OBITER

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

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

ISSN 1682-5853

O B I T E R

2023 Vol 44 3

O B I T E R
2023 Vol 44 3

REGISTRATION OF CUSTOMARY MARRIAGES IN SOUTH AFRICA: A CASE FOR MANDATORY REGISTRATION*

Siyabonga Sibisi
LLB LLM
Senior Lecturer, University of KwaZulu-Natal
Howard College Campus
Attorney of the High Court of South Africa
PhD Candidate, University of KwaZulu-Natal

SUMMARY

Despite the enactment of the Recognition of Customary Marriages Act 120 of 1998 (the Recognition Act), many customary marriages remain unregistered. There are many reasons for non-registration. Since marriage certificates are associated with spousal benefits, people who do not expect such spousal benefits have no reason to register their marriage. These include the elderly and the widowed. The registration process is another reason for non-registration. Nevertheless, the difficulties that arise when a spouse does not have a registration certificate cannot be sustained. This article is motivation for mandatory registration of customary marriages. It briefly discusses the history of registration of customary marriages. It also studies the provisions of the Recognition Act in this regard. The difficulties that arise in the absence of a marriage certificate are also discussed. It recommends the use of traditional leaders, who receive a state salary, to facilitate the instantaneous registration of customary marriages. The benefits of involving traditional leaders are also discussed.

1 INTRODUCTION

The countless number of cases involving unregistered customary marriages that continue to land before our courts bears testimony to the need for something to be done about the registration of customary marriages in South Africa.[1] Although these unregistered marriages are valid[2] (provided that they

* The author is indebted to the comments and suggestions made by the anonymous reviewers. Any shortcomings in this article remain those of the author.

1 Kovacs, Ndashe and Williams ("Twelve Years Later: How the Recognition of Customary Marriages Act of 1998 is Failing Women in South Africa" 2013 *Acta Juridica* 273 275) submit that, as at 2008, only 10 per cent of marriages were registered in the year in which they were entered into. A decade later, the 2019 statistics show that only 2 789 customary marriages were registered for this year. See May and Mudarikwa "Why Customary Marriage Registration Matters in South Africa" (30 August 2021) https://mg.co.za/opinion/2021-08-30-

were entered into in accordance with customary law or recognised as such under customary law), without a certificate of registration, parties to such marriages are in a similar or worse-off position compared to those who have never married.[3] They are also worse off compared to their civil-law counterparts who possess a marriage certificate.[4] It must be added that it is mostly women who find themselves in desperate need to prove their marriages in order to gain access to some spousal benefits or remedies.[5] These benefits include pension funds, spousal maintenance and intestate succession benefits.[6] Institutions like government departments, the Master's Office and other private institutions require a marriage certificate for these benefits to be conferred.[7]

Because of the support that civil marriages receive from the State, civil marriages are registered instantly or within a reasonable time after solemnisation.[8] The duty to oversee the registration of civil marriages rests with officials who solemnise these marriages.[9] In turn, a party to a civil marriage has a certificate readily available and this gives them a head start in accessing any spousal benefits they may wish to access. On the other hand, parties to customary marriages do not enjoy a similar head start. They have personally to oversee the registration process.[10] It is submitted that, because of this, many customary marriages remain unregistered.[11] In turn, it is more common than not for parties to customary marriages not to have a certificate readily available to prove the existence of their customary marriage. Logically, this inhibits quick access to some benefits that come with being married.[12] Besides lack of access to spousal benefits, some of the consequences of being a party to an unregistered marriage may erode a person's dignity.[13] The author is aware of this through the experience of his late great-grandmother. Despite having an identity document bearing her marital surname, when she passed on in 2020 after nearly 75 years of

why-customary-marriage-registration-matters-in-south-africa/ (accessed 2022-06-08). Another reason for the low number of registered customary marriages is dual marriages, in which case only the civil marriage is usually registered. Regardless of this issue, the number of registered customary marriages is too low.

2 See *Kambule v The Master* 2007 (3) SA 403 (E) 409–410.

3 *Mgenge v Mokoena* (GJ) (unreported) 2021-04-21 Case no 4888/2020 par 12.

4 *Ibid.*

5 Kohn "*Ramuhovhi v President of the Republic of South Africa:* A Bittersweet Victory for Women in Old Polygamous Customary Marriages" 2017 *SAJHR* 120 129 and Osman "Comment on the Single Marriage Statute: Implications for Customary Marriages, Polygynous Marriages and Life Partnerships" 2021 *PELJ* 1 12.

6 De Sousa "When Non-Registration Becomes Non-Recognition: Examining the Law and Practice of Customary Marriage Registration in South Africa" 2013 *Acta Juridica* 239 244.

7 Rautenbach *Introduction to Legal Pluralism in South Africa* 5ed (2018) 95.

8 For instance, in terms of s 2(1) of the Marriage Act 25 of 1961, every magistrate or additional magistrate is a marriage officer. In addition, some ministers of religion are recognised as marriage officers for civil marriages. See s 7 of the Marriage Act.

9 Simons "Customary Unions in a Changing Society" 1958 *Acta Juridica* 320 324.

10 De Sousa 2013 *Acta Juridica* 244.

11 Kovacs *et al* 2013 *Acta Juridica* 275.

12 De Sousa 2013 *Acta Juridica* 244.

13 In *MG v BM* 2012 (2) SA 253 (GSJ) par 10, Moshidi J points out that some of the reasons for the almost non-existent registration of customary marriages were owing to negative attitudes towards customary law.

marriage (solemnised as both church and customary weddings), her death certificate indicated "never married".

This article aims to make a case in favour of the compulsory registration of customary marriages. It starts with a discussion of a historical overview of the registration of customary marriages in South Africa. This overview aims to assist with understanding the current jurisprudence relating to the registration of customary marriages. It then critically discusses the provision in the Recognition of Customary Marriages Act[14] (Recognition Act) relating to the registration of customary marriages. The causes of non-registration are also discussed, as are the problems that arise when a marriage is unregistered These problems are substantiated with a discussion of cases that have dealt with these problems. Following these discussions, a case for mandatory registration of customary marriages is made. The challenge of old customary marriages that remain unregistered is also addressed. The article concludes by recommending that the registration of customary marriages be made mandatory, and that the registration process should be enhanced through the use of traditional leaders and other designated persons as envisaged by the regulations in terms of the Recognition Act.

2 A BRIEF HISTORICAL OVERVIEW OF THE REGISTRATION OF CUSTOMARY MARRIAGES IN SOUTH AFRICA

The history of customary law lies in orality.[15] Rules have been passed down from generation to generation through storytelling since time immemorial.[16] A customary law rule or practice drew its validity from communal acceptance and general observance and not necessarily from being written down.[17] As such, marriages drew their validity from being entered into or celebrated in the open with the knowledge of the community.[18] The only known spousal benefits were those derived from customary law, being the only system of law at the time. Since the community knew about the marriages, spousal benefits were not difficult to access; although some women had to accept accessing benefits through a male relative.[19] These benefits included accessing land for residential and agricultural purposes, cattle and other livestock.[20]

Up until the year 2000, customary marriages were not fully recognised. Although they were generally frowned upon, in Natal there was some degree of tolerance.[21] In the Cape, there was a lack of tolerance.[22] The primary

---

14 120 of 1998.

15 Rautenbach "Oral Law in Litigation in South Africa: An Evidential Nightmare?" 2017 *PELJ* 1.

16 Dlamini "The Role of Customary Law in Meeting Social Needs" 1991 *Acta Juridica* 71 72.

17 Dlamini 1991 *Acta Juridica* 72.

18 Maithufi and Moloi "The Need for the Protection of Rights of Partners to Invalid Marital Relationships: A Revisit of the Discarded Spouse Debate" 2005 38(1) *De Jure* 144 152.

19 Mamashela "New Families, New Property, New Laws: The Practical Effects of the Recognition of Customary Marriages Act" 2004 *SAJHR* 616 618.

20 Mamashela 2004 *SAJHR* 621.

21 Dlamini *A Juridical Analysis and Critical Evaluation of* ilobolo *in Changing Zulu Society* (unpublished LLD thesis, University of Zululand) 1983 85.

reasons for non-recognition were the practice of *ilobolo* and the potentially polygamous nature of customary law.[23] The missionaries advocated for a westernised gospel that favoured civil marriages. Converts were encouraged to shun African practices, which were seen as a pagan way of life. For instance, converts were encouraged not to demand *ilobolo* for the marriage of their daughters. Most resisted this and simply incorporated African practices into Christianity.[24]

The Natal Code on Zulu Law of 1891 was the first notable statute to attempt to provide for the registration of customary marriages.[25] Earlier attempts had failed as few or no marriages had been registered.[26] However, the 1891 Code only applied in the Natal province and, ultimately, the KwaZulu homeland.[27] Despite this code, customary marriages remained largely unregistered in Natal.[28] The first meaningful enactment to provide for the registration of customary marriages was the Natal Code of Zulu Law of 1932.[29] Earlier enactments had failed to garner significant support and were thus withdrawn.[30] On the strength of the 1932 Code, customary marriages could be registered before a commissioner of Bantu affairs.[31] They could also be registered before a magistrate. However, failure to register a customary marriage did not invalidate a marriage.[32] Outside of Natal and KwaZulu, the registration of customary marriages was non-existent prior to the year 2000.[33] Despite all of the above, a majority of customary marriages were not registered.[34]

In 1927, the Black Administration Act[35] (BAA) was passed. The aim of this Act was to achieve uniformity among the different ethnic groups for the whole country. Section 22 empowered the commissioner to promulgate regulations for, among other things, the registration of customary marriages.

---

22 Dlamini *A Juridical Analysis and Critical Evaluation of* ilobolo *in Changing Zulu Society* 106.

23 Horn and Janse van Rensburg "Practical Implications of the Recognition of Customary Marriages" 2002 *JJS* 54 55.

24 Dlamini *A Juridical Analysis and Critical Evaluation of* ilobolo *in Changing Zulu Society* 91.

25 Bennet and Pillay "The Natal and KwaZulu Codes: The Case for Repeal" 2003 *SAJHR* 217 219.

26 Bennet and Pillay 2003 *SAJHR* 219. Other attempts at codifying customary law and providing for a mechanism to register customary marriages were also made in the Transkeian Territories; however, these attempts were fruitless. See Simons 1958 *Acta Juridica* 339.

27 Maithufi and Bekker "The Existence and Proof of Customary Marriages for Purposes of Road Accident Fund Claims" 2009 *Obiter* 164 172. In KwaZulu, further codes were subsequently promulgated – namely, the KwaZulu Act on the Code of Zulu Law 16 of 1985, and the Natal Code of Zulu Law Proc R151 of 1987. These had similar provisions on the registration of customary marriages.

28 Maithufi and Bekker 2009 *Obiter* 172.

29 Proclamation 168 of 1932.

30 Simons 1958 *Acta Juridica* 339.

31 Maithufi and Bekker 2009 *Obiter* 166.

32 See generally Simons 1958 *Acta Juridica* 321.

33 *MG v BM supra* par 10.

34 Simons 1958 *Acta Juridica* 339.

35 38 of 1927. The original name of the BAA is the Native Administration Act 38 of 1927. The Act underwent various amendments, one of which was a change of name to the BAA.

On the strength of this, regulations were promulgated.[36] However, these regulations were never implemented, and a proper registration process did not see the light of day.[37] It must be added that the Recognition Act has repealed parts of section 22 of the BAA.[38] As stated above, a registration certificate was a gateway to accessing certain benefits; parties in customary marriages required a registration certificate to access certain benefits. An example of a benefit that could be derived through a registered marriage appeared in section 31 of the Black Laws Amendment Act.[39] This section provided for a claim for loss of support against a person who caused the death of a "partner" in a "customary union".[40] However, the claim could not be enforced unless the claimant produced a marriage certificate issued by a commissioner of Bantu affairs.[41] Section 31 of the Black Laws Amendment Act is an example of the piecemeal recognition of customary marriages.

It is clear from the above that since customary marriages were not fully recognised, a registration process was not properly developed. Besides non-recognition, other factors influenced non-registration. Preliteracy, as opposed to illiteracy, is one such factor. Preliteracy refers to a period where few or no persons were literate.[42] African people did not write things down. As the years went by, African men concluded civil marriages simply in order to derive some benefits and without knowing the legal impact that they had on existing customary marriages. Housing is an example of benefits to be derived during the twentieth century. Council housing could only be allocated to a married couple. The quickest way to access council housing was to conclude a civil marriage with another woman. These civil marriages were rarely entered into with existing customary wives, who were left in the rural areas to look after the family. Instead, these civil marriages were with other women whom they met in the cities.[43] Unlike customary marriages, the civil marriages could be entered into easily, without the involvement of the family.

Any pre-existing customary marriage was dissolved by the civil marriage. A civil marriage and a customary marriage could not co-exist; the civil marriage trumped the customary marriage. The customary marriage spouse was considered to be discarded – that is, in the eyes of the law of the time, the customary marriage ceased to exist. The wife could not even enjoy any of the piecemeal benefits that parties to customary marriages could access at the time. A customary marriage was subservient to a civil marriage.[44] However, on 2 December 1988, the Marriage and Matrimonial Property Law

---

36 Regulation 1970 was promulgated on 25 October 1968. See Maithufi and Bekker 2009 *Obiter* 1972.

37 Maithufi and Bekker 2009 *Obiter* 172.

38 See s 13 of the Recognition Act together with its repeal-of-laws schedule. S 22(1)–(5) of the BAA was repealed by s 13.

39 76 of 1963.

40 S 31(1) of the Black Laws Amendment Act.

41 S 31(2)(*a*) of the Black Laws Amendment Act.

42 Van Niekerk "Orality in African Customary – and Roman Law of Contract: A Comparative Perspective" 2011 *De Jure* 364.

43 De Sousa 2013 *Acta Juridica* 246.

44 Nkosi "A Note on *Mandela v Executors, Estate Nelson Mandela* 2018 (4) SA 86 (SCA) and the Conundrum Around the Customary Marriage Between Nelson and Winnie Mandela" 2019 *SAPL* 1 10.

Amendment Act[45] was passed into law. In terms of section 1(*b*) of this Act, which amended s 22(2) of the BAA, a subsequent civil marriage could no longer dissolve a pre-existing customary marriage. Instead, the civil marriage was void.

In the Transkei, the position was different compared to that in Natal Province, the KwaZulu homeland and the rest of the country. The Transkei Marriage Act[46] governed both customary marriages and civil marriages. It also catered for the registration of both civil and customary marriages. However, non-registration of customary marriages did not invalidate the marriages.[47] In terms of section 3 of the Act, a man could be a party to both a civil marriage and a customary marriage with different women at the same time. A civil marriage did not dissolve a customary marriage. A civil marriage was also not a bar to a customary marriage.[48] The Recognition Act has repealed section 3 of the Transkei Marriage Act, together with other provisions of this Act.[49] The remaining provisions continue to govern existing marriages under the Act.[50]

3 REGISTRATION OF CUSTOMARY MARRIAGES IN TERMS OF THE RECOGNITION OF CUSTOMARY MARRIAGES ACT

Section 4 of the Recognition Act provides for the registration of customary marriages. It must be read with the regulations[51] made under the Recognition Act. The regulations outline the process of registration.[52] It is the duty of both spouses to ensure that their customary marriage is registered.[53] However, section 4(2) of the Recognition Act makes it possible for either spouse to approach the nearest Home Affairs office and register their marriage. Provided that all the prescribed particulars are furnished together with any additional information to satisfy a registering officer that a customary marriage was entered into, spouses do not require each other's cooperation in order to register a customary marriage.[54] While this is commendable in cases of recalcitrant spouses, it also opens up opportunities for abuse.[55] An unscrupulous person may be tempted to falsify documents and register a fraudulent marriage. Be that as it may, Kovacs, Ndashe and Williams submit that in practice, the registration of customary marriages requires the participation of both spouses. Based on empirical

45 3 of 1988.

46 21 of 1978.

47 Horn and Janse van Rensburg 2002 *JJS* 59.

48 West and Bekker "Possible Consequences of Declaring Civil and Customary Marriages Void" 2012 *Obiter* 351 356.

49 See s 13 of the Recognition Act together with its repeal-of-laws schedule.

50 West and Bekker 2012 *Obiter* 356.

51 Regulations in terms of the Recognition of Customary Marriages Act 120 of 1998 GN R1101 in *GG* 21700 of 2000-11-01.

52 Regulation 2.

53 S 4(1) of the Recognition Act.

54 S 4(2) of the Recognition Act.

55 Van Niekerk "The Registration of Customary Marriages: *Banda v General Public Service Sectoral Bargaining Council* (JR3273/2009) (26 February 2014)" 2014 *SAPL* 494 496.

research, they submit that registering officers refuse to register customary marriages where only one spouse is present, despite the provisions of section 4(2) of the Recognition Act.[56] A customary marriage entered into after the commencement of the Act must be registered within three months of being entered into.[57] De Sousa submits that, because of the hardships involved in the registration of customary marriages, such as transport fees for the spouses and the witnesses, three months is a short period.[58] The time frames for registration of customary marriages entered into prior to the Act are discussed below.

The Recognition Act is not explicit about what other particulars or additional information is required for the registration of customary marriages. It simply provides that if the registering officer is satisfied that the spouses concluded a customary marriage, he or she must register the customary marriage by recording the identity of the spouses, the date of the marriage, any *ilobolo* agreed to and any other particulars.[59] The officer must then issue a certificate of registration bearing the prescribed particulars.[60] While there is utility in open-ended provisions in a society that accommodates different practices, proof is a universal concept. The legislature should have specified the type of proof that is required to register a customary marriage. This could include proof of *ilobolo*, proof that the bride was handed over to her new family, or that both the parties and their families agreed to waive the handing-over of the bride.

Section 4(8) of the Recognition Act provides that the certificate of registration serves as *prima facie* proof of a customary marriage. It provides the public with certainty regarding a person's marital status.[61] However, the certificate is not conclusive proof of a customary marriage. The validity of a certificate procured through fraudulent efforts may be challenged. The person who alleges fraud must prove it. A certificate will remain valid if the plaintiff fails to prove fraud. In *Road Accident Fund v Mongalo, Nkabinde v Road Accident Fund*,[62] the RAF rejected claims for loss of support on the ground that the marriage certificates had been procured through fraud. However, the RAF failed to lead evidence to prove fraud. The court held that the claimants were entitled to judgment against the RAF for loss of support.[63] In *Mgenge v Mokoena*, the mother of the deceased was able to bring an application in terms of section 4(8) to challenge the marriage of her son. On paper, the court could not establish whether a valid customary marriage had been entered into between the parties. The court referred the matter for oral evidence. Although the court was not specific on this, the

---

56 Kovacs *et al* 2013 *Acta Juridica* 281. See also Van Niekerk 2014 *SAPL* 499–500.

57 S 4(3)(*a*) of the Recognition Act.

58 De Sousa 2013 *Acta Juridica* 252.

59 S 4(4)(*a*) of the Recognition Act. See also Horn and Janse van Rensburg ("Non-Recognition? *Lobolo* as a Requirement for a Valid Customary Marriage" 2002 *JJS* 170 174–175) who submit that the fact that *ilobolo* is one of the particulars that a registering officer must consider in order to determine if there is a valid customary marriage is a pointer to the fact that *ilobolo* is an essential requirement for a customary marriage.

60 S 4(4)(*b*) of the Recognition Act.

61 *Mgenge v Mokoena supra* par 12.

62 [2002] ZASCA 158; [2003] 1 All SA 72 (SCA).

63 *RAF v Mongalo, Nkabinde v RAF supra* 127.

operation of the certificate of registration was suspended.[64] At the time of writing this article, the author is not aware of whether the oral evidence has been heard by the court. The impact of section 4(8), as discussed above, is welcome.

The Recognition Act also provides for the registration of those customary marriages that were not registered before the Act's commencement date.[65] These are the "old" customary marriages. These marriages were to be registered within twelve months of the commencement of the Act or within such longer period as may be prescribed by the Minister.[66] After more than two decades since the implementation of the Recognition Act on 15 November 2000, there are still too many unregistered customary marriages.[67] Following the decision in *Mankanyi v Minister of Home Affairs*,[68] the deadline for registration of customary marriages was extended to 30 June 2024.[69] Section 4(3)(*b*) refers specifically to new customary marriages. This extension applies to customary marriages entered into after the commencement of the Act. As pointed out above, new customary marriages must be registered within three months of conclusion or within such longer period prescribed by the Minister from time to time. The present legal position is that parties who fail to register new customary marriages within three months have until 30 June 2024 to register these marriages.

Section 4(9) provides that failure to register a customary marriage does not affect its validity. This provision is not novel to the Recognition Act since the various homeland enactments mentioned above had similar provisions.[70] It has been submitted that this provision was designed to protect women in unregistered customary marriages. It is an assurance that if they show proof of a customary marriage, the law will assist them by registering the marriage.[71] De Sousa points to the absence of a sanction in case of non-registration.[72] With reference to the South African Law Commission report on customary marriages,[73] De Sousa also points out that declaring an unregistered marriage void would have led to hardships for women in these marriages. In addition, this would have deprived existing marriages of legal

64 *Mgenge v Mokoena supra* par 42.2.

65 S 4(3)(*a*) of the Recognition Act.

66 *Ibid.* The first extension lasted until 15 November 2002. Thereafter, the date of registration has been extended several times. The latest extension will last until 30 June 2024.

67 Kovacs *et al* (2013 *Acta Juridica* 275) submit that as at 2008, an average of only 10 per cent of customary marriages were registered in the year in which they were concluded.

68 KZP (unreported) 2021-07-02 Case no 3146/2020P.

69 SA News "Registration of Customary Marriages With Home Affairs Extended" (30 September 2021) https://www.sanews.gov.za/south-africa/registration-customary-marriages-home-affairs-extended (accessed 2022-07-07).

70 Horn and Janse van Rensburg "Practical Implications of the Recognition of Customary Marriages" 2002 *JJS* 54 59.

71 Singh "Woman Know Your Rights: The Recognition of Customary Marriages Act: Traditional Practices and the Right to Equal Treatment" 1999 *De Jure* 314 317.

72 De Sousa 2013 *Acta Juridica* 243–244. De Sousa also points out that the absence of a sanction for non-registration may be in conflict with South Africa's international law obligation in terms of article 16.2 of the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW).

73 South African Law Commission *The Harmonisation of the Common Law and the Indigenous Law: Report on Customary Marriages* (1998).

validity.[74] While this protection is welcome, it is submitted that it comes at a cost. With the exception of new marriages (less than three months old), parties in unregistered marriages will have to approach a court for an order directing the Department of Home Affairs to register their marriage in terms of section 4(7)(*a*). De Sousa submits that the idea of having to approach a court before a marriage may be registered is, on its own, a form of sanction.[75] Unfortunately, not everyone can afford the costs of bringing such an application before court,[76] leaving many people vulnerable.[77] Furthermore, any extension of the registration period is usually communicated by notice in the *Government Gazette*; unless care is taken to inform the public, parties to unregistered customary marriages may not become aware of the extension. In essence, if a spouse in an unregistered customary marriage does not approach a court for an order declaring a marriage valid and directing the Department of Home Affairs to register the marriage and issue a marriage certificate, section 4(9) of the Recognition Act is nothing more than cold comfort.

4 THE POSSIBLE REASONS FOR NON-REGISTRATION OF CUSTOMARY MARRIAGES

As stated above, many customary marriages remain unregistered. There are various reasons for this. Any South African who has been to any of the various offices of the Department of Home Affairs will confirm the difficulty involved in trying to access any services at these offices. Typically, one has to sacrifice a whole day. Offices of the South African Department of Home Affairs are infamous for their long queues.[78] In addition, it should be noted that the majority of people who get married according to customary law live in rural areas[79] and the cost of going to the nearest Department of Home Affairs office is not always affordable.[80] It should be noted that old marriages often involve the elderly and those who are widowed.[81] Unless these people need to access some benefit that requires the production of a marriage certificate, they will not register the marriage.[82] In most instances, the costs of registration outweigh the benefits of possessing a registration certificate, especially for older and widowed persons.[83]

---

74 De Sousa 2013 *Acta Juridica* 243.

75 De Sousa 2013 *Acta Juridica* 251.

76 West and Bekker 2012 *Obiter* 353.

77 Kovacs *et al* 2013 *Acta Juridica* 281.

78 Kretzmann "Queue, the Beloved Country – Welcome to Aaron Motsoaledi's Dysfunctional Department of Home Affairs" (14 May 2022) https://www.dailymaverick.co.za/article/2022-05-14-queue-the-beloved-country-welcome-to-aaron-motsoaledis-dysfunctional-department-of-home-affairs/ (accessed 2022-10-14).

79 Manthwa "*Lobolo*, Consent as Requirements for the Validity of a Customary Marriage and the Proprietary Consequences of a Customary Marriage: *N v D* (2011/3726) [2016] ZAGPJHC 163" 2017 *Obiter* 438 444.

80 Kovacs *et al* 2013 *Acta Juridica* 279.

81 Kohn 2017 *SAJHR* 130.

82 Kovacs *et al* 2013 *Acta Juridica* 278.

83 De Sousa 2013 *Acta Juridica* 269.

Horn and Janse van Rensburg submit that the fact that a customary marriage can always be registered at a later stage may be one of the reasons for the initial non-registration of a customary marriage.[84] Van Niekerk submits that, in general, the Recognition Act does not inspire compliance, as non-compliance does not result in the invalidation of a customary marriage.[85] It is submitted that while non-registration does not amount to invalidation of a marriage, what the parties may not be aware of is that they may have trouble in trying to register a marriage at a later stage. As stated above, applicants have to approach a court for an order in terms of section 4(7)(*a*) directing Home Affairs to register their customary marriage. Unless they succeed at this, the unregistered marriage is similar to an invalid marriage in certain circumstances.[86]

Another reason for non-registration of customary marriages is that registration is often associated with civil marriage.[87] Some individuals living under customary law are not aware that it is now possible to register customary marriages and that they have to register theirs. Osman submits that dual marriages also have an impact on the registration of customary marriages.[88] Dual marriages are concluded when the same people conclude both a civil and customary marriage with each other. Section 10(1) of the Recognition Act permits monogamous dual marriages. Osman submits that a dual marriage is celebrated as a customary marriage and registered as a civil marriage.[89]

5 THE PROBLEMS THAT ARISE IN UNREGISTERED CUSTOMARY MARRIAGES

Many problems may arise when a customary marriage is not registered. Some of these have already been alluded to. The reasons for non-registration of old customary marriages are understandable since, when these marriages were concluded, a registration process was almost non-existent. Now that the Recognition Act provides for registration of these old marriages, it is not practical to expect all parties to existing customary marriages to flock to the offices of the Department of Home Affairs to register their customary marriages. Be that as it may, parties to unregistered old customary marriages are still susceptible to the same disadvantages as parties to new unregistered customary marriages. For this reason, this article recommends ways to address registration of both new and old marriages below.

---

84 Horn and Janse van Rensburg 2002 *JJS* 60.

85 Van Niekerk "The Courts Revisit Polygyny and the Recognition of Customary Marriages Act 120 of 1998" 2013 *SAPL* 469 478–479. The author cites non-compliance with s 4 (registration) and s 7(6) (a prior court-approved contract for a subsequent customary marriage) of the Act as examples of non-compliance situations that do not result in the invalidation of a customary marriage.

86 Kovacs *et al* 2013 *Acta Juridica* 279 and Van Niekerk 2014 *SAPL* 495.

87 Osman "The Million Rand Question: Does a Civil Marriage Automatically Dissolve the Parties' Customary Marriage?" 2019 *PELJ* 1 9.

88 Osman 2019 *PELJ* 9.

89 *Ibid*.

The fact that a customary marriage may still be registered after the fact makes it possible to manipulate facts. This is worse when one party to the marriage is no longer around to dispute some of the alleged facts, as in the case of *Mgenge v Mokoena supra*. As a result, spousal benefits such as pension, maintenance and other intestate benefits may end up in the wrong hands. For instance, in the light of decisions that have held that the physical handing-over of the bride is optional, it has become very easy to convince a court that a customary marriage existed where some *ilobolo* negotiations took place followed by informal cohabitation. Maithufi and Bekker raised the alarm about this practice and approach. They submit that problems regarding proof of existence of a customary marriage cannot be solved by bringing domestic partnerships into the picture because, if the parties cohabited, a marriage will be said to exist.[90] Bapela and Monyamane submit that the controversial approach of the courts to proving the existence of customary marriages will continue to breed opportunistic litigants with ulterior motives unless the courts close the revolving door of the requirements of a customary marriage.[91]

5 1 Hurdles in divorce proceedings

The most odious of the problems arises when a person who is validly married in terms of customary law has to approach a court to prove that they are married, because the marriage was not registered immediately after it was entered into. This often happens when one spouse has died or when divorce is sought. The absence of a marriage certificate could have an impact on burial rights. Although a surviving spouse, in the absence of a testamentary provision, does not have an automatic right to bury a deceased spouse, the spouse as heir will have a right to bury the deceased. Without a marriage certificate, the surviving spouse will be in a weaker position against any detractors. The only way to get the marriage registered urgently may be through an urgent court application. As indicated, many people cannot afford the costs of litigation.[92] In any event, the money may be needed for the burial of the deceased and all related costs.

In the absence of a marriage certificate, a person may experience problems in obtaining a divorce decree and accessing patrimonial benefits. Although section 8 of the Recognition Act provides that a customary marriage may only be dissolved by a decree of divorce on the ground of the irretrievable breakdown of the marriage relationship, this section does not draw a distinction between registered and unregistered customary marriages. The requirement of a decree of divorce to access patrimonial benefits is absurd when the marriage was not registered in the first place. Osman submits that this requirement is a trap for unsophisticated individuals who are unaware of the law.[93] She also points out that, in practice, families negotiate divorces and settlements between couples married in terms of

90 Bekker and Maithufi 2009 *Obiter* 173.

91 Bapela and Monyamane "The 'Revolving Door' of Requirements for Validity of Customary Marriages in Action" 2021 *Obiter* 186 192–193.

92 Kovacs *et al* 2013 *Acta Juridica* 279.

93 Osman 2021 *PELJ* 13.

customary law.[94] Considering that both parties in a customary marriage are represented by their families, the chances of these negotiations being unfair are very slim. The wife, who often occupies a vulnerable position, has the benefit of her family's support. Another benefit of a divorce negotiated in terms of customary law is that it is cost effective. Nevertheless, divorces negotiated by customary law are not recognised in the Recognition Act.[95]

In divorce proceedings, a party to a civil marriage only has to allude to the marriage and support this by producing a marriage certificate as proof. Beyond that, he or she does not have to prove the existence of a civil marriage. The marriage certificate serves as *prima facie* proof of the marriage. The same is not the case for unregistered customary marriages. In addition to alluding to a marriage, a party to an unregistered customary marriage must prove the existence of the marriage. In some cases, the facts may be such that the court has to refer the matter for oral evidence. This means more court appearances and more costs. This may be a humiliating task for someone who, at all times, has always regarded herself or himself as married. The humiliation may be less reprehensible if no customary marriage in fact existed in the first place, such as where the bride had not been integrated.

5 2 Spouse can easily enter into a secret marriage with another

Because customary marriages are not registered, a spouse to a subsisting customary marriage can easily conclude another customary marriage or a civil marriage with another person without having dissolved the initial customary marriage. Without registration, there is no way of ascertaining if a person is party to an existing customary marriage. The provisions of section 10 of the Recognition Act are apposite. It is not competent for a person who is a party to a subsisting customary marriage to conclude a civil marriage with another person.[96] Although the Recognition Act is silent on the validity of the subsequent marriage, courts have held that the subsequent marriage will be invalid.[97] More often than not, it is not the man who suffers; it is women who find themselves in the cold with an invalid marriage. The Recognition Act does not provide any protection for these women.

In *Ngcwabe-Sobekwa v Sithela*,[98] the deceased had entered into a civil marriage with the applicant in 1996 during the subsistence of a customary marriage between himself and the first respondent.[99] The customary marriage had been concluded in 1998 but was never registered.[100] It is interesting to note that it was not the first time that the deceased had contracted a civil marriage during the subsistence of a customary marriage.

94 *Ibid*.
95 *Ibid*.
96 S 10(1) of the Recognition Act.
97 The latest of these decisions includes *Ledwaba v Monyepao* [2018] ZALMPPHC 61 and *Ndlovu obo Ndlovu v Monama* [2021] ZAGPJHC 810.
98 *Ngcwabe-Sobekwa v Sitela* [2020] ZAECMHC 49.
99 *Ngcwabe-Sobekwa v Sitela supra* par 26.
100 *Ngcwabe-Sobekwa v Sitela supra* par 8.

The applicant's civil marriage was the deceased's second civil marriage.[101] It appears that the earlier one had been dissolved through divorce. The court held that the conclusion of two civil marriages by the deceased did not detract from the existence of a valid customary marriage.[102] Although the civil marriages were invalid because they contravened section 10(3) of the Recognition Act, the court observed that in such a situation, a party to the invalid civil marriage would be in a stronger position, being in possession of a *prima facie* valid marriage certificate – something that a party to an unregistered customary marriage did not enjoy.[103]

The problem of husbands entering into secret marriages is the same with old civil marriages under the BAA that were not properly registered. Recently, the Limpopo Division heard a matter involving a deceased man who, during his lifetime, had managed to enter into at least three secret civil marriages with different women.[104] The first two marriages were entered into during apartheid; the plaintiff's marriage was included in these marriages. The last marriage was entered into in the year 2000.[105] The question before the court was which of the three civil marriages was valid. While it was not in dispute that one of the three civil marriages had been dissolved by divorce, it was not clear when that marriage had been entered into.[106] This information was essential for determining which of the three women claiming to be the surviving widow married the deceased first. The plaintiff could not prove when she got married to the deceased.[107] The court therefore absolved itself from the instance.[108]

Non-registration of customary marriage is not the sole factor making it possible for a person to enter into a civil or customary marriage with another person during the subsistence of an initial marriage. The current system that requires customary marriages to be dissolved by a divorce decree is also a contributing factor.[109] This is not a problem in cases of registered marriages; however, it does pose a hurdle in unregistered marriages. For an unsophisticated person, it is difficult to comprehend the need to approach a court to dissolve a marriage that was never registered in the first place. As stated above, such persons simply negotiate divorce settlements. They also go on to conclude marriages with other persons. In *Monyepao v Ledwaba*,[110] the appellant and the deceased had entered into a customary marriage. When the marriage soured, the deceased left the matrimonial home. The appellant entered into a civil marriage with another man shortly thereafter.[111] The deceased also subsequently concluded a customary marriage with the respondent. The appellant only became aware that her civil marriage was invalid and that her customary marriage to the deceased subsisted after the

101 *Ngcwabe-Sobekwa v Sitela supra* par 16.
102 *Ngcwabe-Sobekwa v Sitela supra* par 17.
103 *Ngcwabe-Sobekwa v Sitela supra* par 28.
104 *Mkhari v Minister of the Department of Home Affairs* [2022] ZALMPPHC 32.
105 *Mkhari v Minister of the Department of Home Affairs supra* par 1.
106 *Mkhari v Minister of the Department of Home Affairs supra* par 11 read with par 31.
107 *Ibid*.
108 *Ibid*.
109 S 8(1) of the Recognition Act can only be dissolved by a decree of divorce.
110 *Monyepao v Ledwaba* [2020] ZASCA 54.
111 *Monyepao v Ledwaba supra* par 19.

death of the latter.[112] It is submitted that there are many other people who are faced with similar situations and who are not aware of the legal position pertaining to their marriages.

Despite the prohibition in section 10, the practice of concluding customary marriages during the subsistence of civil marriages and *vice versa* is rife.[113] Maithufi and Bekker question the continued existence of the prohibition in light of the full recognition of customary marriages.[114] They argue that failure to legalise the coexistence of civil and customary marriages would inevitably lead to harsh results despite the expectations of all the parties to the polygamous marriage that their marriages are valid.[115] Indeed, this came to pass in *Zulu v Mathe*.[116] In this case, the applicant, the first wife of the late *Isilo* Goodwill Zwelithini, approached the court for a declaratory order stating that by virtue of her civil marriage to the King, she was entitled to half of *Isilo*'s estate.[117] The King had concluded subsequent customary marriages during the subsistence of the civil marriage. Initially, the applicant did not wish to challenge the validity of the customary marriages. She had at all times accepted them as valid. It was only at a later stage that attempts were made to challenge these marriages from the bar. The court did not allow this because the matter was not properly brought before the court. In addition, the respondents did not have the opportunity to formulate proper arguments in defence.[118]

5 3 Impact of non-registration on claims for loss of support

The non-registration of customary marriages also has an impact on other areas of law. For instance, it may have an impact on claims against the Road Accident Fund (RAF) in cases of negligent causation of death of a breadwinner. The RAF can simply reject a spousal claim for loss of support on the ground that the applicant was not a spouse. As noted above, a party cannot easily approach the Department of Home Affairs and register a customary marriage. A court application as envisaged by section 4(7)(*a*) is necessary. This protracts proceedings while the surviving spouse has no remedies. In *TZ obo Minors v RAF,*[119] the plaintiff had lost her husband in a motor vehicle accident. They had four minor children.[120] The plaintiff filed a claim for loss of support for herself and her minor children against the defendant, the RAF. The RAF argued that the deceased did not have a duty to support the plaintiff. The latter was unable to produce a marriage certificate because the customary marriage was not registered.[121] She had to litigate against the RAF. The court had first to determine if a valid

112 *Monyepao v Ledwaba supra* par 23.
113 Maithufi and Bekker 2009 *Obiter* 171.
114 Maithufi and Bekker 2009 *Obiter* 170.
115 Maithufi and Bekker 2009 *Obiter* 171.
116 *Zulu v Mathe* [2022] ZAKZPHC 6.
117 *Zulu v Mathe supra* par 33.
118 *Zulu v Mathe supra* par 38.
119 *TZ obo Minors v Road Accident Fund* [2021] ZAGPPHC 367.
120 *TZ obo Minors v Road Accident Fund supra* par 1–2.
121 *TZ obo Minors v Road Accident Fund supra* par 15.

customary marriage existed between the deceased and the plaintiff. It was common cause that the marriage had not been celebrated.[122] The court held that the marriage was nevertheless valid as it was not mandatory for a marriage to be celebrated.[123] It also held that a reciprocal duty of support existed between the deceased and the plaintiff.[124]

6 THE CASE FOR THE MANDATORY REGISTRATION OF CUSTOMARY MARRIAGES

The rationale for compulsory registration of customary marriage lies in the fact that registration may address the bulk of, if not all, the problems that non-registration may cause. This article submits that customary marriages should be registered immediately after they are concluded or within a reasonable time thereafter.[125] Once registered, marriages will be on the system and a certificate of registration will be readily available. In this way, it will be possible to verify a potential spouse's marital status with a degree of certainty. Parties to customary marriages will have marriage certificates readily available to prove the existence of a customary marriage. This will then also eliminate the need to litigate in order to prove a customary marriage. If a marriage is registered immediately after it is concluded, the practice of alleging that a customary marriage exists when none exists will be dealt with easily.

The immediate registration of customary marriages cannot be approached blindly. Although the aim is to place parties to a customary marriage in the same position as parties to a civil marriage, the process of registering these marriages is not the same. As indicated above, the registration of civil marriages enjoys a lot of support from the State, thus ensuring the immediate registration of civil marriages upon their conclusion. Some religious officers also serve as marriage officers.[126] Magistrates can also marry people.[127] Some Department of Home Affairs officials are also marriage officers.[128] This ensures that civil marriages are registered speedily. Parties to civil marriages do not have to worry about the sophistications of registering the marriage. Someone else does it for them. The same is not the case with customary marriages. Currently, the duty to register customary marriages rests with the spouses. As stated above, some spouses may not be aware that they have to register the marriage. Even if they are aware, they may decide not to register the marriage for various reasons. The process of registration could prove to be too sophisticated for unsophisticated persons, as well as expensive. The fact that a customary marriage is valid regardless of registration may contribute to non-registration. Since a marriage certificate is associated with benefits, in the absence of potential benefits, a party can just decide not to register the

122 *TZ obo Minors v Road Accident Fund supra* par 21.
123 *TZ obo Minors v Road Accident Fund supra* par 26.
124 *TZ obo Minors v Road Accident Fund supra* par 28.
125 De Sousa 2013 *Acta Juridica* 244 and Rautenbach *Introduction to Legal Pluralism* 95.
126 S 7 of the Marriage Act. However, this section must be treated with caution.
127 S 2(1) of the Marriage Act.
128 S 2(2) of the Marriage Act.

marriage. This is not to suggest that non-registration should invalidate customary marriages.

For reasons that have been stated above, it is hereby recommended that the process of registering customary marriages should be made mandatory and enhanced. The Recognition Act, read with the regulations in terms thereof, makes it clear that the personnel who are key to the registration of customary marriage are the registering officers and, in certain instances, designated persons.[129] It appears that a designated person may be a traditional leader.[130] Data shows that, as at 2018, there were approximately 844 traditional leaders in South Africa.[131] It is submitted that the government must activate and accordingly train traditional leaders for the purposes of registration of customary marriages.

The recommendation that traditional leaders should facilitate the registration of customary marriages is not new. In its report on customary marriages, the South African Law Commission deliberated on this recommendation. However, the Commission noted that not all areas in South Africa had designated traditional leaders,[132] although this could be resolved by activating traditional leaders for the areas in question.[133] However, the main problem concerned making registration compulsory. This led to the question of the penalty for failure to register a marriage.[134] The Commission considered a penalty necessary.[135] It observed that invalidation for failure to register a marriage could result in undue hardships for parties to these customary marriages, especially widows.[136] For these reasons, the Commission recommended that, although compulsory registration was desirable, unregistered marriages should however not be invalidated.[137] Parties should be allowed to prove the existence of the marriage.[138] The Commission insofar as it reported on the compulsory registration of customary marriages may be criticised for focusing too much on the sanctions. It is submitted that the emphasis should have been on traditional leaders facilitating compulsory registration. This could have been achieved while ensuring that unregistered customary marriages were not invalidated.

Be that as it may, the following should be noted. Traditional leaders have always been part and parcel of traditional weddings and often officiate at

---

129 Regulation 2(1) of the Recognition Act.

130 S 11(1)(*a*)(iii) of the Recognition Act.

131 Staff Writer "South Africa Has a Huge Number of Traditional Leaders – Here Is How Much They Get Paid" (2018-08-06) *Business Tech* https://businesstech.co.za/news/government/263191/south-africa-has-a-huge-number-of-traditional-leaders-heres-how-much-they-get-paid/ (accessed 2022-07-07). This data represents data collected in 2018 and it only accounts for those traditional leaders who are recognised as such and who draw a salary from the State.

132 South African Law Commission *Harmonisation of Common Law and Indigenous Law: Report on Customary Marriages* 68.

133 *Ibid.*

134 South African Law Commission *Harmonisation of Common Law and Indigenous Law: Report on Customary Marriages* 69.

135 *Ibid.*

136 *Ibid.*

137 South African Law Commission *Harmonisation of Common Law and Indigenous Law: Report on Customary Marriages* 70.

138 *Ibid*.

customary weddings.[139] In other words, they are present when the marriage is entered into or celebrated. Their job involves confirming that the family of the bride has received what is due to them and that they have consented to the marriage. They also confirm that the bride has not been coerced into the marriage.[140] A majority of traditional leaders draw a salary from the State. They are no strangers to the exercise of public powers.[141] The role of traditional leaders as designated persons in the process of registration of customary marriages is clearly spelled out in the regulations.[142] They should receive an application for registration from the parties after the marriage is concluded and forward this application to the registering officer for registration.[143] Unfortunately, this role for traditional leaders has not been implemented. Instead, the focus is on parties to a customary marriage directly approaching Home Affairs to register their marriage.

The involvement of traditional leaders has a number of advantages. Since they live under customary law, they will ensure that a marriage complies with the living requirements actually observed by the community in question. They will also ensure that only legally compliant marriages are registered. Form A of the regulations, which is used to register a customary marriage, makes provision for a traditional leader to declare that the marriage in question was entered into in accordance with the customary practices of a particular community. It is doubtful whether this part of Form A plays any role when the parties approach the Department of Home Affairs directly. Some may argue that requiring a traditional leader to declare that the marriage complied with the requirements is tantamount to giving traditional leaders too much power and exposes this process to potential abuse. It is submitted that these arguments are merely speculative, seemingly influenced by a lack of knowledge regarding the role of traditional leaders and a low perception in general. Their counterparts (religious leaders, magistrates and officials of the Department of Home Affairs) have managed the registration of civil marriages without issues of abuse ever arising. The same benefit of the doubt should be afforded to traditional leaders. In addition, there is no need for concern if a marriage is in accordance with living customary law.

The option to approach the Department of Home Affairs directly must be retained. For instance, a considerable number of people in urban areas conclude customary marriages, and a traditional leader or a designated person may not be within reach to assist with the registration of the customary marriage. The parties should thus still be able to approach the Department of Home Affairs to register their customary marriage. In any event, it is submitted that most people who live according to customary law conclude customary marriages in their traditional communities. In most cases, the customary marriage should be registered there.

The involvement of traditional leaders will also ensure that parties who decide to conclude dual marriages have a choice of which marriage they

---

139 De Sousa 2013 *Acta Juridica* 260.

140 Horn and Janse van Rensburg 2002 *JJS* 66.

141 Staff Writer https://businesstech.co.za/news/government/ 263191/south-africa-has-a-huge-number-of-traditional-leaders-heres-how-much-they-get-paid/.

142 Reg 2 of the regulations in terms of the Recognition Act.

143 Reg 2(2) and (3) of the regulations in terms of the Recognition Act.

want to register. As illustrated above, some people are still not aware that an antenuptial contract may be entered into and registered even when a customary marriage is intended. People often associate an antenuptial contract only with the conclusion of civil marriages. Everything pertaining to registration is associated with a civil marriage. The parties to dual marriages should be given a proper choice whether to register the civil marriage or the customary marriage. If they decide to register their customary marriage, they will also have an opportunity within the three-month window period to execute an antenuptial contract if they choose to do so.[144] In this way, what the parties agree on will be legally protected. In *LNM v MMM*,[145] the parties had agreed to conclude a civil marriage in community of property.[146] They also agreed to comply with all the cultural requirements of a customary marriage, as is customary among many African people in dual marriages. They duly complied with the cultural requirements. Thereafter, in anticipation of the civil marriage, they executed and registered an antenuptial contract.[147] Before the civil marriage could take place, the relationship between the parties soured. In litigation, the court held that a valid customary marriage had been concluded and that it was in community of property. The antenuptial contract was null and void as it was not concluded before the marriage.[148] In this case, the court essentially ignored the true intentions of the parties to conclude a civil marriage despite the glaring evidence before it.

7 MARRIAGES ENTERED INTO BEFORE THE RECOGNITION ACT

The old customary marriages that still subsist present a special case. It is submitted that the activation of the role of traditional leaders in facilitating the registration of customary marriages could address some issues relating to the non-registration of old customary marriages. As submitted above, parties to old customary marriages are predominantly the elderly and the widowed. Some may be less sophisticated. The use of traditional leaders who live within the communities would assist in addressing the challenges that such parties face to a certain extent. Issues of proof when the marriage has been of a long duration can best be resolved using knowledge that is available within the community. It is also submitted that traditional leaders could also assist with unregistered old civil marriages, which are also discussed above. The State, through the Department of Home Affairs, could work with traditional leaders in establishing processes for the registration of old marriages. Workshops may be conducted to assist traditional leaders in

144 S 4(3)(*b*) of the Recognition Act provides that a customary marriage must be registered within three months of being entered into. This three-month period may be used to execute an antenuptial contract while the parties prepare to register their customary marriage. A traditional leader may be informed of this intention, in which case he will delay the registration of the marriage until registration of the antenuptial contract. It is also interesting that s 87(1) of the Deeds Registries Act 47 of 1937 provides that an antenuptial contract must be registered within three months of execution. Therefore, a lot can be done in the three-month window period.

145 *LNM v MMM* [2021] ZAGPJHC 563.

146 *LNM v MMM supra* par 16.

147 *LNM v MMM supra* par 1.

148 *LNM v MMM supra* par 39.

executing their duties in the registration of old customary marriages. These workshops could drive consensus on the different kinds of proof that may be accepted as proof of the existence of an old customary marriage.

8 CONCLUSION

This article has argued for the mandatory registration of customary marriages. It has discussed the historical background of the registration of customary marriages. It has also discussed the process of registration of customary marriages as set out in the Recognition Act. It has shown that the process of registering these marriages is very slow. Possible reasons for this slow registration have been fully discussed. This article has also unpacked the problems that arise when marriages are not registered. These problems include denial of access to benefits such as a spousal claim for loss of support against the RAF, and hurdles with obtaining a divorce, as a party must first prove that a customary marriage was entered into. This has the effect of protracting court proceedings. A spouse to an existing but unregistered customary marriage or an old unregistered civil marriage can easily conclude a marriage with another person.

It is recommended that the process of registering customary marriages should be enhanced. The role of traditional leaders in facilitating the registration of customary marriages must be activated. The benefit of involving traditional leaders is that marriages will be immediately registered upon conclusion, or at least very soon after their conclusion. Because traditional leaders receive a salary from the State, they are in a better position to facilitate the submission of the application for the registration to the relevant Home Affairs office. The elderly and the widowed will benefit from this, as they will not have to deal with the sophisticated process of registering a marriage and to incur all the related expenses associated with this process.

LIMITATION OF PARENTAL CONSENT IN RESPECT OF VACCINATIONS IN SOUTH AFRICA: GUIDANCE FROM THE UNITED KINGDOM AND THE UNITED STATES

Franaaz Khan
LLB LLM PhD
Senior Lecturer, University of Johannesburg

SUMMARY

For decades, immunisation has saved millions of lives in South Africa and prevented countless illnesses and disabilities in South Africa. Vaccination is the most important thing we can do to protect ourselves and our children against ill health. One example is paediatric immunisation, which prevents approximately three million child deaths worldwide each year and saves 750 000 more from disability. In addition to alleviating suffering and the prevention of infectious diseases by vaccination, it is also more cost-effective than treatment of infectious diseases once contracted. Nonetheless, the current vaccine climate is polarised, with some vaccine hesitancy in the population. Another conundrum that arises is the vaccine gauntlet between parent and child. The Department of Health announced in 2021 that children are to be vaccinated in South Africa with or without parental consent. In the context of our law and the requirements of informed consent, a child as young as 12 years of age can be vaccinated, unassisted. Several issues and concerns arise in the given circumstances: in one instance there might be an implied threat that a parent's wish will be undermined and circumvented by the Department of Health and, in another, that a child's own wish to be vaccinated or not will be ignored. This article examines the conflict over parent and child consent in relation to the Covid-19 vaccination. The current legal framework regarding minors' consent in South Africa is discussed. Thereafter, the article analyses the consent in respect of children required for the Covid-19 vaccination in the United Kingdom and the United States. The article concludes by exploring recommendations to bridge the divide that exists between parent and child when they have opposing views on vaccinations in certain instances.

1 INTRODUCTION

Vaccine hesitancy in Africa is often rooted in distrust, shaped by a long history of inequality. An effective pandemic response includes addressing

those doubts.[1] Some fears are rooted in colonialism, oppression and exploitation, which are easily stirred up in situations like a pandemic, especially in light of the world's vaccine inequity, where some countries have been able to buy up a disproportionate number of vaccines. Hesitancy could mean a longer road to herd immunity and slower economic recovery amid second and third waves.[2] For months, many African governments struggled to secure vaccines in a system where wealthy countries took the lion's share, shining a spotlight on global inequalities. For most of the region, this challenge continued. However, as campaigns eventually rolled out across the continent, the lingering issue of distrust came into sharp focus. The reasons vary. In South Africa, distrust of the weakening, overburdened public health systems (and government that manages it) runs deep. So does scepticism that people's lives here really matter to the foreign companies and countries behind most Covid-19 research concerns.[3]

1 1 Vaccine hesitancy in Africa

The continent's lower number of deaths, compared with many other regions, has given many Africans a false sense of immunity. As recently as December 2021, around a quarter of Africans surveyed felt vaccines were not safe, according to the African Centers for Disease Control and Prevention.[4] A recent survey found that only 61 per cent of South Africans would get a vaccine, lower than any other of the 14 countries surveyed.[5] Some concerns about vaccine safety stem from its quick development, spooked by unverified claims of death following immunisation in Europe. These worries can be countered with accurate targeted information.[6] For decades, groups like Rotary International worked to overcome polio vaccine rejection in Nigeria by working with local health workers and volunteers who were known and trusted by their communities, and who helped carry out the door-to-door immunisation push across the country; the country is now declared polio- free.[7]

---

1 See, for e.g., Brown "Behind Vaccine Doubts in Africa, a Deeper Legacy of Distrust" (2021) https://www.csmonitor.com/World/Africa/2021/0304/Behind-vaccine-doubts-in-Africa-a-deeper-legacy-of-distrust (accessed 2022-01-11) 1; Cooper, Van Rooyen and Wiysonge "COVID-19 Vaccine Hesitancy in South Africa: How Can We Maximize Uptake of COVID-19 Vaccines?" 2021 20(8) *Expert Review of Vaccines* 921.

2 See Brown https://www.csmonitor.com/World/Africa/2021/0304/Behind-vaccine-doubts-in-Africa-a-deeper-legacy-of-distrust 1.

3 *Ibid*.

4 See, for e.g., Brown "Behind Vaccine Doubts in Africa, a Deeper Legacy of Distrust" (2021) https://www.csmonitor.com/World/Africa/2021/0304/Behind-vaccine-doubts-in-Africa-a-deeper-legacy-of-distrust (accessed 2022-01-11) 1.

5 Brown https://www.csmonitor.com/World/Africa/2021/0304/Behind-vaccine-doubts-in-Africa-a-deeper-legacy-of-distrust 1.

6 *Ibid*.

7 NDoH "Strategies to Address COVID-19 Vaccine Hesitancy and Promote Acceptance in South Africa" (2021) https://sacoronavirus.co.za/2021/04/12/strategies-to-address-covid-19-vaccine-hesitancy-and-promote-acceptance-in-south-africa/ (accessed 2022-01-13) 2.

In South Africa, people are afraid because they lack information.[8] They need help to understand the science, how vaccines work, and how they are tested. An earlier study on South Africans' vaccine confidence found that the most common reasons for doubts were fear of side effects and concerns about effectiveness.[9] Targeting people with accurate information is especially important now. Activists argue that vaccine scepticism will decline as more Africans are vaccinated, and see for themselves that it is a safe and effective procedure, and that when more broadly offered, it could ease restrictions on movement and help reopen economies.[10] Vaccinations remain one of the most successful, cost-effective public health interventions.

1 2 Factors in refusing consent

The reasons that parents refuse to vaccinate their child vary, ranging from medical reasons and safety concerns to religious or philosophical objections. Safety concerns underpin most decisions by parents not to vaccinate their child. Some parents are concerned about the number and variety of vaccines recommended, citing concerns that the antigens they contain may interact dangerously or act to overwhelm or weaken the child's immune system.[11] Despite such fears being addressed in medical literature[12] and scientific evidence, they still exist. Vaccine refusal on the basis of religious grounds stems from the belief that the body is sacred and should not be healed through "unnatural" means, but rather through prayer. It has been recognised that the family unit is the "crucible" for the transmission of religious and cultural beliefs,[13] and that religious beliefs endorse a strong measure of parental choice.[14] In South Africa, parents have discretion in deciding how and whether their children will worship, since the religious beliefs that parents adopt, and in accordance with which they raise their children, are intrinsically connected with parents' rights to human dignity and with their sphere of parental authority, in which the State should not arbitrarily interfere. Though careful to avoid unwarranted judicial interference in the realm of parental authority, courts have shown special solicitude to

---

8 See, for e.g., National Department of Health "Strategies to Address COVID-19 Vaccine Hesitancy and Promote Acceptance in South Africa" South Africa: National Department of Health (2021) https://sacoronavirus.co.za/2021/04/12/strategies-to-address-covid-19-vaccine-hesitancy-and-promote-acceptance-in-south-africa/ (accessed 2022-01-13) 2.

9 NDoH https://sacoronavirus.co.za/2021/04/12/strategies-to-address-covid-19-vaccine-hesitancy-and-promote-acceptance-in-south-africa/ 2.

10 *Ibid*.

11 Blignaut *Calling the Shots on Vaccination: When is the State Justified in Overturning a Refusal to Vaccinate?* (LLM , University of Cape Town) 2013 13.

12 Blignaut *Calling the Shots* 15; see Chen and DeStefano "Vaccine Adverse Events: Causal or Coincidental?" 1998 351 *Lancet* 61; DeStefano "Vaccines and Autism: Evidence Does Not Support a Causal Association" 2007 82 *Clinical Pharmacology and Therapeutics* 756; and Omer "Vaccine Refusal, Mandatory Immunization, and the Risks of Vaccine-Preventable Diseases" 2009 *The New England Journal of Medicine* 1981.

13 Brown "Freedom From or Freedom For? Religion as a Case Study in Defining the Content of Charter Rights" 2000 33 *UBC L Rev* 551 579.

14 Bekink "Parental Religious Freedom and the Rights and Best Interests of Children" 2003 66 *THRHR* 246 248.

protect children from what they have regarded as potentially injurious consequences of parents' religious practices.[15]

2 THE LEGAL FRAMEWORK FOR MINOR'S CONSENT IN SOUTH AFRICA AND THE CONFLICT BETWEEN PARENT AND CHILD

2 1 A minor's capacity to act independently

Children under the age of 18 are legal minors who, in South African law are not fully capable of acting independently without assistance from parents or legal guardians.[16] However in recognition of the evolving capacity of children, there are exceptional circumstances where the law has granted minors the capacity to act independently. Some of these circumstances are briefly discussed below.

2 1 1 Medical treatment

According to section 129 of the Child Care Act,[17] a child may consent to their own medical treatment if they are over the age of 12 years and of sufficient maturity and decisional capacity to understand the various implications of the treatment, including the risks and benefits thereof. However, the Act does not provide a definition for what qualifies as "sufficient maturity", nor does it stipulate how health professionals ought to assess the decisional capacity of a child.[18] This dilemma is discussed further in the article.

2 1 2 HIV testing

In respect of HIV testing, children can consent independently to an HIV test from the age of 12 when it is in their best interests, and below the age of 12 if they demonstrate "sufficient maturity" – that is, they must be able to understand the benefits, risks and social implications of an HIV test. Once again, the pressure rests on a health-care professional to assess the decision-making capacity of the child.[19]

---

15 *Christian Education South Africa v Minister of Education* 2000 (10) *BCLR* 1051 (CC) 41.

16 Strode, Slack and Essack "Child Consent in South African Law: Implications for Researchers, Service Providers and Policy-Makers" 2010 100 *South African Medical Journal* 247.

17 38 of 2005.

18 Ganya, Kling and Moodley "Autonomy of the Child in the South African Context: Is a 12-year-old of Sufficient Maturity to Consent to Medical Treatment?" 2016 17 *BMC Medical Ethic*s 1 66.

19 Strode *et al* 2010 *South African Medical Journal* 247; s 130 of the Children's Act 38 of 2005; McQuoid-Mason "The Effect of the New Children's Act on Consent to HIV Testing and Access to Contraceptives by Children" 2007 97 *South African Medical Journal* 1252 1253.

2 1 3 Termination of pregnancy

As the law currently stands, girls can consent to the termination of pregnancy at any age.[20]

2 2 Medical treatment and informed consent

2 2 1 Children's Act

Section 129 of the Children's Act expressly dictates the pre-requisites for medical treatment of a child and stipulates as follows:[21]

> "(2) A child may consent to his/her own medical treatment or to the medical treatment of his or her child if–
>
> (a) the child is over the age of 12 years and;
>
> (b) the child is of sufficient maturity and has the mental capacity to understand the benefits, risks, social and other implications of the treatment."

Under the Children's Act, a child must satisfy two requirements before accessing medical treatment on their own – that is without parental, guardian or caregiver's consent being required. The first requirement is that the child must have reached 12 years of age. The second requirement is that the child must have "sufficient maturity" and decisional capacity to understand the benefits, risks, social and other implications of the treatment. However, this section of the Act is deficient with regard to certain definitions, regulations and sufficient descriptions. The Act fails to provide a definition for what ought to be considered as medical treatment. Moreover, the Act does not provide a definition for "sufficient maturity". According to Ganya,[22] "sufficient maturity" may infer a degree of cognitive development that affords a child the kind of engagement necessary in decision-making comparable to that of fully developed persons, namely adults. Ganya[23] further demonstrates that there is no provision in the Act specifying how the health practitioner ought to assess a child's decisional capacity. This deficit is exacerbated by the fact that there is currently no standard objective tool for assessing the decisional capacity of children. Nonetheless, the informed consent principle holds that persons are their own sovereign and should thus be allowed to make the final decision on affairs concerning themselves, provided that the elements required for informed consent have been satisfied.[24] In this light, it may be deduced that informed consent has occurred when a competent person has received a thorough disclosure,

---

[20] S 5 of the Choice on Termination of Pregnancy Act 92 of 1996.

