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

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

ISSN 1682-5853

OBITER

2023 Vol 44 4

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THE IMPORTANCE OF GRADUATE ATTRIBUTES IN PREPARING LAW STUDENTS FOR LEGAL PRACTICE

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SUMMARY

The gap between university legal education and legal practice significantly contributes to the view that most law graduates are substantially underprepared for entry into legal practice.[1] Consequently, this article suggests that an improvement in the training of law students, as far as preparing them for entry into legal practice is concerned, is necessary. It is argued that this preparation is supported by transformative constitutionalism – that is, after graduation, graduates will be expected to possess certain attributes that will ensure that they are ready for entry into legal practice. It is therefore necessary to investigate and evaluate such graduate attributes, as well as to ascertain the source of the need for such attributes. In this article, the Qualification Standard for the LLB degree, as the source stipulating the standard of proficiency for which the LLB degree should prepare graduates, is also discussed. This is followed by an evaluation of a baseline study into graduate attributes from the perspective of employers. Holistically seen, the qualification standard, as well as the graduate-attributes study, should provide an indication as to whether the LLB degree is adequately preparing law graduates for entry into legal practice. The qualification standard is set out and evaluated on whether, and to what extent, it aligns with the arguments put forth in this article. The research in this article has been conducted by way of a desktop study.

1 INTRODUCTION

The gap between university legal education and legal practice significantly contributes to the view that most law graduates are substantially underprepared for entry into legal practice.[2] Consequently, this article suggests that an improvement in the training of law students, as far as preparing them for entry into legal practice is concerned, is necessary. It is

1 Uphoff, Clark and Monahan "Preparing the New Law Graduate to Practice Law: A View From the Trenches" 1997 65 *University of Cincinnati Law Review* 381 381.

2 *Ibid.*

argued that this preparation is supported by transformative constitutionalism – that is, after graduation, graduates will be expected to possess certain attributes that will ensure that they are ready for entry into legal practice. It is therefore necessary to investigate and evaluate such graduate attributes, as well as to ascertain the source of the need for such attributes. The article also discusses the Qualification Standard for the LLB degree as the source stipulating the standard of proficiency for which the LLB degree should prepare graduates. Thereafter, a baseline study into graduate attributes from the perspective of employers is discussed. In this regard, it should be noted that no interviews were conducted with prospective employers. The attitude of employers, as discussed in this article, has been inferred and/or extracted from source material. Holistically seen, the qualification standard, as well as the graduate-attributes study, should provide an indication as to whether the LLB degree is adequately preparing law graduates for entry into legal practice. The qualification standard is set out, and is evaluated on whether and to what extent it aligns with the arguments put forth in this article.

2 WHAT ARE "GRADUATE ATTRIBUTES"?

Higher education is seen as an important contributor to the economy by way of producing skilled graduates.[3] It was not until relatively recently (approximately the middle of the 1990s) that it was suggested that there must be a measurable link between what is taught at higher education levels and the development of skills necessary for the working world.[4] It had previously always been assumed that graduates acquired sufficient skills during their academic years to be useful when they commence employment after leaving university.[5] A baseline study was conducted in South Africa in order to determine whether higher education institutions deliver graduates of the appropriate quality expected by the working world.[6] For this purpose, the following question is asked: do higher education graduates possess the necessary and applicable attributes in order to enter the professional world successfully? Before discussing and evaluating the mentioned baseline study, it is important to define "graduate attributes" in order to understand the focal points of the study. However, it is not always a simple task to delineate precisely what the term "graduate attributes" means, or at what stage of a person's career they must be developed.[7] Graduate attributes have been described as the skills, qualities and understanding that a

[3] Winberg, Staak, Bester, Sabata, Scholtz, Monnapula-Mapeseta, Sebolao, Ronal, Makua, Snyman and Machika "In Search of Graduate Attributes: A Survey of Six Flagship Programmes" 2018 32(1) *South African Journal of Higher Education* 233 234, 236; Bridgstock "The Graduate Attributes We've Overlooked: Enhancing Graduate Employability Through Career Management Skills" 2009 *Higher Education Research and Development* 31, 40.

[4] Greenbaum and Rycroft "The Development of Graduate Attributes: The Book of the Year Project" 2014 28(1) *South African Journal of Higher Education* 91 91; Bridgstock 2009 *Higher Education Research and Development* 31.

[5] Greenbaum *et al* 2014 *South African Journal of Higher Education* 91.

[6] See heading 5 1.

[7] Van Schalkwyk, Herman and Muller "Graduate Attributes for the Public Good: A Case of a Research-Led University" in Leibowitz (ed) *Higher Education for the Public Good: Views From the South* (2012) 88.

university community agrees their students should develop during their academic years at the institution.[8] The University of the Western Cape (UWC) defines graduate attributes as "[q]ualities, attitudes and dispositions that graduates should possess, in full or part, when they have completed their course of study".[9] Graduate attributes are strongly linked to the missions, visions and values of universities, as well as to their accountability for the quality of the graduates they produce.[10] One view is that the emphasis should be on development, as the student progresses through the academic years, from the first year, up to and including the final year.[11] Another view is that the emphasis should be on employability, and should focus on generic skills – that is, skills, values and attitudes that employers might regard as attractive.[12] Graduate attributes include disciplinary expertise and technical knowledge, but are not limited to those.[13] Instead, they also refer to qualities that should prepare graduates to perform social good in an uncertain future.[14] It is submitted that, in the South African context, this refers to the constitutional vision of accomplishing social justice in order to improve the lives of people with reference to where they were during the previous political dispensation, and to where they can possibly go in the future. Barrie states that graduate attributes should include more than skills and attitudes.[15] They could also include new concepts of wisdom and knowledge, which should be seen as the product of higher education itself.[16] In this regard, graduate attributes should not be viewed as something completely separate or different from what higher education conventionally delivers, but rather as outcomes that can reasonably be expected from the higher education experience,[17] specifically including undergraduate students.[18] These attributes should not be viewed merely as entry-level skills for purposes of entering the working world after graduation, but as an important outcome of the university-based learning experience.[19] It is submitted that this view, together with the previous descriptions of graduate attributes, serves to strengthen the argument in this article that university law schools should deliver graduates who are sufficiently skilled to serve the public upon their exit from university.

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8 Van Schalkwyk *et al* in Leibowitz (ed) *Higher Education for the Public Good* 88.

9 University of the Western Cape "Graduate Attributes and the Strategic Plan for Teaching and Learning" (2013) https://www.uwc.ac.za/TandL/Pages/Graduate-Attributes.aspx (accessed 2020-05-17).

10 Winberg *et al* 2018 *South African Journal of Higher Education* 234.

11 Van Schalkwyk *et al* in Leibowitz (ed) *Higher Education for the Public Good* 88.

12 *Ibid*.

13 *Ibid*.

14 Van Schalkwyk *et al* in Leibowitz (ed) *Higher Education for the Public Good* 88; Greenbaum *et al* 2014 *South African Journal of Higher Education* 92.

15 Barrie "A Research-Based Approach to Generic Graduate Attributes Policy" 2004 23(3) *Higher Education Research & Development* 261 262; Van Schalkwyk *et al* in Leibowitz (ed) *Higher Education for the Public Good* 88.

16 Barrie 2004 *Higher Education Research & Development* 263.

17 Barrie 2004 *Higher Education Research & Development* 263; Van Schalkwyk *et al* in Leibowitz (ed) *Higher Education for the Public Good* 89.

18 Barrie 2004 *Higher Education Research & Development* 262.

19 Barrie 2004 *Higher Education Research & Development* 262; Greenbaum *et al* 2014 *South African Journal of Higher Education* 93.

In relation to the content and purpose of graduate attributes, Walker states that higher education can equip students with the essential cultural values and knowledge that are important for active citizenship and democratic participation in debates shaping ethical and political life.[20] This means that higher education has a central role to play in the health of democracy in society, in how such democracy contributes towards civic life, and in producing graduates who reflect such features.[21] This argument is closely connected to the nature of the attributes that graduates possess when leaving university, as well as how these attributes will equip students for the working world.[22] The concepts of social justice and civic life are also prominently stated in the Council on Higher Education (CHE) and the South African Qualifications Authority (SAQA) Qualification Standard, which is discussed below.[23] In 2001, the need for graduates to participate actively in expanding the national economy was already identified.[24] The attributes that an institution bestows upon graduates are the responsibility of both the institution and the graduates themselves:[25] graduates must see their development in the context of the working world and should strive to prepare to enter the working world as knowledgeable and skilled individuals.[26] The Preamble of the Legal Practice Act (LPA)[27] makes mention of the constitutional right to freedom of trade, occupation or profession,[28] as well as referring to the fact that justice is not accessible to many people in South Africa. The right to freedom of trade, occupation and profession, in the context of this discussion, requires some analysis. It is an individual right that consists of several underlying values. In this regard, it denotes the following:

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[20] Walker "Pedagogy and the Politics and Purposes of Higher Education" 2002 1(1) *Arts and Humanities in Higher Education* 43 43; Van Schalkwyk *et al* in Leibowitz (ed) *Higher Education for the Public Good* 87. In this regard, see also Fourie "Constitutional Values, Therapeutic Jurisprudence and Legal Education in South Africa: Shaping Our Legal Order" 2016 19 *Potchefstroom Electronic Law Journal* 1 20. It is important that law teachers prepare students for an active citizenship role in society so as to display constitutional values and to share the same in relation to their clients when they (the students) enter legal practice after graduation.

[21] Walker 2002 *Arts and Humanities in Higher Education* 42–43; Van Schalkwyk *et al* in Leibowitz (ed) *Higher Education for the Public Good* 87.

[22] Van Schalkwyk *et al* in Leibowitz (ed) *Higher Education for the Public Good* 87.

[23] See heading 3. Also see Van Schalkwyk *et al* in Leibowitz (ed) *Higher Education for the Public Good* 87 in this regard as far as a former qualification standard is concerned.

[24] Van Schalkwyk *et al* in Leibowitz (ed) *Higher Education for the Public Good* 87. This was stated as part of the former Department of Education's National Plan in Higher Education.

[25] Van Schalkwyk *et al* in Leibowitz (ed) *Higher Education for the Public Good* 89.

[26] See Van Schalkwyk *et al* in Leibowitz (ed) *Higher Education for the Public Good* 89 in this regard. A complete discussion of the perceptions of graduates in this regard however falls outside the scope of this article.

[27] 28 of 2014.

[28] S 22 of the Constitution of the Republic of South Africa, 1996. It provides that "[e]very citizen has the right to choose their trade, occupation or profession freely. The practice of a trade, occupation or profession may be regulated by law".

