarding Activities to Which Section 12R Does Not Apply" in *GG* 39930 of 2016-04-15 www.gpwonline.co.za (accessed 2022-01-27).

2010.[32] This section finds application where a lessee undertakes improvements on leased property in terms of a public private partnership or where the property is owned by the government in the national, provincial or local sphere or by certain government-owned exempt entities.

Earlier versions of section 12N also included the obligation-to-improve requirement of section 11(*g*), but this was subsequently removed in amendments to the section. The section does not cross-refer to section 11(*g*), and therefore it must act as an alternative to the section rather than as a route to a section 11(*g*) allowance.

Section 12N(1) of the Income Tax Act reads as follows:

> "If a taxpayer–
>
> "(*a*) holds a right of use or occupation of land or a building;
> (*b*) effects an improvement on the land or to the building in terms of–
> (i) a Public Private Partnership; or
> (ii) *an agreement in terms of which the right of use or occupation is granted, if the land or building is owned by–*
> *(aa) the government of the Republic in the national, provincial or local sphere***;** or
> (*bb*) any entity of which the receipts and accruals are exempt from tax in terms of section 10(1)(cA) or (t);
> (iii) the Independent Power Producer Procurement Programme administered by the Department of Energy.
> (*c*) incurs expenditure to effect the improvement contemplated in paragraph (*b*); and
> (*d*) ...
> *(e) uses or occupies the land or building for the production of income or derives income from the land or building,*
>
> the taxpayer must, for the purposes of any deduction contemplated in section 11D, 12B, 12C, 12D, 12F, 12I, 12S, 13, 13*ter*, 13*quat*, 13*quin*, 13*sex* or 36, and for the purposes of the Eighth Schedule, *be deemed to be the owner of the improvement* so completed." (emphasis added)

This section therefore permits an allowance on improvements to be calculated as if the lessee owned the property with one of the conditions being that the taxpayer must use the property to produce income. In such a case, the expenditure incurred by the lessee to complete improvements is deemed to be the cost for the purposes of the various capital allowances mentioned.

The restrictions imposed by subsection (3) of section 12N however cannot be ignored. This subsection states:

> "This section does not apply if the taxpayer–
>
> (*a*) is a person carrying on any banking, financial services or insurance business; or

[32] National Treasury "Explanatory Memorandum on the Taxation Laws Amendment Bill, 2010" (2010) https://www.sars.gov.za/wp-content/uploads/Legal/ExplMemo/LAPD-LPrep-EM-2010-01-Explanatory-Memorandum-Taxation-Laws-Amendment-Bill-2010.pdf (accessed 2021-05-10) 45.

(*b*) *enters into an agreement whereby the right of use or occupation of the land or building is granted to any other person,* unless–

(i) the land or building is occupied by that other person and that other person is a company that is a member of the same group of companies as that taxpayer in terms of such an agreement;

(ii) the cost of maintaining the land or building and of carrying out repairs thereto required in consequence of normal wear and tear is borne by the taxpayer; and

(iii) subject to any claim that the taxpayer may have against the other person by reason of the other person's failure to take proper care of the land or building, the risk of destruction or loss of or other disadvantage to the land or building is not assumed by that other person." (emphasis added)

Applied to the context of a property developer lessee in an SEZ, in a scenario where the taxpayer subleases the property to a third party that is unlikely to be a member of the same group of companies, section 12N seems not to be available to the lessee owing to the restriction of section 12N(3)(*b*).

The Explanatory Memorandum on the Taxation Laws Amendments Bill, 2010 does not explicitly address why subletting is outside the scope of section 12N. However, it might be a legacy of the historic rationale for not granting a deduction to lessees, as captured in this introduction:

> "The general denial of the improvement allowance in respect of leased land or buildings of an exempt lessor was enacted in the early 1980's to prevent tax avoidance. At that time, a number of lease financing schemes existed so that financiers could obtain artificial write-offs for improvements on leased property as if these financiers had directly owned and operated the underlying property. These schemes were particularly prevalent in the case of exempt parties seeking finance because these entities lacked a tax base from which a depreciation allowance could be utilised. The purpose of the lease finance schemes was to shift the depreciation allowance to financiers that had a tax base upon which the allowance could be utilised."[33]

The above, in the authors' opinion, refers to schemes designed to take advantage of section 11(*g*). The extension of such denial to prohibit the deduction of commercial building allowances in the context of section 12N is, it is submitted, unnecessarily wide. Although the legislature's intention to combat tax avoidance through the artificial shifting of depreciation allowances from exempt entities to taxpayers is acknowledged, it is submitted that the restriction is unnecessarily wide. This may discourage participation by property developers that will use the property for purposes of their own trade.

In the "Taxation Laws Amendments Bills, 2010: Final Response Document from National Treasury and SARS", the Standing Committee on Finance noted that section 12N should put the lessee in the same position

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[33] National Treasury https://www.sars.gov.za/wp-content/uploads/Legal/ExplMemo/LAPD-LPrep-EM-2010-01-Explanatory-Memorandum-Taxation-Laws-Amendment-Bill-2010.pdf 46.

as the owner, but not in a better position.[34] This effectively means that if an owner would not have qualified for an allowance, a lessee should also not qualify for an allowance through section 12N. However, by denying an allowance to a lessee that develops and sublets the property on land owned by government, the property developer lessee is placed in a worse position than if it had been the owner of that land, without tax avoidance being present. Furthermore, section 12N facilitates certain allowances for improvements made to land or buildings not owned by the taxpayer but over which the taxpayer holds a right of use or occupation.

The concept of "right of use or occupation" is not defined in the Income Tax Act. In South African law, the Latin term *commodus usus* refers to the use and enjoyment of property and includes various factors, since the term "use" includes both the right to use the property and the right to gather and enjoy the civil and natural fruits of the property.[35] It is submitted that a developer that subleases a property applies that property in its trade in the production of income. South African tax principles allow for expenditure incurred in the production of income to be deducted against income.

It is commonly acknowledged that the maxims of taxation – namely, equality, certainty, convenience and economy – serve as indicators of a good tax policy.[36] Of particular relevance in the current context is the concept of neutrality (encompassed by the maxim on equality). Neutrality means that tax outcomes should not cause economic distortions.[37] Although neutrality can be achieved by way of the recommendations in this study, the study acknowledges that in certain instances there may be a trade-off within the maxims, and also between the maxims and economic policy.[38] This study does not propose a comprehensive analysis of the incentives related to SEZs against each of the maxims of taxation.

The remaining potentially relevant provisions of the Income Tax Act applicable to buildings are sections 13 (buildings used in the process of manufacture) and 13*quin* (commercial buildings).

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[34] Standing Committee on Finance "Taxation Laws Amendments Bills, 2010: Final Response Document from National Treasury and SARS" (8 November 2010) https://www.sars.gov.za/wp-content/uploads/Legal/RespDocs/LAPD-LPrep-Resp-2010-01-Response-Document-Taxation-Laws-Amendment-Bills-2010.pdf (accessed 2021-05-10) 13.

[35] Hutchison, Van Heerden, Visser, Van der Merwe *Wille's Principles of South African Law* 8ed (1191) 548 549.

[36] Alley and Bentley "A Remodelling of Adam Smith's Tax Design Principles" 2005 20 *Aust Tax Forum* https://heinonline.org/HOL/Page?handle=hein.journals/austraxrum20&id=577&collection=journals&index=# (accessed 2018-04-20) 579–624.

[37] Besley, Blundell, Gammie and Poterba "Dimensions of Tax by Design: The Mirrlees Review" (2010) https://www.researchgate.net/profile/Richard_Blundell/publication/50876719_Dimensions_of_Tax_Design_The_Mirrlees_Review/links/00b4953a94b4a8b25d000000/Dimensions-of-Tax-Design-The-Mirrlees-Review.pdf (accessed 2018-04-17) 2.

[38] Davis Tax Committee "Report on the Efficiency of South Africa's Corporate Income Tax System" (2018) https://www.taxcom.org.za/docs/20180411%20Final%20DTC%20CIT%20Report%20-%20to%20Minister.pdf (accessed 2018-06-01) 70; American Institute of CPAs (AICPA) "Tax Policy Concept Statement 1 Guiding Principles of Good Tax Policy: A Framework for Evaluating Tax Proposals" (2017) https://www.aicpa.org/content/dam/aicpa/advocacy/tax/downloadabledocuments/tax-policy-concept-statement-no-1-global.pdf (accessed 2018-04-20) 14.

5 1 4 Section 13

Section 13(1) of the Income Tax Act allows a taxpayer to deduct an allowance on the cost of a building erected where:

> "such building was wholly or mainly used by the taxpayer during the year of assessment for the purpose of carrying on therein in the course of its trade … any process of manufacture, …, or such building was let by the taxpayer and was wholly or mainly used by the tenant or subtenant for the purposes of carrying on therein any process as aforesaid in the course of trade."

The taxpayer claiming the allowance can either be the owner or the lessee of the building, ownership not being a requirement in order to receive this allowance. The taxpayer that incurred the expenditure for the improvements, which can be either the lessor or the lessee, can receive the allowance in respect of costs incurred by that person.

The effect of section 13 is that a property developer lessee (or indeed a sublessee tenant) incurring costs in respect of property development or improvement within an SEZ may claim an allowance in respect of such costs, notwithstanding that government continues to own the land on which that property is located, as long as the building houses a process of manufacture. This entitlement to allowances arises as a result of the direct application of section 13 and is not dependent on the application of section 12N, and therefore circumvents the prohibition on subleasing contained in section 12N(3). In fact, since ownership is not a requirement in section 13, the reference to section 13 within section 12N for the purposes of deemed ownership seems somewhat anomalous.

However, section 13 applies only where the sublessee tenant is engaged in a process of manufacture within that building. It therefore does not address the problem with respect to other forms of commercial activity.

5 1 5 Section 13quin

Section 13*quin* of the Income Tax Act, on the other hand, grants to the taxpayer:

> "an allowance equal to five per cent of the cost to the taxpayer of any new and unused building owned by the taxpayer, or any new and unused improvement to any building owned by the taxpayer, if that building or improvement is wholly or mainly used by the taxpayer during the year of assessment for purposes of producing income in the course of the taxpayer's trade, other than the provision of residential accommodation."

Section *13quin* therefore requires the taxpayer to be the owner of the commercial building and does not permit the claiming of such capital allowance by a lessee. Section 13*quin* therefore does not extend to a lessee except through the application of section 12N. In the context of SEZs, the property developer lessee is then prohibited from claiming such deduction by the prohibition on subleasing contained in section 12N(3).

5 1 6 Section 11(e)

For the sake of completeness, it may be added that section 11(*e*) of the Income Tax Act finds no application in this context, since it does not apply to structures and works of a permanent nature.[39]

5 2 Conclusion: availability of capital allowances

From the preceding analysis, it may be concluded that section 11(*g*) allowances will only be available to a property developer lessee where ownership of the land developed resides in the SEZ operator. Where ownership is retained by government, section 11(*g*) allowances are unavailable. Section 13*quin* is only available where the lessee is also the occupier for the purposes of trading (that is, the development is not subleased) in terms of section 12N. In addition, a capital allowance in terms of section 13 is available to the property developer lessee where the tenant is engaged in a process of manufacture.

In all other situations, the obstacle to a property developer lessee claiming a section 13*quin* allowance is that section 13*quin* requires the taxpayer to be the owner of the building, while section 12N requires that the lessee not be engaged in subleasing the building. This obstacle may be overcome if the building might be considered "owned" by the lessee in the context of a long-term lease for purposes of the Income Tax Act. This is considered in the next section.

6 OWNERSHIP VERSUS LEASE

6 1 Ownership

Sections 12S and 13*quin* of the Income Tax Act require that a building or improvement be "owned" by the taxpayer for the building allowance to apply.[40] "Owned" and/or "ownership" is not defined in the Income Tax Act and must therefore take on the meaning under common law.

A person or entity owns fixed property if it is registered in the Deeds Office under the entity's name,[41] which effectively gives the owner almost unfettered real rights to do as it pleases, subject to the law, servitudes and the like. The South African Revenue Service (SARS) considers ownership in its "Interpretation Note 107: Deduction in Respect of Commercial Buildings":

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39 SARS "Interpretation Note 107: Deduction in Respect of Commercial Buildings" (2018) https://www.sars.gov.za/wp-content/uploads/Legal/Notes/LAPD-IntR-IN-2018-10-IN107-Deduction-in-respect-of-commercial-buildings.pdf (accessed 2021-02-01) par 2.

40 Ownership is also required in sections 13*quat* and 13*sex* of the Income Tax Act (although not directly relevant to the context of SEZs).

41 SARS https://www.sars.gov.za/wp-content/uploads/Legal/Notes/LAPD-IntR-IN-2018-10-IN107-Deduction-in-respect-of-commercial-buildings.pdf, par 4.1.6.

> "Ownership is not defined in the Act. However, general common law principles apply. Under the common law principle of *superficies solo cedit* (owner by accession), buildings or other structures affixed or attached to land become the property of the owner of the land. A taxpayer wanting to claim an allowance under section 13*quin* must therefore be the owner of the land on which the building is erected, or the improvements are effected. This requirement is relevant in the context of section 13*quin* as it deals with buildings of a permanent nature and such buildings will be permanently attached to the land."[42]

6 2 Long-term leases

With respect to long-term leases, Snymans Inc Attorneys state the following:

> "Fundamentally, a long-term lease is a contract between the lessor and the lessee that entitles the lessee to a limited real right over the property in question for an agreed period of time ranging from 10 years to 99 years. The lessor agrees to allow the lessee use and enjoyment of the property, and the lessee agrees to compensate the lessor through a rental fee.[43]
>
> A lease longer than 10 years is accepted as a long-term lease. This creates a limited real right and is registrable in the Deeds Office."[44]

A lease may be akin to ownership, especially where the "purchase" of a property entails the acquisition of a 99-year lease of the property and the cancellation of the preceding lease, no matter the remaining duration of the previous leaseholder's occupation.[45] However, leasehold grants a limited real right and is not freehold ownership under South African law. The deeds register records the property leased under the name of the owner with an endorsement noting the 99-year lease against that property in the name of the lessee.

Although not dealing with long leases as such, the Supreme Court of Appeal had the following to say in *CSARS v Wyner*:[46]

> "[39] I therefore do not agree with the reasoning and findings of the court *a quo* that the *mix of private rights and public forbearance gave the respondent a sui generis claim to the property which was close to ownership,* that the respondent was to all intents and purposes entitled to treat the site as her own and that she should notionally be put in the same category as someone who by force of circumstance is forced to sell her home. In my view this reasoning and the findings ignored the juristic nature of the relevant transaction." (emphasis added)

These sentiments accord with the concepts raised by Muller, Brits, Pienaar and Boggenpoel:

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42 SARS https://www.sars.gov.za/wp-content/uploads/Legal/Notes/LAPD-IntR-IN-2018-10-IN107-Deduction-in-respect-of-commercial-buildings.pdf, par 4.1.6.

43 Snymans Inc Attorneys "What Is a 'Long Term Lease'?" 2015 2 *Rental Management* https://www.snymans.com/advice/what-is-a-long-term-lease/ (accessed 2021-05-21).

44 S 1(2) of Formalities in Respect of Leases of Land Act 18 of 1969.

45 Anecdotally, these transactions have been accepted by the banks as a legitimate and secure transaction, providing adequate security for property-financing loans.

46 [2003] 4 All SA 541 (SCA); 66 SATC 1.

> "*As a point of departure, we should briefly distinguish between ownership, as the only real right with regard to one's own property (ius in re propria), and rights with regard to things which belong to another person (iura in re aliena).* For present purposes, it suffices to say that of all real rights the right of ownership in its unrestricted form confers the most comprehensive control over a thing. A right with regard to a thing which belongs to another person, on the other hand, is a limited real right in the sense that it is a real right 'less than ownership' in a thing owned by a person other than the holder of such a right."[47] (emphasis added)

6 3 Implications of ownership versus lease in an SEZ

It is clear that in South African law, ownership grants a real right to the owner over the property in question. In contrast, leases grant limited real rights to the lessee. Even though a lease may diminish the rights of an owner, the rights granted under ownership and lease are fundamentally different.

Thus, it is submitted that, irrespective of the length of the lease or the conditions for renewal or extension, ownership as envisaged in the Income Tax Act does not include leased property. This is confirmed by the provisions of sections 12N, where in certain cases improvements carried out on leased property are deemed to be owned by the lessee.

A lease, therefore, irrespective of its duration or the availability of unlimited extensions, grants limited real rights, and even if akin to ownership, cannot be regarded as ownership. Leasehold grants a limited real right. This is true, even if it is a 99-year lease that is renewable in perpetuity. A lease, therefore, regardless of its terms, can never be considered to grant the lessee the status of "owner" for the purposes of applying the capital allowance provisions of the Income Tax Act. To the extent that the ownership of land, and therefore improvements, in SEZs remains with either government or the SEZ operator, the property developer lessee cannot own the improvements under South African law.

7 RECOMMENDATIONS

Underlying the obstacles to SEZ property developers claiming capital allowances in various circumstances is the asymmetry between the application criteria of sections 13 and 13*quin* of the Income Tax Act. This asymmetry would appear to fail the test of equity or neutrality in terms of the commonly accepted principles of a good tax system.[48] Indeed, Interpretation Note 107 observes, in relation to the introduction of section 13*quin* of the Income Tax Act, that there was "no policy rationale for excluding commercial

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[47] Muller, Brits, Pienaar and Boggenpoel *Silberberg and Schoeman's The Law of Property* 6ed (2019) 53.

[48] Pistone, Roeleveld, Hattingh, Nogueira and West *Fundamentals of Taxation: An Introduction to Tax Policy, Tax Law and Tax Administration* (2019) par 2.1.2.

buildings that were not used within the specified trades from an allowance".[49] It is submitted that the inclusion of the ownership requirement in section 13*quin*, which is absent from section 13, is equally without policy rationale. This study therefore recommends that the term "owned" be removed from section 13*quin* and that the application of the section be aligned with that of section 13.

While the immediate issue identified in this study might also be resolved either through the removal of the prohibition against subleasing contained in section 12N(3), or the inclusion of leases of ten or more years' duration within the definition of "owned" as used in section 12S of the Income Act, it is submitted that the more far-reaching amendment of section 13*quin* would be most appropriate in establishing equity (or neutrality) in the building allowance provisions. Although not specifically considered by this study, it is recommended that similar consideration be given to amending other building allowance sections such as those in sections 13*quat*, 13*ter* and 13*sex* of the Income Tax Act, which also include ownership requirements.

The implications of this recommendation in different circumstances may be illustrated as follows.

7 1 Lease between tax-exempt lessor and tax-paying lessee and sublessee

In the case of a lease between a tax-exempt lessor and a tax-paying lessee and sublessee, the lessee may deduct the rentals paid or incurred if the property leased is used for trade purposes (section 11(*a*) read with section 23(*g*) of the Income Tax Act). Rental costs therefore do not form part of the base cost of the right of use of the property.

In terms of existing legislation, a lessee is not entitled to any capital allowances in respect of improvements effected. Section 11(*g*) is not applicable, as the lessor did not include the amount in gross income (since it is a tax-exempt entity).

Section 12N is not applicable because it prohibits subletting. Section 13*quin* is also not applicable as the lessee is not the owner of the building.

An "asset" is defined in paragraph 1 of the Eighth Schedule to the Income Tax Act as including a "right or interest of whatever nature to or in such property". While the rights granted under ownership and lease are fundamentally different, it is submitted that this element of the definition of "asset" includes the rights granted to a lessee under a lease agreement.

SARS has clarified that a part-disposal includes the granting of a lease over immovable property. In its *Comprehensive Guide to Capital Gains Tax*, after a quote from *Vairetti v Zardo NO*,[50] the following is noted:

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[49] SARS https://www.sars.gov.za/wp-content/uploads/Legal/Notes/LAPD-IntR-IN-2018-10-IN107-Deduction-in-respect-of-commercial-buildings.pdf par 2.

[50] [2010] ZAWCHC 146 par 17 *et seq*.

> "Therefore, for example, the granting of a lease over property by the owner creates a contractual right in favour of the lessee. *That right is an asset for CGT purposes.* The creation of this right has given rise to a disposal of part of the full right in the property that the owner previously enjoyed. In other words, there has been a part-disposal. As can be seen, the 'creation' has given rise to both an acquisition and a disposal."[51] (emphasis added)

Although the lease of property may be considered to be an alienation by the owner of a right to use the property for the duration of the lease, paragraph 33(3)(*b*) of the Eighth Schedule of the Income Tax Act excludes such a transaction from the ambit of a part-disposal as envisaged in that paragraph, where no proceeds are received or accrued. In addition, improvements effected by a lessee to immovable property owned by a lessor will not trigger a part-disposal for the lessee (see paragraph 33(3)(*c*) of the Eighth Schedule).

Any disposal of the *bare dominium* in the improvements[52] is thus deferred until the end or the expiry of the lease agreement. Because no deduction is available, the expenditure by the lessee constitutes the base cost of the *bare dominium* in the improvement,[53] which is disposed of for no consideration at the conclusion of the lease, when it passes to the lessor. The Income Tax Act and the Draft Interpretation Note on sections 12N and 12NA do not consider the impact of such disposal.

In terms of the amendment proposed in this article, the lessee would qualify for a section 13*quin* allowance. This would reduce the base cost of the *bare dominium* to nil over the course of the lease, which would lead to the elimination of any capital loss for the lessee at the end of the lease. The lessor, which is a tax-exempt entity, and the sublessee, which incurs no cost in respect of the improvements, are unaffected by the proposed amendment.

The net effect to the fiscus is a loss in tax revenue equal to the difference between the capital loss and the revenue deduction of the lessee.

This may be illustrated as follows:

Assume Entity A (tax-exempt entity) leases a piece of land to Entity B for R25 000 per annum. According to the 20-year lease agreement, Entity B is obligated to effect leasehold improvements (the erection of a building on the piece of land) to the value of R3 million within one year of entering into the lease agreement. Entity B then subleases the building to Entity C for R200 000 per annum. Entity C uses the building for the distribution of goods (thus, not for a process of manufacture). At the conclusion of the lease, Entity C vacates the building, and Entity A sells the property for R10 million.

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51 SARS "Comprehensive Guide to Capital Gains Tax" (2020) https://www.sars.gov.za/wp-content/uploads/Ops/Guides/LAPD-CGT-G01-Comprehensive-Guide-to-Capital-Gains-Tax.pdf (accessed 2022-01-26) 88.

52 That is, ownership of improvements without the right of use of them.

53 SARS https://www.sars.gov.za/wp-content/uploads/Ops/Guides/LAPD-CGT-G01-Comprehensive-Guide-to-Capital-Gains-Tax.pdf, 342

Table 1: Tax-exempt lessor and tax-paying lessee and sublessee

Entity A	**Current legislation**	**Proposed legislation**
Lease income, improvements, end of lease, sale of property	No effect as a tax-exempt entity	No effect as a tax-exempt entity

Entity B	**Current legislation**	**Proposed legislation**
Annual gross income on sublease to Entity C	R200 000	R200 000
Annual deduction of lease payments to Entity A – s 11(*a*)	(R25 000)	(R25 000)
Annual deductions for improvements – s 13*quin*	(–)	(R150 000) *(R3m x 1/20)*
Capital gain or (loss) on disposal of *bare dominium*	Proceeds – Base cost (R3 000 000) Capital loss (R3 000 000)	Proceeds – Base cost (–) Capital gain/loss –
Net benefit to taxpayer / cost to fiscus		**R600 000**[54]

Entity C	**Current legislation**	**Proposed legislation**
Annual deduction of annual lease payments to Entity B	(R200 000)	(R200 000)
Annual deductions for improvements	(–)	(–)

7 2 Lease between tax-paying lessor and lessee with obligatory improvements

In the case of a lease (whether long-term or short-term) between a tax-paying lessor and a tax-paying lessee, the rental received by or accrued to the lessor is gross income and therefore not proceeds for capital gains tax (CGT) purposes. The lessor may deduct, per section 11(*a*) of the Income Tax Act, expenditure relating to the lease, since rental of property is included in the definition of "trade" in section 1(1) of the Income Tax Act.

In terms of existing legislation, the lessee is entitled to an annual section 11(*g*) allowance, because the lessee is obligated to effect improvements and

[54] R150 000 x 20 years – R3m x 80% capital loss (assuming a corporate taxpayer).

the lessor is a tax-paying entity. The amount stipulated in the lease agreement, less any allowances utilised under section 11(*g*), will be the base cost of the improvements. However, since section 11(*g*)(vii) grants an allowance of any amount not yet deducted in terms of section 11(*g*) where a lease is terminated before the full allowance has been utilised, there will be no base cost. Therefore, there is no capital gain or loss arising for the lessee on disposal of the *bare dominium* at the end of the lease.

Obligatory improvements effected to land or property will not constitute a disposal of an asset by the lessor for CGT purposes, but rather will result in the acquisition of an asset. The base cost of the improvements under paragraph 20(1)(*h*)(ii)(*cc*) of the Eighth Schedule of the Income Tax Act is the amount included in the lessor's gross income in terms of paragraph (*h*) of the definition of "gross" income in section 1(1), less any allowance granted under section 11(*h*). Thus, the lessor gains the improvements at the end of the lease period having been taxed on a portion thereof at the beginning of the lease period.

In terms of the proposed amendment, the lessee would be entitled to either a section 13*quin* or section 11(*g*) allowance and would presumably elect the lesser write-off period. The net effect to the fiscus is therefore only a possibly reduced write-off period for the cost of the improvements.