[21] Ganya *et al* 2016 *BMC Medical Ethics* 67.

[22] Ganya *et al* 2016 *BMC Medical Ethic*s 68.

[23] Ganya *et al* 2016 *BMC Medical Ethics* 69.

[24] The elements being: competence; disclosure of information, understanding and appreciation of information disclosed; voluntariness in decision making; and the ability to express a choice; Ganya *et al* 2016 *BMC Medical Ethics* 68.

understands and appreciates the disclosure, acts voluntarily, and consents to the intervention.[25]

2 2 2 The National Health Act

The National Health Act[26] stipulates that informed consent must be obtained prior to any health-care intervention. Patients must have full knowledge of the procedure to which they are consenting. As part of informed consent, patients are entitled to know their health status and should be informed by their health-care provider of the range of diagnostic procedures and treatments available to them, and of the benefits, risks, costs and consequences associated with their options.[27] Moreover, the patient should be informed of their right to refuse health services, and the health-care practitioner must explain the implications, risks and obligations of such refusal.[28] Unfortunately, health-care professionals have an additional burden, especially when the patient is a child;[29] they are required to inquire into the patient's beliefs and culture that may have a bearing on the information that they need in order to reach a decision. The health-care professional has the task of acquiring this information from a child, which may prove to be onerous. The health-care professional involved must also, for obvious reasons, be capable of undertaking this evaluation. With regard to vaccines, this will need to be done at a vaccination centre by the available staff whose primary task is to administer vaccines and who may not have the necessary training or information available to perform this critical assessment in an already time-constrained environment.[30]

2 2 3 The Constitution

In terms of section 12(2)(*b*) of the Constitution:[31]

> "Everyone has the right to bodily and psychological integrity, which includes the right to security in and control over their body."

The right to physical and psychological integrity in the context of health is about being the ultimate decision-maker on what one allows to be done to one's body. However, patient autonomy is not absolute, as the Constitution permits a limitation of rights in terms of the law of general application, to the

---

25 Ganya *et al* 2016 *BMC Medical Ethics* 68.

26 61 of 2003.

27 S 36 of the National Health Act 61 of 2003.

28 *Ibid*.

29 See, for e.g., Seale "Legal Obstacle Course: Vaccinating Children Aged 12 to 17 With or Without Parental Consent" (2021) https://www.dailymaverick.co.za/opinionista/2021-10-26-legal-obstacle-course-vaccinating-children-aged-12-to-17-with-or-without-parental-consent/ (accessed 2022-08-01) 1.

30 *Ibid.*

31 Constitution of the Republic of South Africa, 1996.

extent that it is reasonable and justifiable in an open democratic society based on human dignity, equality and freedom.[32]

In terms of section 28(2) of the Constitution:

> "A child's best interests are of paramount importance in every matter concerning the child."

The above section also applies to matters that affect the health and well-being of the child. Naturally, parents want the best for their children and some parents' concerns stem from the potential harm that a vaccine may pose. Parents want to be involved in the decision-making of their children between the ages of 12 and 17.[33]

2 3 South African law cognisant of international law instruments

The Constitution, the Children's Act and the National Health Act are some of the domestic pieces of legislation that reflect the international position regarding the choices and views of children. Despite a child being incapable of consenting in certain instances, a child's opinion should not be disregarded. International legal instruments mandate that even very young children should be included in the decision-making process insofar as this is possible. The principle of "evolving capacity" in terms of article 5 combined with article 12 of the Convention on the Rights of the Child,[34] and of article 7 of the African Charter on the Rights and Welfare of the Child,[35] provide that a child who is able to form and communicate their own views has the right to express these views and have them taken into consideration. These provisions lean towards the capacities of older children and adolescents evolving towards independent decision-making as they mature. Similarly, the Children's Act provides that in major decisions involving a child, the person making the decision "must give due consideration to any views and wishes expressed by the child, bearing in mind the child's age, maturity and stage of development".[36] Where the child is of an age, maturity and stage of development so as to be able to participate in any matter concerning that child, the Act provides that the child "has the right to participate in an appropriate way and views expressed by the child must be given due consideration".[37]

---

32 Blignaut *Calling the Shots* 21; Thomas "Where to From Castell v De Greef? Lessons From Recent Developments in South Africa and Abroad Regarding Consent to Treatment and the Standard of Disclosure" 2007 124 *South African Law Journal* 188 203.

33 See, for e.g., Rall "Here Is What the Law Says When It Comes to Consent for Covid-19 Vaccination in SA Children" (2021) https://www.iol.co.za/capeargus/news/here-is-what-the-law-says-when-it-comes-to-consent-for-covid-19-vaccination-in-sa-children-26e086bc-e733-4743-896f-b84b88bc58b5 (accessed 2022-08-01) 2.

34 UNGA *Convention on the Rights of the Child* 1577 UNTS 3 (1989). Adopted 20 November 1989; EIF: 02/09/1990.

35 Organization of African Unity (OAU) *African Charter on the Rights and Welfare of the Child* CAB/LEG/24.9/49 (1990). Adopted: 11/07/1990; EIF 29/11/1999.

36 S 31(1)(*a*) of the Children's Act 38 of 2005.

37 Blignaut *Calling the Shots* 22; s 10 of the Children's Act 38 of 2005.

2 4 Conflict between parent and child regarding consent

As noted earlier in this article, the focus in the parent-and-child relationship has moved from the rights and powers of parents to the rights of the child.[38] A parent is no longer perceived to have absolute control and power over a child. This fact can cause tension between the rights. Despite the recognition that a child's right to health care has received, the right does not function in isolation. The family is the fundamental unit of society. It functions as an important support system for individuals. Although the family unit is viewed as a private domain, the State may in certain instances interfere, if necessary, to ensure respect for the right of the particular individual.[39] For example, where a child is neglected, the State is obliged to intervene in order to protect the child's interests. The State's obligation is recognised in terms of international human rights law as seen in article 16 of the Universal Declaration of Human Rights,[40] as well as article 23(1) of the International Covenant on Civil and Political Rights,[41] which South Africa has ratified. Surprisingly, South Africa does not expressly protect the right to family life, but the Constitution has affirmed that the family is a social institution of importance that provides for the security and support of raising children.[42] The Constitutional Court has recognised this in the decisions of *Dawood v Minister of Home Affairs*[43] and *Ex parte Chairperson of the Constitutional Assembly: In re Certification of the Constitution of the Republic of South Africa, 199*6,[44] where the right to family life is held to be protected by the right to dignity, which entails protecting the rights of individuals. Both international and national law recognise the importance of a family structure. In South Africa, despite the absence of an explicit right to family life, our courts in particular have recognised this importance, which is protected by the foundational constitutional right to human dignity.

In instances where parents refuse to vaccinate their children, the rights of parents and children are brought into conflict. Children's rights to health care are infringed by parents' refusal to vaccinate. How can this dilemma be resolved? According to Blignaut, the best-interests-of-the-child standard serves as a useful tool for resolving the conflict. This standard is widely used as an ethical, legal and social basis for decision-making that involves children.[45] It is the legal benchmark when decisions regarding children are

---

38 Blignaut *Calling the Shots* 23.

39 Blignaut *Calling the Shots* 26; s 10 of the Constitution.

40 See for e.g., United Nations "Universal Declaration of Human Rights" https://www.un.org/en/about-us/universal-declaration-of-human-rights (2022-08-21).

41 See for e.g., Council of Europe "International Covenant on Civil and Political Rights"https://www.coe.int/en/web/compass/the-international-covenant-on-civil-and-political-rights (accessed 2022-08-21).

42 Blignaut *Calling the Shots* 24*; Dawood v Minister of Home Affairs; Shalabi v Minister of Home Affairs; Thomas v Minister of Home Affairs* 2000 8 BCLR 837 (CC) 30.

43 2000 8 BCLR 837 (CC) 30 par 31.

44 *Shalabi v Minister of Home Affairs; Thomas v Minister of Home Affairs* 2000 8 BCLR 837 (CC) 31.

45 Blignaut *Calling the Shots* 25.

involved. The Constitutional Court, in the case of *Christian Education South Africa v Minister of Education*,[46] affirmed that a child's best interests are of paramount importance. In addition, section 7(1)(*a*) of the Children's Act lists factors to consider when applying the standard in a particular case. These include the nature of the parent-and-child relationship;[47] the parents' capacity to fulfil the child's needs;[48] the need for the child to be raised in a stable environment;[49] and the need to protect the child from physical or psychological harm that may be caused by maltreatment, abuse or neglect.[50] In South Africa, our courts have recognised that the best-interests standard should be a flexible one as individual circumstances will determine which factors secure the best interests of a particular child.[51] However, placing limitations on a child's best interests is permissible in certain instances.[52]

3 COMPARATIVE ANALYSIS OF MINOR'S CONSENT IN THE UNITED KINGDOM AND THE UNITED STATES

3 1 United Kingdom

In the United Kingdom, children aged 16 and older are entitled to consent to their own treatment in terms of the Children's Act 1989. As with adults, young people aged 16–17 are presumed to have sufficient capacity to decide on their own medical treatment, unless there is significant evidence to suggest otherwise. Children under the age of 16 in the United Kingdom can consent to their own treatment if they are believed to have enough intelligence, competence and understanding to appreciate fully what is involved in their treatment. This is known as the *Gillick* component,[53] following a court case in the 1980s between Ms Victoria Gillick and the NHS (National Health Service) regarding consent to treat children under 16.[54] The court case eventually made its way to the House of Lords, which ruled that the parental right to determine whether their minor child below the age of 16 will have medical treatment terminates if and when the child achieves sufficient understanding and intelligence to grasp what is proposed. The rule is valid in England and Wales. Whether a child is *Gillick*-competent is

46 *Supra.*

47 S 7(1)(*a*) of Children's Act 38 of 2005.

48 S 7(1)(*c*) of Children's Act 38 of 2005.

49 S 7(1)(*i*) of Children's Act 38 of 2005.

50 S 7(1)(*j*) of Children's Act 38 of 2005.

51 In *Hay v B* (2003 (3) SA 492 (W) 4941J), the court authorised a blood transfusion for an infant against the parents' religious views, stating that the child's best interests are "the single most important factor to be considered when balancing or weighing competing rights and interests concerning children". Although the parents' reasons for refusing consent were duly considered, they were outweighed by the potentially fatal harm to the child if the transfusion were not given.

52 S 36 of the Constitution.

53 See, for e.g., NHS "Children and Young People: Consent to Treatment" (2022) https://www.nhs.uk/conditions/consent-to-treatment/children/ (accessed 2022-08-01) 1.

54 *Gillick v West Norfolk and Wisbech Area Health Authority* 1985 3 All ER 402.

assessed using criteria such as the age of the child, their understanding of the treatment (both benefits and risks) and their ability to explain their views about the treatment. If deemed to be *Gillick*-competent, the child can make their own decision about a medical intervention such as a Covid-19 vaccination.[55] Health-care professionals administering the vaccine without parental consent will assess the individual child's capacity to consent for themselves (*Gillick* competence) and be responsible for deciding the appropriateness of administering the vaccine. If no consent is received, and the child is not *Gillick*-competent or does not want to be vaccinated, the immunisation will not proceed.[56]

In addition, with regard to children younger than 16 who are not *Gillick*-competent, a person with parental responsibility must have the capacity to give consent. If a parent refuses to give consent for a particular treatment, this decision can be overruled by the courts if treatment is thought to be in the best interests of the child. Health-care professionals only require one person with parental responsibility to give consent for them to provide treatment. In cases where one parent disagrees with the treatment, doctors are often unwilling to go against their wishes and will try to secure agreement. If agreement about a particular treatment or what is in the child's best interests cannot be reached, the courts can decide. In an emergency, where treatment is vital and waiting for parental consent would place the child at risk, treatment can proceed without consent.[57]

3 2 United States

In May 2021, the United States Food and Drug Administration approved the emergency use of the Pfizer-Biotech Covid-19 vaccine in adolescents aged 12–15 years.[58] In the United States, vaccine hesitancy among parents is also prevalent. Despite clinical data indicating that the vaccine is safe and 100 per cent efficacious for this age group, some parents and guardians may remain hesitant or outright opposed to vaccinating their children, particularly in politically and culturally conservative communities. During 2022, the United States accounted for approximately 22 per cent of positive Covid-19 cases reported worldwide, and hospitalisations among this population spiked.[59] Weekly reported cases for individuals aged 14–17 have generally mirrored or exceeded rates among adults. As cases in the United States in adults declined, the rate of infection in teenagers exceeded that of

---

55 Morgan, Swartz and Sisti "COVID-19 Vaccination of Minors Without Parental Consent Respecting Emerging Autonomy and Advancing Public Health" 2021 175(10) *JAMA Pediatrics* 995.

56 UK Health Security Agency "Covid-19 Vaccination Programme for Children and Young People: Guidance for Schools" (19 January 2022) https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/1042559/UKHSA-12222-COVID-19-parent-leaflet-v3.pdf (accessed 2022-08-01) 2.

57 See for e.g., NHS "Children and Young People: Consent to Treatment" (8 December 2022) https://www.nhs.uk/conditions/consent-to-treatment/children/ 1.

58 Shevzov-Zebrun and Caplan "Parental Consent for Vaccination of Minors Against COVID-19" 2021 39 *Vaccine* 6451 6451.

59 Shevzov-Zebrun and Caplan *Vaccine* 6451–6453.

adults. Most state laws in the United States presume that minors lack medical decision-making capacity and therefore require parental consent for most health-care decisions, including vaccination. There are exceptions to this requirement for stigmatising or sensitive interventions, but few states authorise vaccination without parental consent.[60]

The age requirement for a minor to consent to medical intervention, including vaccines, in six states is as follows: Alabama, age 14; District of Columbia, age 11; Oregon, age 15; Washington, no age requirement; Tennessee, no age requirement; and North Carolina, age 16. Sometimes, court interventions may also grant permission for 'mature minors' (adolescents who, after clinical evaluation, are deemed to possess competence) to consent or refuse treatment. Currently, in many US states that still believe capacity to consent is reached at 18 and over, there has been discussion regarding lowering the age for consent to vaccine/medical treatments.[61] Scholars argue that allowing children below the age of 18 to consent without parental consent in the majority of states respects the emerging autonomy of young people and would advance public health. The concept of evolving emerging autonomy is in keeping with the universal evolving autonomy principle endorsed by of the World Health Organization and United Nations.[62]

4 CONCLUDING REMARKS

This article has sought to provide the reader with a brief background on vaccine hesitancy in Africa, and also highlight the current legislative framework pertaining to parental consent in respect of vaccinations in South Africa. Parent-child conflict was also discussed. Thereafter, the article sought to discuss the comparative legal position pertaining to parental consent in the United States and United Kingdom respectively.

As highlighted in this article, the family forms the foundation of South African society. It is acknowledged that children's rights in South Africa take cognisance of international standards and the protection of family life. The law affords parents a considerable measure of discretion in their decision-making regarding their child. In order to prevent parental decision-making powers from being arbitrarily countermanded by the State, parents may rely on their right to dignity. The best interests of the child is always of paramount importance and must be considered when determining whether to vaccinate a child. Even though courts may be reluctant to interfere with parental responsibilities, they will nonetheless protect a child from harmful consequences of their parents' choices.[63] The courts do this by exercising their common or statutory powers to protect the child. In respect of vaccination refusal, this may involve the court ordering treatment where it is

60 Shevzov-Zebrun and Caplan *Vaccine* 6453.

61 Shevzov-Zebrun and Caplan *Vaccine* 6452.

62 Shevzov-Zebrun and Caplan *Vaccine* 6453. The universal evolving autonomy principle is explained as being part of the emerging autonomy of young people and their freedom to choose.

63 Blignaut *Calling the Shots* 32.

unreasonably refused by the parent to ensure the child's best interests. Whether vaccinations are indeed in the child's best interests is contingent upon the vaccination coverage in that community and whether a child may benefit from herd immunity or not.

Ultimately, there is a need for continued education and communication between health-care practitioners and the public to dismiss vaccine suspicion and promote effective immunisation policies. It should also be noted that there are circumstances where the State could legitimately intervene in a vaccination refusal, and mandate vaccinations, as has been witnessed early on in 2022 in South Africa. Ultimately, the courts bear the daunting task of balancing the best interests of the child with honouring parental discretion at times; courts have demonstrated their willingness to fetter parental rights where their exercise undermines the best interests of the child.[64]

[64] Blignaut *Calling the Shots* 32–45.

MUTILATION OF THE INDEPENDENCE OF THE JUDICIARY: THREATS, INTIMIDATION AND CONSTITUTIONAL AMENDMENTS IN ZIMBABWE

Simbarashe Tembo
LLB LLM PhD
Post-Doctoral Research Fellow, School of Law
University of KwaZulu-Natal

Annie Singh
LLB LLM PhD
Senior Lecturer, School of Law
University of KwaZulu-Natal

SUMMARY

Zimbabwe adopted a new Constitution in 2013. It was widely believed that the new Constitution would deepen democracy and constitutionalism. Central to this was the establishment of an independent judiciary. Barely 10 years after the adoption of the Constitution, judicial independence has deteriorated. This has been the result of intimidation against the judiciary, and constitutional changes aimed at weakening the judiciary. This article is intended to show that there exists a long-term project to bring the judiciary under the control of the political arms in Zimbabwe. With a weakened judiciary, Zimbabwe loses the chance to entrench constitutionalism, democracy and the rule of law. The article first highlights the imperative of judicial independence, then examines how the judiciary has suffered from threats at the hands of politicians, and finally assesses the impact of two recent constitutional amendments on the independence of the judiciary. It is shown that the independence of the judiciary has been systematically mutilated, and that hopes for effective judicial review cardinal to constitutionalism have waned.

1 INTRODUCTION AND BACKGROUND

Judicial independence is central to constitutionalism and democracy. What is required is "the existence of strong democratic and judicial institutions working in general harmony with each other, independent judges who strive

to apply the law neutrally and within a culture that seeks to do justice according to law".[1] In recent times, there has been an increase in the reliance on courts to settle political disputes and this has transformed courts into playgrounds for politics.[2] Since the courts have become arenas for political contestation, politicians have jostled at every opportunity to control them. Where successful, this has seen a catastrophic decline in judicial independence with judges reduced to political commissaries.

Within the African context, Zimbabwe, Kenya and Malawi are prime examples of courts being entrusted with the duty to resolve political disputes involving election results.[3] Hirschl notes that, in recent years, courts have become involved in

> "mega politics – matters of outright and utmost political significance that often define and divide whole polities. These range from electoral outcomes and corroboration of regime change to matters of war, [and] peace."[4]

It is submitted that when courts become so powerful as to be the final arbiters of political disputes, their independence becomes threatened by political parties trying to influence the outcomes. It can also confidently be submitted that once they lack independence, the courts could then be used to "handle" political adversaries. In Zimbabwe, this has culminated in the courts making unfavourable judgments against opposition parties, including denying outright the right to bail for those arrested for political reasons.[5]

Threats to the independence of the judiciary in Zimbabwe reached their lowest ebb in November 2000 when the War Veterans' wing of ZANU-PF invaded the Supreme Court and threatened judges and lawyers.[6] This was at the height of political tensions surrounding the acquisition of land from the White erstwhile commercial farmers. According to Magaisa:

> "The regime knew that it needed judicial support for this endeavour, and it viewed the courts as hostile to its ideology and policy. The result was a wholesale turnover in key judicial positions, beginning with the forced early retirement of Chief Justice Antony Gubbay in 2001."[7]

---

1 Mzikamanda *Constitutionalism and the Judiciary: A Perspective from Southern Africa* Paper presented at conference on Law Reform Agencies for Eastern and Southern Africa, Lilongwe, Malawi, (November 2011) 7.

2 Hirschl "The Judicialization of Mega-Politics and the Rise of Political Courts" 2008 11 *Annual Review of Political Science* 93 95.

3 See *Chamisa v Mnangagwa* [2018] ZWCC 42; *Peter Mutharika and Electoral Commission v Saulos Chilima and Lazarus Chakwera* (Constitutional Appeal No. 1 of 2020) [2020] MWSC 1 and *Raila Odinga v Independent Electoral and Boundaries Commission* Petition no 1 of 2017.

4 Hirschl 2008 *Annual Review of Political Science* 94.

5 See SALC "Statement on the Attacks on Human Rights Defenders and Journalists in Zimbabwe" (13 April 2021) https://www.southernafricalitigationcentre.org/2021/04/13/statement-on-the-attacks-on-human-rights-defenders-and-journalists-in-zimbabwe/ (accessed 2022-01-23).

6 Goredema "Whither Judicial Independence in Zimbabwe?" in Raftopoulos and Savage (eds) *Zimbabwe: Injustice and Political Reconciliation* (2004) 99.

7 Magaisa "Zimbabwe: An Opportunity Lost" 2019 30(1) *Journal of Democracy* 143 154.

Since then, what Zimbabwe has witnessed is a downward spiral in the independence of the judiciary. This has taken various forms. For present purposes, the authors focus on the political threats against the judiciary and the constitutional changes aimed at weakening the independence of the judiciary. For purposes of clarity, the authors attempt to provide a clear picture of the prevailing legal-political circumstances that may have precipitated these changes since the year 2000. One unique feature of Zimbabwe's political environment is that it is consistently in an election mode. Every political decision is made with forthcoming elections in mind. Mavedzenge notes:

> "In the case of Zimbabwe, it has been suggested that the courts sometimes are used, particularly by the executive, to rubber-stamp legislation and decisions that are patently unconstitutional, but which assist the ruling party to maintain its political power."[8]

A weak judiciary is a perfect arena for legitimising illegitimate political conduct. For instance, when former president Robert Mugabe was removed from power on 17 November 2017, the courts made two strange judgments that raised suspicions of a captured judiciary.[9] One court ruled that Mugabe's removal through a "military coup" was constitutional, and another court ruled that the sacking of Mnangagwa (who became President through the coup) as Vice President by Mugabe was illegal.[10] These two rulings were not only startling in terms of legal reasoning, but were also audacious; by no coincidence, they were extremely convenient for Mnangagwa's ascendancy to power and the legitimacy of his presidency.

In this article, the authors highlight how the independence of the judiciary in Zimbabwe has been mutilated over the past few years. The authors begin by highlighting the imperative of judicial independence in the post-1990 African state, and then theorise that judicial independence is an incident of the separation of powers cardinal to constitutionalism, democracy and the rule of law. This is followed by an in-depth analysis of the contraction of judicial independence in Zimbabwe. The authors argue that the political arms of state have resorted to a combination of threats and constitutional changes to interfere with the independence of the judiciary.

---

8 Mavedzenge "The Zimbabwean Constitutional Court as a Key Site of Struggle for Human Rights Protection: A Critical Assessment of Its Human Rights Jurisprudence During Its First Six Years" 2020 20(1) *African Human Rights Law Journal* 181 202.

9 See *Emmerson Dambudzo Mnangagwa v The Acting President of the Republic of Zimbabwe and Attorney General* HC940/17 and *Joseph Evurath Sibanda and Leonard Leonard Chikomba v President of the Republic of Zimbabwe – Robert Gabriel Mugabe NO; Minister of Defence, Commander of the Defence Forces of Zimbabwe and the Attorney-General of Zimbabwe* HC10820/17.

10 These judgments were convenient for each other. The question of Mnangagwa's legitimacy as the successor to Robert Mugabe had to be addressed first and followed by the question of the constitutionality of the army's conduct.

2 JUDICIAL INDEPENDENCE IN POST-1990 CONSTITUTIONAL STATES IN AFRICA

Several African states have over the past years adopted democratic constitutions in what has been termed the "third wave of democratisation". In this wave, the adoption of progressive constitutions has been the easier part; the implementation or entrenchment of the culture of constitutionalism in some of these countries has been a different story.[11] The constitutions whose adoption was accompanied by so much hope and jubilation are now being mutilated at an alarming rate for political expedience.

The constitutional developments of the 1990s in Africa have significantly altered the political landscape.[12] According to Masengu, Africa has, since the early 1990s, witnessed the emergence of constitutional courts wielding judicial review powers and the enforcement of fundamental rights provided for in the constitutions.[13] It is unclear, however, whether the recent trend of interference with the powers of the courts stems from the fact that courts had become more powerful so as to threaten the political arms of state or whether the political arms have increasingly sought to control a strong institution in the form of the judiciary. What remains clear, however, is that there have been covert (and sometimes overt) threats against judges.[14]

In the Gambia, the former Chief Justice Judge Agyemang was forced to flee the country in the middle of the night after she had been accused of serving the interests of a hostile foreign nation. Judge Agyemang was widely viewed as a pro-human-rights judge. Prior to this, concerns had been expressed that the government was acting in a manner that sought to undermine the independence of the judiciary.[15]

In 2015, the Vice President of the Burundi Constitutional Court revealed that the court had passed a judgment in favour of the President's bid for a third term after receiving threats.[16]

In Zimbabwe, the political arms of state have directed their efforts towards eroding judicial independence. This has been done in three main ways: one, by making threats against the judiciary; two, by making constitutional amendments that limit the powers of the judiciary; and three, by creating a system of patronage.

Evidence drawn from Zimbabwe points towards a deliberate ploy by the political elite to weaken the judiciary. A judiciary endowed with so much power by the constitution is, for the elite, a stumbling block to power

---

11 Mzikamanda paper presented at conference on Law Reform Agencies for Eastern and Southern Africa n.p.

12 Masengu "The Vulnerability of Judges in Contemporary Africa: Alarming Trends" 2017 63(4) *Africa Today* 3 4.

13 *Ibid*.

14 *Ibid.*

15 *Ibid*.

16 Aljazeera "Burundi Court Forced to Validate Leader's Third Term" (14 May 2015) https://www.aljazeera.com/news/2015/5/14/burundi-court-forced-to-validate-leaders-third-term (accessed 2022-03-27).

retention. The conduct of Zimbabwe's power elites is synonymous with the post-independent African state; shambolic constitutionalism led to economic, social and political instability, from which the continent is still reeling.[17] Fombad notes that in order to prevent this problem, most post-1990 African constitutions restricted the powers of government to amend the constitution.[18] Succinctly put, "the overall objective is to ensure that the general will of the people, as reflected in the constitution, is not casually and capriciously frustrated by self-seeking political leaders or transient majorities in order to perpetuate themselves in power".[19]

The former Lesotho Chief Justice Lehohla once stated that the "most pernicious of the challenges facing judiciaries in Africa today is that of undue interference or influence in one form or another".[20] He also argued that despite constitutional provisions against interference with the judiciary, there is a growing tendency among African states to control the judiciary.[21]

3 JUDICIAL INDEPENDENCE AND SEPARATION OF POWERS

One of the most fundamental features of constitutional democracies is that they allow courts to make pronouncements on issues of disagreement between different polities. Tushnet notes that "reasonable disagreements over specification are resolved by recourse to 'independent' courts".[22] According to Ferejohn, "judges should be autonomous moral agents, who can be relied on to carry out their public duties independent of venal or ideological considerations".[23] Having judges who are insulated from external influence strengthens the rule of law and is also a precondition for good governance and democracy.[24] An independent judiciary serves "as an effective mechanism that controls and constrains the operation and power of the legislature and executive".[25] The word "independence", according to Ferejohn, has at least two meanings:

> "One meaning commonly invoked when considering the circumstances of the individual judge – is that a person is independent if she is able to take actions without fear of interference by another. In this sense, judicial independence is the idea that a judge ought to be free to decide the case before her without fear or anticipation of (illegitimate) punishments or rewards. Another meaning is perhaps less common in discussions surrounding judges, but applies naturally to courts and to the judicial system as a whole. We might think of a

---

17 See Fombad "Some Perspectives on Durability and Change Under Modern African Constitutions" 2013 11(2) *International Journal of Constitutional Law* 382 383.

18 *Ibid*.

19 *Ibid*.

20 Masengu 2017 *Africa Today* 3.

21 *Ibid*.

22 Tushnet "The Relation Between Political Constitutionalism and Weak-Form Judicial Review" 2013 14(12) *German Law Journal* 2249 2250.

23 Ferejohn "Independent Judges, Dependent Judiciary: Explaining Judicial Independence" 1998 72 *South California Law Review* 353.

24 Aydın "Judicial Independence Across Democratic Regimes: Understanding the Varying Impact of Political Competition" 2013 47(1) *Law & Society Review* 105.

25 *Ibid*.

> person or an institution as being dependent on another if the person or entity is unable to do its job without relying on some other institution or group."[26]

One of the most significant developments of the twentieth century is the expansion of the judicial domain globally.[27] The link between constitutionalism and judicial review has become more apparent. Combined, these constitute the backbone of mature democracy. Mature democracy, in a conceptual sense, protects itself against tyranny (and majoritarian tyranny) through constitutionalism and judicial review.[28] It has been observed that the inclusion of rights in constitutions and the accompanying powers of judicial review invested in courts act as power-diffusing mechanisms.[29] The importance of the independence of the judiciary was underscored by the words of former Chief Justice of South Africa, Mahomed CJ:

> "[A] judiciary which is independent and which is perceived to be independent within the community protects both itself and the freedoms enshrined in the Constitution from invasion and corrosion. A judiciary which is not, impairs both."[30]

4 LEGISLATIVE AND CONSTITUTIONAL SAFEGUARDS FOR JUDICIAL INDEPENDENCE

Zimbabwe, like other constitutional democracies, has included provisions to safeguard judicial independence. For present purposes, two such provisions relate to the appointment of judges and to their compulsory retirement.

4 1 Appointment of judges

The process of appointing judges is crucial for determining the independence of the judiciary. Fombad notes that "[t]he independence of the judiciary and its ability to discharge its functions without fear, favour or prejudice depend largely on how judges are appointed".[31] This has become particularly important owing to the increase in politically sensitive matters that are brought before the courts.[32] Where the executive wields enormous powers to appoint judges, it may interfere with the judges' ability to dispense with "matters fairly and impartially".[33] The United Nations Resolution on Independence and Impartiality of Judges requires that the selection of

---

26 Ferejohn 1998 *Southern California Law Review* 353 355.

27 Hirschl *Towards Juristocracy: The Origins and Consequences of the New Constitutionalism* (2009) 1.

28 Hirschl "The Political Origins of the New Constitutionalism" 2004 11(1) *Indiana Journal of Global Legal Studies* 71.

29 Hirschl 2004 *Indiana Journal of Global Legal Studies* 72.

30 Mahomed "The Independence of the Judiciary" 1998 115 *South African Law Journal* 658 661.

31 Fombad "A Comparative Overview of Recent Trends in Judicial Appointments: Selected Cases from Africa" 2021 55(1) *Canadian Journal of African Studies* 161 162.

32 Fombad 2021 *Canadian Journal of African Studies* 182.

33 *Ibid*.

judges be done in a transparent manner.[34] Chiduza notes that politicians are involved in the appointment process to give it legitimacy; however, this prerogative cannot be left entirely in the hands of politicians.[35] Pertinent here is the role played by the Judicial Service Commission. Section 90 of the Constitution of Zimbabwe, 1980 (Lancaster House Constitution) provided for the composition of the Judicial Service Commission. The Judicial Service Commission comprised the Chief Justice or Acting Chief Justice or the most senior judge of the Supreme Court, the Chairman of the Public Service Commission, the Attorney-General, and not less than three other members appointed by the President, of whom one must be a person who is or has been a Supreme Court or High Court judge, a person who has been qualified as a legal practitioner in Zimbabwe for not less than five years, or a person who is possessed of such legal qualifications or experience as the President considers suitable and adequate for appointment to the Judicial Service Commission; and the remaining presidential appointees must be chosen for their ability and experience in administration, for their personal qualifications, or for their suitability otherwise for appointment. It is crucial to note that of the six possible members of the Judicial Service Commission under the Lancaster House Constitution, three members were directly appointed to the Commission by the President, two appointed by virtue of being the holders of offices to which they were appointed by the President after consultation with the Judicial Service Commission, and one was directly appointed by the President to an office by virtue of which he was a member of the Commission.

Section 189 of the new Constitution (Constitution of Zimbabwe, 2013)[36] creates the Judicial Service Commission. In terms of section 189(1), the Judicial Service Commission is made up of: (a) the Chief Justice; (b) the Deputy Chief Justice; (c) the Judge President of the High Court; (d) one judge nominated by the judges of the Constitutional Court, the Supreme Court, the High Court, the Labour Court and the Administrative Court; (e) the Attorney-General; (f) the chief magistrate; (g) the chairperson of the Civil Service Commission; (h) three practising legal practitioners of at least seven years' experience designated by the association, constituted under an Act of Parliament, which represents legal practitioners in Zimbabwe; (i) one professor or senior lecturer of law designated by an association representing the majority of the teachers of law at Zimbabwean universities or, in the absence of such association, appointed by the President; (j) one person who for at least seven years has practised in Zimbabwe as a public accountant or auditor, and who is designated by an association, constituted under an Act of Parliament, which represents such persons; and (k) one person with at

[34] UN Human Rights Council *Independence and Impartiality of the Judiciary, Jurors and Assessors and the Independence of Lawyers* Resolution adopted by the Human Rights Council (5 October 2010) A/HRC/RES/15/3 (2010) https://www.refworld.org/docid/4cbbebd72.html (accessed 2022-04-26) par 2.

[35] Chiduza "Towards the Protection of Human Rights: Do the New Zimbabwean Constitutional Provisions on Judicial Independence Suffice?" 2014 17(1) *Potchefstroom Electronic Law Journal* 368.

[36] Constitution of Zimbabwe Amendment (No 20) Act, 2013.

least seven years' experience in human resources management, appointed by the President.

Section 180 of the 2013 Constitution states:

> "(1) The Chief Justice, the Deputy Chief Justice, the Judge President of the High Court and all other judges are appointed by the President in accordance with this section.
> (2) Whenever it is necessary to appoint a judge, the Judicial Service Commission must–
> (a) advertise the position;
> (b) invite the President and the public to make nominations;
> (c) conduct public interviews of prospective candidates;
> (d) prepare a list of three qualified persons as nominees for the office; and
> (e) submit the list to the President;
>
> whereupon, subject to subsection (3), the President must appoint one of the nominees to the office concerned.
>
> (3) If the President considers that none of the persons on the list submitted to him in terms of subsection (2)(c) are [sic] suitable for appointment to the office, he or she must require the Judicial Service Commission to submit a further list of three qualified persons, whereupon the President must appoint one of the nominees to the office concerned.
> (4) The President must cause notice of every appointment under this section to be published."[37]

The rationale for this section is to provide for a process to appoint judges that is transparent and free of manipulation.

4 2 Compulsory retirement of judges

The Constitution of Zimbabwe, 2013 sets the age of retirement for the judges of the Constitutional Court at 70 years.[38] The compulsory retirement of judges is at the heart of judicial independence. The strict retirement age ensures that judges' allegiance cannot be bought in exchange for extension of tenure. As a further entrenchment of compulsory retirement, the Constitution of Zimbabwe, places a restriction on any amendments to provisions relating to, among others, extension of tenure for judges. Section 328 of the Constitution requires any amendments to the said provision to be put to a national referendum. In addition, the effect of section 328(7) is that any amendments that may allow for extension of tenure for public officers will not apply to anyone currently in office when the amendments come into effect. This means that no judge is allowed to benefit from an amendment effected while still in office. This provision guards against judges lobbying for constitutional amendment to benefit themselves.

---

37 S 180 of the Constitution of Zimbabwe, 2013.

38 S 186(1)(*a*) of the Constitution of Zimbabwe, 2013.

5 THREATS AGAINST THE JUDICIARY IN ZIMBABWE

The courts have been abused to score cheap political points. Members of opposition parties and civil-society organisations have endured arrests with no bail and, in some cases, outright detention without trial.[39] The courts are severely compromised. The former president, Robert Mugabe, is on record threatening judges who allow opposition members to demonstrate.[40] Minister of Justice Kazembe Kazembe has also made some disparaging remarks against the judiciary.[41] Historically, the government of Zimbabwe has made serious threats against the judiciary, including against individual members. The former Minister of Home Affairs has previously remarked:

> "But even after this, recalcitrant and reactionary members of the so-called benches still remain masquerading under our hard-won independence as dispensers of justice or, shall I say, injustice by handing down pieces of judgment which smack of subverting the people's government. We inherited in toto the Rhodesian statutes which these self-same magistrates and judges used to avidly and viciously interpret against the guerrillas. What is so different now apart from it being majority rule? Our posture during constitutional negotiations with the British … that the judiciary must be disbanded, can now be understood with a lot of hindsight."[42]

The interference with the judiciary has worsened since President Mnangagwa came to power through a military coup in November 2017. Research has shown that under the current government, there is "continued capture and undermining the independence of the courts".[43] The government has adopted strategies such as public attacks, threats and intimidation and pushing through constitutional amendments that undermine the independence of the judiciary.[44] The theoretical supposition in this article is that judicial independence entails that the judges are able to discharge their duties without external interference or undue influence.[45] According to Hofisi,

---

39 For e.g., Hon Joanna Mamombe, Hon Job Sikhala, Hopewell Chin'ono, Makomborero Haruzivishe, Peter Mutasa, Linda Masarira, Netsai Marova and Cecelia Chimbiri, among others.

40 BBC News "Mugabe Lambasts Judges Over Protests" (4 September 2016) https://www.bbc.com/news/world-africa-37270873 (accessed 2022-02-11).

41 ISS Africa "Mnangagwa Regime Continues to Score Own Goals" (1 June 2021) https://issafrica.org/iss-today/mnangagwa-regime-continues-to-score-own-goals (accessed 2022-03-02).

42 Karekwaivanane *The Struggle Over State Power in Zimbabwe: Law and Politics Since 1950* (2017) 208.

43 Buchanan-Clarke and Mashingaidze "Rebuilding Constitutionalism and Rule of Law in Zimbabwe" (August 2021) *Good Governance Policy Brief* https://www.africaportal.org/publications/rebuilding-constitutionalism-and-rule-law-zimbabwe/ (accessed 2022-03-07).

44 *Ibid*.

45 Siyo and Mubangizi "The Independence of South African Judges: A Constitutional and Legislative Perspective" 2015 18(4) *Potchefstroom Electronic Law Journal* 816.

the judiciary in Zimbabwe is generally viewed as captured, "subject to the whims of the executive".[46]

The 1980 Constitution had a clear statement on the independence of the judiciary. Section 79B of the 1980 Constitution provided that

> "in the exercise of his judicial authority, a member of the judiciary shall not be subject to the direction or control of any person or authority, except to the extent that a written law may place him under the direction or control of another member of the judiciary".[47]

A similar statement is made in section 165(2) of the South African Constitution,[48] which states that "[t]he courts are independent and subject only to the Constitution and the law, which they must apply impartially and without fear, favour or prejudice". Section 165(3) states that "[n]o person or organ of state may interfere with the functioning of the courts".[49] The 2013 Zimbabwe Constitution entrenches judicial independence in section 164.[50] In addition, the Constitution also establishes the Constitutional Court.[51] The Constitutional Court is expressly empowered to exercise judicial review powers.[52] Chiduza commends the inclusion of this provision in the Constitution as it gives the courts the power to hold the other branches of government to account.[53] He further argues that if these powers are exercised impartially, they will prohibit abuse of power by other branches of government.

6 CONSTITUTIONAL CHANGES AFFECTING THE INDEPENDENCE OF THE JUDICIARY

In addition to threats against the judiciary, political arms in Zimbabwe have also resorted to making constitutional changes that have the effect of weakening the judiciary. This has been done by tampering with the ways in which judges are appointed and in how their tenures are extended. The

---

46 Hofisi "The Constitutional Courts of South Africa and Zimbabwe: A Contextual Analysis" 2021 35 *Speculum Juris* 55.

47 S 79(B) of the Constitution of Zimbabwe, 1980.

48 Constitution of the Republic of South Africa, 1996.

49 S 165(3) of the South African Constitution.

50 S 164 of the 2013 Zimbabwe Constitution is titled "Independence of the Judiciary" and states: "(1) The courts are independent and are subject only to this Constitution and the law, which they must apply impartially, expeditiously and without fear, favour or prejudice.(2) The independence, impartiality and effectiveness of the courts are central to the rule of law and democratic governance, and therefore– (a) neither the State nor any institution or agency of the government at any level, and no other person, may interfere with the functioning of the courts; (b) the State, through legislative and other measures, must assist and protect the courts to ensure their independence, impartiality, dignity, accessibility and effectiveness and to ensure that they comply with the principles set out in section 165."

51 S 166 of the Constitution of Zimbabwe, 2013.

52 S 167 of the Constitution of Zimbabwe, 2013.

53 Chiduza "Towards the Protection of Human Rights: Do the New Zimbabwean Constitutional Provisions on Judicial Independence Suffice?" 2014 17(1) *Potchefstroom Electronic Law Journal* 368.

2017 Constitutional Amendment No 1 and the 2021 Constitutional Amendment No 2 bear testimony to this.

6 1 Constitutional Amendment No 1 and independence of the judiciary

In October 2016, acting in terms of section 180 of the Constitution, the Judicial Service Commission invited nominations from the President and members of the public for candidates to fill the position of Chief Justice. The incumbent was about to reach the retirement age of 70 and was obliged to retire in terms of the Constitution. Four candidates were nominated, and the interview date was set for 16 December 2016. Before the interviews could take place, the then-Chief Justice, in his capacity as the Chairperson of the Judicial Service Commission received an executive order to stop the interview process. The Chief Justice defied this order on the grounds that it lacked constitutional basis. The events that followed clearly support the view that there had been a long-term project to diminish the independence of the judiciary. The words of the then-Chief Justice Chidyausiku are telling:

> "Ever since adopting our stance to abide by the Constitution, a segment of the media has sought to impugn the integrity of the Judicial Service Commission. This is most regrettable. This is all I wish to say on this unfortunate debate. In this regard, I am inspired by Michelle Obama's words of wisdom, 'when your detractors go low, you go higher'. You do not follow them into the gutter."[54]

While this battle was raging on, the Ministry of Justice proposed an amendment to section 180 of the Constitution, specifically to dispense with the public interviews. It is our view that public interviews were included in the Constitution in order to bring transparency to the appointment of judges and to ensure that the judges would be appointed on merit. This aspect is crucial to judicial independence. Any attempt to reverse it consequently undermines the safeguards for protecting judicial independence. Four days before the interviews, one Romeo Zibani made an urgent chamber application to the High Court for an interdict against the public interviews.[55] Conspicuously, despite being cited, the Minister of Justice did not oppose the application. The then-Minister of Justice is the current President Mnangagwa. The basis for Zibani's application was that the interview process was unconstitutional because it was open to bias.[56] He relied on the fact that the Chief Justice, in his capacity as the Chairperson of Judicial Service Commission would essentially be interviewing his colleagues. It was also contended that one of the nominees also served as the secretary of the Judicial Service Commission:

---

[54] Munyoro "Chidyausiku Speaks on Chief Justice Saga" (2017-01-17) *The Herald Zimbabwe https://www.herald.co.zw/chidyausiku-speaks-on-chief-justice-saga/* (accessed 2022-02-23).

[55] Verheul "From 'Defending Sovereignty' to 'Fighting Corruption': The Political Place of Law in Zimbabwe after November 2017" 2021 56(2) *Journal of Asian and African Studies* 189 195.

[56] Bazana and Jackson "An Appraisal of the Recruitment and Selection Process of the Judiciary (Chief Justice) in Zimbabwe" 2019 11(1) *Inkanyiso: Journal of Humanities and Social Sciences* 39 40.

> "The fifth and eighth respondents are part of the Commission, the JSC, which is the first respondent. The fifth respondent is its secretary as well as judge of appeal in the Supreme Court where the seventh respondent also sits as a judge of appeal… The applicant contends that over time, relationships have formed between and among these individuals which may result in either prejudicial bias or favourable bias between and amongst them."[57]

The High Court agreed with the respondents that the impugned provision was lawful, but found that it was contrary to the constitutional values of transparency and accountability. The interdict was granted. Without dwelling on the merits of this judgment, what is worrying is the expression made by the court that upholding the Constitution ahead of an expressed intention by the executive to amend section 180 would be "slavish-adherence to the separation of powers doctrine." This reasoning is deeply flawed. This amounts to holding a constitution in abeyance simply because there is a group lobbying against it. At this point, the proposed amendment had not even been tabled for consideration in Parliament. According to Hofisi and Feltoe, this judgment is "at variance with the basic principles of independence of the judiciary, the separation of powers and the supremacy of the Constitution".[58]

The foregoing was the culmination of factional fights within the ruling ZANU-PF party.[59] Each faction was angling for control of the judiciary. Hofisi and Feltoe seem to suggest that the Minister of Justice and his faction had ties to one of the candidates owing to his liberation war credentials and strong ties to the military. Legal blogger Alex Magaisa submits:

> "what is clear from this case is that the process of appointing the Chief Justice has been the subject of political gamesmanship within the context of ZANU-PF's succession politics … it is hardly a coincidence that Romeo Zibani submitted his application at the same time that the Ministry of Justice was also crafting an amendment in the process of appointing a Chief Justice and that the Ministry had no interest in opposing Zibani's application."[60]

The events leading to the appointment of the Chief Justice provide a backdrop for the criticism against the judiciary. The process was and remains tainted. The political involvement in the appointment process had the effect of "diminishing authority and prestige that should attach to the office".[61]

The Constitution of Zimbabwe Amendment Act No 1 gave the President the sole responsibility to appoint the Chief Justice, Deputy Chief Justice and Judge President of the High Court. The President is allowed to appoint these members of the judiciary without following recommendations of the Judicial Service Commission and his only obligation would be to inform the Senate.

---

57 *Zibani v Judicial Service Commission* HC 12441-16 par 11.

58 Hofisi and Feltoe "Playing Politics with the Judiciary and the Constitution?" 2017 *The Zimbabwe Electronic Law Journal* 68.

59 Verheul 2021 *Journal of Asian and African Studies* 189 195.

60 Hofisi and Feltoe 2017 *The Zimbabwe Electronic Law Journal* 68.

61 VERITAS "Chief Justice Succession: The Continuing Saga" (2 March 2017) http://www.veritaszim.net/sites/veritas_d/files/Court%20Watch%202017%20-%20Chief%20Justice%20Succession_The%20Continuing%20Saga.docx (accessed 2022-04-02).

Allowing the President to act alone when making judicial appointments is contrary to the principles of accountability and transparency. According to Fombad allowing members of the executive to play a decisive role in the appointment of judges leaves the judiciary branch vulnerable to manipulation.[62]

6 2 Constitutional Amendment No 2 and the independence of the judiciary

A Constitution Amendment Bill was gazetted in January 2021. It was signed into law in May 2021. This constitutional amendment is endowed with flaws,both in terms of the process that led to its promulgation and in terms of its substance. According to Makumbe, the method used to adopt the amendment "fell short of adherence to correct legal procedures".[63] Section 328 of the 2013 Constitution of Zimbabwe provides that a Bill amending the Constitution must be made public by the Speaker of Parliament 90 days before its introduction in the House of Assembly. The Bill was never made public before it was tabled in Parliament. This essentially deprived the people of the opportunity to comment and discuss the Bill. Some changes that were later made to the Bill were never tabled for discussion. They were made just before adoption without giving sufficient time for debate.

Constitutional Amendment No 2 has been widely criticised for violating judicial independence. It affords the President wide discretionary powers on the appointment of judges after the Judicial Service Commission has tendered its recommendations.[64] Furthermore, the amendment extends the age of retirement for judges by 5 years from 70 to 75 years.[65] According to scholars, this extension is yet another assault on the independence of the judiciary as this amendment was solely crafted to retain the current Chief Justice, Luke Malaba, who was due for retirement.[66] The Constitution of 2013 has a safeguard against this. Section 328(7) requires that, should there be an extension of the tenure of the Chief Justice, it should not benefit the incumbent.[67] The rationale behind this section is straightforward: it is meant to prevent the capture of sitting judges by incentivising their allegiance with tenure extensions. According to Madhuku, provisions that give power to the President to extend the retirement age provide a loophole through which the

62 Fombad 2021 *Canadian Journal of African Studies* 161 175.

63 Makumbe "Amendment or Abrogation? The Zimbabwe Constitutional Amendment Bill Number 2 and Its Implications to Democracy, Judicial Independence and Separation of Powers" 2021 *Academia Letters* 2.

64 Buchanan-Clarke and Mashingaidze "Rebuilding Constitutionalism and Rule of Law in Zimbabwe" (August 2021) *Good Governance Policy Brief* https://www.africaportal.org/publications/rebuilding-constitutionalism-and-rule-law-zimbabwe/ (accessed 2022-03-07) 11.

65 S 13 Constitution of Zimbabwe (Amendment No. 2) Act, 2021.

66 Buchanan-Clarke and Mashingaidze "Rebuilding Constitutionalism and Rule of Law in Zimbabwe" (August 2021) *Good Governance Policy Brief* https://www.africaportal.org/publications/rebuilding-constitutionalism-and-rule-law-zimbabwe/ (accessed 2022-03-07) 11.

67 S 328(7) of the Constitution of Zimbabwe, 2013.

executive may influence the judiciary.[68] The extension of the Chief Justice's tenure was therefore "a well thought out plan to weaken vital institutions such as the judiciary and fill the courts with judges beholden to the executive".[69] Madhuku notes that the privilege of extension of tenure beyond retirement age may be reserved for "good" judges. This means that the President is likely only to extend the tenure of judges who are viewed as favourable to the system. He adds that "[t]his, in the long term, undermines the independence of the judiciary".[70]

The extension of the Chief Justice's tenure was met with legal resistance. The night before the Chief Justice turned 70, an urgent application was made to the High Court for a declaratory order that the Chief Justice's term had come to an end and that the amendment to the Constitution cannot benefit him.[71] The application was centred on the effect of section 186 of the Constitution of Zimbabwe, as amended by Amendment No 2,[72] in light of the restrictive provision in section 328 of the Constitution. The court was faced with the task of interpreting section 186 in light of the provisions of section 328. The court held that the purpose of section 328 is "among other important considerations, to ensure that a person who occupies or holds public office does so for limited time, to prevent turning persons into institutions thereby compromising on the precepts enjoined in s 3 of the Constitution".[73] Furthermore, the court held, the provision was meant to "ensure that a person who holds public office does not influence changes in the law in order to entrench his or her occupation of the public office by

---

68 Madhuku "Constitutional Protection of the Independence of the Judiciary: A Survey of the Position in South Africa" 2002 46(2) *Journal of African Law* 232 243.

69 Makumbe 2021 *Academia Letters* 2.

70 Madhuku 2002 *Journal of African Law* 232 243.

71 *Kika v Minister of Justice Legal & Parliamentary Affairs* (HC 264-2021, HC 2128/21) [2021] ZWHC 264.

72 S 186 of the 2013 Constitution is titled "Tenure of office of judges" and states: " (1) The Chief Justice and the Deputy Chief Justice hold office from the date of their assumption of office until they reach the age of 70 years, when they must retire unless, before they attain that age, they elect to continue in office for an additional five years: Provided that such election shall be subject to submission to, and acceptance by the President, after consultation with the Judicial Service Commission, of a medical report as to their mental and physical fitness so to continue in office. (2) Judges of the Constitutional Court are appointed for a non-renewable term of not more than 15 years, but– (a) they must retire earlier if they reach the age of 70 years unless, before they attain that age, they elect to continue in office for an additional five years: Provided that such election shall be subject to submission to, and acceptance by the President, after consultation with the Judicial Service Commission, of a medical report as to the mental and physical fitness of the judge so to continue in office; (b) After the completion of their term, they may be appointed as judges of the Supreme Court or the High Court at their option, if they are eligible for such appointment. (3) Judges of the Supreme Court hold office from the date of their assumption of office until they reach the age of 75 years, when they must retire unless, before they attain that age, they elect to continue in office for an additional five years: Provided that the election shall be subject to the submission to, and acceptance by the President, after consultation with the Judicial Service Commission, of a medical report as to the mental and physical fitness of the judge so to continue in office. (4) Notwithstanding subsection 7 of section 328, the provisions of subsections (1), (2) and (3) of this section shall apply to the continuation in office of the Chief Justice, Deputy Chief Justice, judges of the Constitutional Court and judges of the Supreme Court."

73 *Kika v Minister of Justice Legal & Parliamentary Affairs* supra 19.

extending the length of time that he or she remains in that office."[74] The judgment concluded by declaring, among other things, that the tenure of the Chief Justice had come to an end. In response to this judgment, the Minister of Justice, Ziyambi Ziyambi, openly "spewed vitriol" against the judges accusing them of being captured by foreign states.[75] It can be argued that the courts were being targeted for scuppering the efforts by the government to undermine the independence of the judiciary through extending the tenure of the Chief Justice.

7 CONCLUSION

For democracy and constitutionalism to take root in Zimbabwe, judicial independence must be strengthened. The Constitution of Zimbabwe, despite recent mutilations, can be considered to be progressive and exemplary in charting a democratic trajectory for the country. However, threats and intimidation that have been meted out to the judiciary are a cause for concern. The government's commitment to democracy and constitutionalism is questionable. Constitutional provisions relating to independence of the judiciary have been amended twice in the recent past. Both amendments have the effect of contracting the independence of the judiciary. As a result, there has been a steady regression of the independence of the judiciary, with political arms amassing more power and thereby placing the aspirations for constitutionalism and democracy in jeopardy. Zimbabwe needs a strong and independent judiciary if the aspirations of constitutionalism and democracy are to be realised.

74 *Ibid*.

75 Makumbe 2021 *Academia Letters* 3.

DRAFTING DEFINITIONS WITH POLISEMY AND SEMANTIC CHANGE IN MIND

Terrence R Carney
BA(Hons) MA PhD
Associate Professor, University of South Africa

SUMMARY

Legislative definitions must be as clear and precise as possible. Different sources for legislative drafting provide guidelines on how to ensure clarity and precision. Many of these guidelines provide language-related advice. However, language guidelines and linguistic principles are not the same thing. Garth Thornton's book is one of the few that suggests drafters study language to benefit their drafting techniques. He specifically mentions the link between language and society, and claims that drafters will gain by understanding how meaning (and language) change owing to societal changes. This article explores Thornton's observation by attending to the polysemy and possible semantic change of the word "strike", taken from the case of *SASRIA v Slabbert Burger Transport* [2008] ZASCA 73. The article claims that social processes like lived experiences and changing perspectives function as drivers of semantic change. These changes lead to the development of new semantic variations that coexist with the old or base meaning of a word, resulting in polysemy. Polysemy has the potential to cause vagueness, ambiguity and uncertainty, which complicates drafters' task in producing clear and precise texts. Understanding the complexity and instability of words ahead of time could aid drafters to hone their definitions for better legal communication. To prevent unnecessary semantic pitfalls, the contribution further suggests that drafters apply their linguistic awareness (referred to as the "lexicological approach") to words chosen for definition, as well as to a selection of words deliberately left undefined.

1 INTRODUCTION

In his guide to legislative drafting in South Africa, Burger makes the important observation that legislative drafters must have a very sound knowledge of the law and its sources.[1] This might seem rather obvious. What is not so obvious, however, is that drafting also requires a thorough knowledge of language, and specifically linguistics.[2] Most drafting guides contain many suggestions on how to improve the language of statutes or

[1] Burger *A Guide to Legislative Drafting in South Africa* (2002) 10; also see Crabbe *Legislative Drafting* (1994) 13.

[2] Crabbe puts it a bit differently. He mentions a thorough knowledge of grammar and legal language (Crabbe *Legislative Drafting* 6). Indeed, they are very important for good drafting. However, grammar is only one aspect of linguistics, and legalese is a language register. Linguistics allows drafters to understand that a particular word has different meanings and it helps to explain why that might be so.

other legal documents like contracts in favour of clarity and plain language.[3] However, language guidance is something entirely different from linguistics. Thornton realises this and believes that an interest in linguistics is "a desirable, perhaps essential, quality for a drafter".[4] To him, a drafter will benefit from a study of language, an understanding of how the various components of language function. More importantly, drafters will gain by paying attention to linguistic changes, "how time and social forces influence meaning and usage".[5] Focusing on linguistics, and the knowledge that language change occurs, might seem like an added burden to over-worked drafters, but it has a direct influence on what they do. Aitchison mentions that the universe is perpetually in a state of change and language is an obvious part of this constant process.[6] Words notoriously have more than one meaning, which often results in ambiguity or vagueness. They also have the potential to gain and change meaning. Paying attention to the semantic complexity of words and their potential to change is vital to prevent statutes from turning into a "morass" of incomprehensibility.[7] According to Aitchison, semantic shift often makes people nervous and desperate to preserve what they consider to be a word's "proper meaning", and to prevent an apparent decay or weakening from taking place.[8] Understandably, this fear is evident in law too, because law has a need for precision, clarity and precedent. The need persists in falling back on codified examples and explanation in order to be fair in all contexts.

To illustrate the value of Thornton's observation, this article considers the word "strike", which is contested in the case of *SASRIA v Slabbert Burger Transport*.[9] At the time of the case, the word was undefined, and courts relied on its ordinary meaning for guidance. The case proves helpful on two fronts: it shows that the word "strike" has more than one relevant meaning worth considering, and that a semantic change could alter the way in which speakers use and define the word, now and in the future. It also shows how important it is for drafters to pay attention to various aspects like polysemy and the impact of societal changes on semantic meaning. Of equal importance is a drafter's responsibility to test undefined words and determine whether their ordinary meanings will suffice. If a test shows that they will not, drafters must consider defining selected words to ensure

---

3 Burnett *Commercial Contracts: Legal Principles and Drafting* (2010) 50; Hawthorne and Kuschke "Drafting of Contracts" in Hutchison and Pretorius (eds) *The Law of Contract in South Africa* 3ed (2017) 385. Christie does not provide guidelines on the drafting of contracts, but his discussion of the interpretation of contracts stresses the importance of clarity. He mentions that disputes often arise because certain words have more than one interpretation, or because the language of the contract is poor. In the event that the *contra proferentem* rule must be applied, the author of the contract suffers for the incurable ambiguity. The premium on clear and precise drafting is therefore quite high. See Christie and Bradfield *Christie's The Law of Contract in South Africa* 8ed (2022) 258, 263, 265, 278–279.

4 Thornton *Legislative Drafting* 4ed (1996) 3.

5 Thornton *Legislative Drafting* 3, 4.

6 Aitchison *Language Change. Progress or Decay?* (2013) 3–4.

7 Burrows *Thinking About Statutes. Interpretation, Interaction, Improvement* (2018) 89.

8 Aitchison *Language Change* 126–127.

9 *SASRIA Ltd v Slabbert Burger Transport (Pty) Ltd* [2008] ZASCA 73.

clarity. According to Price, good definitions help to create models through which the legislator or contractants control the future.[10] If the model is successful, it will promote readability and efficiency and improve comprehensibility.[11] If the South African Special Risk Insurance Association (SASRIA) had made a linguistic measurement of "strike" ahead of time, they would have realised the benefit of describing the word in their definition clause. If SASRIA had considered the polysemous nature of "strike" and its proximity with "riot" and "public disturbance", they might not have refused a pay-out or decided to litigate.

The remainder of this contribution contains four parts. First, the author provides the facts of the *SASRIA* case. The article then explains what semantic change entails and follows up with an indication of the possible polysemy of "strike". The author concludes with a discussion.

2 FACTS: *SASRIA V SLABBERT BURGER TRANSPORT*

In 2005, the South African Transport and Allied Workers Union embarked on a lawful strike. Unfortunately, the strike turned violent, resulting in property damage.[12] One of the damaged items was a truck owned by Slabbert Burger Transport, which was set alight. The truck was insured by SASRIA for the value of approximately R600 000 against any damage caused by a riot, strike or public disorder.[13] The insurer claimed that the truck was not damaged by any of the perils listed in the policy document.[14] Instead, the applicant in *SASRIA v Slabbert Burger Transport* tried to convince the court *a quo* and the Supreme Court of Appeal (SCA) that the word "strike" should have a modified meaning to reflect true events.[15] They argued that "strike" should incorporate attributes of (among others) violence and unlawfulness. In support, the applicant referred to a dictum by Dijkhorst J, where he stated:

> "Although some strikes are lawful, the fact that damage is caused introduces an element of unlawfulness, which is also the hallmark of a riot or public disorder. The activities are (also in the case of a strike where damage is caused) of a disorderly nature. In the context, violence leading to damage is a necessary ingredient."[16]

The applicant argued that the ordinary dictionary definition did not account for the violent action that took place.[17] Indeed, some strikers did commit

---

10 Price "Wagging, Not Barking: Statutory Definitions" 2013 60(4) *Cleveland State Law Review* 1017.

11 *Ibid*.

12 *SASRIA v Slabbert Burger Transport supra* par 4.

13 *Slabbert Burger Transport (Pty) Ltd v SASRIA Ltd* [2007] ZAGPHC 9 par 1–2; *SASRIA v Slabbert Burger Transport supra* par 1, 3.

14 *Slabbert Burger Transport v SASRIA supra* par 1.18.2.

15 *Slabbert Burger Transport v SASRIA Ltd supra* par 1, 3; *SASRIA v Slabbert Burger Transport supra* par 8, 9.