(a) that the public has an interest in allowing individuals to perform work for the purpose of their own living, rather than being supported by any public funds;[29] and

(b) that the public also has an interest in benefitting from the skills of such individuals.[30]

This right enables an individual to be self-providing and also to live a profitable, dignified and fulfilling life.[31] It is self-evident that the legal profession falls within the definition of "profession" in this context. A "profession" is defined as any type of work that needs special training or a particular skill – often one that is respected because it requires a high level of education.[32] A person who exercises a profession is called a professional person. "Professional" is therefore an adjective that describes work that needs special training or education, or it can describe a particular type of work that has the same qualities that are connected with trained and skilled people, such as effectiveness, skill, organisation and seriousness of manner.[33] It therefore describes a type of work that is respected owing to its requirement of a high level of education and training.[34] If consideration is given to these descriptions, the mould of the legal profession can easily be recognised. The constitutional right, entrenched in section 22, in fact establishes a vocation.[35] This denotes a relationship to the human personality in its entirety.[36] A vocation denotes a relationship that shapes and completes a person over a lifetime of devoted activity.[37] Furthermore, a vocation is the foundation of a person's existence, and through which that person contributes to the totality of a social product.[38] It is consequently argued in this article that law graduates need to possess graduate attributes

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[29] In this regard, see Rautenbach "The Right to Choose and Practice a Trade, Occupation or Profession: The Momentous and Meaningless Second Sentence of Section 22 of the Constitution" 2005 4 *Tydskrif vir Suid-Afrikaanse Reg* 851 854; *Affordable Medicines Trust v Minister of Health of the Republic of South Africa* 2005 6 BLCR 529 (CC) par 59; Currie and De Waal *The Bill of Rights Handbook* (2013) 465.

[30] *Affordable Medicines Trust v Minister of Health supra* par 60; Currie *et al The Bill of Rights Handbook* 465.

[31] *Affordable Medicines Trust v Minister of Health supra* par 59; Currie *et al The Bill of Rights Handbook* 465.

[32] Cambridge Dictionary "Profession" (2020) PROFESSION | meaning in the Cambridge English Dictionary (accessed 2020-12-10).

[33] Cambridge Dictionary "Professional" (2020) PROFESSIONAL | meaning in the Cambridge English Dictionary (accessed 2020-12-10).

[34] *Ibid.*

[35] University of Texas at Austin School of Law "Apotheken-Decision" (1 December 2005) https://law.utexas.edu/transnational/foreign-law-translations/german/case.php?id=657 (accessed 2020-10-13). S 22 is similar in nature to s 12(1) of the German Constitution; thus, German jurisprudence, relating to the interpretation of s 12(1), has significant comparative value when interpreting s 22. The leading German case with regard to s 12(1) is the *Apotheken* decision (*Pharmacy* case); see Currie *et al The Bill of Rights Handbook* 462; *Affordable Medicines Trust v Minister of Health supra* par 59; Currie *et al The Bill of Rights Handbook* 465.

[36] University of Texas https://law.utexas.edu/transnational/foreign-law-translations/german/case.php?id=657; *Affordable Medicines Trust v Minister of Health supra* par 59; Currie *et al The Bill of Rights Handbook* 465.

[37] *Ibid.*

[38] *Ibid.*

not only to promote the quality of their own professional lives, but also to use such attributes to deliver professional, ethical and high quality legal services to the public.

Research shows that university staff struggle to understand general graduate attributes, because such attributes have different meanings in the various disciplines.[39] Nevertheless, many higher education institutions have formulated lists of generic attributes (across a variety of disciplines) that they want to see in their graduates.[40] These are called critical cross-field outcomes (CCFOs) and apply to the development of all graduates as far as economic and social contributions to society are concerned.[41] They stem from the outcomes formulated by SAQA, which are viewed as critical to the development of the capacity for life-long learning.[42] They include critical thinking, teamwork and effective use of science and technology, as well as viewing the world as a global village where problem-solving contexts cannot exist in isolation.[43] An example is the list compiled by the Central University of Technology in the Free State. The list states that graduates should be skilled, innovative, socially responsible and technologically savvy, as well as astute, competent and focused.[44] The university lists ten graduate attributes that must be present in all graduates;[45] these are sustainable development,[46] community engagement, entrepreneurship, innovation and problem solving, technological literacy, numeracy, communication, technical and conceptual competence,[47] teamwork and citizenship and global leadership. The University of Stellenbosch's Faculty of Medicine and Health Sciences states that graduate attributes of students should be reflective of an enquiring mind, an engaged citizen and a dynamic professional, as well as a well-rounded person.[48] The university further states that the aim of the graduate competence framework is to provide a transformed learning experience to students and to equip them with the necessary competencies to address health inequalities by way of patient-centred and community-based care.[49] Although this framework does not relate to law, it is submitted the approach

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39 Winberg *et al* 2018 *South African Journal of Higher Education* 234.

40 Van Schalkwyk *et al* in Leibowitz (ed) *Higher Education for the Public Good* 89; Herok, Chuck and Millar "Teaching and Evaluating Graduate Attributes in Science Based Disciplines" 2013 4(7A2) *Creative Education* 42 42.

41 *Ibid.*

42 Van Schalkwyk *et al* in Leibowitz (ed) *Higher Education for the Public Good* 89. Also see Herok *et al* 2013 *Creative Education* 42 with regard to the notion of life-long learning.

43 Van Schalkwyk *et al* in Leibowitz (ed) *Higher Education for the Public Good* 89.

44 Central University of Technology, Free State "Developing CUT Graduate Attributes" (16 August 2018) https://www.cut.ac.za/graduate-attributes (accessed 2020-05-17).

45 *Ibid.*

46 This is explained to mean that a graduate should "[b]e environmentally sensitive and recognize [their…] role as a socially responsible citizen who care[s] for the common good of others, the country and environment".

47 This is explained to mean that a graduate should "[d]emonstrate depth of specialised disciplinary knowledge and skills and be able to apply them in different contexts to solve problems".

48 Centre for Health Professions Education, University of Stellenbosch "Graduate Attributes" (undated) http://www.sun.ac.za/english/faculty/healthsciences/chpe/Pages/Graduate_attributes.aspx (accessed 2020-05-17).

49 *Ibid.*

is equally applicable to law schools, as there are also inequalities in communities regarding access to justice, quality legal services and community legal services. More general approaches to graduate attributes are evident from Nelson Mandela University (NMU) and the University of the Western Cape (UWC). NMU clearly supports the notion of the integration of graduate attributes with the academic experience, as their CCFOs mention that education must be life changing.[50] Other attributes, *inter alia*, include:[51]

a) expanding and engagement with knowledge bases of various professions;
b) excellence in art and science of various professions;
c) awareness of the latest advances of technical competencies required by the various professions;
d) production of new knowledge by way of understanding, inquiry, critiquing and synthesis;
e) commitment to ethical conduct, social awareness and responsible citizenship;
f) acknowledging and respecting constitutional principles, as well as values inclusive of equality, quality, equity, humanity, diversity and social justice;
g) the ability to apply knowledge and skills in a variety of contextual and conceptual frameworks;
h) the ability to think creatively and to generate a series of innovative ideas that are appropriate to a particular context;
i) openness to new ideas;
j) the ability to understand, interrogate and apply a variety of theoretical and philosophical positions, as well as the objective assessment of competing and alternative perspectives;
k) critical reflection;
l) relating and collaborating with others, exchanging views and achieving desired outcomes;
m) the ability to function in a multilingual and multicultural context; and
n) the ability to articulate ideas and information with confidence and coherently in visual, written, verbal and electronic formats.

UWC has developed a Charter of Graduate Attributes,[52] which guides the university in developing the knowledge, skills and competencies of graduates.[53] The various faculties and departments at the university are currently in the process of analysing such graduate attributes in the context of their own missions and visions, and embedding such attributes in the

[50] Nelson Mandela University "Our Desired Graduate Attributes Profile" (2015) https://nmmu10.mandela.ac.za/Looking-ahead/Our-Desired-Graduate-Attributes-Profile (accessed 2020-05-18).

[51] Nelson Mandela University https://nmmu10.mandela.ac.za/Looking-ahead/Our-Desired-Graduate-Attributes-Profile.

[52] A complete discussion of this charter falls outside the scope of this article. A link to the charter is available at https://www.uwc.ac.za/TandL/Pages/Graduate-Attributes.aspx.

[53] University of the Western Cape https://www.uwc.ac.za/TandL/Pages/Graduate-Attributes.aspx.

teaching and learning of the various modules in their degrees and courses.[54] It is submitted that all university law schools should follow this approach, should their universities have similar charters. Such attributes should be in alignment with the national qualification standard for the legal discipline, as set by the CHE. It is relevant and applicable here to analyse and evaluate the qualification standard applicable to the legal profession.

3 QUALIFICATION STANDARD FOR THE LLB DEGREE

3 1 Introduction

The CHE is the quality control council for higher education in South Africa.[55] SAQA provides national qualification framework (NQF) level descriptors that are applicable to each discipline.[56] The CHE must ensure that the NQF level descriptors remain current and appropriate.[57] The LLB degree currently meets the requirements of NQF level eight.[58]

It is consequently necessary to identify some applicable sections of the qualification standard in order to evaluate to what extent they apply to and support the theoretical basis and arguments advanced in this article.

3 2 Preamble

The Preamble to the qualification standard provides valuable information with regard to the content of the standard. It recognises that the law is central to the creation of a cohesive and successful society, that it fulfils a significant role in facilitating economic development and that it plays a vital role in entrenching the ethos and values of South Africa's constitutional democracy.[59] It further recognises that the Constitution is transformative in nature; that constitutional democracy aims to transform the legal system in accordance with its foundational values of human dignity, equality and freedom; and that this ethos must pervade the whole legal system.[60] Thus, legal education cannot be separated from transformative constitutionalism.[61] Transformative constitutionalism denotes a change, brought about in a structured manner, to better things by way of adherence to a constitutional system of government.[62] In the South African context, transformative

[54] University of the Western Cape https://www.uwc.ac.za/TandL/Pages/Graduate-Attributes.aspx. Also see Herok *et al* 2013 *Creative Education* 42 and Greenbaum *et al* 2014 *South African Journal of Higher Education* 94 in this regard.

[55] Council on Higher Education *Higher Education Qualifications Sub-Framework: Qualification Standard for Bachelor of Laws (LLB)* (May 2015) 3

[56] *Ibid.*

[57] *Ibid.*

[58] CHE *Qualification Standard for LLB* 8.

[59] CHE *Qualification Standard for LLB* 7.

[60] *Ibid.*

[61] *Ibid.*

[62] Mbenenge "Transformative Constitutionalism: A Judicial Perspective From the Eastern Cape" 2018 32(1) *Speculum Juris* 1 2.

constitutionalism is a process, not an event that has taken place and therefore been completed.[63] It is a transformative process in itself.[64]

This article makes the argument that transformative constitutionalism can lead to improved and high-quality legal education.[65] There are a few reasons for this. In terms of the Constitution, the rights of people should be protected and enforced, wherever necessary and applicable. The Bill of Rights includes fundamental rights that are designed to improve the lives of people, including the right to equal education, as well as access to justice when people need legal problems to be resolved by the involvement of the courts. The Constitution also seeks to advance the dignity and equality of people. Transformative constitutionalism seeks to improve the lives of people. In a South African context, this means that a person's past and circumstances need to be taken into account in order to determine in which ways improvement(s) can be brought about. Therefore, constitutional values need to be actively and clearly incorporated into the teaching and learning of law students so that students can learn how to apply the law in order to advance people's rights.[66] This may also indicate to students in what instances the law should be challenged if procedural law and evidence do not bring about both substantive and procedural justice.