This may be illustrated as follows:

Assume Entity A (a taxable entity) leases a piece of land to Entity B for R25 000 per annum. According to the 25-year lease agreement, Entity B is obligated to effect leasehold improvements (the erection of a building on the piece of land) to the value of R3 million within one year of entering into the lease agreement. The improvements are completed within one year of entering into the lease agreement. Entity B uses the building for the distribution of goods (thus, not for a process of manufacture). No allowance under section 11(h) was granted to Entity A. At the conclusion of the lease, Entity B vacates the building, and Entity A sells the property for R10 million.

Table 2: Tax-paying lessor and lessee with obligatory improvements

Entity A	**Current legislation**		**Proposed legislation**
Annual gross income on lease to Entity B	R25 000		R25 000
Gross income inclusion for leasehold improvements – paragraph (*h*)	R3 000 000		R3 000 000
Capital gain on disposal of property	Proceeds R10 000 000 Base cost		Proceeds R10 000 000 Base cost

	(R3 000 000) Capital gain R7 000 000		(R3 000 000) Capital gain R7 000 000

Entity B	**Current legislation**	**Proposed legislation**
Annual deduction of lease payments to Entity A – s 11(*a*)	(R25 000)	(R25 000)
Annual deductions for improvements – s 11(g) or s 13*quin*	(R125 000) *(R3m x 1/24)*	(R125 000) or (R150 000)
Capital gain or (loss) on disposal of *bare dominium*	Proceeds – Base cost (–) Capital gain/loss –	Proceeds – Base cost (–) Capital gain/loss –
Net benefit to taxpayer / cost to fiscus		**–** [55]

7 3 Lease between tax-paying lessor and lessee without obligation to make improvements

In the case of a lease between a tax-paying lessor and a tax-paying lessee where there is no obligation to make improvements, voluntary improvements, or amounts in excess of obligatory improvements, result in neither gross income nor a base cost to the lessor. In terms of current legislation, the lessee is not entitled to any allowance under section 11(*g*). The expenditure thus constitutes the base cost in the *bare dominium* in the improvement, which is disposed of at the conclusion of the lease, when it passes to the lessor. To the extent that the lessee is not compensated for such improvements, the expenditure will result in a capital loss at the end of the lease period.

The anomalous exception to this outcome is where voluntary expenditure relates to an improvement used mainly in a process of manufacture. In such an instance, the lessee may claim an allowance for such expenditure in terms of section 13 (which does not contain an ownership requirement) and need not look to section 11(*g*). To the extent that the lessee claims capital allowances under section 13, this will reduce any capital loss at the end of the lease period.

[55] The availability of a section 13*quin* deduction accelerates the taxpayer's capital allowances but does not increase the total amount over the duration of the lease.

Because the lessor neither incurs any cost, nor includes any amounts in its gross income in respect of the improvement, that improvement has a base cost of nil for the lessor.

In terms of the amendment proposed by this article, the lessee would be entitled to a section 13*quin* allowance for the cost of any voluntary improvements. This would reduce the base cost of the *bare dominium* to nil over time and eliminate any capital loss for the lessee at the end of the lease (assuming it were for a period exceeding 20 years, being the section 13*quin* write-off period). The lessor would be unaffected by the amendment.

Once again, the net effect to the fiscus is a loss in tax revenue arising from the difference between the capital loss and the revenue deduction of the lessee.

This may be illustrated as follows:

Assume Entity A (a taxable entity) leases a piece of land to Entity B for R25 000 per annum. Entity B is entitled but not obligated to effect leasehold improvements in terms of the lease agreement. Entity B in fact erects a building at a cost of R3 million within one year of entering into the lease agreement. Entity B uses the building for the distribution of goods (thus, not for a process of manufacture). At the conclusion of the lease, Entity B vacates the building, and Entity A sells the property for R10 million.

Table 3: Tax-paying lessor and lessee with no obligatory improvements

Entity A	**Current legislation**	**Proposed legislation**
Annual Gross income on lease to Entity B	R25 000	R25 000
Gross income inclusion for leasehold improvements – paragraph (*h*)	–	–
Capital gain on disposal of property	Proceeds R10 000 000 Base cost (–) Capital gain R10 000 000	Proceeds R10 000 000 Base cost (–) Capital gain R10 000 000

Entity B	**Current legislation**	**Proposed legislation**
Annual deduction of lease payments to Entity A – s 11(*a*)	(R25 000)	(R25 000)
Annual	(–)	(R150 000)

deductions for improvements – s 13*quin*		
Capital gain or (loss) on disposal of *bare dominium*	Proceeds – Base cost (R3 000 000) Capital loss (R3 000 000)	Proceeds – Base cost (–) Capital gain/loss –
Net benefit to taxpayer / cost to fiscus		**R600 000**[56]

8 FURTHER CONSIDERATIONS

8 1 Sale of a long-term lease

Where, for whatever reason, land may not be sold, but is leased on a long-term lease and the lease is then transferred to another lessee (not as a sublease but as an outright sale of the lease), the normal CGT rules would apply. As a consequence of the amendment proposed by this article, the person incurring the expense of an improvement to the leased property may claim allowances, but on selling the lease, would have a receipt or accrual partly in compensation for the value of the improvement disposed of, and partly for the right to the lease disposed of. It is submitted that in this case the same consequences as for the sale of land and buildings would apply. There would be a recoupment in respect of the improvement, but not for the lease itself. The buyer would have a base cost, being partly the right to the lease and partly the improvement acquired. It is further submitted that since the lease and improvement are inextricably linked, there is no part-disposal as envisaged in paragraph 33 of the Eighth Schedule of the Income Tax Act.

8 2 Possible reduction in inclusion of leasehold improvement obligation clauses

As may be evident from comparing the outcomes above, a possible consequence of the proposed amendment is the rendering obsolete of section 11(*g*) of the Income Tax Act, since it would no longer be a prerequisite to the lessee obtaining a capital allowance in respect of improvements effected. Section 11(*g*) would only be advantageous to a lessee where a lease period is less than 20 years, being the period over which section *13quin* building allowances may be claimed.

Clauses obligating a lessee to effect improvements may be omitted from lease agreements, *inter alia* to avoid an inclusion in the lessor's gross income in terms of paragraph (*h*). The extent to which such clauses might

[56] R150 000 x 20 years – R3m x 80% capital loss (assuming a corporate taxpayer).

continue to be incorporated in lease agreements in order to provide the lessor with an enforceable right to have improvements effected is unclear.

9 CONCLUSION

The objectives of the SEZ regime, which follows the directives of government, are to encourage investment and proliferate economic development, both within and outside these zones. This study has demonstrated that, where the ownership of land in an SEZ is not transferred to a property developer, the property developer will only be able to claim capital allowances, in terms of the direct application of section 13 of the Income Tax Act, in respect of expenditure incurred when the sublessee tenant is engaged in a process of manufacture. In contrast, in all other circumstances, the property developer will not be able to claim capital allowances in respect of similar expenditure incurred in developing commercial property in terms of section 13*quin* of the Income Tax Act, since that section requires the taxpayer to be the owner of the property. The possible application of section 12N of the Income Tax Act (intended to promote development of land owned by government) is in this instance frustrated by the prohibition within that section against subleasing by the property developer lessee.

In South Africa, buildings and improvements that adhere to the land are owned by the landowner. Leasing, regardless of the length of the lease, does not confer ownership rights. The rights granted under ownership and lease are fundamentally different. This difference is confirmed by the provisions of section 12N of the Act. Land leased by a property developer as well as any development on that land cannot therefore be considered "owned" by the property developer for the purposes of the Income Tax Act.

As an emerging market, it seems that the unavailability of capital allowances where the property developer lessee is not the owner of the commercial building, but did erect it, could detract from stimulating economic growth and development in South Africa, and restrict development within SEZs to that of industrial buildings. This may significantly undermine the policy objectives of the SEZ Act.

This study therefore concludes that it is an anomaly that no allowance is currently available for leased commercial buildings in SEZs, which is at odds with the principle of neutrality and a potential barrier to the success of the SEZ initiative in South Africa. This finding highlights the greater anomaly of a failure of equity or neutrality between available building allowances, for which there is no clear policy rationale.

It is submitted that removing the "ownership" requirement from section 13*quin* would create equity between the income-tax treatment of improvements made to leased commercial property and the treatment of improvements made to manufacturing property. This would more closely align with the sentiment expressed in the 2010 "Final Response Document"

on the Taxation Laws Amendment Bill[57] upon the introduction of section 12N. There, National Treasury and SARS indicated that the lessee should be put in the same place as the owner, but not in a better place. Such equity would however come at a cost to the fiscus in the form of the substitution of deductible expenditure for a capital loss for the lessee in some instances.

It is further submitted that the tax incentives for SEZ investment provided for in sections 12S and 12R, and from which commercial property developers are excluded, are sufficient to preserve the policy objectives of SEZs in the absence of an ownership requirement in section 13quin.

[57] Standing Committee on Finance https://www.sars.gov.za/wp-content/uploads/Legal/RespDocs/LAPD-LPrep-Resp-2010-01-Response-Document-Taxation-Laws-Amendment-Bills-2010.pdf 13.

CASES / VONNISSE

A STEP FORWARD IN THE FIGHT AGAINST ABLEISM:

Damons v City of Cape Town [2022] ZACC 13

1 Introduction

In *Damons v City of Cape* Town ([2022] ZACC 13) (CC judgment), the Constitutional Court (CC) had to deal with the issue of a person living with a disability who was injured in training. The minority judgment by Pillay AJ takes a socio-legal approach to the issue as it dives deep into how Mr Damons was injured and the responsibility of the employer to ensure that Mr Damons was reasonably accommodated. On the other hand, the decision of the majority by Majiedt J takes a formal legal approach in that it critiques the minority judgment from the perspective of the pleadings. This case note engages in a deep discussion of the matter, spanning the arbitration, Labour Court (LC), Labour Appeal Court (LAC) and both of the judgments of the CC. This case note engages in a discussion of the two judgments of the CC.

2 Facts

Mr Damons was a firefighter employed by the City of Cape Town. He was injured on duty during a fire drill owing to the employer ignoring safety requirements (CC judgment par 1). During the drill, Mr Damons was required to hop onto the back of another trainee, as a result of which he fell from the second floor to the first floor (CC judgment par 2). Mr Damons was injured permanently and now cannot carry anything heavy. Physical fitness is a requirement for firefighters. Mr Damons commenced his employment as a firefighter in 2001 and, but for his permanent injury, he would have been promoted in 2010 (CC judgment par 3). In 2013, Mr Damons was "accommodated" by his employer through alternative employment and was placed in the Fire and Life Safety Section to perform administrative and educational work; he retained his title as firefighter and his salary (CC judgment par 5). Mr Damons then applied for the position of senior firefighter and asked that his employer relax the physical fitness requirement (CC judgment par 6). The employer refused, and Mr Damons has since had no promotion.

Feeling aggrieved, Mr Damons instituted legal proceedings under the Employment Equity Act (55 of 1998) (EEA) (CC judgment par 7). He claimed that he was being unfairly discriminated against as the employer refused to drop the physical fitness requirement and to promote and advance him,

preferably as a firefighter. The employer, on the other hand, raised the defence that physical fitness is an inherent job requirement for firefighters (CC judgment par 8).

3 Arbitration and adjudication

3 1 Arbitration

The arbitrator found as follows:

> "[T]he respondent is of the view that the mere fact that the applicant has been accommodated within the Unit that itself is sufficient. To me this is a misguided notion because there is no favour done to the applicant to accommodate him as that is a legal requirement expected from the respondent to do so. Clearly, it does not bother the respondent as to whether ... the applicant is advanced. I note the attitude displayed here borders on arrogance of the respondent's management and there is no empathy displayed here towards the applicant. It is as if the applicant brought this condition to himself and therefore tough luck to him and must be grateful that he still works for the respondent." (CC judgment par 13; see also *South African Municipal Workers Union* (*SAMWU*) *obo A Damons v City of Cape Town*, SALGBC Arbitration Award, 17 October 2014 par 23)

However, since the City of Cape Town had raised inherent job requirements as a defence, the arbitrator found that the bargaining council had no jurisdiction to deal with the matter. The matter was then referred to the Labour Court (CC judgment par 14; see also s 10(6)(*a*) of the EEA).

3 2 Labour Court

The issues the Labour Court had to deal with were

> "whether the inherent requirement of physical fitness for a firefighter precluded the applicant's advancement or promotion to the position of senior firefighter. Second, regarding discrimination, the parties asked the Labour Court to determine whether the Policy constituted justifiable and fair discrimination in as much as it distinguished between persons on the basis of an inherent requirement of a job; and whether the application of the Policy to the applicant constituted unfair direct, alternatively indirect, discrimination as contemplated by section 6 of the EEA." (CC judgment par 17)

When asked why he did not apply for other positions or jobs, Mr Damons acknowledged that he would not have been successful in applying for any other promotion. As he did not have the necessary skills or qualifications, he applied to be a senior firefighter (CC judgment par 22).

In its decision, the Labour Court was of the view that, since Mr Damons was injured on duty, his employer could not simply apply its policy on the inherent job requirement for advancement in a way that prevented Mr Damons from advancing owing to the disability he lives with; this would be a violation of s 6(1) of the EEA (CC judgment par 25; see also *SAMWU obo Damons v City of Cape Town* (2018) 39 *ILJ* 1812 (LC) (LC judgment)).

The LC, while acknowledging the employer's inherent job requirement defence, was of the view that the discrimination against Mr Damons was

unfair; it was an infringement of the Code of Good Practice on Employment of Persons with Disabilities (GN 1085 in *GG* 39383 of 2015-11-09) that prevented the employment on less favourable terms of people living with disabilities (CC judgment par 25; see also LC judgment par 20–21). The LC went further, stating that since his incapacity was permanent, his work could have been adapted to ensure that he was accommodated while ensuring that he added value to the fire and rescue service (CC judgment par 26; see also LC judgment par 22).

3 3 Labour Appeal Court

The LAC focused on the inherent job requirement defence raised by the City of Cape Town to prevent the advancement of Mr Damons (CC judgment par 27; see also *City of Cape Town v SA Municipal Workers Union obo Damons* (2020) 41 *(ILJ)* 1893 (LAC) (LAC judgment) par 13). The court accepted that physical fitness is indeed an inherent requirement of the firefighter job (CC judgment par 27; see also LAC judgment par 14). The LAC relied on *TDF Network Africa (Pty) Ltd v Faris* ((2019) 40 *ILJ* 326 (LAC); see also *South African Airways (Pty) Ltd v V* (2014) 35 *ILJ* 2774 (LAC)), which held that a job requirement is inherent if it is rationally connected to the performance of the work. The LAC set aside the decision of the LC as it held that it was not possible for Mr Damons to perform the vital activities expected of an active firefighter; furthermore, it was not in the public interest to have firefighters who were not capable of dealing with the outbreak of fires (CC judgment par 31; see also LAC judgment par 18).

4 Issue before the Constitutional Court

The issue before the CC was reduced to a simple question: does the City of Cape Town owe Mr Damons an obligation of reasonable accommodation? (par 9). In the CC, Pillay AJ asked the primary question: was the City of Cape Town discriminating unfairly against Mr Damons on the grounds of his disability? (par 43). The secondary question put by the court was whether, in relation to Mr Damons, the City of Cape Town had a duty of reasonable accommodation; the City of Cape Town denied it had such a duty, raising its defence of the absence of an inherent job requirement (par 43).

4 1 Minority judgment by Pillay AJ

Pillay AJ began with an analysis of the statutory framework. Section 2 of the EEA refers to the purpose of the statute as: (*a*) to promote equal opportunity and fair treatment by eliminating unfair discrimination; (*b*) to implement affirmative action measures to redress the disadvantages of designated groups. Section 3 of the EEA resembles the Preamble: it gives life to the constitutional right of equality as enshrined in section 9 of the Constitution, as well as to the right to fair labour practices (CC judgment par 44). Pillay AJ also engaged in an analysis of international law, which is not relevant for this case note's purpose (par 44; on international law, see s 233 of the Constitution; Lawson "Disability Law as an Academic Discipline: Towards Cohesion and Mainstreaming?" 2020 47 *Journal of Law and Society* 558

559; Ngwena and Albertyn "Special Issue on Disability: Introduction" 2014 30 *SAJHR* 214; UN General Assembly *Declaration on the Rights of Disabled Persons* A/RES/3447 (XXX) (9 December 1975); Nussbaum "Capabilities and Human Rights" 1997 66 *Fordham Law Review* 273 277; Dugard "International Law and the South African Constitution" 1997 8 *European Journal of International Law* 77 92; International Labour Organization *Discrimination (Employment and Occupation) Convention* C111 (1958) EIF: 15/06/1960; *Standard Bank of South Africa v Commission for Conciliation, Mediation and Arbitration* (2008) 29 *ILJ* 1239 (LC); UN General Assembly *International Convention on the Elimination of All Forms of Racial Discrimination* 660 UNTS 195 (1965) Adopted: 21/12/1965. EIF: 04/01/1969; UN General Assembly *Convention on the Elimination of All Forms of Discrimination Against Women* 1249 UNTS 13 (1979) Adopted: 18/12/1979. EIF: 03/09/1981).

Turning to the Code, Pillay AJ noted that it does not create additional rights and obligations regarding disability. Of relevance is item 6 of the Code, which imposes positive duties on employers to accommodate workers reasonably and in the process promote equality and eliminate discrimination (par 62).

Pillay AJ also noted that section 6 of the EEA prohibits unfair discrimination, including on the ground of disability. Using the test set in *Harksen v Lane N.O* (1998 (1) SA 300 (CC)), Pillay AJ noted that the burden of proof rests on an employer to prove that the discrimination is fair, and if it is not fair, that it is at least justifiable.

Pillay AJ noted that once a requirement is declared as being inherent to that work, it is no longer discriminatory in nature. Such a requirement is protected against a claim of discrimination and the employer in such an instance cannot be compelled to set aside that requirement in order to make way for a worker living with a disability (par 67). In this case, it is a settled principle that physical fitness is an inherent requirement for firefighters (par 68; *Imatu v City of Cape Town* 2005 26 *ILJ* 1404 (LC) par 28; *Pharmaco Distribution (Pty) Ltd v EWN* (2017) 38 *ILJ* 2496 (LAC); *Department of Correctional Services v Police and Prisons Civil Rights Union* 2013 (4) SA 176 (SCA)). Mr Damons alleged that his employer applied this requirement to him, but did not apply it to other workers who were promoted as senior firefighters; as such, the other workers were promoted without the need to perform physical tasks (par 69). Pillay AJ noted, however, that Mr Damons failed to provide evidence for this assertion and that, since implementation of the policy on advancement, no firefighter had been promoted without the application of this requirement (par 70).

Pillay AJ accordingly found that application of this inherent job requirement is not unfair discrimination; rather, it gives effect to section 6(2)(*b*) of the EEA (par 71). Pillay AJ also agreed with both the LC and the LAC as regards their finding that physical fitness is an inherent requirement of the job of operational firefighters. Pillay AJ also upheld the decision of the LAC when it set aside the decision of the LC that had held that the application of the advancement policy to Mr Damons amounted to unfair discrimination in terms of section 6(1) of the EEA (par 72–73).

With regard to the issue of reasonable accommodation, Pillay AJ stated that it is not synonymous with affirmative action (par 75). Pillay AJ suggested a broad interpretation of this phrase, meaning any adjustment or modification. Employment cannot be limited to familiar physical requirements; it must include psychological counselling and career training in order to maximise participation of people living with disabilities (par 78). Reasonable accommodation includes not only participation, but also advancement. Reasonable accommodation is about the need to promote substantive equality and eliminate discrimination. Therefore, the failure or refusal by an employer to accommodate reasonably a worker living with a disability would not achieve the objectives of the EEA. The employer has a duty to prevent unfair discrimination; failure to accommodate reasonably the worker then becomes unfair discrimination (par 81–82). Pillay AJ went on further to explain that reasonable accommodation under the EEA is reserved for designated groups; it does not extend to everyone. However, it does extend to people living with a disability (par 81–82).

The concept of *uBuntu* also plays a role in this matter as it solidifies the moral claim of reasonable accommodation (par 84; also see *Port Elizabeth Municipality v Various Occupiers* 2005 (1) SA 217 (CC) par 37; *S v Makwanyane* 1995 (3) SA 391 (CC) par 308; *Makate v Vodacom (Pty) Ltd* 2016 (4) SA 121 (CC) par 14 and 100; *Everfresh Market Virginia (Pty) Ltd v Shoprite Checkers (Pty) Ltd* 2012 (1) SA 256 (CC)). Treating people living with disabilities as a problem is distasteful to a human rights culture (par 86). Reasonable accommodation must be a genuine effort to remedy disadvantage so as to pave the way for implementation of equality of opportunity and remuneration (par 86; Ngwena "Interpreting Aspects of the Intersection Between Disability, Discrimination and Equality" 2005 16 *Stellenbosch Law Review* 3 5). Employers have a duty to consult with the person in utmost good faith to clarify whether reasonable accommodation would be necessary and, if so, what form that might take. Reasonable accommodation is person specific (par 86; see *Association for Mineworkers and Construction Union v Anglo Gold Ashanti Limited* (2022) 43 *ILJ* 291 (CC)).

The duty to accommodate disability reasonably is not an optional act of charity, compassion and welfare that the employer applies of its own will; rather it is a statutory requirement. Pillay AJ noted that "[i]t cannot be that once an employer successfully raises the defence of the inherent requirement of a job, its obligation to eliminate discrimination automatically ends" (par 90). In Pillay AJ's view, the ultimate aim of accommodation is not about fulfilling the vital functions of the job but "a" job. In the search for reasonable accommodation, an employer is not limited to a particular job. However, once a job is identified, then assessment, access and suitability for "the job" applies. Pillay AJ noted that reasonable accommodation is the appropriate manner to accommodate incapacities, enable capabilities and restore identity and dignity. This is further scrutinised in this matter as the worker was injured on duty and the employer was liable. The permanent injuries of Mr Damons stripped him of some of his dignity as he was no longer the self-sufficient man he had been. Furthermore, the City of Cape Town led no evidence to discharge its obligation to explore ways of accommodating Mr Damons in other lines of employment (par 95).

Pillay AJ found that the appropriate remedy in this case must be for the City of Cape Town to explore what positions Mr Damons could hold and what accommodations could be made for him to enhance his responsibilities so that he could have prospects for advancing his career. If need be, the City of Cape Town should facilitate counselling, reskilling, retraining and reassigning to the applicant functions that he can perform. The City of Cape Town's view of what is doable should, with creativity and imagination, craft a career path that Mr Damons desires. Pillay AJ held:

> "Consequently, the respondent is in breach of sections 5 and 6(1) of the EEA in that its refusal to reasonably accommodate the applicant in a job, with prospects for advancement, for which physical fitness is not required, amounts to unfair and unjustifiable discrimination of the applicant as a person with disabilities." (par 105)

4 2 Majority judgment by Majiedt J

The approach adopted by the minority judgment of Pillay AJ above was treated cautiously by the majority judgment of Majiedt J. According to Majiedt J such an approach invokes feeling of sympathy and not legal reasoning; in this matter, the emotions are based on Mr Damons being permanently injured and such an injury occurring in the workplace and resulting in his living with a permanent disability (par 110). In essence, Majiedt J was of the view that this unfortunate situation of Mr Damons had no role to play in the decision to be made on the objective facts. The majority proceeded to state that the circumstances surrounding Mr Damons's injury were not logically connected to the issue of unfair discrimination before the court (par 111). However, Majiedt J stated clearly that the City of Cape Town was indeed liable for Mr Damons's injury sustained during the ill-conceived fire drill (par 112).

According to Majiedt J, the advancement policy plays a central role to this matter as it deals with active firefighters with practical assessment being the backbone of the promotion to senior firefighter (par 113). Majiedt J proceeded to highlight the pre-trial minute between the parties, which conceded that no firefighter had previously been advanced without the application of this assessment and that Mr Damons was unable to meet this inherent job requirement owing to his disability (par 114). The post of non-operational firefighter did not exist. The City of Cape Town had merged different departments and, in an attempt, to reduce anomalies had adopted the policy in 2009; since then, all firefighters have had to meet all requirements in order to advance (par 115).

Majiedt J proceeded to deal with the issue of pleadings. Citing *Fischer v Ramahlele* (2014 (4) SA 614 (SCA) par 13), *Mtokonya v Minister of Police* (2018 (5) SA 22 (CC) par 77) and *South African Transport and Allied Workers Union v Garvas* (2013 (1) SA 83 (CC) par 114), Majiedt J put forward a general rule that it can only deal with issues brought by the parties on the papers and cannot simply construct issues by itself (par 118). Courts through judicial precedent have adopted this rule to ensure legal certitude (par 119). The judgment of Pillay AJ, in an attempt to undo the wrong done to Mr Damons, evokes pity; it goes further than the issues in the pleadings

and, as a result, prejudices the City of Cape Town. Majiedt J proceeded to state:

> "Mr Damons' case is that the City had discriminated against him unfairly by not waiving the requirement of physical assessment in the Policy and by failing to promote him in terms of the Policy." (par 119)

To simplify it even further, Mr Damons alleges that it was unfair discrimination for the City of Cape Town to refuse to promote him to the rank of senior firefighter by refusing to waive the physical assessment requirement (par 121). His claim was based on the advancement policy and not any other legislation. The court had to adjudicate whether there was unfair discrimination (par 122). The case did not turn on the promotion of Mr Damons to a non-operational role despite the judgment of Pillay AJ suggesting that the applicant's case was that the City of Cape Town had failed to make a policy for the promotion of non-operational firefighters (par 123–124). In his pleadings, Mr Damons simply sought an order striking out the requirements of the physical assessment (par 125). The City of Cape Town, on the other hand, pleaded that the policy in question did not unfairly discriminate against Mr Damons as it found protection in s 6(2)(*b*) of the EEA (par 127). This section provides that it is not unfair discrimination to exclude Mr Damons as the exclusion was based on an inherent job requirement (par 127). The two important conditions for promotion to the role of senior firefighter are the physical assessment requirement and the continuous years of experience requirement (par 128).