16 *South African Special Risks Insurance Association v Elwyn Investments (Pty) Ltd* TPD (unreported) 1994-05-30 Case no A370/93 par 8.

17 *SASRIA v Slabbert Burger Transport supra* par 10.

violent and unlawful acts: they assaulted and threatened non-striking co-workers, they damaged trucks by stone-throwing and fire, and they looted cargo.[18] As a result, the applicant requested that the courts apply the *eiusdem generis* rule to indicate that "strike" bears the same meaning as "riot" and "public disorder".[19] However, as Hurt AJA correctly pointed out, the appellant's attempts at redefining "strike" to include semantic criteria of violence and unlawfulness brought them within the semantic scope of both "riot" and "public disorder" – both perils covered by the insurance policy.[20] As a result, the SCA concurred with the court *a quo* and found no reason to either restrict or expand the meaning of "strike"; instead, it applied the ordinary-meaning principle and kept to the dictionary definition.[21]

Notably, the word "strike" does have more than one meaning and one of its senses does provide for a violent strike. Why would this be? One of the plausible explanations is language change that reflects perspectives in society. The next section elucidates "semantic change" in more detail.

3 SEMANTIC CHANGE

3 1 A brief overview of semantic change

Changes occur in both the grammar and the lexicon of a language for various reasons; some are unpredictable and imperceptible; others are traceable.[22] Semantic change, also known as semantic shift, is a form of language change that affects the meaning of mostly lexical words. This includes new and existing words. The meaning of an existing word either changes entirely (which means that the old meaning falls away), or a new sense is added. Change is mostly a gradual process, which means that a word's new sense will not appear immediately, and depends on a diffusion within a speech community.[23] For example, the word "awful" used to mean "full of awe", but now it glosses "terrible" or "bad"; the word "bar" used to refer to a counter or barrier, but its meaning now extends to include an establishment that sells alcohol.[24]

Language change also happens when people encounter a new language (like that of a coloniser) and this leads to an imperfect adoption of the new

---

18 *SASRIA v Slabbert Burger Transport supra* par 4.

19 *Slabbert Burger Transport v SASRIA supra* par 9; *SASRIA v Slabbert Burger Transport supra* par 8.

20 *SASRIA v Slabbert Burger Transport supra* par 9.

21 *SASRIA v Slabbert Burger Transport supra* par 10–11; *Slabbert Burger Transport v SASRIA supra* par 9. From both cases, it seems clear that the word "strike" was undefined by the policy document, and neither of the courts saw reason to consult the Labour Relations Act 66 of 1996. The policy-wording document (Annexure 4A) uploaded onto the SASRIA website in 2021 now defines both "strike" and "riot". The latter is defined quite specifically, but "strike" refers to the definition in s 213 of the Labour Relations Act.

22 Aitchison *Language Change* 16–17.

23 Fuß "Language Change" in Roberts (ed) *The Oxford Handbook of Universal Grammar* (2017) 475–476.

24 Similarly, the bar (barrier) that divides a judge, lawyer and jury was extended to include the legal fraternity: the Pretoria Bar.

language, and the handing-down of those imperfections to their children.[25] Afrikaans provides many examples, like "watermelon". The Afrikaans "*waatlemoen*" is a contraction of "*water lemoen*" (water orange) which used to be "*water meloen*" (water melon). This phonological mistake can be described as an unconscious change, because speakers are not necessarily aware of the mistake or the change taking place, which also means that changes like these are often subtle.[26] On the other side, speakers can be conscious of a change and might even encourage it. Active attempts at ameliorating language serve as an example. We often see this in language targeted at minority or vulnerable groups. Think of the word "cripple", which changed to "handicapped", then to "disabled", and now we use "differently-abled". We also say "visually impaired" instead of "blind". These reflect conscious decisions to change words and their meanings in order to shift attitudes in society.[27]

Two powerful drivers of semantic shift are the linguistic need for expression and language use. This is rather obvious in vocabulary; when items are no longer used or concepts are no longer applicable, the words that describe them fall away and become relics.[28] Think of "jerkin" which denotes a man's sleeveless leather jacket worn during the Renaissance, or "floppy disc" which describes an external data storage device used mostly in the 1980s and early 1990s. Speakers create new words or extend existing meanings to cover newly conceived inventions. For instance, "ghosting" reflects both semantic and grammatical change. "Ghost" is the original meaning and refers to an undetectable apparition, while "ghosting" is an extension of the original form, describing an immediate and unexplained break in communication resulting in one party ignoring the other. "Ghosting" is polysemous, because the newer sense connects to the older sense and coexists.

One mechanism of semantic changed is speakers' own lived experiences, which links directly to changes in society. The next section briefly explains what this entails.

3 2 Subjectification and user-based linguistic need

Today, it is widely understood that speakers cannot say or write something without also expressing a point of view.[29] This so-called speaker-imprint contains expressions of the self and the representation of a speaker's

---

25 Aitchison *Language Change* 145. In this example, mistakes made in Dutch became standardised in Afrikaans.

26 Aitchison *Language Change* 56.

27 This is also known as political correctness, and usually aims at changing attitudes by introducing new words and supressing taboo terms (and behaviours). This means there is a link between language and orchestrated change. See Hughes "Changing Attitudes and Political Correctness" in Nevalainen and Traugott (eds) *The Oxford Handbook of the History of English* (2012) 402.

28 Aitchison *Language Change* 154; Traugott and Dasher *Regularity in Semantic Change* (2002) 11.

29 Traugott "The Rhetoric of Counter-Expectation in Semantic Change: A Study in Subjectivity" in Blank and Koch (eds) *Historical Semantics and Cognition* (1999) 179.

perspective on the matter he or she is talking about.[30] This means that language use is often subjective. According to Traugott, certain elements or constructions in language help to express subjectivity explicitly. She refers to this as a process of subjectification and defines it as the development of a word's new meaning grounded in the socio-physical world, which marks subjectivity overtly.[31] Put differently, the process of subjectification is a speaker's subjective perspective on meaning flowing from his or her lived experience and the speaker's view of the world. This leads to a development of pragmatic polysemies with highly contextualised senses.[32] It is especially evident in pejoratives, euphemisms, amelioration, metaphors and other connotations. Speakers' beliefs that particular words are impolite or problematic are subjective. Once an entire speech community agrees that certain words carry a particular meaning, the subjective perspective becomes the norm. For example, the word "boor" used to denote a farmer, but soon other characteristics like "uneducated", "uncultured" and "rough" became associated with the lower classes in contrast to the more sophisticated middle class. Today, "boor" refers to a bad-mannered and obnoxious person. It underwent a negative shift. Its South African cognate, "*boer*", maintains the denotation of "farmer" but has since developed other senses associated with identity as well, all of which are subjective.

The process of subjectification is present in the disambiguation of "strike". Its connotation with violence and disturbance is in many respects subjective, grounded in South Africans' lived experiences of violent strikes and their growing (collective) perception of these events.[33] It is also grounded in the user-based linguistic need to describe what the speaker is experiencing. The notion of a violent strike is neither odd nor uncommon. Manamela and Budeli note that violence during both protected and unprotected strikes has become a cause for concern, and argue that violent strikes contribute nothing to collective bargaining.[34] They also remind us that the right to strike does not

30 *Ibid*.

31 *Ibid*. Not only does semantic change occur over time, it does so "in concert with broad social changes"; Hughes in Nevalainen and Traugott (eds) *The Oxford Handbook of the History of English* 403. In addition, see Hutton, who cites examples from English law that favour meanings that have changed because society has changed. Hutton *Word Meaning and Legal Interpretation. An Introductory Guide* (2014) 32–34.

32 Traugott in Blank and Koch (eds) *Historical Semantics and Cognition* 188.

33 Even though violent strikes in South Africa seem to be increasing, we are still dealing with perceptions. Studies analysing strike data indicate that less than 3 per cent of the workforce take part in strikes. More than 80 per cent of strikes are considered peaceful and more than 80 per cent of unionised labourers do not respond to the call to strike. Also, South Africa is on par with the rest of the world and do not strike more than other countries. According to Runciman *et al (*Runciman, Alexander, Rampedi, Moloto, Maruping, Khumalo and Sibanda "Counting Police-Recorded Protests: Based on South African Police Service Data" 2016 *Social Change Research Unit, University of Johannesburg* 15, 28, 29), about 80 per cent of protests recorded by the South African Police Service were peaceful events. See also Siwele "Most South African Workers Ignore Strike Call, Employers Say" (2021-10-07) *Bloomberg*; Mail&Guardian "South Africa's Strike Rate Isn't as Bad as It's Made out to Be" (2018-04-30) *Mail&Guardian*; Bhorat, Naidoo and Yu "Trade Unions in an Emerging Economy: The Case of South Africa" *WIDER Working Paper Series wp-2014-055, World Institute for Development Economic Research*.

34 Manamela and Budeli "Employees' Right to Strike and Violence in South Africa" 2013 46(3) *CILSA* 308 322–323.

extend to a right to violence.[35] The fact that legislation permits an employer to dismiss an employee during an unprotected strike if he or she is guilty of intimidation or property damage and misconduct is already telling of labour strike practices and of Parliament's means of coping with these incidents.[36]

The word "strike" can sometimes recall daunting images, of which the Marikana strike of 2012 is probably the best example. The circumstances that played out at the Lonmin Platinum Mine led to proposed amendments to the Labour Relations Act[37] as a means to address unprotected industrial action and unlawful acts such as violence and intimidation.[38] Some see violent labour strikes as the result of inadequate dispute-resolution mechanisms and the ineffectiveness of the Labour Relations Act, while others consider replacement labour as the potential root of all evil.[39]

Police-recorded protests for the period between 1997 and 2013 saw an average of 11 protests per day, of which 10 per cent were considered violent and another 10 per cent disruptive.[40] Tenza reported that 114 strikes took place during 2013 and another 88 in the following year.[41] In 2014, violence accompanied strikes in the form of intimidation (246 reported cases), violent incidents (50 reported cases) and vandalism (85 reported cases).[42] Records from the period 1999 to 2013 show at least 181 strike-related deaths, followed by 313 injuries; and the police arrested about 3 000 people for acts of public violence associated with industrial action.[43] As Tenza has indicated, strike-related violence tends to affect innocent parties as well – non-striking workers' families are threatened or assaulted and individuals associated with safety and security are often targeted.[44] There are examples in case law as

35 Manamela and Budeli 2013 *CILSA* 324.

36 See Schedule 8 of the Labour Relations Act 66 of 1995, and s 23(1) of the Constitution of the Republic of South Africa, 1996. This kind of unlawful conduct may also be interdicted; see Basson "Some Recent Developments in Strike Law" 2000 12(1) *SA Merc LJ* 119 127–128, 133. See also *Chemical, Energy, Paper, Wood and Allied Workers Union v CTP Ltd* [2013] 4 BLLR 378 (LC), and *TAWUSA obo MW Ngedle v Unitrans Fuel and Chemical (Pty) Ltd* [2016] ZACC 28, for examples where violence is used as a criterion to determine dismissal.

37 66 of 1995, specifically ss 64, 65, 67 and 69.

38 Ngcukaitobi "Strike Law, Structural Violence and Inequality in the Platinum Hills of Marikana" 2013 34(4) *ILJ* 836 844–845.

39 Du Toit and Ronnie "The Necessary Evolution of Strike Law" 2012 *Acta Juridica* 195 195–196; Calitz "Violent, Frequent and Lengthy Strikes in South Africa: Is the Use of Replacement Labour Part of the Problem?" 2016 28(3) *SA Merc LJ* 436 440; Kujinga and Van Eck "The Right to Strike and Replacement Labour: South African Practice Viewed From an International Law Perspective" 2018 21 *Potchefstroom Electronic Law Journal* 1 3, 23. Along with replacement labour, Tenza mentions the deficiencies of the bargaining system and its use of balloting as contributing factors. See Tenza "An Investigation into the Causes of Violent Strikes in South Africa: Some Lessons From Foreign Law and Possible Solutions" 2015 19 *Law, Democracy & Development* 211 214, 219.

40 Runciman *et al* 2016 *Social Change Research Unit* 5.

41 Tenza "The Effects of Violent Strikes on the Economy of a Developing Country: A Case of South Africa" 2020 41(3) *Obiter* 519 520–521.

42 Tenza 2020 *Obiter* 521.

43 Tenza 2020 *Obiter* 522.

44 Tenza 2020 *Obiter* 523. Tenza mentions that approximately 20 people were thrown off trains in Gauteng, many of them security guards. This is particularly true of replacement workers, whose lives are often in real danger; see Calitz 2016 *SA Merc LJ* 440.

well, such as *SATAWU v Ram Transport South Africa (Pty) Ltd*, in which the court had to address accusations of intimidation, misconduct and damage to property.[45] In *FAWU obo Kapesi v Premier Foods Ltd t/a Blue Ribbon Salt Water*, a number of non-striking workers looked on as protesters ransacked and set their homes alight, which later extended to the burning of cars and other possessions.[46] Those who identified rogue protesters were killed.[47] This particular strike was accompanied by death threats, assaults, arson and intimidation.[48] During the Rhodes Must Fall and Fees Must Fall actions, universities across South Africa also experienced violent student strikes and insourcing protests, resulting in intimidation and property damage.[49] Recently, protesters of the Clover strike assaulted and murdered security guards and strikers at the University of South Africa and set property on fire at the vice-chancellor's official residence.[50]

Even if violent strikes in South Africa are uncommon, they form part of South Africans' perception of strikes. If we accept that the process of subjectification is altering the meaning of words like "strike", it implies that "strike" is itself polysemous. The following section briefly describes what polysemy is and considers the implications for "strike".

4 POLYSEMY OF "STRIKE"

Polysemy indicates a word's capacity to have many related meanings. Most words are polysemous. A word's original meaning often coexists alongside new extensions of the word and depends on context to determine which meaning applies. Therefore, linguists view polysemous words as containing "layers of meaning".[51] Sometimes the new meaning replaces the original, or

---

45 *SATAWU v Ram Transport South Africa (Pty) Ltd* [2014] ZALCJHB 471, see par 2, 53, 68, 110 and 119.

46 *FAWU obo Kapesi v Premier Foods Ltd t/a Blue Ribbon Salt Water* (2010) 31 *ILJ* 1654 (LC) par 4.

47 *FAWU v Premier Foods supra* par 4. See also *S v Ramabokela* 2011 (1) SACR 122 (GNP), in which the appellants were convicted of kidnapping, assault and culpable homicide during a strike.

48 *FAWU v Premier Foods supra* par 23.

49 The court in *Hotz v University of Cape Town* ([2017] ZACC 10, par 32) specifically mentions valuable South African artworks that were ruined; in *Rhodes University v Student Representative Council of Rhodes University* ([2016] ZAECGHC 141), the court also addressed gender- and race-based violence during student protest action in addition to kidnapping, assault and intimidation; also see *Durban University of Technology v Zulu* [2016] ZAKZPHC 58. Violent student strikes were reported in the mass media as well; see *News24* "Unisa Gets Interdict Against Protesters" (2016-01-15); Singh "Police Disperse Protesting Durban Unisa Students with Rubber Bullets, Tear Gas" (2020-01-27) *News24*; Sobuwa *Live* "NWU Campus Closed as Violent Protests Hit Varsities" (2020-01-29) *Sowetan*. For an academic perspective, see Mutekwe "Unmasking the Ramifications of the Fees-Must-Fall-Conundrum in Higher Education Institutions in South Africa: A Critical Perspective" 2017 35(2) *Perspectives in Education* 142.

50 Otto "Moord op Oud-Recce: 'Waar is die Wye Verontwaardiging?'" (2022-02-20) *Netwerk24*; Sibiya "Unisa Arson Attack as Union Protests Turn Violent" (2022-05-20) *Rekord*.

51 Traugott and Dasher *Regularity in Semantic Change* 12. Another way of looking at it is to view a word as having a subset of meanings; each meaning is disambiguated according to the relevant context. In the sentence "John left for the bar at about 10h00", the context should aid the interpreter in deciding whether "bar" refers to a pub or a law chamber. See

it fossilises, which means that speakers no longer recognise the relation between the old and new senses. The word "bank" is a classic example of polysemy. It can refer to an institution (Allied Bank), the building ("I'll meet you in front of the bank") or the people working there ("The bank on Church Street is always helpful"). Although these are three distinct senses, they all relate to the financial institution. It takes the German word "*bank*" as its base, which denotes a counter. A banker was someone who processed money on a table that separated the officer from the customer.[52] The reference to "table" fossilised; it is no longer recognisable as related to the financial institution.

The terms used for original and new meanings respectively are "conventional" and "occasional" meaning.[53] Conventional meaning is the established definition of a word, codified in a dictionary and agreed upon by the larger speech community. Speakers use these definitions the most often and consider them common. More importantly, they are decontextualised.[54] The known definition of "strike" as a (peaceful) protest is currently the conventional meaning of the word, whereas "violent strike" is bound to instances of actual violent strikes.[55] Occasional meaning is sensitive to context and is a modulation of the conventional meaning in the specific context of an utterance.[56] In other words, the conventional meaning either restricts or expands depending on the context. This means that when a particular labour strike is evidently riotous or an instance of public disturbance, speakers could invoke the occasional sense (that is, violent or riotous strike) because the actual context makes the applicable denotation more salient.[57]

Frequency or repetition is key when it comes to implementing semantic changes.[58] The higher the frequency of use, the greater the potential for a word's meaning to generalise.[59] Generalisation happens when a lexical item develops a new or occasional meaning that still stands in relation to its conventional meaning; it is an instance of inclusion and takes the form of superordination.[60] Geeraerts illustrates generalisation with the word "arrive", which is a borrowing from the French, "*arriver*". Originally, the word meant to reach the river's bank, but it now extends to indicate any destination.[61] Complete semantic change takes place when there is a gradual shift from

Grondelaers, Speelman and Geeraerts "Lexical Variation and Change" in Geeraerts and Cuyckens (eds) *The Oxford Handbook of Cognitive Linguistics* (2012) 992.

52 Cognates of the German word "*bank*" are present in Afrikaans: "*skoolbank*", "*skaafbank*".

53 Geeraerts "Sense Individuation" in Riemer (ed) *The Routledge Handbook of Semantics. Routledge* (2016) 238–239. This is one way to view the distinction.

54 Geeraerts *Theories of Lexical Semantics* (2010) 231.

55 *SASRIA v Slabbert Burger Transport supra* par 8–11.

56 Grondelaers *et al* in Geeraerts and Cuyckens (eds) *Cognitive Linguistics* 990.

57 Grondelaers *et al* in Geeraerts and Cuyckens (eds) *Cognitive Linguistics* 989–990.

58 Bybee "Usage-Based Theory and Grammaticalization" in Hene and Narrog (eds) *The Oxford Handbook of Grammaticalization* (2012) 72.

59 Bybee "Diachronic Linguistics" in Geeraerts and Cuyckens (eds) *The Oxford Handbook of Cognitive Linguistics* (2012) 75.

60 Geeraerts *Theories of Lexical Semantics* 26–27.

61 Geeraerts *Theories of Lexical Semantics* 27.

the occasional to the conventional, or when the new replaces the old entirely. This signifies that when speakers say "strike", they will eventually denote "violent strike". The conventionalising and generalising of "violent strike" is already underway (or so it seems) because violent strikes have become common enough to be recognised by ordinary South Africans, the media and academic scholars.[62] Violent strikes are not strange or rare occurrences anymore, even if they remain rare in comparison to most South African strikes. This means that the increase in or persistence of violent strikes will eventually lead to the word "strike" denoting "violent strike" among speakers.

Conventionally, we define "strike" as an event to protest particular labour conditions. The Oxford English Dictionary describes it as a concerted cessation of work on the part of a body of worker, to obtain some concession from the employer.[63] Oxford's Historical Thesaurus reveals that a strike can be official or unofficial; it is a form of dispute and protest meant to affect labour supply in some way. Ultimately, it is a participation in labour relations. Violence as a semantic characteristic is absent, which creates the impression that strikes are usually peaceful.[64] However, it does not include "peaceful" as a semantic criterion either; this too is a subjective view. At its core, "strike" describes a protest in which employees affect workflow until the employer meets certain demands.

When we compare the entries for "strike", "riot" and "disturbance" (the three perils listed in the SASRIA policy) – the entries are set out in Table 1 below[65] – two things become evident: "riot" and "public disturbance" are

---

62 The author is collecting survey data to determine to what extent respondents associate the meanings of "strike", "riot" and "public disturbance" with one another. So far, 88 per cent of respondents (N=60) view the meaning of "strike" and "riot" as very similar or the same, and 85 per cent see "strike" and "public disturbance" as having mostly the same meaning. Seventy-eight per cent of respondents said South African labour strikes are mostly violent. Though the data set is still very small and not representative, it already points to perceptions that influence people's understanding and use of the word "strike", implying that an occasional sense does exist. (Ethics ref.: 90163184_CREC_CHS_2021)

63 Oxford English Dictionary "Strike n.1" (2022) https://www.oed.com/view/Entry/191631?rskey=gKyNbU&result=1&isAdvanced=false&print (accessed 2022-06-15).

64 A study on ordinary meaning found that "strike" usually indicates a non-violent event. Carney "A Legal Fallacy? Testing the Ordinariness of 'Ordinary Meaning'" 2020 137(2) *South African Law Journal* 269 291–292. See also the definition of "strike" in s 213 of the Labour Relations Act 66 of 1995 for comparison.

65 Oxford Historical Thesaurus "strike" (2022) https://0-www-oed-com.oasis.unisa.ac.za/browsethesaurus?page=3&pageSize=100&scope=ENTRY&searchType=words&thesaurusTerm=strike&type=thesaurussearch (accessed 2022-06-15); Oxford Historical Thesaurus "riot" (2022) https://0-www-oed-com.oasis.unisa.ac.za/browsethesaurus?thesaurusTerm=riot&searchType=words&type=thesaurussearch (accessed 2022-06-15; Oxford Historical Thesaurus "disturbance" (2022) https://0-www-oed-com.oasis.unisa.ac.za/browsethesaurus?thesaurusTerm=disturbance&searchType=words&type=thesaurussearch (accessed 2022-06-15). Most thesauri are organised according to a conceptual hypernymic taxonomy. This means that entries are sorted according to concept and then classified in terms of a hierarchical taxonomy of inclusion. The general item includes the more specific items, as it moves from broadest to narrowest classification. Each entry in Table 1 starts with their entry number, followed by the hypernymic structure within the larger conceptual structure.

synonymous and violent strikes are very similar to riots.[66] "Riot" and "disturbance" both describe an outbreak of disorder; violent action committed by a crowd, or a commotion caused by a mob. Clearly, when strikers disturb those around them and act unlawfully, the labour protest takes on riotous features. This means that we might do better to describe the occasional sense of "strike" as a "riotous strike" instead.

Table 1: Entries of "strike", "riot" and "disturbance" in the Oxford Historical Thesaurus

Strike	Riot	Disturbance
229. Society > occupation and work > working > labour relations > strike	12. The world > action or operation > harm or detriment > hostile action or attack > make an attack upon > in a riot > riot	5. Society > authority > lack of subjection > unruliness > disorder or riot > disturbance
230. Society > occupation and work > working > labour relations > participate in labour relations > strike	30. Society > authority > lack of subjection > unruliness > disorder or riot > riot	6. Society > law > rule of law > lawlessness > specific offences > illegal seizure or wrongful occupation > prevention of lawful enjoyment of something

5 DISCUSSION AND CONCLUSION

Thornton says that drafters have no choice but to produce material that is as straightforward as possible and so clear that its "intended meaning is conveyed in such a way that it cannot reasonably be misunderstood".[67] The author does not think such clarity is entirely possible, but he believes that drafters can come close enough if they have the necessary tools. Linguistics offers many such tools and, more importantly, it brings about an understanding that language is an instrument of thought, and a reflection of society.[68] On a practical level, this is visible in the word "strike" and in the difference between its conventional and occasional meanings. As a polyseme, we can summarise "strike" as:

---

66 SASRIA's current policy wording (Annexure 4A: F4; 12–13) describes "public disorder" as a riot or "civil commotion" and describes "riot" as "a tumultuous disturbance of public peace", which confirms their similarity.

67 Thornton *Legislative Drafting* 2–3.

68 Thornton *Legislative Drafting* 3–4.

(1) an action to stop working in order to receive concessions from an employer (conventional sense);
(2) an action to stop working, using violence to receive concessions from an employer (occasional sense).

More importantly, if South Africans continue to perceive industrial action as violent, the meaning of "strike" will become synonymous with "riot" and "public disorder". What does this mean for interpretation? In terms of *Natal Joint Municipal Pension Fund v Endumeni*, understanding the semantic complexity of words will aid in deciding which one of the senses is the more sensible meaning relevant to the circumstantial facts.[69] What does this mean for drafting? According to Hurt AJA, the problem was not the fact that "strike" could denote a violent event, but rather that SASRIA did not stipulate "strike" and its conditions of use.[70] The practice of leaving important words undefined is partly attributable to the blurry distinction between some ordinary words on the one hand and terms of art and trade on the other. Another reason for not defining words is that drafters feel that certain words' ordinary meaning is sufficiently clear. The author thinks for the most part this is true. That said, drafters must devise a protocol or model that allows them to test ordinary words (words deliberately left undefined) to see if their ordinary meanings can stand tests of vagueness, ambiguity, plurality and the potential of changing in the immediate future. It is not enough to focus on words that seem overtly technical or unusual.

There is a potentially useful methodology that may be referred to as the "lexicological approach to drafting". Though slightly oversimplified, lexicology entails the study of various features of a word: its origin, formation, spelling, usage and meaning. Seen differently, the lexicological approach expects a drafter to study a word holistically before he or she commences with drafting a definition. In principle, drafters should apply the lexicological approach to both defined and selected undefined words.[71] Before a new word is included in a dictionary, and long before the task of describing it commences, a lexicographer will monitor it for a number of years.[72] The lexicographer will also study the word in detail. How do we say it? How do we write it? How do we form a particular word and any of its derivatives? To what part of speech does it belong? What meaning does it have and how many? Are any of

---

69 *Natal Joint Municipal Pension Fund v Endumeni Municipality* [2012] ZASCA 13 par 18.

70 *SASRIA v Slabbert Burger Transport supra* par 10.

71 By "selected undefined words", the author is referring to lexical words specifically (nouns, verbs, adjectives and adverbs) that contribute conceptually to the purpose and function of a statute or contract. For instance, few contracts that include clauses about resignation from employment include an interpretation clause stipulating when exactly the resignation period starts. We saw that SASRIA's initial policy coupon indemnified clients against damage caused by a strike, but they did not define the word "strike". The National Nuclear Regulator Act 47 of 1999 elaborates on who an inspector is and what the inspector should be doing, but the Act does not explain what an inspector is. The reader of the Act must infer the concept from the various references to "inspector". Many words are conceptually important to the purpose and functioning of legal texts, but the legislator/drafter mostly relies on their ordinary meaning instead of stipulating them.

72 Jackson *Lexicography. An Introduction* (2002) 27–28; see, in general, Gouws and Prinsloo *Principles and Practice of South African Lexicography* (2005); and Atkins and Rundell *The Oxford Guide to Practical Lexicography* (2008) 45–47.

these meanings related? The lexicographer looks at the different ways that speakers use it and labels those uses according to context and situation. Notes are made of its behaviour in sentences. It is never a simple matter of choosing a word and saying what it means. Before a lexicographer can clarify a word, he or she must understand what that word entails. Surely, the same must apply to drafters of statutes and contracts. A lexicological approach holds the following potential benefits:

- It alerts drafters, contractants and litigators to a word's possible meanings and will assist in determining which of the meanings are either vague or ambiguous.
- It helps drafters, contractants and litigators to determine which of the possible meanings is the most sensible, and therefore the preferred meaning.[73]
- It aids in identifying terms of art and trade among ordinary words. Sometimes, drafters leave ordinary words undefined but continue to use them as terms of art. This means the meaning of the ordinary word has shifted from its conventional use to a technical meaning. Realising this ahead of time will benefit drafters, because they can then still define the word or at least determine whether its ordinary meaning will suffice for their purpose.[74]
- It improves legal communication in pursuit of clarity.
- It has the potential to reduce litigation and the laborious task of repealing provisions.[75]

Granted, it is unrealistic to think that overburdened drafters of either statutes or contracts have enough time to do a lengthy linguistic study of each word they must define (and a host of words they choose to leave undefined). However, statutes are authoritative texts meant for many different people, including legal practitioners and ordinary citizens, and contracts are serious agreements that should reflect the best interests of both parties. Because words are the carriers of meaning and because meaning tends to be elusive, the lexicological approach expects drafters to give both defined and ordinary words more thought. Paying close attention, at least to a word's build, meaning and conventional use, will aid drafters and everyone else in the end.

With regard to the word "strike", the lexicological approach entailed a study of its polysemy and the likelihood that societal changes can affect its semantic features. Considering different aspects of "strike" illustrates that words sometimes have meanings that are different but which remain closely related. Their differences are nuanced enough that the different senses may cause uncertainty and complicate the outcome of a dispute. Understanding that a word such as "strike" is multifaceted also makes us realise that its

---

73 *Natal Joint Municipal Pension Fund v Endumeni Municipality supra* par 18.

74 This does not relate to implied terms in contracts that recall trade usage and which have conventionalised and need no further stipulation. See Fouché "The Content of Contracts" in Fouché (ed) *Legal Principles of Contract and Commercial Law* (2021) 106; Singh *Business and Contract Law* (2010) 26–33.

75 Burger *A Guide to Legislative Drafting* 3.

ordinary meaning in South Africa is unstable. Therefore, relying on its ordinary meaning, or even its trade usage, is problematic. Treating it as a term of art is probably a better option. The notion that "strike" is a term and not an ordinary word is evident in the Labour Relations Act.[76] The word itself occurs 113 times and the Act devotes an entire chapter to strikes and lock-outs. It also helps to realise that ordinary (or dictionary) meanings have no authority; only legislative and contractual definitions do. Ordinary meaning gains authority once a court assigns authority to it. This means that a drafted definition – if drafted properly – has the power to bind people to that specific description of use in the future.[77] It also means the drafter influences how people must use a certain word.[78] Because the audience of a legal text is mostly heterogeneous, it is vital that drafters formulate definitions in such a manner that most users understand the text from the start.[79] Considering defined and selected undefined words lexicologically could aid drafters in achieving this.

[76] 66 of 1995.

[77] Roznai "'A Bird is Known by its Feathers' – On the Importance and Complexities of Definitions in Legislation" 2014 2(2) *The Theory and Practice of Legislation* 145 147.

[78] Obviously, the author is not insinuating that legal texts are written by a sole drafter who controls the whole drafting process. There is a lot of input from various sources, ranging from committees to public or private participation. However, drafters make their own contributions and affect the discourse surrounding the legal text through their drafting.

[79] Price "Wagging, Not Barking: Statutory Definitions" 2013 60(4) *Cleveland State Law Review* 999 1004.

AN ANALYSIS OF DIFFERENCE OF RELIGION AS A DISQUALIFICATION FROM INHERITING IN TERMS OF THE ISLAMIC LAW OF SUCCESSION: A SOUTH AFRICAN CASE STUDY

Muneer Abduroaf
BA (Shariah) LLB LLM LLD
Senior Lecturer, Department of Criminal Justice and Procedure, University of the Western Cape
CRL Rights Commissioner

SUMMARY

A Muslim man can marry a maximum of four women at a time in terms of Islamic law. These women may include Muslim women, Christian women, and Jewish women. It is noted that a Christian and Jewish widow would not inherit from the intestate estate of her deceased Muslim husband in terms of the Islamic law of intestate succession. This article analyses the problems with this type of discrimination within the South African context. Interfaith marriages between Muslims and non-Muslims are looked at first. Then the disqualification of a Christian widow inheriting from her deceased Muslim husband's estate in terms of the Islamic law of intestate (compulsory) succession and testate (optional) within the South African context is discussed. The article concludes with an overall analysis of the findings and makes a pertinent recommendation.

1 INTRODUCTION

This article analyses difference of religion as a disqualification with regard to inheriting in terms of the Islamic law of intestate (compulsory) succession within the South African context. It looks at a scenario where a Muslim male (W) from Cape Town dies on 23 May 2021, leaving behind a Muslim widow (X), a Christian widow (Y) and a Muslim son (Z) as his only relatives. He also leaves behind a gross estate of R1 000 000.[1] The liabilities against his gross estate are R100 000. He drafted a will two years prior to his death, stating that his intestate estate (estate after all liabilities and testate succession claims have been deducted), which is R900 000 in this scenario, must devolve in terms of the Islamic law of succession. It should be noted that he

[1] The gross estate refers to the estate left behind by W prior to any deductions.

made no bequest according to the Islamic law of testate (optional) succession in terms of this scenario.[2] The will further states that an Islamic distribution certificate must be drafted by a recognised Islamic institution or qualified Islamic law expert, and must state who his lawful beneficiaries are in terms of the Islamic law of succession.[3] This article focuses on the position of the Christian widow (Y) in terms of the Islamic law of intestate (compulsory) succession within the South African context.[4] The status of interfaith marriages in terms of Islamic law in South Africa is looked at first. Y's disqualification from inheriting from her deceased Muslim husband's estate in terms of the Islamic law of intestate (compulsory) succession within the South African context is discussed next.[5] The position of Y inheriting in terms of the Islamic law of testate succession is then looked at. The article concludes with an overall analysis of the findings and makes a recommendation.

2 THE STATUS OF INTERFAITH MARRIAGES IN TERMS OF ISLAMIC LAW WITHIN THE SOUTH AFRICAN CONTEXT

Muslim males are allowed to marry a maximum of four wives at a time; these may include Muslim wives, Christian wives, and Jewish wives. Al Quraan (5)5 states:

> "(Lawful to you in marriage) are chaste women from the believers [Muslims] and chaste women from those who were given the Scripture (Jews and

---

2 The following should be noted for purposes of the above scenario. The gross estate of W less the liabilities would be the net estate, which is R900 000. The net estate is divided into the testate estate and intestate estate. The testate estate is up to a maximum of one-third of the net estate and may be bequeathed in favour of testate (optional) beneficiaries. The remaining two-thirds must be distributed to the intestate (compulsory) beneficiaries. There are no claims against the testate estate and therefore it is R0 and the intestate estate is R900 000. It should be noted that there are exceptions to the above rules, but a further discussion on this is beyond the scope of this article.

3 The Muslim Judicial Council (SA) based in the Western Cape is an example of an Islamic Institution that offers the service of drafting Islamic distribution certificates for the Muslim community. See Muslim Judicial Council (SA) "Fatwa" (undated) https://mjc.org.za/departments/fatwa/ (accessed 2021-05-22) where it is stated that "[a] Distribution Certificate is a document listing the heirs of a deceased and the portions each one receives according to the Islamic Laws of Inheritance. The Certificates are issued to clients and attorneys as soon as all relevant documentation is forwarded to the Fatwa Department".

4 The Islamic law of intestate succession could also be referred to as the Islamic law of compulsory succession as the intestate beneficiaries cannot inherit though testacy.

5 See Sunan Abi Dawud ("Shares of Inheritance (Kitab Al-Fara'id) - كتاب الفرائض « Hadith 2911 [Reference: Sunan Abi Dawud 2911, In-book reference: Book 19, Hadith 27, English translation: Book 18, Hadith 2905]" (undated) https://sunnah.com/abudawud:2911 (accessed 2021-05-24)) where is written: "Can A Muslim Inherit from A Disbeliever? Narrated Abdullah ibn Amr ibn al-'As: The Prophet (ﷺ) said: people of two different religions would not inherit from one another." It is noted that this disqualification applies only to the Islamic law of intestate (compulsory) succession and not to the Islamic law of testate (optional) succession. The word in the Prophetic tradition refers to the inheritance in the form of "meeraath" which is the intestate (compulsory) succession and the "wasiyyah" which is the testate (optional) succession.

> Christians) before your time, when you have given their due Mahr (bridal money given by the husband to his wife at the time of marriage)."[6]

Al Quraan 1404H (4) 3 states:

> "And if you fear that you shall not be able to deal justly with the orphan girls, then marry (other) women of your choice, two or three, or four."[7]

W was lawfully married to both X (Muslim) and Y (Christian) in terms of the first verse above.[8] The second verse allowed the polygynous nature of the marriages. It is interesting to note that a Muslim female is not allowed to marry more than one husband at a time in terms of Islamic law.[9] It is also

---

6 See Khan *The Noble Qur'an: English Translation of the Meanings and Commentary* (1998) 1404H (5) 5.

7 See Khan *The Noble Qur'an* (4) 3.

8 Muslim institutions in South Africa have restricted the practice of interfaith marriages by stipulating the necessary requirements in terms of Islamic law. See, for e.g., the Muslim Judicial Council (SA) Fatwa "Re: Marriage to non-Muslim females" (2021) [A copy of document available with the author of this paper] where it states: "Re: MARRIAGE TO NON-MUSLIM FEMALES … The view which we espouse is that of the Shāfiʿī madhhab … In terms of this view, the Ahl al-Kitāb are, in line with the literal purport of the verse from Sūrah al-Māʾidah above, only those to whom Scripture was actually given. Scripture was given to the Jews, and then to the Christians … However, the early Christians to whom Sayyiduna ʿĪsā ʿalayhi s-salām was sent were, ethnically speaking, Jewish. This is supported by both the Qurʾān and the Bible: i) In Sūrah al-Ṣaff 61:6 the Qurʾān states: "And when ʿĪsā the son of Maryam said, 'O Children of Israel, indeed I am the messenger of Allah to you.'" The term, Banī Isrāʾīl explicitly refers to the twelve tribes descended from Sayyiduna Yaʿqūb ʿalayhi s-salām, and in this verse Sayyidunā ʿĪsā ʿalayhi s-salām states unambiguously that it was to them that he was sent. ii) The New Testament states in Matthew 15:24: "I was sent only to the lost sheep of the House of Israel." … It follows from the above that the woman from the Ahl al-Kitāb to whom marriage would be permissible must as a rule belong to the Jewish race, in addition to subscribing to either Judaism or Christianity … In widening the circle of permissibility to include adherents of these two faiths who are not ethnic Jews, our jurists relied upon two criteria: i) The first forefathers to have converted to that religion (either Judaism or Christianity) must be known to have done so before that religion became abrogated. ii) The conversion of those earliest converts in the line of genealogical ascent must also be known to have occurred before corruption set into that religion … Marriage to women from the Ahl al-Kitāb is thus permitted, provided - a) she is ethnically descended from Banī Isrāʾīl; b) and if not, that her first forefathers to have converted to Judaism or Christianity are known to have done so before either naskh (abrogation) and taḥrīf (corruption) set in."

9 It is interesting to note that a Muslim male may marry a Jew or a Christian, but the opposite is not allowed in terms of Islamic law. See also Dar Al-Ifta Al-Missriyya ("Why a Muslim Woman Can't Marry a Non Muslim?" (2021) https://www.dar-alifta.org/Foreign/ViewFatwa.aspx?ID=6167 (accessed 2021-05-22)), where the following was stated regarding the rationale behind this rule: "[Interfaith Marriages in Islam] It is permissible in Islam for a Muslim man to marry a non-Muslim woman (Christian or Jewish) and not vice-versa. Though this may seem unfair, the rationale behind it becomes clear if the true reason is known. All legislations in Islam are based upon certain wisdom and a definite interest to all parties involved. Marriage in Islam is based upon love, mercy and peace of mind; a family must be built upon a firm basis to guarantee the continuity of the marital relationship. Islam respects all the previous heavenly revealed religions and the belief in all the previous Prophets is an inseparable part of the Islamic creed. A Muslim man who marries a Christian or a Jewish woman, is commanded to respect her faith, and it is not permissible for him to prevent his wife from practicing the rites of her religion and going to the church or synagogue. Therefore, Islam seeks to provide the wife with her husband's respect for her religion which in turn protects the family from destruction. On the other hand, a non-Muslim man will not respect his Muslim wife's faith. This is because a Muslim man believes in all previous religions and Prophets of God and respects them while a non-

interesting to note that a Muslim female is not allowed to marry a non-Muslim man in terms of Islamic law.[10] Nevertheless, an instance has been recorded where a Muslim woman married a Christian man within the Western Cape.[11] A further discussion on this issue is beyond the scope of this article.

3 THE POSITION OF Y BEING DISQUALIFIED FROM INHERITING IN TERMS OF ISLAMIC LAW BASED ON HER RELIGION

The will drafted by W states that an Islamic distribution certificate must be drafted by a recognised Islamic institution or qualified Islamic law expert stating who his lawful beneficiaries are in terms of the Islamic law of succession. For purposes of this clause, an Islamic distribution certificate can be obtained from the Muslim Judicial Council (SA) based in Cape Town.[12] The certificate should state the identity of W's lawful beneficiaries in terms of Islamic law at the moment of his death on 23 May 2021. The certificate should provide that X inherits one-eighth of R900 000 = R112 500 and that Z inherits the remainder, which is seven-eighths of R900 000 = R787 500.[13] Y would not be entitled to inherit in terms of Islamic law as,

Muslim does not believe nor acknowledges the Prophet of Islam; rather, a non-Muslim considers Prophet Mohammed a false prophet and usually believes in all the fabricated lies made against Islam and its Prophet. Even if a non-Muslim husband does not explicitly express this, a Muslim wife will constantly feel that her husband does not respect her faith. There is no room for compliments regarding this matter; it is a matter of principle. Moreover, mutual respect between spouses is a fundamental element for the continuity of their marital relationship. Islam follows its own logic when it prohibits a Muslim man from marrying a non-Muslim other than a Christian or a Jewess for the same reason it prohibits a Muslim woman from marrying a non-Muslim. A Muslim believes in only the Heavenly revealed religions; all other religions are human made. So, in the case when a Muslim woman marries a non-Muslim, the element of respect to the wife's religion will be non-existent. This will affect the marital relationship and will not achieve the love and mercy that is required in a marital relationship." It should be noted that the discrimination between males and females in this regard raises the question of discrimination based on sex or gender, which is prohibited in South African law; see s 9(4) of the Constitution of the Republic of South Africa, 1996.

10 See Muslim Judicial Council (SA) Fatwa "Re: Marriage to Non-Muslim Females" (2018) [document on file with the author of this article] which states: "Re: MARRIAGE TO NON-MUSLIM FEMALES With regards interfaith marriages kindly take note of the following: 1) The marriage of a Muslim female to a non-Muslim male is categorically and unconditionally prohibited. This prohibition rests on ijmāʿ, or consensus."

11 See Hassen ("South Africa Witnesses First Interfaith Marriage" (2015) https://www.aa.com.tr/en/world/south-africa-witnesses-first-interfaith-marriage/64796# (accessed 2021-05-23)), who states: "A reception was held on the occasion of the marriage of Muslim woman Saieda Osman and Christian man Siegfried Milbert at what is known as the 'Open Mosque' in Cape Town."

12 The Muslim Judicial Council (SA) based in the Western Cape is an example of an Islamic Institution that offers the service of drafting Islamic distribution certificates for the Muslim community. See Muslim Judicial Council (SA) "Fatwa", which states that "[a] Distribution Certificate is a document listing the heirs of a deceased and the portions each one receives according to the Islamic Laws of Inheritance. The Certificates are issued to clients and attorneys as soon as all relevant documentation is forwarded to the Fatwa Department."

13 See Khan *The Noble Qur'an* (4) 12, which states with regard to the inheritance of surviving spouses: "In that which you leave, their (your wives) share is a fourth if you leave no child; but if you leave a child, they get an eighth of that which you leave after payment of legacies that you may have bequeathed or debts … This is a Commandment from Allah; and Allah is Ever All Knowing, Most Forbearing." See also, with regard to the residue of the intestate

based on her religion, she is disqualified from inheriting as an intestate (compulsory) beneficiary. This type of disqualification may be problematic in terms of South African law. Section 9(4) of the Constitution of the Republic of South Africa, 1996 (Constitution) states:

> "No person may unfairly discriminate directly or indirectly against anyone on one or more grounds in terms of subsection (3)."

Subsection 3 refers to discrimination based on

> "race, gender, sex, pregnancy, marital status, ethnic or social origin, colour, sexual orientation, age, disability, religion, conscience, belief, culture, language and birth."

It can clearly be seen that discrimination based on religion is one of the prohibited listed grounds. Section 9(5) of the Constitution further states:

> "Discrimination on one or more of the grounds listed in subsection (3) is unfair unless it is established that the discrimination is fair."

The discrimination against Y would thus be deemed unfair unless it is established that the discrimination is fair. Section 36 of the Constitution is the general limitation clause, and it can be used to argue that Y's right to equality has been limited. Section 36 of the Constitution, 1996 states

> "(1) The rights in the Bill of Rights may be limited only in terms of law of general application to the extent that the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom, taking into account all relevant factors, including– (*a*) the nature of the right; (*b*) the importance of the purpose of the limitation; (*c*) the nature and extent of the limitation; (*d*) the relation between the limitation and its purpose; and (*e*) less restrictive means to achieve the purpose. (2) Except as provided in subsection (1) or in any other provision of the Constitution, no law may limit any right entrenched in the Bill of Rights."

The fact that W has *inter alia* exercised his right to freedom of testation would play a big role insofar as balancing the rights of W and Y for purposes of section 36 of the Constitution is concerned. A further discussion on the constitutionality of W's provision in the Islamic will is beyond the scope of this article. The constitutionality of the provision is, in the final analysis, left to the South African courts to decide based on constitutional grounds.[14] It is

estate being distributed to the son in this scenario, Khan *The Translation of the Meanings of Sahih Al Bukhari* (724) vol 8 (2004), 477 where it states: "The Prophet said, 'Give the Fara'id (the shares of the inheritance that are prescribed in the Qur'an) to those who are entitled to receive it. Then whatever remains, should be given to the closest male relative of the deceased.'" The son, Z, is the closest as well as the only male in this scenario.

[14] See Abduroaf ("A Constitutional Analysis of an Islamic Will Within the South African Context" 2019 52(2) *De Jure Law Journal* 257 266) for a discussion on the constitutionality of an Islamic will within the South African context. The issue concerning a son inheriting double the share of a daughter is the focus of the article. At 266 of the article, he states: "Based on the above [analysis], it would seem quite unlikely that [the daughter] would succeed in her quest to challenge the constitutionality of the Islamic will based on discriminatory grounds." It is noted that an Islamic will was also the point of litigation in the case of *Moosa NO v Minister of Justice and Correctional Services* 2018 (5) SA 13 (CC), where the facts of the case concerned a situation where the sons inherited double the shares of the daughters. The court did not comment on the discrimination in this regard. See par 6 of the judgment where the court states: "Since then the deceased lived with both

interesting to note that, if W had stated in his will, without referring to an Islamic distribution certificate, that X should inherit one-eighth of his intestate estate and that the remaining seven-eighths of his intestate estate should be distributed to Z, Y would probably not be successful in an attempt to challenge her non-inclusion in the will.[15]

The following discussion is based on the assumption that a South African court would find the provision in the Islamic will to be unconstitutional. The court would then have a number of difficult questions to answer. Exactly what benefit should Y receive from W's estate? Should X and Z also not inherit in terms of the Islamic distribution certificate owing to the provision in the Islamic will being found unconstitutional? Should X, Y and Z now all inherit in terms of the Intestate Succession Act[16] as there is no further instruction in the Islamic will as to how the estate should devolve in such an instance? If this be the case, then X, Y and Z would all inherit in terms of the Intestate Succession Act. In terms of this Act, X should inherit R300 000, Y should inherit R300 000, and Z should inherit R300 000.[17] If, however, the court finds that Y does inherit in terms of the Islamic distribution certificate, should she inherit the same share as Y (one-eighth of R900 000 = R112 500) or should she share the eighth with X, as would have been the situation in terms of Islamic law of succession if Y were Muslim (which she is not)? Each of them (X and Y) would then inherit one-sixteenth of the R900 000, which is R56 250 for X and R56 250 for Y.[18] The above instances are all problematic as they do not give effect to the Islamic law of intestate succession. It is submitted that should the provision in the will be found to be unconstitutional owing to it disqualifying Y, then a solution could be

his wives and some of their children in their family home until his death in 2014. He prepared a will three years earlier in which he referred to both marriages. Its terms direct his estate to be distributed under Islamic law. The Muslim Judicial Council certified that this required the estate to be divided in 1/16 shares to each of his wives, 7/52 to each of his sons and 7/104 to his daughters." See also Abduroaf "An Analysis of the Right of a Muslim Child Born Out of Wedlock to Inherit from His or Her Deceased Parent in Terms of the Law of Succession: A South African Case Study" 2021 42(1) *Obiter* 126 135 where the inheritance position of an adopted child in terms of the Islamic law of succession is looked at.

15 See Abduroaf (*The Impact of South African Law on the Islamic Law of Succession* (LLD Thesis, University of the Western Cape) 2018 187 http://hdl.handle.net/11394/6211 (accessed 2021-05-24)), where this argument is made.

16 81 of 1987.

17 S 1(1) of 81 of 1987 states: "If after the commencement of this Act a person (hereinafter referred to as the "deceased") dies intestate, either wholly or in part, and … (*c*) is survived by a spouse as well as a descendant – (i) such spouse shall inherit a child's share of the intestate estate or so much of the intestate estate as does not exceed in value the amount fixed from time to time by the Minister of Justice by notice in the *Gazette*, whichever is the greater; and (ii) such descendant shall inherit the residue (if any) of the intestate estate." The current amount set by the Minister of Justice by notice in the *Government Gazette* is R250 000. See Chief Master's Directive 3 of 2015, Circular 58 of 2015, effective 17 August 2015, www.justice.gov.za/master/m_docs/2015-03_chm-directive.pdf (accessed 2021-05-18). It should be noted that s 1 of 81 of 1987 applies to both monogamous as well as polygynous marriages. See *Hassam v Jacobs NO* 2009 (5) SA 572 (CC) par 57, 3.2 where the court states that "[s]ection 1 of the Intestate Succession Act 81 of 1987 must be read as though the words 'or spouses' appear after the word 'spouse' wherever it appears in section 1 of the Intestate Succession Act."

18 See Khan *The Noble Qur'an* (4) 12. It should be noted that the 1/8 is shared between the widows in terms of the Islamic law of intestate (compulsory) succession.

application of the "compulsory bequest scenario" (a reform in the Islamic law of intestate (compulsory) succession), as is applicable in the law of succession in Egypt and Syria.[19] Y could inherit her share in terms of the Islamic law of "testate (optional) succession" in the form of a compulsory bequest. This compulsory bequest scenario is generally in favour of a totally excluded grandchild in the event where a child of the deceased has predeceased him or her. For example, B passes away leaving behind a net estate of R600 000, a son (C), a son (D), and an agnate grandson (F) (who is the son of the predeceased son (E)) as the only relatives. The estate should ordinarily be inherited only by C and D (R300 000 each), and F would be totally excluded from inheriting. However, in terms of the compulsory bequest scenario, F would inherit the share that his predeceased father would have inherited from B if he were alive. It should be noted that C, D and E would each inherit R200 000 if E were alive. The compulsory bequest cannot be more than one-third of the net estate. In this instance, the share that E would have inherited had he been alive is exactly one-third of the net estate. F would therefore inherit R200 000.[20] It is submitted that, in the current scenario, the surviving non-Muslim spouse should take the status of the totally excluded grandchild in the form of a compulsory bequest. She would inherit the share she would have been entitled to had she been Muslim, which would be an amended version of the compulsory bequest application in Egypt and Syria.[21] This could be seen as the lesser of two evils in the South African context. The outcome would then not affect the distribution in terms of the Islamic law of intestate (compulsory) succession. It would, however, affect the distribution in terms of the Islamic law of testate (optional) succession. The benefit in favour of Y must not be more than one-third of the net estate, which is generally the maximum bequest that can be made in terms of the Islamic law of testate (optional) succession. One-third of the net estate in the scenario to hand would be one-third of R900 000, which equals R300 000. Y would have inherited one-sixteenth of R900 000, which is R56 250, had she been Muslim. The intestate estate would then be R900 000 minus R56 250, which equals R843 750. X would then inherit one-eighth of R843 750 = R105 468,75 and Z would inherit seven-eighths of R843 750 = R738 281,25 for purposes of the Islamic distribution certificate drafted in terms of Islamic law. It is noted that no change would have been made in terms of the Islamic law of intestate (compulsory) succession, but the distribution would have an impact on the Islamic law of testate (optional) succession.

It should be noted that Y could nonetheless argue that she would inherit less than the share that X inherits in the scenario above, and that this is still unfair discrimination based on religion. If the court rules in favour of Y, and orders that Y should inherit the equivalent of X's share, then both X and Y would inherit one-eighth of the intestate estate. This would still be in line with the "compulsory bequest scenario", on condition that the benefit in favour of

---

19 See Abduroaf *The Impact of South African Law on the Islamic Law of Succession* 29–30, for a discussion on this issue.

20 See Al Subaa'ee *Sharh Al Qaanoon Al Ahwaal Al Shakhshiyyah* 7ed vol 2 part 2 (2000), 101–105 for a discussion on this issue.

21 It should be noted that the compulsory bequest scenario is a reform and there is no consensus on its permissibility in terms of Islamic law.

Y is not more than one-third of the net estate (one-third of R900 000 = R300 000). One-eighth of R900 000 = R112 500, and this amount is definitely less than one-third of R900 000, which is R300 000. X would then inherit one-eighth of R900 000 = R112 500, Y would inherit one-eighth of R900 000 = R112 500, and Z would inherit the remainder, which is six-eighths of R900 000 = R675 000. The above would not be the best solution but it is an option available for consideration.

It should be noted that W always had the choice of bequeathing a maximum of one-third of his net estate in favour of his Christian widow (Y) as a normal bequest, as she is disqualified from inheriting as an intestate beneficiary.[22] It should be noted that W could have stated in his Islamic will that Y should inherit the same share that his Muslim wife would inherit in terms of the Islamic law of intestate (compulsory) succession, albeit in the capacity of a testate (optional) succession beneficiary. X would then inherit as an intestate (compulsory) beneficiary, whereas Y would inherit as a testate (optional) beneficiary in terms of Islamic law. One-eighth of R900 000 is R112 500, which is definitely less than one-third of R900 000, which is R300 000. X would inherit one-eighth of R900 000 (which is R112 500), Y would inherit one-eighth of R900 000 (which is R112 500), and Z would inherit the remainder, which is six-eighths of R900 000 (which is R675 000). It is evident that the R112 500 that Y inherits in her capacity as a Christian (owing to her being disqualified from inheriting as an intestate ((compulsory) succession beneficiary) is more favourable to Y than the R56 250 she would have inherited if she were a ”Muslim” at the time that her husband died. It is also noted that Y could argue that she is discriminated against as she inherits as a testate (optional) beneficiary, whereas X inherits as an intestate (compulsory) beneficiary. It is submitted that this argument should not succeed, as she would in fact inherit the same share as X.

4 CONCLUSION

This article has analysed difference of religion as a factor in disqualification from inheritance in terms of the Islamic law of succession within the South African context. The findings show that a Christian widow is not allowed to inherit as an intestate (compulsory) beneficiary in terms of the Islamic law of succession, owing to her being disqualified based on her religion. The findings highlight that the disqualification is problematic within the South African context, since the Constitution prohibits unfair discrimination based on a number of grounds, which include religion as a listed ground. The findings further highlight the difficult questions that would have to be answered by a court in the event that a clause such as the one that has a disqualifying effect on Y from inheriting as a beneficiary in terms of the Islamic distribution certificate is found to be unconstitutional. It is not certain what relief would be given to a Christian widow in the event that she challenges the constitutionality of such clause and it is found to be unconstitutional. The article concludes with a recommendation that a Muslim

[22] See Abduroaf *The Impact of South African Law on the Islamic Law of Succession* 30–32, which looks at testate succession limitations in terms of the Islamic law of testate succession.

testator should state in his will that he bequeaths the same share that his Muslim widow would inherit in terms of the Islamic distribution certificate to his non-Muslim wife. This would alleviate the possibility of the provision in the Islamic will being challenged on grounds of discrimination.

NOTES / AANTEKENINGE

A CRITICAL LEGAL PERSPECTIVE ON STATUTORY INTOXICATION – TIME TO SOBER UP?

"Drunkenness is nothing but voluntary madness" (Seneca)

1 Introduction

Intoxication has been a phenomenon since time immemorial. Alcoholic beverages play a central role in South African life and culture. Millions of rands are spent annually by government on "Arrive Alive" and "Zero Tolerance" campaigns in the fight against drunken driving (compare Jacobs *Drunk Driving: An America Dilemma* (1989) 13). The liquor industry advertises aggressively, linking its products to positive cultural symbols and social needs. The use of alcohol and drugs is, however, also associated with personal, social and legal problems. The role of alcohol and drugs in South Africa's escalating crime rate cannot be ignored (Snyman *Criminal Law* (2020) 194). According to Jacobs, alcohol abuse is involved in a quarter of all admissions to general hospitals in the United States of America (Jacobs *Drunk Driving* 13). This is precisely the reason that government put a total ban on the sale of alcoholic beverages when the Covid pandemic hit South Africa and hospitals were flooded with Covid patients. Alcohol abuse also plays a major role in the four most common causes of death of men aged 20 to 40: suicide, accidents, murder and cirrhosis of the liver (Vaillant *The Natural History of Alcoholism Revisited* (1995) 1; Klein, Martel, Driver, Reing and Cole "Emergency Department Frequent Users" 2018 *Western Journal of Emergency Medicine* 398). On 9 May 2022, the World Health Organization stated that the harmful use of alcohol is a causal factor in more than 200 disease and injury conditions. A million deaths annually result from harmful use of alcohol globally, which amounts to 5,3 per cent of all deaths worldwide. It was further stated that alcohol consumption causes death and disability relatively early in life; in mortalities of persons aged 20–39 years, approximately 13,5 per cent of total deaths are attributable to alcohol (Obodeze "Alcohol and Crime: Does the Popular Drug Influence Offence Levels?" (7 August 2019) https://alcorehab.org/the-effects-of-alcohol/alcohol-related-crimes (accessed 2023-01-23) 1).

It is, therefore, alarming that people who become voluntarily drunk, to this day, still stand a chance of being acquitted in South African courts if the evidence reveals that, at the time of the act, the accused happened to fall into the grey area between "slightly drunk" and "very drunk". This legal position was once again confirmed in the case of *S v Ramdass* (2017 (1)

SACR 30 (KZD)). The decision represents yet another instance where an accused who committed alleged crimes in a state of voluntary intoxication was acquitted on both counts.

South Africa's legal position on voluntary intoxication is clearly at odds with the global and national call for stricter regulations on the public's excessive use of alcohol, which makes a consideration of the *Ramdass* judgment, and the policy behind it, deserving of closer analysis.

2 Schools of thought shaping the defence of voluntary intoxication

The defence of voluntary intoxication in the context of South African criminal law has undergone various phases of development over the years. The defence has a long history but was never acknowledged as a defence in Roman-Dutch law (see Burchell *Principles of Criminal Law* (2014) 304). In the classic decision of *R v Bourke* (1916 TPD 303), Wessels J held:

> "To allow drunkenness to be pleaded as an excuse would lead to a state of affairs repulsive to the community … the regular drunkard would be more immune from punishment than the sober person." (306)

After many developments and attempted judicial advances pertaining to the defence of voluntary intoxication, South African criminal law finds itself in the exact position Wessels J cautioned against in *Bourke*.

It is well known that the effect of intoxication on criminal liability has vacillated between an unyielding approach (according to which voluntary intoxication could never serve as a defence against criminal liability) and a lenient approach (according to which voluntary intoxication could serve as a complete defence against criminal liability). Of particular importance for purposes of this contribution are two opposing schools of thought regarding the effect of intoxication on criminal liability (Snyman *Criminal Law* 194). The policy-based approach holds that the community will not accept a position in which a sober person who commits a crime is punished for such crime, while an intoxicated person who commits the same crime is exonerated merely because they were intoxicated when they committed the crime. This approach allows no room for intoxicated persons to be treated more leniently than sober persons, despite the fact that one or more of the elements of the criminal charge might have been excluded owing to voluntary intoxication. The principle-based approach, on the other hand, holds that, if the ordinary principles of liability are applied to the conduct of an intoxicated person, there is the possibility that such a person should be exonerated either because they lacked voluntariness, criminal capacity or intention at the time of the act. This approach allows room for intoxicated persons to be treated more leniently than sober persons.