As far as legal education is concerned, proper student education, as well as preparation for legal practice, cannot be achieved without appropriate legal education based on transformative constitutionalism.[67] The Preamble consequently states that legal education:[68]

a) must be responsive to the needs of the economy, the legal profession and society as a whole;
b) must produce skilled graduates who can think critically and have a substantial understanding of the impact of the Constitution on legal development;
c) must promote social justice in South Africa;
d) must enable law graduates to execute their professional and social duties in an ethical and efficient manner; and
e) must be responsive to ever-evolving information technology.

3 3 Purpose

The qualification standard states that the LLB degree prepares students for entry into legal practice.[69] For that reason, the degree offers a broad education that should develop well-rounded graduates with the following attributes:[70]

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63 Mbenenge 2018 *Speculum Juris* 2; Langa "Transformative Constitutionalism" 2006 3 *Stellenbosch Law Review* 351 354.
64 *Ibid.*
65 See Quinot "Transformative Legal Education" 2012 129 *South African Law Journal* 411 412.
66 See Quinot 2012 *SALJ* 415.
67 *Ibid.*
68 *Ibid.*
69 CHE *Qualification Standard for LLB* 8.
70 *Ibid.*

a) knowledge and appreciation of the values and principles in the Constitution;
b) a critical understanding of theories, concepts, principles, ethics, perspectives, methodologies and procedures integral to the law;
c) the ability to apply the aforementioned knowledge, appreciation and critical understanding in an appropriate manner to academic, professional and career contexts; and
d) the capacity to be accountable and take responsibility in academic, professional and relevant societal contexts.

3 4 Standard for awarding the LLB degree

The qualification provides that the LLB degree may be awarded to students if and when the following attributes are evident:[71]

a) *knowledge*: the graduate must have a comprehensive and sound knowledge and understanding of the Constitution and basic areas of law. These areas include, *inter alia*, formal law, perspectives on the law, the legal profession, as well as the dynamic nature of the law and its relationship with relevant and applicable contexts, including political, economic, commercial, social and cultural contexts.[72] Clinical Legal Education (CLE) is expressly stated as an alternative to any specialisation in particular fields of law that may be presented;[73]
b) *critical thinking skills*: the graduate must, *inter alia*, be able to recognise and reflect on the role and place of the law in society and beyond;[74] and
c) *research skills*: the graduate must be able to find, select, organise, use, analyse, synthesise and evaluate a variety of relevant sources of information in theoretical and applied research-based contexts.[75]

As far as CLE is concerned, it forms part of the LLB curriculum at most South African and overseas universities.[76] It is an experiential learning methodology by which law students acquire practical skills by delivering legal services to indigent members of society in a social justice environment, mostly at university law clinics.[77] "Experiential learning" can be defined as

[71] *Ibid.*
[72] CHE *Qualification Standard for LLB* 8–9.
[73] CHE *Qualification Standard for LLB* 9.
[74] *Ibid.*
[75] *Ibid.*
[76] Du Plessis "Clinical Legal Education Models: Recommended Assessment Regimes" 2015 18(7) *Potchefstroom Electronic Law Journal* 2778 2778.
[77] McQuoid-Mason "The Four-Year LLB Programme and the Expectations of Law Students at the University of KwaZulu-Natal and Nelson Mandela Metropolitan University: Some Preliminary Results From a Survey" 2006 27(1) *Obiter* 166 168; Bodenstein (ed) *Law Clinics and the Clinical Law Movement in South Africa* (2018) 43; Ortiz "Going Back To Basics: Changing the Law School Curriculum by Implementing Experiential Methods in Teaching Students the Practice of Law" (June 2011) https://www.law.cuny.edu/wp-content/uploads/page-assets/strategic-planning/future/changes-in-legal-education/Ortiz-2012.pdf (accessed 2019-10-01) 4; Bleasedale, Rizzotto, Stalker, Yeatman, McFaul, Ryan, Johnson and Thomas "Law Clinics: What, Why and How?" in Thomas and Johnson (eds) *The Clinical Legal Education Handbook* (2020) 8. Also see Dednam ("Knowledge, Skills and

"[t]he process whereby knowledge is created through the transformation of experience. Knowledge results from the combination of grasping and transforming experience".[78] The knowledge of the student, which is conceptualised in the abstract, becomes more concrete in being actively applied to practical scenarios.[79] At the same time, students have the opportunity to observe how to execute a particular task, as well as to reflect upon the experience.[80] Experiential learning provides the ideal opportunity for more integrated teaching and learning, because it involves a clear link between thinking and doing.[81] CLE can also host simulated activities. Simulations are excellent exercises where a live-client model is not available, but where teachers nevertheless are looking for opportunities to introduce active learning in modules.[82] Simulations are also beneficial, because they are more resource friendly, predictable and more manageable than the live-client model.[83] It also exposes students to practical scenarios, providing them with the opportunity to apply their doctrinal knowledge.[84]

3 5 Applied competence

The qualification standard provides that the graduate must have the following competences:

a) *ethics and integrity*: the graduate must have knowledge of relevant ethical considerations of law and must be able to act ethically and with integrity within the university, as well as with clients, courts, other legal practitioners and members of the public;[85]

b) *communication skills and literacy*: the graduate must be proficient in reading, writing, comprehension and speaking to specialists and lay persons in a professional capacity.[86] In the guidelines to the qualification standard, "proficiency" is described as being able to show

Values: Balancing Legal Education at a Transforming Law Faculty in South Africa" 2012 26(5) *South African Journal of Higher Education* 926 927), where it is stated that the South African law curriculum must increasingly provide for social justice issues.

78 Kolb "Experiential Learning: Experience as the Source of Learning and Development" (26 August 2005) https://www.academia.edu/3432852/Experiential_learning_Experience_as_the_source_of_learning_and_development (accessed 2020-03-25) 20; Quinot and Greenbaum "The Contours of a Pedagogy of Law in South Africa" 2015 1 *Stellenbosch Law Review* 29 47.

79 Quinot *et al* 2015 *Stellenbosch Law Review* 47.

80 *Ibid.*

81 See Quinot *et al* 2015 *Stellenbosch Law Review* 48 in this regard.

82 Bodenstein *Law Clinics and the Clinical Law Movement in South Africa* 217.

83 Hall and Kerrigan "Clinic and the Wider Law Curriculum" 2011 *International Journal of Clinical Legal Education* 31.

84 See Krieger "Domain Knowledge and the Teaching of Creative Legal Problem Solving" 2004 11 *Clinical Law Review* 149 149 in this regard. This approach exposes students to "real world" situations. Also see Evans, Cody, Copeland, Giddings, Joy, Noone and Rice *Australian Clinical Legal Education: Designing and Operating a Best Practice Clinical Program in an Australian Law School* (2017) 44–45 with regard to the benefits of simulations.

85 CHE *Qualification Standard for LLB* 10.

86 *Ibid.*

ability or skill in doing something.[87] Proficiency in writing can be developed by regularly exposing students to problem solving and research-type problems and to expect them to produce well-written and coherent work.[88] Proficiency in language includes both substantive and formal components.[89] The substantive component includes relevance, clarity and precision concerning the topic and scope of the research being conducted, systematic and clearly structured treatment of the topic, and logic and persuasiveness of arguments, as well as the correct application of authority.[90] The formal component includes consistency in style, subdivision for primary[91] and secondary[92] sources, language and appropriate diction.[93] Proficiency in speaking can be developed by way of moot courts, debating settings, as well as oral presentation or defence of research projects.[94] Graduates must be able to provide clear and concise descriptions during presentations, respond effectively to any questions posed to them, as well as demonstrate clear understanding of trial or debating procedures.[95] Graduates must be able to conduct presentations with spontaneity, not solely making use of a prepared text.[96] Such presentation must be organised and well reasoned, clearly setting out the most important facts and legal principles, as well as applying such principles to the facts of the case.[97] As far as communication in general is concerned, the graduate must be able to demonstrate effective verbal, written, listening and non-verbal communication skills.[98] The graduate must also be able to apply communication skills to situations relevant to professional legal practice and must further be able to engage with diverse audiences as far as culture, language and gender are concerned;[99]

c) *numeracy*: graduates must be able to perform basic numeracy tasks as far as the legal field is concerned;[100]

d) *information technology*: the graduate must be able to access information in an effective manner.[101] The graduate must furthermore be able to use technology as a tool to conduct research, as well as to organise, evaluate and communicate information;[102]

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87 CHE *Qualification Standard for LLB* 13.
88 *Ibid.*
89 *Ibid.*
90 *Ibid.*
91 “Primary sources” refers to legislation and case law.
92 “Secondary sources” refers to books, journal articles and similar sources.
93 CHE *Qualification Standard for LLB* 13.
94 *Ibid.*
95 CHE *Qualification Standard for LLB* 13–14.
96 CHE *Qualification Standard for LLB* 14.
97 *Ibid.*
98 CHE *Qualification Standard for LLB* 10.
99 *Ibid.*
100 *Ibid.*
101 *Ibid.*
102 *Ibid.*

e) *problem solving*: graduates must be able to identify and define relevant issues in legal problems.[103] Graduates must further be able to identify and use the most relevant sources and research methods in solving legal problems and generating reasoned solutions to such problems;[104]

f) *self-management and collaboration*: graduates must be able to act effectively in both individual and collaborative settings;[105]

g) *transfer of acquired knowledge*: graduates must be able to apply knowledge to different, new and unfamiliar fields of law, deal with the development of the law on a continuous basis and transfer knowledge to others.[106] As far as a description of "continuous basis" is concerned, the guidelines to the qualification standard states that life-long learning is a pursuit that is essential for every law graduate throughout the career of such graduate.[107] With regard to "transfer of knowledge to others", the guidelines state that the graduate must have an understanding of the law and also be able to explain it to colleagues, clients, lay persons and members of society who do not have sufficient exposure to the law;[108] and

h) *agency, accountability and service to the community*: graduates must be able to recognise, reflect on and apply social justice imperatives.[109] This entails that graduates must acknowledge the capacity, agency and accountability of a legal practitioner in the shaping and transformation of the legal system in order to promote social justice.[110] In this regard, fairness, legitimacy, efficacy and equity in the legal system play important roles.[111] It further entails that graduates must understand the professional responsibilities of a legal practitioner in rendering services to members of the community.[112]

3 6 Assessment

The qualification standard provides information about the types of assessment that are appropriate in order to test graduate attributes. The standard mentions a variety of assessment methods, including summative and formative assessments.[113] Assessments must occur regularly during the course of a particular module and must include authentic problem solving in real-life contexts or simulated teaching and learning activities.[114] The staff

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103 CHE *Qualification Standard for LLB* 11.
104 *Ibid.*
105 *Ibid.*
106 *Ibid.*
107 CHE *Qualification Standard for LLB* 14.
108 CHE *Qualification Standard for LLB* 15.
109 CHE *Qualification Standard for LLB* 11.
110 *Ibid.*
111 *Ibid.*
112 *Ibid.*
113 CHE *Qualification Standard for LLB* 12.
114 *Ibid.*

must be adequately qualified in order to conduct such assessments.[115] There must be opportunities for students to engage in independent research, which must also be assessed.[116] The guidelines to the qualification standard provide further insight into the nature of assessments, namely written or verbal assignments, tutorials, collaborative work, small group work, case studies, portfolios, moot courts, examinations and tests, role play, mock trials, client consultation exercises, reflective journals, observation of real work, as well as actual work in live-client clinics, which must be duly supervised, or any simulation of said work.[117] The guidelines also provide that assessments may include any other compulsory and voluntary activities.[118] There must be regular and constructive feedback to students as far as problem solving, research, literacy and communication skills are concerned.[119]

4 RELEVANCE OF THE QUALIFICATION STANDARD FOR THIS ARTICLE

It is clear that the relevant provisions of the qualification standard, as analysed, support the arguments for better preparedness of law graduates for legal practice. The following points are important as far as this conclusion is concerned:

a) *the importance of transformative constitutionalism*:[120] this fully substantiates the argument that students need to be pervasively taught about the supremacy of the Constitution and that all areas of law, whether substantive or adjectival, must be measured against its provisions in order to ensure that social justice takes place and that the values of dignity, equality and freedom are advanced. In this way, students will be made aware of their role in legal practice, as well as the important task of the legal profession to serve the needs of members of society as far as their democratic rights are concerned. The legal profession is thus developed in order to advance the spirit and purport of the Constitution instead of applying conservative and rigid interpretations of legal principles and procedures that are not underpinned by the mentioned constitutional values;

b) *the importance of both substantive teaching and practical training*:[121] theory and practice should not be taught separately from each other. This substantiates the argument that a methodology like CLE, or any other practical training, should play an integrated role in the teaching and learning of the law.[122] In this regard, CLE is explicitly mentioned in the qualification standard as an alternative to any field of

[115] *Ibid.*

[116] *Ibid.*

[117] CHE *Qualification Standard for LLB* 15.