Mr Damons had sought to rely on his having kept the title of firefighter after being rotated into a non-operational role owing to his injury; it was alleged that Mr Damons accepted a non-operational role on condition that he would not be prejudiced for future promotions (par 132). Majiedt J was of the view that this logic and reasoning fails on multiple grounds. He stated:

> "First, it is clear from the final outcome of the incapacity enquiry that this "condition" was not included. But even if it were included, it could hardly have been intended that the applicant would be free to advance and be promoted to any position he chose, irrespective of whether he could meet the inherent requirements of the job. Secondly, while it is true that the applicant retained the title of firefighter, he was, as the applicant's counsel accepted, a "firefighter in name only". The alternative positions to which the applicant was transferred were in non-operational divisions, first in the Finance and Billing Section and then in the Fire and Life Safety Education Section. These positions do not require him to do physically demanding work.
>
> Thirdly, in any event, the Policy applies only to operational firefighters and, again, the applicant admitted that he was non-operational. This aspect has been extensively addressed and nothing more need be said about it. In all the circumstances, it could never have been the intention of any party – or policy-maker – to either withdraw the requirement of physical ability and fitness in the Policy or to create an exception to the Policy entitling the applicant to advancement as an operational firefighter. Such circumstances include the permanent nature of the applicant's disability, the core functions of a firefighter, the reasons for and content of the Policy, the record of the incapacity proceedings and the common cause facts recorded in the pre-trial minute." (par 133–135)

Majiedt J proceeded to find that the matter should have ended in the LC as s 6(2)(*b*) was a complete defence against Mr Damons's claim (par 139).

Majiedt J further disagreed with the judgment of Pillay AJ in his application of the principle of reasonable accommodation. The first judgment misconstrued this principle. Reasonable accommodation only applies if the worker in question will be able to meet the inherent job requirements; accommodation beyond this point would be unreasonable as it would place the employer in a position where it hires someone who cannot meet the inherent requirements of the job (par 141). It is common cause that Mr Damons does not meet the inherent job requirements and there is no amount of accommodation on the part of the City of Cape Town that would make him meet them (par 142). In this case, the moment the City of Cape Town raised s 6(2)(*b*), the question of reasonable accommodation fell away (par 142).

5 Discussion

The objective of pleadings in a civil matter is to define the issues in dispute between the parties; they also serve the purpose of informing the presiding officer of the nature of the dispute (Vettoril and De Beer "The Consequences of Pleading a Non-Admission" 2014 46(2) *De Jure* 612). It becomes unfair for a party simply to ambush the other at the hearing without having alleged the issue in the pleadings. In order to ensure balance and fairness, it is not for the court to deal with an issue that it may consider as having importance if it was not pleaded (*Fischer v Ramahlele supra* par 14). This case note concurs with the majority judgment by Majiedt J that the courts in our adversarial system are only empowered to deal with issues as presented to them in the pleadings (*National Director of Public Prosecutions v Zuma* 2009 (2) SA 277 (SCA) par 15 and 19; *Hart v Pinetown Drive-In Cinema (Pty) Ltd* 1972 (1) SA 464 (D) 469 C–E). This principle ensures fairness to all the parties in the dispute as one cannot be prejudiced when reliance is placed on an issue not appearing in the pleadings (*Phillips v National Director of Public Prosecutions* 2006 (1) SA 505 (CC) par 39).

However, the court is allowed to raise an issue of law that arises during the course of a matter if it is necessary for the decision of the case, even though it was not pleaded. This is subject to no party being prejudiced by the court's approach (*CUSA v Tao Ying Metal Industries* 2009 (2) SA 204 (CC) par 68; *Barkhuizen v Napier* 2007 (5) SA 323 (CC) par 39; *Maphango v Aengus Lifestyle Properties (Pty) Ltd* 2012 (3) SA 531 (CC) par 109–114). This case note takes the view that the approach adopted by the minority judgment of Pillay AJ, taking into account the injury of Mr Damons at the hands of the City of Cape Town and the City's failure to promote him through the adoption of a policy that allows for non-operational firefighters, is valid as it shines a light on the much broader issue of ensuring that people living with a disability be protected by policies (*Electricity Supply Commission v Stewarts and Lloyds of SA (Pty) Ltd* 1981 (3) SA 340 (A) 345A–E).

From a socio-political perspective, disability is a matter of political and social construct and not necessarily the problem of an individual (Rocco *From Disability Studies to Critical Race Theory: Working Towards Critical Disability Theory* Paper presented at Adult Education Research Conference, University of Georgia (2005); see also Marumoagae "Disability Discrimination and the Right of Disabled Persons to Access the Labour Market" 2012 1(15) *PELJ* 345–428). Marumoagae states that even though

academics have engaged in a discussion regarding discrimination relating to race, religion and gender, they have not yet sufficiently engaged the issue of disability discrimination in the workplace. Marumoagae argues further that people living with disabilities continuously face difficulties in exercising their basic social, political and economic rights. Discrimination against people living with disabilities is one of the worst social stigmas and our society has not been able to have open and honest discussions in order to overcome the stigma. People living with disabilities are among the most marginalised in all societies and face unique challenges in the enjoyment of their human rights. In order to effectively exterminate employment challenges, the notion of equality advocated for in South Africa with regards to this group of people has to be one of substantive equality. Although previously society considered disability no different from other "miseries" of life, this must not be misunderstood to downplay the various kinds of issues faced by people living with a disability (Rocco paper presented at Adult Education Research Conference*).*

It is submitted, on the one hand, that the court should have engaged in a discussion regarding the stigmatisation of people living with disabilities in the workplace. Owing to employers' desire to maximise profits on the one hand, and the anticipated costs of accommodating people living with disabilities on the other, such persons often face stigma in the workplace. Such stigma is a continuation of eugenics where a certain group is viewed not only as the default "normal", but also as being the evolved and most worthy of human beings (Glass "Racism and Eugenics in International Context" 1993 68(1) *The Quarterly Review of Biology* 61–67). By default, the people regarded as "other" by the "normal" group are stigmatised. People who are considered as "the other" possess an undesired differentness (Glass 1993 *The Quarterly Review of Biology* 9; on stigma, see also Link and Phelan "Conceptualizing Stigma" 2001 *Annual Review of Sociology* 363 375). The other, who bears this kind of differentness (usually a matter of race, gender, class or disability, and in South Africa usually an intersection of these), is reduced in the minds of the default "normal" from being a complete human being to being a tainted and undesired human being (Glass 1993 *The Quarterly Review of Biology* 9). Using Critical Race Theory infused with Critical Disability Theory the paper notes that "the other" in this context takes the shape of the disabled, who are marked by capitalism as inferior and thus stigmatised. The "normal people" take the shape of people who do not live with disabilities.

On the other hand, it is submitted that this judgment, specifically the minority decision by Pillay AJ, is significant and has a positive social impact in that it lays the practical foundation for the fight against the ableism that is enforced by our capitalist society in the workplace. It was during the creation of capitalism in the industrial revolution that people living with disabilities became a form of surplus with diminished capacity to contribute towards the making of profits in the labour sector (Rocco *From Disability Studies to Critical Race Theory*). Pillay AJ's minority judgment seeks to rid the labour sector of employer behaviour that reduces people living with disabilities to a form of surplus; Pillay AJ demands that the employer reasonably accommodate the employee and does not allow the former simply to allege inherent job requirements as a defence without proof. In essence, this addresses the commodification of labour and the reduction of people living

with disabilities to an identity of "the other". Pillay AJ seeks to protect the dignity of the worker and, as proposed by Critical Disability Theory, it paves the way for inclusion into the discrimination triad of race, gender and sexuality of people living with disabilities.

The court, however, should have highlighted CDT briefly. The importance of this theory is that the continued commodification of labour leaves those living with disabilities in a state of poverty and isolation (Rocco paper presented at Adult Education Research Conference; also see item (t) of the Preamble to the UN General Assembly *Convention on the Rights of Persons with Disabilities* (CRPD) A/RES/61/106 (13 December 2006). Published: 24 January 2007; Foreword to the Code of Good Practice on Employment of Persons with Disabilities GN 1085 in *GG* 39383 of 2015-11-09 (Code), as alluded to in s 3(*c*) of the EEA). This principle would also have assisted the court by giving more weight to its reasoning regarding the need for reasonable accommodation as it engaged also in a discussion of work being a form of restoring the dignity and reducing poverty for a person living with a disability (CC judgment par 96). Furthermore, this author agrees with the minority decision of Pillay AJ that people living with disabilities often live in extreme poverty. As such, society has a duty to acknowledge the critical need to address the negative impact of poverty on persons with disabilities; one such form of redress, it is submitted, is reasonably accommodating people living with disabilities and putting this as a priority before the excuse of inherent job requirements (CC judgment par 1). The approach by Pillay AJ must be applauded as it put the spirit of *uBuntu* above the needs of the employer.

The majority judgment by Majiedt J has an incorrect premise. Its disregard for the social aspect of law and decision making is an undesirable approach. Pillay AJ was correct to use the social aspect to take into account the poverty suffered by those living with disabilities, how Mr Damons was injured, and in essence invoking the spirit of *uBuntu*. The common thread is that legal scholars consider the socio-legal approach to use tools drawn from a range of social science disciplines to examine social experience. This is because a proper understanding of legal thought is not possible without subscribing to the sociology of law, as informed by social theory (Cotterell "Law, Culture and Society: Legal Ideas in the Mirror of Society" 2006 *Ashgate, Aldershot* 1). In essence, law should not be viewed as an independent force imposed onto society; rather, it should be understood as a tool sharpened by the lived experiences of people through the context of social, political and economic logic (Blandy "Socio-Legal Approaches to Property Law Research" 2014 3(3) *Property Law Review* 1 11).

6 Conclusion

The case note has engaged in a critical discussion of a matter that started as an arbitration, and went all the way through to the Constitutional Court. Each court decision was highlighted in brief to give context. The case note focused on the decision of both the minority and the majority of the CC.

The case note submits that this matter was appropriately decided by the minority judgment of Pillay AJ. Pillay AJ's decision took into account the critical component of the matter – namely that Mr Damons was injured in the

workplace, on duty and the employer had a duty of reasonable accommodation to Mr Damons. The majority by Majiedt J, on the other hand, took a more legally formalistic approach, which did not have the desirable outcome, as it refused to take into account what the minority considered as being a critical component, as highlighted above.

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THE PROS AND CONS OF A SIDE HUSTLE IN AN EMPLOYMENT RELATIONSHIP:

Bakenrug Meat (Pty) Ltd t/a Joostenberg Meat v CCMA [2022] 4 BLLR 319 (LAC)*

1 Introduction

South Africa's strained economy has cajoled many employees into seeking extra work to complement their primary employment earnings. Most often, employees try to make ends meet by opting to take a second job – in common parlance, a side hustle (see Momentum/Unisa "Science of Success Insights Report" (2021) https://retail.momentum.co.za/documents/campaigns/scienceofsuccess2021/unisa-science-of-success-insightsreport.pdf (accessed 2022-03-15) 78–79; Business-tech Staff Writer "Middle-Class South Africans Are Turning to Side Hustles to Make Ends Meet" (31 October 2021) https://businesstech.co.za/news/business/532794/middle-class-south-africans-are-turning-to-side-hustles-to-make-ends-meet (accessed 2022-03-15); Abraham and Houseman "Making Ends Meet: The Role of Informal Work in Supplementing Americans' Income" 2019 5 *The Russell Sage Foundation Journal of the Social Sciences* 110–130).

Often, this practice of engaging in a second job is hidden from the main employer because there is a fine line to tread when it comes to moonlighting. Snow and Abramson acknowledge that moonlighting is a "recurring problem in labour relations, and it involves the practice of holding more than one job" (Snow and Abramson "By the Light of Dual Employment: Standards for Employer Regulation of Moonlighting" 1980 55 *Indiana Law Journal* 581).

In this context, employees and employers need to understand their responsibilities and expectations to avoid it flaring into a legal issue. The general rule is that employment relationships are built on trust and confidence (Tshoose and Letseku "The Breakdown of the Trust Relationship Between Employer and Employee as a Ground of Dismissal: Interpreting LAC Decision in *Autozone*" 2020 32 *SA Mercantile Law Journal* 156–174; Okpaluba and Maloka "The Breakdown of the Trust Relationship and Intolerability in the Context of Reinstatement in the Modern Law of Unfair Dismissal (1)" 2021 35 *Speculum Juris* 149; Garbers, Basson, Christianson,

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Christoph, Le Roux, Mischke and Strydom *The New Essential Labour Law Handbook* (2019) 36; *Central News Agency v Commercial Catering and Allied Workers Union of SA* 1991 (12) ILJ 340 (LAC); Boyle "The Relational Principle of Trust and Confidence" 2007 27 *Oxford Journal of Legal Studies* 633–657).

As the Appellate Division (as it then was, now the Supreme Court of Appeal) found in *Council for Scientific and Industrial Research v Fijen* (1996 (17) ILJ 18 (A) par 26D–E):

> "It is well established that the relationship between employer and employee is in essence one of trust and confidence and that, at common law, conduct clearly inconsistent therewith entitled the "innocent party" to cancel the agreement."

As such, the cardinal duty lying at the heart of any employment relationship is the common-law duty to act in good faith, owed by employee to employer (*Aquarius Platinum (SA) (Pty) Ltd v Commission for Conciliation, Mediation & Arbitration* 2020 (41) *ILJ* 2059 (LAC); *Phillips v Fieldstone Africa (Pty) Ltd* 2004 (3) SA 465 (SCA); *Sappi Novoboard (Pty) Ltd v Bolleurs* 1998 (19) *ILJ* 784 (LAC); *Bidserv Industrial Products (Pty) Ltd v CCMA* 2017 (38) *ILJ* 860 (LAC) par 17).

However, the concept of good faith has for long been surrounded by considerable mystery (see Bagchi "Unions and the Duty of Good Faith in Employment Contracts" 2003 112 *The Yale Law Journal* 1881–1910; Ehlers "Trust and Perceptions of Compliance, Fairness and Good Faith in Primary Labour Relationships" 2020 23 *South African Journal of Economic and Management* 5).

Nevertheless, the amplification and extension of the good-faith concept has spawned more extensive academic and court jurisprudence in the context of derivative misconduct (see the seminal case of *FAWU v ABI Ltd* 1994 (15) *ILJ* 1057 (LAC) and *Chauke v Leeson Motors* 1998 (19) *ILJ* 1441 (LAC)). Further refinement of derivative misconduct can be seen in *Western Platinum Refinery Ltd v Hlebela* (2015 (36) *ILJ* 2280 (LAC)) and *NUMSA v Dunlop Mixing & Technical Services (Pty) Ltd* (2019 (40) *ILJ* 1731 (CC)) (see generally, Maqutu "Collective Misconduct in the Workplace: Is 'Team Misconduct' ... Good Faith in the Law of Contract" 2018 29 *Stell LR* 379; Poppesqou "The Sounds of Silence: The Evolution of the Concept of Derivative Misconduct and the Role of Inferences" 2018 39 *ILJ* 35); Maloka "Derivative Misconduct and Forms Thereof: Western Refinery Ltd v Hlebela 2015 36 ILJ 2280 (LAC)" 2016 19 *PER/PELJ* 1). The contours of good faith and fiduciary duties have been authoritatively elaborated upon in *Volvo* (*Southern Africa*) *(Pty) Ltd v Yssel* (2009 (4) All SA 497 (SCA) (*Volvo*)) (see Idensohn "Towards a Theoretical Framework of Fiduciary Principles: *Volvo (Southern Africa) (Pty) Ltd v Yssel* 2009 4 All SA 497 (SCA)" 2010 2 *Speculum Juris* 142).

This case note thus centres on the duty of good faith, with a particular emphasis on moonlighting. Determination of the scope of the duty of good faith was the crux of the judgment of the Labour Appeal Court (LAC) in *Bakenrug Meat t/a Joostenburg Meat v CCMA* (2022 (4) BLLR 319 (LAC))

(*Bakenrug*). By inquiring into the "scope", the case note highlights that the duty is wide and has numerous dimensions. Thus, lack of clarity and confusion by courts creates difficulties for the fairness or otherwise of dismissals for alleged moonlighting. Compounding this challenge, a recurring problem in labour relations involves the extent to which employers discipline employees for moonlighting (the practice of holding more than one job).

After outlining the salient facts, the case note engages with the CCMA award, the decision of the Labour Court (LC) and the judgment of the LAC. The balance of analysis is structured in the following way. First, there is an evaluation of the concept of the "duty of good faith" in circumstances of moonlighting. Secondly, the case note unpacks the notion of "conflict of interest" in employment relations. Thirdly, misconduct as a ground that warrants dismissal is viewed in the context of moonlighting. Finally, the note makes some concluding remarks.

2 Overview of the salient facts

The employee in the *Bakenrug* case was employed as a sales representative on 28 October 2013. The company was engaged in the marketing and distribution of various types of cold meat product. In September 2016, the company added biltong production to its business.

The employee also operated a formal business of her own but only on weekends. It was accepted based on uncontested evidence that the employee's independent business included:

> "Cutting up of meat, goat, lamb, pork etc. Deboning of carcasses and cuts, cutting up of bones, goulash [recipes], and steak. It is all business, all activities that we are busy with. This business is competing directly with what we do and then game meat processing, dry *wors*, biltong, packing, packing into smaller packages." (*Bakenrug supra* par 11)

The employee also sold biltong products. She did not inform the employer about her business activities.

The employee was dismissed on a charge of dishonesty. To be precise, the employee failed to inform the employer that she operated her own business that marketed dried meat products. She thus failed to give full attention to marketing the meat products produced by the company (*Bakenrug supra* par 1).

3 Proceedings before the CCMA

Aggrieved by the outcome of the disciplinary proceedings, the employee referred an unfair dismissal claim to the Commission for Conciliation Mediation and Arbitration (CCMA). The CCMA found that the employee's dismissal was substantively fair. The CCMA reasoned concisely:

> "The respondent (appellant *in casu*) marketed meat products and at the very least it should have been aware of the applicant's (third respondent) activities so that it could decide whether the applicant's activities were in conflict. The

> applicant chose to not tell the respondent. It was dishonest not to do so. The effect was that she could not have given full attention to her duties. The respondent provided evidence that it was constantly attempting to impress upon the applicant that she was not performing her duties." (*Bakenrug supra* par 4)

On the timeframe of when the respective businesses dealt specifically in biltong, Commissioner JJ Kitshoff had this to say:

> "The fact that the respondent may not have marketed biltong prior to September 2016 is not an acceptable excuse for the applicant to operate a formal business, marketing meat products, without telling the respondent." (*Bakenrug supra* par 4)

4 Proceedings before the Labour Court

The employee then instituted review proceedings with the LC. The LC reversed the arbitration award on the basis that the CCMA had misconceived the evidence, which did not sustain the charge against the employee. Simply put, the CCMA Commissioner arrived at a decision that no reasonable decision maker could have reached (*Bakenrug supra* par 7). Cele J found in the main that the employee operated her business only on weekends. Accordingly, "there was no nexus between her performance for the third respondent (appellant) and the running of the side-line business" (*Bakenrug supra* par 7). In short, the employee achieved substantial success at the LC. Dissatisfied with the setback at the LC, the employer approached the LAC.

5 Proceedings before the Labour Appeal Court

In the LAC, Davis JA found that the employee failed to disclose an essential and important fact that she was running "a side-line business" in the market for the sale of meat products. Irrespective of the fact that the two businesses at issue might not have been marketing and selling similar products, the employee's failure to disclose her side-entrepreneurial activities cannot be countenanced. As noted by the LAC, whether the employee was able to execute her duties was immaterial. Accordingly, failure to disclose the fact that she conducted a business that involved the sale of biltong "was manifestly in violation of her duty of good faith to her employer" (*Bakenrug supra* par 15).

The LAC stated further that, "when the second respondent found that the third respondent had acted in a dishonest and unacceptable manner, he came to a conclusion which most certainly on the facts, was a reasonable one" (*Bakenrug supra* par 17). In short, the LAC overturned the order of the LC and replaced it with an order dismissing the application to review the CCMA award (see *Herholdt v Nedbank Ltd v COSATU as Amicus Curiae* 2013 (34) *ILJ* 2795 (SCA)).

6 Commentary

It is extremely important that an employee charged with misconduct within a workplace knows exactly what the charge is (Garbers *et al The New Essential Labour Law Handbook* 184). Employers inevitably make a dismissal decision in view of the available evidence. Courts have held this to be important because, should a dismissed employee challenge the fairness of the dismissal, the employer will be held to the original reason for dismissal (*Kekana v Railway Safety Regulator* [2021] ZALCJHB 395 par 54; *Abernethy v Mott. Hay and Anderson* 1974 ICR 323). Despite occasional overlap among the various types of misconduct, the relevant type should be identified and pursued. Accordingly, a charge of moonlighting against an employee should be clearly identified as a particular type of misconduct. In *Bakenrug*, this extremely important duty of localising a charge was overlooked. As such, a number of different forms of misconduct were referred to as finding application to the facts.

6 1 The scope of the duty of good faith owed by an employee to an employer

As noted in the introduction, an employment relationship is based on the common-law principle of good faith (McGregor, Dekker, Budeli, Manamela, Manamela, Germishuys and Tshoose *Labour Law Rules* (2021) 25). It is recognised that there is an implied duty on employees to act in good faith and to promote the interests of employers (McGregor *et al Labour Law Rules* 25).The essence of the duty of good faith is eloquently expounded by the Supreme Court of Appeal (SCA) in *Phillips v Fieldstone Africa (Pty) Ltd* (*supra*) (*Phillips*). This matter was an appeal concerning the liability of an employee to account to his employer for secret profits made by the employee out of an opportunity arising in the course of his employment. The facts of the case, briefly, are that the employer carried on a business raising capital for its clients. The clients usually paid the employer for these services by way of an issue of shares to it. The employee bought and sold shares of one of his employer's clients in his own name, although the employer itself was interested in acquiring the shares. The employee sold the shares and made profit.

Heher JA upheld the decision of the court *a quo*, on the ground that the employee breached his duty of good faith. The court in *Phillips* (*supra* par 31) unequivocally pointed out that the duty entails the following:

a) The rule that an employee is not allowed to make secret profits at the expense of the employer or to be in a position wherein her or his interests' conflict with those of the employer is a firm one that allows little room for exception.
b) The rule relates not only to actual conflict of interest, but also to conflicts that are real and sensibly possible.
c) The defences open to a fiduciary in breach of the duty are limited. Only the full consent of the employer after full disclosure will suffice (Van Niekerk, Smit, Christianson and Van Eck *Law@Work* (2018) 94).

As discussed above, an employee owes an employer a fiduciary duty, which is a duty of good faith, trust and confidence. According to *Black's Law Dictionary*, a person with a fiduciary duty owes to another the duties of good faith, trust, confidence and candour, and is required to exercise a high standard of care in managing another's money or property (see Garner *Black's Law Dictionary* 8ed (2004) 702). *Black's Law Dictionary* also indicates that a person in a position of trust with fiduciary duties is expected to act primarily for the benefit of the person/entity to whom the fiduciary duties are owed (The Law Dictionary "Fiduciary Definition and Legal Meaning" (undated) http://thelawdictionary.org/fiduciary/ (accessed 2022-03-15)). A person in a fiduciary position exercises discretion over the affairs of another (*Volvo (supra)* par 17). The meaning of the word fiduciary is based on the concepts of honesty, good faith, confidence, reliance and utmost trust (*Volvo supra* par 17). These concepts are centred on the notion of loyalty.

Courts are often required to determine whether fiduciary duties apply to a given relationship but have not been able to articulate a clear standard for making this determination (Coetzee and Van Tonder "The Fiduciary Relationship Between a Company and its Directors" 2002 35 *Obiter* 287). Certain relationships have come to be clearly recognised as encompassing fiduciary duties, while other relationships have not (*Volvo supra* par 16). The concept of a fiduciary relationship is universal and may be found in different categories of relationship – for example, trustee/beneficiary, director/company, agent/principal and attorney/client relationships (*Volvo supra* par 16). The list of fiduciary relationships is not closed (see *Volvo supra* par 16).

The Appellate Division in *Robinson v Randfontein Estates Gold Mining Co Ltd* (1921 AD par 168) (*Robinson*) held that a fiduciary relationship exists where one man stands to another in a position of confidence involving a duty to protect the interests of another (*Robinson supra* par 177–178). Whether a particular relationship should be regarded in law, as being one of trust will depend on the facts of the particular case (*Volvo supra* par 16).

The breach of the duty of good faith is a strict catch-all obligation, often used in charges of misconduct (Van Niekerk *et al Law@Work* 94). As McGregor *et al* opine, this broad obligation demands of employees not to work against the employer's interests, not to compete with the employer, and not to make profit at the expense of the employer, as well as to devote hours of work to promote the business interests of the employer and to act honestly (McGregor *et al Labour Law Rules* 25). It is worth noting that this list is not exhaustive.