Snyman notes that, historically, our common law did not recognise a defence of voluntary intoxication, and that it was, at most, considered a mitigating factor in sentencing (Snyman *Criminal Law* 195; Burchell *Principles of Criminal Law* 304). In *S v Johnson* (1969 (1) SA 201 (A) 205C–E), Botha JA confirmed that voluntary intoxication was at the time not a defence to a criminal charge unless the voluntary intoxication resulted in a

mental disease. This was the case even if the accused was so drunk that they lacked criminal capacity (*S v Johnson supra* 207F–G). This was said to be merely in accordance with the legal convictions of society. This stance represents a policy-based approach to the effect of intoxication on criminal liability (Watney "Voluntary Intoxication as a Criminal Defence: Legal Principle or Public Policy?" 2017 *TSAR* 547). Botha JA concluded that, although illogical in principle, on policy grounds the fundamental requirement of voluntariness does not apply to self-induced intoxication except where the intoxication causes a type of mental illness (Van Oosten "Non-Pathological Criminal Incapacity Versus Pathological Criminal Incapacity" 1993 *South African Journal of Criminal Justice* 134; *R v Bourke supra*; *R v Holiday* 1924 AD 250; *R v Taylor* 1949 (4) SA 702 (A); *R v Schoonwinkel* 1953 (3) SA 136 (C) 137G; *R v Dhlamini* 1955 (1) SA 120 (T) 121B; *R v Mkize* 1959 (2) SA 260 (N) 264, 265; *R v Ahmed* 1959 (3) SA 776 (W) 780A; *R v Ngang* 1960 (3) SA 363 (T) 366E).

Until 1981, the courts, under the influence of English law, followed a middle path between an unyielding (policy-based) and a lenient (principle-based) approach, applying the so-called "specific intent theory". According to this theory, crimes could be divided into two groups: those requiring a "specific intent" (such as murder and assault with intent to do grievous bodily harm) and those requiring only an "ordinary" or "basic" intent. Where an accused was charged with a crime requiring a "specific intent", his intoxication could exclude the "specific intent" but not the "ordinary intent". The accused was then partially excused and not convicted of the "specific" intent crime with which he was charged, but only of a less serious crime requiring only an "ordinary intent" (Snyman *Criminal Law* 195; Burchell "Intoxication and the Criminal Law" 1981 *South African Law Journal* 177). The "specific intent theory" was not based on legal principle and was later abandoned in 1981 in the judgment of *S v Chretien* (1981 (1) SA 1097 (A) par 1103H–1104A (*Chretien*)).

The *Chretien* judgment introduced a more lenient, principle-based approach to the defence of voluntary intoxication. After *Chretien,* voluntary intoxication was accepted as affecting criminal liability to the same extent as youth, mental illness and involuntary intoxication. This finding was in stark contrast to the previous legal position, namely that intoxicated assailants could not escape criminal liability on the strength alone of their voluntary intoxication (see Paizes "Intoxication Through the Looking Glass" 1988 *South African Law Journal* 776). The Appellate Division held that voluntary intoxication could, albeit only in highly exceptional circumstances, lead to a complete acquittal. On the facts, Chretien was acquitted on one count of murder and five counts of attempted murder because his voluntary intoxication excluded his intention (compare Hiemstra "Dronkenskap ná Chretien of: Die Losgemaakte Remkabel" 1981 *Journal of Contemporary Roman-Dutch Law* 249; Ellis "Vrywillige Dronkenskap: 'n Nuwe Dag" 1981 *Journal of Contemporary Roman-Dutch Law* 175; Rabie "Vrywillige Dronkenskap as Verweer in die Strafreg: Die *Chretien*-Saak" 1981 *South African Journal of Criminal Law and Criminology* 111). As anticipated, the decision in *Chretien* was met with ardent support as well as tenacious criticism, not only among lawyers but also in the community generally (see Burchell 1981 *SALJ* 171).

In order to neutralise the effect of the *Chretien* decision, and owing to public distaste for the lenient approach, the legislature intervened and passed the Criminal Law Amendment Act 1 of 1988 (the Act), which was promulgated on 4 March 1988 (see also Paizes 1988 *SALJ* 777–788; Burchell "Intoxication After Chretien*:* Parliament Intervenes" 1988 *South African Journal of Criminal Justice* 274; Coetzee "Artikel 1 van die Strafregwysigingswet 1988" 1990 *South African Journal of Criminal Justice* 285). The inherent aim of the Act was to:

> "[a]ccommodate the sense of justice of the society in respect of the judicial treatment of (intoxicated) persons for actions committed by them while they are in that condition in cases where such condition was brought about by the voluntary use of intoxicating liquor or drugs." (see the Memorandum on the Objects of the Criminal Law Amendment Bill 1987 as discussed by Paizes 1988 *SALJ* 777)

The provisions of the Act (discussed below) reflect the current legal position in respect of voluntary intoxication as a criminal defence. The Act provides a statutory framework for the crime of statutory intoxication (see Snyman *Criminal Law* 199–204; Burchell and Milton *Principles of Criminal Law* (2014) 303–315; Burchell *Cases and Materials on Criminal Law* (2016) 433–444). Almost three decades after its enactment, and despite the inherently well-intended aims of the Act, application of the Act's provisions remains problematic and contentious.

Although the Act was not applied in the judgment of *Ramdass* (and was only referred to *obiter*), the inherent deficiencies of section 1(1) of the Act were once again brought to the fore, ultimately highlighting the need for law reform.

3 *S v Ramdass* 2017 (1) SACR 30 (KZD) – once again exposing the intrinsic deficiencies in the Act

The facts of the decision appear from the judgment delivered by Ploos van Amstel J. The accused was charged with the murder of his girlfriend, as well as robbery with aggravating circumstances. On 2 March 2014, the accused, the deceased and the deceased's mother went to a shopping mall and had lunch (par 3). On their way home, the deceased and her mother dropped the accused at a tavern and went home. The accused returned later in the afternoon. According to testimony by the deceased's mother, he appeared to be intoxicated when he arrived home (par 3). The deceased's mother then left to visit a casino and returned later in the evening. Upon entry, she noticed that the house had been ransacked. When she entered the deceased's room, she found the deceased on her bed with a plastic bag over her head (par 3). There was no sign of forced entry. The accused was found the next morning in possession of the deceased's handbag containing her cellphone and house keys (par 3). He admitted to killing the deceased but averred that he had no recollection of the events, and that the events transpired as a result of his state of intoxication, precipitated by the use of alcohol and crack cocaine (par 3). The accused was accordingly charged with murder and robbery with aggravating circumstances (par 2).

The accused relied on the defence of criminal incapacity as a result of the consumption of alcohol and crack cocaine. The accused specifically raised, as a defence, the inability to appreciate the wrongfulness of his act and to act in accordance with such appreciation. He also alleged that he did not have the intention to kill the deceased (par 7). The court, in assessing the defence raised by the accused, reaffirmed that criminal capacity is an essential prerequisite for criminal liability (par 4). In cases of non-pathological criminal incapacity, the State bears the onus of proving, beyond a reasonable doubt, that the accused had the requisite criminal capacity at the time of the commission of the alleged crime. The latter was confirmed by the court while also emphasising that amnesia in itself constitutes no defence, but could be helpful in assessing the possible lack or not of criminal capacity (par 7; see also *S v Humphreys* 2013 (2) SACR 1 (SCA) par 10–11; *S v Majola* 2001 (1) SACR 337 (N) 339–340; Le Roux "Strafregtelike Aanspreeklikheid en die Verweer van Nie-Patologiese oftewel Gesonde Outomatisme: Ware Amnesie onderskei van Psigogene Amnesie – Blote Verlies van Humeur onderskei van Verlies van Kognitiewe Geestesfunksie – *S v Henry* 1999 (1) SACR 13 (SCA)" 2000 33 *De Jure* 190; Hoctor "Amnesia and Criminal Responsibility" 2000 13(3) *South African Journal of Criminal Justice* 273).

The State called a psychiatrist, Professor Mkhize, who was one of the specialists who assessed the accused's triability in terms of sections 77, 78 and 79 of the Criminal Procedure Act (51 of 1977 (CPA)). The accused was found fit to stand trial and did not suffer from any mental illness or defect at the time of the commission of the offence (par 11). According to Professor Mkhize, it is a common occurrence for a person to be unable to recollect past events after the excessive use of alcohol (par 12). When asked whether it was a reasonable possibility that, as a result of the consumption of alcohol and crack cocaine, the accused lacked the capacity to appreciate the wrongfulness of his actions, Professor Mkhize testified that it was a reasonable possibility (par 13). It was noted by Ploos van Amstel J that no evidence was presented as to the degree of intoxication of the accused (par 27). The State contended that it was unlikely that the accused had been so intoxicated that he lacked criminal capacity (par 28).

The court held as follows in respect of the defence of criminal incapacity:

> "I am conscious of the need for caution in finding too readily that a person who had killed someone is not criminally responsible because he acted involuntarily or without criminal capacity … Nevertheless, this does not mean that the court may shirk its duty to determine whether the guilt of an accused person was established beyond a reasonable doubt. If there is a reasonable doubt as to his criminal capacity then he must get the benefit of that." (par 29)

Ploos van Amstel J was satisfied that the accused had established a sufficient foundation for his defence of criminal incapacity (par 30). Having regard to the totality of the evidence, it was held that there was reasonable doubt as to whether the accused had the required criminal capacity (par 30). It was further held, albeit *obiter*, that the accused could not be found guilty in terms of section 1(1) of the Act:

> "The difficulty with the statutory offence is the requirement that the accused must have been so drunk that he lacked criminal capacity. In a case where

> the accused is acquitted on a charge of murder on the basis that there is a reasonable possibility that he was so drunk that he lacked the required capacity, he cannot be convicted of the statutory offence unless the court can find beyond a reasonable doubt that he did not have such capacity." (par 33)

The court held further:

> "The outcome of this case does not mean that persons charged with violent crimes can escape liability easily by claiming a lack of criminal capacity due to the use of alcohol and drugs. Each case will be decided on its own facts, and the evidence scrutinized carefully." (par 34)

The court further emphasised the need for cogent and thorough expert evidence in cases of this nature (par 34). *In casu*, the evidence revealed that, at the time of the act, Ramdass was more than "slightly drunk" and he could therefore not be convicted of murder. The evidence also did not prove beyond a reasonable doubt that Ramdass was "very drunk" – that is, drunk enough to lack criminal capacity at the time of the act. He could therefore not be convicted of a contravention of the Act either. To convict the accused of the original offence (murder), the State needed to prove criminal capacity beyond a reasonable doubt. Alternatively, to obtain a conviction on the statutory offence, the State needed to prove criminal *in*capacity beyond a reasonable doubt. For a conviction on the statutory offence, the State thus had to prove the opposite of what it originally needed to prove. Judged by the law on intoxication as it stands, Ramdass was simultaneously too drunk (for a conviction on the main charge) but not drunk enough (for a conviction on a contravention of the Act). He "fell" between the proverbial "two chairs", as Snyman so aptly puts it (Snyman *Criminal Law* 203). All that was needed for an acquittal on the murder charge was for the accused to raise reasonable doubt about his capacity, which he indeed did. Such an acquittal did not require the accused to prove the absence of capacity beyond reasonable doubt. The accused was accordingly acquitted on both charges. Indeed, the twilight zone of the semi-drunk offered the accused asylum.

4 Statutory intoxication in the twilight zone again

A proper understanding of the case under discussion necessitates that the history behind the Act be contextualised. Intoxication may result in conditions such as impulsiveness, diminished self-criticism, overestimation of a person's abilities and underestimation of dangers (Snyman *Criminal Law* 192*;* in respect of intoxication as a defence in criminal law, see Burchell 1981 *SALJ* 177; Burchell 1988 *SAJCJ* 274; Rabie 1981 *South African Journal of Criminal Law and Criminology* 111; Rabie "*Actiones Liberae in Causa*" 1978 *Journal of Contemporary Roman-Dutch Law* 60; Snyman "Die *Actio Libera in Causa*: Die Benadering in die Duitse en Suid-Afrikaanse Reg" 1978 *De Jure* 227; Snyman "Die *Actio Libera in Causa*: 'n Onsekere Wending in die Suid-Afrikaanse Reg" 1984 *South African Journal of Criminal Law and Criminology* 227).

Goldman, Brown and Christiansen state the following in respect of the effects of intoxication:

> "If any characteristic has been seen as a central, defining aspect of alcohol use, it is the presumed capacity of alcohol to alter anxiety, depression and

> other moods." (Goldman, Brown and Christiansen "Expectancy Theory: Thinking About Drinking" in Blane and Leonard *Psychological Theories of Drinking and Alcoholism* (1987) 200)

The major driving force behind the enactment of the Act historically, was the judgment handed down by Rumpff CJ in *Chretien*. As stated above, the accused had been charged with one count of murder and five counts of attempted murder. The charges emanated from events that occurred after the accused had attended a social event. After the social event (where the accused consumed a large quantity of liquor), the accused got into his vehicle and drove in the direction of people who were standing in his way. Thinking that the crowd would disperse, the accused continued driving. He drove in amongst them, killing one person and injuring five. The trial court acquitted the accused on the charges of murder and attempted murder on the basis that he lacked intention. The accused was convicted on one count of culpable homicide. The prosecution appealed against the judgment on a question of law, namely, whether the accused should have been convicted of common assault on the attempted murder charges. Rumpff CJ, however, held on appeal that the trial court had been correct in holding that the accused was not guilty of common assault.

The legal position pertaining to intoxication as a defence after the *Chretien* decision was as follows:

(a) If a person is so drunk that their muscular movements are involuntary, there is no act or conduct on their part, and accordingly although the condition can be ascribed to the use of an intoxicating substance, they cannot be found guilty of a crime (1103D–F).

(b) A person may also as a result of the excessive use of alcohol completely lack criminal capacity and accordingly not be criminally liable; this will be the case where the person is so intoxicated that they are no longer aware of what they are doing or where their inhibitions were substantially affected.

(c) The "specific intent theory" was rejected (1103H–1104A). Intoxication could also exclude ordinary intent. It was owing to the latter principle that voluntary intoxication was held in this case to be a complete defence.

(d) It was also held by Rumpff CJ that a court should not lightly infer that, as a result of intoxication, an accused acted involuntarily or was not criminally responsible or that intention was absent as this would bring the administration of justice into discredit (1105H–1106D; Snyman *Criminal Law* 196; Badenhorst "*S v Chretien* 1981 (1) SA 1097 (A): Vrywillige Dronkenskap en Strafregtelike Aanspreeklikheid" 1981 *Journal of South African Law* 185).

Chretien thus constitutes the leading authority pertaining to the multiple effects of voluntary intoxication on criminal liability (Snyman *Criminal Law* 195; Burchell *Principles of Criminal Law* 305–306; see also Badenhorst "Vrywillige Dronkenskap as Verweer Teen Aanspreeklikheid in die Strafreg – 'n Suiwer Regswetenskaplike Benadering" 1981 *South African Law Journal* 148; Badenhorst 1981 *Journal of South African Law* 185. See also *S v Baartman* 1983 (4) SA 393 (NC); *S v D* 1995 (2) SACR 375 (C); *S v Flanagan* [2005] JOL 14700 (E); *S v Hartyani* 1980 (3) SA 613 (T); *R v Holiday*

supra; *R v Innes Grant* 1949 (1) SA 753 (A); *S v Johnson supra*; *S v Kelder* 1967 (2) SA 644 (T); *S v Lange* 1990 (1) SACR 1999 (W); *S v Lombard* 1981 (3) SA 198 (A); *S v Maki* 1994 (2) SACR 414 (E); *S v Mbele* 1991 (1) SA 307 (T); *S v Mpumgathe* 1989 (4) SA 169 (E); *S v Mula* 1975 (3) SA 208 (A); *S v Ndhlovo* (2) 1965 (4) SA 692 (A); *S v Pienaar* 1990 (2) SACR 18 (T); *S v Saaiman* 1967 (4) SA 440 (A); Paizes 1988 *SALJ* 779).

To further contextualise the legal problem under discussion, it is important to distinguish between voluntary and involuntary intoxication. Voluntary intoxication denotes the conscious consumption of alcohol, drugs or any intoxicating substance. The individual must know or foresee that the substance may impair his or her awareness and understanding (see, in general, Haque and Cumming "Intoxication and Legal Defences" 2003 *Advances in Psychiatric Treatment* 144–151). Involuntary intoxication refers to intoxication resulting from ignorant or unconscious consumption of an intoxicating substance by the accused, or such consumption brought about by an absolute force over the accused. Involuntary intoxication can also be caused by the use of prescribed medicine taken in accordance with a medical practitioner's instructions that usually does not cause unpredictability or aggressiveness. Involuntary intoxication is a complete defence to any crime, owing to the fact that the accused could not have prevented it. The court in *Chretien* did not change the law pertaining to involuntary intoxication (Snyman *Criminal Law* 193–194; *S v Hartyani* 1980 (3) SA 613 (T); *S v Els* 1972 (4) SA 696 (T) 702). The court in *Chretien* also did not change the law pertaining to intoxication leading to mental illness or the *actio libera in causa.* Where chronic consumption of alcohol has resulted in a mental illness such as *delirium tremens*, the rules relating to the defence of mental illness (as contained in ss 77–79 of the CPA) apply. The *actio libera in causa* refers to a situation where the accused forms the intention to commit a crime while still sober. The accused then consumes an intoxicating substance to build courage, whereafter they merely use their intoxicated body as an instrument to commit the crime. An *actio libera in causa* situation is never a defence but could, on the contrary, be an aggravating factor in punishment (Snyman *Criminal Law* 193; Rabie "*Actiones Liberae in Causa*" 1978 *Journal of Contemporary Roman-Dutch Law* 60; Vorster "*Actio Libera in Causa* en Dronkenskap" 1984 *Journal of South African Law* 89; Oosthuizen "Dronkenskap in Perspektief - 'n Strafregtelike Bespreking" 1985 *Journal of Contemporary Roman-Dutch Law* 407; *S v Ndhlovu (2)* 1965 (4) SA 629 (A) 692).

In short, voluntary intoxication could potentially have the following effects (Snyman *Criminal Law* 196–197):

(a) Intoxication might result in an accused acting involuntarily, in which case they will not be guilty of a crime.

(b) Intoxication may cause an accused to lack criminal capacity in which case they will not be guilty of a crime.

(c) If, despite intoxication, an accused was able to perform a voluntary act and also had criminal capacity, the intoxication may result in the accused lacking the intention required for the particular crime. In the latter instance, the accused will not necessarily escape the clutches of the criminal law: the evidence might reveal that they were negligent, in

which case they might be convicted of a crime requiring culpability in the form of negligence.

(d) Intoxication may also serve as a ground for the mitigation of punishment.

While voluntary intoxication was never regarded as a complete defence before the *Chretien* decision, after the *Chretien* decision, voluntary intoxication could in certain circumstances constitute a complete defence. The decision in *Chretien* was criticised severely in the sense that it was difficult to accept a situation where a sober person is punished for criminal conduct while the same conduct performed by an intoxicated person is condoned merely because they were intoxicated. The reality of intoxicated persons escaping conviction too easily, owing to the lenient approach to intoxication as a defence as enunciated in *Chretien*, called for the legislature to enact a provision to the effect that a person incurs liability if they voluntarily become intoxicated and, while intoxicated, committed an act that would have resulted in liability but for the rules relating to intoxication laid down in *Chretien*. The retributive and deterrent theories also demand that the intoxicated perpetrator should not be allowed to hide behind intoxication in order to escape conviction (compare *S v Mafu* 1992 (2) SACR 494 (A) 497c–d; Snyman *Criminal Law* 10–15). The need accordingly arose to enact legislation to curb the lenient approach followed in *Chretien*. In response, the legislature enacted the Criminal Law Amendment Act 1 of 1988 (Snyman *Criminal Law* 201; Burchell *Principles of Criminal Law* 309. See also Paizes 1988 *SALJ* 776).

Section 1 of Act 1 of 1988 reads as follows:

> "(1) Any person who consumes or uses any substance which impairs his or her faculties to appreciate the wrongfulness of his or her acts or to act in accordance with that appreciation, while knowing that such substance has that effect, and who while such faculties are thus impaired commits any act prohibited by law under any penalty, but is not criminally liable because his or her faculties were impaired as foresaid, shall be guilty of an offence and shall be liable on conviction to the penalty which may be imposed in respect of the commission of that act.
>
> (2) If in any prosecution for any offence it is found that the accused is not criminally liable for the offence charged on account of the fact that his faculties referred to in (1) were impaired by the consumption or use of any substance, such accused may be found guilty of such a contravention of sub-section (1) if the evidence proves the commission of such contravention."

The Act clearly recognises intoxication as a ground excluding criminal capacity. The section refers to impairment of an accused's "faculties to appreciate the wrongfulness of his acts or to act in accordance with that appreciation" (Snyman *Criminal Law* 200–201). This refers to the impairment of the perpetrator's cognitive or conative mental abilities (see *S v Laubscher* 1988 (1) SA 163 (A) 166H–I; *S v Wiid* 1990 (1) SACR 561 (A) 563i–j; *S v Lesch* 1983 (1) SA 814 (O) 823H–824B; *S v Campher* 1987 (1) SA 940 (A) 956, 958I). The Act is silent on instances where intoxication excluded the voluntariness of the accused's conduct or intention or where the accused's alleged conduct took the form of an *omissio*. The court in *S v Ingram* (1999 (2) SACR 127 (W)) correctly found that an accused who was so intoxicated

at the time of the alleged crime that the conduct was involuntary will automatically also lack criminal capacity. That is because intoxication resulting in involuntary conduct is a more severe degree of intoxication than that resulting only in incapacity. One therefore has to assume that the legislature aimed to include intoxicated persons who were exonerated under common law owing to a lack of voluntariness and incapacity. This conclusion is supported by Burchell (1988 *SACJ* 277), Burchell and Milton (*Principles of Criminal Law* (1991) 410) and Snyman (*Criminal Law* 202).

Snyman submits the following:

> "Intoxication resulting in automatism is surely a more intense form of intoxication than that resulting in lack of criminal capacity; if, therefore, the legislature intended to cover the latter situation, it is inconceivable that it could have intended to exclude the former, more serious, form of intoxication." (Snyman *Criminal Law* 201)

The burden of proving all of the elements of the crime created in Act 1 of 1988 beyond a reasonable doubt falls on the State. One of these elements entails that the State has to prove that an accused is not criminally liable for their act because they lacked criminal capacity. An intoxicated accused will escape liability if neither their liability nor their non-liability can be established beyond a reasonable doubt (see Paizes 1988 *SALJ* 781). In *S v Mbele* (*supra*), the magistrate gave the accused the benefit of the doubt and held that the accused may have been intoxicated at the time of the act (theft in this instance), and held the accused not criminally liable. The magistrate convicted Mbele of a contravention of the Act instead. On review, the court held that Mbele's lack of criminal capacity was also not proved beyond a reasonable doubt, and he therefore could also not be convicted of having contravened the Act. As in *Ramdass,* the accused in *Mbele* went scot-free (see also *S v Griessel* 1993 (1) SACR 178 (O) 181e).

The above-mentioned unsatisfactory situation stems from an unfortunate choice of words in the crime's formulation (compare Snyman *Criminal Law* 203). The elements of the crime of statutory intoxication present numerous procedural difficulties for the State (Snyman *Criminal Law* 201–203; Burchell *Principles of Criminal Law* 309):

- In order to secure a conviction on contravening section 1, the State is required to prove that the accused is not guilty of a crime. While the accused only needs to raise doubt about their capacity, the State needs to prove the absence of capacity beyond reasonable doubt. The State thus has to prove the opposite of what it normally has to prove. The State either has to establish, beyond a reasonable doubt, the presence of criminal capacity for a conviction on the main charge, or the lack of criminal capacity beyond a reasonable doubt, in order to secure a conviction in terms of section 1.
- The State must prove lack of criminal capacity beyond reasonable doubt (see *S v September* 1996 (1) SACR 332 (A); *S v D* 1995 (2) SACR 375 (C)).

It is submitted that expert evidence will also play a vital role in cases where the State seeks a conviction in terms of section 1 of Act 1 of 1988. The reason for this lies in the fact that the State has to prove that the accused is

"not criminally liable". Paizes correctly notes that non-liability is very different from non-conviction. If an accused is, for example, acquitted on a charge of assault, it merely indicates that the court was not convinced of their guilt beyond reasonable doubt – it does not mean they are "not liable" (Paizes 1988 *SALJ* 781).

Paizes observes the following:

> "After seeking to establish X's liability beyond reasonable doubt, the State now has to prove his non-liability beyond a reasonable doubt. An intoxicated wrongdoer will, therefore, escape the clutches of the criminal law if neither his liability nor his non-liability can be established on the stringent criminal standard or proof." (Paizes 1988 *SALJ* 781)

In *S v Mbele* (*supra* 311C–D), Flemming J held:

> "Dit is derhalwe onvoldoende as die Staat sake net so ver voer dat daar onsekerheid is of die beskuldigde se vermoëns 'aangetas is' en 'aangetas was' tot die nodige mate."

It is clear that mere uncertainty as to whether an accused lacked criminal capacity is not sufficient for the State to discharge the onus. It is at this stage that expert evidence becomes pivotal to the State. The State will have to lead expert evidence of a high degree in order to prove lack of criminal capacity owing to intoxication beyond a reasonable doubt (see also *S v Griessel supra*, where Muller AJA held that a finding that the accused had "possibly" not known what they were doing was not sufficient to sustain a conviction under section 1(1)). A positive finding was required that the accused lacked criminal capacity as a result of consumption of alcohol when they committed the act complained of (*S v Griessel supra* 181D–E)). From a procedural perspective, the following should be noted in terms of section 1(2) of the Act:

(a) Statutory intoxication is a competent verdict on any offence charged (see *S v Mpungatje* 1989 (4) SA 139 (EPD) 143H).

(b) If any portion of a sentence flowing out of a conviction on statutory intoxication is suspended, the condition of suspension should refer to a future contravention of the actual offence: there should be a relationship between the offence of which the accused has been convicted and the one referred to in the condition of suspension (see *S v Oliphant* 1989 (4) SA 169 (EPD)).

(c) When convicting an accused of the statutory crime, a description of the initial charge on which the accused would have been convicted had they not been intoxicated should be stipulated (see *S v Flanagan* [2005] JOL 14700 (E) 5; *S v Maki supra* 416A–C; *S v Pietersen* 1994 (2) SACR 434 (C) 439).

5 Assessing the way forward and possible solutions

The case under discussion once again exposes the intrinsic anomalies associated with the crime of statutory intoxication. The judgment in *Ramdass* exposes the inherent difficulties with which a court is confronted whenever

intoxication is raised as a defence in order to exclude a particular element of criminal liability. The Act, despite its good intentions, is still problematic more than three decades after it came into effect. The burden of proof for the State, where a conviction in terms of the Act is sought, becomes extremely problematic when the State has to prove beyond a reasonable doubt that the accused lacked criminal capacity. In *S v V* (1996 (2) SACR 290 (C) 295–296), the court held that there is no logical reason why the normal standard of proof in a criminal case was not applicable to proof of incapacity for the purpose of this statutory crime (see also Stoker "Nugterheid oor Dronkenskap: *V* 1979 (2) SA 656 (A)" 1979 *South African Journal of Criminal law and Criminology* 280).

Where the accused is acquitted on the main charge owing to uncertainty as to their capacity, lack of capacity is not automatically proved beyond a reasonable doubt. The result is that a conviction in terms of the Act does not follow. In cases where the State fails to prove lack of capacity beyond a reasonable doubt for purposes of the Act, the accused will be acquitted on both the main charge as well as a contravention of the Act. If the evidence reveals that, at the time of the act, the accused happened to fall in the grey area between "slightly drunk" and "very drunk", it would be impossible to convict the accused of any crime (see Paizes 1988 *SALJ* 781). The accused will escape liability completely. It is highly unlikely that the legislature could have intended that the section be circumvented so easily. This absurd outcome was evident in the case under discussion. In *S v September* (1996 (1) SACR 325 (A) 332), Hefer AJ alluded to the problematic nature of the burden of proof and held as follows:

> "Subartikel (1) is 'n misdaadskeppende bepaling wat, volgens geykte beginsels en ten opsigte van elke element van die misdryf, bewys bo redelike twyfel van die Staat verg. Dat die beskuldigde se vermoëns inderdaad aangetas was end at hy daarom nie strafregtelik aanspreeklik is vir 'n verbode handeling deur hom in sy beskonke toestand verrig nie, moet dus positief bewys word. Bestaan daar bloot twyfel oor sy toerekeningsvatbaarheid kan hy nog weens sy handeling nóg aan oortreding van subartikel (1) skuldig bevind word." See also *S v Griessel supra* 181e; *S v Mbele supra* 113C–D; *S v Lange supra* 204 e–h.

From the case under discussion, and mindful of the historical context of the Act, it is evident that the two main contentious areas in the practical application of the Act relate to its limited scope of application and the burden of proof. The provisions of the Act only become operative once an intoxicated accused has been found not guilty on the main charge owing either to voluntariness or criminal capacity not having been proved by the State beyond reasonable doubt. In the event that an accused, similar to the *Chretien* case, is acquitted owing to having lacked intention, the Act simply does not apply. In addition, the prosecution has an unrealistically heavy burden of having to prove criminal non-liability on the main charge for a specific reason, namely criminal incapacity.

More than three decades after its inception, the Act remains contentious and problematic. The question that inevitably arises is how do we cure the defective aspects of the Act?

To eradicate the first-mentioned obstacle, the wording of section 1(1) should be rephrased by Parliament in the following terms:

> "Any person who consumes or uses any substance voluntarily, while knowing or foreseeing that such substance will have an intoxicating effect on him, and who, while intoxicated, commits any act or omission prohibited by law under any penalty, but is acquitted for such act or omission due to their intoxication, shall be guilty of an offence and shall be liable on conviction to the penalty which may be imposed in respect of the commission of that act or omission."

Such a formulation will extend the field of application of the statutory crime to include all accused persons who were acquitted on the main charge on the strength of the *Chretien* decision. The suggested wording "*is acquitted for such act"* (rather than "but is not criminally liable" as the Act currently reads), will alleviate the unrealistically difficult burden of proof for the State. As Snyman points out, non-liability is very different from non-conviction (Snyman *Criminal Law* 201). The accused's acquittal on the main charge merely means that the court was not convinced of his liability beyond a reasonable doubt because the accused succeeded in raising reasonable doubt as to any of the elements of the crime. It does not mean that the court found him "non-liable". It certainly also does not mean that the accused's non-liability has been proved beyond reasonable doubt. Although it is common knowledge that the use of alcohol and drugs lowers inhibitions, and that violent crimes are generally the type of crimes that result from intoxication, the authors submit that the Act should target all crimes and not only crimes of violence. Such broader formulation would include criminal charges concerning road fatalities that result from driving under the influence of alcohol and drugs.

Alternatively, it is submitted that statutory intoxication should be elevated: it should be a substantive crime with which an accused can be charged, irrespective of any previous acquittal on a main charge. Such a crime would give effect to the policy-based approach regarding the effect of intoxication on criminal liability (compare Snyman *Criminal Law* 194) and would see the pendulum revert back to the same approach that was followed by the courts decades ago (see *R v Schoonwinkel supra*; *R v Ahmed supra*; *R v Dhlamini supra*; *R v Mkize supra* and *R v Ngang supra*). The wording of such a policy-based crime could read as follows:

> "Any person who consumes or uses any intoxicating substance voluntarily, while knowing or foreseeing that such substance will have an intoxicating effect on him, and who, while intoxicated, commits any act or omission prohibited by law under any penalty, shall be guilty of an offence and shall be liable on conviction to a fine or imprisonment, or to both such fine and imprisonment in the court's discretion."

Such a formulation would provide proportionality between the degree of punishment and the reprehensibility of the original offence.

Such a statutory crime would be based on policy considerations and not legal principle. According to the principle-based approach, an accused who has committed a crime while intoxicated and who manages to raise reasonable doubt as to the existence of any of the elements of the criminal charge, must be acquitted. A policy-based crime such as the one suggested would, of course, be open to criticism from a constitutional point of view in

that it may violate the accused's right to dignity, freedom of the person, and a fair trial. Snyman shares this reservation when he opines:

> "To find X, who was genuinely deprived of capacity as a result of voluntary intoxication, blameworthy for deeds he commits whilst in that state, could not be consistent with the basic values underlying our criminal justice system, and indeed our Constitution." (Snyman *Criminal Law* 198)

In an attack on the constitutionality of liability based on the doctrine of common purpose, the appellants in *S v Thebus* (2002 (2) SACR 319 (CC) par 17) contended that the Supreme Court of Appeal failed to develop the common-law doctrine of common purpose in conformity with the Constitution of the Republic of South Africa, 1996 (the Constitution), as required by section 39(2), and thereby failed to give effect to their rights to dignity, freedom of the person, and a fair trial, which includes the right to be presumed innocent. The common-purpose doctrine is also policy-based and enables the prosecution to obtain a conviction in the absence of proof of individual causation provided that certain elements are proved beyond a reasonable doubt. In dismissing the appeal, the Constitutional Court stated:

> "The mere exclusion of causation as a requirement of liability is not fatal to the criminal norm. There are no pre-ordained characteristics of criminal conduct, outcome or condition. Conduct constitutes a crime because the law declares it so. Some crimes have a common law and others a legislative origin. In a constitutional democracy, such as ours, a duly authorised legislative authority may create a new, or repeal an existing, criminal proscription. Ordinarily, making conduct criminal is intended to protect a societal or public interest by criminal sanction. It follows that criminal norms vary from society to society and within a society from time to time, relative to community convictions of what is harmful and worthy of punishment in the context of its social, economic, ethical, religious and political influences." (par 38)

The authors submit that the court in *Thebus* gave impetus to the crime-control model, or "socially expedient doctrines", as described by Watney (2017 *TSAR* 547 and Snyman *Criminal Law* 199). In the suggested formulation above, statutory intoxication would also be a competent verdict to any other charge and, in addition, the rules pertaining to the duplication of convictions would inadvertently also apply. The crime could potentially also overlap with offences such as driving under the influence in terms of section 65(1) of the Road Traffic Act (93 of 1996), to mention but one example. One should remain mindful of the *ius certum* and *ius strictum* requirements as they appear in the principle of legality (see s 35(3)(*l*) of the Constitution and Snyman *Criminal Law* 31–39). Irrespective of which formulation or suggestion is followed, the application of the Act, as illustrated once again by the decision in *Ramdass*, is contentious and in urgent need of reform. The history of the application of the Act proclaims this need emphatically.

G Stevens
University of Pretoria

J Le Roux-Bouwer
University of South Africa

CASES / VONNISSE

THE NATURE AND AMBIT OF THE INTIMIDATION OFFENCE

S v White 2022 (2) SACR 511 (FB)

1 Introduction

The offence of intimidation has been associated with controversy, particularly because of the historical link between the Intimidation Act (72 of 1982) and the legislative machinations of the apartheid regime. In the words of Gamble J, the Act may be regarded as "a piece of apartheid order legislation introduced at a time of increasingly repressive internal security legislation designed to criminalise conduct, largely in the field of resistance politics" (*Sandlana v Minister of Police* 2023 (2) SACR 84 (WCC) par 34). The nature and ambit of the intimidation offence has once again come under scrutiny in the recent case of *S v White* (2022 (2) SACR 511 (FB)). The decision in this case is examined here in the context of a general assessment of the offence. The offence can now only be committed by contravening section 1(1)(*a*) of the Act, as the Constitutional Court has struck down the section 1(1)(*b*) provision (as well as section 1(2)) as unconstitutional in *Moyo v Minister of Police* (2020 (1) SACR 373 (CC)), a development confirmed by the amendment of the Act by the Protection of Constitutional Democracy Against Terrorist and Related Activities Amendment Act (23 of 2022). (Some are of the view that the Constitutional Court could have gone further (Burchell *Principles of Criminal Law* 5ed (2016) 593–594).) However, for the purposes of the discussion that follows, it is useful to cite the full section 1(1) provision prior to amendment. (For ease of reference, the excised wording of section 1(1)(*b*) is italicised, to distinguish from the wording that remains part of the provision). Section 1(1) of the Act provides for the "prohibition of and penalties for certain forms of intimidation" as follows:

> "(1) Any person who–
> *(a)* without lawful reason and with intent to compel or induce any person or persons of a particular nature, class or kind or persons in general to do or to abstain from doing any act or to assume or to abandon a particular standpoint–
> (i) assaults, injures or causes damage to any person; or
> (ii) in any manner threatens to kill, assault, injure or cause damage to any person or persons of a particular nature, class or kind,
> *(b) acts or conducts himself in such a manner or utters or publishes such words that it has or they have the effect, or that it might reasonably be*

> *expected that the natural and probable consequences thereof would be, that a person perceiving the act, conduct, utterance or publication–*
>
> *(i) fears for his own safety or the safety of his property or the security of his livelihood, or for the safety of any other person or the safety of the property of any other person or the security of the livelihood of any other person; and*
>
> *(ii) .....*
>
> shall be guilty of an offence and liable on conviction to a fine not exceeding R40 000 or to imprisonment for a period not exceeding ten years or to both such fine and such imprisonment."

It is noteworthy that the Indian Penal Code of 1860 (Act 45 of 1860) also contains an intimidation offence. Section 503 of the Code provides as follows:

> "Whoever threatens another with any injury to his person, reputation or property, or to the person or reputation of any one in whom that person is interested, with intent to cause alarm to that person, or to cause that person to do any act which he is not legally bound to do, or to omit to do any act which that person is legally entitled to do, as the means of avoiding the execution of such threat, commits criminal intimidation."

It may further be noted that the draft bill to replace the colonial-era 1860 Code, the Bharatiya Nyaya Sanhita 2023 (Bill 121 of 2023), also includes this offence at clause 349. The only proposed alteration to the current wording of section 503 is the inclusion of the words "by any means" to include any mode of delivery or causing of the threat (i.e., "Whoever threatens *by any means*, another"), which would clearly include, *inter alia*, threats transmitted electronically or via social media.

The significance of the Indian provision is that it may be concluded that the criminalisation of intimidation is not only a colonial project or an instrument of political oppression. Moreover, South Africa is not the only modern constitutional democracy making use of such a provision. But what ought to be the ambit of this offence?

2 Facts of *S v White*

After pleading guilty in the Hertzogville magistrates' court to contravening section 1(1)(*a*) of the Intimidation Act, the accused was duly found guilty. The factual basis for this conviction was that, in the course of an argument, the accused threatened to kill the complainant if he (the complainant) were to date one Palesa, a woman that the accused considered to be his girlfriend (par 5–7).

The senior magistrate of Welkom sent the matter on special review to the High Court in terms of section 304(4) of the Criminal Procedure Act 51 of 1977, despite having no concerns regarding the proper legal representation of the accused, or regarding the validity of his plea, or whether the accused's section 112 statement was properly handed in (par 2). Citing *S v Motshari* (2001 (1) SACR 550 (NC)), where it was held that the erstwhile section 1(1)(*b*) offence under the Intimidation Act should not be used in the context of private quarrels, the senior magistrate indicated misgivings whether the

conviction in this case should be upheld on review, and if it were so upheld, whether the sentence was appropriate (par 3).

3 Judgment

On review, the High Court pointed out that it was clear that there were a few procedural issues to deal with. First, the trial magistrate had incorrectly made the suspension order in terms of sections 2 and 3 of the Intimidation Act, instead of section 1(1)(*a*), which the review court was asked to address by the senior magistrate (par 3–4). Moreover, the High Court noted that the charge sheet was deficient in its formulation, as it included words that did not apply to the charge, including opposites (to "do" and to "abstain from doing") (par 6). The accused's statement in terms of section 112(2) more or less repeated the unfortunate phrasing of the charge sheet (par 7). In this regard, the court later reviewed these discrepancies and stated that if the prosecution wished to rely on statutory offences, it should "ensure proper compliance with the particular statute" (par 21). The court also voiced its concern that the accused had not properly understood the nature of the charge of intimidation, given that English was not his mother tongue (or indeed, the mother tongue of any of the role players in the court proceedings). However, leaving these issues aside, the primary focus of the High Court on review was on the issue implicit in the senior magistrate's comments: whether the court should interfere with the conviction (par 4), in order "to consider the applicability of s 1(1)(*a*) [of the Intimidation Act] in somewhat trivial matters and/or where a common law offence is applicable" (par 8).

Ultimately the reviewing court decided that the conviction was very clearly not in accordance with justice (so much so that the trial magistrate need not be consulted as provided for in section 304(2)(*a*) of the Criminal Procedure Act) (par 23), and set the conviction (and sentence) aside on review (par 24). The court reached this conclusion after citing section 1 of the Intimidation Act by evaluating some cases in which offences under the Intimidation Act were examined – specifically, *S v Motshari* (*supra*), *Moyo v Minister of Justice and Constitutional Development* (2018 (2) SACR 313 (SCA)), *S v Holbrook* ([1998] 3 All SA 597 (E)), and *S v Ipeleng* (1993 (2) SACR 185 (T)). In addition, the court referred to the chapter on intimidation in Milton, Cowling and Hoctor *South African Criminal Law and Procedure Vol III: Statutory Offences* (1988) HA1, as well as the discussion on the intimidation offences in Snyman *Criminal Law* 6ed (2014) 455.

Having considered these sources, the court reasoned that the offence contained in section 1(1)(*a*) "was never intended to be applicable to the usual threats that appear every day between members of the public, but with no real consequences or harm" (par 17). The court therefore sought to distinguish between "serious issues" and "normal run-of-the-mill threats" (par 17). Furthermore, the court reasoned, the paucity of reported cases relating to section 1(1)(*a*) is indicative of justifiable prosecutorial reluctance to use this section where it could use common-law offences such as assault, extortion or malicious injury to property – "[o]ne does not need a 10-kilogram sledgehammer to kill a fly" (par 18). The court continued (par 18):

> "If the prosecution is allowed to charge all persons in terms of the Intimidation Act instead of with appropriate common-law offences, these common-law offences may just as well be done away with. There is no reason at all for this."

Therefore, it was concluded by the court, the subsection "should be used in deservingly serious matters only" (par 21), which it was held were not present in the current case.

4 Discussion

4 1 The history of the intimidation offence

The history of the criminalisation of intimidation mirrors the turbulent history of South Africa (for a detailed history, see Hoctor "Intimidation" in Milton, Cowling and Hoctor *South African Criminal Law and Procedure* HA1-1). It was first established as part of the legislative armoury to counter unlawful labour-related practices (in the following pre-Union statutes: Act 15 of 1856 (C); Ordinance 2 of 1850 (N); Law 13 of 1880 (T) and Ordinance 7 of 1904 (O)), before being taken up into national legislation shortly after Union (in section 8 of the Riotous Assemblies and Criminal Law Amendment Act of 1914). After a further iteration of the legislation, repealing the 1914 Act, and repeating this offence, which principally continued to target workers aggressively seeking to enforce their demands (s 10 of the Riotous Assemblies Act 17 of 1956), the offence was considerably expanded by section 8 of the General Law Amendment Act (39 of 1961). This provision deleted the words "in respect of employment" from section 10 of the 1956 Act, which enabled the offence to be used in all contexts, not simply that of employment. Finally, the Intimidation Act was passed in 1982, at the same time that a number of security offences were created by legislation (found mainly in the Internal Security Act 72 of 1982, which in itself criminalised a broad form of intimidation in s 54(1)(*d*)). Further amendments to the Act (via the Internal Security and Intimidation Amendment Act 138 of 1991, followed by the Criminal Law Second Amendment Act 126 of 1992), *inter alia* broadened the definition of intimidation, introduced a new form of intimidation (set out in s 1(1)(*b*) of the Act), and switched the broad intimidation offence in the Internal Security Act to the Intimidation Act (s 1A).

After this development, the offences set out in section 1 of the Intimidation Act were as set out above (under heading 1 of this note).

Two provisions of the Intimidation Act were subject to compelling criticism. The first of these was the reverse-onus provision contained in section 1(2) of the Act (see, e.g., Snyman *Criminal Law* 456). The Constitutional Court has been resolute in striking down any provisions that incorporate a reverse-onus provision as posing an unjustifiable infringement on the right to be presumed innocent contained in section 35(3)(*h*) of the Constitution (see, e.g., *S v Zuma* 1995 (2) SA 642 (CC); *S v Coetzee* 1997 (3) SA 527 (CC)). The second provision to attract criticism was the offence contained in section 1(1)(*b*). This provision has been the object of vigorous judicial and academic criticism. Its formulation has been described as "tortuous" (*S v Holbrook supra* 600i), and the offence has been variously described as

"disconcertingly widely formulated" (Snyman *Criminal Law* 456), even as assuming "absurd proportions" (Plasket and Spoor "The New Offence of Intimidation" 1991 12(4) *Industrial Law Journal* 747 750).

Neither of these provisions subsists in South African law. The unconstitutionality of the section 1(2) reverse-onus provision was confirmed by the Constitutional Court (*Moyo v Minister of Police supra*) after being declared as such by the Supreme Court of Appeal (*Moyo v Minister of Justice and Constitutional Development supra*); and section 1(1)(*b*) was struck down as unconstitutional by the Constitutional Court in *Moyo v Minister of Police* (*supra*), despite the majority of the Supreme Court of Appeal having a different view (*Moyo v Minister of Justice and Constitutional Development supra*). The basis for the finding of unconstitutionality in respect of section 1(1)(*b*) was its unjustifiable infringement on the right to freedom of expression. As indicated above, this provision was subsequently deleted by section 24 of the Protection of Constitutional Democracy Against Terrorist and Related Activities Amendment Act (23 of 2022). (For a discussion of the intimidation offence and the judgments in *Moyo*, see Watney "Freedom of Expression and Intimidation: Uneasy Relationship or Matter of Interpretation?" 2020 *TSAR* 377.)

4 2 The approach of the court in White

It is noteworthy that the reviewing court in *White* starts its analysis of the appropriateness of the intimidation conviction by citing the full text of section 1 of the Intimidation Act, quoting both the extant and repealed offences. This approach is perhaps understandable in light of the court proceeding to discuss the *Motshari* and *Holbrook* cases, which dealt specifically with the offence declared unconstitutional in section 1(1)(*b*), but whether such sources are indeed pertinent to the case at hand requires closer attention.

The context of the *Motshari* case was a domestic quarrel, between partners who had lived together in a somewhat fractious relationship for seven years, where the accused had threatened to kill the complainant, and had employed very insulting language towards her. Despite the threat and verbally abusive behaviour, the complainant was not sufficiently alarmed to leave their mutual home. On review, the court set aside the conviction for contravening section 1(1)(*b*), holding that the provisions of this section did not apply to the case at hand. The court in *Motshari* (which judgment was *inter alia* praised in *Sandlana v Minister of Police supra* par 42) stated that the "draconian penal provisions [of the Act] … strongly militate against trivial and ordinary run-of-the-mill cases having been within the contemplation of the Legislature" (*supra* 554a–b), and approved of the approach of the earlier decision in *S v Holbrook* (*supra*), where the court similarly held that the appellant's actions did not amount to a contravention of section 1(1)(*b*). In this case, there had been a heated argument between the appellant and the complainant after the appellant had thrown the complainant's cat into the swimming pool on the property on which they both resided. When the complainant insisted on reporting the matter to the estate agent responsible for the property, with a view to getting the appellant evicted, he threatened to kill her. The complainant was however undeterred, and had to be restrained

when she emerged from her dwelling with a firearm, to confront the appellant.

While the purpose of the court in *White* in citing these decisions is clear – namely that the decisions indicate the disjuncture that the courts in these cases found between the conduct on which these cases were based, and the conduct targeted in the section – it simply bears noting, once again, that the cases in question relate to section 1(1)(*b*) (although the ultimate conviction in the court *a quo* in *Holbrook* was a contravention of section 1(1) of the Criminal Law Amendment Act 1 of 1988). The court in *White* notes that the Constitutional Court in *Moyo* overruled the majority judgment in the SCA decision to strike down section 1(1)(*b*) as unconstitutional, although section 1(1)(*a*) did not face a constitutional challenge, and thus remains valid (*supra* par 12–13). However, notably, the court in *White* returns to the *Holbrook* decision, and its critique of the breadth of the section 1(1)(*b*) provision, and its statement that "the section is an unnecessary burden on our statute books" (*Holbrook supra* 603, cited in *White supra* par 14).

Why the focus on the *Holbrook* decision? Because, for the court in *White*, the "general tenor" of the dicta from *Holbrook* is valid (*supra* par 15):

> "It is not necessary to completely do away with sub-section 1(1)(*a*), but it should be utilised in line with the purpose of the Legislature, bearing in mind the long title of the Intimidation Act, that is to prohibit certain forms of intimidation, the extreme sentences that may be imposed, the context in which the Act was promulgated, and the language used. There is certainly a place for it, but to use it in trivial matters as in casu is unimaginable."

As discussed above, the Intimidation Act has been subjected to some penetrating, and justified, criticism. The scope of the Act has in particular been a matter for concern, being described by Mathews as a "dragnet law" (*Freedom, State Security and the Rule of Law* (1986) 59), but is the approach of the court in *White* to this offence correct?

4 3 The scope of the section 1(1)(a) offence

In assessing the scope of the offence, it is necessary to return to its rationale. The long title of the Act is not particularly revealing in this regard, simply stating that the purpose of the Act is to prohibit certain forms of intimidation. In short, the text of section 1(1)(*a*) merely describes certain conduct that the legislature wished to prohibit. Although the judgments in *Moyo* were naturally focused on the constitutionality of the challenged provisions of sections 1(1)(*b*) and 1(2), both the SCA and the Constitutional Court made more general observations about the intimidation offence, which are referred to in the discussion below. Wallis JA points out in *Moyo v Minister of Justice and Constitutional Development* (*supra* par 94), that the nature of the offence may be derived from its name, being directed at "behaviour constituting intimidation" and that the statutory purpose should be understood as having deterrence of such behaviour as its goal. On the face of it, the wording of this provision, though wide-ranging, is hardly vague or obscure. In fact, in the minority judgment of the SCA in *Moyo v Minister of Justice and Constitutional Development* (*supra* par 49), the offence contained in section 1(1)(*a*) is described as "narrowly tailored".

While the rationale of the offence has altered over the period of its development through various legislative amendments (see above discussion), it is clear that it is not merely protecting against bodily harm or damage, although this is indeed incorporated in section 1(1)(*a*) (*Moyo v Minister of Police supra* par 68). As pointed out by Ledwaba AJ, writing for a unanimous bench of the Constitutional Court, "[t]he mischief that the Act seeks to correct is intimidatory conduct" (*Moyo v Minister of Police supra* par 67; see also Hoctor *Snyman's Criminal Law* 7ed (2020) 401). Proof of such intimidatory conduct (i.e., conduct that falls within section 1(1)(*a*)), such as assault, causing injury or damage, or a threat to kill or assault or cause injury or damage, "will almost always constitute *prima facie* proof of unlawfulness" (*Moyo v Minister of Justice and Constitutional Development supra* par 77). It follows then that the intent to intimidate is central to the proof of the commission of this offence, and that liability would typically turn on the question of whether such intent accompanies the prohibited conduct.

Mathews has criticised the intent component of the offence as "all-encompassing" and "unfocused" (*Freedom, State Security and the Rule of Law* 58). However, it is clear that the intent component significantly narrows the offence. Whilst intimidation can be committed in a variety of ways, "by acts or conduct, or through the spoken or published word" (*Moyo v Minister of Justice and Constitutional Development supra* par 95 – for examples of such conduct see *supra* par 96), it can only be committed where such conduct is performed with a particular intimidatory purpose. Thus, an analogy can be drawn between the *mens rea* component of the common-law crime of housebreaking with intent to commit a crime, and the *mens rea* component of the intimidation offence. In respect of the housebreaking crime, the accused is required to have intent in respect of the unlawful breaking and entry into the premises or structure in question, but there can be no liability without a further intent to commit a crime on the premises (see Hoctor *Snyman's Criminal Law* 484). With regard to the intimidation offence, the conduct specified in section 1(1)(*a*) (i.e., assault, injury, causing of damage, or threat to kill or assault, injure or cause damage) must be intentional, but the offence is not committed unless the accused further intends to by such conduct compel or induce a person to do or refrain from doing something, or to assume or abandon a particular standpoint.

The presence of such purpose must, as with all elements of an offence, be established beyond reasonable doubt, and thus the evidence for such intimidatory intent should be properly tested (see *S v Ipeleng supra*, where the evidence of whispered intimidation that was not heard or confirmed by any other person did not suffice for a conviction). Furthermore, the prosecution can no longer rely on the erstwhile reverse-onus provision in section 1(2) to require that the accused prove that he had a lawful reason for his conduct. Instead, the prosecutor is required to prove the absence of a lawful reason for the conduct.

It should further be noted that, with the demise of section 1(1)(*b*), the offence of intimidation can no longer be committed on the basis that the accused's conduct has the effect of, or even "might reasonably be expected that the natural and probable consequences thereof would be" that a person perceiving the conduct would be put in fear. The test for intimidation is

therefore now entirely subjective in nature. It can no longer be premised upon criteria of objective reasonableness. The crucial consideration is whether the accused by his conduct *intended to intimidate*. The intention to assault or the intention to commit public violence, to take two examples where potentially intimidatory *conduct* may be in issue, would not suffice for liability for the intimidation offence.

The importance of this consideration is evident if one takes into account that in *Holbrook* (*supra*) the court applied the test whether "objectively viewed" a reasonable man would have regarded the conduct and words used by the appellant to be threatening to the safety of the complainant (*supra* 597). The approach and reasoning applied in *Holbrook* was adopted as "sound" in *Motshari* (*supra* 558). In *S v Gabatlhole* (2004 (2) SACR 270 (NC)), the court held, following *Motshari*, that the threat of the housebreaker caught in the complainant's house, that he would return along with his "bandiet tjommies" (gangster friends), should be regarded as a less serious case (par 8), such that the conviction for the intimidation offence set out in section 1(1)(*b)* should be set aside. Whatever the correctness of the assessment of reasonableness, the approach is indeed sound, but only in relation to section 1(1)(*b*), where an objective assessment of the natural and probable consequences of the accused's conduct is the test to be applied. However, in cases dealing with section 1(1)(*a*), where no such reasonableness criterion forms part of the provision, it is important that the courts not adopt this mode of thinking. It seems that this occurred in *S v Mramba* ([2008] JOL 21713 (E)), where the court (par 14) cites the passage from *Motshari* (554a–b), doubting that "trivial and ordinary run-of-the-mill cases" fall within the ambit of section 1(1)(*b*) of the Act, and then states that "[t]here is no reason why this remark should not also apply to section 1(1)(*a*) of that Act in the circumstances on which the charge was aimed against the accused". After noting (par 18) that the magistrate in the court *a quo* did not have regard to the *Motshari* and *Gabatlhole* cases (which both dealt with section 1(1)(*b*), not section 1(1)(*a*), the basis for the conviction *in casu*), the court held that the conviction should be overturned and replaced with an assault conviction. It seems that the court in *White*, having cited cases such as *Holbrook* and *Motshari*, falls into the same error when it excludes threats "with no real consequences of harm" and "run-of-the-mill threats" (*supra* par 17) from the ambit of section 1(1)(*a*), in favour of "deservingly serious matters only" (*supra* par 21), having earlier stated that the use of section 1(1)(*a*) "in trivial matters as *in casu* is unimaginable". Given that the court is not describing a threat to kill another as being *de minimis non curat lex*, the basis for assessing whether a threat has a "real consequence of harm" or is "run-of-the-mill" or "deservingly serious" can only be an objective, reasonableness assessment.

The approach of the court in *S v Cele* (2009 (1) SACR 59 (N)) is better. The court held that the conviction of the appellants for contravening section 1(1)(*a*)(ii) should be overturned after the court's analysis of the words "we will crucify you" yielded the conclusion that the words did not constitute a threat (par 31). Whether this is so may be doubted but is a matter for the court to ascertain on the facts. However, it is notable that the court specifies that it made this finding, "notwithstanding how Govender [the complainant] interpreted them". This approach immediately divorces liability from an

objective assessment of the seriousness of the threat, and focuses on the proper criterion: whether the accused acted in an intimidatory manner with the necessary intent to do so. Such an approach is admirably demonstrated in the case of *Van Zyl v S* ([2010] ZAWCHC 595), where the appellant was convicted *inter alia* on four counts of intimidation, as a result of telephonic threats that he had issued to the various complainants. On appeal, the conviction on the third count was overturned, as the court found that the State had failed to prove that there was indeed a threat intended to induce the complainant "to take up a particular view or to take up a particular course of conduct" (par 47). However, on the remaining counts (four, six and seven), the convictions for contravention of section 1(1)(*a*) were confirmed (see par 49–64). The court held in respect of each of these matters that although the respective complainants were not threatened or alarmed by the telephonic threats to burn down their shops (or alternatively, home, in the case of count seven), in each case the threat intentionally sought to intimidate the complainants to refrain from certain conduct (specifically, to not pay their fees to the corporation of which they were franchisees). The intimidation offence was thus established in each case, not on the basis of whether it was likely to effect real consequences (it did not, in any of the convictions for intimidation) or whether the complainant was actually intimidated, but rather whether the appellant had acted in an intimidatory manner, with the necessary intent to intimidate, as set out in section 1(1)(*a*).

4 4 The need for the existence of the intimidation offence

Snyman points out that intimidation is rife in South Africa (*Criminal Law* 455, cited in *White supra* par 17); given that it is necessary to protect against cruel, inhumane or degrading treatment, it is entirely appropriate that the criminal law provide a suitable and specific remedy for intimidatory conduct. Even those who have criticised the Intimidation Act acknowledge a role for the offence of intimidation in appropriate circumstances (see Mathews *Freedom, State Security and the Rule of Law* 57). Furthermore, the Constitutional Court (in *Moyo v Minister of Police supra* par 25) has stated:

> "Intimidatory conduct that negates these rights [to dignity, personal freedom and security] has no place in an open and democratic society that promotes democratic values, social justice and fundamental human rights."

It has, however, been stated on a number of occasions that the intimidation offence is not required, since existing common-law offences can cover the same ground (*S v Holbrook supra* 603b; *Motshari supra* par 11–13): in the *White* case, the court applauds (*supra* par 18) the use of "common-law offences such as assault, extortion or malicious injury to property" rather than resorting to section 1(1)(*a*). While there could be some overlap between the intimidation offence and other offences, it is by no means clear that common-law crimes present a viable alternative to the intimidation offence. Brief reference can first be made to the crimes listed in *White*.

First to be assessed is assault, which may be defined as "unlawfully and intentionally (1) applying force to the person of another, or (2) inspiring a belief in that other person that force is immediately to be applied to him or

her" (Burchell *Principles of Criminal Law* 591). There is a clear overlap between section 1(1)(*a*)(i) of the Act and assault in terms of the conduct requirement. However, while there may be such an overlap in terms of the second form of the intimidation offence (i.e., s 1(1)(*a*)(ii), see e.g., the *Cele* case *supra*), on the facts of *White*, there would be no overlap as the definition indicates that the threat of harm must be immediate, which is not the case in *White*, where the threat of harm was conditional on the complainant dating Palesa. In *Sandlana v Minister of Police* (*supra* par 44), the court's understanding of the content of section 1(1)(*a*) is that it involves an "imminent threat" of violence. This is simply not consistent with the wording of the provision.

More needs to be said here. A conditional threat could in fact constitute assault "where the accused is lawfully entitled to act in the way that she is threatening to act … [but] could amount to assault if, on account of the threat, [the complainant] is prevented from doing what she is lawfully entitled to do" (Hoctor *Snyman's Criminal Law* 397–398, where the case of *R v Dhlamini* 1931 (1) PH H57 is cited in this regard). Since there were no lawful impediments to the complainant dating Palesa, could the accused in *White* then not be charged with assault after all? No, he could not, since even the unlawful conditional harm threatened would be required to be immediate, rather than related to some future aggression (Milton *South African Criminal Law and Procedure Vol II: Common-Law Crimes* 3ed (1996) 427, referring *inter alia* to *R v Sibanyone* 1940 JS § 40 (T); *S v Miya* 1966 (4) SA 274 (N) 276 277). It is also clear that assault differs from intimidation with regard to the respective intent requirements: in intimidation, the intent of the conduct is to "compel or induce … to do or abstain … or to assume or abandon a particular standpoint" (s 1(1)), whereas, in assault, the intent is simply to apply force to the person of another or to threaten such person with immediate personal violence (Burchell *Principles of Criminal Law* 599), and no further intended purpose is required.

The next offence mentioned in *White* is extortion, which may be defined as "when a person unlawfully and intentionally obtains some advantage, which may be of either a patrimonial or a non-patrimonial nature, from another by subjecting the latter to pressure which induces her to hand over the advantage" (Hoctor *Snyman's Criminal Law* 369). The intimidation offence can be contrasted with the crime of extortion in that, in the case of intimidation, the intimidatory conduct or threat need not successfully produce the effect aimed at; whereas for there to be liability for extortion, the advantage must indeed be induced by the pressure. It seems that the pressure placed on the complainant in the extortion crime may take the form of a threat of physical harm (although this is not actually stated in the sources cited in support of this proposition in Milton *South African Criminal Law and Procedure* 690 n83, which are Voet *Commentarius ad Pandectas* 47.13.1; Matthaeus *De Criminibus* 47.7.1; *R v Kandasamy* 1912 NLR 146), on the strength of the *obiter dictum* in *R v Mhlongwa* (1928 PH H60 (N)), and the acceptance that extortion and robbery could overlap in *Ex parte Minister of Justice: R v Gesa; R v De Jongh* (1959 (1) SA 234 (A) 240). However, it is clear that, on the facts in *White*, there could only be liability for attempted extortion at best, since the advantage (the abandonment of a relationship with Palesa) had not yet been obtained. Although extortion could apply to

such non-patrimonial advantage since the legislative widening of the crime in this regard by section 1 of the General Law Amendment Act (139 of 1992), it is at least questionable whether the breadth of such an extortion charge would be appropriate *in casu* (see the comments in *S v Von Molendorff* 1987 (1) SA 135 (T) 168J–169A). Could it be said, according to the principle of fair labelling, that the stigma attaching to an (attempted) extortion verdict on these facts would be "an accurate and fair reflection of … [the accused's] guilt, and hence neither more nor less than he deserves" (Walker, Palmer, Baqwa, Gevers, Leslie and Steynberg *Criminal Law in South Africa* 4ed (2022) 25)?