[118] *Ibid.*

[119] CHE *Qualification Standard for LLB* 12.

[120] See heading 3 2.

[121] See heading 3 3.

[122] See, *inter alia*, Welgemoed *Integration of Clinical Legal Education With Procedural Law Modules* (doctoral thesis, Nelson Mandela University) 4 7 2 1 in this regard.

specialisation to which a student might be exposed.[123] CLE can play a vital role in assisting with the development of students concerning the applied competences,[124] as prescribed by the qualification standard. When integrated with procedural law modules, it can advance students' appreciation of ethics and professionalism, communication, problem solving and collaboration in the handling of a client's case.[125] In this regard, students can be divided into groups when working on simulated cases, drafting documents, or partaking in moots and mock trials; from these activities, their ethical and professional behaviour can be ascertained. In executing these activities, students will learn how to transfer knowledge to others. In this regard, mock consultations can serve as a good platform where students can "consult" with one another and "provide legal advice". In doing so, they must foster an appreciation for social justice in accordance with the principles and values of the Constitution and critically evaluate the benefit of existing legal principles and procedures in the context of their "client's" case and social setting. Students must be afforded the opportunity to reflect on the actions that they have taken to evaluate their effectiveness. Constructive feedback from the presenter plays a paramount role in combining substantive legal principles with practical steps taken in order to place students in a position to substantiate and justify fully the procedures that they have suggested for a client in a particular social setting;

c) *the importance of training in the use of digital technology*:[126] being part of transformative legal education, students must be skilled in using digital technology in performing practical legal work, such as, making use of document-generating software to draft process and pleadings.[127] Transformative legal education is based on transformative constitutionalism as a guiding theory and overarching discipline.[128] *Inter alia*, it focuses on the impact of the digital revolution on the acceptance of knowledge and teaching and learning.[129] This also includes the use of digital technology to conduct research for the purpose of finding adequate and practical solutions to legal problems. It is submitted that training law students to use digital technology promotes the legal profession's move to a more advanced and technologically developed level;

d) *appropriate assessment methods*:[130] in this regard, the qualification standard reiterates the necessity for practical training, specifically mentioning problem solving in a real-life context, simulations, moot

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[123] See heading 3 4.

[124] See heading 3 5.

[125] *Ibid.*

[126] *Ibid.*

[127] See, *inter alia*, Welgemoed *Integration of Clinical Legal Education* 4 7 4 2 in this regard.

[128] Quinot and Greenbaum 2015 *Stellenbosch Law Review* 29 35. Also see Bauling "Towards a Sound Pedagogy in Law: A Constitutionally Informed Dissertation as Capstone Course in the LLB Degree Programme" 2017 (20) *Potchefstroom Electronic Law Journal* 1 11–12 in this regard.

[129] Quinot *et al* 2015 *Stellenbosch Law Review* 11–12.

[130] See heading 3 6.

courts, mock trials and work at law clinics. The collaborative work directive also reinforces the constitutional notion of participatory parity. Participatory parity[131] is a theory of social justice[132] based on the principle that everyone has the right to participate and interact with one another as peers in social life.[133] In working together, the students develop an appreciation for the needs of others and learn to listen closely to a colleague's input in a matter. This facilitates appreciation of the needs of clients in legal practice and listening closely to what clients want in order to assist them accordingly. The reference to reflective journals emphasises the importance of affording students opportunities to evaluate their own performance critically and to learn from it in collaboration with the law teacher.[134] The reference to other compulsory or voluntary activities refers to concepts like working at university law clinics and mobile law clinics[135] – activities that can play a valuable role in enriching students' knowledge and enhancing their practical skills. Assessment in this regard may be linked to students' participation and performance in each of these activities;

e) *the provision of constructive feedback to students about their performance in all teaching and learning activities*:[136] without feedback, students do not know whether they have satisfactorily completed particular activities and accomplished certain learning outcomes. Feedback is paramount to students' development as future legal practitioners, especially taking into account the need to develop professional accountability to members of the public. In this regard, the qualification standard specifically mentions accountability and professional responsibility to members of the public; and

f) *linked to the previous item is the graduate's ability to transfer knowledge to others*: this is important insofar as a graduate's interaction with members of the public is concerned, and also as a candidate legal practitioner providing legal training to students as part of community service as discussed.

From a practical perspective, student numbers at universities might present problems as far as the above-mentioned points are concerned. Large student numbers is a current reality at almost all law schools in South Africa. This presents problems, as it may not be possible to use any or adequate

[131] Liebenberg "Needs, Rights and Transformation: Adjudicating Social Rights" 2006 1 *Stellenbosch Law Review* 5 7. "Participatory parity" is a theory that has been developed by Nancy Fraser.

[132] Armstrong and Thompson "Parity of participation and the politics of status" 2007 *European Journal of Political Theory* 1 1.

[133] Liebenberg 2006 *Stellenbosch Law Review* 7; Armstrong *et al* 2007 *European Journal of Political Theory* 1.

[134] See, *inter alia*, Welgemoed *Integration of Clinical Legal Education* 4 3 2 with regard to the importance of student reflection.

[135] See, *inter alia*, Welgemoed *Integration of Clinical Legal Education* 4 7 2 3 with regard to the mobile law clinic of NMU and how it can enrich student experience and education.

[136] See heading 3 6.

practical methods to teach students.[137] The availability of venues large enough to accommodate all students may also be problematic. Furthermore, large student numbers may also have an impact on student behaviour and discipline in class, lecture organisation and time management.[138] Blended learning might be a solution. This is especially beneficial in addressing large student numbers. Problematic and complex issues, brought up during lectures and other engagement sessions, could be discussed online by the law teacher on a dedicated e-learning site by way of a frequently-asked-questions section. As far as CLE is concerned, a clinician might prefer to produce a video recording discussing problems and issues experienced during practical sessions at the law clinic. This recording could be posted online on an e-learning site where students could watch it, learn from it and pose questions to the clinician on a thread provided on the site. The clinician could respond to the questions. Mock trials, moots and other practical exercises, including consultation skills and drafting skills, could also be conducted online. This approach would eradicate the need for venues and the problem of large student numbers. It would furthermore enhance transformative legal education, in that digital technology would be made part and parcel of the teaching and learning experience.

5 A BASELINE STUDY RELATING TO GRADUATE ATTRIBUTES ON SOUTH AFRICAN GRADUATES FROM THE PERSPECTIVE OF EMPLOYERS

5 1 Reasons for the baseline study

During 2009, the results of a baseline study, undertaken by Higher Education South Africa (HESA), was published. This study was a pilot survey and its purpose was to ascertain the views and expectations of employers, as well as their evaluation, of the quality of graduates produced by higher education institutions in South Africa.[139] The study was not specifically conducted with regard to law graduates, but it is submitted that the study, as well as its results, are applicable to the legal profession. The reason for this submission stems from the fact that legal practitioners are constantly on the lookout for new candidate legal practitioners to join law firms and, for that reason, these legal practitioners can be classified as "employers" in the context of this discussion. Furthermore, the baseline study does not exclude legal practitioners in this regard. It was envisaged that the outcomes of this study would:

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[137] Also see Du Plessis "Clinical Legal Education: The Challenge of Large Student Numbers" 2013 38(2) *Journal for Juridical Science* 17 18–19 where it is stated that, even for CLE, large student numbers are a challenge.

[138] McGlynn "The Pros and Cons of Small Group Teaching" (13 June 2018) http://www.sec-ed.co.uk/best-practice/the-pros-and-cons-of-small-group-teaching/ (accessed 2019-07-22).

[139] Griesel and Parker "Graduate Attributes: A Baseline Study on South African Graduates From the Perspective of Employers" 2009 *Higher Education South Africa & The South African Qualifications Authority* 1 2. Also see Greenbaum *et al* 2014 *South African Journal of Higher Education* 94–97 for a discussion of this baseline study.

a) provide useful data to give rise to debate and engagement with the industry;[140] and

b) establish an empirical threshold against which periodic future reviews could be measured.[141]

In a South African context, this baseline study is still relevant and applicable, despite being somewhat dated. This is because the country's economy has not changed and/or improved significantly compared to the time that the study was undertaken. The economy has certain pressing needs and the need for a "skills revolution" was expressed by former Deputy President Phumzile Mlambo-Ngcuka.[142] This expression formed part of the Deputy President's vision to mobilise high-level support for priority skills development.[143] The Deputy President stated that curriculum developers are not paying sufficient attention to the relevance of skills and competencies of graduates in the context of the world of employment.[144] The Deputy President's statement supports the argument in this research that something more is required from higher education in order to produce better graduates for practice. The expectation is for higher education to commence active engagement with the skills needs of the economy, while at the same time addressing the many pressing imperatives constraining South Africa as a developmental state and relatively young democracy.[145] The mentioned engagement should be conducted by way of research, knowledge motivation and innovation.[146]

The baseline study was conducted within the following contextual layers as far as skills and employability are concerned:[147]

a) the interface between higher education and the employment world, as well as the challenges in aligning these two areas;

b) the current pressing skills needs of the economy and society;

c) the reality of a twenty-first century world that is driven by knowledge – a notion that should compel higher education to produce graduates who are able to compete and participate in the increasingly globalised world and economy in useful and productive ways; and

d) the concern of employers about the gap between the outcomes of higher education and the needs of the economy. This gap refers specifically to the quality, type and quantity of graduates produced by higher education institutions.[148] In this regard, higher education has expressed, with some frustration, that universities are not human resources development factories and that employers must therefore

[140] *Ibid.*

[141] *Ibid.*

[142] Griesel *et al* 2009 *Higher Education South Africa & The South African Qualifications Authority* 2.