6 2 Dishonesty as a form of misconduct viewed in the context of moonlighting

It has been emphasised that "good faith" means honesty or sincerity of intention (*Qonde v Minister of Education, Science and Innovations* LC (JHB) (unreported) (7 September 2021) (J874/21) par 40). By contrast, dishonesty is multidimensional (see e.g., *UKZN v Pillay* 2019 (4) *ILJ* 158 (LAC); *Makoni*

and McGovern t/a Banana Jam Café 2020 (41) *ILJ* 1324 (CCMA); *Maseko and Lonmin Platinum* 2020 (41) *ILJ* 1333 (CCMA); *TAWUSA obo Sithole and Tosas (Pty) Ltd* 2020 (41) *ILJ* 1357 (BCA); *Malaka v GPSSBC* 2020 (41) *ILJ* 2783 (LAC)). Often, theft and fraud are illustrative of dishonesty. In the present case, the employee was dismissed for having been dishonest. The employee's dishonesty emanated from neither fraud nor theft. Rather, the dishonesty arose from concealment of the employee's side-line business, which was in direct competition with the employer.

To recap, the employer's line of business entailed marketing and distribution of cold meat products, including biltong. The employee's side hustling activities overlapped with those of her employer: she marketed dried meat products. It is also important to note that dishonest non-disclosure of a material fact justifies a dismissal. Moreover, a calculated silence in the face of a duty to inform an employer of material facts amounts to fraudulent nondisclosure (*Schwartz v Sasol Polymers* 2017 (38) *ILJ* 915 (LAC) par 30).

6 3 Unpacking the notion of conflict of interest in employment relations

The Constitution of the Republic of South Africa, 1996 in section 22 protects the rights of everyone to be economically active. Inevitably, people seek to do business with one another and some people exercise their rights to employment. The workplace is often characterised by competing interests of the employer and employee (Sørensen "Capital and Labour: Can the Conflict Be Solved?" 2006 4 *Interdisciplinary Journal of International Studies* 29–46). Both parties have the right to have their interests protected, but not at the expense of the other, unless there are genuine interests to be protected.

In an effort to protect their interests, employers typically design policies that prevent employees from entering into situations that may be in conflict with the interests of their business. Unfortunately, and owing to compelling interests, employees often entangle themselves in compromised situations and enter into interests that are in conflict with the employer. Once the employer finds out, these employees are often dismissed for misconduct owing to their failure to disclose their conflict of interest and involvement in such situations (see *Martin & East (Pty) Ltd v Bulbring No* 2016 (5) BLLR 475 (LC); *City of Cape Town v SALGBC* [2017] ZALCCT 35; *SAMA obo Craven v Department of Health* 2005 (12) BALR 1259; *Biyela v Nelson Mandela Children's Fund* 2004 (10) BALR 1210; *Steyn v Crown National (Pty) Ltd* 2002 (5) BALR 546).

It is well recognised at common law that employees have an implied duty to render services in good faith. As such, employees are obliged to further the business interests of their employers (Van Niekerk *et al Law@Work* 93). As discussed in the foregoing paragraphs a contract of employment is inherently based on mutual trust and confidence. As such, an employee must, among other things, not work against the employer's interests (see *Robinson supra* par 168). Employees are also required to devote hours of work to the business interests of the employer. In this regard, any conduct

that is likely to affect the business interests of the employer detrimentally may warrant disciplinary action. Direct competition by an employee with the employer is a most flagrant conflict of interest (Van Niekerk *et al Law@Work* 298). The degree of dishonesty in this form of misconduct ordinarily cries out for dismissal. Be that as it may, the LAC decision of *De Beers Consolidated Mines v National Union of Mineworkers* ([2019] ZALAC 72), has shown that even with conflict-of-interest disputes, a dismissal is not automatic, and one still has to assess the prejudice or potential prejudice to the employer and whether damages are real.

Nevertheless, what is the position where an employee seeks extra earnings outside of working hours? This is commonly known as moonlighting. Does this warrant a dismissal, and if so, why? Van Niekerk *et al* hold that, if the employee uses the employer's assets or if the employee neglects their responsibilities with the employer, while advancing outside interests, such conducts *could* constitute misconduct warranting dismissal (Van Niekerk *et al Law@Work* 299). In the absence of any element of dishonesty, the argument goes, a moonlighting employee will not *ordinarily* be in a conflict of interests with their employer.

In *Bakenrug* (*supra*), the LAC agreed with the conclusion of the CCMA to the extent that a "conflict of interest may arise even where no real competition actually arises" (*Bakenrug supra* par 16). This conclusion is at exact variance with that reached by the LC (*Bakenrug supra* par 13). According to the LAC, an employee is in a conflict of interests with their employer where they do not disclose material activities relating to their employer's business.

6 4 Moonlighting as a ground for discipline and dismissal

Few would dispute that moonlighting presents a catch-22 situation. Judicial practitioners are vigilant in safeguarding an employer whose employee acts part-time in competition with it. Equally, the courts will not prohibit an individual's legitimate spare-time activities. Lord Greene described the extent to which the court will go to protect this delicate balance in *Hivac Ltd v Park Royal Instruments* (1946 1 All ER 350 par 356), when he stated that it would be deplorable if an employee could consistently, knowingly, deliberately and secretly inflict great harm on his employer's business. In that case, two weekday employees of the plaintiff company spent their Sundays working on highly specialised tasks for the defendant firm, which was in direct competition with the plaintiff. An interdict was granted against continuing this arrangement, because their actions infringed the general duty of good faith.

The observations of Goddard CJ in *Tisco Ltd v Communication & Energy Workers' Union* (1992 (2) ERNZ 1087, 1092) are apt and acutely describe the plight of employees struggling to make ends meet in a tight contemporary labour market:

> "Generally speaking, an employee whose hours of work are done is perfectly at liberty to spend the remainder of the day or week as he or she pleases and therefore free to use some of it to augment his or her earnings by undertaking either secondary employment or self-employment as a contractor. The short point which this case raises is whether this freedom is wide enough to allow the employee to derive earnings from work that is indirectly or potentially in competition with the employer's business or otherwise injurious to it. It is quite clear that the employee's freedom is less than absolute but what is less clear is where the line should be drawn in any particular situation (see also *Orbell v Armourguard Security Ltd AT 116/95 (Auckland)* 1995 NZEmpT 792 (24 April 1995); *Blyth Chemicals Ltd v Bushnell* 1933 CLR 66)."

It is trite that employers' disciplinary jurisdiction extends to off-duty misconduct (Grogan *Dismissal* (2014) 178; Van Niekerk *et al Law@Work* 301–302). The employer has a prerogative to take disciplinary action against an employee accused of an alleged off-duty misconduct relating to moonlighting in particular. However, such a privilege cannot be exercised capriciously and is subject to procedural and substantive fairness. The test is whether the conduct prejudicially affects the employer's business interests or impairs the relationship between the parties (Van Niekerk *et al Law@Work* 302).

Misconduct itself may take various forms, but the legal basis of a finding for dismissal in all cases is the same: the employee concerned is deemed to have committed a breach of a material term of their contract or destroyed the employment relationship, which justifies its termination (Grogan *Dismissal* 178; see further Tshoose and Letseku 2020 *SA Merc LJ* 156–174). The dismissal must be for sound reasons; otherwise, the dismissal will be unfair with dire repercussions for the employer. Besides automatically unfair reasons for dismissal, Van Niekerk asserts that misconduct is one of three potentially fair reasons for dismissal (Van Niekerk *et al Law@Work* 295).

6 5 Dereliction of duty

A recent blatant example is the dismissal of an employee for spending time on social media to the detriment of the employer. The LC in *Lucas Dysel Incorporated v CCMA* ([2021] ZALCCT 3) found that the CCMA commissioner had erred in finding that the employee did not break a workplace rule by dedicating excessive time to private social media and gaming on her work computer at the expense of her work performance. It found that the delinquent employee was guilty of dereliction of duty and the sanction of dismissal was appropriate.

6 6 Unpacking the notion of conflict of interest in an employment relationship

As discussed earlier, the employer-employee relationship is based on mutual trust and confidence. A corollary of the duty of mutual trust and confidence is that an employee must, among other things, not work against the employer's interests, and must also devote hours of work to the business interests of the employer. In this regard, any conduct that is likely to affect the business interests of the employer detrimentally may warrant disciplinary

action. While the employers expect employees to act in their best interests, and this includes ensuring they not pursue any interests that may conflict with the interests of the employer, this notion is anathema to employees (*Kader v Sandvik Mining and Rock Technology (Pty) Ltd* [2021] ZALCJHB 129 par 1).

An employee, in terms of common-law requirements, is expected to act in the furtherance of the employer's business interests. If an employee fails to act in good faith and instead acts in bad faith by competing with the employer's business or conducts private business under the company name without permission, this constitutes a conflict of interest. As Innes CJ in *Robinson* eloquently captured it:

> "where one man stands to another in a position of confidence involving a duty to protect the interest of that other, he is not allowed to make a secret profit at the other's expense or place himself in a position where his interests conflict with his duty. The principle underlies an extensive field of legal relationship. A guardian to his ward, a solicitor to his client, an agent to his principal, afford examples of persons occupying such a position." (*Robinson supra* par 177–180)

It is clear that direct competition by an employee with her or his employer is a flagrant manifestation of conflict of interest (Van Niekerk *et al Law@Work* 298). Bull DP in *Berger v United Crib Block Construction Pty Ltd* (2017 FWC 450) held that:

> "[a] conflict of interest (pecuniary or otherwise) arises where an employee's non-work-related activities may unduly influence decisions and conflict with the proper performance of an employee's duties, or are simply incompatible with the impartial fulfilment their duties."

In *City of Cape Town v SALGBC* (*supra*), the Labour Court found that an employee's failure to declare his involvement in other business entities warranted his dismissal by the employer. The case serves as an important reminder to employees that a failure to declare their involvement in outside enterprises may compromise the duty of good faith owed to their employer and result in their dismissal. In *Arno's Plumbing v L Ziraya* (GATW1601416), the CCMA found that a plumber who contacted the employer's clients and offered to do private jobs that were against the insurance rules and company conduct might lead to the employer losing business. The employee received money for installing a geyser, and the dismissal was upheld.

In summation, a conflict of interest is generally recognised as a grave offence, sufficiently serious to warrant possible dismissal. However, the above case law shows that a number of important conditions must be met before the court or CCMA will agree to such a dismissal.

Israelstam summarises these requirements below:

> "(a) The employee must already have jeopardised the interests of the employer by the time the charges were laid. For the employee merely to be contemplating competition with the employer's interests may not be sufficient to constitute conflict of interest. In such a case the employer would need either to wait until the employee sets up the competing

business before acting or prove a specific loss caused by the employee's mere plans for a competing business.

(b) The employer must also prove that the employee's private business in fact conflicts with the employer's business interests. Merely showing that the employee runs a private business is not enough to prove conflict of interests.

(c) The employer should show that the employee knew the rule prohibiting conflict of interests. This is a disconcerting requirement, as employees ought to be aware that competing with the employer is wrong even if there is no specific rule to that effect. However, where the industry is such that it is often acceptable for employees to carry out private work, an employer that has a rule to the contrary would need to show that the employee was aware of this." (Israelstam "Beware Dismissing for Conflict of Interests" (2021) https://www.labourlawadvice.co.za/articles/beware-dismissing-forconflict-of-interests (accessed 2022-03-15)

7 Mapping the way forward

One thing is clear from the analysis advanced by this case note. The definition of the duty of good faith is extremely unclear, let alone the proper determination of its scope. This is not made any easier by the frequent reliance by courts on the principle to find misconduct. The common-law conception of misconduct itself is problematic as it has multiple dimensions that are also not clearly defined.

As such, it is suggested that courts limit their generalised reasoning in decisions on the principle of good faith. The starting point should be a specific form of misconduct found applicable to the facts. Continued generalisation of misconduct leads to legal uncertainty and violation of the rule of law, because aggrieved parties who cry substantively unfair dismissals will seldom be clear on the substance of their dismissal. Further recourse is also likely to be hampered owing to this convolution. Accordingly, it is submitted that courts should strive as far as possible to focus their reasoning on particular principles when dealing with the mushrooming incidents of moonlighting in the workplace.

8 Concluding remarks

The decision of the LAC in *Bakenrug* reiterated the common-law principle of good faith expected of employees in the realm of moonlighting. This common-law concept is undeniably multifaceted and dynamic. In modern times, moonlighting is expected to proliferate, given the current state of the economy and ever-rising costs of living. If courts are to continue to rely on the concept of good faith, its application to moonlighting needs to be properly demarcated. The habitual reliance by courts on this principle should be approached with caution owing to the wide scope of the principle. Courts relying on a breach of good faith seldom pinpoint the reason for a dismissal. As evinced in *Bakenrug*, the reason could be dishonesty, conflict of interests, competition or poor work performance, among others. It is crucial, to the interests of the rule of law on the one hand, and to the right to fair labour practices on the other, that courts should strive to identify, as much as possible, the particular form of misconduct with which employees are

charged. It is hoped that courts will develop the ancient principle of good faith to better address the proliferating practice of moonlighting.

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CLARIFYING THE POWER OF THE SOUTH AFRICAN HUMAN RIGHTS COMMISSION TO TAKE STEPS TO REDRESS THE VIOLATION OF HUMAN RIGHTS: A DISCUSSION OF

South African Human Rights Commission v Agro Data CC [2022] ZAMPMBHC 58

1 Introduction

Chapter 9 of the Constitution of the Republic of South Africa, 1996 (the Constitution) establishes six institutions having the express purpose of "strengthen[ing] constitutional democracy" (s 181(1) of the Constitution). Murray ("The Human Rights Commissions *et al*: What Is the Role of South Africa's Chapter 9 Institutions?" 2006 9 *PELJ* 122–147) suggests that the two purposes of the Chapter 9 institutions are: 1) "checking government", and 2) "contributing to the transformation of South Africa into a society in which social justice prevails". Two of the institutions that contribute significantly to these purposes are the Public Protector (ss 182–183 of the Constitution) and the South African Human Rights Commission (s 184 of the Constitution). Each of these institutions has a vitally important role to play in South Africa's constitutional democracy. In strengthening constitutional democracy, the Public Protector is to investigate conduct in state affairs or in public administration that is allegedly improper, report on such conduct, and "take appropriate remedial action" (s 182(1)(*c*) of the Constitution). The South African Human Rights Commission (the Commission) is to advance and protect human rights within South Africa. The Commission can investigate the observance of human rights, and "take steps to secure appropriate redress where human rights have been violated" (s 184(2)(*b*) of the Constitution).

In *Economic Freedom Fighters v Speaker of the National Assembly* (2016 (3) SA 580 (CC)) (*EFF*), the Constitutional Court confirmed that remedial action ordered by the Public Protector, if appropriate, would be binding on the parties against whom it is made. Remedial action can therefore not simply be ignored but must be implemented. A party who is of the view that the remedial action is not rational should approach a court to have the remedial action set aside. On the strength of this decision, the Commission has continually argued that its directives on steps to secure redress, following an investigation where it is found that human rights have been violated, are similarly binding on the parties against whom they are made (see South African Human Rights Commission *Final Report of the Gauteng*

Provincial Inquiry Into the Sewage Problem of the Vaal River (2021) par 116).

The argument that the directives of the Commission are binding was also advanced by the Commission in *Solidarity v Minister of Labour* ([2020] 1 BLLR 79 (LC)) (*Solidarity*). In this decision, Solidarity argued that the findings and recommendations in the Commission's Equality Report (South African Human Rights Commission *Equality Report 2017/2018*) were binding. The Equality Report was, however, a research report and did not contain recommendations to redress the violation of human rights. Therefore, as the issue in *Solidarity* was not about directives issued to redress the violation of human rights, but about findings made after research conducted by the Commission, the court did not rule on whether directives to remedy the violation of rights were binding.

It is for this reason that the recent decision of the High Court in *South African Human Rights Commission v Agro Data CC* ([2022] ZAMPMBHC 58) (*Agro Data*) is important, as it provided the High Court with the opportunity to consider whether the directives issued by the Commission to remedy the violation of human rights can be considered binding on the parties. In this matter, the Commission's directives to address the violation of labour tenants' right of access to water had not been implemented, prompting the Commission to approach a court for an order that the directives were binding.

This case note proceeds as follows. First, it sets out the powers of the Commission in terms of the Constitution and the South African Human Rights Act (40 of 2013) (the Act), before turning to a discussion of *Agro Data* and considering the implications that this decision may hold for the power of the Commission, specifically as far as it relates to taking "steps to secure redress where human rights have been violated".

2 Powers of the South African Human Rights Commission

The South African Human Rights Commission is established in terms of section 184 of the Constitution. In terms of section 184(1), the Commission has the mandate to promote, protect and monitor the realisation of human rights in South Africa. In terms of its promotional mandate, the Commission is obliged to "promote respect for human rights and a culture of human rights" (s 184(1)(*a*)). In terms of its protection mandate, the Commission is obliged to "promote the protection, development and attainment of human rights" (s 184(1)(*b*)). In terms of the Commission's monitoring mandate, it is obliged to "monitor and assess the observance of human rights in the Republic" (s 184(1)(*c*)). The Commission also generally structures its programmes and operations along the lines of these three mandates (South African Human Rights Commission *Annual Report 31 March 2020* 14–15).

To enable the Commission to fulfil the mandates as set out in section 184(1), it is empowered in terms of section 184(2) to investigate and report "on the observance of human rights" (s 184(2)(*a*)). It is empowered to "take steps to secure appropriate redress" where it has found that human rights

have been violated (s 184(2)(*b*)). The Commission is further empowered to "carry out research" (s 184(2)(*c*)), and "to educate" (s 184(2)(*d*)). The Act further describes the power of the Commission. Most notably, section 13 of the Act confers various powers and places various obligations on the Commission. For instance, the Commission can investigate any violation of human rights, either on its own initiative or after receipt of a complaint, and can assist the complainant or other persons affected to secure appropriate redress for the human rights violation (s 13(3)(*a*) of the Act). The assistance may include financial assistance to approach a competent court for redress. The Commission can also "bring proceedings in a competent court or tribunal in its own name, or on behalf of a person or group or class of persons" (s 13(3)(*b*) of the Act). In section 15 of the Act, the Commission is provided with broad investigatory powers for purposes of exercising its section 13 powers, and with the power to enter, search and attach goods in section 16.

In light of its statutory powers, the Commission follows a particular methodology before it exercises its power to "take steps to secure appropriate redress" in terms of section 184(2)(*b*) of the Constitution. In this regard, there seems to be a coupling of the power of the Commission to "investigate and to report on the observance of human rights" in section 184(2)(*a*) with its power to take steps to secure redress in terms of section 184(2)(*b*). The Commission investigates the violation of human rights, and after concluding its investigation, which may at times involve a public hearing, it ordinarily releases a report (on the violation), which often includes the steps to be taken to secure redress for the violation as reported. A recent example is the report of the Commission following a joint enquiry with the Public Protector into unrest in the Alexandra township. The unrest, which involved barricading of roads and burning tyres, came as a result of frustration with "severe overcrowding, inadequate service delivery, rampant crime and illegal land occupations" (South African Human Rights Commission *Final Report of the Gauteng Provincial Inquiry Into the Alexandra Township Total Shutdown* (2021) 1). The Commission and the Public Protector held a joint site visit to various areas in Alexandra, as well as a joint public forum, gathering information from the residents of Alexandra, followed by a request for responses from the various state departments. Although the Commission and the Public Protector held a joint inquiry, they published separate reports on the basis of their respective constitutional and statutory powers. In its report, the Commission identified several factors that impede the full realisation of socio-economic rights. These include "improper use of budgets, planning that is not coherent and integrated; skills shortages, high staff turnover, illegal occupation, limited space, extreme overcrowding, high rate of unemployment, non-collaborative working between organs of state" (*Final Report of the Gauteng Provincial Inquiry into the Alexandra Township Total Shutdown* 2, 69). The Commission specifically noted that it would not make findings in relation to each of these identified factors, as experience has shown that these individual findings are not heeded by the relevant organs of state. Instead, the Commission made broader overarching findings to which the implicated state organs would have to respond within 60 days. Most of these required relevant state organs to provide reports containing plans to address the

various shortcomings in the delivery of basic services. For instance, in relation to water, sanitation and refuse removal, the relevant organs of state had to present a plan setting out short- and long-term steps to ensure adequate access to water, sanitation and refuse removal (*Final Report of the Gauteng Provincial Inquiry into the Alexandra Township Total Shutdown* 2). In its report into the Alexandra unrest, the Commission specifically noted the following:

> "The Commission's directives herein are binding on the Respondents. Should any of the parties be aggrieved by the findings and directives of the Commission as contained herein, such a party is entitled to challenge same in court through the process of judicial review." (*Final Report of the Gauteng Provincial Inquiry into the Alexandra Township Total Shutdown* 5, 74)

However, in 2022 the Commission conducted a follow-up visit to the Alexandra township to determine whether there had been any improvement in the conditions in Alexandra. The Commission noted that nothing much has changed in Alexandra since the release of its report. Importantly, it was reported that

> "neither the City [of Johannesburg] nor the provincial government has responded to the [Commission's] report … though they were given 60 days in which to do so." (Mafata "Nothing Has Changed in Alexandra, Says Human Rights Commission" GroundUp (15 February 2022) https://www.groundup.org.za/article/sa-human-rights-commission-says-nothing-has-changed-alexandra/ (accessed 2022-06-15))

The Commission indicated that if the relevant parties did not respond in due course, it would consider using its subpoena powers.

Although the Commission used its power to monitor and assess the observance of human rights, as granted in the Constitution and the Act, the investigation found a clear violation of human rights, triggering the Commission's protection mandate, which enables it to "take steps to secure appropriate redress". In its Revised Strategic Plan 2015–2020 (South African Human Rights Commission *Revised Strategic Plan 2015–2020*), the Commission identified the inadequate implementation of the recommendations of the Commission as a risk in reaching its objective of monitoring, assessing, and reporting on the observance of human rights. The fact that the relevant state organs and other parties often fail to respond to the reports of the Commission, or to implement its recommendations, calls into question the Commission's ability to execute its mandate effectively to strengthen constitutional democracy generally, and to advance the protection of human rights specifically.

It is for this reason that the decision in *Agro Data* is important as it seemingly clarifies the relative power of the Commission to issue directives.

3 *Agro Data*

3 1 Facts

In this matter, the Commission received a complaint from Mosotho on behalf of the occupiers of the De Doorn Hoek Farm to the effect that the respondents were unilaterally placing restrictions on their use of borehole water. After an investigation, the Commission found a *prima facie* violation of the various rights of the occupiers, most notably of the right not be denied access to water, which is protected by section 6(2)(*e*) of the Extension of Security of Tenure Act (62 of 1997) and section 27(1)(*b*) of the Constitution. To remedy the *prima facie* violation, the Commission issued a number of directives. Among other instructions, these directives required the respondents to restore the supply of borehole water within seven days of release of the report, and the parties to engage with each other about water management on the farm. The respondents failed to comply with the directives, prompting the Commission to seek a declaratory order that the Commission's directives issued in terms of section 184(2)(*b*) were binding.

The Commission argued that the directives flow from its protective mandate, as well as its power in section 184(2)(*b*) of the Constitution, to take steps to secure appropriate redress in the case where human rights are violated (*Agro Data supra* par 9). The Commission also argued that for redress to be *appropriate* it needs to be binding on the parties; if not, no party against whom a directive has been given would comply and this would detrimentally affect the Commission's ability to strengthen constitutional democracy in South Africa (in *EFF supra* par 71, the Constitutional Court defined "appropriate" remedial action as "effective, suitable, proper or fitting to redress the transgression"). In this regard, the Commission relied extensively on the Constitutional Court's judgment in *EFF*, where the Constitutional Court confirmed that the remedial action of the Public Protector is binding on the parties against whom it is made if it is "appropriate and practicable to effectively remedy" (*EFF supra* par 71) the complaint.

The respondents argued that although the Commission may issue directives, it does not have the "judicial power to issue orders that must automatically be adhered to where it concerns private individuals" (*Agro Data supra* par 20). In this regard, the respondents argued that the duty to provide access to water rests with the State and this constitutional obligation cannot be imposed on a private party. The court seems to have accepted that the primary obligation to provide access to water rests with the municipality, and that private parties would have a duty not to refuse the installation of water supply infrastructure on their property. The question as to whether, and how, the Bill of Rights binds private parties has been, and remains a contested matter (Van der Sijde "Tenure Security Occupiers for ESTA Occupiers: Building on the Obiter Remarks in *Baron v Claytile Limited"* 2020 36 *SAJHR* 74–92; Madlanga "The Human Rights Duties of Companies and Other Private Actors in South Africa" 2018 29 *Stell LR* 359–378 and the cases discussed there). In this regard, it is questionable whether this was the appropriate case for the Commission to take to court.

There are numerous examples where the State has failed to heed the Commission's directives, and it may have been sensible for the Commission to rather institute legal proceedings where the State has failed to implement the directives of the Commission as steps to remedy the violation of human rights.

In considering the question whether the directives of the Commission are binding, the court first considered the position, purpose, and constitutional powers of the Commission. As significant reliance was placed on the *EFF* decision, the court had to differentiate between the powers of the Public Protector as set out by the Constitutional Court and the powers of the Commission as understood by the High Court.