Malicious injury to property may be defined as where a person "unlawfully and intentionally damages property belonging to another" (Hoctor *Snyman's Criminal Law* 475). Given the facts in *White*, where the accused threatened that he would kill the complainant if the complainant did not desist from romancing Palesa, this crime would not apply. However, even if the threat had been to damage property, it is clear that this crime would not have application.

Similar considerations would apply to the crime of public violence (which consists in "the unlawful and intentional commission, by a number of people acting in concert, of acts of sufficiently serious dimensions which are intended violently to disturb the public peace or security or to invade the rights of others" (Milton *South African Criminal Law and Procedure* 74)) and the crime of *crimen iniuria* (the unlawful and intentional "impairing the dignity or privacy of another person" (Burchell *Principles of Criminal Law* 648)). Both these crimes are mentioned by Mbha JA in *Moyo v Minister of Justice and Constitutional Development* (*supra* par 49) as part of the group of "narrowly tailored offences" that exist to protect the individual against threats. However, Wallis JA (*supra* par 103), writing for the majority in the same case, points out that while there may be overlaps between these crimes (along with assault) and the intimidation offence, there are a wide variety of examples where this would not be the case. Indeed, neither public violence nor *crimen iniuria* would be applicable to the facts of the case in *White*.

It may therefore be concluded that there cannot be a facile replacement of liability for intimidation with any common-law crimes, as has been suggested. While there may be instances of overlap, taking into account either the facts of the *White* case or a host of other examples (such as those suggested by Wallis JA in *Moyo v Minister of Justice and Constitutional Development supra* par 97–102), it is clear that the section 1(1)(*a*) offence plays a unique role in combating intimidatory conduct.

4 5 How limited should the role of the intimidation offence be?

Given the concerns regarding the historical breadth of the intimidation crime (and, no doubt, the taint regarding its use as a controlling mechanism in response to conduct associated with political unrest and opposition before the advent of democracy in South Africa), there have been arguments in favour of limiting the offence to serious harm or threats of serious harm (Mathews *Freedom, State Security and the Rule of Law* 59). Such thinking

apparently animates the decision in *White*, where, as noted above, the court states that though it does not believe that section 1(1)(*a*) should be done away with in its entirety, for it to be employed "in trivial matters as *in casu* is unimaginable" (*supra* par 15).

There are a number of difficulties with this approach, however. First, it may be inquired what "serious" means in this context. While the majority of the Constitutional Court in *Economic Freedom Fighters v Minister of Justice and Constitutional Development* ([2020] ZACC 25) has held that this ought to be a question well within the capacity of the courts to assess (par 70), the inherent vagaries of the majority judgment itself give the lie to such confidence. Secondly, is intimidatory conduct not in itself sufficiently serious to merit being criminalised? Notwithstanding that there are circumstances in which a prosecution for intimidation is not appropriate, despite the conduct falling within the definition of the offence (as is the case with assault, for example – see *S v Visagie* 2009 (2) SACR 70 (W)), can it be gainsaid that, in the words of Wallis JA (in *Moyo v Minister of Justice and Constitutional Development supra* par 84), intimidatory conduct is "abhorrent in any democratic society"? Furthermore, the mere fact that intimidatory conduct took place in a domestic setting (as in *Motshari supra*) does not, in the context of the scourge of gender-based violence render such conduct inappropriate for the application of the offence (see *Moyo v Minister of Justice and Constitutional Development supra* par 97). After all, threats of violence are explicitly criminalised in section 1(1)(*a*) of the Act (*Moyo v Minister of Justice and Constitutional Development supra* par 28).

The question also arises in the present case, where the conduct is categorised by the court in *White* as "trivial", despite it consisting of a death threat. While the court in *Ipeleng* (*supra*, cited in *White supra* par 19) overturned a conviction for contravening section 1(1)(*a*) on the evidence, it was held in *White* that "there can be little doubt that the action taken, but not proven, was sufficiently serious to warrant prosecution in terms of s 1(1)(*a*)". The alleged conduct was that the appellant had approached the complainants at work during a strike, asked them what they were doing at work, and told them that they would be killed for coming to work. In *S v Phungwayo* (2005 JDR 0496 (T)), the context for the conviction for contravention of section 1(1)(*a*) was a heated argument between the accused and his superior, as a result of which the accused uttered threats, including a threat to kill the complainant. On review, the court upheld the conviction, holding that "[a] threat to kill anyone is a serious matter and cannot be dismissed lightly".

The point may be made that intimidation in section 1(1)(*a*) encompasses a threat "in any manner" to "kill, assault, injure or cause damage to any person". While a threat to cause physical harm of any sort, with killing being the most serious manifestation of such harm, is clearly included in the ambit of the offence, even the threat of causing "damage" to a person suffices. In this regard, and in light of the approach of the court in *White* to the *Ipeleng* case, it is difficult to understand the rationale of the court in *White* in excluding the conduct that gave rise to this case from the ambit of the intimidation offence. It may be noted that in the context of the analogous offence in the Indian Code (s 503), the conduct in the *White* case would also

fall within the ambit of criminal liability (see the case of *Anna Kamu Chettiar* 1959 Cr LJ 1084). The only exception to liability would be where the threat was vague or ambiguous (BM Ghandi *Indian Penal Code* (1996) 578).

It may further be argued that the intimidation offence performs a function in South African law similar to the housebreaking crime. Holmes has argued in the US context that the object of punishing breaking and entering (like burglary, analogous to the South African housebreaking crime) is not to prevent trespasses, but "only such trespasses as are the first step to wrongs of a greater magnitude, like robbery or murder" (*The Common Law* (1881) 74). In the same vein, Wright argues that burglary is a legislative endeavour to apprehend criminal personalities at the earliest possible moment ("Statutory Burglary: The Magic of Four Walls and a Roof" 1951 100 *University of Pennsylvania Law Review* 411 444). If the housebreaking crime operates as a form of inchoate offence, creating criminal liability at a stage earlier in the passage of events than when the harm threatened is actually carried out, then can the same not be said of the intimidation offence? Is it not preferable to hold someone liable for a threat to kill than for the actual death of another?

Even if the accused did not intend ultimately to kill or physically harm the victim or damage their interests, but provided that the accused intended to intimidate the victim into acting (or not acting) in a particular way, this is entirely consistent with the principles of subjective criminality upon which the South African criminal law is based. Whatever the reaction of the victim, the accused's intentional intimidatory conduct by way of a threat should give rise to criminal liability just as it would do in the case of assault. Intimidation in section 1(1)(*a*) of the Act is not limited to where actual physical assault, injury or damage is perpetrated upon a person to intimidate them, but crucially includes intimidation by way of threat.

Given the significant maximum penalties set out in the Intimidation Act for a contravention of section 1(1)(*a*) – imprisonment for a period not exceeding 10 years or a fine of R40 000 (which in terms of section 1(2) of the Adjustment of Fines Act 101 of 1991 would translate into a maximum fine of R400 000), or both – concerns about excessive sentences underlie the critique of the intimidation offence. However, these concerns should not be overemphasised. Just because a heavy sentence can be handed down upon conviction does not mean that this will necessarily transpire. The court will have to weigh all the factors relating to sentence and take a reasoned decision on this basis. This is no less the case in respect of the intimidation offence than in any other.

The flexibility available to judicial officers in crafting sentences can be seen in the cases of *Phungwayo*, *Van Zyl* and *White* itself. The court in *Phungwayo* (*supra*) acknowledged the gravity of a threat to kill, holding that the imposition of a direct sentence of imprisonment is justified. Nevertheless, the court took into account that the accused was a first offender, that the words were uttered in the heat of argument, and that the magistrate in the trial court over-emphasised the seriousness of the offence. The accused had at the time of review already served three months of a sentence of 18 months' imprisonment. The court on review proceeded to suspend the balance of the sentence. In the *Van Zyl* case, the court, having examined the

offender's personal circumstances and the nature of the offence, took the view that direct imprisonment was not required, and that a suspended sentence would suffice (*supra* par 74). The trial court in *White* handed down a sentence of R1 000 or six months' imprisonment, which was wholly suspended (*supra* par 1). It may further be noted, by way of comparison, that the punishment for criminal intimidation in the Indian Penal Code is a period of up to two years' imprisonment, or a fine, or both (s 506). If the threat is to cause death or serious hurt, or destruction of property by fire, or to cause an offence punishable with death or imprisonment for life, or with a prison term that may extend to seven years, or to impute unchastity to a woman, the punishment is imprisonment for a period up to seven years or a fine, or both (s 506). Where criminal intimidation is committed by way of anonymous communication, the punishment may be extended by two years' imprisonment (s 507). It is noteworthy that the punishment provisions relating to the intimidation offence in the new draft Code are identical (cl 349(2)–(4)).

5 Concluding remarks

The court in *White* envisages a very limited role for the intimidation offence, seeking to apply it only in "deservingly serious" matters, which the court would categorise by adopting an objective criterion. For this reason, the threat to kill the complainant if he did not desist from exploring his romantic interest in Palesa was regarded as "trivial". The court further advocates that the intimidation offence not be used if there is an alternative option among the common-law crimes.

It has been argued above that despite the problematic history of the offence, the intimidation offence still has a significant role to play. In this regard, the discussion of the proper use of the offence in *White* is a useful point of departure to examine the nature of the current offence, after the unconstitutional aspects of the offence have been repealed. It is submitted that the role of the offence should simply be to fulfil the legislative intent such that where a person acts in an intimidatory manner with the intent to intimidate, there should be criminal liability. There may be some overlap between the intimidation offence and common-law crimes. However, other grounds for liability do not cover all aspects of intimidatory conduct. Even where there is some overlap, other crimes do not sufficiently highlight the specific purposive role that the offence serves in protecting both rights and public policy.

As noted, intimidation can be profoundly harmful, and violates the rights to dignity, personal freedom and security (see *Moyo v Minister of Police supra* par 25). It follows that criminalising intimidatory conduct is legitimate in a constitutional democracy such as South Africa. While the section 1(1)(*a*) offence is broadly framed, the offence can only be committed where the accused intended to inflict harm (or threatened to do so) with the purpose of intimidation. This significantly narrows and focuses the ambit of the offence. In any event, where the offence is committed in circumstances where the court concludes that the offender is less blameworthy or is unlikely to reoffend, this can be reflected in the sentence handed down by the court. The concerns of the court in *White* should be seen in light of these

safeguards, and the need for the offence to combat the scourge of intimidatory behaviour in South African society.

Shannon Hoctor
Stellenbosch University

THE APPLICATION OF DERIVATIVE MISCONDUCT IN THE WORKPLACE: A CRITICAL ANALYSIS OF

National Union of Metalworkers of South Africa obo Nganezi v Dunlop Mixing and Technical Services (Pty) Limited 2019 (5) SA 354 (CC)

1 Introduction

In modern South African law, employees have several fundamental rights, the right to strike being one of those rights. This right is enshrined in the Constitution of the Republic of South Africa, 1996 (the Constitution) and also in the Labour Relations Act 66 of 1995 (the LRA); both statutes provide that every employee has the right to strike (s 64(1) of the LRA and s 23(2)(*c*) of the Constitution). However, for a strike to be protected as legal strike action, at least 48 hours' notice of the commencement of the strike must be given, in writing, to the employer (s 64(1)(*b*) of the LRA). If employees misconduct themselves – for example, engage in acts of violence during a protected strike – the employer is entitled to dismiss those employees on the grounds of misconduct (Schedule 8, item 7 of the Code of Good Practice under the LRA). However, if the employer is unable to identify the responsible employees (the perpetrators), the question is whether the employer can request other employees to identify the perpetrators. If the answer to this is yes, the next question is whether the employer can dismiss these employees if the employees do not want to identify the "perpetrators".

To answer these questions, employers have relied on the principle of "derivative misconduct" to discipline employees during strike action where employees responsible for misconduct cannot be identified and other employees fail, when requested, to come forward and assist the employer to identify those responsible. Derivative misconduct is a principle that is neither defined nor appears in any labour legislation. It has been developed by the courts and used by employers as a concept to require an employee to come forward and give information about other employees who have misconducted themselves during protest action. Since derivative misconduct is not defined in labour legislation, a consideration of the judgments that have considered the scope and application of this principle on a particular set of facts demonstrates the difficulties of its application. Before the Constitutional Court judgment in *NUMSA obo Khanyile Nganezi v Dunlop Mixing and Technical Services (Pty) Ltd* (2019 (5) SA 354 (CC)), several judgments attempting to develop or clarify the concept either found derivative misconduct did not exist on the particular facts or just expressed

obiter views on the issue. This led to varying decisions on the application of derivative misconduct. The Constitutional Court has now finally sought to articulate and grapple with this concept.

2 The facts

This was an application for leave to appeal against a decision of the Labour Appeal Court (LAC) in which Sutherland JA dismissed NUMSA's appeal and confirmed the order of the Labour Court. On 22 August 2012, 204 employees, who were also members of NUMSA, embarked on a protected strike. During the strike, violence erupted, leading to intimidation and property damage. An interdict to stop this violence was sought and granted but the violence continued to escalate. Over several weeks, the violence allegedly included setting alight the homes of a manager and a foreman, damaging several vehicles belonging to staff and visitors, stone-throwing, various forms of physical violence, throwing a petrol bomb, blockading workplace entrances, theft of a camera used to record the violence, scrawling death threats on a billboard and violation of agreed picketing rules. Dunlop and two associated companies (Dunlop) thereafter sought to identify the individuals who took part in the violence, but this was unsuccessful. This was done on three different days as follows:

- On 22 August 2012, a letter was sent to the union. The letter described the acts of violence and demanded that the identities of the culprits be given to management. The letter made it clear that the culprits would be disciplined. Moreover, it declared that failure to provide the relevant information would lead to a collective hearing at which all employees were at risk of dismissal.
- On 29 August 2012, a further letter to the attorney of the strikers described more acts of violence, including, notably, arson, death threats, and theft of the camera. Again, the strikers were called upon to identify the actual culprits, preparatory to a formal inquiry.
- On 12 September 2012, a further list of violent acts was given to the union. The letter drew attention to contempt of the court order. The union's intervention was requested.

Just over a month later, on 26 September 2022, Dunlop dismissed the employees, listing some as culprits and others as being party to "derivative misconduct". NUMSA challenged the fairness of the dismissal while Dunlop relied on actual misconduct, derivative misconduct, and common purpose as the basis of dismissal.

3 The Commission for Conciliation, Mediation and Arbitration (CCMA)

The arbitrator placed dismissed employees into three categories, namely:

a) employees who were positively identified as committing violence;

b) employees who were identified as present when violence took place but who did not physically participate in violence; and

c) employees who were not positively identified as being present when violence was being committed (see *NUMSA obo Nganezi v Dunlop Mixing and Technical Services (Pty) Ltd* 2018 (6) SA 240 (LAC) 4 for these categories).

Having so categorised the employees, the arbitrator found that employees under category a) were fairly dismissed; employees under category b) were fairly dismissed on the grounds of "derivative action"; and employees under category c) were unfairly dismissed and therefore reinstated (*NUMSA obo Khanyile Nganezi v Dunlop Mixing and Technical Services* CC *supra* 16).

The employer was unhappy with the conclusion concerning the third category of employees and brought a review application to the Labour Court.

4 Labour Court decision (*Dunlop Mixing & Technical Services (Pty) Ltd v National Union of Metalworkers of SA obo Khanyile* (2016) 37 *ILJ* 2065 (LC))

In the Labour Court (LC), the application by Dunlop sought to review and set aside a portion of the award handed down by the arbitrator in the arbitration proceedings. In essence, Dunlop disputed the arbitrator's conclusion that it had not discharged its onus of proving derivative misconduct on the employees – who were not specifically identified as having been present during the "direct misconduct" (par 21). Dunlop claimed that it was illogical and unreasonable for the arbitrator to hold that those third-category employees were entitled to decide not to testify because there was no evidence against them (par 24). As a result, Dunlop argued, the decision of the arbitrator could not have been reasonably reached on the evidence and other material placed before him (par 25). In support of these claims, Dunlop argued that the employees – despite not being identified – were guilty of derivative misconduct and therefore fairly dismissed as it could be inferred that they were present during the acts of misconduct (par 22). Dunlop submitted several arguments, including that the evidence adduced was sufficient to create an inference in respect of the respondent employees, whether or not they had been identified, that required them to explain. It argued further that failure or refusal to come forward was a breach of the trust relationship, and that the evidence established that at all relevant times NUMSA and the employees were well aware of Dunlop's attitude towards the failure of employees to come forward and identify the perpetrators, as well as of its intention to rely upon derivative misconduct arising from that failure (par 62).

The issue to be determined by the court, therefore, was whether the inference could be drawn that the employees (including category c)) – all of whom were on strike at the time – were present during the acts of violence. In this case, the court concluded that a reasonable and plausible inference could be drawn that category c) employees were present during the strike and accordingly during the misconduct (par 76). The court further held that if they were not present or had no information regarding the perpetrators, they

would have said so, bearing in mind the opportunities afforded to them to respond (par 76). The court further held that the employees' failure to come forward and give evidence was a breach of trust (par 60). In reaching this decision, Gush J held:

> "[T]he evidence clearly established that the dismissed employees (the applicants before the arbitration) were members of the first respondent and were all on strike. The applicants on numerous occasions during the strike communicated to [NUMSA] that they sought particulars of those directly involved in the principal misconduct from the employees and they regarded the failure by the striking employees to assist as a breach of the trust relationship constituting derivative misconduct … The employees were given an opportunity to explain, either to identify the perpetrators of the direct misconduct or to exonerate themselves both prior to their dismissal and at the arbitration. The employees eschewed such opportunities. The only evidence adduced by or on behalf of [NUMSA] and the employees relating to who was present was confined simply to denying any direct misconduct. It was never suggested by the employees that they were not present during the direct misconduct that took place during the strike." (par 65 and 69)

Accordingly, the court reviewed the decision of the arbitrator and found that the dismissal of employees was both procedurally and substantively fair. After the decision of the Labour Court, NUMSA took the matter to the Labour Appeal Court.

5 Labour Appeal Court decision (*NUMSA obo Nganezi v Dunlop Mixing and Technical Services (Pty) Ltd* 2018 (6) SA 240 (LAC))

The Labour Appeal Court (LAC) held that the central controversy in this matter was the meaning and scope of "derivative misconduct" and the question of whether the third category of employees was culpable of its prescripts (par 6). The court was split and it issued a majority and minority judgment. The majority judgment upheld the decision of the LC.

5 1 Majority judgment

Although the majority judgment found that the appeal must be dismissed, the judges differed on the reasons for the dismissal of the appeal. Commencing with Sutherland JA, the court started by holding that "'derivative misconduct' cannot be thought of as more than a label, a term of art to capture a rather complex idea [but] its genesis is an example of a breach of the employee's duty of good faith" (par 21). The court accepted, however, that the appropriate approach in the case of derivative misconduct is that the employer bears the onus of proving, on a balance of probabilities, that the employee knew or must have known about the principal misconduct (par 29). In this case, the court held that once it could be inferred from the evidence that the employees were probably present during the violence, the onus to satisfy that the employees "knew or must have known" who perpetrated violence was established (par 29).

Turning to the facts of the case, the court commenced by interpreting the reasoning of the arbitrator and that of Gush J in the LC. In this regard, the court found that the arbitrator adopted too narrow an approach when it treated the presence and identification of each employee as a *sine qua non* to be implicated based on derivative misconduct (par 32). On an interpretation of the facts, the court found that it was not disputed that all dismissed employees were on strike and therefore the inference could be drawn that it was improbable that every employee could not have acquired actual knowledge of the misconduct perpetrated, more especially because the misconduct was so spectacular (par 34). In reaching this decision, Sutherland JA reasoned:

> "[T]he very act of striking, being a collective activity in which worker solidarity is a critical dimension, it may be asked how likely would it be that strikers would absent themselves from the demonstrations of resolve and solidarity which are the very fibre of strike culture. On this aspect, the employees chose to be silent." (par 34)

Accordingly, there was nothing in the evidence to contradict the inference that, on the probabilities, each employee was present for at least some of the time, and equally probable that they were each present most of the time, even if it was not every day (par 34). The court, therefore, agreed with the LC's decision and held that the arbitrator erred in not assessing the evidence for inferences from which, on the probabilities, the employees were shown to have been present during the perpetration of violence: the evidence supported an inference of their presence during the violence; the LC was correct to conclude that the award ought to be set aside; and the employees breached their duty of good faith towards their employer by failing to disclose the identity of the culprits (par 42). In agreeing with the LC, Sutherland J summarised his reasoning (par 39) as follows:

- "39.1 Proof of the presence of the appellant employees during violence has been proved on a balance of probabilities. The Labour Court was correct to find that the arbitrator acted unreasonably in failing to conclude that the appellants were present at any of the scenes of misconduct and had actual knowledge of the misconduct and of the identity of any of the perpetrators thereof.
- 39.2 It had been implicit in the employer's case that the appellants were present and had such knowledge. The absence of direct evidence to that effect seems to have persuaded the arbitrator to arrive at his impugned conclusion. The arbitrator did not give consideration to the fact that such presence and knowledge were capable of proof by means of indirect evidence, or by inference, and, accordingly, did not determine whether those facts had indeed been proved by inference.
- 39.3 Circumstantial evidence relating to the appellants' presence at the scenes of misconduct and their knowledge of the misconduct and/or any of its perpetrators was placed before the arbitrator. Since it constituted an important component of the evidential material in the arbitration, it was incumbent upon the arbitrator to consider whether to draw the required inferences by complying with well-established rules of logic. The failure to do so was not reasonable.
- 39.4 The inference sought to be drawn in this case was whether the appellants were present at any of the scenes, or incidents of misconduct, but more crucially, whether each of them had actual knowledge of any of the misconduct, or of any of the perpetrators thereof. All of the appellants

were on strike with the other workers. The inferences that each of the appellants was present at some or all of the incidents where the misconduct occurred, and that they had actual knowledge of such misconduct and/or of the perpetrator(s) thereof, are consistent with the proven facts and are the only plausible inferences that can be drawn.

- 39.5 There was enough evidence, although not conclusive, that called for an explanation. The false evidence tendered through the witnesses called by the Union, and the failure by the appellants to give evidence themselves in those circumstances, are factors that could justifiably be placed in the balance against them.
- 39.6 A reasonable arbitrator would not have found otherwise."

The appeal was accordingly dismissed.

Concurring with Sutherland J, Coppin JA gave his reasoning in support of the decision to dismiss the appeal. As a point of departure, Coppin JA took the view that the appeal was capable of being decided on the basis that the arbitrator had unreasonably concluded that it had not been proved by Dunlop that the employees were present at any of the scenes of misconduct, had actual knowledge of the misconduct and/or any of the perpetrators thereof, and had deliberately withheld the information (par 47). The court considered the arbitrator's failure to draw the inference – on the circumstantial evidence that employees had been present at the scene of misconduct and their knowledge of the misconduct thereof – as unreasonable (par 49). It was held that such inference constituted an important component of the evidential material in the arbitration, and the arbitrator needed to consider such inference (par 49). On the question of derivative misconduct, the court took the view that the dismissed employees had a duty to speak and failure to disclose the required information was deliberate and culpable (par 54).

In addition, the court dealt in detail with the principle of derivative misconduct and its meaning for the duty to speak and the right to remain silent. The court took the view that requiring an employee to speak, even if the employee had no actual knowledge of the principal misconduct, overlooks or discards certain fundamental rights of employees, including the right to be deemed innocent of any wrongdoing (par 67). According to Coppin JA, completely denying an employee the right to silence and the privilege against self-incrimination seems to be inconsistent with the ethos of the LRA (par 67). Furthermore, the court held that disciplinary codes generally provide, consistent with the (generally) adversarial nature of disciplinary proceedings, that the employer bears the onus to prove the misconduct alleged; therefore, deviating from this is unfair (par 67).

5 2 Minority judgment

The minority judgment was given by Savage AJA and started by dealing with the duty to disclose information. In this regard, the court contextualised the societal challenges and complexities of labour relations in the workplace. The court appreciated the complexity of society and the suffering caused by racial discrimination stemming from inequality. The court, therefore, warned that developing labour jurisprudence

> "to include an expansive duty upon on employee to act in good faith or with trust and confidence towards his or her employer, with a duty to 'rat' on fellow employees must therefore be a careful process, one which ensures that there is appropriate regard to the context and tensions inherent in the contractual relationship between the employer and employee, the position of the employee and the circumstances and conditions under which employees work and live." (par 101)

Savage AJA took the view that appropriate regard must be had to the position of both employer and employee, especially to the risks that may arise when an employee speaks out in naming perpetrators or for purposes of exoneration, and to the dangers that may arise in doing so (par 102). Savage AJA held:

> "While a harsh view may be taken of an employee's passivity and silence when the employer's best interests could be advanced by disclosure, in determining the fairness of a dismissal, account must be taken of all relevant factors, which includes the risk of mortal or other serious danger to the employee." (par 104)

Savage AJA went further to deal with circumstantial evidence and questioned whether the arbitrator had not concluded reasonably that it had not been proved by Dunlop that the employees were present at any of the scenes of misconduct, or that they had actual knowledge of the misconduct and/or any of the perpetrators thereof and thus were under a duty to disclose the information sought by the employer. The judge was not persuaded that the arbitrator had adopted a narrow approach as maintained by Sutherland JA in the main judgment (par 109). Instead, she took the view that the decision of the arbitrator was reasonable. Savage AJA held the following:

> "[T]he fact that the employees did not exonerate themselves, by either disclosing any knowledge to the employer, or raising a defence such as intimidation, or the fear of reprisals and absence of any effective protections against same, does not lead me to a different conclusion; nor does it, to my mind, allow a finding in the circumstances that the employees can as a result be inferred to be culpable. The dishonesty of the union witnesses did not, however, to my mind, allow an inference to be drawn that all employees charged with misconduct as a result of their silence held actual knowledge of misconduct and were consequently culpable by virtue of such silence. If this were so, it raises the obvious question: what of those employees who were on strike but chose not to be on the picket line and knew nothing of the misconduct committed; or those employees who were on the picket line but did not witness strike misconduct? I am not persuaded that there was an obligation on those employees to testify individually to exonerate themselves, whether at the disciplinary hearing or the arbitration hearing, in the manner suggested by the employer, given the burden which rested on the employer to prove the existence of the misconduct alleged and the fairness of their dismissals." (par 112 and 115)

Accordingly, the minority judgment held the decision of the arbitrator to have been in line with the ambit of reasonableness required. NUMSA, still not happy with the outcome, brought the matter to the Constitutional Court (CC).

6 Constitutional Court decision (*NUMSA obo Nganezi v Dunlop Mixing and Technical Services (Pty) Ltd* 2019 (5) SA 354 (CC))

The unanimous judgment by Froneman J (with Mogoeng CJ, Cameron J, Jafta J, Khampepe J, Ledwaba AJ, Madlanga J, Nicholls AJ and Theron J concurring) dismissed the decision of the LAC. In dismissing the LAC decision, the court considered the historical understanding of the concept of "derivative misconduct" and whether an inference could be drawn that third-category employees were present at any of the scenes of misconduct. The court commenced by engaging on the issue of whether the Constitutional Court had jurisdiction to hear the appeal by NUMSA, and found that it did have jurisdiction to hear the appeal. In reaching this decision, the court interpreted section 23(1) of the Constitution and found that it guarantees the right to fair labour practices and the right to strike. Since employees had embarked on a protected strike, the court found that the concept of "derivative misconduct" had a direct impact on this protected right. Accordingly, the court concluded that it had jurisdiction to hear the matter and that it was in the interests of justice to grant leave to appeal (par 11).

Having concluded that it had jurisdiction to hear the matter, the court had to deal with the arguments raised by Dunlop and NUMSA. It became clear that the court had to deal with the circumstantial evidence and its role in the dismissal of third-category employees. In support of the LAC majority judgment, Dunlop argued that

> "inferential reasoning would have led the arbitrator to finding that the third category of employees were also present at some or all instances where violence occurred. With that established, the duty of good faith underlying the employment relationship necessitated the disclosure of the identities of others or personal exoneration, neither of which was forthcoming. These failures were sufficient to prove derivative misconduct." (par 25)

In disputing the correctness of the LAC majority judgment, NUMSA argued:

> "[E]ven if an inference of presence at the scenes of violence could be drawn, no derivative misconduct was established. Dunlop's reciprocal duty of good faith required, at the very least, that employees' safety should have been guaranteed before expecting them to come forward and disclose information or exonerate themselves. This was not done." (par 26)

To deal with these arguments, the court dealt in detail with the "derivative misconduct" principle and its application to South African labour law jurisprudence. In this regard, the court commenced by dealing with the link between primary misconduct and derivative misconduct. The court held that a derivative duty on employees to disclose information about the actual presence and participation of their co-employees in collective misconduct is a double-edged sword, aimed at dismissing employees (par 44). The court further held that it would be wrong to use the duty to disclose as an easier means to dismiss, rather than dismissing for actual individual participation in violent misconduct itself; to do so may result in the imposition of a harsher sanction on employees who did not take part in the actual primary

misconduct (par 45). It was further held that the failure, by an employer, to appreciate that there are many ways in which an employee may participate in and associate with the primary misconduct carries the risk of using derivative misconduct as an easier means to effect dismissal (par 48).

The court went further to deal with the duty of good faith, stressing the point that there must be a reciprocal duty between employee and employer. The court held that the contractual duty of good faith as a legal precept does not, as a matter of law, imply the imposition of a unilateral fiduciary obligation on employees to disclose known information of misconduct of their co-employees to their employers, because the legal contractual obligation of good faith is a contested one and must, at the very least, be of a reciprocal nature (par 62 and 63). According to the court, "a sound account of what the contractual duty of good faith requires within a reciprocal relationship between employer and employee is essential for identifying the basis of the misconduct" (par 69). Therefore, "in fair labour practice, the reciprocal duty of good faith should not, as a matter of law, be taken to imply the imposition of a unilateral fiduciary duty of disclosure on employees" (par 75). In applying this principle to the facts, Froneman J held that Dunlop's reciprocal duty of good faith required, at the very least, that employees' safety should have been guaranteed before expecting them to come forward and disclose information or exonerate themselves, but this was not sufficiently done (par 78).

The court went further to deal with the duty to disclose and its impact on the right to strike. In this regard, the court commenced by holding that "the fact that a protected strike turned violent does not mean that the right to strike is no longer implicated in the analysis, or that the setting of the strike no longer constitutes relevant circumstances within which to assess the reciprocal duties of good faith" (par 70). Therefore, to impose a duty to disclose on employees would undermine the collective bargaining power of the employee by requiring positive action in the interests of the employer without any concomitant obligation on the part of the employer to give something reciprocally similar to the workers (par 71). It was therefore held by the court that a balance should be struck between the interests of employer and employee. On the one hand, the impact of violence on the employer's business and its trust of the employee after the strike points to a rationale for the concept of indirect misconduct; on the other hand, the intimidation of innocent, non-striking, or non-picketing employees makes safe disclosure a prerequisite for the possibility of this kind of misconduct (par 74). According to Froneman J, to find the right balance, a reciprocal duty of good faith should not, as a matter of law, be taken to imply the obligation of a unilateral fiduciary duty of disclosure on employees (par 75). Froneman J held that caution must be taken not to use derivative misconduct as a means to easier dismissal rather than initially investigating the participation of individual employees in the primary misconduct (par 75).

Furthermore, regarding the LAC's finding that the arbitrator had failed to consider circumstantial evidence and had drawn inferences about the dismissed employees' presence in violent actions, the court found this finding to be incorrect. The court held that based on the evidence given, it

was not good enough to draw the inference that some employees were probably present when the acts of violence were committed (par 81). Accordingly, the appeal was dismissed.

7 Comments

The principle of derivative misconduct stems from the idea that a failure to notify the employer of misconduct by other employees during a protest action is in itself an act of misconduct. Simply put, derivative misconduct is misconduct that is derived from the misconduct of another during protest action. When dealing with the principle of derivative misconduct, its purpose must be meticulously applied. On interpreting whether the derivative principle applies to the given facts, one must balance the interests of both employer and employee. This is because its application has an impact on the employer-employee relationship. For the purposes of this paper, it is imperative to deal with derivative misconduct as dealt with by the Constitutional Court.

7 1 History and development of derivative misconduct

The Constitutional Court commenced by looking at the concept's origins. The concept was introduced in an *obiter* statement in the early 1990s when Nugent J in *Food & Allied Workers Union v Amalgamated Beverage Industries Limited* ((1994) 15 *ILJ* 1057 (LAC) 1063) held that, in the field of industrial relations, policy considerations may, in certain circumstances, require more of an employee than to be silent where his failure to assist the employer in an investigation may justify disciplinary action. However,at the time it was introduced, Nugent J did not mention this principle by name (*NUMSA obo Nganezi v Dunlop Mixing and Technical Services* (CC) *supra* 32). The concept surfaced again four years later in *Chauke v Lee Service Centre t/a Leeson Motors* ((1998) 19 *ILJ* 1441 (LAC)) and this is where the concept was given its name. Cameron JA developed the concept by stating:

> "[T]his approach involves a derived justification, stemming from an employee's failure to offer reasonable assistance in the detection of those actually responsible for the misconduct. Though the dismissal is designed to target the perpetrators of the original misconduct, the justification is wide enough to encompass those innocent of it, but who through their silence make themselves guilty of a derivative violation of trust and confidence." (par 33)

Although the court developed the concept of derivative misconduct, the court continued to hold that it was not necessary to decide the question of derivative misconduct based on the facts before the court (*Chauke v Lee Service Centre t/a Leeson Motors supra* 36).

In 2015, the test for misconduct was then developed in *Western Refinery Ltd v Hlebela* ((2015) 36 *ILJ* 2280 (LAC)), where the court provided factors that may assist in determining whether a dismissal for derivative misconduct was justified. The factors included, *inter alia*: the undisclosed knowledge – established by inferences from the evidence adduced – must be actual, not imputed or constructive knowledge of the wrongdoing; the non-disclosure

must be deliberate, therefore contravening the duty of good faith; the non-disclosure would be related, in part, to the degree of seriousness of the wrongdoing; the duty to disclose does not depend on the rank of the employee although higher rank might be material to the degree of blameworthiness; the duty of good faith does not depend on a specific request for relevant information – mere actual knowledge by an employee triggers a duty to disclose (par 10, 11, 12, 13 and 14). In associating the concept of derivative misconduct with the duty of good faith, Sutherland JA held that derivative misconduct lies within the principles of the duty of good faith to "rat" on the responsible employees, not on culpable participation (par 15).

Having looked at the development and origins of derivative misconduct, the Constitutional Court had to interpret the duty to disclose and derivative misconduct in the context of strike action. The court interpreted derivative misconduct as a double-edged sword. It is submitted that the court was correct to view derivative misconduct as a double-edged sword, and as one that works in favour of the employer. This is because, in instances where violence erupts during a protected strike, the employer can, either way, dismiss employees. If the employee complies with the duty to disclose the identity of responsible employees, the employee escapes dismissal but their co-employees (responsible employees) are implicated in the primary misconduct. If the employee does not comply with the duty to disclose, they are dismissed, and unidentified perpetrators are not. This puts an employee in a difficult position: either the employee saves their job but runs a risk of later being confronted by the responsible employees, or the employee does not disclose the information and gets "fired". Furthermore, the court correctly found that immediate recourse to derivative misconduct may result in the imposition of a harsher sanction on an employee who was not a party to the primary misconduct (par 45). Therefore, it is imperative to understand that it may be wrong to use the duty to disclose as an easier means to dismiss an employee who did not participate in the primary misconduct. This is because there may be several ways for an employee, directly or indirectly, to participate or associate themselves with the primary misconduct; a failure to appreciate this carries the risk that an easier means, such as derivative misconduct, may be sought to effect a dismissal, without thoroughly investigating the primary misconduct (par 48). This principle, expounded by the court, curbs the misuse of derivative misconduct as an easier means to effect dismissals.

7 2 The obligations of the duty of good faith

In the LAC, the minority judgment by Savage AJA provided that developing the duty to "rat" on fellow employees must be a careful process (*NUMSA obo Nganezi v Dunlop Mixing and Technical Services* (LAC) *supra* 101). According to that judgment, the process of disclosure should ensure that due regard is given to the context and tensions inherent in the contractual relationship between employer and employee, the position of the employee and the circumstances and conditions under which employees work and live (*NUMSA obo Nganezi v Dunlop Mixing and Technical Services* (LAC) *supra*

101). Savage AJA held this after considering the inequality that exists in South African society. The Constitutional Court concurred with this idea and reasoned further. According to the court, the duty of good faith requires a reciprocal duty for both employer and employee. The court held that in the context of a violent strike, the duty of good faith requires a recognition of the impact of the violence on both employer and employee (*NUMSA obo Nganezi v Dunlop Mixing and Technical Services* (CC) *supra* 67). Froneman J held that, in the context of strike action, the imposition of a duty to disclose has the impact of undermining the collective bargaining power of workers by requiring positive action in the interests of the employer without any concomitant obligation on the part of the employer to give something reciprocally similar to the workers (*NUMSA obo Nganezi v Dunlop Mixing and Technical Services* (CC) *supra* 71). On this premise, Froneman J held that a reciprocal duty of good faith requires, at the very least, that employees' safety be guaranteed before expecting them to come forward to disclose information or exonerate themselves (*NUMSA obo Nganezi v Dunlop Mixing and Technical Services* (CC) *supra* 76).

Guaranteeing employees' safety before expecting them to come forward to disclose information or exonerate themselves may be positive or negative – depending on the perspective from which one approaches the situation. From an employee's perspective, the guarantee of safety is positive. When one deals with a duty imposed on an employee to speak out, one must not forget the risks that may arise after an employee has spoken out. The risk of mortal or other serious danger to the employee, after disclosing the identity of responsible employees, cannot be ruled out. Once an employee has "snitched" on other employees, those employees may want revenge, especially if they are dismissed. Therefore, for an employee to disclose information to the employer, the employee must enjoy some sort of protection from the employer. However, on the negative side of the guarantee, the court did not specify what type of safety the employer needs to provide. It is not clear how far the employer should go in guaranteeing the safety of an employee. Does the guarantee extend outside the workplace, or is it confined within the workplace? If it is confined within the workplace, the employee may view the guarantee to be insufficient, as serious danger or mortality may occur outside the workplace.

From the employer's perspective, the principle of guarantee, as laid down by the court, is likely to be viewed mostly negatively. As has been said above, it is not clear how far the employer should go in guaranteeing the safety of an employee. The question that may always be asked by the employer is: what guarantee is required before it can be said that the guarantee is sufficient? If a guarantee is confined to the workplace, the employer may find this achievable. However, if the guarantee is to be extended outside the workplace, this may be difficult for an employer. The employer may argue that it is unreasonable to be expected to guarantee the safety of an employee outside the workplace. Nevertheless, while it may be difficult for the employer to guarantee safety outside the workplace, serious danger or mortality is likely to occur outside the workplace.

7 3 Inference to be drawn

Froneman J assessed and interpreted the evidence as follows:

> "The evidence showed that there were more than 150 employees involved in the strike and that on the first day about 100 were present when violence occurred. That was the high-water mark in the numbers of those present at violent occurrences. At least three possible inferences could be drawn in relation to presence at any one of the incidents of violence: (a) none of the applicants were present; (b) all of the applicants were present; or (c) some of the applicants were present. The more probable inference of these is the third, namely that some of them were present. But that is not good enough. One still does not know who they were. To dismiss all in the absence of individual identification would not be justified. So, the inferential reasoning fails at the first step. And even if it passed the first step, drawing the other necessary inferences would simply become progressively more difficult." (par 81 and 82)

Here, the court interpreted the number of employees present during violence as important in deciding whether the inference can be drawn. On an interpretation of the judgment and the evidence before the court, more than 30 per cent of employees were not present on the first day of the violence that erupted. This number led the court to hold that drawing an inference that linked all employees to derivative misconduct was not justified. It can therefore be argued that the more employees are not present during the violent strike, the more likely it is that one cannot draw the inference that employees were present during the violent protest.

8 Conclusion

This case note has sought to answer the question of whether an employee has a duty to identify responsible employees during a violent strike, and whether the employer is entitled to dismiss an employee for failure to disclose such information. In doing so, the case note has dealt with the principle of "derivative misconduct" as developed by the common law. The critical analysis of the Constitutional Court judgment in *NUMSA obo Nganezi v Dunlop Mixing and Technical Services (Pty) Limited* (*supra*) was at the heart of the discussion about derivative misconduct. According to this judgment, the derivative-misconduct principle can be employed by the employer in dismissing the employee. However, the court developed a new principle – the existence of an important reciprocal duty of good faith for both employer and employee – when it comes to derivative misconduct. While an employee must disclose information that can be crucial to discipline violent protestors, the employer has a duty to guarantee an employee's safety before expecting them to come forward and disclose information or exonerate themselves. The reciprocal duty serves to protect the employee and further guarantees the employee's safety prior to disclosing any information about who committed the alleged primary misconduct of the violent strike. The case note, however, shared some difficulties that may arise with the guarantee to be given by the employer.

Simphiwe Phungula
University of Cape Town

THE REJECTION OF *ROE v WADE* BY THE UNITED STATES SUPREME COURT AFTER FIVE DECADES – A SEISMIC DECISION

1 Introduction

The recent dramatic about-turn of the United States Supreme Court (USSC) in *Dobbs v Jackson Women's Health Organisation* (*Dobbs*) in May 2022 regarding the rights of women in the United States to an abortion has caused a major uproar. Overruling one of the most famous of all USSC cases, *Roe v Wade* (410 US 113 (1973) (*Roe*)), five decades after it was decided, has had major repercussions. To fully comprehend the impact that *Roe* had on the United States, it is opportune to give an overview of *Roe*, which was a dramatic judgment and became established law for 50 years. In revisiting *Roe,* it is difficult to understand why such a clear and well-reasoned majority judgment has been overruled.

Roe raised serious legal, moral and religious issues. The central issue was whether a woman had a legal right to an abortion. The USSC by a majority of seven to two held that woman had a constitutionally protected right to an abortion. As will be seen, *Roe* based its decision on its interpretation specifically of the Fourteenth Amendment of the United States Constitution.

All major cases before the USSC can be put into two categories – abortion cases and all others. Abortion remains the central legal issue before that court. It defines the judicial philosophies of the justices of the USSC. It dominates their nomination and confirmation processes. The abortion controversy is sensitive and emotional. It generates vigorous, opposing views. It inspires deep and absolute convictions. A person's philosophy, experiences, exposure to the raw edges of human existence, religious beliefs, and attitudes towards family values, and the moral standards a person establishes and seeks to observe all influence their thinking about abortion.

It arguably delineates the difference between the National Democratic and Republican parties. When, during the confirmation proceedings of the present Chief Justice Roberts, he was asked about his views on *Roe*, he was careful not to commit himself. His answer was that *Roe* was settled as a precedent of the court and entitled to be respected under the principles of *stare decisis*, but he added that the justices of the Supreme Court do sometimes reverse their own precedents (Toobin *The Nine: Inside the Secret World of the Supreme Court* (2008) 327).

Abortion issues remain eternal. Does a woman have a legal right to an abortion? Is the termination of a pregnancy a decision to be made by a

woman and her doctor, or is the protection of potential human life a legitimate interest of the State? At what point does an unborn person acquire legal rights that are protected under the law? The majority and dissenting judgments in *Roe* represent the full spectrum of legal approaches to these and related questions. However, no court decision exists in a vacuum and the controversial issues raised in *Roe* continue to be raised and debated in the legal and political life of the United States, as they do in other jurisdictions.

2 Factual background

The circumstances that led to *Roe* arose in 1970 in the state of Texas. An unmarried pregnant woman desired to terminate her pregnancy, but the laws of Texas made abortion a crime, except when it was necessary to save the life of the mother. She decided to challenge the Texas abortion law, and the pseudonym "Jane Roe" was created to protect her privacy. She brought her case against Henry Wade, the district attorney charged with enforcing the law of Texas in her county.

Jane Roe filed a class-action lawsuit brought on behalf, not only of herself – a pregnant woman who wanted access to a safe and legal abortion – but also of all other women in a similar situation. Roe contended that the Texas law making abortion a crime, and other state laws that similarly restricted or prohibited abortion, violated rights that she and other women had under the United States Constitution. Roe submitted that the state of Texas did not have the right to invade her privacy, which, she asserted, included her right to decide whether or not to terminate her pregnancy. Relying on the concept of personal liberty embodied in the Fourteenth Amendment, she also argued that the Constitution gave her rights as an individual that meant she should be free from state interference of this sort. This was the main basis of Roe's argument.

The first ten Amendments to the United States Constitution, all adopted as far back as 1791, are commonly called the Bill of Rights. Their principal purpose is to protect the individual against various sorts of interference by the federal government. The Thirteenth, Fourteenth and Fifteenth Amendments were enacted for the purpose of barring discrimination by states against individuals. Of greatest interest to the discussion of *Roe* is the Fourteenth Amendment. Section 1 provides, in full, as follows:

> "All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

This Fourteenth Amendment is commonly referred to as the "due process clause" of the United States Constitution. It suffices to say that it does not, and nor does any other Amendment constituting the Bill of Rights, refer to a right to privacy.

Wade argued that the State had a proper interest in protecting both a pregnant woman's health and human life from the moment of conception. He submitted that the Texas legislature expressed in clear language that abortion was a crime, except if necessary to save the life of the mother. He also submitted that a majority of states in the United States had similar laws. He argued that the State had an interest in protecting the health and welfare of all its people, regulating doctors, medical facilities and procedures, including the abortion procedure, and protecting those who were yet unborn.

Roe was first heard in a federal court in Texas. Roe then appealed directly to the USSC. Roe argued for an unconditional right to terminate her pregnancy. Texas argued for an unconditional right to protect unborn human life.

3 The right to privacy

Owing to the centrality of the Fourteenth Amendment's "due process clause" in the *Roe* decision, it is imperative to refer to a previous USSC decision on the meaning of "No state … shall deprive any person of life, liberty or property, without due process of law". This decision is *Griswold v Connecticut* (381 US 479 (1965) (*Griswold*)), known as the "contraceptive case". At issue in *Griswold* was a Connecticut statute that forbade the use of contraceptives (and made it a criminal offence); the statute also forbade aiding or counselling others on their use. The defendants were the director of the Planned Parenthood Association and its medical director. They were convicted of counselling married persons in the use of contraceptives. The Supreme Court struck down the relevant statute finding that several of the Amendments in the Bill of Rights protect the privacy interest and create a zone or penumbra of privacy surrounding the marriage relationship. The court concluded that the right of married persons to use contraceptives fell within this zone or penumbra of privacy. Three of the concurring opinions specifically held that the Connecticut statute violated the Fourteenth Amendment's "due process clause", which included the "right to privacy".

Griswold was one of the USSC's most controversial and far-reaching decisions. The court for the first time recognised a constitutional right to privacy, thereby barring the state of Connecticut from enforcing its statute forbidding the use of contraceptives by married couples.

By the time *Griswold* was decided, a substantial consensus had emerged in the United States on the desirability of family planning through contraception. Even Justice Stewart, who held that the Connecticut anti-birth-control statute should be upheld, called the statute an "uncommonly silly law". *Griswold* became the leading precedent for the USSC's extension of the right to privacy to include a woman's right to an abortion in *Roe.*

In *Eisenstadt v Baird* (405 US 438 (1972) (*Eisenstadt*)), *Griswold* was expanded on by the USSC. Here the court, by invoking the Fourteenth Amendment, invalidated a statute that permitted contraceptives to be distributed only by registered pharmacists and only to married persons. The court held that such a statute discriminated against the unmarried. The court held that if the right of privacy means anything, it is the right of the individual,

married or single, to be free from unwarranted government intrusion into matters so fundamentally affecting a person as the decision whether to bear or beget a child.

Griswold and *Eisenstadt* led to what can be referred to as the "right of reproductive autonomy", which laid the basis for *Roe*, which was to follow.

4 The decision of the Supreme Court in *Roe*

Justice Blackmun delivered the opinion of the court (in which Chief Justice Burger and Justices Douglas, Brennan, Stewart, Marshall and Powell joined). Justice Rehnquist filed a dissenting opinion, in which Justice White joined. (In what follows, the various approaches of the Justices are discussed using a broad brush, without dissecting the details.)

According to Justice Blackmun, although the Constitution did not explicitly mention any right to privacy, the court has recognised the existence of a right of personal privacy, or a guarantee of certain areas or zones of privacy, under the Constitution, such as in the First, Fourth, Fifth and Ninth Amendments, and especially in the first section of the Fourteenth Amendment. These rights to personal privacy, Justice Blackmun held, could be deemed to be "fundamental" or "implicit in the concept of ordered liberty". This right of privacy, held Justice Blackmun, was broad enough to encompass a woman's right to decide whether or not to terminate her pregnancy.

Such a right, however, was not absolute and was not unlimited. The majority concluded that the right of personal privacy (which includes a woman's right to decide on an abortion) is not unqualified and must be considered against a state's legitimate interests, which may override the rights of the pregnant woman that are at stake.

Despite holding that a woman's right to privacy (which includes a right to an abortion) is a fundamental right under the Fourteenth Amendment, the court held that a state had a limited right to regulate abortions, but could not absolutely prohibit them. The court thereupon divided pregnancy into three trimesters and prescribed a different rule for each. During the first trimester, a state may not ban or even closely regulate abortions. The decision to have an abortion, and the manner in which it is to be carried out, are left to the pregnant woman and her physician. During the second trimester, a state may protect its interest in the mother's health, by regulating the abortion procedure in ways that are reasonably related to the mother*'s* health – for example, provision for the operation to take place in a hospital or a clinic. It was emphasised that a state may only protect the mother's health and not the fetus's life during this period. At the beginning of the third trimester, the court stated, the fetus becomes "viable". This means that it has a capability of meaningful life outside the mother's womb. After such viability, a state has a compelling interest in protecting the fetus. It may thus regulate or even prohibit abortion, but abortion must be permitted where it is necessary to preserve the life or health of the mother.

Justice Stewart, in a separate concurring judgment, emphasised what was held in *Griswold* – namely, that the birth-control law of Connecticut was unconstitutional because it substantively invaded the "liberty" that was protected by the "due process clause" of the Fourteenth Amendment. Stewart also referred to *Eisenstadt*, which recognised the right of the individual, married or single, to be free from governmental intrusion in matters so fundamentally affecting a person as the decision to bear or beget a child. That right, held Stewart, necessarily includes the right of a woman to decide whether or not to terminate her pregnancy.

Justice Douglas, in his concurrence, held that the Fourteenth Amendment protected freedom of choice in one's life, respecting marriage, divorce, procreation, contraception and the education and upbringing of children.

Justice Rehnquist, in his dissent, had difficulty in comprehending how the right to "privacy" was involved in the case. He could not agree with the majority's sweeping invalidation of any restrictions during the first trimester as being justifiable. He saw the majority opinion as being more legislative than judicial. Contrary to the majority, he found that a right to an abortion is not so rooted in the conscience and traditions of the people of the United States as to be ranked as "fundamental".

5 *Doe v Bolton*

Along with *Roe*, the court simultaneously decided a companion case from Georgia, *Doe v Bolton* (410 US 179 (1973)). The court made it clear that the cases were to be read together. The pleadings of the Doe couple presented them as a childless married couple, the woman not being pregnant, and having no desire to have children because of medical advice that Mary Doe should avoid pregnancy and for other highly personal reasons. They feared that if they faced the prospect of becoming parents and pregnancy ensued, they would want to terminate it by an abortion. They asserted an inability to obtain an abortion legally in Texas. They thus alleged a detrimental effect upon their marital happiness because they were forced into a choice of either refraining from sexual relations or endangering Mary Doe's health through a possible pregnancy. They also claimed that if Mary Doe should in future become pregnant owing to failure of contraceptive measures, and she wanted an abortion, that would be illegal under Texas statutes.

In *Doe v Bolton*, the opinion of the court was also delivered by Justice Blackmun, in which Chief Justice Burger and Justices Douglas, Brennan, Stewart, Marshall and Powell joined. Justices White and Rehnquist (as in *Roe v Wade)* dissented. Of relevance is Justice Douglas's concurring judgment, in which he saw the Georgia statute as being at war with a long line of Supreme Court decisions – such as *Union Pacific R Co v Botsford* (141 US 250); *Terry v Ohio* (392 US 1); *Katz v United States* (389 US 437) and *Meyer v Nebraska* (262 US 390), which all protect individual liberty against governmental intrusion and allow the individual to enjoy common-law privileges essential to the orderly pursuit of happiness by free men. He held that all these cases had a clear implied message that a woman is free to make the basic decision whether or not to bear an unwanted child.

6 *Roe* partially overruled

In *Planned Parenthood of Southeastern Pennsylvania v Casey* (60 USLW 4795 (*Casey*)), important aspects of *Roe* were partially overruled. These aspects were abortion's status as a "fundamental right", and a state's almost complete inability to regulate first-trimester abortions, and the whole trimester framework of *Roe.* The majority of the court declined to overrule *Roe* explicitly but the practical result of the decision, in a nutshell, was that states may restrict abortion as long as they do not place an "undue burden" on the woman's right to choose.

It must be noted that *Casey* was decided 20 years after *Roe*, and the changed composition of the court introduced new viewpoints and philosophies on this contentious issue. (As to how the personal philosophies of justices of the Supreme Court determine their approaches to the law, see Toobin *The Nine: Inside the Secret World of the Supreme Court*; Woodward and Armstrong *The Brethren: Inside the Supreme Court* (1979); O'Brien *The Supreme Court in American Politics* (2003); Starr *First Among Equals: The Supreme Court in American Life* (2002); Garbus *Courting Disaster: The Supreme Court and the Unmasking of American Law* (2002) and Greenburg *Supreme Conflict* (2007)).

At issue in Casey were a number of significant restrictions on abortion, such as a requirement that a woman wait 24 hours after receiving information from a doctor on abortion, and a requirement that a married woman notify her husband of her intent to abort. Such restrictions were *prima facie* clearly unconstitutional judged by the standards of *Roe*.

There were three distinct voting blocs in *Casey*. First, traditionally "liberal" Justices Stevens and Blackmun (the author of *Roe*) wished to reaffirm *Roe* completely. Secondly, four "conservative" Justices (Rehnquist, White, Scalia and Thomas) wished to overturn *Roe* completely. The third bloc were middle-of-the-road Justices (O'Conner, Souter and Kennedy) who wished to reaffirm the central principles of *Roe,* but to allow state regulation that did not "unduly burden" the woman's freedom to choose. The court eventually decided, five to four, to maintain *Roe* as a precedent but decided, seven to two, to allow states to regulate more strictly than *Roe.*

Casey rejected the trimester approach used by *Roe* as the basis to govern abortion regulations. As stated above, according to *Roe*, no regulation at all was permitted during the first trimester. Regulations to protect a woman's health were permitted during the second trimester, but not to further a state's interest in potential life. During the third trimester, because the fetus was now viable, a state could prohibit abortion as long as the life or health of the mother was not at stake.

In place of the trimester approach of *Roe, Casey* introduced the "undue burden" standard. An "undue burden", the court held, was where a regulation had the purpose or effect of placing a substantial obstacle in the path of a woman seeking an abortion of a non-viable fetus. Such a regulation, the court held, would have the effect of a state reaching into the heart of the liberty protected by the due process clause and could thus be prohibited. A

state could, for example, make regulations to further the health and safety of the woman, as long as such regulations did not "unduly burden" the woman's right to abortion. After "viability" however, a state may prohibit all abortions not needed to protect the health or life of the mother.

Casey made it clear that a woman's right to decide whether to terminate her pregnancy remains an interest that receives special constitutional protection.

7 Conclusion

What *Roe* proved was that the United States Constitution rests not on any static meaning but on its adaptability to cope with current problems and needs. *Roe* proved that the Constitution is a living Constitution. It stood for an expansive conception of the democratic way of life as the foundational ideal of constitutional interpretation. The court revived the "due process clause" of the Fourteenth Amendment to protect human dignity. The court expanded constitutional rights by pointing to their contribution to protecting human dignity. The focus of *Roe* was whether individual dignity had been honoured – that is, whether the worth of an individual had been acknowledged.

In contrast to *Roe* and succinctly put, *Dobbs* decided by a majority that abortion is not a constitutionally related issue, and that the Bill of Rights is not a consideration, and that it is for each state within its discretion to regulate abortion in its own jurisdiction.

Dobbs proves that much depends on how the USSC is constituted and how new justices are appointed, and retirements take place. It is virtually impossible to say with any certainty which issues are settled for the long term. Explosive issues – such as abortion, for example – will remain tenuous. The replacement of a liberal justice by a conservative justice, and *vice versa*, can transform the law for generations. Six of the nine present USSC justices, including three Donald Trump appointees, are considered conservatives. It is thus no surprise that the USSC overturned *Roe.*

With a liberal Democratic presidential incumbent at present and conceivably for at least the next six years, more liberal appointees to the USSC could conceivably resurrect *Roe* as being the pre-eminent legal authority on abortion. It is for this reason that *Roe* will continue to be a hotly debated decision on abortion with its vociferous protagonists and detractors. The views expressed by the seven-to-two majority of the USSC in *Roe* will not disappear overnight and will continue to dominate the abortion debate in the United States for the foreseeable future. Thus, *Roe* demands a continuous incisive discussion. It is the purpose of this note to take part in this discussion.

What are the expected consequences of *Dobbs*? Many conservative Republican-led states are expected to introduce measures restricting access to abortion. Near-total bans can be expected. Many measures on abortion may provide exceptions for cases of rape or incest. Many women may not have the financial means to travel across multiple state lines for an abortion,

once widespread bans are imposed. This could lead to women ending their pregnancies outside the medical system, with attendant legal and health risks. The USSC in *Dobbs* was not swayed by testimonies of women who had abortions after being raped, who wanted to continue their education, who wanted to escape poverty, or who wanted to avoid the consequences of teenage pregnancies.

Dobbs, in effect, has damaged women's dignity and freedom in making a decision that is right for their bodies and their circumstances, as was emphasised in *Roe*. In one strike, it consigned *Roe* to the dustbin. It is to be hoped this will be only temporary, until the USSC reverts to a majority of liberal justices.

Whatever one's views on abortion or *Roe* or *Dobbs* may be, the differing views on the controversial topic may never be reconciled – not by philosophers, theologians, legal or medical scholars.

Opinion polls have consistently shown that the majority of Americans are in favour of *Roe,* and it will be interesting to see whether *Dobbs* is going to cause a backlash against the conservative Republican party in future elections.

George Barrie
University of Johannesburg

LEGAL GYMNASTICS: AN EVALUATION OF THE JUDGMENT IN

Z v Z [2022] ZASCA 113

1 Introduction

The South African Supreme Court of Appeal (SCA) recently considered an appeal (*Z v Z* [2022] ZASCA 113) against an order of the Eastern Cape Division of the High Court, Port Elizabeth (ECD). The ECD upheld a special plea and confirmed that a parent lacks *locus standi in judicio* to claim maintenance from the other parent, for and on behalf of adult dependent children, during divorce proceedings (*Z v Z supra* par 2). The SCA, however, reasoned that the obligations of a divorce court set out in section 6 of the Divorce Act (70 of 1970) (the Act) by implication made provision for a parent to apply on behalf of an adult child for maintenance. The SCA, accordingly, dismissed the special plea and the appeal was upheld with costs.

The SCA judgment is noteworthy as several previous High Court judgments found that adult dependent children must pursue claims for maintenance against their parents in their own name. Interestingly, most courts of first instance have reasoned that adult dependent children should be before the court when applying for maintenance. However, the SCA did not share the same position. In its reasoning, the SCA emphasised convenience and stressed that all the matters relevant to the divorce, including maintenance of dependent children, should and could be disposed of at the hearing of the main action. The SCA confirmed that both parents have a duty to maintain their dependent children and that this duty, at times, persists after the child attains majority age. The SCA further commented that children, including adult children, should be removed from the conflict between the divorcing parents as far as possible. The SCA, therefore, held that the requirements of section 6 of the Act provide the basis for admitting a claim by a parent for maintenance for and on behalf of an adult dependent child. It is submitted that the reasoning of the SCA and the precedent created could undermine the ability of a court to make an order of parental support for adult dependent children, and may ultimately result in outcomes that do not effectively provide for the needs of the adult child. This case note evaluates the facts of the matter together with the reasoning of the High Court and the SCA. The previous judgments on parents representing their adult dependent children during divorce proceedings are then evaluated. The specific intent of the case note is to establish whether section 6 of the Act confers *locus standi* on a parent to apply for maintenance for and on behalf of their adult dependent children during divorce proceedings. The benefits and challenges of conferring *locus standi* on parents of adult children are also considered. The last relevant issue that is evaluated, and

on which the courts did not have to adjudicate, relates to the termination of a parent's duty to provide financial support for their adult children. This case note ultimately aims to establish what obligations and powers are inherent in the application of section 6 of the Act and what procedures may, therefore, be employed by a Divorce Court when an adult dependent child applies for parental support.