[143] *Ibid.*

[144] *Ibid.*

[145] *Ibid.*

[146] *Ibid.*

[147] Griesel *et al* 2009 *Higher Education South Africa & The South African Qualifications Authority* 3.

[148] *Ibid.*

appreciate the role that higher education plays in the education of students and the type of graduate that can be delivered.[149]

In conducting this baseline study, HESA assumed the following:[150]

a) that knowledge, skills, competencies and values, developed by higher education, may not be aligned with the needs and expectations of employers and the demands of the rapidly changing working world; and
b) that "skills" may require redefinition in order to bring the responsibilities of higher education in alignment with the possibilities of new and changing forms of work and how knowledge is being applied.

In light of the aforementioned, the study was structured so as to produce the following information:[151]

a) graduate attributes that are considered as important by employers when graduates enter the working world; and
b) the extent to which graduates graduating from South African higher education institutions demonstrate these attributes.

5 2 The study and its results

In conducting this study, it was noted that there is a shift away from the earlier notion of preparing graduates for "employment" towards a notion of "employability".[152] "Employability" is influenced by four broad, but interrelated components, namely:[153]

a) *skilful practices*: this refers to communication, time management, self-management, resource management, problem solving and lifelong learning;
b) *deep understandings grounded in a disciplinary base*: this refers to specialised expertise in a field of knowledge;
c) *efficacious beliefs about personal identity and self-worth*; and
d) *metacognition*: this refers to self awareness, as well as the ability to reflect on actions taken.

"Employability" appears to be a very deep notion.[154] It is inclusive of a lot of soft skills and not merely of attributes that will enable graduates to perform the work when entering the working world. Soft skills refer to time

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[149] *Ibid.*

[150] Griesel *et al* 2009 *Higher Education South Africa & The South African Qualifications Authority* 3, 19; Greenbaum *et al* 2014 *South African Journal of Higher Education* 95.

[151] *Ibid.*

[152] Griesel *et al* 2009 *Higher Education South Africa & The South African Qualifications Authority* 4.

[153] Griesel *et al* 2009 *Higher Education South Africa & The South African Qualifications Authority* 5.

[154] *Ibid.*

management, networking, teamwork, creative thinking and conflict resolution.[155]

In conducting the study, a questionnaire was provided to employers.[156] In the questionnaire, various questions were asked and employers had to answer with written comments or indicating values on two sets of rubrics.[157] Both sets of rubrics contained values from one to five, with one being indicative of "Very Dissatisfied" and five being indicative of "Very Satisfied". One rubric was based on the type of graduate that the employer perceived higher education institutions to have delivered and was titled "what you get".[158] The other rubric was based on the type of graduate that employers expected to receive after the graduate's exit from higher education institutions, and was titled "what you expect".[159] Graduate attributes were categorised into four main groups for the purposes of this study, namely:[160]

a) *basic skills and understanding*: this category investigated whether graduates display the necessary knowledge to meet the expectations of the workplace. In this regard, it was asked: can graduates hit the ground running when entering the workplace? The assumption was that employers would expect graduates to possess basic communication skills and an understanding of the workplace in order to perform effectively.[161] The study revealed that there was a gap between what higher education institutions deliver and what employers expect.[162] The expectations of employers were also placed in different categories and the biggest gaps were found in these categories: "ability to find and access information", "written communications skills", and "ability to use information";[163]

b) *knowledge and intellectual ability*: this category investigated whether graduates demonstrated the intellectual ability and adequate conceptual depth to perform well in the workplace. The assumption was that graduates need to have consolidated their intellectual ability and knowledge foundation, which would enable them to engage with

155 Doyle "What are Soft Skills?" (revised 24 June 2020) https://www.thebalancecareers.com/what-are-soft-skills-2060852 (accessed 2020-04-20).

156 Griesel *et al* 2009 *Higher Education South Africa & The South African Qualifications Authority* 23–27.

157 *Ibid.*

158 Griesel *et al* 2009 *Higher Education South Africa & The South African Qualifications Authority* 24, 25; Greenbaum *et al* 2014 *South African Journal of Higher Education* 95.

159 Griesel *et al* 2009 *Higher Education South Africa & The South African Qualifications Authority* 24, 25.

160 Griesel *et al* 2009 *Higher Education South Africa & The South African Qualifications Authority* 6.

161 Griesel *et al* 2009 *Higher Education South Africa & The South African Qualifications Authority* 9.

162 Griesel *et al* 2009 *Higher Education South Africa & The South African Qualifications Authority* 9–10.

163 Griesel *et al* 2009 *Higher Education South Africa & The South African Qualifications Authority* 10. The ratings were as follows: "ability to find and access information" – higher education delivered: 3.5, while employer expected: 5.0, bringing about a gap of 1.45; "written communication skills" – higher education delivered: 3.2, while employer expected: 4.5, bringing about a gap of 1.34; "ability to use information" – higher education delivered: 3.4, while employer expected 4.6, bringing about a gap of 1.23.

the demands of the workplace, as well as for them to benefit from workplace opportunities.[164] Once again, the delivery of higher education and the expectations of employers were placed in different categories and of these, the biggest gap was in "understanding of economic and business realities";[165]

c) *workplace skills and applied knowledge*: this category investigated whether the performance of graduates was indicative of an appropriate and applied competence to tasks inherent to the workplace. The assumption was that graduates would be able to move from a theoretical approach to a more practical basis.[166] Of the various higher education delivery and employer expectation categories, two stood out as displaying the biggest gaps: the "ability to choose appropriate information to address problems" and the "ability to plan and execute tasks independently";[167] and

d) *interactive and personal skills*: this category investigated how graduates see and conduct themselves in the context of the workplace and workplace practices. The assumption was that changes in workplace practices demand flexibility and adaptability of graduates.[168] Of the various higher education delivery and employer expectation categories, the biggest gap was recorded in "openness and flexibility".[169] "Openness and flexibility" apparently refer to a graduates' willingness to be transparent about their own abilities and to continue learning,[170] realise where change(s) are required and adapt to bring about such changes.[171] Of significance is that the smallest gap was recorded in "willingness to learn".[172] This clearly shows that graduates have a desire to learn skills that are applicable to the workplace. However, it is not clear what the cause of the lack of openness and flexibility in graduates is.

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164 Griesel *et al* 2009 *Higher Education South Africa & The South African Qualifications Authority* 11.

165 Griesel *et al* 2009 *Higher Education South Africa & The South African Qualifications Authority* 12. The rating was as follows: higher education delivered: 2.9, while employer expected 4.2, bring about a gap of 1.34.

166 Griesel *et al* 2009 *Higher Education South Africa & The South African Qualifications Authority* 13.

167 Griesel *et al* 2009 *Higher Education South Africa & The South African Qualifications Authority* 13–14. The ratings were as follows: "ability to choose appropriate information to address problems" – higher education delivered: 3.1, while employer expected: 4.5, bringing about a gap of 1.42; and "ability to plan and execute tasks independently" – higher education delivered: 3.1, while employer expected: 4.5, hence a gap of 1.41.

168 Griesel *et al* 2009 *Higher Education South Africa & The South African Qualifications Authority* 15.

169 Griesel *et al* 2009 *Higher Education South Africa & The South African Qualifications Authority* 15–16. The rating was as follows: higher education delivered: 3.4, while employer expected 5.0, hence a gap of 1.60.

170 See Griesel *et al* 2009 *Higher Education South Africa & The South African Qualifications Authority* 17 in this regard.

171 See Griesel *et al* 2009 *Higher Education South Africa & The South African Qualifications Authority* 15 in this regard.

172 Griesel *et al* 2009 *Higher Education South Africa & The South African Qualifications Authority* 15–16. The rating was as follows: higher education delivered: 4.0, while employer expected 4.7, hence a gap of 0.75.

5 3 Comments on the baseline study by Higher Education South Africa and the South African Qualifications Authority

HESA and SAQA considered the responses from the employers in the context of the two assumptions on which this study was based.[173] There appeared to be a need, as far as both instances are concerned, for engagement between employers and higher education institutions on how to narrow the gap between what is expected and what is delivered.[174] To address this, a common understanding must be reached about the nature of the gaps, as well as ways in which to narrow them.[175] Investigating higher education's work-based and work-placed teaching and learning programmes can assist in establishing what is best and most appropriate.[176] It will further require an investigation into the particular curriculum and educational and assessment practices in order to conclude what will be most effective as far as both higher education and the workplace are concerned.[177]

The study revealed the importance of proficiency in English, communication and digital technology for the purpose of employability.[178] As indicated in the study, this is hardly surprising,[179] especially taking into account that communication and digital technology are concepts integral in almost all forms of employment, including the legal profession. A foundation for these skills is firmly established in the majority of countries, but not in South Africa.[180] Thus higher education has to address the failure of the school system in order for such a foundation to be established in a more systematic and thorough manner.[181] This foundation is of paramount importance for the legal profession, as communication plays an important role in the everyday life of legal practitioners;[182] and digital technology, as part of the Fourth Industrial Revolution, now finds accelerated application in the legal profession.[183] Transformative legal education also requires that students be trained as far as digital technology is concerned.

Overall, the findings of HESA and SAQA are summarised as follows:

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173 See heading 5 1.

174 Griesel *et al* 2009 *Higher Education South Africa & The South African Qualifications Authority* 19.

175 *Ibid.*

176 *Ibid.*

177 *Ibid.*

178 *Ibid.*

179 *Ibid.*

180 *Ibid.*

181 *Ibid.*

182 Hyams "On Teaching Students to 'Act Like a Lawyer': What Sort of Lawyer?" 2008 13 *Journal of Clinical Legal Education* 21 22; Swanepoel, Karels and Bezuidenhout "Integrating Theory and Practice in the LLB Curriculum: Some Reflections" 2008 (Special Issue) *Journal for Juridical Science* 99 103. Communication, in this regard, consists of both writing and verbal skills. Also see Welgemoed *Integration of Clinical Legal Education* 3 4 4 with regard to the importance of effective verbal and drafting skills.