3 2 The Commission's position, purpose and powers

The court had regard to the position of the Commission relative to the traditional structures of government. The court noted that the Commission falls outside of the traditional three arms of government, highlighting that the Commission "does not exercise power in the same way" (*Agro Data supra* par 38) as the other branches of government (Murray 2006 *PELJ* 126). In particular, the court mentioned that the Commission, although having some administrative powers, does not have the power to govern. A core purpose of the Commission is to serve as an additional avenue for holding government accountable. It therefore plays an instrumental role in placing a check on the exercise of government power. In placing a check on the exercise of government power, the Commission's power is limited. According to the court, "it cannot conclusively declare government actions to be unconstitutional or illegal, nor can it order the executive to act in a certain way, and it cannot penalise unconstitutional behaviour" (*Agro Data supra* par 38; the statements of the court are strikingly similar to those of Murray 2006 *PELJ* 130, which is not referred to). Instead, the Commission is meant to enter into dialogue with the various organs of state and use advice and persuasion to achieve a desired outcome, which in this case would be addressing the human rights violation identified by the Commission. In this regard, the court relied on a 2000 article written by a Canadian academic (Reif "Building Democratic Institutions: The Role of the National Human Rights Institutions in Good Governance and Human Rights Protection" 2000 13 *Harvard Human Rights Journal* 1–69). The court concluded that the Commission exercises "cooperative control" (Reif 2000 *Harvard Human Rights Journal* 1–69), as opposed to "coercive control", which is able to force a particular action on the part of the State (*Agro Data supra* par 39).

With regard to the constitutional powers of the Commission, the court reasoned that the Commission is "most central in monitoring government's commitment to human rights". In this regard, the court points towards the monitoring mandate of the Commission as seemingly *the* constitutional mandate of the Commission. The court also had regard to the statutory power of the Commission, particularly the power in section 13(1)(*a*)(i), where the Commission is "competent and obliged" to make recommendations to organs of state where it is "advisable for the adoption of progressive measures for the promotion of human rights" (this section does not refer to making recommendations to private parties). The court also referred to the

Commission's power to investigate the violation of human rights and assist the complainant to secure redress in section 13(3)(*a*) of the Act. The constitutional and statutory powers also point towards the cooperative control that the Commission exercises over organs of state (*Agro Data supra* par 43). In this regard, the court held that directives of the Commission, issued in terms of section 184(2)(*b*) of the Constitution, are not binding on the parties against whom they are made.

The reasoning of the court seems to be in line with the sentiments expressed by the *ad hoc* committee under the chairpersonship of Kader Asmal established by the National Assembly to review Chapter 9 and associated institutions. In its report, the committee found that the "Commission is not a court of law and cannot make binding decisions on complaints lodged with it" (Asmal, Dithebe, Johnson, Burgess, Matsomela, Camerer, Smuts, Van der Merwe, Rajbally and Simmons *Report of the Ad Hoc Committee on the Review of Chapter 9 and Associated Institutions* (2007) 168). Klaaren, although indicating that some state organs have considered the directives of the Commission to be binding, states that it is generally understood that these directives are in fact not binding on the relevant parties (Klaaren "SA Human Rights Commission" in Woolman and Bishop (eds) *Constitutional Law of South Africa* (2013) 24C–7; this approach is contrary to the view taken by Govender and Swanepoel "The Powers of the Office of the Public Protector and the South African Human Rights Commission: A Critical Analysis of *SABC v DA* and *EFF v Speaker of the National Assembly* 2016 3 SA 580 (CC)" 2020 *PELJ*, who argue that in appropriate circumstances, the directives of the Commission may be binding).

Based on the powers and purpose of the Commission and its position relative to the other branches of government, the court concluded that the Commission does not have the power to issue binding directives, although it would certainly be open to the implicated state organ to implement the directives in addressing a human rights violation. Although this interpretation finds support in the Kader Asmal Report and in the writing of academic authors, it is unfortunate that the court did not differentiate more clearly between the Commission's mandates in order to provide a stronger justification as to why the directives of the Commission are not binding. In certain cases, the Commission monitors and reports on the observance of human rights, which may shed light on a potential human rights violation for the State to take note of and address, where appropriate. In these cases, the Commission does not regard its recommendations as binding (see, especially, the founding affidavit of the Commission in *Solidarity v Minister of Labour supra*). In other cases, the Commission may uncover a human rights violation following a thorough investigation and then issues directives on steps to secure redress (see the reports referred to above). It is in these limited circumstances that the Commission regards its directives as binding. The failure of the court to clearly differentiate between the various mandates and powers of the Commission renders the justification for this particular finding somewhat inadequate.

3 3 Differentiating between the powers of the Public Protector and the Commission in light of EFF

As the Commission relied heavily on the *EFF* judgment in arguing that the directives issued in terms of its protective mandate are binding, it is important to consider how the court differentiated between the power of the Public Protector to order binding remedial action, and the power of the Commission to "take steps to secure appropriate redress".

The court compared the relative powers of the Commission and the Public Protector and their proper position relative to each other. Although the Public Protector and the Commission have some similarities, there are also key differences between the two institutions. According to the court, there is an apparent constitutional hierarchy of Chapter 9 institutions. In this regard, the Public Protector apparently enjoys an "elevated status" (*Agro Data supra* par 46) when compared to the Commission and other Chapter 9 institutions. This elevated status is justified by a number of considerations. The first, rather dubious, reason relates to the fact that the Public Protector is the first institution to be listed in Chapter 9 of the Constitution. This argument was proffered by Govender and Swanepoel (2019 *PELJ)*, who, without further explanation or justification, argue that the Public Protector enjoys an elevated status because it is the first institution to be listed in Chapter 9. The second reason relates to the provisions regarding the appointment and removal of the Chapter 9 institution incumbents as regulated in section 193(5) of the Constitution. In terms of section 193(5)(*b*)(i) of the Constitution, the National Assembly can approve the appointment of the Public Protector (and the Auditor-General) by a supporting vote of 60 per cent of its members, while a simple majority vote is sufficient in the case of the appointment of the commissioners of the Commission in terms of section 193(5)(*b*)(ii). This latter provision also applies to the appointment of commissioners to all the other commissions in Chapter 9, except for the Commission for the Promotion and Protection of the Rights of Cultural, Religious and Linguistic Communities (CRL Commission), whose appointment process is governed by section 11 of the Commission for the Promotion and Protection of the Rights of Cultural, Religious and Linguistic Communities Act (19 of 2002). Similarly, higher majorities are required for the removal of the Public Protector than for the commissioners of the Commission in section 194(2) of the Constitution.

It is unclear how the higher majority required for the appointment of the Public Protector (and the Auditor-General) elevates the Public Protector above all the other Chapter 9 institutions. Furthermore, as the grounds for removal in section 194(1) are the same for the Public Protector, the Auditor-General and the commissioners of the various commissions, it is unclear how the removal process elevates the Public Protector above the Commission and other Chapter 9 institutions. The Public Protector, the Auditor-General and the commissioners of the various commissions can only be removed on the grounds of "misconduct, incapacity or incompetence", supported by the National Assembly with regard to the applicable majorities required after a committee of the National Assembly has found that a ground for removal exists. This means that the removal of the Chapter 9 incumbents

would have to follow the same procedure and be based on the same consideration, although the majorities may differ. Surely, the appointment and removal process, as concerning individuals such as the Public Protector and the Auditor-General and the various commissioners of the various commissions, is to secure the independence and impartiality of the various Chapter 9 institutions, and does not point to a hierarchy of the various institutions. Murray (2006 *PELJ* 127) argues along the same lines and states:

> "To secure their independence, the selection of people to office under Chapter 9, with the exception of the commissioners on the CRL Commission, must be by a special majority in the National Assembly and their dismissal likewise requires a special parliamentary majority."

Furthermore, there is only one Public Protector and one Auditor-General as opposed to several commissioners in the various commissions, which may render it important to protect the independence of an individual person to a higher degree.

The third reason for the apparently elevated status that the Public Protector enjoys relative to the Commission is the "specific function and powers" of each. It is perhaps not entirely appropriate to consider the functions of the Chapter 9 institutions as justification for why one Chapter 9 institution is elevated above the others. All the Chapter 9 institutions have the function of strengthening constitutional democracy, and each plays a unique role in that regard. Furthermore, speaking specifically to the Public Protector and the Commission, it would be disingenuous to suggest that, because the function of the Public Protector relates to addressing improper public administration, it is elevated above the Commission whose function is to establish a culture of human rights – especially in light of the country's unjust and racist past, where human rights were denied people simply based on their race.

A closer look at the relative powers of the Public Protector and the Commission, in light of the Constitution and relevant legislation, may place either institution in a stronger position in realising its purpose to strengthen constitutional democracy although not elevating one above the other. Both the Public Protector and the Commission derive its powers from the Constitution, and their powers are further regulated by legislation. The court pointed out the differences between the constitutional power of the Public Protector and the Commission respectively. The Public Protector's power to order remedial action (which the court interpreted as the "direct power to take remedial action" (*Agro Data supra* par 47)) is different from the Commission's power to take steps (which does not empower the Commission to take or issue actual remedial action or order redress. According to the court, "[t]he wording is purposefully different" (*Agro Data supra* par 47)). Based on this interpretation, the Constitution does not authorise the Commission to take actual steps in the form of directives or remedial action for addressing the human rights violation. Instead, it simply authorises the Commission to take steps in the event that its investigation uncovers a human rights violation.

In relation to the Constitutional Court's judgment in *EFF* (to the effect that the remedial action of the Public Protector is binding if effective), the court

reasoned that even though the Commission's power is different from the Public Protector's power, that does not mean that the Commission can simply be ignored or that its powers are not binding. However, the court reasoned that even though the Commission is clothed with the power to take steps to secure redress, those steps do not include the taking of actual steps in the form of remedial action or directives. Instead, after the Commission has investigated and determined a violation of rights, it can consider what steps it would take to address the violation. In this regard, the court reasoned that once the Commission has determined that human rights have been violated, it is empowered and can decide which steps it should take to secure appropriate redress. Those steps may include only those steps specifically provided for in the Act, and include assisting a complainant to secure redress by instituting litigation in its own name, by assisting (materially or financially) the complainant to approach a competent court, or by directing the complainant to an alternative forum (ss 13(3)(*a*) and 13(3)(*b*) of the Act. The Commission often engages in litigation in its own name to vindicate the rights of people (South African Human Rights Commission *Strategic Plan* 2020–2025 9–12).

The court therefore found that the constitutional power in section 184(2)(*b*) does not empower the Commission to take direct remedial action or issue directives that are binding on the parties. Instead, the steps referred to in section 184(2)(*b*) of the Constitution refer to the steps explicitly allowed for in the Act.

4 Concluding remarks

In *Agro Data*, the High Court confirmed that the directives issued by the Commission as steps to secure redress where human rights have been violated in section 184(2)(*b*) of the Constitution are not in themselves binding. The court's justification for this finding rests, first, on the purpose of the Commission, which is to exercise cooperative control, meaning that the Commission must enter into dialogue and persuade state organs to give effect to the realisation of human rights and remedy any human rights violation. Secondly, the power of the Commission, as described in the Constitution, does not empower the Commission to take direct steps in the form of remedial action or directives to secure redress where human rights have been violated. Instead, the power in section 184(2)(*b*) is merely an indication that the Commission is empowered to take the steps specifically provided for in the Act. In this regard, the constitutional power of the Commission to take steps to secure redress is distinguishable from the Public Protector's power to take remedial action, even though both the steps and the remedial action follow an investigation and a finding of impropriety or a human rights violation that should be remedied.

The finding of the High Court places the Commission in a slightly weaker position than the Public Protector in its ability to strengthen constitutional democracy, although it does not elevate the Public Protector above the Commission. Although the Commission may not be able to issue binding directives or take binding remedial action where human rights have been violated on the strength of section 184(2)(*b*) of the Constitution, the Commission continues to play a pivotal role in strengthening constitutional

democracy by effectively using its broad powers to establish a culture of human rights.

The steps that the Commission can take in terms of section 13 of the Act have been used effectively by the Commission to secure redress where human rights have been violated. For example, the Commission has become involved in litigation for the protection of human rights – sometimes as a litigant (*South African Human Rights Commission v Minister of Home Affairs* [2014] 11 BCLR 1352 (GJ); *Qwelane v South African Human Rights Commission* 2021 (6) SA 579 (CC); *Strategic Plan 2020–2025* 9–12), and at other times as a friend of the court (see *Strategic Plan 2020–2025* 9–12). The Commission also monitors the implementation of court orders that seek to remedy the violation of human rights. For instance, in *Minister of Basic Education v Basic Education for All* (2016 (4) SA (SCA) 2), the Supreme Court of Appeal held that every learner is entitled to a textbook. In light of this judgment, the Commission monitors the delivery of textbooks in all provinces (*Strategic Plan* 2020–2025 11).

The Commission further uses its broad powers to establish a culture of human rights in South Africa. This, the Commission achieves by compiling comprehensive reports focusing on particular human rights issues, such as human settlements, water and sanitation (South African Human Rights Commission *Final Report of the Gauteng Provincial Inquiry Into the Sewage Problem of the Vaal River* (2021); South African Human Rights Commission *Access to Housing, Local Governance and Service Delivery* (2015); South African Human Rights Commission *Report on the Right to Access Sufficient Water and Decent Sanitation in South Africa* (2014)), as well as certain cross-cutting human rights issues, such as inequality, the rights of children, and disability (South African Human Rights Commission *Equality Report* 2017/2018; South African Human Rights Commission *Lack of Safety and Security Measures in Schools for Children With Disabilities*; South African Human Rights Commission *Research Brief: The Management of and Rights of Learners at Special-Needs Schools* (2018)).

In this regard, even though the directives that the Commission may make in order to remedy a human rights violation are not binding on the State, the Commission's use of its broad constitutional and statutory powers goes a long way to promote and protect human rights in South Africa. Even though the State is obliged to ensure the dignity and effectiveness of the Commission, it is clear that the State is not always responsive to the Commission's reports and interventions. This may be considered a failure to comply with a constitutional obligation that is directly placed on all organs of state in terms of section 181(3) of the Constitution. Moreover, it is generally important not to lose sight of the intermediary role that the Commission can play in relation to ordinary citizens. The intermediary role that the Commission can play has been noted:

> "Prompted by the large number of complaints that the Commission has received about the government's failure to fulfil its obligation to provide a right to basic education, the hearings provided an opportunity for citizens and the government to raise concerns about education. Because hearings like this are generally not adversarial and because the reports drafted by the Commission after previous hearings have credibility, the hearings provide an effective way

> of assessing problems and drawing government's attention to them." (Murray 2006 *PELJ* 128)

This intermediary role is essential where it concerns marginalised citizens, who individually may not have the resources to engage with the various organs of state, other than through costly litigation.

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THE APPLICATION FOR LEAVE TO APPLY TO COURT FOR REVIEW OF A SCHEME OF ARRANGEMENT IN TERMS OF SECTION 115 OF THE COMPANIES ACT 71 OF 2008

Sand Grove Opportunities Master Fund Ltd v Distell Group Holdings Ltd [2022] ZAWCHC 46

1 Introduction

Schemes of arrangement in terms of section 114 of the Companies Act 71 of 2008 (the Companies Act) are a common mechanism for implementing business combinations, takeovers or restructurings of share capital in South Africa (see, for e.g., Luiz "Some Comments on the Scheme of Arrangement as an 'Affected Transaction' as Defined in the Companies Act 71 of 2008" 2012 *PER/PELJ* 105; Cameron "A Critical Analysis of the Continued Preference Displayed Towards Schemes of Arrangement in South Africa" 2016 *Journal of Corporate and Commercial Law & Practice* 77–87; Davis, Geach, Mongalo, Butler, Loubser, Coetzee and Burdette *Companies and Other Business Structures in South Africa* 3ed (2013) 233–234; Cassim FHI, Cassim MF, Cassim R, Jooste, Shev and Yeats *The Law of Business Structures* 2ed (2021) 482; see also Boardman "A Critical Analysis of the New South African Takeover Laws as Proposed under the Companies Act 71 of 2008" in Mongalo *Modern Company Law for a Competitive South African Economy* (2010) 314). A scheme of arrangement is basically any arrangement between a company and "holders of any class of its securities", which includes the company's shareholders (s 114(1) of the Companies Act). Such arrangement may involve a consolidation of securities of different classes, a division of securities into different classes, an expropriation of securities from the holders, an exchange of the company's securities for other securities, a reacquisition by the company of its securities, or a combination of the above methods (s 114(1)(*a*)–(*f*)). The formulation of a scheme of arrangement in these broad terms dovetails well with the fundamental policy objectives of promoting flexibility for companies to restructure their businesses (see Cassim *et al The Law of Business Structures* 454).

A scheme of arrangement is a "fundamental transaction" under Chapter 5 of the Companies Act and, as such, a company may not implement a scheme of arrangement unless it has been approved by a special resolution adopted by "persons entitled to exercise voting rights" on the matter in terms of section 115(2) of the Companies Act. A scheme of arrangement is also an "affected transaction" if it is between a regulated company and its shareholders (s 117(1)(*c*)(iii) read with s 118(1)). As such, a company may

not implement a scheme of arrangement unless the Takeover Regulation Panel has issued a compliance certificate in respect of the scheme of arrangement in terms of section 119(4)(*b*), or has exempted it in terms of section 119(6) of the Companies Act.

In contrast to the Companies Act 61 of 1973, which required court approval for a company to implement a scheme of arrangement (see s 311), the implementation of a scheme of arrangement under the current Companies Act is initiated by the board of directors and is subject to the super-majority rule – that is, shareholder approval by way of a special resolution (s 115(2)(*a*)). One of the principal protective mechanisms for minority shareholders in a scheme of arrangement, as in the other fundamental transactions, is the appraisal remedy in terms of section 164 of the Companies Act. This remedy acts as an exit mechanism for dissatisfied minority shareholders rather than allowing them to thwart the implementation of a scheme of arrangement. Another protective mechanism for dissenting shareholders is the involvement of the court in schemes of arrangement, which is, however, limited to court approval (s 115(3)(*a*)) or court review (s 115(3)(*b*)) of the implementation of a scheme of arrangement in clearly circumscribed circumstances. Insofar as court review is concerned, a company may not proceed to implement the special resolution approving a scheme of arrangement without court approval if the court grants any person who voted against the resolution leave to apply to court for a review of the transaction (s 115(3)(*b*), (6) and (7)). Such an application must be brought within 10 business days after the vote (s 115(3)(*b*)).

In *Sand Grove Opportunities Master Fund Ltd v Distell Group Holdings Ltd* ([2022] ZAWCHC 46 (*Sand Grove*)), the Western Cape Division of the High Court (the court) dealt with some pertinent issues relating to the application for leave to apply for court review of schemes of arrangement under section 115(3)(*b*), (6) and (7) of the Companies Act. These issues included the applicants' standing to bring proceedings in terms of section 115, application for leave to intervene as co-applicants in such proceedings, and condonation of non-compliance with the prescribed period within which the application for leave to apply for court review must be brought, as well as the validity of the meeting and special resolution approving the scheme of arrangement. This case note examines the above key issues raised in *Sand Grove* and provides a critical discussion of the judgment and its significance. The case note also highlights the practical implications of this case for companies, directors, beneficial holders of shares, shareholders (especially dissenting minority shareholders) and other participants under schemes of arrangement.

2 Facts

The applicant companies were Cayman Islands-registered investment funds (collectively, the applicants or the Sand Grove funds), which claimed to be the beneficial owners of a total of 3,72 per cent of issued ordinary shares in Distell Group Holdings Ltd (Distell). The three respondents were Distell, Heineken International BV and Sunside Acquisitions Ltd (collectively, the respondents). Briefly, the board of Distell proposed a scheme of arrangement to Distell's shareholders in terms of which Distell's business

would be restructured to facilitate its acquisition by Heineken International BV (Heineken) through Heineken's wholly-owned subsidiary, Sunside Acquisitions Limited (Newco) (*Sand Grove supra* par 3 and 4). Distell was, at the time, a listed company and had two classes of issued shares – ordinary shares and B class shares (par 2). The B class shares were linked to some of the ordinary shares and afforded their holder premium voting rights. The effect of these premium voting rights was that Remgro Limited, which was the only holder of the B class shares and which held just 31 per cent of Distell's issued ordinary shares, was able to exercise about 56 per cent of the aggregate of all voting rights exercisable by the holders of all ordinary shares and B class shares in respect of any matter to be decided on by Distell (par 8).

At the meeting held for the purposes of considering and approving the scheme of arrangement (the scheme meeting), the voting rights of the shares beneficially owned by the applicants were exercised by Mr Barber, under the authority of letters of representation issued to him by the registered holders of those shares – namely, First National Nominees (Pty) Ltd and Standard Bank Nominees (RF) (Pty) Ltd (the local custodians or nominee companies) (par 21). There was no mention of the identity of the beneficial owners of the shares in those letters of representation (par 21). Mr Barber voted against the resolution to approve the scheme of arrangement (the scheme resolution) at the scheme meeting as a representative of the local custodians or nominee companies. However, the scheme resolution was adopted by an overwhelming majority of Distell's shareholders, holding 94,03 per cent of the voting rights that were exercised on the scheme resolution (par 13). These voting rights included the voting rights exercised in respect of both the ordinary and the B class shares, which were counted together (par 13). As the court observed, even if the ordinary shares and the B class shares had been voted separately, the scheme resolution would still have been passed with the requisite majority in terms of section 115(2)(*a*) of the Companies Act (par 13).

Dissatisfied with the scheme of arrangement, the applicants brought an application in terms of section 115(3)(*b*), read with section 115(6) of the Companies Act, for leave to apply to court for a review and setting aside of the scheme resolution in accordance with section 115(7) (par 15). The respondents opposed the application.

After oral arguments had been presented, the applicants applied for leave to amend their notice of motion to insert a claim for orders declaring that the scheme meeting was not properly constituted and, therefore, invalid, as well as that the scheme resolution purportedly adopted at such meeting was also void (par 16). In the amendment application, the applicants claimed the relief they had originally sought in terms of section 115 of the Companies Act only in the alternative to the above declaratory orders (par 16). The respondents opposed the amendment application.

When, as discussed later in this case note, the respondents challenged the applicants' standing to bring proceedings in terms of section 115 of the Companies Act, the local custodians or nominee companies sought to join the proceedings as co-applicants but only after the statutorily prescribed time limit of 10 business days for bringing the proceedings had expired (par

35–36). The local custodians, therefore, applied for condonation of their non-compliance with the time limit of 10 business days. The respondents opposed the application for condonation.

3 Issues before the court

3 1 Standing

One of the issues that the court had to decide related to the standing to bring proceedings in terms of section 115(3)(*b*) of the Companies Act for leave in terms of section 115(6) to apply to court for a review of the resolution to approve a scheme of arrangement in terms of section 115(7). The respondents' argument was that the Sand Grove funds did not have standing to bring the proceedings as these funds were not registered holders of Distell ordinary shares, but only had beneficial ownership of the shares (par 23–25). The respondents further argued that the Sand Grove funds were not entitled to vote at the scheme meeting and did not vote at the scheme meeting (par 23–25). As indicated above, the relevant Distell ordinary shares were registered in the names of the local custodians or nominee companies, which had, through letters of representation, appointed Mr Barber (not the Sand Grove funds) as their representative or proxy to exercise the voting rights associated with the shares (par 21 and 32).

3 2 Application for leave to intervene as co-applicants in the proceedings

The court observed that the respondents' argument that the Sand Grove funds lacked standing prompted applications by the local custodians or nominee companies for leave to intervene as co-applicants in the proceedings in terms of section 115(3)(*b*) of the Companies Act in the event that the court upheld the respondents' argument (par 35). The issue was, therefore, whether the application instituted by the Sand Grove funds, which the court found to lack standing to seek the relief in terms of section 115(3)(*b*), could be saved by the intervention of the local custodians or nominee companies that had the right to vote on the scheme resolution and that had voted against it but failed to take the resolution on review before the expiry of the prescribed time limit of 10 business days.

3 3 Request for condonation for lateness

A further issue that arose in *Sand Grove* was whether the court may condone non-compliance with the 10-business-day period provided for in section 115(3)(*b*) within which the application for leave to apply for court review of the resolution to approve the scheme of arrangement must be brought. When the applicants sought condonation for their non-compliance with the 10-business-day time limit, the respondents argued that the court had no power to extend the statutorily prescribed period (par 36).

3 4 Validity of the scheme meeting and the scheme resolution

Another issue that the court had to consider was whether the scheme meeting and the special resolution approving the scheme of arrangement were valid. This issue arose in light of the applicants' application for leave to amend their notice of motion to insert a claim for declaratory orders that the scheme meeting at which the scheme of arrangement was approved was not properly constituted and, therefore, invalid, and that the special resolution purportedly adopted at such meeting was also invalid (par 16). The applicants argued that the scheme of arrangement was required to be tabled for approval by the holders of each class of Distell's shares at separate meetings in terms of section 115(2)(*a*) of the Companies Act – that is, one meeting of the holders of Distell's ordinary shares, and another separate meeting of the holders of the B class shares (par 68). As Distell's ordinary shares and the B class shares had been voted together and not separately, the applicants argued that the resolution adopted at the meeting did not constitute a resolution at all in terms of section 115(2) of the Companies Act and that, as such, there was no basis to review the purported resolution in terms of section 115(3), (6) and (7) (par 90). Under the amendment application, the applicants claimed the relief they had originally sought in terms of section 115 of the Companies Act only in the alternative to the above declaratory orders (par 16). The respondents opposed the application to amend the applicants' notice of motion.

4 Judgment

With regard to standing, the court upheld the respondents' objection to the applicants' standing and held that the Sand Grove funds lacked standing to apply for leave in terms of section 115(3)(*b*) of the Companies Act (par 24–26 and par 34). It found that the Sand Grove funds were not registered holders of Distell's ordinary shares but were only holders of beneficial rights in those shares (par 27). The relevant shares were registered in the name of the local custodians or nominees. As such, the court held that the Sand Grove funds were not persons entitled to exercise voting rights at the scheme meeting, as contemplated in section 115 of the Companies Act. Furthermore, the court found that the Sand Grove funds were not appointed by the registered shareholders as proxies. Instead, the local custodians, being the registered shareholders, had appointed Mr Barber as their proxy to exercise the voting rights associated with the shares at the scheme meeting (par 32). Mr Barber had exercised the voting rights at the scheme meeting as a proxy or representative of the local custodians or nominees and not as a proxy or representative of the Sand Grove funds (par 34).