2 Factual background and salient features of *Z v Z*

The appellant and the respondent were married to each other, and two children were born of their marriage. It was not in dispute that the children were above the age of 18 and still financially dependent on their parents. The parties' marriage relationship deteriorated, and the applicant initiated divorce action, claiming a decree of divorce and maintenance for herself, as well as for and on behalf of their two adult dependent children (*Z v Z supra* par 3–4). The appellant argued that section 6 provides the required *locus standi* for a parent to claim maintenance from the other parent on behalf of an adult dependent child in divorce proceedings between the two parents. In this regard, the court considered the words of section 6, which is intended to safeguard the interests of both dependent and minor children. Section 6 specifically provides that a court must be satisfied that "the provisions made or contemplated with regard to the welfare of any minor or dependent child of the marriage are satisfactory or are the best that can be effected in the circumstances" before it grants a decree of divorce. The Act further provides that a court, in granting a decree of divorce, may make any order it deems fit regarding the maintenance of a dependent child of the marriage (s 6(1)(*a*) read with s 6(3) of the Act).

The respondent, in reply to the appellant's claim for maintenance on behalf of the adult dependent children, filed a special plea stating that the children are majors and, therefore, possess the required *locus standi* to pursue maintenance claims in their own names (*Z v Z supra* par 4). The special plea, by implication, thus disputes that a parent under these circumstances would have the required standing to act on behalf of an adult dependent child. The High Court upheld the special plea with costs and confirmed that the plaintiff does not possess *locus standi* to pursue the maintenance claims on behalf of the adult dependent children; it ordered that the adult dependent children be joined as parties to the divorce action, whereafter the hearing of the divorce action could proceed (*Z v Z supra* par 6).

3 The judgment of the Supreme Court of Appeal

The SCA commented that there are conflicting High Court decisions on whether a parent, in divorce proceedings, has *locus standi in judicio* to claim maintenance from the other parent on behalf of their adult dependent children. The SCA further noted that the words in the Act must be interpreted purposively, properly contextualised, and with reference to their ordinary grammatical meaning unless the exercise produced an absurd result. The interpretation must also, where reasonably possible, preserve the constitutional validity of the provisions (*Z v Z supra* par 7). The SCA did not

elaborate further on this, and it is not clear whether such an interpretation with regard to the ordinary meaning of the provision was applied or which words were specifically interpreted by the court.

The SCA reiterated that the parents of minor and adult dependent children have a common-law and a statutory duty to support their children in accordance with their respective means. The dissolution of the marriage by divorce does not terminate this duty and it extends, in specific circumstances, beyond the age of majority. The SCA further commented that a maintenance order by the court is ancillary to the common-law duty of support and that it does not replace or alter a divorced parent's common-law duty to maintain a child (*Z v Z supra* par 8–9). The SCA concluded that a parent, therefore, has the required legal standing in divorce proceedings to apply for a judicial award of parental financial assistance for both minor and adult dependent children from the other parent (*Z v Z supra* par 15–16). The respondent's special plea was therefore dismissed, and the appeal was upheld with costs (*Z v Z supra* par 22).

4 Previous judicial reasoning regarding *locus standi* of a parent to claim maintenance for and on behalf of an adult dependent child

Various High Court decisions relevant to the SCA judgment have already been reported. All these decisions concerned divorce actions where one parent requested maintenance for and on behalf of adult dependent children. Flemming J, in one such judgment, found in *Smit v Smit* (1980 (3) SA 1010 (O)) that a child must, after attaining majority, directly claim maintenance against a parent. This decision was followed in *Sikatele v Sikatele* (1996 (1) All SA 445 (Tk)) and in *Zeelie v Zeelie* (unreported case no 903/2019 (9 March 2021)). However, the Botswana High Court, in *Modise v Modise* (2007 (1) BLR 622 (HC)), referred to in *C[....] v C[....]* ([2020] ZAGPPHC 553 par 77), stated that the test for *locus standi* focuses on whether a litigant can prove "sufficient interest in a matter to litigate". The Botswana High Court, therefore, found that a litigant "certainly had *locus standi*" to apply for maintenance for a dependent child "emerging from minority" (*Modise v Modise supra* par 7). The Cape High Court, in *Butcher v Butcher* (2009 (2) SA 421 (CPD)), thereafter, again and as required by precedent, held that a divorcing parent lacks the required *locus standi* to apply for maintenance for and on behalf of an adult dependent child.

The North Gauteng High Court, Pretoria, in *C v C* (*supra*), relied on *Butcher v Butcher* (*supra*) and stated:

> "parents are regarded unsuited [to claim maintenance for and on behalf of a dependent child] as soon as the dependent child attains the age of majority." (*C v C supra* par 61)

Khumalo J commented that the dependent adult children should have been automatically substituted as a party in the claim for their maintenance to "facilitate their participation and access to justice". The adult dependent child was not before the court and the undertaking by the parent to adequately support the child could, as a result, not be incorporated as part of the order of the court

(*C v C supra* par 75). The North Gauteng High Court, Pretoria, confirmed in *DD v FD* ([2020] ZAGPPHC 778 (per Manamela AJ)), in a Rule 43 application, that an adult dependent child must independently and personally approach the court for a maintenance order against a parent (*DD v FD supra* par 19).

The ECD, in *Whitfield v Whitfield* ([2021] ZAECPEHC 55), confirmed that the adult dependent children have a direct and substantial interest in the divorce and should, accordingly, be joined in the main action to pursue a claim for maintenance (*Whitfield supra* par 8). The Western Cape High Court, Cape Town, in *CL v CJL* ([2022] ZAWCHC 127), commented that it would be "legally problematic" for a parent to have *locus standi* to act on behalf of an adult dependent child, as this may exclude a later claim for alternative or better relief by the child (*CL v CJL supra* par 17). Wille J found that only the adult dependent child has the requisite standing to pursue a maintenance claim against a parent (*CL v CJL supra* par 29). The adult dependent child must, therefore, be joined to any *pendente lite* proceedings in which the parents are involved. Judicial oversight demands that the relevant facts (the child's financial needs and views) be properly ventilated before the court (*CL v CJL supra* par 42–43).

5 Discussion

5 1 Judicial oversight

The SCA stated that a court, in granting a decree of divorce, must be satisfied that the welfare of any dependent children born of the marriage is protected, and the onus is primarily on the parties to the divorce proceedings to satisfy the court (*Z v Z supra* par 15). The Divorce Court itself has extensive discretionary powers to cause any investigation that it may deem necessary and or to appoint a legal practitioner to represent the adult dependent child during the divorce proceedings. It is, however, submitted here that there is a difference between the requirement to satisfy the court that the dependent children's interests have been or will be, adequately provided for, and the duty to prove that an adult dependent child requires maintenance and the scope and extent thereof. The obligation on the Divorce Court is aimed at ensuring that provisions are in place that would either already provide for the support of the adult child (such as in a settlement agreement), that the adult child was joined as a party to the divorce proceedings, or that the children have been made aware that the maintenance claims could, at a later stage, be referred to the Maintenance Court. The SCA further stated that the decree of divorce operates between the parties to the proceedings and the adult dependent children would, therefore, still be free to institute their own maintenance proceedings against an errant parent in terms of the Maintenance Act (99 of 1998) (*Z v Z supra* par 15). The SCA, therefore, confirms that adult children could pursue a maintenance claim against a parent under the Maintenance Act and, it is submitted, that this alone would be sufficient to satisfy the obligation on the parties and the court to ensure that the welfare of any dependent children born of the marriage is, or will be, satisfactorily provided for as required by section 6 (s 6(1)(*a*) of the Act).

The SCA also stated that the Act does not make provision for the adult dependent children to be party to or joined to the divorce proceedings between their parents. This comment seems to confuse substantive law with procedural law, as joinder of plaintiffs is specifically provided for in Rule 10 of the Uniform Rules of Court (Rules Regulating the Conduct of the Proceedings of the Several Provincial and Local Divisions of the High Court of South Africa). Rule 10(1) allows for the joinder of

> "[a]ny number of persons, each of whom has a claim, ... may join as plaintiffs ..., provided that the right to relief of the persons proposing to join as plaintiffs depends upon the determination of substantially the same question of law or fact."

The SCA also commented that a claim for maintenance by an adult dependent child is "intrinsically linked to other issues in the divorce" (*Z v Z supra* par 17). Again, Rule 10 of the Uniform Rules of Court specifically refers to relief sought that "depends upon the determination of substantially the same question of law or fact". The appropriate procedure is thus to join the adult child and not artificially to create *locus standi* for a parent, where such development is neither required nor appropriate. The last comment on this issue is that an adult child who claims maintenance bears the onus to prove that such support is required together with proof of the amount of support needed (*Sikatele v Sikatele supra*; see also *Gliksman v Talekinsky* 1955 (4) SA 468 (W) 469; *Osman v Osman* 1992 (1) SA 751 (W) 754H; *Hoffman v Herdan NO* 1982 (2) SA 274 (T) 275)). It is also important to note that both parents are indeed obliged to support their dependent children even after the child attains majority but that the nature of the support may change after the child attains majority (*B v B* (1999 2 All SA 289 (A)). The determination of both the need and the scope and extent of maintenance would, therefore, require that the adult child be brought before the court. The Act also provides discretion to appoint a legal practitioner to represent the adult child, which again implies that the child must be before court for such representation to happen (s 6(4) of the Act).

The SCA found that any interpretation of section 6 that excludes a claim for maintenance by a parent on behalf of a dependent adult child would not preserve its constitutional validity and would thus result in absurdity (*Z v Z supra* par 16). The SCA focused on the term "maintenance" but the Act specifically refers to the "welfare" of a dependent child, which requires that provisions be in place ("made") or that there at least be a plan ("contemplated") that is "satisfactory or …. the best that can be effected in the circumstances". This would suggest that the SCA entered into judicial review to determine whether awarding *locus standi* to a parent to act for and on behalf of an adult child during divorce proceedings would ensure the constitutional validity of section 6. Judicial review of the constitutional validity of legislation should never be a mere technical exercise where the courts engage in a form of proofreading of the provisions under consideration. There is no evidence that such judicial review was requested or required, or that the SCA measured the provisions of the Act against any of the provisions of the Constitution of the Republic of South Africa, 1996. It is, therefore, difficult to establish if the joining of the adult child to the proceedings or the adult child's right of access to a Maintenance Court

would not secure the constitutional validity of section 6 of the Act. The Constitutional Court commented in *Zondi v MEC for Traditional and Local Government Affairs* (2005 (3) SA 589 (CC) par 90) that the purpose and effect of legislation that is inconsistent with the Constitution may render it unconstitutional. There was no argument on this issue, and nor did the SCA consider the issue further.

5 2 Locus standi

The SCA reasoned that dependent children should be shielded, for as long as possible, from the conflict between their divorcing parents, and acted to maintain a meaningful relationship with both their parents after the divorce. It is reasonable to argue that minor children should be removed from conflict between their parents, but adult children cannot be dealt with in a similar manner. The capacity of children to act and exercise their rights autonomously is subject to their ongoing but diminishing psychological developmental limitations (Rude-Antoine *Forced Marriages in Council of Europe Member States: A Comparative Study of Legislation and Political Initiatives* (2005) 7). Children, interpreted as persons under the age of 18 years of age, have a right to be allowed to take increasing responsibility in decision-making as they progressively develop towards the attainment of adulthood. Adults are generally deemed not to share the limitations of children, even where they are financially dependent on another and, therefore, persons above the age of 18 do not require others to act on their behalf in legal proceedings, and nor do adults require protection from any real or perceived conflict between their parents. Lastly, it is necessary to consider that the Children's Act (38 of 2005) requires appropriate child participation, depending on the child's age, maturity and stage of development, in any matter concerning that child. An adult dependent child's right to participate in legal proceedings in which that adult has a sufficient interest should thus be respected.

The SCA relied on academic writing (Heaton and Kruger *South African Family Law* 4ed (2015) 187) concerning the position of young adult children. Heaton and Kruger argue that it is "undesirable for children to become involved in the conflict between the divorcing parents by being joined as parties in divorce proceedings". It may be undesirable, but it is necessary as the court must be satisfied that the welfare of dependent children has been, or will be, adequately dealt with. This, together with the need for judicial oversight, obliges a court to ensure that an adult child is joined in the proceedings. Heaton and Kruger further argue that there may be instances where adult dependent children do not pursue their maintenance claims (*Z v Z supra* par 18). However, the obligation on the court is to find that the arrangements concerning the welfare of the dependent children are "satisfactory or are the best that can be effected in the circumstances" (s 6 of the Act). This obligation cannot be interpreted to compel a divorce court to adjudicate on claims on behalf of an adult who is, for whatever reason, reluctant to do so on their own.

The SCA also referred to the judgment in *AF v MF* (2019 (6) SA 422 (WCC) par 75), in which the High Court stated that young adult dependent children find themselves in a vulnerable position during a divorce

action between their parents, as there exists a power imbalance between the parent and child. This imbalance complicates access to the necessary support for the child and makes it "unimaginably difficult" to claim maintenance from the parent. It is, however, also reasonable to conclude that a litigating parent may, owing to the influence they have over the adult child, influence the child through manipulative conduct, which would also place unnecessary pressure on the child. It is further submitted that a court that fails to require the joinder of adult dependent children requesting maintenance in divorce proceedings between their parents will not comply with its obligations to deal with cases "efficiently, effectively and expeditiously" (par 5.1(ii) of the South African Norms and Standards for the Performance of Judicial Functions GN R147 in *GG* 37390 of 2014-02-28, and art 10(1)(*c*) of the South African Code of Judicial Conduct, issued in 2012, pursuant to the Judicial Service Commission Act 9 of 1994, s 12, GN R865 in *GG* 35802 of 2012-10-18). There is, accordingly, a duty on the court, to ensure that the maintenance of an adult dependent child is either sufficiently resolved or that a plan is in place to ensure that such an outcome is achieved by requiring the adult child to be joined. The court may appoint a legal practitioner to represent an adult child at the proceedings where it has a reasonable belief that the adult child may not be able to pursue their maintenance claim appropriately or where their involvement in the proceedings may have detrimental effects on the adult's life (art 6(4) of the Act).

An interesting challenge may develop, based on the SCA's interpretation of section 6, where both parents claim the right to represent their adult dependent children during the divorce proceedings. A parent may regard it as beneficial to represent the adult children of the marriage, based on the impression that it creates regarding the parent's relationship with the children. This advantage may also be used strategically to promote concessions in other areas of the divorce proceedings, or possibly to secure a desired settlement. An impasse would then effectively create a situation where the adult child would have to choose sides, or the court would have to make a determination as to which parent may exercise their *locus standi* to represent the child during the divorce. This outcome would be detrimental to the relationship between all the parties.

The institution of a separate claim for maintenance by an adult dependent child against a parent after the divorce proceedings would also, according to the SCA, result in the disjointed adjudication of the issues (*Z v Z supra* par 17). These comments by the SCA erroneously presume that divorce actions will always be confrontational and that these actions will always be opposed. The reasoning of the SCA further creates some confusion regarding the capacity of adult persons who are also the children of a litigating party to act on their own behalf. It must be appreciated that some level of dispute between a parent and an adult dependent child would already exist when a child approaches the court for relief. The court's role is then to resolve that dispute on behalf of the parties and to avoid further confrontation, insofar as that is possible. Presiding officers are required to "maintain order" during court proceedings (art 9(*b*)(i) and (iii) of the Code of Judicial Conduct) and presiding officers must maintain "a firm hand on proceedings" (art 9 (i) of the Code of Judicial Conduct). The preservation of a meaningful relationship

must, therefore, be supported and maintained through the child's right to access a court and the courts' intervention to resolve that very dispute.

A parent who intends to institute a claim for maintenance on behalf of an adult dependent child may not be able to do so owing to a real or perceived conflict of interests between the parent and child. The parent and the adult child both require support from the other parent. The parent requiring maintenance is also obliged to contribute to the financial support of the dependent child within that parent's means. A parent may, as a result of such a conflict of interest, forfeit their right to represent a child. The Act, for this reason, allows a court to appoint a legal practitioner to represent the adult child during these proceedings (art 6(4) of the Act). Various other factors may also preclude a divorcing parent from adequately acting for and on behalf of a dependent child during divorce proceedings. Divorce proceedings are still, in essence, adversarial in nature, but this may also serve to prevent either of the parents from adequately representing the child, or may even subordinate the interests of the child to their own interests or prejudices. The court may, as a result, receive a distorted picture of the interests and needs of the adult child. The representation of the parent may also, where the interests of the parent and child do not coincide, or where the parent is unable to determine the needs of the adult child, result in detrimental outcomes for the child. A parent who is also involved in litigation that may have an emotional element may sincerely believe that they are acting in the adult child's best interests while actually promoting their own best interests.

The reasoning of the SCA also suggests some linguistic drift to achieve a goal that the legislation was not intended to provide. The court must be satisfied that the welfare of the dependent child will be secured but this obligation alone does not, by implication, confer *locus standi* on a parent to represent the interests of the adult child. Section 6(3) of the Act also cannot be read in isolation from the rest of the provisions in the Act or without considering the full intent of this section. Section 6(3) of the Act confers the power on a court "in regard to the maintenance of a dependent child" to "make any order which it may deem fit". However, the section specifically relates to minor children where it refers to the determination of guardianship and the custody of the minor.

5 3 Duty of support for adult dependent child – exceptional circumstances

The courts were not required to determine at what stage a parent may expect an adult dependent child to become self-sufficient. The meaning of "adult dependent child" and the duration and extent of the duty were indeed not the focus of the appeal in the SCA matter, and were, as a result, not considered. However, this issue creates an interesting question that is relevant to the current matter. The argument in favour of providing financial support to adult dependent children admittedly relies on the arbitrary and rigid nature of the age of majority. It may be argued that age is merely one non-controlling factor to be considered to determine whether a child has reached adulthood. There is also no formally established post-18 age ceiling

that marks the point where the adult child is no longer eligible for parental support, or where specific limitations or statutory or judicial guidelines on parental liability for educational-related expenses were provided. These uncertainties raise questions as to whether the duty on a parent to support an adult child can logically extend indefinitely. Most parents are likely to assume and expect that their children will progressively achieve economic independence after the age of 18 and that their financial obligations to support their children will gradually diminish and eventually terminate after their child attains majority or legal adulthood (Moore "Parents' Support Obligations to Their Adult Children" 1985 19(2) *Akron Law Review* 183).

It is further debatable whether all parents, even where they can do so, would agree that they have a legal duty to offer financial support for the tertiary or further education of their adult children. The SCA did not comment on the benefits of further education for children, but this issue has received attention in foreign judicial reasoning where the courts found that parents may be liable to provide financial support for an adult child's further education in exceptional circumstances (Moore 1985 *Akron Law Review* 186). The Supreme Court of Mississippi granted a petition against one parent for an increase in child support to pay for future college expenses of the parties' daughter (*Pass v Pass* 238 Miss. 2d 449, 118 So. 2d 769 (1960)). The court commented on the importance of a well-equipped, well-trained, and well-educated citizenship for the State. A financially capable parent must therefore provide a "worthy child" with the opportunity to obtain a further education (*Pass v Pass supra* 453, 118 So. 2d 773; *Accord Khalaf v Khalaf* 58 NJ 63 71–72, 275 A.2d 132 137 (1971)). A further relevant matter concerned a decree of divorce wherein a parent was ordered to pay child support until the twin children attained their majority (*Finn v Finn* 2312 So. 2d 726 (Fla. 1975)). However, during this time, Florida reduced the age of majority from 21 to 18 but authorised courts to order support for "dependent" persons beyond the age of 18. The parent stopped paying maintenance when the children reached the age of 18. The Supreme Court of Florida directed the parent to resume child support as the development of special skills is necessary and a person between the ages of 18 and 21 may qualify as "dependent" to obtain the required education and training to be competitive in the economic system (*Finn v Finn supra* 73 1; see also *Kern v Kern* 360 So. 2d 482 (Fla. Dist. Ct. App. 1978).

The Supreme Court of South Carolina stated in *Risinger v Risinger* (273 S.C. 36 SC) that a divorced parent must pay maintenance to a 19-year-old child, but certain conditions qualified the order. The adult dependent child had to remain registered as a full-time student in good standing and the obligation would terminate should the child get married. The Supreme Court of Iowa, in the matter of *In re Marriage of Vrban* (293 N.W.2d 198 (Iowa 1980)) found that the adult dependent child must regularly attend an approved school or must, in good faith, be a full-time student in a college, university, or area school. An adult child's aspiration and ability to pursue further education may, as a result, be regarded as an "exceptional circumstance", as the child's earning potential would be greatly diminished without further education. A New Jersey court, in *Sakovits v Sakovits* (178 N.J. Super. 623, 429 A.2d 1091 (1981)), refused to order a divorced parent to contribute to the further education of a 22-year-old child who had lived

alone and who had been employed for the preceding four years. The court commented that the adult child had structured his financial future and any extension of the parental obligations to support the child would create an unreasonable, open-ended burden on the parents (*Sakovits v Sakovits supra* 632, 429 A.2d 1096).

The issue of the termination of a duty on a parent to support an adult child has been the subject of judicial enquiry but the circumstances of the particular case may be regarded as extraordinary. In *M v M* ([2018] ZAGPJHC 506) (Nkosi-Thomas AJ), the applicant applied for a verification of an existing maintenance order in favour of two adult children born from his previous marriage (*M v M supra* par 1 and 3; art 8(1) of the Act). Section 8(1) of the Act states, *inter alia*, that a maintenance order may at any time be rescinded or varied if the court finds that there is *sufficient reason* therefor (own emphasis). The older child ("S") was a dependent major enrolled for tertiary education but was not attending lectures and the second child ("L") was in matric at the time when the marriage was dissolved and the settlement agreement concluded (*M v M supra* par 4). S later re-registered for tertiary education but this attempt also proved to be unsuccessful (*M v M supra* par 7). The applicant intervened and S was allowed to complete the degree studies after the Dean of the Faculty agreed to extend the registration for S, who again dropped out and had, at the time of the hearing, not completed the degree. There is also no certainty as to any possible future prospect of gainful employment for S, but he has again enrolled for further studies at the expense of the applicant (*M v M supra* par 10). L, after successfully finalising her secondary studies at a private school at the expense of the applicant, initially did not pursue further studies for two years but later enrolled for further education, but this endeavour also failed (*M v M supra* par 6–7). Both children thereafter moved to the United States of America without informing the applicant. Both children subsequently returned to South Africa and again pursued further education (*M v M supra* par 8–9). L was 22 years of age at the time of the hearing and was residing in the United States of America, but the applicant had not been informed of her circumstances.

The applicant approached the court alleging that there exists "*sufficient reason*" as provided for in section 8(1) of the Act for the maintenance order to be varied. S was, at this time, 27 years of age, the applicant had paid for the private school education, living expenses and tertiary education, and had offered his child employment at his company. However, the respondent stated that "work is beneath her precious children" and that the applicant should simply pay a monthly salary to both the adult children. The same result occurred when the applicant arranged employment for S. It was further not in dispute that S started consuming alcohol and smoking marijuana, which resulted in anti-social and aggressive behaviour towards the applicant (*M v M supra* par 10). The court referred to *Bursey v Bursey* (1999 (3) SA 33(SCA) 38D), where the SCA held:

> "In my view, the present order fixed a time for its duration, i.e., until John becomes self-supporting, and it will cease to operate when that event occurs [...]. Whether that event has indeed occurred may be the subject of dispute but it is an objective fact capable of being established with sufficient certainty." (*M v M supra* par 20)

Nkosi-Thomas AJ commented that L and S are "conceivably capable of supporting" themselves and that they were the authors of their own predicament (*M v M supra* par 22, 25 and 27). The court referred to *Gliksman v Talekinsky* (*supra* 469 F–H), where it was held:

> "A child, when it becomes of age, should normally be able to provide for himself or herself … [and] the liability on her father to support her only arises when it is shown that she cannot support herself, she being a major who should be able to provide for herself in normal circumstances."

In the final analysis, the court commented that the adult children could not expect the applicant to maintain them "*ad infinitum*" and that *sufficient reason* existed for the maintenance order to be varied (*M v M supra* par 29–30).

Generally, the duty to support an adult child will end when the child becomes capable of, or actually becomes, self-supporting. The determination of whether the child has indeed reached that point will be subject to argument, but it will probably be possible in most instances to evaluate objective facts that will be capable of being established with sufficient certainty. The test of whether an adult dependent child is entitled to maintenance, and the amount payable, is ultimately based on whether the child is capable of being self-supportive, but the court will also have regard to the financial means of the parents.

6 Conclusion

The SCA was acutely aware of the potential conflict between the interests and desires of the adult child and those of the parent. This issue was resolved by allowing a litigant to act on behalf of parties who were not before the court. It may be argued that the adult children were subjected to discrimination based on age and capacity, which was presumed not to exist or that the adult children were unable or unwilling to act in their own interests. The SCA attempted to ensure that the maintenance responsibility of divorcing parents is shared equally between them and that such support would not solely become the responsibility of one parent. However, the SCA did not make a clear distinction between a minor child and an adult dependent child for the purposes of section 6. It is not suggested that the SCA intentionally conflated the competencies and needs of minor and adult children during a divorce. However, the description of an adult who requires maintenance as a child may subconsciously influence the reasoning of any court. Section 6 clearly requires that the court must be satisfied that the welfare of a dependent child is sufficiently considered and catered for before the divorce is finalised. A court cannot determine whether the requirements of section 6 have been satisfied, relying only on a parent and litigant before it to obtain the necessary and credible information regarding the adult child's needs. The adult child's interests will, as a result, remain unrepresented and the eventual award of maintenance may not safeguard the child's welfare.

The SCA should have referred the matter back to the court *a quo* for the adult dependent child to be heard and to make representations as to the nature and level of support needed. The situation of adult dependent children must not be confused with the attributes and limitations that are

normally associated with minor children who are still progressively developing their emotional, physical, and psychological capacity to express their needs. Thus, an adult child should be acknowledged to possess the *actual* developmental capacity of an adult and should accordingly be allowed to make decisions for themselves with binding future consequences.

Arthur van Coller
University of Fort Hare

Ebrezia Johnson
Stellenbosch University

ALTERNATIVE ACCOMMODATION OF AN UNLAWFUL OCCUPIER'S CHOOSING: SOME REFLECTIONS ON

Grobler v Phillips [2022] ZACC 32*

1 Introduction

An abundance of case law dealing with eviction has emerged (see for e.g., *Government of the Republic of South Africa v Grootboom* 2001 (1) SA 46 (CC); *Port Elizabeth Municipality v Various Occupiers* 2005 (1) SA 217 (CC); *Occupiers of 51 Olivia Road Berea Township & 197 Main Street Johannesburg v City of Johannesburg* 2008 (3) SA 208 (CC); *City of Johannesburg Metropolitan Municipality v Blue Moonlight Properties 39 (Pty) Ltd* 2012 (2) SA 104 (CC); *City of Johannesburg v Changing Tides 74 (Pty) Ltd* 2012 (6) SA 294 (SCA); *Occupiers of Portion R25 of the Farm Mooiplaats 355 JR v Golden Thread Ltd* 2012 (2) SA 337 (CC); *Molusi v Voges NO* 2016 (3) SA 370 (CC); *Occupiers of Erven 87 and 88 Berea v De Wet NO* 2017 (5) SA 346 (CC); *Snyders v De Jager* 2017 (3) SA 545 (CC); *Baron v Claytile (Pty) Ltd* 2017 (5) SA 329 (CC)). Clear rules for evictions exist in the eviction context and a solid body of law is being developed in this regard (see generally, Muller *The Impact of Section 26 of the Constitution on the Eviction of Squatters in South African Law* (LLD dissertation, Stellenbosch University) 2011 103–146; Pienaar *Land Reform* (2014) 659–811; Cloete *A Critical Analysis of the Approach of the Courts in the Application of Eviction Remedies in the Pre-Constitutional and Constitutional Context* (LLM thesis, Stellenbosch University) 2016 74–142; Viljoen *The Law of Landlord and Tenant* (2016) 361–378; Muller, Brits, Pienaar and Boggenpoel *Silberberg and Schoeman's The Law of Property* 6ed (2019) 499–500). For many years, little attention was given to the issue of unlawful occupiers refusing to be evicted based on preferences or wishes to remain

* This case note is partly based on the ideas developed in parts of Ngwenyama *A Common Standard of Habitability? A Comparison Between Tenants, Usufructuaries and Occupiers in South African Law* (LLD dissertation, Stellenbosch University) 2020. The case note is an extended version of a case discussion presented at a seminar hosted by the North-West University Faculty of Law Research Unit on 28 September 2022. The case note is also an extended version of a paper presented at the 13th Annual Meeting of the Association of Law, Society, and Property (ALPS) under the sub-theme '(Re)Possession and Property Law' hosted by the University of Southampton Law School, from 11–13 May 2023, Southampton, England. The author extends his thanks to the seminar or ALPS conference organisers and to all the other colleagues whose case or research discussions and contributions during the seminar or ALPS conference influenced his approach in this case note. The opinions expressed in this case note are those of the author and should not be attributed to any of the institutions and persons mentioned above. All errors are the author's.

in the same house or land under the Prevention of Illegal Eviction From and Unlawful Occupation of Land Act 19 of 1998 (PIE). However, in recent years disputes around the choice of alternative accommodation in terms of the Extension of Security of Tenure Act 62 of 1997 (ESTA) have increased significantly.

For instance, the Constitutional Court in *Snyders v De Jager* (*supra*) dealt with the position of Mr Willem Breda who was employed by Stassen Farm and lived in a house on the farm that was previously occupied by Mr Snyders and his family. The Constitutional Court found that the right to "reside on" that was enjoyed by Mr Breda and his family was not tied to the specific house they lived in (*Snyders v De Jager supra* par 78). In another case, *Oranje v Rouxlandia Investments (Pty) Ltd* (2019 (3) SA 108 (SCA)), the Supreme Court of Appeal dealt with the position of Mr Oranje who was employed as a manager at Rouxlandia Investments (Pty) Ltd and was entitled to live in the manager's house. Mr Oranje's employment on the farm was terminated because he was medically unfit to work, but he continued to reside in the house (*Oranje v Rouxlandia Investments (Pty) Ltd supra* par 5). The private landowner wanted to relocate Mr Oranje to a smaller house than the manager's house in which Mr Oranje resided (*Oranje v Rouxlandia Investments (Pty) Ltd supra* par 20). The Supreme Court of Appeal held that ESTA was not enacted to provide security of tenure to Mr Oranje in the house of his choice (*Oranje v Rouxlandia Investments (Pty) Ltd supra* par 21). It should be mentioned that despite ESTA being aimed at protecting lawful occupiers and that its provisions are different from those of PIE, there is no basis to argue that the principles laid down in *Snyders* and *Oranje* are not applicable to PIE cases to the extent that both pieces of legislation are enacted to prevent unfair evictions (*Grobler v Phillips* [2022] ZACC 32 par 36).

The Constitutional Court in *Grobler v Phillips* ([2022] ZACC 32) had to decide whether it was just and equitable in terms of section 4(7) of the Prevention of Illegal Eviction From and Unlawful Occupation of Land Act 19 of 1998 (PIE) to grant an order instructing Mrs Phillips and her son, who has a physical disability, to vacate their current home. This judgment is important, not only because it showed that an unlawful occupier such as Mrs Phillips does not have the right to refuse to be evicted on the basis that she prefers or wishes to remain in the same property that she is occupying unlawfully, but it is also important because the judgment provides clarity on whether private landowners are obliged to provide unlawful occupiers with alternative accommodation of their choosing. The purpose of section 26 of the Constitution of the Republic of South Africa, 1996 (the Constitution) played a significant role in the determination of whether private landowners have an obligation to provide alternative accommodation to unlawful occupiers. The Constitutional Court indicated that section 26 of the Constitution does not give Mrs Phillips the right to choose exactly where she wants to reside (par 36). According to the Constitutional Court, where an offer of alternative accommodation is made by a private landowner, such an offer should not be construed as authority regarding what other private landowners are obliged to do in similar circumstances (par 48).

This brings us to the subject matter of this case note – namely, alternative accommodation of an unlawful occupier's choosing under PIE. The pertinent question is whether private landowners are obliged to provide unlawful occupiers with suitable alternative accommodation of their own choosing. To answer this question satisfactorily, the first part of the case note discusses the meaning of access to adequate housing (as set out in s 26(1) of the Constitution). The second part of the case note analyses and evaluates the recent case of *Grobler v Phillips* (*supra*) in light of the question whether private landowners could be obliged to provide unlawful occupiers under PIE with suitable alternative accommodation of the unlawful occupier's own choosing. The assessment includes reasons why it may not be appropriate to compel private landowners to provide unlawful occupiers with alternative accommodation that the unlawful occupiers desire or prefer.

2 Conceptualising adequate housing for unlawful occupiers

In terms of section 26(1) of the Constitution, everyone (including unlawful occupiers) has the right of access to adequate housing. However, section 26(1) of the Constitution does not define the meaning of adequate housing. Interestingly, the Constitutional Court in *Government of the Republic of South Africa v Grootboom* (*supra*) has observed that what constitutes adequate housing depends on a particular context (*Government of the Republic of South Africa v Grootboom supra* par 37). This is because some occupiers may require access to land, housing or services (*Government of the Republic of South Africa v Grootboom supra* par 37). The Constitutional Court in *Grootboom* has had an opportunity, with reference to international law, to shed light on what constitutes access to adequate housing (*Government of the Republic of South Africa v Grootboom supra* par 26–33). Section 39 of the Constitution obliges a court to consider international law as an interpretative guide to the Bill of Rights (s 39(1)(*b*) of the Constitution; see further, *Government of the Republic of South Africa v Grootboom supra* par 26; *S v Makwanyane* 1995 (3) SA 391 (CC) par 35; Slade *International Law in the Interpretation of Sections 25 and 26 of the Constitution* (LLM thesis, Stellenbosch University) 2010 5 and 13–37). The court's reference to the contextual nature of the term "adequate housing" resembles what the United Nations Committee on Economic, Social and Cultural Rights (CESCR) has proposed on the meaning of adequate housing. According to the CESCR, housing would be considered adequate if it is habitable, and if it provides its inhabitants with adequate space, protection from the elements such as cold, damp, heat, rain, wind or other threats to health, structural hazards, and disease vectors, and if the physical safety of the inhabitants is ensured (CESCR *General Comment No 4: The Right to Adequate Housing (Art 11(1) of the Covenant)*,13 December 1991, E/1992/23 par 8(d)). This statement means that the right of access to adequate housing implies habitability. It should be pointed out that an interpretation of habitability should include the list of descriptors that came after the descriptor of habitability to encompass what is meant by habitability, meaning that those descriptors are not

separate from and stand-alone concepts but that they form part of the concept of habitability.

The CESCR has also observed that housing is adequate if it contains certain facilities that are necessary for health, security, comfort, and nutrition such as safe drinking water, electricity or gas for cooking and lighting, facilities for washing, bathing and sanitation, storage for food and regular refuse and sewage removal (CESCR *General Comment No 4* par 8(b)). This statement suggests that adequate housing must include access to basic services such as water and electricity. In the final instance, the CESCR point out that housing is adequate if it is in a location that is close to the unlawful occupier's place of employment and not far away from social amenities such as schools, clinics, and shopping centres (CESCR *General Comment No 4* par 8(f)). The CESCR point of view implies that location is an integral part of adequate housing. However, in South African law, the statement cannot mean that unlawful occupiers have a right to adequate housing at the vicinity of the unlawful occupiers' own choosing (in this context, remaining in the same house at the same demarcated area or preferred spot or location where the unlawful occupier resided since they moved onto the land) (*City of Johannesburg v Rand Properties (Pty) Ltd* 2007 (6) SA 417 (SCA) par 44 and 75; *Occupiers of 51 Olivia Road Berea Township & 197 Main Street Johannesburg v City of Johannesburg supra* par 254). This is the position since the issue of remaining in the same house or preferred spot or location for eviction is determined by considering a number of factors, such as the availability of land on the preferred site (*Occupiers of 51 Olivia Road Berea Township & 197 Main Street Johannesburg v City of Johannesburg supra* par 254). In view of the location being a contextual factor to consider in South African law, the private landowner, who in certain circumstances could provide adequate housing or alternative housing to unlawful occupiers under PIE must, prior to the eviction, consider the inter-connectedness between the location of housing to be inhabited by unlawful occupiers and the unlawful occupiers' place of work and access to social amenities like schools and clinics (*City of Johannesburg v Rand Properties (Pty) Ltd supra* par 44; *Occupiers of 51 Olivia Road Berea Township & 197 Main Street Johannesburg v City of Johannesburg supra* par 254). It is important to mention here that if a private landowner offers alternative accommodation to unlawful occupiers, that should not be taken as being a blanket application to what other private landowners are obliged to do in certain circumstances (*Grobler v Phillips supra* par 38 and 48). Therefore, the obligation to provide adequate housing or alternative accommodation to unlawful occupiers rests primarily with the State (s 26(2) of the Constitution; *Government of the Republic of South Africa v Grootboom supra* par 82; *Occupiers of 51 Olivia Road Berea Township & 197 Main Street Johannesburg v City of Johannesburg supra* par 17; *Grobler v Phillips supra* par 37). As such, housing that is built on polluted sites or close to sources that cause pollution are likely to be classified as inadequate (CESCR *General Comment No 4* par 8(f)). This is because such an environment may impact on the unlawful occupiers' rights to health (see s 27 of the Constitution) and a healthy environment (see s 24 of the Constitution). This means that adequate housing in South African law must, at the very least, be in a location that is

not dangerous to the unlawful occupiers' health and safety, and not impair their human dignity (CESCR *General Comment No 4* par 8(f); *City of Johannesburg v Rand Properties (Pty) Ltd supra* par 36; *Occupiers of 51 Olivia Road Berea Township & 197 Main Street Johannesburg v City of Johannesburg supra* par 44; *Residents of Joe Slovo Community, Western Cape v Thubelisha Homes* 2010 (3) SA 454 (CC) par 108).

Thus, when unlawful occupiers are evicted under PIE, the right to have access to adequate housing, which includes suitable alternative accommodation, may be implicated (*Grobler v Phillips supra* par 36–37). The Constitutional Court has observed in *Government of the Republic of South Africa v Grootboom* (*supra*), that it is not only the right of access to adequate housing that may be at stake when unlawful occupiers are evicted (*Government of the Republic of South Africa v Grootboom supra* par 83; *Jaftha v Schoeman, Van Rooyen v Stoltz* 2005 (2) SA 140 (CC) par 21). Whenever unlawful occupiers approach a court asserting that their socio-economic rights have been infringed, the right to human dignity may also be implicated (*Government of the Republic of South Africa v Grootboom supra* par 83; *Jaftha v Schoeman, Van Rooyen v Stoltz supra* par 21). This means that any claim based on socio-economic rights must essentially engage the right to human dignity (*Government of the Republic of South Africa v Grootboom supra* par 83; *Jaftha v Schoeman, Van Rooyen v Stoltz supra* par 21).

Section 26(3) of the Constitution protects unlawful occupiers against conduct that may cause them to be removed from their homes without prior engagement (*Residents of Joe Slovo Community, Western Cape v Thubelisha Homes supra* par 139, 230 and 237). In this regard, the historical context of forced removals requires genuine engagement. Section 26 of the Constitution was enacted as a vehicle to facilitate a move away from the past by emphasising the significance of having access to adequate housing in our new constitutional dispensation (*Jaftha v Schoeman*, *Van Rooyen v Stoltz supra* par 29, referred to in *City of Johannesburg v Rand Properties (Pty) Ltd supra* par 30). Furthermore, it was enshrined in the Constitution to rectify the indignity that was suffered by unlawful occupiers because the alternative accommodation offered was inadequate and could not provide the unlawful occupiers with access to adequate housing and human dignity (*Jaftha v Schoeman*, *Van Rooyen v Stoltz supra* par 29; cited in *City of Johannesburg v Rand Properties (Pty) Ltd supra* par 30). As unlawful occupiers were previously not protected in terms of the common law from forced removals, section 26(3) of the Constitution, through the provisions of PIE, now aims to protect unlawful occupiers from forced removals (compare *Oranje v Rouxlandia Investments (Pty) Ltd supra* par 12). The discussion on the meaning of adequate housing under section 26 has shown that adequate housing is more than just a roof over one's head. It is for this reason that the Constitutional Court in *Port Elizabeth Municipality v Various Occupiers* (*supra* par 17) once remarked that the constitutional provision guaranteeing the right to adequate housing:

> "evinces special constitutional regard for a person's place of abode. It acknowledges that a home is more than just a shelter from the elements. It is a zone of personal intimacy and family security. Often it will be the only

> relatively secure space of privacy and tranquility in what (for poor people in particular) is a turbulent and hostile world."

The right of access to adequate housing is fulfilled if a minimum standard that unlawful occupiers should enjoy is met in the form of protection from the elements, such as cold, damp, heat, rain, wind or other threats to health, structural hazards, and disease vectors and physical safety and privacy of the unlawful occupier must be guaranteed. This part of the note has explained the meaning of adequate housing flowing from section 26 of the Constitution. The part that follows analyses the case of *Grobler v Phillips* (*supra*). The difference in terminology between section 26 (adequate housing) and PIE (suitable alternative accommodation/housing) is that the former is a constitutional right, while the latter is a right conferred upon unlawful occupiers by PIE. It should be mentioned that a claimant relying directly on section 26 may be provided with suitable alternative accommodation, as section 26 includes an entitlement to suitable alternative housing. In light of the *Grobler v Phillips* case, this analysis is important in showing that unlawful occupiers are not entitled to the alternative accommodation they desire or prefer.

3 Alternative accommodation of an unlawful occupier's choice in *Grobler v Phillips*

3 1 Facts of Grobler v Phillips

The applicant was Mr Grobler, a businessman and private landowner who resided at 21 Aberdeen Street, Somerset West, Western Cape Province. The first respondent was Mrs Phillips aged 85 years. Mrs Phillips had resided on the property since she was 11 years old. Mrs Phillips started residing on the property in 1947 when the property had formed part of a larger farm. Mr Grobler bought the property at a public auction because he wanted his old parents to reside on it (par 2). After Mr Grobler had bought the property, he met with Mrs Phillips three times and informed her that he required her to vacate the property. During the meetings, Mr Grobler proposed to Mrs Phillips that he was willing to pay a certain amount towards her relocation or provide Mrs Phillips, at his own expense, with alternative accommodation. Mrs Phillips rejected Mr Grobler's proposals. Mrs Phillips refused to move out of the property (par 4). Mr Grobler's attorneys then requested Mrs Phillips in writing to vacate the property. Mrs Phillips refused to leave the property and alleged that she enjoyed an oral right of *habitatio*, which was granted by a previous private landowner and enforceable against Mr Grobler. The right of *habitatio* is a limited real right, which confers on the holder the right to dwell on a property belonging to another, without any detriment to the substance of the property (see *Hendricks v Hendricks* 2016 (1) SA 511 (SCA) par 6; Muller *et al Silberberg and Schoeman's The Law of Property* 387; Van der Walt *The Law of Servitudes* (2016) 492; Pope, Du Plessis, Badenhorst, Freedman, Mostert, Pienaar and Van Wyk *The Principles of the Law of Property in South Africa* 2ed (2020) 258). Mr Grobler's attorneys made another offer to Mrs Phillips in writing, that Mr

Grobler would at his own expense make available to her a two-bedroom flat where she could reside for the rest of her life. Mrs Phillips also rejected this offer. Mr Grobler's attorneys made the same offer to Mrs Phillips in writing, but she rejected the offer again (par 5). Mr Grobler then approached the Somerset West magistrates' court for relief.

3 2 The magistrates' court decision

Relying on PIE, Mr Grobler applied for Mrs Phillips's eviction and alleged that she was an unlawful occupier on his property. The application was opposed by Mrs Phillips on the basis that she had an oral right of *habitatio*, which she alleged had been given to her by previous owners. Mrs Phillips also alleged that she was protected in terms of PIE, and that an eviction order should not be granted (par 6). The magistrates' court rejected Mrs Phillips's defence based on the alleged right of *habitatio*. The magistrates' court held that Mr Grobler had proved his right of ownership over the property. The magistrates' court found that the alleged right of life-long *habitatio* was invalid and unenforceable against Mr Grobler as it was not registered against the property's title deed. The magistrates' court pointed out that the only right Mrs Phillips had in respect of the property was the right of occupancy which, according to the magistrates' court, could not be equated to a right of *habitatio* or a usufruct. The magistrates' court further held that at the time of the proceedings, Mrs Phillips no longer had Mr Grobler's consent to occupy the property and had no right in law to occupy it. The magistrates' court granted an order of eviction against Mrs Phillips. The eviction date was not considered immediately by the magistrates' court and the matter was thus postponed to consider an appropriate eviction date (par 7). Prior to the postponement of the matter, Mr Grobler's attorneys informed the magistrates' court that despite Mrs Phillips's attorney expressed intention to apply for leave to appeal against the eviction order, Mr Grobler was willing at his own expense to assist Mrs Phillips with her relocation. Mr Grobler's attorneys further informed the magistrates' court that Mr Grobler was willing to allow Mrs Phillips to continue to stay on the property for another two months until she was relocated. Mr Grobler's attorneys further mentioned that Mr Grobler would bear the expenses relating to the accommodation in a retirement centre for a period of 12 months (par 8). Mrs Phillips also rejected this offer. The magistrates' court heard evidence on whether alternative accommodation for Mrs Phillips was available. The magistrates' court was addressed on Mrs Phillips's personal circumstances, including her age and the duration of her residence on the property. After considering all the relevant factors, the magistrates' court ordered Mrs Phillips to leave the property (par 9). Mrs Phillips appealed this decision to the full court of the Western Cape Division of the High Court.

3 3 The High Court decision

In the High Court, Mrs Phillips invoked the provisions of PIE and relied on a new ground of appeal. This ground was that Mrs Phillips was an occupier in terms of ESTA. The appeal was upheld by the High Court. The High Court

pointed out that a change of Mrs Phillips's status from that of a "lawful occupier" to an "unlawful occupier" could not be achieved without giving her reasonable notice to terminate the right to occupy the property. The High Court held that the notice of termination of occupation given to Mrs Phillips was too short and thus unreasonable. The High Court found that Mr Grobler should not have launched the eviction proceedings prior to considering Mrs Phillips's rights and whether she was in fact an unlawful occupier. The High Court further mentioned that Mr Grobler had failed to show that Mrs Phillips was an unlawful occupier in terms of PIE. Regarding Mrs Phillips's reliance on ESTA, the High Court found that the property only ceased to be a farm in 2001 and ESTA was thus applicable. This meant that Mrs Phillips was protected in terms of ESTA (par 10–11). Mr Grobler appealed this decision to the Supreme Court of Appeal.

3 4 The Supreme Court of Appeal decision

There were three issues for determination at the Supreme Court of Appeal. The first issue was whether it was appropriate for the High Court to allow Mrs Phillips to raise a new ground on appeal, that she was also protected by ESTA. The second issue was whether Mr Grobler had established that Mrs Phillips was an unlawful occupier under PIE. The third issue related to the exercise of the High Court's discretion not to order the eviction because such an order would not be just and equitable (par 12).

The Supreme Court of Appeal pointed out that the application before the magistrates' court was started on the basis that PIE was applicable. According to the Supreme Court of Appeal, the magistrates' court seemed not convinced that there was an express agreement between the parties that ESTA did not apply. In this regard, the magistrates' court reasoned that the dispute between the parties was whether Mrs Phillips was an unlawful occupier (par 13). Regarding Mrs Phillips's reliance on ESTA, the Supreme Court of Appeal found that the property was converted from agricultural land into a township by no later than 1991 when its status as an erf was registered in the deeds register. The Supreme Court of Appeal concluded that section 2(1)(*b*) of ESTA did not apply. This meant that the High Court erred in finding that Mr Grobler did not discharge the onus of establishing that ESTA did not apply (par 14). The Supreme Court of Appeal considered the finding of the High Court that Mrs Phillips was not an unlawful occupier. The Supreme Court of Appeal found that Mr Grobler clearly showed his intention to terminate Mrs Phillips's right to occupy the property and to withdraw his consent for her continued occupation. The Supreme Court of Appeal held that Mr Grobler had proved that Mrs Phillips was an unlawful occupier (par 16). The Supreme Court of Appeal also considered the alleged oral right of *habitatio*. It found that the alleged right of *habitatio* had not been in writing nor registered against the title deed and could not be enforceable against successive owners (par 17).

The Supreme Court of Appeal went on to decide whether it was just and equitable to grant an eviction order. The Supreme Court of Appeal found that there were certain factors to be taken into account by the High Court in exercising its discretion, namely: (a) Mrs Phillips had been in occupation of

the property since she was 11 years old; (b) Mrs Phillips was 84 years at the time the matter was heard at the Supreme Court of Appeal; and (c) during Mrs Phillips's occupation of the property, it had formed part of a farm and gradually became part of an urban development. According to the Supreme Court of Appeal, Mrs Phillips could have been protected under ESTA if it had not been for the urban development (par 19). The Supreme Court of Appeal found that Mr Grobler as property owner was not entitled to obtain an order of eviction. This is because in terms of PIE a private landowner's right may, in certain circumstances, be limited and the right of vulnerable persons to housing upheld (on the fact that ownership is not absolute, see generally Dhliwayo *A Constitutional Analysis of Access Rights That Limit Landowners' Right to Exclude* (LLD dissertation, Stellenbosch University) 2015 79–102 and 136; Van der Walt and Dhliwayo "The Notion of Absolute and Exclusive Ownership: A Doctrinal Analysis" 2017 134 *South African Law Journal* 34 34–52; Van der Walt "Sharing Servitudes" 2015 *European Property Law Journal* 162 200). The Supreme Court of Appeal then concluded that there was no basis to interfere with the discretion exercised by the High Court and agreed that it was not just and equitable to order an eviction in the matter. Mr Grobler approached the Constitutional Court for relief.

3 5 The Constitutional Court judgment

Two of the issues that were considered by the Constitutional Court related to the exercise of the magistrates' court discretion and whether it was just and equitable to grant an order of eviction. The Constitutional Court found that the discretion was that of the trial court and not the High Court as a court of appeal. According to the Constitutional Court, the High Court could have been entitled to exercise a discretion if it had interfered with the exercise of discretion by the magistrates' court (par 31). In deciding whether it was just and equitable to grant an order of eviction, the Constitutional Court began by pointing out that a court must consider all the relevant circumstances. The circumstances include, except where the land was sold in a sale in execution pursuant to a mortgage, whether land has been made available or can reasonably be made available by a municipality or other organ of state or another private landowner for the relocation of the unlawful occupiers. The relevant circumstances also entail taking into consideration the rights and needs of the elderly, children, disabled persons, and households headed by women (par 33). In this case, the relevant factors in terms of section 4(7) of PIE included, namely (a) Mrs Phillips's age; (b) that Mrs Phillips resided on the property with her disabled son; (c) that Mrs Phillips could have been protected by ESTA if the farm had not become part of an urban development; (d) Mrs Phillips's wishes regarding the offers of alternative accommodation; and (e) that Mrs Phillips was accustomed to life in the current house and enjoyed the freedom, space, and environment around it (par 34). The Constitutional Court went on to cite two judgments as authority for its view that an unlawful occupier such as Mrs Phillips does not have a right to refuse to be evicted because she prefers or wishes to remain in the property that she presently occupies unlawfully. This is because section 26 of the Constitution does not give Mrs Phillips the right to choose exactly

where in Somerset West she wants to live (see par 35–36; *Snyders v De Jager supra* par 78; *Oranje v Rouxlandia Investments (Pty) Ltd supra* par 21). As already mentioned, the Constitutional Court rightfully confirmed that an unlawful occupier's right to adequate housing does not include housing in the vicinity of the unlawful occupier's own preference (in this context, remaining in the same house for Mrs Phillips because she was accustomed to the freedom, space, and environment that the house offered) (par 34, 36 and 42).

The Constitutional Court considered a secondary question on who bears the obligation to provide alternative accommodation. The Constitutional Court held that, in terms of section 4(7) of PIE, such an obligation rests on the State and its organs. This obligation is further reinforced by section 26(2) of the Constitution, which places a positive obligation on the State to realise the right of access to adequate housing. Relying on the case of *City of Johannesburg Metropolitan Municipality v Blue Moonlight Properties 39 (Pty) Ltd* (2012 (2) SA 104 (CC) par 31), the Constitutional Court reaffirmed that a private landowner has no obligation to house unlawful occupiers for free. The obligation to house unlawful occupiers rests solely on the State in terms of section 26(2) of the Constitution (par 37 and 48). The Constitutional Court accepted that the capacity of a private landowner to provide alternative accommodation and the peculiar circumstances of an evictee may be relevant in determining whether an eviction order is just and equitable. However, the Constitutional Court held that in cases like this, where Mr Grobler has repeatedly offered Mrs Phillips alternative accommodation, such an offer should not be taken as creating any obligation on Mr Grobler to provide alternative accommodation (par 38). This is because an offer of alternative accommodation is not a precondition for the granting of an eviction order, but one of the factors to be considered by a court (see *Port Elizabeth Municipality v Peoples Dialogue on Land and Shelter* 2001 (4) SA 759 (E) par 769). It should be pointed out that an eviction order in instances where there is no provision of alternative accommodation is likely not to be as just and equitable as where provision of alternative accommodation is offered (see *City of Johannesburg v Changing Tides 74 (Pty) Ltd* [2012] ZASCA 116; 2012 (6) SA 294 (SCA) par 15).

Owing to the tensions that arise when occupiers are evicted, the Constitutional Court mentioned that justice and equity considerations require that the rights and/or interests of the parties to the eviction proceedings be balanced and reconciled (par 39; *Port Elizabeth Municipality v Various Occupiers supra* par 23; *Hattingh v Juta* 2013 (3) SA 275 (CC) par 32). This means that when balancing the rights and/or interests of the parties, compromises may have to be made by both parties to reach a just and equitable outcome (par 40). In this case, the Constitutional Court observed that no effort had been made by Mrs Phillips to accept the various offers of alternative accommodation made by Mr Grobler, which was counter-productive to reaching that compromise (par 40–41). If these offers had been accepted by Mrs Phillips, she would have continued to enjoy a decent home. Consequently, it is here where a just and equitable order should not be construed to mean that the rights and/or interests of the unlawful occupier are given preference over those of private landowners. Furthermore, a just

and equitable order should not be taken to mean that the wishes or personal preferences of an unlawful occupier are of any relevance in the balancing enquiry (par 44). What is important in the circumstances is the consideration that an eviction order does not render Mrs Phillips homeless. Since Mr Grobler's offer of alternative accommodation was still available, the Constitutional Court made it an order of court (par 49). This would essentially mean that Mrs Phillips could only be required to relocate from one house to another in the same immediate community within Somerset West. In this regard, the order would not have the effect of relocating Mrs Phillips to a different community that she does not know. The Constitutional Court found such an order to be just and equitable (par 46). The Constitutional Court then instructed Mr Grobler to purchase a two-bedroom dwelling in a good condition for Mrs Phillips. The Constitutional Court held that the dwelling must comply with the following requirements; (a) it must have at least two bedrooms; (b) it must have a lounge, kitchen and a bathroom; (c) the dwelling must be situated within Somerset West; and (d) regard must be had to Mrs Phillips's age and her son's disability and the dwelling should be easily accessible (par 49). The Constitutional Court concluded by holding that this generous offer should not be construed as setting a precedent on what other private landowners may be obliged to do in similar circumstances (par 48).

3 6 Some reflections on Grobler v Phillips

3 6 1 Alternative accommodation that the unlawful occupiers desire or prefer

As mentioned above, alternative accommodation is not a precondition for the granting of an eviction order, but one of the factors to be considered by a court (*Port Elizabeth Municipality v Peoples Dialogue on Land and Shelter supra* par 769). However, if suitable alternative accommodation is not provided on the site where unlawful occupiers are to be evicted, it might not be just and equitable for a court to grant an eviction order (*City of Johannesburg v Changing Tides supra* par 15). Coupled to whether it is just and equitable to provide alternative accommodation to unlawful occupiers is the question whether private landowners are obliged or compelled to provide unlawful occupiers with the suitable alternative accommodation that they desire or prefer. As already mentioned, it should be noted that section 26 of the Constitution was enshrined to provide unlawful occupiers with access to adequate housing, which does not mean to include a preferred house of choice (*Grobler v Phillips supra* par 36). The purpose of section 26 of the Constitution is to promote and guarantee everyone access to adequate housing and provide occupiers with rights protecting their homes (Liebenberg "Housing" in Davis, Cheadle and Haysom (eds) *Fundamental Rights in the Constitution: Commentary and Cases* (1997) 334). Khoza points out that the purpose of section 26(1) of the Constitution is to give people access to housing, basic needs and services that are important for occupants to lead a dignified life (Khoza *Socio-Economic Rights in South Africa: A Resource Book* (2007) 20). Thus, the need to promote access to

adequate housing to occupiers living on land belonging to another is recognised in section 26 of the Constitution. In terms of the purpose of section 26 of the Constitution, private landowners are not obliged to provide unlawful occupiers with suitable alternative accommodation of their own choice. Rather, private landowners may within their available resources provide unlawful occupiers with suitable alternative accommodation that, at the very least, is fit for human habitation as held in the *Grobler v Phillips* case. Furthermore, such provision of suitable alternative accommodation must not be seen as imposing an obligation on what other private landowners are obliged to do in similar circumstances, as indicated in *Grobler v Phillips*. This is because the law protects not only the rights of unlawful occupiers, but also recognises the rights of private landowners to apply for the eviction of unlawful occupiers under certain conditions and circumstances, while balancing the rights of private landowners and unlawful occupiers (*Grobler v Phillips supra* par 39–41).

Consequently, private landowners may not move unlawful occupiers to uninhabitable dwellings (for the meaning of what constitutes a habitable dwelling, see specifically Ngwenyama *A Common Standard of Habitability? A Comparison between Tenants, Usufructuaries and Occupiers in South African Law* (LLD dissertation, Stellenbosch University) 2020 121–144) that could offend unlawful occupiers' right to live in accordance with basic human dignity (compare *Oranje v Rouxlandia Investments (Pty) Ltd supra* par 17). In the same way, when unlawful occupiers are fairly and legally evicted, they should not unreasonably delay their eviction by insisting on remaining in the same accommodation that they desire or prefer to live in, as held in *Grobler v Phillips*. If the alternative accommodation is unsuitable for human habitation and impacts on the unlawful occupiers' right of access to adequate and other fundamental rights such as human dignity, unlawful occupiers can resist such an eviction because the house impairs their right to live in dignity (compare *Oranje v Rouxlandia Investments (Pty) Ltd supra* par 17). The protection afforded by section 10 of the Constitution, on which unlawful occupiers could rely to resist their eviction, is to ensure that unlawful occupiers are not subjected to conditions that are inhumane and that infringe on their human dignity (*Daniels v Scribante* 2017 4 SA 341 (CC) par 31–32; *Oranje v Rouxlandia Investments (Pty) Ltd supra* par 18; Van der Sijde "Tenure Security for ESTA Occupiers: Building on the *Obiter* Remarks in *Baron v Claytile Limited*" 2020 36 *South African Journal on Human Rights* 1 5 and 9–11). It should be noted that the protective measures in section 10 of the Constitution do not amount to a blanket resistance to an eviction under all circumstances, but in instances where the state of disrepair of the house implicates constitutional rights (*Oranje v Rouxlandia Investments (Pty) Ltd supra* par 18). While it is clear that private landowners cannot be compelled to provide unlawful occupiers with the alternative accommodation they desire or prefer, the discussion that follows provides the specific reasons for such an approach.

3 6 2 Justifications for a non-preference approach

Private landowners may not be compelled to provide unlawful occupiers in terms of section 26 with suitable alternative accommodation of the unlawful occupiers' own choosing, because the primary purpose of section 26 of the Constitution was not to provide unlawful occupiers with housing of their own choosing. However, section 26 of the Constitution was enshrined to ensure that everyone gains access to at least adequate housing as part of the transformative mandate of the Constitution.

Another reason for not compelling private landowners to provide unlawful occupiers with suitable alternative accommodation of the unlawful occupiers' choosing, would be that suitable alternative accommodation is provided by the private landowner to unlawful occupiers within his or her available resources, as in the case of *Grobler v Phillips*. It would be unreasonable, therefore, to require private landowners, who fund themselves from their own pockets, to provide unlawful occupiers with suitable alternative accommodation of their own choosing (*Daniels v Scribante supra* par 40; Currie & De Waal *The Bill of Rights Handbook* 6ed (2013) 50).