183 Also see Welgemoed *Integration of Clinical Legal Education* 4 7 4 2 with regard to the importance of digital technology and artificial intelligence in the legal profession.

a) employers have a much more complex perception of the role of higher education.[184] This means that employers and higher education may be misreading each other's positions;[185]

b) there is a need to narrow the gap between what employers expect and what higher education delivers.[186] This primarily concerns a proactive task directed at engagement and the application of knowledge by graduates;[187]

c) it is noted that employers do add value to the conceptual foundation, knowledge and intellectual approach to tasks that higher education is generating;[188]

d) this study presents a real opportunity to promote engagement, understanding and more collaborative efforts between higher education and employers. To accomplish this, both higher education and employers must have clarity on how far higher education should go in order to narrow the gap as far as education is concerned, and on to what extent employers should provide on-the-job-training and continuing development;[189]

e) there is political sensitivity relating to the mentioned issues, which may lead to simplification.[190] Nevertheless, honest and constructive engagement between higher education and employers remains essential to improving quality across higher education institutions.[191] The issues cannot merely be left out; they need to be problematised and contextualised.[192]

To achieve better synergy between higher education and employers, the study recommends, *inter alia*, that, before graduation, students should have a clear idea of the expectations of future employers.[193] In this regard, businesses and companies can conduct presentations about these expectations at universities, thereby facilitating the interaction between higher education and employers.[194] It is significant that the study regards it as important to increase the student's career literacy while the student is still attending university.[195] In this regard, it is submitted that career literacy should commence in the first academic year, permeate all other academic years, and culminate in a definitive summary in the final academic year. This will contribute towards continuous education of students and contextualise their preparation for entry into the working world. A pleasing and

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[184] Griesel *et al* 2009 *Higher Education South Africa & The South African Qualifications Authority* 19.
[185] *Ibid.*
[186] Griesel *et al* 2009 *Higher Education South Africa & The South African Qualifications Authority* 20.
[187] *Ibid.*
[188] *Ibid.*
[189] *Ibid.*
[190] *Ibid.*
[191] *Ibid.*
[192] *Ibid.*
[193] *Ibid.*
[194] *Ibid.*
[195] *Ibid.*

unanticipated outcome of the study is that employers appear to understand the demands of a changing working world, as well as the demands that the future will place on graduates who enter the workplace.[196] This emphasises the role of higher education in producing thinking, responsive and intellectually well-grounded graduates who possess flexibility and the ability to adapt readily to demands and challenges.[197]

5 4 Significance of the baseline study for this article

The baseline study by HESA and SAQA has revealed that there is substance to the dissatisfaction of various stakeholders in the legal profession as far as the preparedness of law graduates for legal practice is concerned. A "skills revolution", as suggested by the former Deputy President,[198] is paramount, as graduates appear to lack the necessary skills required for entry into the legal profession. For this reason, the training provided by university law schools and the expectations of legal practice require alignment to ensure that graduates can adapt to the working world. This alignment is beneficial to both graduate, as far as self-development is concerned, and society at large, as graduates must serve members of the public in an accountable and professional manner when entering legal practice.[199] Alignment should be seen as a constitutional imperative as far as teaching and learning by university law schools are concerned. Without a more practical approach to law modules, fully underscored by constitutional values, graduates will not develop a sense of how the law can promote social and procedural justice to improve people's lives. Thus the various suggestions for improvement in the teaching and learning of students (including enhanced written and verbal skills, the involvement of legal practitioners and adequate recognition of the impact of the Fourth Industrial Revolution) can significantly assist with the narrowing of the gap between higher education and the working world.

An important question to be answered is whether the integration of graduate attributes with curricular content is yielding any success. It is not easy to determine whether students have absorbed such attributes during their academic years at university.[200] To answer this question, the views of academics (the primary teachers at university level) should be visited. In the United Kingdom, there has been very little sign of large-scale impact in this regard.[201] In Australia, it has been reported that academics regard graduate attributes as relatively unimportant additive outcomes that are only taught in order to supplement the more important substantive content of the various modules.[202] These findings therefore appear to provide a somewhat negative

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196 *Ibid.*

197 *Ibid.*

198 See heading 5 1.

199 See the Preamble of the Legal Practice Act 28 of 2014, as well as Welgemoed *Integration of Clinical Legal Education* 5 2 2 1 in this regard.

200 Greenbaum *et al* 2014 *South African Journal of Higher Education* 93.

201 *Ibid.*

202 *Ibid.*

answer to the aforementioned question. Graduate attributes can only be successfully internalised by graduates if there is a willingness to integrate them with the module content, which will be reflective of a belief by the particular law teacher that such attributes are indeed important.[203]

The baseline study has already shown that graduates indicate a willingness to learn skills that are applicable to the workplace;[204] therefore, it is submitted that law schools have no choice but to regard integration of graduate attributes with curricular content as paramount to the professional education and training of law students.

It is consequently submitted that law schools at South African universities should take immediate and serious notice of the content of the baseline study, as well as the expectations of legal practice, and adapt the teaching and learning of all substantive law and procedural law modules accordingly.

6 CONCLUSION

Arendt stated the following:[205]

> "Education is the point at which we decide whether we love the world enough to assume responsibility for it and by the same token save it from that ruin which, except for renewal, except for the coming of the new and the young, would be inevitable. And education, too, is where we decide whether we love our children enough not to expel them from our world and leave them to their own devices, not to strike from their hands their chance of undertaking something new, something foreseen by no-one, but to prepare them in advance for the task of renewing the common world."

The Legal Practice Act[206] (LPA) brings about new developments for the legal profession. As argued, it requires of legal practitioners and candidate legal practitioners to practise law in a professional and ethical manner, ever aware of the best interests of their clients. This duty, together with the constitutional imperative to improve the life of all members of society against the backdrop of the constitutional and democratic values, provides opportunities for legal practitioners and candidate legal practitioners to renew the common world, as stated by Arendt. Arendt's pedagogy requires universities to serve the public good by way of critical learning experiences and notions of democratic freedom, instead of a consumerist future.[207]

It has been indicated that the legal profession is, and has always been regarded as, a noble profession.[208] It therefore does not come as a surprise that the South African Minister of Justice and Correctional Service, Ronald

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203 Greenbaum *et al* 2014 *South African Journal of Higher Education* 93.

204 See heading 5 2.

205 Arendt "The Crisis in Education" (undated) file:///D:/LLD%20research/Arendt-Crisis_In_Education-1954.pdf (accessed 2020-05-21); Walker 2002 *Arts and Humanities in Higher Education* 48.

206 28 of 2014.

207 Walker 2002 *Arts and Humanities in Higher Education* 48. Also see heading 2 3 in this regard.

208 See, *inter alia*, Welgemoed *Integration of Clinical Legal Education with Procedural Law Modules* 5 2 2 1 with regard to the legal profession being depicted as a noble profession.

Lamola, has called for judicial officers to be held to the highest standards of scrutiny.[209] As justification for this statement, the Minister stated that the conduct of judicial officers must at all times be beyond reproach and their conduct must befit their office.[210] This follows the suspension of a magistrate based on misconduct for allegedly being linked to corruption.[211] The Minister indicated that such allegations are devastating to the image of judicial officers, the courts and the rule of law in general.[212] Perception definitely matters,[213] especially as far as a noble profession is concerned. The influence of social media on public perception of everyday life (the legal profession not being exempt in any way) has been discussed. The judiciary and the rule of law are therefore no exceptions.[214] US Supreme Court Justice Kennedy has stated that, where there is a loss of confidence in the judicial system and a misunderstanding of the judicial system, steps must be undertaken to correct this.[215]

Therefore, whether it is a judicial officer, legal practitioner, legal administrative official, or the rule of law in general that is compromised by way of unprofessional and unethical conduct, the entire legal profession is tainted by public perceptions of impropriety, and appears not to heed the call for accountability of the provisions of the LPA. As also stated, it may raise concerns about the legal education and training that legal professionals have undergone, not only during their years of experience and vocational training in practice, but also as far as university education and training is concerned. Sibanda indeed states that "[s]ome of the faultlines in the judiciary and legal profession lie in our legal training."[216] Law schools offer legal practices modules as part of the LLB curriculum, but topics like professional conduct and ethics are not always sufficiently addressed.[217] As professional conduct and ethics are linked to the law, the inclusion of such aspects in the training of students should be emphasised. It will strengthen the attempts to produce graduates who can fulfil accountable roles in serving the public.

It can therefore be stated without doubt that the advent of the LPA requires a new level of legal education. This is undeniable when taking into account statements that the LPA must bring change not only to the legal profession, but also to the manner in which the legal profession provides legal services to beneficiaries of the system (members of the public).[218] During practical vocational training, candidate legal practitioners use substantive law, legal procedure and aspects of evidence every day. This

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[209] Sibanda "Why Pay a Lawyer When You Can Buy the Judge? Corruption in our Legal System is a Threat to Democracy" (1 March 2020) https://www.dailymaverick.co.za/opinionista/2020-03-01-why-pay-a-lawyer-when-you-can-buy-the-judge-corruption-in-our-legal-system-is-a-threat-to-democracy/ (accessed 2020-03-17).

[210] *Ibid.*

[211] *Ibid.*

[212] *Ibid.*

[213] *Ibid.*

[214] *Ibid.*

[215] *Ibid.*

[216] *Ibid.*

[217] *Ibid.*

[218] Thebe "Legal Practice Act and human rights at the core of issues discussed at LSSA AGM" (2015) http://www.saflii.org/za/journals/DEREBUS/2015/89.pdf.

does not cease after they have been admitted and enrolled as legal practitioners; it intensifies. In applying substantive law, legal procedure and evidence, legal practitioners and candidate legal practitioners are serving the world. In this regard, and to paraphrase Arendt's above-mentioned words, if law teachers value the world that is to be served by legal practitioners and candidate legal practitioners, law teachers must educate law students accordingly. This requires transformative legal education to enable students to undertake "something new", as stated by Arendt, when entering legal practice as adequately qualified graduates.

However, in order for graduates successfully to undertake "something new" upon entering legal practice, they need to possess the required graduate attributes. The LLB standard makes it clear that a substantial knowledge of legal theory, practical skills and an appreciation of constitutional values, legal ethics and professionalism are paramount for all law graduates. It is consequently recommended that law schools should devise faculty-specific CCFOs in order to direct the focus to the desired quality of graduates when leaving university.[219] These faculty-specific CCFOs should not in any way contradict what is contained in the LLB standard. Rather, they should be viewed as focus areas as to where specific training is required to prepare students better for legal practice. The CCFOs should therefore flow from and be interrelated with what is stated in the LLB standard. It is submitted that these CCFOs will also amplify the identity of a particular university as far as the recognition of the importance of graduate attributes are concerned. In devising such graduate attributes, law schools should ensure that the constitutional imperative, as argued for in this article, is strictly adhered to. If they do so, the foundation is firmly established for the training of law graduates who can promote the spirit and purport of the LPA and the Constitution from their first day in legal practice.

A wide range of employability skills can have positive effects not only on graduate learning outcomes and employability, but also on the economy.[220] For this reason, higher education institutions should play a pivotal role in developing the career management skills of students.[221] University law schools must actively engage with aspects of employability as far as all law modules are concerned.[222] It is submitted that, in order to determine whether university law schools are compliant in this regard, more frequent baseline studies relating to graduate attributes may be required. This could be done every alternate year, with annual reports submitted to the particular government funding institution(s) by law schools, clearly setting out the training provided to law students. As much as this may bring about administrative burdens for both law schools and government, it may result in more practice-ready law graduates. It is therefore important that universities remove the division between themselves and the demands of legal practice in order to assist graduates to prepare for their careers in legal practice.[223] In

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219 See heading 2 for examples of CCFOs of UWC and NMU.

220 Bridgstock 2009 *Higher Education Research and Development* 39.

221 *Ibid.*

222 See Bridgstock 2009 *Higher Education Research and Development* 39 in this regard.

223 See Bridgstock 2009 *Higher Education Research and Development* 40 in this regard.

this way, university law schools become important conduits between skilled law graduates and members of the public being served in an accountable, professional and ethical manner.

It can therefore be concluded that the graduate attributes, as provided for in the LLB standard, are sufficient to prepare law students for legal practice. Law schools should further familiarise themselves with the mission and vision of the LPA, in order to be clear on how important it is to comply with the constitutional imperative, as argued for in this article. If not, such universities may be accused of producing legal practitioners who are not responsive to the needs of the public, especially in a developing country like South Africa, where there is a large disparity in the distribution of wealth.[224]

[224] McQuoid-Mason "Can't Get No Satisfaction: The Law and Its Customers: Are Universities and Law Schools Producing Lawyers Qualified to Satisfy the Needs of the Public?" 2003 28(2) *Journal for Juridical Science* 199 207.