With regard to the applications by the local custodians or nominee companies for leave to intervene in the proceedings as co-applicants, the court held that the application instituted by the Sand Grove funds, which had no standing to seek the relief in terms of section 115(3)(*b*) in the first place, was a nullity (par 39–40). As such, the application could not be saved by the intervention of the local custodians or nominee companies, who had the right to vote on the scheme resolution and who had voted against it but failed to

take the resolution on review before the expiry of their right to do so (par 41). According to the court, it was inherently irrational and untenable that the local custodians or nominee companies, whose right to bring an application for relief in terms of section 115(3)(*b*) had lapsed owing to their failure to exercise it within the prescribed time limit, could resuscitate that right "by piggybacking on proceedings instituted within the statutory time limit by someone who had no right to institute them" (par 41).

Insofar as the request by the local custodians or nominee companies for condonation of the lateness is concerned, the court held that the right to seek relief in terms of section 115(3)(*b*) of the Companies Act lapses if the application is not instituted within the prescribed 10-business-day period by a person with the requisite standing (par 60). It held that the prescribed 10-business-day time limit constitutes an "expiry period" or "*vervaltermyn*" and the courts have no inherent power to grant condonation for non-compliance with such a statutorily determined expiry period (par 60).

With regard to the application to amend the applicants' notice of motion to seek declaratory orders (to the effect that the scheme resolution or the meeting at which it was purportedly approved were invalid), the court upheld the respondents' argument that the only way to challenge the approval of a scheme of arrangement is to seek court approval in terms of section 115(3)(*a*) of the Companies Act or, alternatively, to seek court review of the transaction in terms of section 115(7) (par 91). The court found that, through their application for declaratory orders, the applicants were essentially seeking to use a different format to achieve a court review belatedly and thus set aside the transaction outside the limitations of section 115 of the Companies Act (par 93). The court held that entertaining such an application "would defeat the purpose of the carefully framed restrictions subject to which a review challenge can be mounted under s 115 of the Act" (par 94).

Notably, the court concluded that it was not necessary for it to deal with the merits of the application for leave to apply for a review of the scheme resolution, as the court had already found that the applicants lacked the necessary standing and that the local custodians or nominee companies could not intervene as co-applicants (par 96). It is submitted that the remarks expressed by the court on the merits of the case (i.e., on the application of s 115(6) and (7)) are *obiter* (par 96) and these are not discussed for the purposes of this case note.

5 The court orders

In view of the court's findings regarding the issues raised in this case, the court dismissed the application by the Sand Grove funds in terms of section 115(3)(*b*) of the Companies Act for leave to apply for a review of the scheme of arrangement (par 136). Furthermore, the court dismissed the application by the local custodians or nominees for leave to intervene in the proceedings (par 136). The court also dismissed the application by the Sand Grove funds for leave to amend their notice of motion to seek orders declaring that the meeting at which the special resolution approving the scheme of arrangement was adopted was invalid and that the resolution purportedly

adopted at that meeting was, as such, also invalid (par 136). The court ordered the applicants to pay the respondents' legal costs.

6 Further discussion

The issues highlighted in the judgment in *Sand Grove* are important and they warrant further analysis. These issues, as indicated above, include: standing to apply for leave to seek court review of a resolution approving a fundamental transaction; application for leave to intervene as applicants in such proceedings; condonation of non-compliance with the statutorily prescribed time limit for the institution of the application in terms of section 115(3)(*b*) of the Companies Act; and the validity of the scheme meeting and scheme resolution.

6 1 Standing in terms of section 115(3)(b) to seek court review of a resolution approving a fundamental transaction

It is submitted that one significant outcome of *Sand Grove* is that the court assessed and clarified the issue of standing to bring proceedings seeking court review of a resolution approving a fundamental transaction in terms of section 115(3)(*b*) of the Companies Act. The court dealt extensively with the issue of standing. Section 115(2)(*a*) of the Companies Act provides that a proposed fundamental transaction (i.e., a disposal of all or the greater part of a company's assets or undertaking, or an amalgamation or a merger, or a scheme of arrangement) "must be approved by a special resolution *adopted by persons entitled to exercise voting rights on such a matter*" (own emphasis) at the relevant meeting. Section 115(3)(*b*) further provides that, notwithstanding the adoption of the special resolution approving a fundamental transaction in terms of section 115(2)(*a*) of the Companies Act, a company may not implement that resolution without court approval if "the court, on an application within 10 business days after the vote by *any person who voted against the resolution*, grants that person leave, in terms of subsection (6), to apply to a court for a review of the transaction in accordance with subsection (7)" (own emphasis).

This right to apply to court for leave to apply for a review gives effective protection to the minority shareholders who voted against the resolution to approve a fundamental transaction, as this right is available regardless of the percentage support for the resolution (Cassim FHI, Cassim MF, Cassim R, Jooste, Shev and Yeats *Contemporary Company Law* 3ed (2021) 943).

According to the court in *Sand Grove*, the only person with standing in terms of section 115(3)(*b*) to seek court review of a resolution approving a fundamental transaction is a person who satisfies two qualifying criteria. First, it must be a person entitled to exercise voting rights on the matter at the meeting called for that purpose in terms of section 115(2)(*a*) of the Companies Act (par 40). Regarding this first qualifying criteria, the court agreed with the respondents' contention that the phrase "adopted by persons entitled to exercise voting rights on such a matter" in section 115(2)(*a*), when interpreted with reference to the meanings of "voting

rights", "shareholder" and "exercise", as defined in section 1 of the Companies Act, meant that only a registered shareholder or a person appointed as proxy by a registered shareholder could exercise voting rights on the resolution to approve a fundamental transaction in terms of section 115(2)(*a*) of the Companies Act (par 25–26 and 30).

Referring to *Sammel v President Brand Gold Mining Co Ltd* (1969 (3) SA 629 (A) (*Sammel*) 666), *Oakland Nominees (Pty) Ltd v Geiria Mining & Investment Co Ltd* (1976 (1) SA 441 (A) (*Oakland Nominees*) 453B), *Standard Bank of South Africa Ltd v Ocean Commodities Inc* (1983 (1) SA 276 (A) 288*fin*–289B) and *Smyth v Investec Bank Limited* (2018 (1) SA 494 (SCA) (*Smyth*) par 21), the court pointed out that the scheme of the Companies Act is reflective of the general principle of company law that "a company concerns itself only with the registered holders of its shares" and that this principle is "informed by considerations of practicality and convenience" (par 31).

Applying the above principles regarding the first qualifying criteria to the facts, the court held that the Sand Grove funds were not entitled to exercise voting rights for the purposes of the scheme resolution as they were not registered shareholders of Distell. Also referring to *Marble Head Investments (Pty) Ltd v Niveus Investments (Ferberos Nominees (Pty) Ltd Intervening)* ([2020] ZAWCHC 36 (*Marble Head Investments*)) and *Standard Bank Nominees (RF) (Proprietary) Limited v Hospitality Property Fund Limited* (2020 (5) SA 224 (GJ) (*Standard Bank Nominees*)), a matter in which a dissenting shareholder applied to court for the determination of fair value of its shares in terms of section 164 of the Companies Act, the court held that a consideration of section 164 was "indeed germane to the determination of who may exercise voting rights at a meeting in terms of s 115(2), for the appraisal rights thereunder are afforded only to dissenting shareholders who voted against the resolution at the meeting" (par 29). Notably, in *Standard Bank Nominees* (*supra*), it was held that only registered shareholders (and not the beneficial holders of the shares) may exercise the right to approve a fundamental transaction in terms of section 115 of the Companies Act.

The second qualifying criteria for having standing to seek court review of a resolution approving a fundamental transaction is that such person (i.e., a person entitled to vote on the resolution to approve a fundamental transaction) must have voted against the resolution approving the transaction at the relevant meeting, as required by section 115(2)(*b*) of the Companies Act (par 40). In other words, to have standing to seek court review of a resolution to approve the transaction, a registered shareholder, or a person appointed by a registered shareholder as proxy, must have voted against the proposed transaction. The court found that the Sand Grove funds had simply not voted at the meeting (par 27).

The court concluded that the Sand Grove funds had no standing because, first, they were neither registered shareholders nor proxies appointed by the registered shareholders (and were, therefore, not entitled to exercise voting rights) and, secondly, they did not vote against the scheme resolution at the scheme meeting. In *Sand Grove*, the court has thus emphasised that the only person with standing to bring such proceedings is a registered shareholder of the company (i.e., a person entitled to exercise voting rights

on such a matter) who has voted against the resolution approving the transaction at the relevant meeting. In this regard, the court took a pragmatic approach that is, as indicated above, aligned with the general principle that "a company concerns itself only with registered holders of its shares".

The decision in *Sand Grove* has significant implications for beneficial holders of shares, especially on their rights in relation to shareholder approval of fundamental transactions in terms of section 115(2) of the Companies Act, as well as in relation to the remedy of court review of fundamental transactions in terms of section 115(3)(*b*), as read with subsections (6) and (7). This includes holders of the beneficial interest in dematerialised shares that are subject to rules of a central securities depository.

Beneficial holders of shares are common in South Africa owing to the prevalent and acceptable investment practice of holding shares through investment institutions, intermediaries or nominees (s 56(1) of the Companies Act; *Oakland Nominees supra* 453A–B; Esser "Shareholder Interests and Good Corporate Governance in South Africa" 2014 77 *Journal of Contemporary Roman-Dutch Law* 42–43; Esser and Delport "Shareholder Protection Philosophy in Terms of the Companies Act 71 of 2008" 2016 79 *Journal of Contemporary Roman-Dutch Law* 7–8; Wiese *Corporate Governance in South Africa: With International Comparisons* 2ed (2017) 107). Beneficial holders of shares generally do not exercise the voting rights associated with the shares. They are generally not able to seek court review of a resolution approving a fundamental transaction to which they object. However, this does not leave beneficiary holders' interests unprotected. For example, if the beneficial holders of shares wish to participate actively and to vote on resolutions approving fundamental transactions, then such beneficial holders may obtain letters of representation or appointment as proxy from the registered shareholders (see *Sand Grove supra* par 32). This would entitle such beneficial holders of shares to vote on the resolution seeking the approval of a fundamental transaction at the relevant meeting and to later seek court approval in the specific circumstances outlined in section 115(6) and (7) of the Companies Act should they be dissatisfied with the approval of the transaction. Another option for beneficial holders of the shares, in the case of shares held through nominees, would be to terminate the nomination of their nominees and to have their names entered in the register of the company's shareholders (see *Smyth supra* par 55). Obtaining letters of representation or appointment as proxy from the registered shareholders would, in most cases, be a more feasible option available to beneficial shareholders who do not wish to terminate the nomination of their nominees.

Otherwise, the beneficial holders of shares have to rely on the presumption that the management of investment institutions, intermediaries or nominees, through which the beneficiary holders hold their shares, have a better understanding of their investee companies and have expertise in monitoring their investments in such companies (see Esser 2014 *Journal of Contemporary Roman-Dutch Law* 43). The presumption is that the management of investment institutions, intermediaries or nominees would generally be competent to assess the costs and benefits of the board's decisions regarding fundamental transactions, or other decisions by

company boards, and to make informed voting decisions on resolutions to approve such transactions. These investment intermediaries may further adopt transparent policies guiding them on how to assess and exercise their voting rights. Appropriate disclosure of such policies and the provision of explanations for voting in a particular direction would promote the accountability of these intermediaries to the beneficial holders of the shares. The courts have indicated that, in any event, intermediaries such as nominees are actually advancing the interests of the beneficial holders of shares and they act subject to the beneficial holders' instructions (*Smyth supra* par 55; see also *Sammel supra* 666; *Oakland Nominees supra* 453A–B; *Dadabhay v Dadabhay* 1981 (3) SA 1039 (A) 1047D).

It is also notable that the court in *Sand Grove* rejected the applicants' attempt to rely on section 56(9) of the Companies Act. This section gives the holder of a beneficial interest in any securities the right to vote in a matter at a shareholders' meeting if the beneficial interest includes the right to vote on the matter (s 56(9)(*a*)). In addition, such person's name must be listed on the company's register of disclosures as a beneficial interest holder, or such person must hold a proxy appointment in respect of that matter from the registered holder of the securities (s 56(9)(*b*); par 25). The court rejected the applicants' attempt to rely on section 56(9) because the Distell shares in which the applicants held a beneficial interest were dematerialised and were subject to the rules of a central securities depositary (par 25). Section 56(9) was not applicable by virtue of section 56(8), which expressly excludes the application of section 59(9) to (11) in respect of securities that are subject to rules of a central securities depositary (par 25). In any event, as the respondents pointed out, the applicants' names were not listed on Distell's register of disclosures as holders of a beneficial interest. The applicants also did not hold proxy appointments from the registered holders of the relevant Distell ordinary shares (par 25).

6 2 Application for leave to intervene as applicants in terms of section 115(3)(b)

A further significance of *Sand Grove* is that the court considered the issue of intervention as applicants in terms of section 115(3)(*b*) of the Companies Act, and the court took the view that the earlier decision of Sievers AJ in *Marble Head Investments* (*supra*) was clearly wrong (par 43). In *Marble Head Investments* (*supra*), the court held that if an application in terms of section 115(3)(*b*) of the Companies Act was instituted within the prescribed 10-business-day period by any person with capacity to litigate, even if such person lacked standing to claim relief in terms of this section, an intervening applicant with the standing to claim the relief could be admitted even after the expiry of the prescribed time limit (*Marble Head Investments* (*supra*) par 37). In that case, the registered shareholders' applications to intervene were instituted after the expiry of the 10-business-day period in terms of section 115(3)(*b*) but the beneficial shareholders, who lacked standing, had instituted their application timeously (see *Marble Head Investments* (*supra*) par 31–33).

However, the court in *Sand Grove* rejected the approach taken by Sievers AJ in *Marble Head Investments* (*supra*) and, instead, held that an application to seek relief in terms of section 115(3)(*b*) of the Companies Act by a person who does not meet the qualifying criteria to bring such an application (i.e., who does not have standing, as discussed above) is a nullity (par 40). According to the court, such application cannot be resuscitated by the intervention of a person who had the necessary standing but failed to institute the application before the expiry of his right to do so (par 41). The court stressed that it would, otherwise, be inherently irrational and untenable if such person could "avoid the fatal consequences of his delay and resuscitate his lapsed right by piggybacking on proceedings instituted within the statutory time limit by someone who had no right to institute them" (par 41).

In rejecting the approach taken in *Marble Head Investments* (*supra*) regarding the issue of intervention as applicants in terms of section 115(3)(*b*) of the Companies Act, the court in *Sand Grove* further considered that section 115(3)(*b*) does not prohibit the implementation of the fundamental transaction unless the application to seek a court review of the transaction is instituted within the prescribed 10-business-day period by a person who voted against the resolution (par 42). In such circumstances, the "late intervener" will have no right to seek a court review of the transaction or to seek an interdict to prevent implementation unless the intervener's lateness has been condoned (note however, as discussed below, that the court held that the courts have no power to grant condonation for the lateness in these circumstances) (par 42).

Considering the above conflicting authorities regarding intervening applications in terms of section 115(3)(*b*), it is submitted that the approach adopted by the court in *Sand Grove* is sound and courts are likely to follow *Sand Grove* in future rather than the approach adopted in *Marble Head Investments* (*supra*). As pointed out by the court, the approach in *Marble Head Investments* (*supra*) could, if followed, lead to irrational and untenable outcomes where a late intervener's right to seek relief that has lapsed is revived by his intervention in an invalid application instituted within the prescribed time limit by a person who had no right to institute such application in the first place (par 41).

6 3 Condonation of non-compliance with the statutorily prescribed time limit for the institution of proceedings in terms of section 115(3)(b)

Another important aspect of the *Sand Grove* judgment was that the court assessed the issue of condonation of non-compliance with the statutorily prescribed time limit for the institution of proceedings in terms of section 115(3)(*b*) of the Companies Act, and concluded that the earlier finding in *Marble Head Investments* (*supra*) (that the court had the inherent power to condone such non-compliance) was incorrect. Instead, the court in *Sand Grove* held that the 10-day time limit imposed in terms of section 115(3)(*b*) of the Companies Act constitutes an "expiry period" or "*vervaltermyn*" and the courts have "no inherent power to ameliorate the shutting out effect of

such statutorily determined expiry periods" (par 60, in which the court referred to *Hartman v Minister van Polisie* 1983 (2) SA 489 (A) 500).

Sievers AJ's disputed finding, in *Marble Head Investments* (*supra*), was that the court had the inherent power to condone non-compliance with the statutorily prescribed time limit for the institution of proceedings. The court in *Sand Grove* held that this finding was based on obiter remarks in *Toyota South Africa Motors (Pty) Ltd v Commissioner for the South African Revenue Service* (2002 (4) SA 281 (SCA) par 10) that the High Court has inherent jurisdiction to govern its own procedures and accessibility to litigants seeking to exercise their rights and that such jurisdiction has been held to pertain "not only to condonation of non-compliance with the time limit set by a rule but also a statutory time limit: *Phillips v Direkteur van Statistiek* (1959 (3) SA 370 (A) 374 G—*in fine*" (*Sand Grove supra* par 44–45). The court disagreed with Sievers AJ's finding and, instead, took the view expressed by Didcott J in the Constitutional Court case of *Mohlomi v Minister of Defence* (1997 (1) SA 124 (CC) (*Mohlomi*)) that the courts have no inherent power to condone defaults on statutorily prescribed time periods for the institution of litigation unless and until such power is conferred on them. Rejecting Sievers AJ's view that Didcott J's statement was an *obiter dictum*, the court in *Sand Grove* held that Didcott's statement was part of the *ratio decidendi*, binding and consistent with the legal position articulated in many appeal court judgments (*Sand Grove supra* par 47–49 and par 53, in which reference is made to *Benning v Union Government* (*Minister of Finance*) 1914 AD 180 185 and cases such as *Avex Air* (*Pty*) *Ltd v Borough of Vryheid* 1973 (1) SA 617(A) 621F–G; *Administrator, Transvaal, v Traub* 1989 (4) SA 731 (A) 764E and *Pizani v Minister of Defence* 1987 (4) SA 592 (A) 602 D–G).

Significantly, the court also pointed out that the context of the provisions of section 115 of the Companies Act weighs against any interpretation that the court has the power to condone the lateness of an application by an aspirant intervenor (par 61). It also emphasised the practical challenges that condonation could present in the context of fundamental transactions and the rights of other participants under such transactions. For example, it pointed out that, in the absence of an application in terms of section 115(3), the implementation of a fundamental transaction (the scheme of arrangement in this case) can proceed and the rights of the other participants in terms of the transaction vest and become enforceable (see par 61, referring to s 115(9) of the Companies Act). Condonation of a late application in terms of section 115(3)(*b*) would, therefore, be undesirable, as it would run contrary to the purpose of the prescribed timeframes for dissenting shareholders to challenge the approval of the transaction (par 61). It would create uncertainty with regard to the rights of other scheme participants, which section 115(9) and the time limits in section 115(3) were designed to avoid (par 61). Such uncertainty would render the provisions of section 115 unworkable (par 61). In the court's view, giving the court unstated powers of condonation would defeat the objectives of certainty that underlie the statutory time limit for instituting litigation, such as in section 115(3)(*b*) as well as the Companies Act's stated objects of providing for equitable and efficient amalgamations, mergers and takeovers of companies (par 62; and see the long title of the Companies Act). It would be prejudicial

to third parties' vested rights (par 63) and would undermine the objects of promoting equity, efficiency and certainty.

The court rejected the applicants' argument that section 173 of the Constitution gave the court the inherent power to condone non-compliance with the prescribed time period for the institution of the application (par 48 and 64). Notably, section 173 of the Constitution gives the Constitutional Court, the Supreme Court of Appeal and the High Court the "inherent power to protect and regulate their own process … taking into account the interests of justice". Referring to *Vlok NO v Sun International South Africa Ltd* (2014 (1) SA 487 (GSJ) par 49–50), with reference to *Phillips* (*supra* par 51–52), the court took the view that entertaining a claim instituted outside a statutorily prescribed time limit that constitutes a "*vervaltermyn*" is different from the regulation by the court of its own process (*Sand Grove supra* par 64) as envisaged in section 173 of the Constitution.

Considering the above conflicting judgments in *Sand Grove* (*supra*) and *Marble Head Investments* (*supra*), the question of whether the court has inherent powers to condone non-compliance with the statutorily prescribed 10-business-day limit for the institution of the application in terms of section 115(3)(*b*) is yet to be clarified by the Supreme Court of Appeal or the Constitutional Court in an appropriate case in future. It is submitted that the court's view in *Sand Grove* that the prescribed 10-business-day time limit constitutes an "expiry period" or "*vervaltermyn*" and that the courts have no inherent power to grant a condonation for non-compliance with such a statutorily determined time limit is, as indicated above, well-substantiated as being consistent with the legal position expressed by the Constitutional Court in *Mohlomi* (*supra*), as well as by the then-Appellate Division in the cases referred to above. Furthermore, and as quite usefully emphasised by the court, it is consistent with the context of the provisions of section 115 of the Companies Act, which, in the absence of an application in terms of section 115(3), allow for the implementation of the scheme of arrangement (or other fundamental transaction) to proceed and for the rights afforded by it to the scheme participants to vest and to become enforceable. The decision in *Sand Grove* is also consistent with the Companies Act's stated objects of promoting equity and efficiency in amalgamations, mergers and takeovers of companies. The concern that giving the court unstated powers of condonation would create uncertainty, rendering the provisions of section 115, in their current state, unworkable is valid.

Therefore, in view of the court's decision in *Sand Grove*, the dissenting shareholders in a scheme of arrangement, or other fundamental transaction, who wish to take the approval resolution on review should ensure that they adhere to the 10-business-day time period within which they should institute the application to seek court review of the transaction. Failure to adhere to the prescribed time period will result in the lapse of their right to seek court review of the transaction. In such a case, according to *Sand Grove*, the court may not condone any delay in instituting the application in terms of section 115(3) of the Companies Act.

6 4 Validity of the scheme meeting and the scheme resolution

As far as the applicants' challenge to the validity of the scheme meeting and special resolution approving the scheme of arrangement is concerned, the decision in *Sand Grove* is significant in at least three aspects, which apply equally to other fundamental transactions. The first aspect relates to the fact and attendant consequences of the approval of a scheme of arrangement in terms of section 115(2)(*a*). In this regard, the court held that the approval of a scheme of arrangement, in terms of an approval resolution that is being challenged, is a fact and, accordingly, the scheme is enforceable by and against the scheme participants in terms of section 115(9). Once approved, and if section 115(3)(*a*) and (5) of the Companies Act is not applicable, the scheme of arrangement "stands and must be treated as valid unless set aside by a court" (par 91). Referring to *Oudekraal Estates (Pty) Ltd v City of Cape Town* (2004 (6) SA 222 (SCA)), the court compared the fact of the approval of a scheme of arrangement and its attendant consequences with administrative decisions and emphasised that these cannot be ignored, even by a party who is challenging the validity of the adoption of the approving resolution (par 91).

The second significant aspect of the decision in *Sand Grove*, in this regard, relates to the way in which the approval of a scheme of arrangement may be challenged. The court made it clear that the only way to challenge the approval of a scheme of arrangement is to seek court approval in terms of section 115(3)(*a*) of the Companies Act or, alternatively, to seek court review of the transaction in terms of section 115(7) (par 91). A disgruntled dissenting shareholder may not use a different format, such as an application for declaratory orders as in this case, to achieve a court review and setting-aside of the fundamental transaction outside the carefully constructed limitations in terms of which an application to review the transaction may be brought under section 115 of the Companies Act (par 93–94). It is submitted that the court's decision, in this regard, is in line with the context of section 115 of the Companies Act, which limits the role of the court in schemes of arrangement (and other fundamental transactions) to court approval in exceptional circumstances, as provided for in section 115(3)(*a*) read with subsection (5) and in section 115(3)(*b*) read with subsections (6) and (7).

The third significant aspect of *Sand Grove* in the context of the validity of the scheme meeting and scheme resolution relates to the circumstances in which a scheme of arrangement must be put to the holders of each affected class of securities for approval by a special resolution at separate meetings in terms of section 115(2)(*a*) of the Companies Act. The court provided pertinent guidelines in this regard. Notably, under section 311(1) of the 1973 Companies Act, the court could order a meeting of classes of creditors or of members to be convened in such manner as the court might direct. The court's power, in this regard, included directing whether separate meetings had to be convened for different classes of a company's creditors or members (par 71). However, the current Companies Act does not contain

any provision empowering the court to determine the way meetings to consider schemes of arrangement should be convened.

The applicants in *Sand Grove* argued that section 114(1) of the Companies Act (especially the wording that the board of a company may propose and implement "any arrangement between the company and holders of any class of its securities") entailed that if a proposed scheme affected different classes of securities, as defined in section 37(1), the company must convene separate scheme meetings of the holders of each affected class of securities to approve the scheme (par 68–69 and par 78–79). Notably, section 37(1)(*a*) of the Companies Act provides that "all of the shares of any particular class authorised by a company have preferences, rights, limitations and other terms that are identical to those of other shares of the same class". According to the court, section 37 allows the issuance of different classes of shares even when the differences in the rights and limitations associated with those shares are insignificant (par 88). The applicants argued that each separate scheme meeting must be convened in terms of section 115 of the Companies Act and that it was impermissible to combine holders of different classes of shares, as defined in section 37(1), into a single meeting, as Distell had done (par 68–69 and 78–79).