Moreover, private landowners should not be compelled to provide unlawful occupiers with suitable alternative accommodation of their own choosing, because such a position would be prejudicial to the right of private landowners to apply for an eviction order that is permitted by PIE, and while alternative accommodation is not a precondition for the granting of an eviction order. In this regard, the courts should strike a proper balance between the rights and/or interests of unlawful occupiers and private landowners, as indicated in *Grobler v Phillips*. If the private landowner has offered to provide suitable alternative accommodation that is safe and not less favourable to the unlawful occupiers' previous circumstances, an eviction order should be granted, as the unlawful occupiers will not be prejudiced (see *Grobler v Phillips supra*).

It would also not be appropriate to compel private landowners to provide unlawful occupiers with suitable alternative accommodation of the occupiers' own choosing, because occupiers and private landowners are arguably not best placed to decide which accommodation is suitable. Although it is the private landowner's property and they should provide the accommodation, and the unlawful occupiers are obviously familiar with the property and its set-up, what is suitable to the private landowner may arguably not be suitable in the eyes of the unlawful occupier (such as Mrs Phillips). In such circumstances, a court is better positioned than the unlawful occupiers and private landowners to reach an objective, principled decision on what constitutes suitable alternative accommodation. This is why, for example, an *in loco* inspection may be conducted by the court to ensure that the offered accommodation is available and conducive to human habitation. An inspection should also be conducted to ensure that the relocation of unlawful occupiers is feasible and executable, so that unlawful occupiers are not rendered homeless. The justifications for a non-preference approach are essentially based on the fact that section 26 of the Constitution was not enshrined to give unlawful occupiers preference with regard to alternative

housing when they are evicted. It is also not justifiable for unlawful occupiers to choose their own alternative housing because if so permitted, it could become unreasonable for private landowners to provide it, especially in light of the limited resources at their disposal.

In the *Grobler v Phillips* case, the Constitutional Court confirmed the procedural and substantive requirements for evictions in terms of PIE. These requirements require that private landowners and unlawful occupiers work together and where necessary compromise to reach a mutually acceptable outcome. If no compromise is reached, as in *Grobler v Phillips*, the court can be approached to have the matter resolved. Where the court is approached, the case of *Grobler v Phillips* clearly indicates that the court's involvement can be extensive and hands-on. This may include the court acknowledging the various offers of alternative accommodation provided by the private landowner and thus pronouncing that it is just and equitable to grant an eviction order. Given the preferences that can be raised by unlawful occupiers about suitable alternative accommodation and the obvious practicalities and costs with requiring the court to be involved, it is suggested that unlawful occupiers should accept an offer of alternative accommodation by the private landowner in a bid to reach a compromise.

4 Conclusion

Section 26 of the Constitution provides everyone with the right to have access to housing that is adequate. Housing is considered adequate if, among other factors, it is within the vicinity of social amenities such as workplaces, schools, clinics and shopping centres. However, this statement should not be construed to mean that unlawful occupiers have a right to adequate housing of the unlawful occupiers' own choosing – for instance, an occupier wishing to live at a preferred house or on certain land because they are accustomed to the life, space, and environment it offers. As such, unlawful occupiers do not have a right to refuse an eviction because they wish or prefer to remain in the same house or land. Unlawful occupiers can only resist an eviction based on the unsuitability of the alternative house or land and not based on preference, as held in *Grobler v Phillips*. An offer of alternative accommodation is not a prerequisite for an eviction order, but one of the factors to be considered before an eviction order is granted. The obligation to provide unlawful occupiers with alternative accommodation rests solely on the State in terms of section 26(2) of the Constitution. There is no obligation on private landowners to provide alternative accommodation to unlawful occupiers. This is because section 26 of the Constitution was not enshrined to give unlawful occupiers the right to choose exactly where their alternative accommodation should be located when they are evicted. It is also not justifiable for unlawful occupiers to choose their own alternative accommodation because it could be unreasonable for private landowners to provide such preferred accommodation, especially in light of limited resources at their disposal. Thus, where a private landowner offers alternative accommodation to an unlawful occupier, such an offer should not

be construed as a precedent for what other private landowners may be required to do in similar circumstances.

Lerato Rudolph Ngwenyama
Nelson Mandela University

THE INFUSION OF AFRICAN JURISPRUDENCE ON LEGAL DEFENCES INTO JUDICIAL DELIBERATIONS

Bulelwa Ndamase v Development Bank of Southern Africa Limited D 8073/2020 [2022] (ZAKZDHC) (30 May 2022)

1 Introduction

It is often said that customary law is unwritten, as its knowledge system is not recorded in statutes and codifications (Okupa "African Customary Law: The New Compass" in Hinz and Patermann (eds) *The Shade of New Leaves: Governance in Traditional Authority – A Southern African Perspective* (2006) 375). Tracing its earliest origins can prove difficult, largely because African communities have historically lived independently of one another, observing norms and practices that differ from one community to another (Rautenbach *Introduction to Legal Pluralism in South Africa* 5ed (2018) 9). In previous eras, Africans lived according to values such as a sense of communal belonging, collective ownership of assets and the communal life that characterised the African tradition. All these elements developed into an African normative system that catered for justice and human rights (Juma "From 'Repugnancy to Bill of Rights': African Customary Law and Human Rights in Lesotho and South Africa" 2007 *Speculum Juris* 88). The fortunes of customary law, however, changed after contact with colonialism. Section 11(1) of the Black Administration Act (BAA) 38 of 1927, for example, afforded courts the discretion to apply customary law in all disputes concerning African people as disputants, provided that customary law was not against public policy and natural justice. This repugnancy proviso therefore limited the application of customary law. Section 11(1) of the BAA was repealed in 1988 by the Law of Evidence Amendment Act 45 of 1988, which was framed in similar terms to the BAA, and in terms of which courts could take judicial notice of customary law if it could be readily ascertainable. As a result, courts could merely strike down any African practice or norm that they deemed to be inconsistent with principles of public policy and natural justice (Rautenbach *Introduction to Legal Pluralism* 38). The interim Constitution contained a specific provision speaking to the cardinal African concept of *ubuntu.* However, this concept did not find space in the 1996 Constitution.

Yet, *ubuntu* had already informed the basis for the abolition of the death penalty in one of South Africa's most seminal judgments in a first case that came before a full panel of the Constitutional Court (*S v Makwanyane* 1995 (3) SA 391 (CC)). The Constitutional Court stressed the importance of

infusing African jurisprudence or indigenous knowledge systems into judicial pronouncements. This had become apparent in the wake of the ill-treatment of customary law as a subordinate legal system *vis-à-vis* common law. Other courts have subsequently made commitments that customary law and its value systems would be afforded space as an independent legal system away from the prowling eye of the common law (*Alexkor v Richtersveld Community* (2004 3 All SA 244 (LCC) par 51). Also, in *Gumede v President of the Republic of South Africa* (2009 (3) SA 152 (CC) par 22), the Constitutional Court confirmed that customary law "lives side by side with the common law and legislation". Notwithstanding these assertions, courts have not given effect or found an avenue to allow customary law to be integrated in decision-making. It must be stated that customary law differs from indigenous law as customary law emerges from the latter. Customary law is people's adaptation of indigenous law to socio-economic changes. This gives effect to the value of indigenisation that scholars have written about and has also become a value that institutions of higher learning have embraced to form part of their curriculum design and transformation. A long journey still lies ahead for the process of indigenisation, especially in Western-style courts, but there are tools and a rich body of literature with which to work. The role of developing indigenous languages has also become important and requires attention.

The objective of this contribution is to evaluate these developments, considering the judgment of the High Court in *Bulelwa Ndamase v Development Bank of Southern Africa Limited* (*supra*), in which Mathenjwa J recognised *ukuthwasa* as a defence against the applicant, thus allowing a stay of warrant of execution in respect of movables and immovable property. *Ukuthwasa* means to "come out" or to be reborn (par 2). It is a calling by ancestors for a person to become a healer after a period of spiritual training during which a person can be away from their family and work (Bongar and Beutler *Comprehensive Textbook of Psychotherapy: Theory and Practice* (1995) 161). It is a welcome development to see a court infuse indigenous values into a judgment pertaining to civil action. This contribution argues that institutions of higher learning have a role to play in ensuring the infusion of customary law into their curriculum. The contribution provides examples of other significant African practices that can play a legitimate role in South African law if afforded space. It also looks at the significant role of indigenous language development in South Africa and its role in achieving indigenisation.

2 Facts of the case

The first respondent sought an order against the applicant for the immediate handing over of certain valuables in the possession of the applicant. The applicant did not oppose the application and an order was granted against her in her absence on 1 December 2020, but she did not comply with the court order (par 2). Subsequently, on 19 March 2021, the court issued an order calling upon the applicant to appear personally before it to show cause why an order should not be issued against her declaring her to be in contempt of court for failing to comply with the court order granted on 1 December 2020 (par 2). In explaining the delay in instituting in complying

with the court order the applicant said that as from September 2020, she had accepted her ancestral calling and as from October 2020, she had been attending the initiation practice training in line with the terms of her ancestral calling (par 3). During the process of the initiation, in terms of the rules of the initiation process, she was not allowed physically to interact and have contact with anyone except the other trainees and her spiritual diviner, known as *igqira lam* (par 3). In March 2021, she learnt for the first time through her spiritual diviner that there was a court order against her and other court orders that were calling her to appear in person before court. She could not appear in court because in terms of the initiation training rules, she was not allowed to interact physically and communicate with people outside the initiation training centre (par 3).

However, after she had progressed with her training, she was granted limited time by her spiritual diviner to contact her previous attorney telephonically. This is when she noted that there was an appeal against the judgment granted against her in her absence on 1 December 2020 (par 4). Her application for leave to appeal was dismissed by the court, and she appealed against the refusal of her leave to appeal to the Supreme Court of Appeal, which also dismissed her appeal. She later instituted an application for reconsideration of the court order, which application was also dismissed. After extensive consultation, she instituted proceedings in terms of Uniform Rule 42(1)(a) on the basis that the judgments were erroneously sought and erroneously granted against her (par 4).

3 Decision

The question that the High Court needed to determine was whether the applicant had made out a proper case compelling urgent circumstances to justify the court's intervention (par 7). Mathenjwa J concluded that recognition of traditional authority and traditional rituals entails that customary rules can be raised as a defence in litigation, provided they are not inconsistent with the Constitution and legislation (par 8). The matter was brought to court 18 months after the handing-down of the judgment that was the subject of application for variation. In advancing a case compelling urgency, the applicant first relied on the rules of the initiation practice that prevented her from timeously challenging the judgment issued by the High Court in December 2020 in her absence. The court indicated that the issue of whether the observance of traditional practice could be raised as a lawful ground for failing to challenge the judgment timeously could not be appropriately determined at this stage of the urgent application. Mathenjwa J posited that section 211 of the Constitution of the Republic of South Africa, 1996 recognises traditional authority and customary law. He refers to Jafta J in *Bapedi Marota Mamone v Commission on Traditional Leadership Disputes and Claims* (2015 (3) BCLR 268 (CC) par 11), who held:

> "Both the common law and customary law derive their legal force from the Constitution. This means that a customary law rule that is inconsistent with common law retains its validity if it is in line with the Constitution." (par 7)

He accordingly argued that this entailed that customary rules concerning traditional authority and indigenous practice can be raised as a defence in

litigation (par 8). He then ordered that the applicant's non-compliance with rules pertaining to service and time period be condoned, and declared the application an urgent one. Moreover, a warrant of execution against movables issued on 8 October 2021 and 23 February 2022 was ordered to be stayed pending finalisation of the application (par 10).

4 Discussion

The decision by the High Court to infuse African values into its judgment is a good one. The court recognised that it has an obligation in terms of section 211 of the Constitution to apply and recognise traditional authority and customary law (par 7). Courts have on several occasions missed such an opportunity to infuse customary law into their pronouncements, thereby continuing the common-law paradigm. For example, in *Bhe v Khayelitsha Magistrate; Shibi v Sithole*; (2005 (1) SA 580 (CC)), the Constitutional Court imported section 1 of the Intestate Succession Act (81 of 1987) after declaring primogeniture unconstitutional because women were not allowed to inherit property in terms of customary law. The judgment was criticised as it looked to the common law for solutions (Ntlama "The Application of Section 8(3) of the Constitution in the Development of Customary Law Values in South Africa's New Constitutional Dispensation" 2012 15(1) *PELJ* 344). In another example, *MM v MN* (2013 SA 415 CC), the Constitutional Court listened to evidence from community members and traditional leaders affected by the living law. The outcome, however, did not reflect an African solution. The requirements for an African marriage are that *lobolo* must be delivered and that the bride must be integrated into the groom's family. The majority judgment waded into dangerous waters by creating a third requirement for the conclusion of an African marriage that was not previously there, by making consent of the first wife compulsory. Ndima points out that the problem with this construction is that the court enabled an environment where two rules would exist – namely, official law as pronounced by the courts, and the actual lived practices of the community (Ndima "Re-Imagining and Re-Interpreting African Jurisprudence Under the South Africa Constitution" (LLD thesis, Unisa) 2013 185). Kamga argues that *ubuntu* was given effect to in cases such as *MM v MN* (*supra*) and *Bhe v Magistrate Khayelitsha* (*supra*) (Kamga "Cultural Values as a Source of Law: Emerging Trends of Ubuntu Jurisprudence in South Africa" 2018 *AHRLJ* 637).

This is because customary law echoes *ubuntu*, and customary jurisprudence was given effect to in terms of section 211 of the Constitution, which provides that customary law is recognised provided it is consistent with the Bill of Rights. There is, however, nothing that expresses *ubuntu* in the mentioned Constitutional Court judgments: in *MM v MN* (*supra*), the Constitutional Court declared a second marriage unconstitutional because the first wife did not consent to the marriage. It is submitted that leaving the second wife unprotected is not in accordance with *ubuntu*. If *ubuntu* had been applied, then this would have led the court to focus on the legitimate purpose served by a second marriage, and on finding ways to protect also the second wife. Similarly, in *Bhe v Khayelitsha Magistrate* (*supra*), the court would not have declared primogeniture unconstitutional because this is an

important African practice that serves a legitimate purpose (Centre for Child Law *Amicus Curiae*) 2007 12 BCLR 1312 (CC)). This approach highlighted the dominance of Western values over African values. There are cases such as *M v S* (Centre for Child Law *Amicus Curiae*) 2007 (12) BCLR 1312 (CC)), where it could be argued that the outcome was informed by *ubuntu*. This is largely because one of the judges, Conradie J, referred to the importance of restorative justice rather than the Western criminal justice. There is also the case of *Joseph v City of Johannesburg* (2010 4 SA 55 (CC)), where the court referred to the "Batho Pele" principle. Skweyiya J stated that "Batho Pele gives practical expression to the constitutional value of ubuntu". Ntlama argues that while decisions such as *Bhe v Khayelitsha Magistrate; Shibi v Sithole* (*supra*), can be celebrated because they achieved a measure of gender equality, this is nonetheless compromised by the heavy reliance on Western conceptions of gender equality and the failure to afford customary law an opportunity to achieve the same end. She refers to *Dalindyebo v State* (2016 (1) SACR 329 (SCA)), where an opportunity to develop the African philosophy of *ubuntu* was wasted in the interpretation of the criminality of a king/queen within the framework of customary law. The court could have developed the concept of the "king can do no wrong" and enabled the infusion of African criminal law into the determination of the guilt of the king (Ntlama "The Centrality of Customary Law in the Judicial Resolution of Dispute That Emanates From It: *Dalisile v Mgoduka* (5056/2018) [2018] ZAECMHC" 2019 *Obiter* 209).

Scholars have debated the role of customary law in the post-constitutional era and how it should be integrated into judicial pronouncements in the wake of judgments such as *Alexkor v Richtersveld Community*, where a pronouncement was made that the time has passed where the African values would be viewed through the lens of the common law (par 51). Amalgamation has been proposed, but there is no clarity on the form amalgamation could take. Should it, for example, retain the choice-of-law departure point that currently exists with the common law and customary law, but make these options generally applicable to everyone? (Weeks "Constitutionally Transforming South Africa by Amalgamating Customary and Common Law: *Ramuhovhi*, the Proprietary Consequences of Marriage and Land as Property" 2021 11(1) *Constitutional Court Review* 182). Alternatively, should choice of law be retained, but common law draw from customary law to make the common law more infused with customary law or more African? Weeks states that it might be a better option to do away with the choice of laws altogether and have a situation where both the common law and customary law can be merged so that South Africa would have only one single and unified system of law made up of the two jurisprudences, and courts would be guided and apply this in their dispute resolution (Weeks 2021 *CCR* 36–41). It could be argued that amalgamation is problematic because it continues to reaffirm the common-law paradigm, and litigants would not have an option of having customary law as the only system applicable to their dispute. It further denies South Africa a decolonised option because judicial pronouncements on customary law would reflect the common law as part of the solution.

This cannot be advisable at a time when indigenisation should be a solution. Indigenisation is about re-affirming African culture and identity. This

view does not ignore the existence of other jurisprudences, but it is argued that a departure is needed from the common law, and customary law should be afforded space to resolve disputes independently, without the prowling eye of the common law. One could argue that there is hardly anything indigenous about Africans anymore. From fashion to food, education, and thinking, Africans have adapted to modernity, thereby questioning mainstream understandings of the meaning of customary law. It is therefore important not to ignore how Africans adapt their daily lives to socio-economic changes. Customary law is a result of people adapting indigenous law to socio-economic changes such as urbanisation (Diala "The Concept of Living Customary Law: A Critique" 2017 *International Journal of Law, Policy and the Family* 158. Thus, customary law differs from indigenous law because it emerges from indigenous law. English common law is essentially a system of customary law. Customary law is whatever people do at any given moment (Hund "'Customary Law Is What People Say It Is': HLA Hart's Contribution to Legal Anthropology" 1998 *Archives for Philosophy of Law and Social Practice* 420).

However, there are still millions of people who live their daily lives based on indigenous values, and these values must be part of the mainstream legal system. Amalgamation is a reversal of the commitment to walk away from viewing customary law through the lens of the common law. There is also the option of harmonisation, in terms of which an attempt is made to remove the discord between the common law and customary law and to reconcile the contradictory principles of the two to enable the two to coexist (Allot "Towards the Unification of Laws in Africa" 1965 *International and Comparative Law Quarterly* 366). The struggle for recognition of customary law has never been about harmonisation but is about recognising that customary law has a rich body of literature that has served the majority of people in South Africa. Judges must be innovative and come up with ways to infuse customary law into dispute resolution. Nhlapo argues that the disputes of indigenous people of South Africa should strongly be influenced by the integration of the culture of its people, and thus a departure should be taken from the history of re-imagining the African legal system through Western glasses, which makes transformation necessary (Nhlapo "Human Rights: The African Perspective" 1995 (6)1 *ALR* 38). Section 211 of the Constitution provides that customary law is applicable to the extent of its consistency with the Bill of Rights; this has been understood to entail that African values or practices not consistent with the Bill of Rights should be abandoned in favour of the latter. However, there is an element of creativity and innovation required of a judge when faced with a conflict between the two systems (Pieterse "It's a Black Thing: Upholding Culture and Customary Law in a Society Founded on Non-Racialism" 2001 17 *SAJHR* 392). This is what Mathenjwa J achieved in *Bulelwa*: the infusion of African values by recognising *ukuthwasa* as a defence in a civil case.

4 1 The contribution of indigenous practices

There are other important practices that are in line with *ubuntu* that highlight the power of customary law to exist independently but also to contribute to the socio-economic challenges of South Africa. For example, there is the

letsema customary practice in terms of which communities can come together to plough their cropping fields so that it can later form part of the economic activities to sustain the communities. This is a customary-law contract. However, the underlying aims and consequences of the contract differ from those of a common-law contract (Mahoney "Contract and Neighbourly Exchange Among the Birwa of Botswana" 1977 *Journal of African Law* 58). Another example is a *mafisa* contract, which is a livestock loan or farming-out contract: a community member who owns a large herd of livestock lends a portion of it to another community member who can benefit through milking and other benefits (Himonga and Nhlapho (eds) *African Customary Law in South Africa: Post-Apartheid and Living Law Perspectives* (2014) 194–195). The practice carries the risk that the livestock may suffer from disease, and of the loss of livestock, but indigenous communities use the practice for the upliftment of each other (Bekker "Law of Contract" in Joubert (ed) *LAWSA XXXII Indigenous Law* 2ed (2009) 241). A mere promise is enforceable in indigenous law and damages can be claimed when a promise is broken (Schapera "Contracts in Tswana Case Law" 1965 *Journal of African Law* 142). Bekker states that indigenous contracts are real contracts, and there are no fundamental differences between indigenous and Western contracts of purchasing (Bekker *Seymour's Customary Law in Southern Africa* 5ed (1989) 332), exchange or loan agreements. Indigenous courts, when settling social problems in the community, endeavour to reconcile disputing parties within the community's basis of social harmony. Individuals are persuaded to accept the community's *boni mores* – the standards of social behaviour and conformity (with the emphasis on diverse extra-legal traits such as friendliness and generosity) (Whelpton "Die Inheemse Kontraktereg van die Bakwena ba Mogopa van Hebron in die Odi I Distrik van 250 Bophuthatswana" (Unpublished LLD thesis, Pretoria: University of South Africa) 1991 72).

The jurisprudence on *ubuntu* and other practices such as *letsema* must be allowed to form part of the mainstream law and can contribute to overcoming socio-economic challenges such as poverty and unemployment. It is argued that the LLB curriculum in institutions of higher learning must improve the pace of curriculum decolonisation and should infuse African knowledge systems into the LLB curriculum. More importantly, it is argued that these concepts can assist in fighting poverty and in reforming other aspects of law and social justice. Mbembe argues that the LLB curriculum is problematic because it is heavily loaded with Eurocentric epistemology; it mirrors that of the commonwealth tertiary institutions, except that in some quarters, efforts may have been made to integrate the concept of *ubuntu* (Mbembe "Decolonising the University: New Directions" 2016 *AHHE* 32).

Most institutions of higher learning in South Africa have an obligation to implement curriculum transformation to decolonise the curriculum, which has continued to reflect Western epistemologies and pedagogies (Mendy and Madiope "Curriculum Transformation: A Case in South Africa" 2020 38(2) *Perspectives in Education* 2). Institutions of higher learning have provided glossaries of the 11 official languages: the University of South Africa (Unisa) is an example – it identifies the role played by multilingualism as a significant enabler of transformation. Unisa had removed Afrikaans as a medium of instruction and only recognised English. However, the Constitutional Court

upheld the Supreme Court of Appeal's finding that the new policy, excluding Afrikaans, was not consistent with the right to education in terms of section 29(2) of the Constitution (see *Chairperson of the Council of UNISA v AfriForum* 2022 (2) SA 1 (CC); see also *AfriForum v University of the Free State* [2017] ZACC 48; 2018 (2) SA 185 (CC). See also *Daniels v Scribante* 2017 (4) SA 341 (CC) par 154). Afrikaans was removed as a medium of instruction at Unisa following the institution's policy objective of making tuition available in all South African official languages to enable an effective multilingualism. When this proved not immediately feasible, the institution opted to remove Afrikaans and had tuition temporarily offered only in English. There is thus a need for the phasing in of all indigenous languages as having English as the only medium language in South Africa is unconstitutional in terms of section 29(2) of the Constitution, which provides:

> "Everyone has the right to receive education in the official language or languages of their choice in public educational institutions where that education is reasonably practicable."

Other institutions, such as Stellenbosch University, have begun to offer their curriculum in Xhosa. However, transformation is not merely about offering the same curriculum in a language other than English and Afrikaans. It is about what is taught and how it is taught. The journey for curriculum transformation is generally slow in institutions of higher learning. Himonga argues that a decolonisation of the law project is needed to heal the country of the heavy reliance on Western-centred knowledge (Himonga "The Constitutional Court of Justice Moseneke and the Decolonisation of Law in South Africa: Revisiting the Relationship Between Indigenous Law and Common Law" 2017 *AJ* 117). It has the potential to free the country and legal education system from the Eurocentric epistemological concept of law that is deeply rooted in colonialism, which has dominated the legal culture.

Rautenbach asserts that decolonisation of law is vital for the survival of living customary law as an independent legal system that regulates the lives of millions of people. She further asserts that it is important because it provides the basis for an alternative legal epistemology that can realise the true transformative potential of law in regulating real lived inequalities of people (Rautenbach *Introduction to Legal Pluralism* 56). What curriculum decolonisation seeks to do is actively and consciously bring to the centre other marginalised knowledge systems to ensure that both form and substance of the curriculum transcends Western standardised normativity. This would allow judges who have not been fully initiated into how to infuse African knowledge systems into the law a legitimate platform to question the standards and methods of Westernised Art and Humanities, Pure and Life Sciences, Law, Education and Economics, and to reimagine what it could and should be. This would result in judicial outcomes that reflect an infusion of African ontologies and epistemologies. This is not merely about promoting a new hegemony but about enabling a pluralistic approach where other knowledge systems such as customary law can be used to solve disputes without the prowling eye of the common law. However, it must be acknowledged that just because people love a concept such as decolonisation does not make it easy to achieve. Diala argues that law teachers do not unmask colonialism in order to pursue a "successful

ideological struggle for African beliefs (religion), way of life (culture), and perception of the world (philosophy)" (Diala "Curriculum, Decolonisation and Revisionist Pedagogy of African Customary Law" 2019 *Potchefstroom Electronic Law Journal* 6). Colonialism has had an irreversible impact on Africans. This includes indoctrination through Christianity and ethnic conflicts (Diala 2019 *PELJ* 14). The way forward should include unmasking the impact of colonialism on the African people and their legal culture, and focusing on forging a new identity and self-contemplation.

There is thus a need to re-centre the significance of African knowledge systems. For example, South Africa currently experiences the problem of police brutality. This was widely experienced after the outbreak of Covid-19, where scores of people were brutalised and some regrettably killed. This culture must not be tolerated, according to the adage that says *ngwana phoso ya dirwa ga bolawe*, meaning that death or police brutality cannot be justified or used as a response to any unlawful act a person may have committed. It is argued that many indigenous value systems can be infused into the legal system, LLB curriculum and other socio-economic issues and educational challenges faced by South Africa as a developing country (Mendy and Madiope 2020 *Perspectives in Education* 14). It would produce lawyers and judges with a different legal culture to the Western-orientated culture – ones who would be creative and innovative in their pronouncements.

Restorative justice is both backward-looking in that it includes dealing with the "aftermath of the offence", and forward-looking, in that it is a process that looks at implications for the future. This introduces a crime-prevention element to the process in that an effort is made to identify how future incidents may be avoided (Bailey "*Ngwana phosa dira ga a bolawe*: The Value of Restorative Justice to the Reintegration of Offenders" 2008 *South African Crime Quarterly* (*SACR*) 28). The White Paper on Corrections in South Africa (2005) provides a vision for viewing correction as a societal responsibility: correction is therefore not just the duty of a particular department. It is the responsibility of all social institutions and individuals (starting with the family and educational, religious, sport and cultural institutions), and a range of government departments. It is only at the final point, where society has failed an individual, that the criminal justice system and the Department of Correctional Services step in (Bailey 2008 *SACQ* 34).

5 Conclusion

Customary law, despite being the law of the majority of the South African population, continues to play a secondary role to the common law as courts are happy to continue the latter's paradigm. A commitment was made in judgments such as *Alexkor* to move on, yet in subsequent judgments, the paradigm continued. It is nevertheless refreshing that the High Court in *Bulelwa* has recognised the role played by customary law and recognised *ukuthwasa* as a defence in a civil claim. The judgment is commended, and it is hoped that more such infusion will happen. The goal should be indigenisation, where customary law is afforded the sole space to resolve a dispute. The common law should rather be afforded space where customary law falls short of resolving a dispute. This is in line with the choice of laws

because the dispute in hand would determine whether to refer to the common law or customary law. The parties themselves should have the space to determine by which law they wish their dispute to be resolved. It is argued that customary law has a lot more to offer and this must be explored so that the jurisprudence can participate in finding solutions to the country's ills, such as poverty.

Aubrey Manthwa
University of South Africa

RACIAL CONSIDERATIONS ARE A PREREQUISITE AND NOT AN AFTERTHOUGHT: A DISCUSSION OF

Kroukamp v The Minister of Justice and Constitutional Development **[2021] ZAGPPHC 526**
and
Magistrates Commission v Lawrence **2022 1 All SA 321 (SCA)**

1 Introduction

This case note engages in a critical examination of two recent cases concerning the issue of race-based appointments, or rather the lack thereof, in the judiciary. The crux of this case note concerns the appointment of judicial officers as regulated by section 174 of the Constitution of the Republic of South Africa, 1996 (Constitution). In particular, the case note is driven by subsection 2 of section 174, which provides:

> "The need for the judiciary to reflect broadly the racial and gender composition of South Africa must be considered when judicial officers are appointed."

In essence, this case note is an advocate for the argument that the South African judiciary must reflect the demographics of the country. That is to say, racial considerations are a prerequisite in judicial appointments, and not an afterthought. The case note starts with a discussion of the matter that was before the Gauteng High Court, sitting as the Equality Court, in *Kroukamp v The Minister of Justice and Constitutional Development* ([2021] ZAGPPHC 526). The case note then discusses the later decision of the Supreme Court of Appeal in *Magistrates Commission v Lawrence* (2022 1 All SA 321 (SCA)).

The *Kroukamp* case concerns a claim of unfair discrimination before the Equality Court (par 1). The first complainant in the matter was Martin Kroukamp, with the second complainant being the trade union Solidarity. The first respondent was the Minister of Justice and Constitutional Development (Minister), the second respondent was the Director-General of the Department of Justice and Constitutional Development (Director-General), the third respondent was the Magistrates Commission (Commission), and the fourth respondent was the Chairperson of the Magistrates Commission (Chairperson). The two complainants instituted proceedings in the Equality Court after a decision by the Minister not to fill 23 senior magistrate vacancies (par 1). The complainants sought relief in the form of a declaration that the decision by the Minister not to appoint Kroukamp in the position of senior magistrate was unfair discrimination on the basis of race (par 2). According to the complainants, this decision by the

Minister was prohibited by sections 6, 7 and 8 of the Promotion of Equality and Prevention of Unfair Discrimination Act 4 of 2000 (the Equality Act) (par 2). With reference to the alleged unfair discrimination, the complainants also sought to prevent the Minister from making such appointments after considering race alone, and sought an order directing the Minister to appoint Kroukamp into the position of senior magistrate in line with the recommendation of the Commission (par 2).

The *Lawrence* matter consists of three judgments. The first judgment is the majority judgment by Potterill AJA, the second judgment is a minority judgment by Molemela JA, and the third judgment is a concurring judgment by Ponnan JA. The majority and its concurring judgment reject the prerequisite nature of section 174(2) of the Constitution, as according to the majority ruling, such an approach would lead to no White male candidates being appointed. The second, minority judgment of Molemela JA, on the other hand, advances the prerequisite nature of this section, whose intention is to give life to substantive equality and redress. The case note now proceeds to engage in an examination of the *Kroukamp* case.

2 Facts of the *Kroukamp* case

The Commission advertised 23 vacancies for the position of senior magistrate on November 2009 in various districts (par 3). Kroukamp applied for the post of senior magistrate in Alberton. The Commission then prepared a list of candidates. The candidates, who included Kroukamp, were then interviewed for the post in Alberton (par 4). After this process, a list of recommendations was submitted on 28 February 2011 by the Commission to the Minister. The Commission had only recommended one candidate per post for all 23 vacancies (par 5). According to the Commission, the recommended candidates reflected the racial and gender make-up of the Republic. Kroukamp was one of the candidates recommended for the various posts, in particular the vacant post of senior magistrate in the Alberton region. The Minister on 15 June 2011 proceeded to request the Commission to provide him with further information as the information before him was not sufficient to enable him to make judicial appointments (par 6). The Commission filed a response on 28 February 2012 in which it was of the view that there were not enough candidates from which it could make recommendations; as a result, it could only suggest one candidate per post (par 7). Furthermore, according to the Commission, the gender and racial balance in the Alberton region would not be disturbed by the appointment of this White male candidate (par 9). The list of recommendations had taken into account the race and gender make-up; as such, section 174(2) of the Constitution had been complied with (par 10).

However, during the course of 2011, the Minister questioned why only one candidate had been recommended for each of the 23 vacant positions and whether this was ideal for our constitutional aspirations especially after considering the recommendation of three White males for some of the posts (par 11). In February 2012, the Commission provided a detailed response stating that it was bound by its earlier decisions and in these circumstances, only three candidates were shortlisted per post and in most cases only one

candidate was found suitable for appointment, hence only one name being submitted to the Minister (par 12). The Commission went further, stating that the other suitable candidate, an Indian woman, had been appointed in the Johannesburg region (par 13).

The Minister then wrote to the Chairperson on 30 November 2011, stating that while he accepted the recommendation of one candidate per post, he still refused to make any appointments as he was not satisfied with the pool from which the recommendations were made (par 14). The Minister viewed these positions as being critical to the transformation of the judiciary, thus necessitating the consideration of Black women judicial officers (par 14). According to the Minister, this transformation agenda was more significant in vacancies such as the ones advertised, as it was in such senior positions (where there was an under-representation) that the appointment of Black women was needed (par 14). The Minister then proceeded to decline to make any appointments from the Commission's recommendations in May 2013; as such, the Secretary of the Commission suggested that the vacancies be re-advertised. The Equality Court expressed its opinion that there was no reason in law for the Minister not to make appointments simply because there was only one recommendation (par 15). The Equality Court stated further that the Minister in this instance over-relied on section 174(4) of the Constitution. The Constitution allows the appointment of magistrates to be based on an Act of Parliament – in this instance, the Magistrates Act 90 of 1993 (the Magistrates Act). The Magistrates Act does not suggest a specific number of recommendations per post for an appointment to be made. The court expressed the view that the Minister had sought to hide behind section 174(4), and that the only reason for the Minister refusing to appoint the complainant as a senior magistrate of Alberton was because he was not Black and a woman (par 15).

3 Decision of the Equality Court

As a result of the Minister's decision, Kroukamp felt aggrieved and proceeded to launch proceedings, claiming that there was unfair discrimination on the basis of race and/or gender in contravention of sections 6, 7 and 8 of the Equality Act (par 16). The court was of the view that the Minister had no regard to the Commission's balance-of-representation exercise and the merit requirement (par 20). Kroukamp argued that a decision based on considerations of race and gender does not stand in the face of the requirement that affirmative action must be applied in a situation-sensitive manner that takes into account the ability of the applicant.

Kroukamp conceded that it is not unfair discrimination to enforce requirements that were meant to redress the race-based injustices in an attempt to advance such persons who were disadvantaged (par 21). However, this concession according to him did not mean that such important vacancies be left open owing to the requirements of race or gender alone, which may go against other suitable candidates (par 21). Kroukamp was of the view that if the application of race and gender considerations alone went against the appointment of candidates, service delivery in such instances

would be unjustifiably and adversely affected by the Minister's pre-occupation with race and gender representation to the exclusion of other relevant considerations such as competency (par 21). To Kroukamp, the Minister taking into account that he was a White male was unacceptable (par 21). Kroukamp further conceded that the Minister refused to make such appointments owing to insufficient information as there had only been one recommendation per post, even in instances where Black women were recommended (par 22).

The argument of the respondents was that there were no appointments made, even in instances where Black males had been recommended; as such, there was no unfair discrimination (par 23). According to the respondents, there was a difference between not filling a vacant position and not making any appointments. The respondents argued further that the two complainants had failed to prove a *prima facie* case, on a balance of probabilities, that there was unfair discrimination. The respondents further argued that if the complainants made out a *prima facie* case of such alleged unfair discrimination, the respondents would have the onus to disprove it. The respondents' case, in simpler terms, was that there was no unfair discrimination owing to race or gender considerations, but rather, the Minister simply refused to fill the vacant posts owing to insufficient information because of the small pool of candidates recommended by the Commission (par 25).

In the Minister's letter dated 5 June 2011, he stated clearly that what had transpired was different from the usual practice where he was provided with a list of candidates who are according to the Commission fit and proper to be appointed as presiding officers, and from which he would then make such appointments (par 26). Moreover, the Commission's actions of simply submitting one recommended candidate per post deprived him of the opportunity to assess the various attributes that need to be analysed when making such appointments. Furthermore, the Commission's recommendations in the districts of Durban, Alberton and Worcester purported to meet the requirements of section 174(2) of the Constitution, when they did not (par 26). In essence, the respondents were of the view that the Commission's one recommendation per post deprived the Minister of his discretion. The respondents further suggested that since Kroukamp conceded that the Minister did not make any appointments, even where Black females were recommended, should have disposed of the matter (par 27).

The Chairperson had provided an explanation for the recommendation of Kroukamp, which was to bring stability to the office in Alberton owing to his leadership, which was needed (par 28). According to the Equality Court, the Minister failed to explain why he did not consider the additional information provided by the Commission in its response. The court expressed the view that this was owing to his fixation on the explanation he provided that one recommendation per post limited the pool from which he could choose, which violated his discretion, and which was why Kroukamp and others were not appointed (par 30). The Equality Court stated further:

> "However, it is glaringly clear that the main reason for the nonappointment of the first complainant was that 'I have found the pool of the candidates from which I am required to make appointments inadequate for purposes of making appointments that aim at the advancement of the constitutional imperative regarding the transformation of the judiciary. This is more significant especially at the level of Senior Magistrate where these vacancies occur, as it is at the management echelon of the judiciary where we still experience acute underrepresentation of Black and Woman Judicial officer'." (par 31)

The Equality Court proceeded to state that the Equality Act forbids unfair bias. It is legislation that gives life to section 9 of the Constitution, which is the equality clause. Using the principle of subsidiarity, the court reasoned that it is the provisions of the Equality Act that must be applied and there must be no direct reliance on section 9 of the Constitution (par 33). The court gave effect to the principle laid down in *MEC for Education, KwaZulu Natal v Pillay* (2008 (1) SA 474 CC par 40) – namely, that a party cannot avoid statutes enacted to give effect to a constitutional right by attempting to rely directly on the constitutional right. In essence, the respondents cannot rely directly on section 174(2) of the Constitution, but rather, they were supposed to use section 9(2) of the Equality Act (par 34). The court was of the view that section 9 of the Equality Act provided procedural advantages that were not available in the constitutional provisions. The complainants, according to the Equality Court, provided evidence that forced the court to rule in their favour (par 35).

With regard to the issue of discrimination, the Equality Court noted that the relevant test in such instances is whether there is an element of unequal treatment of people owing to their characteristics, as suggested in *Harksen v Lane* (1998 (1) SA 300 (CC) par 48 (par 36)). According to the court, section 174(2) of the Constitution does not provide for absolute consideration of race or gender in judicial appointments (par 37). The court went further and stated that it agreed with the Equality Court's decision delivered by Ledwaba J (as he was then) in *Singh v Minister of Justice and Constitutional Development* (2013 (3) SA 66 (EqC) par 27), when it stated that race and gender in section 174(2) of the Constitution must not be misconstrued as excluding the other crucial factors mentioned in section 9(3) of the Constitution. Rather, the Constitution must be construed as a whole. In this case, the Minister simply ignored the Commission when it said it had properly considered the application of section 174(2) when making its recommendation of Kroukamp (par 39). The Minister further ignored the Commission's plea that the appointment of Kroukamp would have no effect on the composition of the demographic make-up of senior magistrates. The Minister only focused on the race and gender of Kroukamp, neglecting the other qualities for which he was recommended, and such behaviour by the Minister was simply unfair discrimination (par 39).

Another element the complainants raised was the neglect by the Minister of the Magistrates Act and of the Magistrates' Courts Act 32 of 1944 (Magistrates' Courts Act). These statutes provide for the appointment of fit and proper persons as suggested by section 10 of the Magistrates Act and section 9(1) of the Magistrates' Courts Act (par 40 and 41). Relying on *Van Rooyen v State* (*General Counsel of the Bar of South Africa intervening*) (2002 (5) SA 246 (CC)), the court noted that these appointments are done in

consultation with the Commission, which consists of responsible members of society and there is no reason to believe that these members would fail to implement their duties with integrity (par 42). However, the recommendations of the Commission do not bind the Minister, as he is not obliged to make appointments based on such recommendations (par 42; see also *Van Rooyen v State supra* 109). The Equality Court in this case proceeded to note:

> "Once it is recognised that the Magistrates Commission fulfils the role of a constitutional check upon the decision-making power of the Executive, then it must follow that the Minister must have reasons competent in law for declining to follow the recommendations." (par 45)

In the present case, section 174(1) and (2) of the Constitution are relevant in the appointment of prospective judicial officers under section 10 of the Magistrates Act, as the judicial officer must not only be a fit and proper person, but the judiciary must also represent broadly the demographics of the Republic (par 46).

With regard to these appointments, the court referred to an article by Judge Davis, which supported an approach that first considers candidates who have merit for the appointment, and should appointment of such a candidate not ensure a proper representation of the demographics, only then would section 174(2) apply to consider another candidate that was not a first or second choice but who still had the necessary merit (par 47). Raulinga J in this case was of the view that the Minister held the idea that no matter what the Commission's view or recommendation was regarding Kroukamp as a suitably qualified individual for the position of senior magistrate in the Alberton district, he was simply not ready to appoint a White male candidate to fill that vacancy (par 48). According to the Minister, White male candidates should not be recommended for that position given the constitutional aspirations towards transformation. However, the court found that section 174(2) makes no provision that prohibits the recommendation and appointment of White males in these judicial positions. The court, using the Minister's "body language" as evidence, then concluded that his reasons were not sufficient to justify his decision, and that accordingly he had violated the Equality Act (par 50; see also *Minister of Environmental Affairs and Tourism v Pham Fisheries (Pty) Ltd* 2003 (6) SA 407 (SCA) par 40). Raulinga J went further to state that the language used by the Minister, even though ambiguous, showed that his reason for the non-appointment of Kroukamp was that he was a White male, and this is unfair discrimination (par 50). The Minister failed to prove that such discrimination was fair.

The court then stated:

> "We may not become a united society and heal the divisions of the past, if we apply the apartheid inequalities in reverse. Painful as the injustices of the past might have been, we must endure the pain and soldier on." (par 52)

According to the Equality Court, there has been a lot of progress post 1994 in the demographic representation of magistrates (par 53). The Equality Court stated that members of the Black population have taken posts in the judiciary, which has increased their trust in the judiciary. In the same way,

the White population will have increased trust in the judiciary if they see some of their own occupying these positions.

4 Comments on the *Kroukamp* case

This case note respectfully does not agree with the approach and the conclusion reached by the Equality Court in this matter for reasons detailed below. The first point of departure is disagreement with the Equality Court's application of section 174(2) of the Constitution. This provision requires that the appointment of judicial officers must represent the demographic of the Republic of South Africa, in light of the injustices of the colonial and apartheid regimes' unjust racial policies (s 174(2) of the Constitution). While this provision has not yet been given a fixed interpretation by the courts and legal scholars, it is clear that it was intended to redress the injustices highlighted above (Siyo and Mubangizi "The Independence of South African Judges: A Constitutional and Legislative Perspective" 2015 18(4) *PELJ* 817 824). It is evident that the Constitution attempts to recognise the racial and gender oppression that the broader Black community faced from the White community, which extended to the appointment of judicial officers. The case note submits that the provision cannot be relegated into a secondary requirement as the Equality Court has attempted to do, but rather, the provision is a prerequisite on its own that can and should override other requirements (Malan "Reassessing Judicial Independence and Impartiality Against the Backdrop of Judicial Appointments in South Africa" 2014 17(5) *PELJ* 1965 1977).

Using the Magistrates Act, which provides for the appointment of any fit and proper person as a magistrate, the court sought to bypass the need for transformation and adopted once again the legal formalism that is a tool for colour blindness (par 40 and 41). In furtherance of the neoliberal approach of non-genuine meritocracy, the court stated that it preferred the approach where the first step is to find the candidates who are the very best in terms of criteria of merit. Then, and only then, if the ranking of candidates does not reflect the required representation, will race and gender apply to candidates who may not have been the first or second choice in the ranking but who nevertheless comply with the test of merit and hence are appropriately qualified.

This case note submits that the court suggests that race and gender are secondary issues, based on sympathy and not valid primary issues that are sought to be achieved from the start of the process (Madlingozi "Social Justice in a Time of Neo-Apartheid Constitutionalism: Critiquing the Anti-Black Economy of Recognition, Incorporation and Distribution" 2017 28(1) *Stellenbosch Law Review* 123 133). The court further provides a problematic approach when it states that our society may not become a united society and heal the divisions of the past if it continues to apply the apartheid inequalities in reverse. The court seems to suggest that Black people have the strategy, power and systems in place to effect racially-based discrimination Needless to say, this is not the case. The court's perspective on this issue is, respectfully, misplaced. When it comes to an analysis of unfair discrimination, vulnerability is an important factor (Kruger "Equality

and Unfair Discrimination: Refining the Harksen Test" 2011 128(3) *SALJ* 479 491; for an example of the vulnerability of Black people, see *Moseneke v The Master of The High Court* 2001 (2) SA 18 (CC) par 20–22; *Bhe v Magistrate, Khayelitsha* 2005 (1) SA 563 (CC) par 60–68). In the history of the Republic and the broader continent as a whole, White people have not historically had any form of vulnerability that is sufficient to suggest that redress statutes would be an application of reverse exclusion (Kruger 2011 *SALJ* 492). There are no past patterns of disadvantage and vulnerability that would justify this statement by the Equality Court (Kruger 2011 *SALJ* 493). In essence, if such an approach is allowed, it would undermine the actual victims of exclusion and injustice because the past political regimes ensured that their policies were to the sole advantage of White people and their infrastructure built on the backs of Black people (*Pretoria City Council v Walker* 1998 (2) SA 363 (CC) par 45 and 47).

The reason to have section 174(2) take precedence over other provisions is that such an approach would rid the courts of the narrative of meritocracy, which in reality is not neutral but rather breeds colour blindness and results in the perpetual disadvantage of the Black community (Ramalekana "A Critique of the Stigma Argument Against Affirmative Action in South Africa" 2022 4 *OHRH* 1 2; Brassey "The Employment Equity Act: Bad for Employment and Bad for Equity" 1998 *ILJ* 1366). The reality of South Africa is that merit is based on privilege. Allowing such an approach assumes that the starting point for the Black and White community is the same; needless to say, it is not (Ramalekana 2022 *OHRH* 21). Simply put, the case note makes the argument that the provision on demographic representation must not be interpreted as an afterthought or secondary requirement, but rather, demographic representation must be met at all costs without making the assumption (as the Equality Court does) that such an approach will be anti-merit. Nowhere in the Constitution does it state that merit supersedes the demographic-representation requirement.

Owing to the court's refusal to allow reliance on section 9 of the Constitution, it is necessary to enquire whether this approach does not lead to a failure to understand substantive equality, which is the primary purpose of the equality clause. As can be seen from *Minister of Home Affairs v National Institute for Crime Prevention* (2005 (3) SA 280 (CC) par 21), substantive equality is a legally enforceable right (see also *National Coalition for Gay & Lesbian Equality v Minister of Justice* 1998 (12) BCLR 1517 par 62; *President of the Republic of South Africa v Hugo* 1997 (4) SA 1 (CC) par 41). The court's approach is dangerous as it harbours conventionally gendered and racialised ideas of society (Albertyn "Substantive Equality and Transformation in South Africa" 2007 23(2) *SAJHR* 253 254). Albertyn suggests that equality jurisprudence must be consistent in order to properly address the systematic inequalities of our society and overcome the detrimental effect of legal formalism, which the court seemed to adopt in this case (Albertyn 2007 *SAJHR* 253 254).

This view is in line with the approach suggested by Molemela JA in par 38 of *Magistrates Commission v Lawrence* (*supra*), where she provides that section 174(2) must be understood in the context of substantive equality.

This approach would then invalidate the Equality Court's argument of reverse injustice to the White population. As Moseneke DCJ in par 26 of *Minister of Finance v Van Heerden* (2004 (6) SA 121 (CC)) states, the equality provision in the form of substantive equality must be understood in a historical context. In simple terms, when it comes to the issue of equality, one cannot reach a correct conclusion without an examination of the historical context of the Republic (Kruger 2011 *SALJ* 491; see also *Daniels v Campbell NO* 2004 (5) SA 331 (CC) par 48–54; *Brink v Kitshoff NO* 1996 (4) SA 197 (CC) par 40–43; *President of the Republic of South Africa v Hugo supra* par 74). This is because our history is filled with racism and sexism towards Black people. In order to address this, one must not simply interpret statutes as they are, but rather in a manner that seeks to redress and transform (Kruger 2011 *SALJ* 491). Nowhere in the history of the Republic of South Africa have Black people sought and had the necessary means to oppress White people, although the Equality Court also makes an assumption that enforcing this redress approach would result in such. It must be understood that restitution, transformation and redress are extremely important aspirations of the constitutional dispensation; they are given life to in the Bill of Rights and are not an abstraction as the Equality Court suggests (*Minister of Constitutional Development v South African Restructuring and Insolvency Practitioners Association* 2018 (5) SA 349 (CC) par 1; see also *Singh v Minister of Justice and Constitutional Development supra*). Had the court followed the approach highlighted above, the case note submits that it would have reached an appropriate conclusion for South Africa's historical context. The case note now examines the *Lawrence* matter.

5 Facts of the *Lawrence* case

Mr Lawrence, an acting magistrate, applied for the position of permanent magistrate in the magisterial districts of Bloemfontein, Botshabelo and Petrusburg (par 1). He was not shortlisted for any of these posts. Feeling discriminated against and aggrieved, he instituted legal proceedings in the Free State Division of the High Court, Bloemfontein (par 1). Parties to the action against whom Mr Lawrence sought relief included the Magistrates Commission (the Commission), Mr Zola Mbalo who is the Chairperson of the Appointments Committee of the Magistrates Commission (the Chairperson), the Minister of Justice and Correctional Services (the Minister) and Cornelius Mokgobo who is the Acting Chief Magistrate Bloemfontein Cluster "A". These parties were cited as the first to fourth respondents respectively, with the Helen Suzman Foundation being admitted as a friend of the court (par 1).

6 Discussion of Potterill AJA's judgment

The court first had to deal with the contention by Mr Lawrence that, in terms of section 5(2) read with section 6(7) of the Magistrates Act, the Committee did not meet the quorum threshold when the prospective applicants were shortlisted for appointment to Bloemfontein (par 3). Another contention of the

appellants was that Mr Lawrence's failure to join the other shortlisted candidates prevented the court from granting relief until they had been joined as parties to the matter before the court.

The Bloemfontein High Court found that the Committee did not meet the required quorum threshold in respect of the Bloemfontein shortlisting process. The Committee had 10 members.

> "In terms of s 5(2) of the Act the 'majority of the members of the Commission shall constitute a quorum for a meeting of the Commission'. During the shortlisting only five members were present." (par 4)

The Chairperson was fully aware of the shortfall. However, he relied on section 5(4) read with section 6(7), which allowed the progress of the meeting (par 4). In the absence of an appropriate quorum in terms of section 5(2), the meeting would not be valid and therefore section 5(4) could not be relied on (par 6). In essence, section 5(4) has to do with the determination of a quorum for a decision at a meeting that already meets the required minimum threshold (par 7). On this point, the SCA found that as the meeting was not quorate, the decisions made at that meeting, including the shortlisting of candidates for the Bloemfontein post, were not valid and accordingly had to be set aside (par 9). Regarding the joinder issue, the parties conceded that if the meeting did not meet the minimum threshold, then the issue of non-joinder would simply be academic (par 12).

The court then proceeded to highlight section 174(1) and (2) of the Constitution, which provides:

> "(1) Any appropriately qualified woman or man who is a fit and proper person may be appointed as a judicial officer. Any person to be appointed to the Constitutional Court must also be a South African citizen. (2) The need for the judiciary to reflect broadly the racial and gender composition of South Africa must be considered when judicial officers are appointed."

In addition, section 174(7) provides:

> "(7) Other judicial officers must be appointed in terms of an Act of Parliament which must ensure that the appointment, promotion, transfer or dismissal of, or disciplinary steps against, these judicial officers take place without favour or prejudice." (par 13)

The court went further, pointing out that

> "Section 10 of the Act provides:
>
> > '(10) The Minister shall, after consultation with the Commission, appoint magistrates in respect of lower courts under and subject to the Magistrates' Courts' […]Act.'" (par 14)

The court then moved to the Regulations for Judicial Officers in Lower Courts (1994 GN R361 in *GG* 15524 of 1994-03-11). Regulation 3 deals with the appointment of magistrates (par 15). This regulation provides that those who can be appointed as magistrates must be citizens of the Republic, fit and proper and appropriately qualified. Regulation 5 provides that the qualifications, level of education, merits, efficiency and competency of the

people who qualify for the appointment must be considered (par 15). The appointment procedure was approved, taking note of section 174(2) of the Constitution, which provides for consideration of racial and gender demographics at a specific office in an attempt to redress the corruption and imbalances caused by the colonial and apartheid regimes (par 17).

Mr Lawrence commenced acting as a magistrate on 2 January 2015. At the time of the shortlisting process, he had been acting for four years; in addition, he had been acting as the head of the Petrusburg office for two years (par 19). According to the SCA, his competence was not in question. The SCA noted further that Mr Lawrence was known for managing his office well. He held meetings with stakeholders of the community on a regular basis to identify issues and took remedial action to improve the service delivery of the office (par 21). The SCA further noted that Mr Lawrence met the requirements of regulation 3 in that he was a South African citizen, fit and proper and had the necessary qualifications (par 22). According to Potterill AJA, the Committee disregarded the fact that Mr Lawrence had acted and managed the Petrusburg office and that he was knowledgeable in the beliefs and traditions of that predominantly Afrikaans and farming community (par 25). Potterill AJA stated further that the Committee did not consider the relevant experience, qualifications, needs of the office and appropriate managerial skills. Rather, it focused on race as an exclusionary measure to sideline candidates who were White (par 25; the court relied on *Solidarity v Department of Correctional Services* 2016 (5) SA 594 (CC)).

To further justify its reasoning, the court relied on the decision of the Equality Court in *Singh v Minister of Justice and Constitutional Development* (*supra*) where the court had found that the mention of race and gender in section 174(2) of the Constitution should not be misunderstood to exclude the other important factors provided for by section 9(3) of the Constitution and which should also be factored in when shortlisting magistrates (*Magistrates Commission v Lawrence supra* par 27). The SCA also relied on the Equality Court decision in *Du Preez v Minister of Justice and Constitutional Development* (2006 (5) SA 592 (EqC)), which provided that such exclusionary measures create the absolute exclusion of non-designated groups (par 31). The SCA further relied on *Kroukamp v The Minister of Justice and Constitutional Development* (*supra* par 48), as the court stated that subsection 174(2) of the Constitution is not intended to prevent the appointment of White men (par 32). According to Potterill AJA, the advancement of section 174(2) as a disqualifying provision must be rejected (par 33).

Lastly, the SCA held:

> "The legislative scheme does not permit a targeted group approach, precisely because no one factor can at the outset override or take precedence over other factors. The starting point of the exercise was therefore fundamentally flawed. The record shows that the process was rigid, inflexible and quota-driven. The blanket exclusion of white persons, no matter how high they may have scored in respect of the other relevant factors is revealing. Any white candidate, no matter how good, was mechanistically excluded. The result was that Mr Lawrence's application was not considered at all. The approach of the Committee was not consistent with the proper interpretation and application of

> s 174 of the Constitution, regulation 5 or the AP. Rather than considering race as but one of factors, albeit an important one, the Committee set out to exclude candidates, including the respondent, on the basis of their race." (par 34)

The SCA found that that this approach by the Committee leads to an instance where no White candidate is considered.

7 Discussion of Molemela JA's judgment

Molemela JA, providing the minority judgment, agreed with her sister judge concerning the reasoning and conclusion of the non-joinder issue (par 36). The minority found that it cannot rightly be concluded that the Committee's decision regarding the Botshabelo post was rigid, inflexible and quota-driven. However, concerning the Petrusburg post, the minority agreed that the Committee's decision be set aside (par 36). Molemela JA agreed with Potterill AJA that the starting point to this issue is section 174(1) and (2) of the Constitution (par 37). Molemela JA saw these provisions as being two sides of the same coin.

According to the minority, context is everything. Section 174(2) must therefore be understood in the context of substantive equality (par 38). Molemela JA explained that equality is not only a core and foundational value provided for in the Preamble of the Constitution, but it is also an enforceable right enshrined in the Bill of Rights (par 38 of the judgment; the court also cited *Minister of Finance v Van Heerden supra* par 22). Molemela JA stated that the equality clause of section 9(2) required the State to take legislative measures to protect and advance persons who have been disadvantaged by unfair discrimination. This understanding of equality in a substantive manner unavoidably demands us to recognise the need to rectify the entrenched inequalities in our society (par 39). Molemela JA used the reasoning of Moseneke DCJ in *Minister of Finance v Van Heerden* (*supra* par 26) that, when dealing with the equity provision, one must consider the history of the Republic, the underlying values of the Constitution, and the non-racial, non-sexist society founded on human dignity to which it aspires (par 40). However, in *Van Heerden* (*supra* par 29), Moseneke DCJ proceeds to caution that if these principles are not viewed from the perspective of substantive equality, which seeks to redress the injustices caused by the past apartheid and colonial regimes, then these principles will simply ring hollow and not materialise (*Magistrates Commission v Lawrence supra* par 42).

Molemela JA proceeded to rely on *Minister of Constitutional Development v South African Restructuring and Insolvency Practitioners Association* (*supra* par 1), which holds that restitution is an important part of our transformative constitutional order. Something more than the abolition of discriminatory laws and the guarantee of equal rights was required in order to redress the injustices of past regimes – hence the Bill of Rights providing for remedial measures (*Lawrence* par 43).

Molemela JA concurred with these sentiments in *Van Heerden* and *SARIPA* in that section 174(2) aspires to a judiciary that mirrors the race and

gender make-up of the Republic, and this provision is focused on achieving substantive equality (par 44). Therefore, the measures taken in terms of section 174(2) are equally important to the transformation of our courts. Molemela JA cited Langa CJ in *Singh* (*supra* par 25), who stated that the justice system of the colonial and apartheid South Africa had an unwelcoming White face with Black people as its victims; injustice was administered by the courts, which were not only alien but also hostile to Black people (par 46). Molemela JA further noted that even after decades of the new constitutional dispensation, White males remained overrepresented in magisterial districts (par 48). The race of Mr Lawrence and the demographics of the magistrates' offices must not be considered an irrelevant and unspeakable topic, even though a non-racial society is the end goal of our country (par 52).

8 Discussion of Ponnan JA's judgment

Ponnan JA had immense difficulty in accepting Molemela JA's judgment, which according to him calls in aid certain statistics that formed no part of either party's case. Ponnan JA states that the second judgment goes beyond the appeal record, and doubted that the court could take judicial notice of statistics that date back over two decades (par 81). Ponnan JA argued further that the second judgment's approach and logic appear to misunderstand the nature of the case on appeal (par 82). According to Ponnan JA, Mr Lawrence did not seek to challenge the applicable provisions and regulations; rather, he sought to challenge how they were interpreted by the Committee. Therefore, the validity of these statutes and regulations is not in dispute (par 82). Ponnan JA was of the view that Mr Lawrence was not before the court to advance his case on gender; his case was based on race (par 83).

> "The fixed resolve to exclude any and all white candidates on account of their race is clear … Mr Lawrence's application was not considered at all. Instead, his candidacy was dismissed out of hand solely on the basis that he was a white male." (par 92)

Ponnan JA held that the process of the Committee was not only rigid and inflexible, but was also quota-driven (par 101).

> "The blanket exclusion of white candidates, no matter their strengths, is disconcerting. No white candidate was considered for Bloemfontein either. Regrettably, not even excellence could open the door to the consideration of a white candidate." (par 101)

Ponnan JA held further that the approach of the Committee was inconsistent with the correct interpretation and application of section 174 of the Constitution and regulation 5. Rather than using race as one of the factors to be considered in the appointment, the Committee simply sidelined candidates on the grounds of their race (par 104). Such an approach and failure to have regard for any factor other than race was unlawful and unconstitutional.

9 Comment on the *Lawrence* case

Section 174(1) and (2) of the Constitution makes provision for the appointment of a judicial officer who is fit and proper, and who has the necessary qualifications for office; and such an appointment must reflect the demographic make-up of our Republic (Siyo and Mubangizi 2015 *PELJ* 817 824). As stated above in the discussion of *Kroukamp*, subsection 2 does not yet have a interpretation (Siyo and Mubangizi 2015 *PELJ* 824). Without this provision, it would not be possible for our judiciary to do justice and for justice to be seen to be done for the people of the Republic (Siyo and Mubangizi 2015 *PELJ* 824). This provision must not be interpreted in a manner that suggests it is merely a guide and not a prerequisite for the appointment of judicial officers. If one adopts it as a guide, as the first and second judgments have, it becomes too narrow to effectively enforce the reflection of South African demographics (Siyo and Mubangizi 2015 *PELJ* 825).