APPLYING PROVISIONS ON FORFEITURE OF PATRIMONIAL BENEFITS TO POLYGYNOUS CUSTOMARY MARRIAGES

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SUMMARY

The purpose of forfeiture-of-patrimonial provisions (forfeiture) is to ensure that a person does not benefit from the dissolution of a marriage that he or she has wrecked. Forfeiture provisions appear in section 9 of the Divorce Act 70 of 1979 (DA). They were initially designed only for civil marriages in a monogamous setting, and they were designed to apply to the three matrimonial property systems. Strictly speaking, customary marriages were neither in community of property nor out of community of property. Be that as it may, by reason of section 7 of the Recognition of Customary Marriages Act 120 of 1998 (RCMA), the three matrimonial property regimes apply to monogamous customary marriages. In addition, section 8 of the RCMA introduces section 9 of the DA to the dissolution of customary marriages. Monogamous customary marriages do not present a challenge to the application of section 9. It is polygynous customary marriages that present a complex situation. This article considers the application of forfeiture in polygynous customary marriages. It is concerned with a situation where a court orders forfeiture in divorce proceedings between a husband and one of his wives.

1 INTRODUCTION

The original purpose of providing for forfeiture of patrimonial benefits (forfeiture) was to ensure that a party to a marriage did not benefit from the dissolution of a marriage that he or she had actively wrecked.[1] Forfeiture may be seen as an exception to the default rules pertaining to the various matrimonial property systems in South Africa.[2] For instance, the general rule in a marriage in community of property is that the parties share equally in the joint estate on dissolution of the marriage.[3] If a court orders forfeiture, on

1 *Murison v Murison* 1930 AD 157.

2 Sibisi "Re-Thinking Forfeiture of Patrimonial Benefits When a Marriage Dissolves Through Death" 2022 *Obiter* 260 261.

3 See ch 3 of the Matrimonial Property Act 88 of 1984.

application by a party to a marriage, the parties will not share equally in the joint estate. The spouse who is responsible for the breakdown of the marriage will be ordered by the court to forfeit any benefit accruing by virtue of the marriage, either wholly or in part. In marriages out of community of property, without the accrual system, a party forfeits whatever benefit the antenuptial contract confers.[4] In a marriage that is subject to the accrual system, a party forfeits any accrual claim that he or she may have against the estate of the innocent party.[5] In short, a person forfeits a patrimonial benefit. The requirements for a forfeiture order are discussed below.

Difficulties in the application of forfeiture provisions do arise in cases of polygynous marriages. The first hurdle is that in a polygynous customary marriage, a man has more than one wife.[6] Furthermore, the matrimonial property rules in polygynous customary marriages are not as straightforward as they may seem.[7] It is also accepted that, historically, the matrimonial property rules encapsulated in the Matrimonial Property Act[8] do not bode well for customary marriages in general, and is yet more complicated for polygynous customary marriages. Mamashela points out that prior to the promulgation of the Recognition of Customary Marriages Act[9] (RCMA), customary marriages were neither in nor out of community of property.[10] Therefore, she argues that it is incorrect to say that prior to the promulgation of the RCMA, customary marriages were automatically out of community of property.[11] |Although the RCMA has been promulgated, there are challenges regarding matrimonial property matters in polygynous marriages, as is shown below. Nevertheless, Pienaar suggests that the only viable matrimonial property system in a polygynous marriage is out of community of property without accrual.[12] This view is also supported by Heaton and Kruger.[13] These authors are of the view that it is impossible to apply community of property to a polygynous marriage as this may result in one wife having an undivided and indivisible share in property acquired by another wife.[14]

However, Pienaar refers to findings of empirical research published in 2000. She points out that about 69 per cent of the respondents married in terms of customary law (monogamous and polygynous) preferred some form

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[4] Hahlo "When Is a Benefit Not a Benefit?" 1984 *South African Law Journal* 456 457.

[5] See generally Sibisi 2022 *Obiter* 261–262 for a brief discussion on the application of forfeiture in the different matrimonial property systems.

[6] Mwambene "What Is the Future of Polygyny (Polygamy) in Africa?" 2017 *Potchefstroom Electronic Law Journal* 1.

[7] Pienaar "African Customary Wives in South Africa: Is There Spousal Equality After the Commencement of the Recognition of Customary Marriages Act?" 2003 *Stellenbosch Law Review* 256 263.

[8] 88 of 1984.

[9] 120 of 1998.

[10] Mamashela "New Families, New Property, New Laws: The Practical Effects of the Recognition of Customary Marriages Act" 2004 *South African Journal of Human Rights* 616 617–618.

[11] *Ibid*.

[12] Pienaar 2003 *Stell LR* 263.

[13] Heaton and Kruger *South African Family Law* 4ed (2015) 224.

[14] *Ibid*.

of property sharing.[15] Clearly, this does not equate to a marriage that is out of community of property. The RCMA does not cater for a combination of community of property and the sharing of property, especially where the accrual system is excluded.[16]

This article attempts to clarify the application of forfeiture in polygynous customary marriages. It is concerned with a polygynous customary marriage where a court orders forfeiture in divorce proceedings between a husband and one of his wives. It should be noted that the forfeiture provisions, as they currently stand, were designed for civil marriages concluded in accordance with the Marriage Act.[17] They were also designed to apply to a monogamous marital institution. Furthermore, at the time that the laws were written, customary marriages were not fully recognised. Be that as it may, when customary marriages were finally recognised by the RCMA, the legislature decided to introduce civil-law matrimonial property rules to monogamous customary marriages. Accordingly, all monogamous customary marriages are, by default, in community of property and of profit and loss.[18] However, the legislature does not prescribe any matrimonial property system for polygynous customary marriages. Instead, a distinction is drawn between those polygynous customary marriages that were entered into before the RCMA and those that were entered into after the RCMA. Furthermore, by virtue of section 8(4)(*a*) of the RCMA, section 9 of the Divorce Act[19] (DA), which provides for forfeiture, applies in divorce proceedings in customary marriages.

It must be pointed out that a monogamous customary marriage has similar characteristics to a civil marriage in that they are both monogamous; but a monogamous customary marriage is potentially polygynous, and a civil marriage is strictly monogamous. For this reason, the matrimonial property systems applicable to civil marriages can easily be applied in monogamous customary marriages.[20] In turn, this makes the application of the forfeiture relatively straightforward. However, the same is not the case in respect of polygynous customary marriages.

This article opens with a brief discussion in part 2 on polygynous customary marriages in South Africa and their recognition in the RCMA. Part 3 goes on to discuss matrimonial property in polygynous customary marriages. In line with the RCMA, it considers both old polygynous marriages (entered into before the RCMA came into operation) and new polygynous marriages (entered into after the RCMA). This part of the discussion also highlights the complexities involved in matrimonial property matters in polygynous customary marriages and serves as a backdrop to the discussion that follows. Part 4 discusses forfeiture in general, while part 5 is a more focused discussion on the application of forfeiture in polygynous customary marriages. Part 6 concludes by recommending how courts should apply these provisions in polygynous customary marriages.

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15 Pienaar 2003 *Stell LR* 266.
16 *Ibid*.
17 25 of 1961.
18 S 7(2) and (3) of the RCMA.
19 70 of 1979.
20 Pienaar 2003 *Stell LR* 263.

2 A BRIEF NOTE ON THE LEGAL RECOGNITION OF POLYGYNY

Despite predating colonialism, customary marriages were not afforded full legal recognition in South Africa prior to the RCMA. The reasons for non-recognition were given as the requirement of *ilobolo* and the potentially polygynous nature of a customary marriage.[21] Dlamini is critical of polygyny being used as a reason for non-recognition.[22] He argues that since a civil marriage allows for divorce and remarriage, this implies that it accommodates serial polygyny.[23] Thus, it is submitted that this reasoning was simply a poor excuse to perpetuate racial discrimination because even monogamous customary marriages were not recognised. If polygyny were really the reason for non-recognition, then monogamous customary marriages would have been afforded conditional recognition that fell away as soon as the marriage became polygynous. However, monogamous customary marriages suffered the same fate as polygynous customary marriages. The most plausible conclusion to be drawn here is that the grand scheme was for total annihilation of customary marriages in favour of Christian or civil marriages.

Arguably, the promulgation of the Constitution[24] paved the way to the full recognition of customary marriages in general. It is submitted that non-recognition or piecemeal recognition could not withstand constitutional scrutiny in light of constitutionally entrenched rights such as equality,[25] human dignity,[26] freedom of religion, belief and opinion[27] and the right to culture.[28] The RCMA was signed into law on 20 November 1998 and came into effect on 15 November 2000. Section 2 of this Act is relevant for present purposes. Section 2(3) and (4) provides for the recognition of polygynous customary marriages entered into both before and after the commencement of the RCMA (old and new polygynous marriages). Section 2(3) provides for the full recognition of old polygynous customary marriages provided that they were valid under customary law. Section 2(4) provides for the full recognition of new polygynous customary marriages provided that they comply with the RCMA. The legislation clearly intended to clear away any doubts about the legal recognition of all polygynous marriages and promote legal certainty.

Section 3 of the RCMA provides the requirements for a valid new customary marriage. Much has been written about these provisions, but this article only refers to relevant aspects. Parties to a polygynous marriage must

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21 Maithufi and Bekker "The Recognition of the Customary Marriages Act of 1998 and its Impact on Family Law in South Africa" 2002 *Comparative and International Law Journal of Southern Africa* 182.

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

23 Dlamini 1991 *Acta Juridica* 76.

24 Constitution of the Republic of South Africa, 1996.

25 S 9 of the Constitution.

26 S 10 of the Constitution.

27 S 15 of the Constitution.

28 S 30 of the Constitution.

both be above the age of 18;[29] they must consent to be married to each other under customary law[30] and the marriage must be negotiated and entered into or celebrated in accordance with customary law.[31] If one party is below the age of 18, parental consent is required.[32] Neither party should be a party to an existing civil marriage with another person.[33]

The provisions of section 7 of the RCMA are also relevant. In general, section 7 provides for the proprietary consequences of customary marriages and the contractual capacity of spouses. Section 7(6) provides for a court-approved contract if a husband wishes to enter into a subsequent customary marriage. Such a contract would regulate the proprietary consequences of the polygynous marriage. Prior to the Constitutional Court decision in *MM v MN*,[34] the impact of the absence of this court-approved contract on the validity of a subsequent polygynous marriage was unclear. This would not have been the case had section 7(6) been express about the consequences of the absence of a court-approved contract.[35] In *MM v MN*, the court *a quo* had held that failure to comply with section 7(6) invalidated the subsequent marriage.[36] On appeal, the Supreme Court of Appeal disagreed with the court *a quo*. It held that failure to comply with section 7(6) did not invalidate the subsequent marriage, but the subsequent customary marriage was out of community of property.[37] On further appeal to the Constitutional Court, the court confirmed the decision of the SCA – that failure to comply with section 7(6) did not invalidate the subsequent marriage.[38] The marriage remained valid provided there was compliance with other requirements of a polygynous customary marriage, including that there must be consent of the first wife in *Tsonga* polygynous customary marriages. Therefore, though desirable, a court-approved contract as envisaged in section 7(6) is not a requirement for a valid subsequent marriage.[39]

3 MATRIMONIAL PROPERTY IN POLYGYNOUS MARRIAGES

Section 7 of the RCMA provides for proprietary consequences of all customary marriages. While it prescribes community of property, profits and loss for monogamous customary marriages, it does not prescribe any matrimonial property regime for polygynous customary marriages.