The court correctly held that the current Companies Act leaves it to the company to convene the scheme meeting in terms of section 115 (par 81). It is, therefore, the company (i.e., the directors) that must determine the most appropriate way to comply with section 115(2) (par 81, also referring to Delport *Henochsberg on the Companies Act 71 of 2008* 420(1)). Where a proposed scheme affects the shareholders' rights differently, the directors should determine whether the proposal should be put to shareholder approval in terms of section 115(2) at a single scheme meeting or at separate scheme meetings. The court indicated that the directors may consider the independent board's advice and the independent expert's report when determining whether the company should hold separate meetings (par 81). The court further opined that the Takeover Regulation Panel could also direct that a company should convene appropriately constituted separate meetings (par 81). This is because section 119(2)(*b*)(ii) of the Companies Act gives the Takeover Regulation Panel the responsibility to regulate an affected transaction in a manner that ensures that all holders of "voting securities of an offeree regulated company are afforded equitable treatment, having regard to the circumstances" (par 81).

Significantly, the court held that, when determining whether the proposal should be put to shareholder approval in terms of section 115(2) at a single scheme meeting or at separate scheme meetings, the company must apply the principles that the court applied when determining whether separate meetings had to be convened for different classes of members or creditors under section 311(1) of the 1973 Companies Act (par 87–88, also referring to Delport *Henochsberg* 420(1)). In this regard, the South African courts followed the balancing approach laid down in English case-law authorities, particularly the leading case of *Sovereign Life Assurance Co v Dodd* ((1892) 2 QB 573 (*Sovereign Life*)), in terms of which the courts looked at the similarity or dissimilarity of the shareholders' or creditors' rights. In *Sovereign Life Assurance* (*supra*), it was held that the test for calling separate meetings

was based on the similarity or dissimilarity of the shareholders' or creditors' rights, and not on the similarity or dissimilarity of their interests (par 71–72). A single meeting would be convened where the shareholders' rights were sufficiently similar such that the shareholders could properly consult together (par 74, referring to *UDL Argos Engineering & Heavy Industries Co Ltd v Li Oi Lin* [2001] HKCFA 19; [2001] 3 HKLRD 634; (2001) 4 HKCFAR 358; [2002] 1 HKC 172 (*UDL Argos Engineering*)). A difference in the legal rights of the shareholders was only sufficient to require the convening of separate meetings if the difference was such that it was impossible for shareholders to consult together (par 76, referring to *DX Holdings Ltd* [2010] EWHC 1513 (Ch) (*DX Holdings*) par 5).

In *Sand Grove*, the court pointed out how the English courts cautioned against the classification of a proposed scheme as constituting more than one scheme of arrangement and the convening of separate meetings where the differences between the shareholders' affected rights are not sufficiently material. (In this regard, the court referred to cases such as *Nordic Bank plc v International Harvester Australia Ltd* [1982] 2 VR 298 301; and *DX Holdings supra* par 5.) It held that the holding of multiple meetings could undermine the policy rationale underpinning a scheme of arrangement, namely that super-majority decisions should bind the dissenting minority shareholders (par 76, referring to *Nordic Bank plc v International Harvester Australia Ltd* [1982] 2 VR 298 301). Therefore, a balance had to be struck between the risk of enabling the oppression of the minority shareholders by the majority shareholders and the risk of allowing a small minority to obstruct the majority shareholders' wishes (par 75, referring to *UDL Argos Engineering supra* par 26 and to *Representation of FRM Holdings Limited* [2012] JRC 120 par 17). If even the slightest and immaterial differences were to require the holding of separate meetings, this could lead to multiple separate meetings to approve a scheme of arrangement, which would be impracticable.

The court therefore rejected the applicants' contention that, in view of section 37(1), the balanced weighing approach followed by the courts under section 311 of the 1973 Companies Act, that considered the similarity or dissimilarity of the rights, was no longer applicable under the current Companies Act. The court also rejected the applicants' interpretation that section 114 of the Companies Act required companies to convene separate meetings of the holders of each class of shares (as set out in section 37(1)), even where there is no significant dissimilarity between their affected rights (par 79 and 88). It emphasised that such interpretation would lead to the long-recognised impracticalities associated with the holding of multiple separate meetings, thereby undermining efficiency in schemes of arrangement (par 88). In the court's view, the legislature could not have intended, in section 114, to abolish a well-established and sound approach, and to replace it with a new approach that is beset with impracticalities (par 83).

According to the court, section 37 of the Companies Act serves simply to promote clarity regarding the rights and limitations associated with a company's issued shares (par 80) and to make the appraisal remedy available to holders of a class of shares, as defined in section 37(1), where a

company has proposed an amendment of its Memorandum of Incorporation to alter the preferences, rights, limitations or other terms in a manner that is "materially" adverse to that class of shares (par 80; s 164(2)(*a*) of the Companies Act). "Materiality" serves as a determining factor when considering whether an alteration of rights associated with shares warrants a remedy (par 80).

To summarise the court's decision, the Companies Act leaves it to the company to convene a scheme meeting and to determine the most appropriate way to comply with section 115(2). Where a proposed scheme affects the shareholders' rights differently, the directors should determine whether the company should hold separate scheme meetings, taking into account the independent board's advice, the independent expert's report and any relevant directives given by the Takeover Regulation Panel. The company must consider the similarity or dissimilarity of the shareholders' rights, similar to the approach adopted by the courts under section 311(1) of the 1973 Companies Act. Caution should be exercised in the classification of a proposed scheme as constituting more than one scheme of arrangement and the convening of multiple separate meetings to approve a scheme of arrangement where the differences between the shareholders' affected rights are not sufficiently material, as this would lead to serious impracticalities. Where the company's determination triggers any of the grounds for review of the transaction in terms of section 115(7), a dissenting shareholder, with the requisite standing, will be entitled to challenge the determination within the parameters of section 115 (par 87, also referring to Luiz "Protection of Holders of Securities in the Offeree Regulated Company During Affected Transactions: General Offers and Schemes of Arrangement" 2014 *SA Merc LJ* 560 577).

7 Conclusion

This case note has analysed the judgment of the Western Cape Division of the High Court in *Sand Grove* regarding the application for leave to apply to court for a review of a scheme of arrangement in terms of section 115 of the Companies Act. The case note has highlighted the main issues raised by this judgment, which include a litigant's standing to bring an application for leave to seek court review of a scheme of arrangement, application for leave to intervene as co-applicants in the proceedings, application for condonation of non-compliance with the statutorily prescribed period within which the application for leave to apply for court review of a scheme of arrangement must be brought, and the validity of the meeting and special resolution approving a scheme of arrangement. The question of the validity of the meeting and special resolution approving the scheme of arrangement raises further considerations such as the fact of the approval of a scheme of arrangement and its attendant consequences, the manner in which the approval of a scheme of arrangement may be challenged, and the way meetings to consider schemes of arrangement should be convened.

The court emphasised that the only person with standing to bring an application for leave to apply to court for a review of a scheme of arrangement in terms of section 115 of the Companies Act is a registered shareholder of the company (and not a holder of beneficial interest in

shares) who has voted against a resolution approving the transaction at the relevant meeting. The court's decision provides clarity regarding the rights of beneficial holders of shares, including holders of a beneficial interest in dematerialised shares that are subject to rules of a central securities depository, in relation to shareholder approval of fundamental transactions in terms of section 115(2), as well as the remedy of court review of fundamental transactions in terms of section 115(3)(*b*).

With regard to the issue of intervention as applicants in terms of section 115(3)(*b*) of the Companies Act, the court took the view that the earlier decision of Sievers AJ in *Marble Head Investments* (*supra*) was clearly wrong. Instead, the court held that an application to seek relief in terms of section 115(3)(*b*) by a person who does not meet the qualifying criteria to bring such an application is a nullity and such application cannot be resuscitated by the intervention of a person who had the necessary standing but failed to institute the application before the expiry of his right to do so. This case note has argued that the approach adopted in *Sand Grove*, in this regard, is sound and is more likely to be followed by the courts in future than the approach adopted in *Marble Head Investments* (*supra*). As pointed out by the court, the approach in *Marble Head Investments* (*supra*) could, if followed, lead to irrational and untenable outcomes (par 41).

After assessing the issue of condonation of non-compliance with the statutorily prescribed time limit for the institution of proceedings in terms of section 115(3)(*b*), the court concluded that the position adopted in *Marble Head Investments* (*supra*) (that the court had the inherent power to condone such non-compliance) was incorrect. Instead, the court held that the 10-day time limit imposed in terms of section 115(3)(*b*) of the Companies Act constitutes an "expiry period" or "*vervaltermyn*" and the courts have "no inherent power to ameliorate the shutting out effect of such statutorily determined expiry periods". Giving the courts the unstated power to condone the lateness of an application by an aspirant intervenor would create uncertainty, rendering the provisions of section 115, in their current state, unworkable. Again, this case note has submitted that the position taken by the court in *Sand Grove*, in this regard, is sound but this is an issue that is yet to be clarified by the Supreme Court of Appeal or the Constitutional Court should an appropriate case reach these courts in future.

The court made it clear that, once approved, and if section 115(3)(*a*) and (5) of the Companies Act is not applicable, the scheme of arrangement "stands and must be treated as valid unless set aside by a court". It emphasised that the only way to challenge the approval of a scheme of arrangement is to seek court approval in terms of section 115(3)(*a*) or, alternatively, to seek court review of the transaction in terms of section 115(7). Therefore, a dissatisfied shareholder may not use a format to achieve a court review and setting-aside of a scheme of arrangement outside the carefully constructed limitations of section 115 of the Companies Act.

The court provided pertinent guidelines regarding the manner in which the scheme meeting should be convened, especially the circumstances in which a scheme of arrangement must be put to the holders of each affected class of securities for approval by a special resolution at separate meetings in

terms of section 115(2)(*a*) of the Companies Act. The court pointed out that the company (i.e., the directors) should determine the most appropriate way to comply with section 115(2). Where a proposed scheme affects the shareholders' rights differently, the directors should determine whether the company should hold separate scheme meetings. In this regard, the company must consider the similarity or dissimilarity of the shareholders' rights, similar to the approach adopted by the courts under section 311(1) of the 1973 Companies Act. Caution should be exercised in the classification of a proposed scheme as constituting more than one scheme of arrangement and the convening of multiple separate scheme meetings if the differences between the shareholders' affected rights are not sufficiently material, as this would lead to impracticalities. Finally, a dissenting shareholder who is dissatisfied with the company's determination, in this regard, may challenge the determination within the parameters of section 115, but only to the extent that the company's determination triggers any of the grounds for review of the transaction in terms of section 115(7).

It is submitted that the court's decision in *Sand Grove* regarding the issues discussed in this case note is aligned with the sound policy objectives of minimising the involvement of the court, reducing administrative burdens, promoting certainty and creating efficiency in schemes of arrangement. Even though the facts of *Sand Grove* relate to a scheme of arrangement, this case is relevant to the topic of fundamental transactions, as section 115 also applies to the other fundamental transactions (i.e., disposals of all or the greater part of a company's assets or undertaking, and amalgamations or mergers) in Chapter 5 of the Companies Act.

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IS THERE A PRESCRIBED LENGTH FOR A DECLARATION BY AN APPLICANT AND/OR A PLEA BY A RESPONDENT IN RULE 43(2) AND (3) APPLICATIONS?

> "While many rule 43 applications may not require more than a succinct set of affidavits to enable a court to make a proper determination that will serve the best interests of the child, in my respectful view, a one-size-fits-all approach to the sufficiency of evidence that should be placed before a court may in a given case have difficulty either in passing constitutional scrutiny or being capable of meeting the requirements that the outcome will serve the child's best interests." (Spilg J in *TS v TS* 2018 (3) SA 572 (GJ))

1 Introduction

This case note investigates the interpretation of Rule 43(2) and (3) of the Uniform Rules of Court. It determines whether there is a prescribed length for such applications and pleas under the Rules. It takes a historical perspective, tracing two contradictory views in case law and considers how the courts have interpreted these two views in their different judgments. Some courts have interpreted the Rules strictly; they have held that such applications and pleas should be brief, succinct and to the point. Others have disagreed with the strict interpretation and allowed prolixity. The input of the legal fraternity (the Cape Bar and the Law Society of South Africa) on the shortcomings of the Rules, and how they could be amended, is discussed. The ruling of the full bench of the Gauteng Local Division of the High Court has answered the question. It has held that there is no one-size-fits-all approach under the rule. Each case must be determined according to its own merits. Simple cases may be disposed of expeditiously, but complicated cases should not be struck off the roll because of prolixity.

A litigant in divorce proceedings can approach the court to grant a Rule 43 order in respect of interim maintenance for minor children as well as financial aid to assist the needy spouse to alleviate financial needs. A Rule 43 application was designed to provide divorcing parties with an inexpensive procedure to get interim relief in a divorce action. At its inception, the main purpose of Rule 43 applications was to provide for an inexpensive and expeditious way of dealing with maintenance of the indigent spouse and the children during the divorce process. As divorce actions take a long time to finalise, the interim order has significant consequences for the parties. It resolves issues of maintenance for the spouses and the children and the costs of the main divorce action.

The interpretation of Rule 43(2) and (3) has been a bone of contention among legal practitioners and the courts for the last five decades. Some courts have considered that the applicant's declaration and the respondent's

plea should be short, succinct and to the point – failing which, they should be thrown out of court. However, other courts have entertained lengthy declarations and pleas, as long as the information is relevant to the question before the court. Only recently, in 2019, was the question decisively answered by the full bench of the Gauteng High Court.

2 The Rule 43 provisions

Rule 43(1) and (2) provide that whenever a spouse seeks relief from the court in respect of one or more matters (such as maintenance *pendente lite*, a contribution towards the costs of a pending matrimonial action, and interim custody and access to a child), the applicant must deliver a sworn statement by way of a declaration, setting out the relief claimed and the grounds for it, together with a notice to the respondent (Rule 43(1)–(6)) of the Uniform Rules of Court: The Superior Courts Act 10 of 2013). The statement and the notice must be signed by the applicant or their attorney, must give an address for service within eight kilometres of the office of the registrar, and must be served by the sheriff. Rule 43(3) provides that the respondent must within 10 days of receiving the statement deliver a sworn reply in the form of a plea, signed and giving an address as aforesaid, in default of which they will *ipso facto* be barred. A court may hear such evidence as it considers necessary and may dismiss the application or make such an order as it thinks fit to ensure a just and expeditious decision (Rule 43(5)). A court may also, using the same procedure, vary its decision in the event of a material change in the circumstances of either party or child, or if the contribution towards costs proves inadequate (Rule 43(6)). Rule 43(2) and (3) do not prescribe the length of the declaration and the plea. Consequently, how long these documents should be, has been a bone of contention among legal practitioners and the courts.

Some courts have interpreted the provisions strictly by providing that the application and the plea should be succinct and to the point (*Colman v Colman* 1967 (1) SA 291 (C)). Others have adopted a relaxed approach allowing for prolixity, as long as the information in the declaration and plea is relevant to the issues before the court (*Boulle v Boulle* 1966 (1) SA 446 (D)).

3 Background to the two contradictory views

3 1 Cases that interpreted the Rules strictly

The view that a Rule 43(2) application should be concise, succinct and to the point was proclaimed 55 years ago by Judge Theron in *Colman v Colman* (*supra*). In this case, the applicant brought a Rule 43 application in which she sought custody of the three children of the marriage with reasonable access granted to the respondent; R40 maintenance per child per month; and a R100 contribution to her divorce action legal costs and the costs of the application. The judge observed that both parties had submitted voluminous affidavits contrary to the provisions of Rule 43(2) and (3), which provides that the applicant must submit a sworn statement in the form of a declaration, and the respondent must deliver a sworn reply in the nature of a plea. Judge Theron declared:

> "The whole spirit of Rule 43 seems to me to demand that there is to be only a very brief succinct statement by the applicant of the reasons why he or she is asking for the relief claimed and an equally succinct reply by the respondent, and that the court is then to do its best to arrive expeditiously at a decision as to what order should be made *pendente lite*." (*Colman v Colman supra,* per Theron J 292 A)

Accordingly, the judge ordered the respondent to pay the costs of the application. He instructed the taxing master to exclude the costs of all the irrelevant voluminous affidavits filed by the applicant and charge costs for the affidavits contemplated in Rule 43(2).

It is strange and inexplicable that *Colman* subsequently gained so much popularity and currency in the legal fraternity because it is a very short and unreasoned judgment. Interestingly, the judge did not discuss the voluminous documents he referred to in the judgment. He neither specified the number of pages of the applicant's application nor that of the respondent's plea. As a result, the extent of prolixity is uncertain. In other words, it is unclear what length the judge viewed as a voluminous declaration/plea. Judge Theron insisted that the documents should be "short, succinct and to the point". And yet, he did not elaborate on this. How many pages of a declaration/plea are acceptable in order to be succinct and to the point? Bear in mind that the rule, as indicated above, is silent on the required length of these documents. Judge Theron's interpretation is thus open to conjecture. It could thus be argued that in the judge's opinion, as this was an interlocutory application, the matter should be dealt with as expeditiously as possible. According to him, more detailed information should be reserved for the pending "main divorce action". It is equally intriguing that Theron J did not refer to *Boulle v Boulle*, a 1966 judgment of the Durban and Coast Local Division, which allowed for prolixity. (It would have been interesting to know why Theron J disagreed with *Boulle*, although he was not bound by the decision of a local division of another province.)

Five cases (discussed below) from diverse local and provincial divisions applied and followed Judge Theron's interpretation of the Rules (*Smit v Smit* 1978 (2) SA 720 (W)*; Visser v Visser* 1992 (4) SA 530 (SE); *Patmore v Patmore* 1997 (4) SA 785 (W); *Du Preez v Du Preez* 2009 (6) SA 28 (T); *Marr v Marr* [2016] ZAECGHC 140). However, none of these addressed the shortcomings of Judge Theron's judgment, as discussed above. None answered the following questions: Why must the application and the plea be short, succinct and to the point? What does the phrase "short, succinct and to the point" mean? How many pages should the application/plea be? None of these judgments referred to *Boulle*'s case.

In *Smit*, the applicant applied in terms of Rule 43(2) for an order for maintenance *pendente lite* and a contribution towards her legal costs. The founding affidavit with annexures was 24 pages long, and the replying affidavit with annexures was 45 pages long. King AJ remarked that the documents were voluminous and contained unnecessary detail, which was not needed for determining the application. The judge observed that over five pages of the applicant's affidavit dealt with the financial affairs of the parties and certain assets in the erstwhile joint estate in respect of which she contributed approximately R6 000. (Interestingly, and in contrast, in 2018,

Spilg J in *TS v TS* (supra) concluded that he needed more detailed information on the financial affairs of both parties and ordered them to furnish him with the requisite information (pp 602–603); this case is dealt with in more detail below. Furthermore, the judge pointed out the applicant provided unnecessary detail on matrimonial wrongs and disputes. According to the judge, arguments on the ownership of the car and correspondence between the applicant's attorney and herself were irrelevant. King AJ concluded that the affidavits filed by both parties amounted to an abuse of the court process. Consequently, in exercising the inherent jurisdiction of the court, he made no order on the application and its costs.

In *Visser v Visser* (*supra*), Kroon J held that a 34-page founding affidavit and a 100-page reply were voluminous. He noted that both affidavits could have been much shorter. He decried the tendency by some legal practitioners to disregard the provisions of Rule 43(2) and (3). He remarked that "there is a tendency for the provisions of rule 43 to be disregarded and for the applications and replies thereto to assume voluminous proportions" (*Visser v Visser supra* 531 D). He added that the practice had to be firmly discouraged. Accordingly, he concluded that the parties should not be saddled with the payment of the costs because they were not aware of the Rule 43 provisions – but their attorneys should be. He thus struck the matter off the roll and did not make a costs order. He further ordered that the attorneys not charge their clients any fees in respect of the application and the plea. Kroon J cited with approval the case of *Nienaber v Nienaber* (1980 (2) SA 803 (O)) where the respondent objected to the voluminous applicant's application. In *Nienaber*, the matter was struck off the roll and the applicant was ordered to pay the costs.

Epstein AJ discussed the disadvantages of prolix applications and replies in *Patmore v Patmore* (*supra*). He warned that in the Witwatersrand Local Division there were many Rule 43 applications every week. Lengthy affidavits containing unnecessary and irrelevant information were, first, a waste of the judge's time as they had to peruse them for hearing. Secondly, they resulted in unnecessary costs for the parties who could often ill afford them. He distinguished between matters that pertain to the Rule 43(2) and (3) applications and those pertaining to the main divorce action. He believed that some legal practitioners conflated and confused these two issues – hence the lengthy affidavits with unnecessary and irrelevant information. He reiterated that conflation of these issues tended to obstruct the expeditious resolution of these matters, which he considered should be decided speedily and inexpensively. In *Patmore*, the applicant's Rule 43 affidavit and supporting annexures were 47 pages long, and the respondent's opposing affidavit was 17 pages long. Epstein AJ held that the applicant's affidavit was an abuse of the court's process. He said that to prevent such abuse, which he had an inherent power to do, the application should be struck off the roll with costs. Interestingly, part of the "irrelevant" information that the applicant was chastised for was the declaration of her assets, income, and expenses. She also set out the respondent's financial position. However, as is discussed below, in *TS v TS* (*supra*), Judge Spilg demanded such detailed information from both parties in order for him to reach an equitable and well-informed decision.

In *Du Preez*, Murphy J was faced with two main issues: prolixity of the applicant's application and non-disclosure by the applicant of a material fact. The applicant requested R13 600 maintenance for herself and her three daughters pending the outcome of the divorce action. She also asked the respondent to pay the bond repayments, home insurance premiums, utility accounts, DSTV monthly instalments, R4 211 arrears in medical expenses, R44 229 for repairs to the common home, and R40 000 towards her legal costs. Her application was 139 pages long and the respondent's plea was 46 pages long. Murphy J applied and followed *Colman*, *Smit*, *Visser* and *Patmore* discussed above. He observed with dismay that the applicant's first application was dismissed because of prolixity. He also noted that the applicant had failed to disclose the R3 000 she received monthly from an investment, and she was thus guilty of a material non-disclosure to the court. The judge reiterated that as the applicant had failed to act in good faith, she had to be denied the relief she sought.

In *Marr*, the applicant made Rule 43(1) and 43(6) applications, which dealt, respectively, with interim access to children and the variation of the court's order in the event of a material change in the circumstances of either party or a child. Bloem J criticised the applicant's long affidavit and annexures, saying they were an abuse of the court's process. He ordered that the matter be struck off the roll, that the applicant pay the respondent's costs, and that the applicant's attorneys not charge her fees in respect of the application. In *Van Beest Van Andel v Van Beest Van Andel* (GJ 27869/2007) the respondent opposed the application on the basis of non-compliance with Rule 43(2), in that the founding affidavit was not a declaration. He complained that it was unnecessarily long and contained irrelevant facts and annexures. Surprisingly, the respondent also filed a voluminous answering affidavit and counter-application. According to Judge Tsoka, both the applicant's application and the respondent's reply did not comply strictly with Rule 43(2) and (3). Consequently, he dismissed both the application and the counter-application.

Different courts have penalised prolix applications in various ways. They have either struck the application off the roll, penalised the prolix party, penalised the applicant's or respondent's attorney, or not made a costs order.

3 2 Penalties for prolixity

How did the courts deal with prolix applications and pleas in the cases discussed above? Different courts and judges penalised prolix applications in different ways. For instance, in *Nienaber*, the matter was struck off the roll because of its length and the applicant was ordered to pay the costs. So was the case in *Patmore*, but the court took the matter a step further by penalising the applicant's attorney. It ordered that the applicant's attorney not claim any costs in respect of the drafting and preparation of the application. Furthermore, the court ordered that such costs only be taxed after the final conclusion of the divorce proceedings. In *Du Preez*, the matter was also struck off the roll and the court ordered that neither of the parties be charged by their attorneys in respect of the application and the opposing affidavits. In *Marr*, the matter was struck off the roll and the applicant was

ordered to pay the respondent's costs. The court also penalised the applicant's attorneys by ordering them not to charge her any fees in respect of the application.

Some courts penalised the prolix party, as in *Colman* where the respondent was absolved from paying the costs of the applicant's voluminous affidavit. The court reiterated that the respondent had to pay the costs of the applicant's affidavit as Rule 43(2) contemplated that there had to be a concise and succinct application. The difficulty with this order is that the judge does not discuss or describe what he means by this. In terms of costs, one wonders how the taxing master addressed and determined this problem. In *Smit*, King J made no costs order, as was the case in *Visser*. Some courts allowed prolixity as long as the information was relevant. Interestingly, during the same period in which these five cases were decided, other local and provincial judgments disagreed and allowed prolixity.

3 3 The cases that allowed prolixity

Not all courts followed *Colman's* strict interpretation of the rule. Seven cases discussed below allowed voluminous applications and pleas. Five were local or provincial decisions, one was a High Court single-judge judgment, and the seventh which finally declared the correct position of the law in this debate was the full bench of the Gauteng High Court.