It stands to reason that this provision is there to ensure that the marginalisation of those who were prejudiced by the past regimes does not continue. Therefore, section 174(2) is not an island; it must be read alongside section 9(2) of the Constitution. In essence, section 174(2) is given life by the principle of substantive equality (Siyo and Mubangizi 2015 *PELJ* 825). Substantive equality necessitates a consideration of the social and economic conditions of groups to ensure that constitutional aspirations are observed and implemented effectively (Siyo and Mubangizi 2015 *PELJ* 825).

The first and third judgments had no regard to the history and current reality of South Africa. These two judgments accordingly did not appreciate the need to view the matter from the perspective of substantive equality. This principle is rooted in the understanding that inequality is a result of political, social and economic discrimination against certain groups of people in our society and that it is not some arbitrary and irrational circumstance (Albertyn 2007 *SAJHR* 253 254; see also De Vos "Grootboom, the Right of Access to Housing and Substantive Equality as Contextual Fairness" 2001 17(2) *SAJHR* 258; De Vos "Substantive Equality after Grootboom: The Emergence of Social and Economic Context as a Guiding Value in Equality Jurisprudence" 2001 52 *Acta Juridica* 52; Fredman "Providing Equality: Substantive Equality and the Positive Duty to Provide" 2005 21(2) *SAJHR* 163; Fredman "Substantive Equality Revisited" 2016 14(3) *International Journal of Constitutional Law* 712).

Substantive equality acknowledges that inequality is systemic in nature, being the implementation of corrupt social values by institutions and power relations. Langa CJ noted that substantive equality required a social and economic revolution so that everyone can enjoy equal access to the resources and amenities of life (Langa "Transformative Constitutionalism" 2006 3 *Stellenbosch Law Review* 352 353). This social revolution necessitates the dismantling of systemic inequalities. The late revolutionary President of Cuba, Fidel Castro, in his trial in 1953 understood it best: "A revolution is not a bed of roses. A revolution is a struggle to the death

between the future and the past" (The Guardian "Castro in quotes" (2008-02-19) *The Guardian* https://www.theguardian.com/world/2008/feb/19/cuba1 (accessed 2022-04-09)). In essence, substantive equality is a measure whose intention is redress. However, in the process of such transformation and in advancing the constitutional parameters of section 9(2) of the Constitution, another group of people has to be discriminated against even though this is not the primary objective (*Minister of Finance v Van Heerden supra* par 77).

This case note submits that substantive equality is not an easy task that will appease everyone; it is a struggle between South Africa's race-based discriminatory past, present and its desired non-racial future. Pretending that White men do not have an upper hand in society (and by default, the labour sector) is simply turning a blind eye to the need for transformation and redress (Webster "On Conquest and Anthropology in South Africa" 2018 34(3) *SAJHR* 398 414; Gordon and Newfield "White Philosophy" 1994 20(4) *Critical Inquiry* 737–757). Therefore, the court in this case missed an opportunity to continue the reasoning laid down by Moseneke DCJ in *South African Police Service v Solidarity obo Barnard* (2014 (6) SA 123 (CC)), as upheld by Zondo J in *Solidarity v Department of Correctional Services* (*supra*), of looking at the history of the country, the aspirations of section 9 of the Constitution, and the demographics of South Africa.

Substantive equality demands that there must be recognition of the skewed racial and gender advancement patterns in our society; and there must, as a result, be an active means of ensuring that such patterns do not persist (*Minister of Finance v Van Heerden supra* par 27). This case note concurs with the second judgment that section 174(2) is a redress and transformation measure (*National Coalition for Gay and Lesbian Equality v Minister of Justice* 1999 (1) SA 6 (CC) par 60). This redress measure must be considered when making judicial measures, not as a guide, but as a prerequisite (Siyo and Mubangizi 2015 *PELJ* 825). This section ensures that those who were prejudiced and discriminated against by past regimes are appointed, if they are suitably qualified (Siyo and Mubangizi 2015 *PELJ* 826).

The substantive equality approach is critical as it shines a light on an argument that is proposed by critical race theorists – that meritocracy is used to stigmatise the legitimate need to redress past injustices (Ramalekana 2022 *OHRH* 1). The first and third judgments, in essence, portray the need to aspire to an equally represented South Africa as an afterthought, with "competency" as the driving force. This critique must not be misunderstood as an argument against merit; rather, it is an argument in favour of merit that, like Molemela JA's judgment, puts the need to represent the demographics of the country first, which does not mean a decline in merit. If the argument of Ponnan JA regarding merit is accepted, then, by default, one accepts that the demographics of South Africa do not represent people with merit, and continues to stigmatise transformation. Furthermore, the South African reality is that merit is not neutral; it is based on privilege, domination and subordination (Ramalekana 2022 *OHRH* 21). This means that merit only works if all people are on an equal footing. This case note

submits that a person's race, gender, class and disability, or lack thereof, determines the employment opportunities they get and or do not get. The blind adoption and application of merit could lead to perpetual disadvantage for the poor/working class, black people, women and people living with a disability.

The argument of meritocracy raised by Ponnan JA at face value and to an unsuspecting eye is legitimate. This is because it advocates for skill and qualifications to be the reason that people are hired and promoted, this being what equality is about (Fallon "To Each According to His Ability, From None According to His Race: The Concept of Merit in the Law of Antidiscrimination" 1990 *Boston University Law Review* 815 822).

However, if analysed closely, it is flawed and does not align with substantive equality. The meritocracy argument, as highlighted above, assumes that people are on an equal footing, irrespective of race, gender, class and the disability they live with (Ramalekana 2022 *OHRH* 21). It assumes that there are no privileged people in our society and people are where they are because of hard work. Needless to say, this is false and a shield against the reality of state-sanctioned racism, where preference for certain jobs and salaries was, and to a certain extent still is, based not on hard work, but solely on race, ability/disability and or gender.

Disregarding statistics of the demographic make-up of magistrates, as Ponnan JA suggests, would be to forget history – that the South African labour market was, as the social life, organised and segregated along racial lines (Mariotti "Labour Markets During Apartheid in South Africa" 2012 65(3) *The Economic History Review* 1100 1102). Such an approach would forget that the need for demographic representation in the judiciary is our history and past, which must be considered when dealing with substantive equality, and which these two judgments conveniently sideline.

The case note submits that Ponnan JA's reduction of section 174(2) to an afterthought is incorrect. The importance of this provision was highlighted by Chief Justice Mogoeng: section 174(1) and (2) are equally important; however, the need for racial representation in the ranks of judicial officers may, in certain circumstances, override other applicable provisions (Malan 2014 *PELJ* 1965 1977). The need to take into account the racial and gender make-up of the country in making judicial appointments in terms of section 174(2) has legal standing and merit if one appropriately applies substantive equality by considering South Africa's history of racial and gender dispossessions, and the deliberate advancement of unequal opportunities (Tapanya *The Constitutionality of the Concept of Demographic Representivity, Provided for in terms of the Employment Equity Amendment Act 47 of 2013* (LLM thesis University of KwaZulu-Natal) 2015 25).

10 Conclusion

This case note has attempted to examine the court's approach in the application of section 174(2) of the Constitution in *Kroukamp*. Through examining the argument that supports substantive equality as an enforceable constitutional right (which the Equality Court in this instance

sought to ignore) and an analysis of the need for transformation and redress of the injustices of the apartheid and colonial regimes, the case note concludes that it does not concur with the Equality Court's decision. The court's approach in this instance simply reduces race-based redress initiatives to an afterthought rather than a prerequisite, which in turn downplays the injustices that the Black community faced and continues to face. The case note also attempts to show that it was incorrect for the court to suggest that if its meritocracy approach was not adopted, it would lead to reverse injustice against White people. The essence of the case note's argument is that Black people were oppressed in unimaginable ways; they are capable of being appointed to the judiciary; as such, it is incorrect to assume that understanding race as a prerequisite means a downgrade in merit.

This case note has discussed the *Lawrence* case, engaging first with the first judgment, which found that the Committee applied an approach that ensured that White candidates were not considered for vacancies. That judgment found that the Committee's approach did not reflect a proper interpretation of section 174 of the Constitution. However, this case note concurs rather with the reasoning of Molemela JA in the second judgment, in that section 174(2) was meant to be a transformation provision to fix the horrors of the apartheid and colonial regimes. It is submitted that this provision is not an island, but must be understood together with the concept of substantive equality, which requires one to engage with the history, social and economic reality of South Africa in order to understand section 174(2) fully. The case note also examined the judgment of Ponnan JA, who did not agree with Molemela JA's approach. Ponnan JA's judgment rather saw section 174(2) as being a guide, race being a secondary if not the last issue to be considered in appointing judicial officers.

The case note engaged finally in a critical discussion of the above-mentioned judgments, finding (unlike Ponnan JA) that section 174 is a prerequisite provision and not a guideline that treats race as an afterthought consideration. The case note has further suggested that these two judgments should have engaged in a discussion of substantive fairness, as failure to do so advances the assumption that those who will be appointed, if section 174(2) is applied as a prerequisite, would lead to the appointment of incompetent people. The case note lastly engaged in a discussion of how the focus on merit assumes that people of this country are on an equal footing, and that none are disadvantaged, and that none are more privileged than others. The case note did not dispute the interpretation of section 174(1), the Regulations or the Act, nor that Mr Lawrence was a fit and proper person who is appropriately qualified. Rather, the case note has simply argued that the second and third judgments' interpretation and understanding of section 174(2) of the Constitution were narrow and incorrect.

Fanelesibonge Mabaso
University of KwaZulu-Natal

AN ANALYSIS OF RIGHTS OFFERS: THEIR ADVANTAGES AND DRAWBACKS

Maleka Femida Cassim
MBBCh (cum laude) LLB (cum laude) LLM (cum laude) PhD
Attorney and Notary Public of the High Court of South Africa
Professor of Law, Mercantile Law Department, University of South Africa

SUMMARY

A rights offer is a useful mechanism for raising fresh corporate finance, particularly for a listed company with a wide shareholder base. The regulation of rights offers in South African law is critically analysed in this article. This is followed by a comparative analysis of rights issues in the United Kingdom and in Australian law. The advantages and drawbacks of rights issues in practice are also discussed, with reference to recent rights offers launched by prominent JSE-listed companies.

1 INTRODUCTION

A rights issue refers to the opportunity offered by a company to its existing shareholders – and to its existing shareholders only – to acquire additional shares in the company at a discounted price. The existing shareholders are given the right, though not the obligation, to acquire the new shares directly from the company on the primary market, without having to access the secondary market to buy the shares. It is up to the shareholder to decide whether to accept or decline these rights, or in certain cases to transfer these rights to a third party. The shareholders who take up the rights acquire the new shares at a price lower than the market price, and gain increased exposure to the company's shares. These are valuable benefits to the shareholder if the company is exhibiting growth.[1]

A company typically makes a rights offer in order to raise new capital. The fresh capital in some instances may be required to clear the company's debt obligations when it is faced with a shortage of cash. In other instances, it may be used to acquire new assets or technology, or to facilitate the growth and expansion of the company without it having to obtain a loan from a bank or other financial institution. The advantage for the company is that it may

[1] MF Cassim and FHI Cassim *Law of Corporate Finance* (2021) 428–429.

tap its existing shareholder base for finance by inviting its shareholders to subscribe for more shares, so that the company does not need to approach a financial institution to raise funds, especially where the company is already in debt. For listed companies with a wide shareholder base, a rights offer is an expedient and useful method of raising finance. A chief drawback, however, is that a rights issue is by its nature dilutive, since it results in a dilution of the value of the existing shares in the company.

Heading 2 of this article critically analyses the regulation of rights offerings in South African law. This is followed by a brief comparative analysis of rights issues in the United Kingdom and in Australian law under Heading 3. Heading 4 discusses the benefits and drawbacks of rights offerings in practice, using as illustrative cases three rights offers that were recently launched by prominent South African companies listed on the Johannesburg Stock Exchange – namely, Nampak Ltd, EOH Holdings Limited and Tongaat Hulett Limited.

2 RIGHTS OFFERS AND THE COMPANIES ACT 71 OF 2008

2 1 The concept of a rights offer

Rights offers as a mechanism for raising fresh corporate finance are commonly made by listed companies with a broad shareholder base, and which have already previously made an initial public offering (IPO) of their shares. A rights offer must be distinguished from an IPO, in which the company's shares are issued to the general public for the first time,[2] accompanied by a lengthy and detailed registered prospectus.[3] As for a rights offering, the Companies Act 71 of 2008 (the Act) defines a rights offer as an offer, with or without a right to renounce in favour of other persons, made to any holders of a company's securities for subscription of any securities of that company, or any company within the same group of companies.[4] According to this definition, a rights offer need not necessarily be in respect of listed shares; it may be an offer of unlisted shares. It, moreover, need not necessarily be renounceable but could be non-renounceable. A narrower definition of a rights offer pertained under the previous company-law regime, under which the concept of a rights offer by definition related only to offers that were renounceable, and only to offers of listed shares.[5]

It appears from the definition in section 95(1)(*l*) of the Act that a rights offer does not necessarily have to be made to the company's shareholders pro rata or in proportion to their existing shareholdings in the company. Thus, the shareholders do not necessarily have the benefit of pre-emptive rights.[6] In the case of listed companies, however, the JSE Listings

---

2 As defined in s 95(1)(*e*) of the Companies Act 71 of 2008 (the Act).

3 As required by s 99(2) of the Act.

4 S 95(1)(*l*) of the Act.

5 In terms of s 142(1) of the Companies Act 61 of 1973 (1973 Act).

6 A right of pre-emption, in broad terms, is a right conferred on the shareholders of the company to subscribe for a pro rata portion of any new shares to be issued by the

Requirements typically require a company's Memorandum of Incorporation to contain a provision requiring all issues of shares ordinarily to be on a pro-rata pre-emptive basis, except in certain limited circumstances or unless otherwise approved by the shareholders. In this respect, the JSE Listings Requirements are aligned with the traditional definition of a rights issue in Australian law.[7] One of the main definitional elements of a rights issue in the Australian statute is that the offer must be pro rata. Likewise in the United Kingdom (UK), a standard rights issue in accordance with the Listings Rules is necessarily a pro rata offer.[8]

As for unlisted public companies in South Africa, the default position under the Act is that shareholders in a public company do not have pre-emptive rights in respect of the issue of new shares by the board of directors, unless the Memorandum of Incorporation of the public company specifically so provides.[9] There is, however, a safeguard for shareholders in these cases, in that the approval of the shareholders by special resolution is required for an issue of shares (such as in a rights offer) if the voting power of the class of shares issued or to be issued pursuant to the transaction will be equal to or will exceed 30 per cent of the voting power of all the shares of that class held by shareholders immediately before the transaction.[10]

2 2 The disclosure regime for rights offers

When a rights offer is meticulously structured so as to qualify for one of the exemptions or safe harbours contained in section 96(1)(*c*) or (*d*) of the Act, the issuer company will conveniently be exempted from having to draw up and issue a prospectus. This is an important advantage.

The preparation of a prospectus is an expensive and arduous task. Its underpinning objective is investor protection. The cardinal purpose of a prospectus (as expressed in leading US case *SEC v Ralston Purina Co* and Australian cases *Cadence Asset Management Pty Ltd v Concept Sports Ltd* and *Hurst v Vestcorp*)[11] is to provide information to investors and offerees who are unable to fend for themselves, and thus need the protection of a prospectus. The rules and requirements of a registered prospectus are aimed at ensuring that mandatory disclosure is made to the investing public of all the relevant information on the company's performance, its prospects and its shares that they need in order make a fully informed decision

company, in proportion to their existing holdings, so that shareholders may preserve their existing stakes in the company, particularly their control rights (MF Cassim and FHI Cassim *Law of Corporate Finance* 154–155).

7 See s 9A of the Australian Corporations Act 2001.

8 According to the UK Listings Rules, a rights offer is an offer to existing shareholders in proportion to existing holders made by way of a renounceable letter of allotment, with compensation for shareholders that do not take up their rights or sell them, and with special arrangements for overseas shareholders, treasury shares and fractions.

9 S 39(1)(*a*) of the Act.

10 S 41(3) of the Act.

11 See *SEC v Ralston Purina Co* (1953) 346 US 119; *Cadence Asset Management Pty Ltd v Concept Sports Ltd* (2005) 55 ACSR 145; *Hurst v Vestcorp Ltd* (1987) 13 ACLR 17 CA (NSW).

whether to invest in the shares or securities of the company.[12] All the information contained in the prospectus must be carefully verified for accuracy and completeness in a due diligence process, so as to curtail the risk of litigation being launched by aggrieved investors who acquired shares in the company on the faith of its prospectus. To deter companies and their directors from any temptation to embellish the information presented in the prospectus, the Act has adopted an array of robust legal remedies for investors who acquired shares that were offered to the public pursuant to a false or misleading prospectus.[13] While aggrieved investors may also resort to the common-law remedies, which are preserved by the Act,[14] the statutory remedies adopted by the Act are substantially more daunting and more severe for the company, its directors and its expert advisers.[15]

Much of this may be conveniently avoided by a company making a rights offer if its particular rights offering is shielded by one of the exemptions contained in section 96 of the Act. The list of seven safe harbours set out in section 96(1) is designed largely to cover situations where prospective investors are able to fend for themselves so that they do not require protection by means of a full prospectus, or where the offerees will receive the relevant information through some other mechanism – as in the case of rights offers of listed shares. Where an exemption applies, not only is the issuer company relieved of the expense and administrative burden of having to publish a registered prospectus that complies with the Act, but it is also (seemingly) relieved of the potent liability regime for false and misleading prospectuses under the Act.

As a starting point, an offer of securities by a company to its own shareholders is, in principle, an offer to a section of the public. It is notable in this regard that the definition of an "offer to the public" specifically includes an offer of securities to be issued by a company to its own securities holders.[16] Where a rights offer is made, it may be excluded from the ambit of the definition of an "offer to the public" or the definition of "primary offering"[17] if it qualifies for one of the two safe harbours that the Act provides for rights offers. These are section 96(1)(*d*), which exempts a rights offer in respect of listed securities, and section 96(1)(*c*), which creates an exclusion for non-renounceable rights offers. If, however, the rights offer in question qualifies for neither of the two safe harbours – for example, if it is a renounceable rights offer of unlisted securities, then the particular rights offering could amount to an offer to the public that would have to be accompanied by a registered prospectus.

The two exemptions for rights offerings are discussed below in turn.

---

12 MF Cassim and FHI Cassim *Law of Corporate Finance* 389–393.
13 See ss 104–106 and s 214 of the Act.
14 In terms of s 95(6) of the Act.
15 See further MF Cassim and FHI Cassim *Law of Corporate Finance* ch 14.
16 See s 95(1)(*h*)(i)(*aa*) of the Act.
17 In terms of s 95(1)(*i*) of the Act.

2 3 The section 96(1)(*d*) safe harbour

An offer is deemed not to be an offer to the public (and as such is exempt from the requirement of a prospectus in terms of section 96(1)(*d*)) if it is a rights offer[18] that satisfies the prescribed requirements, and (i) an exchange has granted or has agreed to grant a listing for the securities that are the subject of the offer, and (ii) the rights offer complies with any relevant requirements of that exchange at the time the offer is made. The reason that rights offers of listed securities are exempted by section 96(1)(*d*) from the public-offer prospectus rules is that the disclosure of necessary information concerning the offer will be caught by the disclosure rules and the requirements of the relevant exchange. Since the offerees will receive the information through another mechanism, there is no need for the publication of a full prospectus. Moreover, much information on listed companies is already available in the public domain. Listed companies are subject to disclosure obligations and are under the constant scrutiny of the investing public, financial analysts and the media.[19] The section 96(1)(*d*) safe harbour is aimed at making capital-raising more flexible. This serves to balance the protection of the public with the needs of a company. By the avoidance of duplication, the cost burden and the administrative burden on the issuer company are reduced.

Although a section 96(1)(*d*) rights offer need not be accompanied by a registered prospectus under the Act, a rights-offer circular must usually be distributed to the shareholders under the JSE Listings Requirements. The rights-offer circular discloses to the shareholders essential information such as the rationale for the rights offer, details of the rights offer, the use of the proceeds and the state of the company's affairs. The Companies Regulations[20] provide that a rights offer in respect of listed securities, and all documents issued in connection with it, must satisfy the requirements that would apply to a prospectus in terms of the Act[21] and regulation 51 on the general requirements for a prospectus.[22] In addition, there is a statutory prohibition on the issue, distribution or delivery of letters of allocation of listed securities, by means of which rights offers are made to shareholders, unless they are accompanied by all the required documents and are approved by the relevant exchange.[23] The letter of allocation, the accompanying documents and the other requirements of the exchange fulfil the disclosure needs of investors and the objective of investor protection.

Disclosure alone is, however, not a sufficient safeguard to protect investors. A parallel safeguard is needed: a strong liability regime for false or misleading disclosure documents. The approach of regulation by mandatory disclosure, as adopted in Chapter 4 of the Act, puts the burden on the company to disclose the whole truth in its prospectus or other disclosure document. A regulatory system that is centred on investor protection through

---

18 As defined in s 95(1)(*l*), discussed above.

19 See further MF Cassim and FHI Cassim *Law of Corporate Finance* 429.

20 GNR 351 in *GG* 34239 of 2011-04-26.

21 In terms of ss 101 and 102 of the Act.

22 Reg 50 of the Companies Regulations.

23 S 99(4) of the Act.

mandatory disclosure of information is effective only if it is given teeth by means of severe sanctions for non-disclosure. Potent liability must be imposed on the company and those who are responsible for disclosing the information in order to ensure that full and accurate information is disclosed, and to deter them from any temptation to embellish, or to provide false information or half-truths, or to make misleading omissions in the prospectus or other disclosure documents.

Although Chapter 4 of the Act has adopted a laudably severe liability scheme for false and misleading prospectuses, it is plagued by a gaping lacuna: the liability provisions of Chapter 4 seemingly apply only to a "prospectus", but do not extend to rights-offer documents that contain false or untrue statements. Chapter 4 is silent on whether prospectus-type liability extends to documents issued in connection with a rights offer. Based on the literal interpretation of section 104 of the Act, the statutory claim for compensation for false or untrue statements applies only where those untrue statements are contained in a "prospectus". The difficulty is compounded by the lack of a definition of a "prospectus" in the Act. Consequently, where a rights offer of listed securities is made in terms of section 96(1)(*d*), it is uncertain whether the statutory civil and criminal liability provisions[24] will apply to the rights offer, since it does not require a "prospectus". Under the previous company-law regime, by contrast, a rights offer and all rights-offer documents were explicitly subjected to the full statutory civil and criminal liability regime.[25] Strangely, the current Act fails to do the same.

It is likewise unclear whether the statutory claim for compensation for false prospectuses[26] and the statutory criminal-liability provisions[27] apply to documents that are required by and are subject to the approval of the JSE or other relevant exchange. This applies, for instance, in the case of primary offers to the public of listed securities that are not IPOs. As stated above, uncertainty arises as a result of the absence of any definition of a "prospectus" in the current Act.

One may contrast this with the 1973 Act, which defined a "prospectus" broadly as "any prospectus, notice, circular, advertisement or other invitation, irrespective of whether it is done in non-electronic or electronic manner, offering any shares of a company to the public". Its objective was to encompass all offer documents, even if not formally labelled as prospectuses. The extended definition of a prospectus in the 1973 Act served to ensure that all such offer documents were visited with the full legal consequences of failure to comply with the mandatory disclosure requirements.

The lacuna in the current Act is most regrettable. It is perhaps an unintended consequence or a drafting oversight. It must be rectified without delay, either by the courts or preferably by means of a legislative amendment. To deprive investors of the robust statutory remedies, and thus leave these investors to fall back on the inferior level of protection offered by

---

24 Contained in ss 104–106 of the Act.

25 By s 146A(5) of the 1973 Act.

26 Under s 104 of the Act.

27 Contained in s 106 of the Act.

the common-law claims for delictual damages for misrepresentation, is to jeopardise the public offerings regime set up by the Act.

The proposed Companies Amendment Act, presently still in the draft Bill stage,[28] presents a timely window of opportunity to remedy this defect by way of statutory amendment. This opportunity must not be missed.

2 4 Rights-issue litigation and securities litigation

The practical ramifications of this lacuna in the liability regime for public offerings in South African law must not be underestimated. There has been a global wave of securities litigation and shareholder class actions in recent years. One could well expect this trend to be mirrored in South Africa sooner or later.

The watershed moment in UK securities litigation was the rights-issue litigation against the Royal Bank of Scotland. A shareholder class action was brought against the Royal Bank of Scotland and its former directors by thousands of investors who had acquired shares in 2008 in the rights issue launched by Royal Bank of Scotland. Claims amounting to £4 billion were brought under section 90 of the Financial Services and Markets Act of 2000 (FSMA), on the grounds that the bank had omitted essential financial information from the prospectus that accompanied its £12-billion rights issue. Although the bank had raised £12 billion, it ended up collapsing a few months later, resulting in a £45-billion government bailout and a sharp drop in the bank's share price. Section 90 of the FSMA provides for civil liability for a false prospectus in UK law. It imposes a non-fraud-based liability on the issuer company and its directors, by providing that any person responsible for a prospectus is liable to pay compensation to investors who have acquired securities to which the prospectus applies, and who have suffered loss in respect of them as a result of any untrue or misleading statement or omission in the prospectus.

Although a settlement of £800 million was ultimately reached between the bank and claimants on the eve of trial, this rights-issue litigation case demonstrated that high-value shareholder class actions may successfully be pursued under the UK legal framework. This is instructive in South African law, where the broad equivalent of section 90 of FSMA is section 104 of the South African Companies Act of 2008.[29]

Interestingly, since the Royal Bank of Scotland rights-issue litigation, securities group litigation has taken off in the UK, with claims being brought against other listed companies such as Tesco and Lloyds. This demonstrates that shareholders may, in practice, lodge claims against listed companies to recover losses suffered by them as a result of a fall in the price of their shares, often caused by a corporate scandal or other wrongdoing that is revealed to the market. The Tesco litigation concerned a class action brought under section 90A of the FSMA by two groups of institutional shareholders, after Tesco announced that it had overstated its profits guidance statements by more than £250 million, pursuant to which its share

---

[28] Draft Companies Amendment Bill, 2021 GNR 586 in *GG* 45250 of 2021-10-01.

[29] MF Cassim and FHI Cassim *Law of Corporate Finance* 512.

price dropped. The Tesco case, too, was eventually settled a few weeks before trial was due to commence, leaving a number of unanswered legal issues as to how the English courts will apply sections 90 and 90A of FSMA when untrue or misleading statements or omissions cause loss to investors.[30]

The Lloyds case, or *Sharp v Blank,*[31] was the first securities class action to be pursued to the end of trial in English law. It concerned the acquisition of HBOS by Lloyds during the 2008 financial crisis, which was approved by the company's shareholders on the negligent recommendation of the directors, as contained in a shareholder circular that made inadequate disclosure of the risks. Notably, the case was not founded on statutory liability under the FSMA, but instead on the common-law duty of the company and its directors in tort (or delict). The High Court dismissed the claims, on the ground that it was not convinced that the breaches had caused the losses claimed. The court observed that even if causation had been proved, no award of damages would have been available to the claimants under the reflective-loss principle. In the context of the South African liability regime for misleading prospectuses and offer documents, the Lloyds case demonstrates the difficult hurdles for shareholders who seek to pursue securities litigation at common law through the law of tort (or delict).

This trend of rising securities litigation applies not only in the UK, but also in Europe, Australia and Asia. In Germany and the Netherlands, for instance, investors sought compensation from Volkswagen for its failure to disclose its alleged manipulation of emissions tests, while similar cases were launched against Toshiba in Japan and AMP in Australia. In the USA, of course, securities litigation against listed companies has been long established. One wonders when this trend will be mirrored in South African law, particularly in the context of shareholder claims under section 104 of the South African Act for compensation for false and misleading prospectuses.

There are still a number of practical obstacles in South Africa, such as the relative dearth of third-party litigation funding and after-the-event insurance products. In contrast, shareholder class action claims against listed companies in the UK have in recent years become increasingly attractive to claimants. There are perhaps two main reasons for this. First, leading litigation funders in the UK view shareholder class actions as an area for investment and they actively pursue potential shareholder class actions following corporate scandals or regulatory problems. Third-party litigation funding effectively shifts the burden of legal costs from the shareholder claimants onto the third-party funders. Secondly, the costs risks of shareholder claimants in the UK are further alleviated by after-the-event insurance products, which cover the claimants' liability to pay the costs of the defendant should the claim fail. Moreover, the Group Litigation Orders procedure[32] enables claimants to join a class action on an opt-in basis – a mechanism that was successfully used in the Royal Bank of Scotland rights-issue litigation in which thousands of claimants were involved.

---

30 See e.g., *SL Claimants v Tesco* [2019] EWHC 3315 (Ch).

31 [2019] EWHC 3078 (Ch).

32 In Part 19 of the UK Civil Procedure Rules.

2 5 The section 96(1)(*c*) safe harbour

Turning to the second safe harbour for rights offers in the South African Act referred to under heading 2.2 above, section 96(1)(*c*) creates an exemption for a non-renounceable rights offer made only to existing holders of the company's securities, or persons related to existing holders of the company's securities. Since such rights offers are non-renounceable, they may be taken up by the recipients only; they cannot be made available to persons other than those to whom the offer was made. The reason that non-renounceable rights offers under section 96(1)(*c*) are deemed not to be public offers and are therefore exempted from the prospectus requirement seems to be that the company is seeking capital from its current shareholders who, in theory, would already be well versed in the company's affairs.

Disclosure is made by means of filing with the Companies and Intellectual Property Commission letters of allocation conferring the rights to subscribe for shares in the rights offer, accompanied by all the documents required by the Act.[33] The filing and registration of these documents ensures that they are available to the public for inspection. On pain of criminal and civil sanctions, letters of allocation relating to unlisted securities may not be issued, distributed or delivered to the shareholders unless accompanied by all the documents that are required and have been filed.[34] Every letter of allocation must state on its face that a copy of it, together with copies of all other requisite documents, has been filed with the Companies Commission. The letter of allocation must also include a statement that copies of all the documents referred to in regulation 49(1) of the Companies Regulations are available, and must set out the manner by which the copies may be obtained.[35]

In short, one must distinguish between rights offers in listed and unlisted companies. Rights offers of unlisted shares must be non-renounceable in terms of section 96(1)(*c*) in order to be exempt from the publication of a prospectus, whereas rights offers of listed securities are exempt whether or not they are renounceable, in terms of section 96(1)(*d*). In practice though, rights offers launched by listed companies are invariably renounceable, and are typically offered by means of renounceable letters of allocation.

A letter of allocation, in simple terms, is an offer or invitation to take up the shares. The Act defines a letter of allocation as any document conferring the right to subscribe for shares in terms of a rights offer.[36] When a letter of allocation is renounceable, the existing shareholders of the company are given the choice to subscribe for the new shares themselves, or to renounce and sell their rights for cash. In other words, a shareholder may renounce and transfer his or her entitlements to the new shares to other investors. These subscription rights may be renounced either in whole or in part. Renounceable letters of allocation (or nil paid letters of allocation) have a

---

33 S 99(4) of the Act read with reg 49 of the Companies Regulations. See also reg 55.

34 S 99(4)(*a*) of the Act.

35 Reg 49(3) of the Companies Regulations.

36 S 95(1)(*f*) of the Act.

value and may be traded on the market. The value of a renounceable right is an amount up to the difference between the market price of the shares and the issue price of the shares in the rights offer.[37] Existing shareholders who do not wish to participate in the renounceable rights issue consequently have the option to sell these rights to third parties. They have a third option too: to simply do nothing and allow the rights to lapse – in which case their shareholding will inevitably be diluted.[38]

In contradistinction to a renounceable rights issue, the rights in a non-renounceable rights issue are not transferable. The subscription rights cannot be transferred to third parties, nor can they be sold in the market. If they are not exercised by the shareholders, non-renounceable rights simply lapse.

It must be emphasised that the policy choice on rights offers in terms of section 96(1)(*c*) and (*d*) does not constitute full exemption from disclosure – it is instead reduced disclosure. The policy of reduced disclosure for rights offerings may be contrasted with other safe harbours in the Act that offer a full exemption from disclosure, such as the sophisticated-investor exemption or the professional-investor exemption.[39] To elaborate, although section 96(1)(*c*) and (*d*) rights offers do not need full disclosure by means of a prospectus, they are not completely exempt from any disclosure; reduced disclosure is made by means of the documents that are required to be filed or issued in connection with section 96(1)(*c*) and (*d*) rights issues in terms of the Act and the Companies Regulations.

A rights issue must be distinguished from a private placing. While both are methods used by companies to raise capital by means of the issue of shares, there are significant differences between the two methods of equity fund-raising. A private placement involves, not a public offering, but rather a private offering of securities to a small group of selected investors, such as wealthy individual investors, banks, pension funds and other institutional investors. Private placements are quicker and less costly than public offerings. Since a private placement is designed not to be an offer of securities to the public at large, it does not require a sales pitch to attract the public, and may be exempt from the requirement of a prospectus and the other compliance hurdles incumbent in public offerings. A private placement of securities with sophisticated investors or with professional investors falls within the ambit of the excluded list of offers or safe harbours[40] that are not offers to the public and do not require a prospectus.[41] This is a complete or full exemption, which is a distinct advantage that private placings have over rights offers. Unlike the safe harbours for rights offerings under section 96(1)(*c*) and (*d*), which are subject to reduced disclosure, the Act does not regulate private placements at all, leaving disclosure in private placings to be entirely regulated by contract.

---

37 MF Cassim and FHI Cassim *Law of Corporate Finance* 430–431.

38 See further below.

39 Contained in s 96(1)(*b*) and s 96(1)(*a*)(i)–(vii), respectively.

40 Contained in s 96(1)(*a*) and (*b*) of the Act.

41 MF Cassim and FHI Cassim *Law of Corporate Finance* 425.

3 RIGHTS ISSUES IN UNITED KINGDOM AND AUSTRALIAN LAW

3 1 United Kingdom

In the United Kingdom (UK), controversy surrounded the question whether rights issues of securities that are already publicly traded should be exempt from a prospectus in the first place. It was contended, on the one hand, that a full prospectus may be an unnecessary duplication in view of the amount of information that is already publicly available, as a result of the continuing disclosure obligations of listed companies. On the other hand, it was regarded as equally important not to "empty prospectuses of their substance" because that would defeat the objective of investor protection.[42]

It was not until as recently as 2019 that rights issues in the UK benefitted from reduced disclosure requirements. This may be contrasted with South African law, which has exempted rights offerings from a full prospectus for many decades. While the Prospectus Directive prescribed by the European Union[43] initially rejected the approach that exempts rights issues, the Prospectus Regulation,[44] which became effective in July 2019, provides for a simplified disclosure regime for rights issues subject to the condition that the issue must relate to shares that have at least an 18-month track record on the market.[45] Despite Brexit, the Prospectus Regulation continues to be in force in the UK as a domestic law. It must be emphasised that the policy choice on rights issues in the UK is by no means a policy of full exemption; it is, rather, one of reduced disclosure or simplified disclosure. This, too, is the case in South African law.

The UK is now making strides towards a new regime for prospectuses and public offers. In December 2022, an illustrative draft statutory instrument was published by HM Treasury on the proposed reforms of the public offers and admissions to trading regime; it is intended to replace the UK Prospectus Regulation and to introduce a reformed regulatory framework. Some of the key features of the draft legislation are that it proposes to give the Financial Conduct Authority the power to redesign prospectus contents, and that prospectuses will be required in fewer instances. There will also be a split between the regulation of offers to the public and the regulation of admissions to trading, as opposed to the current UK framework where they are regulated together but with different exemptions.

In the arena of public offerings of securities, the current requirement (to publish a prospectus for public offerings unless it falls within one of a number of exemptions) will be replaced with a general prohibition on public offerings, subject to exemptions. Some of the current exemptions will be retained, such as the case of an offer to professional or qualified investors, or an offer to fewer than 150 persons (who are not qualified investors). New

---

42 European Securities and Markets Authority ESMA/2011/323 par 262.

43 Directive 2003/71 on Prospectuses [2003] OJ L345/64 as amended by Directive 2010/73 [2010] OJ L327/1.

44 Reg 2017/1129 [2017] OJ L168/12.

45 Art 14 of the Prospectus Regulation.

exemptions proposed to be added include offers of securities of a class that are already, or will be, admitted to trading on regulated markets, and offers to existing equity shareholders of unlisted companies on a pro rata basis – that is, rights issues. Interestingly, these rights issues by unlisted companies must be made to shareholders on a pro rata basis in order to qualify for the exemption – in contrast with the rights-issue exemption for unlisted companies contained in the South African statutory provisions. As discussed above, it appears from the South African Act[46] that a rights offer need not be pro rata or in proportion to shareholders' existing holdings in an unlisted company in order to qualify for the section 95(1)(*c*) safe harbour. Where a public offer is permitted, there will be a general requirement in the proposed new UK legislation that material information must be disclosed in the prospectus, if one is required, or otherwise must be disclosed to all other investors to whom the offer is addressed.

3 2 Australian law

In a similar vein to South African law and current UK law, Australian law does not require a full prospectus for a rights offer of listed shares. The approach adopted in the Australian legislation is, however, a more liberal one. The Australian regime on corporate fund-raising and disclosure in offers of securities is more complex than its South African equivalent.

The Australian Corporations Act 2001 provides that an offer of securities requires disclosure to investors unless sections 708, 708AA and 708A state otherwise.[47] Consequently, even an offer to one person only requires disclosure unless an exemption is applicable. Many, though not all, of the exemptions contained in the Australian statute are broadly similar in nature to the safe harbours in South African law. The main exemptions are those for small-scale personal offers, sophisticated investors, wealthy investors, experienced investors and professional investors, offers to parties within the company such as corporate insiders, offers for no consideration, and offers to existing security holders, which includes bonus issues of fully paid shares.

As regards the onus of proof, it has been held in several Australian cases that the issuer company that seeks to raise capital under the benefit of an exemption bears the onus of proving that the exemption applies.[48] However, more recently, in *Gore v ASIC*,[49] a contrary view was expressed – that the onus of proof does not lie on the contravener, but he or she has an evidentiary burden to raise the issue that an exemption may apply. In South African law, the issue of the onus of proof of an exemption arose, but was left open, in *S v National Board of Executors Ltd*.[50]

Regarding exemption for rights issues in Australian law, a rights issue of quoted or listed securities does not require disclosure to investors by means

46 In terms of s 95(1)(*l*) of the Act.

47 S 706 of the Australian Corporations Act 2001.

48 *ASIC v Axis International Management Pty Ltd* (No 5) (2011) 81 ACSR 632; *ASIC v Great Northern Developments Pty Ltd* (2010) 79 ACSR 684; *ASIC v Cyclone Magnetic Engines Inc* (2009) 71 ACSR 1.

49 (2017) 118 ACSR 58.

50 1971 (3) SA 817 (D).

of a prospectus or disclosure document, provided that four conditions have been satisfied:[51] first, the offer must be made to all existing holders in the offer class; secondly, the offer must be pro rata; thirdly, the terms of the offer must be the same; and fourthly, the issuer must give the market operator a "cleansing notice". When all the conditions are fulfilled, the rights offer may be made without the need for any disclosure documents to be lodged with the Australian Securities and Investments Commission (ASIC). The "cleansing notice" must state that the company will offer the relevant securities for issue without disclosure to investors under Chapter 6D, set out any information that is "excluded information",[52] and state the potential effect that the issue of the securities will have on the control of the company and its consequences. The rationale for the exemption for rights issues[53] is that investors' interests will be protected through the original prospectus coupled with continuous disclosure obligations imposed on listed companies, which will enable them to make an informed decision on the rights issue. Instead of a prospectus or disclosure document, all that is required is a "cleansing" notice.

This liberal approach, which permits listed companies to make rights issues without any disclosure documents, on condition that the company submits a notice to the market operator, was adopted in 2007.[54] Prior to 2007 though, the legal treatment of rights issues in Australian law was broadly in tandem with the current approach in the UK and South African law, insofar as a policy of reduced disclosure applied. A disclosure document was required for rights issues prior to 2007, but listed companies could take advantage of the reduced disclosure requirements under the special prospectus rules for continuously quoted securities.

Interestingly, the reason for the liberalisation of rights offers in Australian law is that the prospectus or disclosure requirement had resulted in rights issues as a fund-raising mechanism being superseded by other forms of capital-raising with less onerous disclosure requirements, such as placements of shares with institutional investors – with the consequence that small shareholders were being disadvantaged.[55] Whether or not such a policy shift would be advisable in the South African socio-economic and regulatory environment is debatable and is open to question.

---

51 In terms of s 9 read with s 708AA of the Australian Corporations Act 2001.

52 "Excluded information" is information that has been excluded from a continuous disclosure notice, and that investors and their professional advisers would reasonably require for the purposes of making an informed assessment of the assets and liabilities, financial position and performance, profits and losses, and prospects of the company, or the rights and liabilities attaching to the securities.

53 Explanatory Memorandum to the Corporations Legislation Amendment (Simpler Regulatory System) Bill 2007 (Explanatory Memorandum).

54 With the commencement of the Corporations Legislation Amendment (Simpler Regulatory System) Act of 2007.

55 Explanatory Memorandum par 5.6.

4 BENEFITS AND DRAWBACKS OF RIGHTS OFFERS

A company commonly launches a rights offer in order to raise new equity capital. A rights issue is a favourable mechanism for a company to raise capital to operate its business without any attendant increase in debt. By inviting its current shareholders to acquire more of the company's shares in a rights issue, a company essentially taps its shareholder base for finance, so that it does not need to raise the necessary funds by means of borrowing or loan capital. The advantage of equity capital-raising over loan capital, from the company's perspective, is that the payment of interest on loan capital to debt holders, and the repayment of the principal amount on maturity, are fixed claims against the company that must be paid regardless of whether the company is profitable. The company may therefore prefer equity funding in order to avoid the fixed payments of interest that are inherent in debt funding.

4 1 Reasons for rights offers

It is not only companies in financial distress that seek to raise capital by means of a rights issue to their existing shareholders. Even companies with a healthy balance sheet or a smooth cash flow may choose to do so. Such companies may require a large sum of fresh capital for a takeover of a competitor, or to acquire new assets or new technology, or for the growth and expansion of the company's business. In other cases, however, rights issues are offered by cash-strapped companies when debt funding is not available or is too expensive, and when the company has no other viable avenues for finance. The company may be a troubled one that seeks to raise funds in a rights issue in order to use the newly raised finance to pay off its debts to its bankers and lenders and thereby return to financial health.

In practice, a rights offer of shares is more likely to be accepted by the shareholders of a company that is experiencing good growth. It is generally a company's performance, growth and returns, and the value of its shares that attract shareholders to take up the opportunity to subscribe for the new shares offered by the company at a discounted rate in a rights offer. The shareholders, as stated above, are free to take up these subscription rights or to reject them. For existing shareholders, rights offers present the advantage of their being able to acquire more shares in the company below the market price; of course, this is of benefit to the shareholder only if the company is exhibiting growth or the potential for growth.

When a company finds itself with a serious debt problem and is under severe pressure to deleverage, it may decide to embark upon a rights offer to raise its equity capital and service its debts. By means of a rights offer, a company experiencing a shortage of cash may build a new balance sheet and improve its debt-equity balance. A recent, prominent case in point is the JSE-listed technology group EOH Holdings Limited ('EOH'), which approached its shareholder body for cash when it was on the brink of technical insolvency to resolve the legacy debt issues that it had been battling. EOH was almost destroyed by alleged corrupt dealings between

several former employees and directors who were allegedly involved in tender fraud and irregular dealings with public sector officials in state organisations such as the South African National Defence Force and the Department of Water and Sanitation. In January 2023, EOH proceeded to raise equity capital through a R500-million rights offer.[56]

A company's leverage or gearing ratio refers to the ratio of debt to equity in a company. In simple terms, a company raises debt finance by borrowing, and it raises equity finance by the issue of more shares. In a nutshell, the impact of leverage is that it enhances shareholders' returns when the business prospers; but, conversely, it amplifies their risk when the business performs poorly.[57] The drawback of debt funding is that the risk of corporate insolvency rises when there is too much debt in a company's capital structure, since the payment of interest and the repayment of the principal amount constitute fixed claims. From the perspective of the external lender, banks and other financial institutions may be reluctant to extend credit to a highly leveraged company since there is a greater risk. Thinly capitalised companies may be viewed in a negative light by external lenders from whom they seek loans or credit; when a company's own shareholders do not have the confidence to invest in the company's equity, external lenders may refuse to fund the company. It was considerations of this nature that motivated the rights offer made by EOH.

A second notable example of a recent rights offer aimed at deleveraging a debt-laden company was that proposed by the Nampak group, South Africa's largest manufacturer of packaging and cans. Nampak Limited (Nampak) in late 2022 to early 2023 (unsuccessfully) proposed to de-gear by raising up to R2-billion in a rights issue. The bulk of the equity capital raised from its shareholders was intended to be used to settle R1.35 billion of its massive debt of R5.2 billion owed to bankers and lenders, and to thereby de-gear the company.[58]

When a rights issue is driven by a liquidity crisis (as in the case of the rights offers of both EOH and Nampak) rather than plans for the company's growth and expansion, there is a risk of the rights issue having a negative impact on the company's reputation. The market may interpret the rights issue as a warning sign that the company is in trouble, and investors may exit by selling their shares. This could result in share prices plunging. In EOH's case, for instance, the share price fell by 30 per cent ahead of the rights offer, after details of the planned rights issue were released. In Nampak's case, the market was rattled by the large size of the proposed rights issue (up to R2-billion) in comparison to Nampak's market value, with the result that the share price plummeted by nearly a third.[59] This occurred

---

[56] Rubenstein "Press Release: EOH Announces Final Terms of Rights Offer" (19 January 2023) https://www.eoh.co.za/today-eoh-released-the-final-terms-of-its-rights-offer/ (accessed 2023-04-03).

[57] MF Cassim and FHI Cassim *Law of Corporate Finance* 9–12.

[58] Wilson "Nampak Crashes Nearly a Third After Saying It's Looking to Tap Shareholders for R2bn" *News24* (1 December 2022) https://www.news24.com/fin24/companies/nampak-crashes-nearly-a-third-after-saying-its-looking-to-tap-shareholders-for-r2bn-20221201 (accessed 2023-04-03).

[59] Daily Investor "Investors Dump EOH Ahead of Rights Issue" (21 November 2022) https://dailyinvestor.com/technology/5769/investors-dump-eoh-ahead-of-rights-issue/

notwithstanding that a chunk of the capital to be raised in the rights offer was intended for the upgrade of Nampak's beverage can line, so as to take advantage of the strong market demand for beverage cans.

Ultimately, the capital-raising efforts of EOH met with success, with the R500-million rights offer being oversubscribed by its shareholders. Nampak, in contrast, failed to secure shareholder approval of its proposal to raise up to R2 billion in its rights issue, with the extraordinary general meeting in January 2023 being adjourned.[60] The Nampak shareholders favoured a reduction in the quantum of the proposed rights offer in order to protect shareholder value. Rights offers tend to be dilutive.

The rights offers made by EOH and Nampak illustrate the principle that the purpose of a rights issue is of cardinal importance. In deciding whether to participate in a rights issue, shareholders will consider, among other things, the terms of the rights issue as well as the reasons for and the circumstances of the rights issue. As a matter of strategy, there must be a compelling reason for the company to make a rights offer. Savvy shareholders know full well that to acquire additional shares at a discount is not necessarily always a bargain or an advantage. Sophisticated shareholders will consider the number of shares they can acquire, the discount offered on the shares and the financial health of the company.

4 2 Dilution

A key drawback of a rights issue for shareholders is dilution – both in the sense of value dilution and control dilution. From the viewpoint of shareholders, a rights issue means that they must either invest more money in the company or face significant dilution in their shareholdings.

To elaborate, the raising of capital through the fresh issue of additional shares in a company is, *in general*, dilutive. When new shares are issued to third parties or outside investors, or where shares are offered only to some but not all of the existing shareholders, or where they are issued to existing shareholders but on a disproportionate basis to their existing holdings, this could adversely dilute the proportional interests held by existing shareholders in the company. It could result in a dilution of the shareholders' control rights or their voting power in the company (since they now have control over a smaller percentage of the votes), or it could dilute the financial rights of existing shareholders (if the new shares are issued for an amount below their current market value).[61] In a *private placement* of shares, for instance – where shares are offered to a limited pool of selected, high-profile investors, but are not offered to all the company's current shareholders as

(accessed 2023-04-03); Wilson https://www.news24.com/fin24/companies/nampak-crashes-nearly-a-third-after-saying-its-looking-to-tap-shareholders-for-r2bn-20221201.

60 Sharenet, "EOH Holdings Limited Results of the Rights Offer and Directors' Dealings" (13 February 2023) https://www.sharenet.co.za/v3/sens_display.php?tdate=20230213080000&seq=3 (accessed 2023-04-03); Gumede "Nampak Debt Advisers Gallery Swells as Lenders Add Own" *Business Day* (7 March 2023) https://bd.pressreader.com/article/281857237749649 (accessed 2023-04-03).

61 MF Cassim and FHI Cassim *Law of Corporate Finance* 153–154.

would be the case in a rights offer – the existing shareholders of the company suffer dilution as a result of the private placement.

However, where a company raises capital through the issue of shares in a *rights offer*, the advantage to shareholders who choose to take up these rights is that they are able to protect their shareholding from dilution. A rights offer is usually proportional. In other words, existing shareholders are invited to subscribe for new shares pro rata to their current shareholding in the company, so that by taking up the new issue, the shareholders preserve their proportional interests in the company and thereby protect their investments from dilution. Each shareholder owns more shares after the new issue, but still holds the same proportion of the company's total equity.[62] In this way, dilution is avoided. Control of the company remains in the hands of the existing shareholders – in contrast with a private placement of shares with outsiders. This is a significant benefit of a rights issue over a private placement from the perspective of the current shareholders of the company.

However, for existing shareholders who choose not to subscribe for the rights offer, there may be dreadful dilution of their equity stakes in the company. As such, a rights offer tests the faith and confidence that investors have in the company and its management to create value for shareholders. In the case of EOH's rights offer, for example, more than 90 per cent of the company's shareholders took up their rights, with requests for additional allocations.[63]

Importantly, it should be noted that after a rights issue has been completed the company's share price is very likely to drop. It is, of course, still the same company but, since more shares are now in issue to the market, the value of the shares is diluted. This could result in a decrease in earnings per share (EPS) and a reduction in dividends or return on equity. Nonetheless, depending on how the company uses the fresh capital raised in the rights issue, the rights issue may in the long run result in gains for the shareholders, despite the dilution in the value of the shares.

4 3 Discount

From the shareholders' vantage point, rights offers give them the chance to subscribe for extra shares in the company at a reduced rate. Rights issues by listed companies are generally priced lower than the market price of the shares. The reason for the discount is to make the offer attractive to shareholders and to encourage them to take up the fresh shares. The subscription price of EOH's rights offer, for instance, was set at a discount of approximately 30 per cent to the theoretical ex-rights price (TERP) and a discount of approximately 58 per cent to the EOH share price.[64] This is the average for rights offers of that size. By subscribing for the new shares, the shareholders gain the benefit of the discount to the market price.

---

62 MF Cassim and FHI Cassim *Law of Corporate Finance* 428–429.

63 Sharenet https://www.sharenet.co.za/v3/sens_display.php?tdate=20230213080000&seq=3.

64 Sharenet "EOH Holding Limited Finalisation Announcement in Respect of the EOH Renounceable Rights Offer" (19 February 2023) https://www.sharenet.co.za/v3/sens_display.php?tdate=20230119105000&seq=33&scode=EOH (accessed 2023-04-03).

By way of an example, assume that Investor A holds 10 000 shares of X Ltd of R20 each. To raise capital, X Ltd announces a rights issue for current investors at a discount of 30 per cent. It is a one-for-two rights issue, which permits current investors to subscribe for one new share for every two existing shares. This means that A could acquire up to 5 000 additional shares for R14 each, which amounts to a total discount of R30 000. Investor A thus increases his exposure to X Ltd's shares and does so at a reduced price. This brings A's average cost of acquisition for his 15 000 X shares to R18 per share (that is, 10 000 shares at R20 each and 5 000 shares at R14 each). Alternatively, Investor A could decide not to take up his rights at all, in which case his shareholding would be diluted.

Investor A's third option, which applies only in circumstances where the rights are renounceable, is to renounce and sell his rights to other investors for cash or to trade them on an exchange (if the issuer company is listed and the rules of the exchange make provision for rights trading on the market). Renounceable letters of allocation or "nil paid rights" have a value, as discussed above. They are termed "nil paid rights" since the shareholder has paid nothing for them. "Nil paid rights" may generally be sold for an amount up to (but usually less than) the difference between the market price of the shares and the subscription price applicable to the rights issue – or to be more accurate, an amount equivalent to the difference between the ex-rights price and the subscription price. The shareholder's ability to sell to a third party his or her rights to buy the new shares is a further advantage of a (renounceable) rights offer. It enables the shareholder to avoid significant value dilution without having to participate in the rights issue. In practice though, there is typically some degree of dilution, in order to encourage the third party to purchase the nil paid rights. Rights issues may thus be a risk for a company, to the extent that they test the confidence of shareholders in the growth prospects of the company.

A rights offer may in some cases result in more concentrated shareholdings for some investors. In other words, some of the company's existing shareholders may become major controllers of the company. From the shareholders' perspective, this is a drawback of rights offerings. A portion of the rights offer may be unsubscribed. A change of control may result from other circumstances too, as demonstrated by the controversial rights offering launched by JSE-listed company Tongaat Hulett Limited, South Africa's largest producer of sugar.

Tongaat Hulett proposed a controversial and highly dilutive rights issue of R5-billion in 2022 in order to raise capital for the business to reduce its massive debt levels, following years of debt burden, alleged financial mismanagement, and a huge accounting scandal that almost destroyed the company. The rights issue was to be partially underwritten (to the amount of R2 billion) by the controversial Mauritian-domiciled financier Magister Investments, which was a minority shareholder holding approximately 0,15 per cent of the shares in Tongaat Hulett, provided that a waiver was granted by the Takeover Regulation Panel (TRP) to exempt Magister from making a mandatory offer to minorities. The rights offer was strongly opposed by other minority shareholders who questioned the governance and financial history of Magister Investments, and raised concerns about the control Magister

would wield in Tongaat Hulett,[65] bearing in mind that it was to hold 35–60 per cent of Tongaat Hulett's shares pursuant to the rights issue.

Ultimately, the underwriting agreement with Magister Investments was terminated, after the TRP's waiver ruling was struck down on review. An underwriting arrangement is often a significant de-risking mechanism, particularly in rights offers of this magnitude. The result of the termination of the underwriting agreement was that Tongaat Hulett's rights offer was brought to a halt. Sadly, a few months later in October 2022, when it was unable to service its debt to its lenders and it was denied additional funding, Tongaat Hulett went into business rescue.[66]

4 4 Underwriting

An advantage of a rights issue over an IPO or a full-scale public offering is that a rights issue generally enables a company to raise capital without incurring the expense of underwriting fees. A rights issue is a quicker and less costly mechanism for capital-raising than an offer of shares to the public, particularly since a rights offer is typically exempt from the publication of a registered prospectus, as discussed above. The company also saves a substantial amount of money on advertising costs and underwriting costs when it opts for a rights issue rather than an offer of shares to the public at large. Unlike a full-scale public offering though, there is a limit to the amount of money that can be raised in a rights issue. Capital-raising in a rights offer is limited to the amount that existing shareholders are willing to invest.

In some cases, however, a company may decide to have its rights issue underwritten by an investment bank or financial institution. Underwriting is not a mandatory requirement, but it is an important de-risking device – as illustrated by the aborted rights issue of Tongaat Hulett following the termination of its underwriting agreement with Magister Investments. The concept of underwriting is, however, an elusive one. As stated in the Australian case *Aberfoyle Ltd v Western Metals Ltd,*[67] there are at least three different identifiable types of underwriting in practice. Be that as it may, the role of the underwriter, at least in traditional underwriting, is to ensure that the rights issue is a success and to guarantee that the capital sought by the company will be raised. In terms of the underwriting agreement, the underwriter typically agrees, in return for a significant commission, to take up any shares or a specific portion of the shares that are not subscribed for by existing shareholders. Underwriters, in practice, may make arrangements to pass on some or all of their obligations to sub-underwriters, such as institutional investors. Underwriting is quintessentially a form of insurance. It eliminates the risk of a rights offer being undersubscribed, and thereby protects the company against the failure of its equity capital-raising effort.[68]

---

65 Cokayne "Hulett Shares Surge" *The Citizen* (14 July 2022) https://www.pressreader.com/south-africa/the-citizen-gauteng/20220714/281964611438224 (accessed 2023-04-03).

66 Tongaat Hulett Limited "Tongaat Hulett Development Enter Business Rescue in South Africa" (27 October 2022) https://www.tongaat.com/tongaat-hulett-limited-tongaat-hulett-development-enter-business-rescue-in-south-africa/ (accessed 2023-04-03).

67 (1998) 28 ACSR 187.

68 MF Cassim and FHI Cassim *Law of Corporate Finance* 404–405.

EOH's rights offer, for instance, was de-risked by three underwriting agreements in terms of which the underwriters collectively committed themselves to subscribe for any shares that were not taken up by EOH's existing shareholders. These underwriting agreements, coupled with irrevocable undertakings from shareholders holding approximately 30 per cent of EOH's issued shares, to follow their rights in full, effectively guaranteed that the R500 million sought by EOH would be raised.[69] The downside, however, is the additional expense occasioned by underwriting agreements.

5 CONCLUSION

A rights issue is a useful mechanism for a company facing a liquidity crisis to tap its existing shareholders for funds. Several benefits as well as drawbacks pertain to rights issues. The fact that a company makes a rights offer does not necessarily mean that the company is a sinking ship, or that it is facing financial turmoil but is unable to borrow any more money. Even financially healthy companies offer rights issues in order to source fresh capital for the growth and expansion of the company. Where the rationale for a rights issue is business expansion rather than debt repayment, the future financial benefits to shareholders may outweigh the drawback of share dilution in the rights issue. Savvy investors are aware that a rights offer is not always a chance to grab a bargain by acquiring new shares in the company at a discounted price. Astute investors consider factors such as the terms of the rights issue, the discount offered, the number of shares they can acquire, and the circumstances and rationale for the rights offer. It generally is the company's performance, growth and returns, and the value of the company's shares that induce shareholders to take up their subscription rights or to reject them. Rights offers tend to test the faith of shareholders in the company and its board of directors to create shareholder value.

When a rights offer is carefully structured so as to qualify for one of the safe harbours contained in section 96(1)(*c*) or (*d*), the issuer company will conveniently be exempted from the expense and administrative burden of publishing a registered prospectus. This is an important advantage. A policy of reduced disclosure, broadly comparable to the UK approach, has been adopted in relation to section-96(1)(*d*)-rights offerings under the South African Companies Act of 2008 – as opposed to the more liberal policy of full exemption from disclosure (on condition that a cleansing notice is provided) that now applies to rights issues in Australian law.

What is disappointing is the lacuna in the South African prospectus liability regime; the regime fails to extend to false and misleading rights offer documents, and other disclosure documents that are not formally labelled "prospectus". This fails sorely in doing justice to the founding value of investor protection in public offerings, and undermines the public offerings regime set up in Chapter 4 of the Act. The practical ramifications of this shortcoming in the South African Act must not be taken lightly – particularly in light of the wave of shareholder class actions that has been sweeping the

[69] Sharenet https://www.sharenet.co.za/v3/sens_display.php?tdate=20230119105000&seq=33&scode=EOH.

globe, and the seminal rights issue litigation launched against the Royal Bank of Scotland in the UK.

This glaring defect in the liability regime for public offerings in South African law must be rectified without delay by legislative amendment. The proposed Companies Amendment Act (currently still in the draft Bill stage)[70] presents an opportune occasion to do so. The opportunity, it is submitted with respect, should not be missed.

[70] Draft Companies Amendment Bill, 2021 GNR 586 in *GG* 45250 of 2021-10-01.

EDITORIAL NOTE / REDAKSIONELE NOTA

OBITER is published triannually and welcomes contributions in English.

Contributions are received throughout the year and will be subject to peer-review prior to being accepted for publication. An English summary not exceeding 300 words must accompany the submission of full-length articles, which must preferably not exceed 7000 words.

All contributions must be sent *via* email to Adriaan.VanDerWalt@mandela.ac.za (Editor) in a file written in a recent version of Microsoft Word. It may be required that a hard copy of a contribution be sent to the following address: The Editor, *OBITER*, Faculty of Law, PO Box 77000, Nelson Mandela University, Port Elizabeth, 6031.

Page charges will be levied. The tariff is R180,00 per page.

—