In *Boulle v Boulle* (*supra*), the wife brought a Rule 43(2) application against her husband for custody and maintenance of their two children, and a contribution to the costs of the pending action for the restitution of conjugal rights, failing which divorce on the grounds of constructive desertion. She provided detailed information on her earnings and that of her daughter, and how the money was spent. She declared the respondent's salary and his regular expenditure known to her. Lastly, she gave details of the respondent's constructive desertion. The respondent took a point in *limine* that the applicant's statement did not comply with Rule 43(2) in that it was not a statement in the nature of a declaration – as it set out a great deal of detail. He said that the provisions of Rule 43(2) requiring that the applicant's statement be by nature of a declaration were peremptory. He also argued that non-compliance with the terms of the rule nullified the proceedings. Milne JP was not persuaded that the Rule 43(2) provisions were peremptory. He said that the rule expected the application to be concise. However, in this case, it appeared that it was desirable that some detail be given to enable the court to deal with the application without recourse to oral evidence. The judge agreed with the applicant that the details of the constructive desertion and of the applicant's household expenditure were necessary. He concluded that "it seems to me that the particulars which have been given by the applicant in her statement, though they have to some extent been set out with undue prolixity, comply essentially with the intention of the rule" (*Boulle v Boulle supra* 450 C). The objection *in limine* was overruled.

In *Williams v Williams* (1971 (2) SA 620 (O)), the issue before the court was whether annexures to the applying or answering affidavits were allowed. The applicant's counsel objected to the respondent's voluminous answering affidavit with annexures. Erasmus J noted that annexures to a plea under

Rule 43(3) were not forbidden. He stated that the annexures were necessary as the information they provided was relevant to the allegations made by the applicant. Furthermore, the judge averred, the annexures explained and supported the respondent's denial of abusive language towards the applicant. Consequently, the judge concluded that the annexures were neither irregular nor prejudicial to the applicant. In *Zoutendijk v Zoutendijk* (1975 (3) SA 490 (T)), the applicant applied for an order granting her interim custody or daily access to the two children *pendente lite*, maintenance for the children and herself, and a contribution to her legal costs. The applicant's sworn statement was 27 pages long and the respondent's answering affidavit was 90 pages long. The applicant applied in terms of Rule 30 to have the document struck out as it did not comply with the provisions of Rule 43(3), and for leave to amplify her original affidavit by including matters that had subsequently occurred. The court allowed the applicant's 27-page statement because she had to respond to the allegations refusing her access to the children save under supervision of the mother-in-law. The court observed that the allegations were very serious. The applicant also had to set out in some detail the conduct of the respondent as she relied on this as grounds for condonation by the court of her own admitted adultery. Nicholas J conceded that the applicant's affidavit was prolix and repetitious (*Zoutendijk v Zoutendijk supra* 492 H), but it did not offend against the letter or the spirit of Rule 43(2). However, he retorted that it did not justify the respondent's 90-page affidavit and granted the order to strike it out.

Dodo v Dodo (1990 (2) SA 77 (W)) was an acrimonious, protracted divorce that spanned four years. The delay was caused partly by accusations of infidelity and dishonesty that the parties traded against each other. The applicant sought an increase in maintenance and a contribution to her legal costs, respectively, because of her changed circumstances (Rule 43(5)): she had lost her job. Accordingly, she claimed an increase in maintenance from R600 per month in terms of the existing order, to R2 300 per month. Secondly, she asked for a contribution to her legal costs in the sum of R62 663, over and above the sum of R1 400 that the court had ordered. She noted that when the court made the previous orders, it took cognisance of the fact that she was employed at the time.

On the issue of prolixity, Wulfsohn AJ agreed with the general rule laid down by Judge Theron in *Colman*. However, he believed that the general rule was not applicable to all Rule 43 cases. He observed that there were special circumstances in the case that warranted a departure from the general rule. These were the fact that the applicant had to explain how she lost her job and why she could not find another one. She had to defend the charge of infidelity levelled against her by the respondent. She had also attached a draft bill of the costs she claimed – hence, the acceptance of a 21-page affidavit by the judge. The respondent was vehemently against the applicant's application. He blamed her for the loss of her job and asserted that she could find another job if she looked seriously enough. He claimed that she forfeited her right to increased maintenance because of her infidelity. On the increased legal costs, the respondent alleged that the application was premature as the applicant could only apply for a contribution at the start of the trial. Furthermore, he retorted, the claim was

excessive and outrageous. Finally, the respondent asserted that certain items of the draft bill should not have been included and others could be reduced.

The court upheld the applicant's request and agreed that her circumstances had changed. She had lost her job through no fault of hers and was entitled to the increased maintenance. The court noted that it would not, as a general rule, order arrears maintenance. However, it observed, in the circumstances it was necessary to make a retrospective order from the time the applicant lost her job. On the question of a contribution to her legal costs, the court noted that the respondent was a very wealthy man litigating at a luxurious scale. In this regard, he had made a deposit of R100 000 with his attorneys for his disbursements. In the same vein, the court observed, the applicant had to be put in a position to present her case adequately before the court. Accordingly, the court concluded that the applicant's claim of R62 663 for costs was not excessive and awarded her R58 000. It found that the respondent's allegation of his wife's infidelity was based on hearsay and dismissed it.

The question of prolixity occurred again in *W v W* ([2014] ZAGPPHC 765). The applicant made a Rule 43 application of 67 pages, an affidavit of 7 pages and 60 pages of annexures. The respondent opposed the application vehemently on the ground that it did not comply with Rule 43(2) and should be dismissed with costs. The applicant's attorney averred that the annexures were necessary to prove the allegations made in the founding affidavit. He also argued that since the applicant was not allowed to file a replying affidavit, she had to put all the information before the court. Kubushi J held that the annexures were necessary to found the applicant's case and were therefore not prolix. However, he did not discuss the content and relevance of the annexures in detail. Consequently, it is unclear why 60 pages was not prolix in this case. If the case was as simple and straightforward as the judge claimed, why was the applicant's application so long? Regrettably, the judge did not cite or discuss a single case in support of his judgment. The points raised by the respondent *in limine* were dismissed. He was ordered to maintain the applicant and to contribute R10 000 to her legal costs in the main divorce action.

In *TS v TS* (*supra*), Spilg J held that it was necessary for a proper determination of a Rule 43 application for a party to make a full and frank disclosure of their financial affairs, thus permitting longer affidavits. He held that without proper financial disclosure the court had little to work on other than the product of competing typewriters. He ordered both parties to submit detailed affidavits on their income and expenditure (*TS v TS supra* 602–603). Earlier, in 2007, Judge Tsoka had, in the same court, interpreted the same rule strictly; he followed *Colman* as discussed above (*Van Beest Van Andel v Van Beest Van Andel* (*C–D*). In 2019, Van Vuuren AJ was confronted with the same problem – the interpretation of Rule 43(2) and (3). Frustrated by these two diametrically opposed views of the same court on the interpretation of these rules, he discontinued the applications and referred them to the full bench of the Gauteng Local Division of the High Court for consideration and determination (*E v E*; *R v R*; *M v M* 2019 (5) SA 566 (GJ); Maresa "A New Future for Family Law: Significant Changes for r43 Applications" 2019 *De Rebus DR* 10).

All three applications were brought in terms of Rule 43(2) of the Rules of the High Court. The applicants sought relief during their divorce proceedings for interim maintenance, custody of children and a contribution to their legal costs pending the finalisation of their divorce actions. In *E v E*, the applicant sought an order *pendente lite* that the respondent pay her interim spousal maintenance and a contribution to legal costs. The applicant's founding papers comprised 86 pages, 34 of which were sworn statements. The respondent's answering affidavit was 109 pages long, plus 48 pages of annexures. In *R v R*, the applicant's sworn statement comprised 19 pages and 32 pages of annexures. The respondent's answering affidavit with annexures comprised 31 pages. The respondent raised a point *in limine* that the applicant's papers were prolix and not compliant with the requirements of Rule 43(2). In *M v M*, the applicant sought an order for maintenance *pendente lite* for their minor child and a contribution to her legal costs. The applicant's sworn statement was concise. However, she attached to it a copy of the particulars of claim in the divorce action and other annexures. The respondent filed a succinct response of 10 pages and 70 pages of annexures. Van Vuuren AJ believed that the parties had departed from, respectively, delivering a statement in the nature of a declaration and a reply in the nature of a plea, having regard to Rule 43(2) and (3) – hence his referral of the three applications to the full bench of the High Court.

The issues for determination for the referral court were threefold. First, while Rule 43 applications require the submission of succinct sets of papers, does the court have the discretion to permit the filing of applications that have departed from the strict provisions of Rule 43(2) and (3)? Secondly, if the court does not have such a discretion, should the Practice Manual direct that all Rule 43 applications conform to a specific form, particularly in terms of length, and would imposition of a restriction on the length of Rule 43 applications withstand constitutional muster? Thirdly, if the court has such a discretion, what are the factors to consider in order for it to exercise its discretion reasonably and are these factors exhaustive (*E v E supra* 570 A–C)?

On the first question, all the parties agreed that the court did not have such discretion unless it decides to call for further evidence in terms of Rule 43(6). The parties believed that there should be no limitation to the number of pages filed as long as what is contained in the affidavits and the annexures is relevant and admissible as evidence. The Gauteng Family Law Forum, which was admitted as a friend of the court, submitted that the above questions should be determined bearing in mind the constitutional considerations in respect of the right to a fair hearing as entrenched in section 34 of the Constitution (*E v E supra* 576; The Constitution of the Republic of South Africa, 1996 (the Constitution)).

On the second question, the parties concurred that it was constitutionally imperative and practically necessary to amend the Practice Manual, so as to permit Rule 43 applications to be filed without restrictions. They opined that such an allowance would not only promote fairness and transparency between the litigants but would also promote and protect the best interests of children. They proposed that a party who abuses the court process by filing irrelevant information should be mulcted with costs. On the third question, the parties conceded that the court has a discretion under Rule

43(6) to call for more evidence in spite of the limitations of Rule 43(2) and (3). They pointed out that the current problem with Rule 43(2) and (3) was that the respondent often raises a new issue that the applicant is unable to respond to because of the restrictions in the Rules: the applicant has no right of reply. In order to obviate this problem, the parties suggested that the Rules should be amended to allow for an automatic right of reply by the applicant. They noted that a further restriction to the Rules is the fact that an order made under them is not appealable, a point confirmed by the Constitutional Court in *S v S* (2019 (6) SA 1 (CC), discussed in more detail below).

The court ordered that a judge hearing a Rule 43 application must request both parties to furnish supplementary affidavits making a full and frank disclosure of their financial and other relevant circumstances to the court and the other party; that the affidavits should be accompanied by a financial disclosure form, which should be filed seven days before the date of hearing; and that the affidavits should contain averments relevant to the issues for consideration. The court held that it must not be competent for a court to dismiss an application on the grounds of prolixity alone. Should a court be presented with lengthy and irrelevant information, it has the right to strike off the irrelevant and inadmissible material from the affidavit in question and to make an appropriate costs order. The Judge President was asked to amend the Practice Directive to give effect to the court's judgment.

This landmark judgment settled the debate on prolixity. It confirmed and endorsed the notion that there was no one-size-fits-all approach in Rule 43 applications. A simple case may be decided on short, succinct papers. However, a more complex case should not be struck off the roll just because of its prolixity. Under such circumstances, the judge should determine the relevance of the information presented. Each case should be dealt with according to its merits. A judge may not strike off voluminous applications willy-nilly. They need to decide on the relevance of the information presented. Much also depends on how complex a case is. The court was also guided by the socio-economic and legal developments that have taken place since the judgment in *Colman*.

4 Legal developments since 1967

Much has changed since Judge Theron declared the rule in *Colman* that a Rule 43 application should be concise, succinct and to the point. Several laws that have a bearing on Rule 43 applications have been promulgated. The Divorce Act 70 of 1979 introduced a fundamental change in divorce law; it introduced the irretrievable breakdown of marriage principle. It also retained the application of Rule 43 to divorce proceedings (Barnard *The New Divorce Law* (1979) 96–97). The Maintenance Act 99 of 1998, promulgated in 1998, endorsed the common-law reciprocal duty of maintenance between the spouses, as well as the children's right to maintenance by both parents. It also preserved the Rule 43 applications (Van Zyl *Handbook of the South African Law of Maintenance* (2010) 53–54). 1996 ushered in a new political dispensation; South Africa became a constitutional democracy with the Constitution as the country's supreme law, which accentuates the common-law principle of the best interests of the child in dealing with matters

pertaining to children (Spilg J in *TS v TS* 595 E–F). The courts have always respected the best interests of the child in the exercise of their common-law powers and duties as the upper guardian of children. The protection of children's rights is declared in section 28 of the Constitution and is adopted in the Children's Act 38 of 2005. As a broad statement, the Children's Act is intended to give effect, *inter alia*, to the constitutional rights of children to family and parental care (Spilg J in *TS v TS* 595 G–H*)*. The Children's Act endorses the common-law principle that the best interests of a child are "of paramount importance in *every matter* concerning the child" and its general purpose is to "promote the protection, development and well-being of children". Section 6(2) of the Children's Act directs that in all proceedings, actions or decisions in a matter concerning a child, the courts must respect, protect, promote and fulfil the child's rights set out in the Bill of Rights, the best interests of the child standard set out in section 7, and the rights and principles set out in the Act subject to any lawful limitations. Section 34 of the Constitution provides for a right to a fair hearing for everyone. This means levelling the litigation ground for both wife and husband in Rule 43 applications and pleas.

5 Contribution of the legal fraternity to the debate on the relevance of the rule

In February 2010, the Cape Bar Council (CBC) wrote a letter to the chairman of the General Council of the Bar of South Africa (GCBSA) recommending that the Rules Board for the courts of law (RBC) abolish Rule 58(7) and (8) of the magistrates' courts costs structure entirely, and that the Rules be amended to make provision for a realistic costs structure. Submissions on behalf of a number of counsel from the Cape Bar (CB) to the General Council of Bar's Rule Committee (GCBRC) in respect of Uniform Rule 43(7) were made. The second submission, entitled "Proposed Amendments to Rule 43 of the Uniform Rules of Court", was by Adv J Anderson (CB Adv. Anderson). The Law Society of South Africa (LSSA) also commented on Uniform Rule 43(7) and (8) and on the magistrates' courts Rule 58(7) and (8) on tariff provisions ("Comments by the Law Society of South Africa on Uniform Rule 43(7) and (8) and Magistrates' courts Rule 58(7) and (8): Tariff Provisions"). These inputs contributed to the debate on the amendment of the High Court Rule 43(7) and (8) and the magistrates' court Rule 58(7) and (8), respectively. These sections deal with the prescribed costs for Rule 43 and 58 applications. Rule 43(7) and (8) was criticised by the legal profession for the low tariff, which was out of sync with the workload involved. Although the Cape Bar and the LSSA made separate submissions, they agreed on the current shortcomings of the Rules and how they could be amended. In order to avoid repetition, their contributions and suggestions are discussed together. They deplored the current prescribed costs, which were disproportionately low compared to the amount of work to be done in Rule 43 and 58 applications (CB Adv. Anderson par 18). Their presentation dealt in detail with the problem of costs under the Rules and only peripherally with substantive matters. At a substantive level, they suggested several changes to Rule 43 applications. They observed that whereas Rule 43 applications were heard timeously and expeditiously in the past, currently there was a delay of at least two years between the date the application is determined

and the actual divorce action (CB Adv. Anderson par 3). They further noted that in most divorce actions the Rule 43 application had become the most significant interlocutory application, fulfilling a strategic role, and often set the tone for the divorce action (CB Adv. Anderson par 6). They observed it was likely to be the only contested hearing during the divorce. Consequently, they affirmed, a Rule 43 order may in practice harden into an order with a final effect, with potentially inequitable results. A Rule 43 order usually dealt with matters of crucial importance that were in dispute between the litigants pertaining to maintenance of one of the spouses and the children, and care and contact arrangements for minor children (CB Adv. Anderson par 4).

Furthermore, the CB and LSSA commented that Rule 43 applications are usually fraught with factual disputes that are difficult to resolve on paper (CB Adv. Anderson par 6). Often, financial issues are problematic between the parties in such applications. Most of the time, litigants' financial versions are diametrically opposed and yet judges are expected to decide on these opposed versions on paper. While some estates are small and simple, others are massive and complex. As a result, the court often has to grapple with complex financial structures intertwined with family trusts (*RP v DP* 2014 (6) SA 243 (ECP)) or other business ventures in the country or offshore (CB Adv. Anderson par 6). In *RP v DP* (*supra*), the applicant wife claimed that her husband had hidden some of his assets in a family trust he had created. She wanted the court to include the trust assets in his estate, and the value of the assets of the trust established during the subsistence of the marriage to be taken into account in determining his accrual. The husband had abused the trust form to acquire personal wealth and had failed to keep the trust assets separate from his personal estate. Over the years, the net trust assets had grown compared to his personal estate, which had not shown any substantial growth. The court agreed with the applicant and took the value of the assets in the trust as the assets in the personal estate of the respondent.

According to the current procedure, there is no right to reply nor an automatic right to lead oral evidence nor a right to subpoena (CB Adv. Anderson par 6). The LSSA further noted that the applicant is not allowed to reply to the respondent's plea. Under the present procedure, neither litigant is able to challenge any material non-disclosure or misstatement of facts. The CB suggested that there should be a way of exposing such misstatements. In *Du Preez*, where the applicant failed to disclose R3 000 she received from an investment, the court penalised her for the non-disclosure. She was denied the relief she sought as she had acted in bad faith. In *MTC v CMC* (Case No 5430/2020 (C)), the applicant husband sought maintenance of R55 670 *pendente lite* and a contribution of R75 600 to his legal costs. However, it emerged that he had failed to disclose his real monthly income. The court noted that there was a scarcity of information regarding his financial circumstances. Moreover, he had made gross misrepresentations, misstatements and material non-disclosure that skewed the facts. He had also failed to acknowledge his wife's chronic illness. Consequently, his claims for maintenance and legal costs failed because of his gross non-disclosure. In contrast, in *TS v TS*, where both parties were guilty of non-disclosure, Judge Spilg ordered them to fill in detailed

disclosure forms declaring the assets and liabilities they had not divulged in the papers before the court (*TS v TS* 602–603).

The attorneys and counsel further indicated that an order in a Rule 43 application is not appealable (LSSA par 2.5; CB Adv. Anderson par 9). The practical effect is that maintenance orders and care and contact orders in respect of the children and contributions towards costs of such applications are determined once prior to the divorce action (LSSA par 2.5). The Constitutional Court confirmed and endorsed the non-appealability of the rule in *S v S* (*supra* para 46) per Mogoeng CJ, Cameron J, Froneman J, Jafta J, Khampepe J, Ledwaba AJ, Madlanga J, Mhlantla J, Nicholls AJ and Theron J; see Ampofu-Anti "Constitutional Court Rules that Interim Divorce Orders May Not Be Appealed" (20 August 2019) http://www.groundup.org.za/article/constitutional-court-rules-interim-divorce-orders-may-not-be-appealed/ (accessed 2022-05-21)). In this case, the court denied Mr S the right to appeal a maintenance order on the ground that the Rule 43 applications were expeditious and unappealable. It went on to explain that the rationale for the non-appealability of the application was to prevent delays and to curtail costs. The court reiterated that to allow an appeal process would contradict the objective of the Rule 43 order (*S v S supra* 17C).

The last point raised by the attorneys and counsel was that a Rule 43 order may be varied only in the event of a material change in the circumstance of either party or a child (CB Adv. Anderson par 15; Rule 43(6); see *Dodo supra* discussed above). A case in point is that of *TS v TS*, where the applicant indicated that her circumstances had changed, and she wished to submit a third set of affidavits to prove it. She declared that her monthly income from one of the businesses had dried up owing to the respondent's foul play. As a result, she needed more maintenance from the respondent. The court believed her story about her changed circumstances and allowed her to file a third set of affidavits detailing the change (*TS v TS supra* 602–603).

The LSSA's focus was on the amount of work involved in the preparation of these applications which was not commensurate with the prescribed fees. Part of the reason they put in so much work, they asserted, was because Rule 43 applications can settle the whole divorce and often do so. Though interlocutory in nature, some of the Rule 43 applications are contentious and complex. The nature of some of the applications means a lot of work for the legal practitioners. The attorneys said they have to ensure there is a succinct reference to pleadings and to the relevant legislation: the Divorce Act 70 of 1979, the Maintenance Act 99 of 1998, the Constitution, the Children's Act 38 of 2005 (LSSA par 2.2.2), international law and protocols where a case involves another jurisdiction or assets stashed in a foreign country, and judgments of local and foreign courts.

In their preparation for these applications, the attorneys confirmed that they have to balance the need to be short and to the point, as required in *Colman supra,* while capturing factual allegations on a wide array of matters that may affect maintenance *pendente lite*, interim custody, and access (LSSA par 3.1.2). They usually take a number of consultations with clients to complete the application fully. Their clients need to complete a schedule of

expenses, which they are often not properly equipped to do and they need assistance and guidance. (For a detailed Financial Disclosure Form, see *E v E supra* 578–597. The form is 20 pages long. The first three pages capture the personal information of the parties and their attorney. The financial details of the parties are dealt with on pages 3–14.) They have to peruse and analyse documents, draft affidavits, annexures and schedules. They also spend much time trying to settle the matter out of court. In practice, an application is only argued in court when settlement fails, and yet, they retorted, if settlement fails, the negotiations to settle and the attendant costs cannot be charged.

In conclusion, counsel and attorneys recommended that: a Rule 43 application should be maintained; an opposing affidavit should be filed within 10 days of service of such an application; a replying affidavit to the opposing affidavit should be filed within five days of receipt of the opposing affidavit (CB Adv. Anderson par 8); the parties should be able to set the matter down for hearing in the third division of the High Court on 10 days' notice to the other party; the existing rules and case law should apply to the scope and format of these applications (CB Adv. Anderson par 9); and the court should have the ability, at its own discretion, to request further documentary information and/or affidavits to clarify issues should it wish to do so. The last three recommendations are new and in addition to the current rules. The LSSA supported the Cape Law Society's recommendations that the ordinary tariff should apply to these applications and that the costs should not be limited. They also agreed that the procedure should be amended to cater for the ordinary, fast-paced procedure of filing papers in opposed applications (LSSA par 3.2).

The LSSA also agreed that Rule 43 applications have become complex, which suggests that there is no one-size-fits-all solution for these cases. They conceded that Rule 43(3) should be amended to allow for a reply to the respondent's plea. The complexity of some of the cases flew in the face of the restricted interpretation of Rule 43 applications. Although their submissions were not directed at prolixity, by implication it can be inferred that given the complexity of some of the cases, it would be hard to stick to the strict interpretation of the rule as in *Colman*. The LSSA advocated a change of the Rules to allow the courts to have more information before they can decide on the complex cases – in other words, allow prolixity as long as the information is relevant.

Judge Spilg disagreed with the LSSA's suggestion that the Rules should be amended to allow the applicant a right to reply to the respondent's plea. He believed that the amendment would be superfluous as Rule 43(5) already allows the court to ask for more information from either party should the need arise. This is what he did in *TS v TS*, discussed above; he asked both parties to supply him with more information on their financial statements. Consequently, he did not see the need for the amendment.

The Rule 43 applications are not appealable. Consequently, the outcome of the interim proceedings is generally final, pending the finalisation of the divorce proceedings. This was the case in *S v S* where Mr S instituted an application to be awarded an interim care and custody order of the children in terms of Rule 43, pending the outcome of the divorce. At the hearing,

Ms S was granted maintenance. Mr S wanted to appeal the maintenance order granted by the High Court but was precluded from doing so by section 16(3) of the Superior Courts Act 10 of 2013, which prohibits an appeal against Rule 43 orders (*S v S* par 46). Disgruntled by this provision, Mr S retorted that the blanket prohibition infringed both the rights of the children in terms of section 28(2), and his right to equality in terms of section 9 of the Constitution, respectively. He went on to say that by prohibiting appeals there was a clear and distinct differentiation between the litigants in Rule 43 proceedings, and all other litigants who are afforded the right to appeal. Furthermore, he asserted, the differentiation was irrational and was a violation of his constitutional right to equality and to access the courts in terms of section 34 of the Constitution, and this was especially so because the outcome of the interim proceedings was generally final pending the finalisation of the divorce proceedings.

The judge said the question was whether by denying disgruntled Rule 43 litigants the right to appeal, section 16(3) had a rational connection to a legitimate statutory purpose. He went on to declare that the purpose of Rule 43 was to provide a speedy and inexpensive remedy, primarily for women and children. The rationale for the non-appealability was to prevent delays and curtail costs. To allow an appeal process would contradict the objective of Rule 43 orders. The statutory differentiation between those litigants who can appeal and those who are precluded from doing so by section 16(3) clearly bore a rational connection to a legitimate government purpose. Moreover, the judge concluded, there was no differentiation between the individual litigants in a Rule 43 dispute as they both bore the same encumbrance. Thus, the equality challenge could not stand.

On the issue of the encroachment of Mr S's right to access the court enshrined in section 34 of the Constitution, the court said not all litigants have the right to appeal. It was not in the interests of justice to appeal an interim order because such an appeal would defeat the interim nature of the order. The question was whether the denial of appeal processes in terms of section 16(3) passed constitutional muster. Under these circumstances, the judge concluded, it must be answered in the positive.

6 Conclusion

The case note examined in detail the provisions of Rule 43(2) and (3) and pointed out that the rule does not specify how long an application or a plea should be. It investigated how the courts have interpreted them. It discussed the two dominant views espoused in case law: one that the application should be short and succinct; and the other that lengthy and voluminous applications and pleas should be allowed. It discussed the landmark case of *E v E*, which quelled the debate and settled the law. It held that each case must be treated according to its own merits. Simple and straightforward cases can be dealt with expeditiously and swiftly. However, complex cases should be treated differently. Under such circumstances, prolixity is allowed, and the applicant should not be penalised for a prolix application.

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