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29 S 3(1)(*a*)(i) of the RCMA.

30 S 3(1)(*a*)(ii) of the RCMA.

31 S 3(1)(*b*) of the RCMA.

32 S 3(3) of the RCMA.

33 S 10(1) and (4) of the RCMA.

34 2013 (4) SA 415 (CC).

35 Kruuse and Sloth-Nielsen "Sailing Between Scylla and Charybdis: *Mayelane v Ngwenyama*" 2014 *Potchefstroom Electronic Law Journal* 1710 1712.

36 The decision of the court *a quo* is reported as *MM v MN* 2010 (4) SA 286 (GNP). See par 23.

37 The decision of the SCA is reported as *Ngwenyama v Mayelane* 2012 (4) SA 527 (SCA). See par 38.

38 *MM v MN* (CC) *supra* par 41.

39 Van Heerden, Skelton, Du Toit, Anderssen, Baird, Boezaart, Carnelley, Feldhaus, Hansungule, Human, Weeks, Ozah, Robinson and Smith *Family Law in South Africa* 2ed (2021) 225.

Furthermore, a distinction is drawn between the proprietary consequences in old and new polygynous customary marriages.[40] The wisdom behind this distinction is debatable in light of developments pertaining to customary marriages. A similar distinction does not exist in relation to monogamous customary marriages. In terms of the amended section 7(2), a monogamous customary marriage, irrespective of when it was entered into, is a marriage in community of property unless the community of property is excluded by the parties in an antenuptial contract.

Prior to amendments in 2021,[41] the proprietary consequences of old monogamous and polygynous customary marriages were governed by customary law,[42] leading to a conclusion that these customary marriages were neither in nor out of community of property.[43] Although section 6 of the RCMA conferred equal status and capacity, the husband retained control of all property.[44] Parties to these marriages could apply to court for leave to amend their matrimonial property system.[45] The husband had to join all the wives to his application.[46] The proprietary consequences of new polygynous marriages were to be governed by a court-approved contract as provided for in section 7(6), briefly discussed above.

The amendments were triggered by two notable cases. These cases challenged the provision that the proprietary consequences of old customary marriages continued to be governed by customary law and were thus out of community of property. With respect to old monogamous customary marriages, the leading case is *Gumede v President of the Republic of South Africa*.[47] Since this article does not focus on monogamous marriages, these decisions will not be discussed in great detail, save to indicate that the RCMA was subsequently[48] amended, as mentioned above, to provide that all old and new monogamous customary marriages are, by default, in community of property.[49] For the sake of clarity, matrimonial property in old polygynous customary marriages is discussed separately from matrimonial property in new polygynous marriages.

3 1 The matrimonial property regime in old polygynous customary marriages

The leading case with respect to old polygynous customary marriages is the Constitutional Court decision in *Ramuhovhi v President of the Republic of South Africa*.[50] In this case, the applicants approached the courts for an

[40] See s 7 of the RCMA.
[41] The Recognition of Customary Marriages Amendment Act 1 of 2021.
[42] S 7(1) of the RCMA before the amendment.
[43] Rautenbach *Introduction to Legal Pluralism in South Africa* (2018) 97.
[44] Bennett *Customary Law in South Africa* (2004) 246.
[45] S 7(4)(*a*) of the RCMA.
[46] S 7(4)(*b*) of the RCMA.
[47] 2009 (3) SA 152 (CC).
[48] Notably, it took approximately a decade for the RCMA to be amended after the decision in *Gumede supra*.
[49] S 7(2) of the RCMA, as amended.
[50] 2018 (2) SA 1 (CC).

order that section 7(1) of the RCMA was unconstitutional in providing that old polygynous customary marriages continued to be governed by customary law, in terms of which only the husband controlled matrimonial property. The Constitutional Court had to consider the damaging impact that this provision had on the lives of women in old polygynous customary marriages. It found that section 7(1) perpetuated "inequality between husbands and wives" in the case of old polygynous customary marriages.[51] It also found that section 7(1) discriminated on the ground of marital status in that it differentiated between parties to old polygynous customary marriages and parties to new polygynous customary marriages.[52] Since marital status is a listed ground,[53] the discrimination was automatically unfair.[54] In addition, the court found that the discrimination limited the right to human dignity.[55] After finding that section 7(1) was unconstitutional, the court ordered interim relief pending legislative intervention.[56] It held that the spouses in old polygynous customary marriages must all share equally in the ownership, management and control of family property.[57] With respect to house property, the court held that the husband and wife of that house must have equal rights. It also held that a party retains exclusive ownership and control of personal property.[58]

Following this decision, the RCMA was amended in 2021. These amendments included those necessitated by the decision in *Gumede*,[59], albeit that more than a decade had passed. In its amended form, section 7(1) provides for the proprietary consequences of old polygynous customary marriages. Accordingly, the spouses have joint and equal ownership, right of management and control over marital property.[60] In respect of house property, the husband and wife must jointly manage and control the house property in the best interests of the members of the house.[61] In respect of family property, the husband and all the wives must jointly manage and control the family property in the best interests of the whole family constituted by all the houses.[62] Each spouse retains exclusive ownership, management and control of personal property.[63] It is thus clear that old polygynous customary marriages are neither in nor out of community of property. There is also a significant shift from the legal position before *Ramuhovhi*, where the husband had control of all the property.[64]

The most important question that arises is about the meaning of the concepts "house property", "family property" and "personal property". In

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51 *Ramuhovhi supra* par 35.
52 *Ramuhovhi supra* par 37.
53 S 9(3) of the Constitution.
54 *Ramuhovhi supra* par 39.
55 *Ramuhovhi supra* par 38.
56 *Ramuhovhi supra* par 51.
57 *Ibid.*
58 *Ramuhovhi supra* par 63.
59 *Supra.*
60 S 7(1)(*a*)(i) and (ii) of the RCMA, as amended.
61 S 7(1)(*b*)(i) of the RCMA, as amended.
62 S 7(1)(*b*)(ii) of the RCMA, as amended.
63 S 7(1)(*c*) of the RCMA, as amended.
64 Bennett *Customary Law Africa* 257.

Ramuhovhi, the court did not explain them. The amended RCMA also does not define them. Instead, it provides that they have the meaning ascribed to them in customary law.[65] One may conclude that this is in deference to living customary law: should there be a dispute about which property belongs to what category and the consequences thereof, the courts will first ascertain the contents of the living law of a particular group before making a decision. However, if the past is anything to go by, courts will simply apply official customary law or formal law to the dispute. It is submitted that there is nothing wrong with applying official customary law *per se*. However, from time to time, courts must verify if the formal law is still in line with lived experiences. Be that as it may, the concepts above are explained with reference to formal literature.

To understand the meaning of the concepts, it is first important to understand the system of the ranking of wives and their houses in a polygynous customary marriage. Each wife constitutes a house,[66] and all her descendants belong to that house. House property refers to property acquired by members of the house.[67] House property is also referred to as general property, although, reference to general property is problematic because it can easily be confused with family property. Property acquired by children of the house will belong to that specific house.[68] *Ilobolo* delivered for the marriage of the daughter of the house belongs to that house.[69] In addition, *ihlawulo* (damages) given for a wrong committed against a person belonging to a particular house will also form part of house property.[70] A house will continue to exist indefinitely, as long as there is a surviving member of that house.[71]

Family property refers to property that has been acquired by the husband, but that has not been allotted to any house.[72] If the husband allots any property to a particular house, such property belongs to that house and no longer constitutes family property.[73] Once the husband has allotted property to a particular house, he cannot reverse this.[74] However, an inter-house loan is possible, in which case one house is indebted to another.[75] The decision to make an inter-house loan is taken after consultation between the husband, the wife of the lending house and other members of that house.[76] For example, if cattle delivered for a daughter belonging to the first house is

[65] S 7(1)(*d*) of the RCMA, as amended.

[66] Himonga, Nhlapo, Maithufi, Weeks, Mofokeng and Ndima *African Customary Law in South Africa: Post-Apartheid and Living Law Perspective* (2020) 129.

[67] *Ibid.*

[68] Heaton and Kruger *South African Family Law* 223.

[69] Himonga *et al African Customary Law* 129.

[70] Bennett *Customary Law Africa* 257.

[71] Weeks "Constitutionally Transforming South Africa by Amalgamating Customary and Common Law: *Ramuhovhi*, the Proprietary Consequences of Marriage and Land as Property" 2021 *Constitutional Court Review* 174.

[72] Himonga *et al African Customary Law* 129.

[73] Heaton and Kruger *South African Family Law* 223.

[74] Mwambene 2017 *PELJ* 19.

[75] Mwambene 2017 *PELJ* 20.

[76] Maithufi and Bekker 2002 *CILSA* 182 188 ; Bennett *Customary Law* 244.

used by the son of the second house to deliver *ilobolo* for his bride, the second house is indebted to the first house. The loan must be paid back.[77]

Personal property includes everything that is not house property or family property. It includes clothes of a particular family member[78] and also gifts given to a member of the family.

3 2 The matrimonial property regime in new polygynous customary marriages

As seen above, matrimonial property in new polygynous customary marriages is dealt with differently from old polygynous customary marriages. Section 7(6) of the RCMA provides that a husband in a customary marriage who wishes to enter into a subsequent customary marriage with another woman must approach the court for approval of a written contract that will regulate their future matrimonial property affairs. This must be done before the subsequent marriage. It must again be stressed that section 7(6) is not a prerequisite for the validity of the subsequent customary marriage. This provision only has a bearing on the matrimonial property affairs of the customary marriage. A court hearing an application of this nature is empowered to order the termination of any applicable matrimonial property system in the existing marriage[79] and also order division of the estate accordingly.[80] The court is also bound to take into account the circumstances of the family groups that will be affected by the order.[81] The existing spouse(s) and any other persons with sufficient interest in the matter, such as creditors, must be joined in the application proceedings.[82] The court has a discretion whether to accept the written contract or refuse it. It may refuse to accept the contract if it is of the opinion that the interests of any party will not be sufficiently protected by the contract.[83]

The written contract envisaged is flexible. It does not prescribe any prescriptive terms for the parties. It allows the parties to structure their matrimonial property affairs in a way that works for the household. The only prerequisites are that the contract should be fair to all the parties involved. In order to achieve certainty, one formality is essential. The contract must be in writing. To ensure that all the spouses are on the same page regarding the written contract, the registrar or clerk of the court is required to furnish each spouse with the order of the court and a certified copy of the written

[77] Bennett *Customary Law* 244.

[78] Horn and Janse van Rensburg "Practical Implications of the Recognition of Customary Marriages" 2002 *Journal for Juridical Science* 54 62.

[79] S 7(7)(*a*)(i)(*aa*) of the RCMA.

[80] S 7(7)(*a*)(i)(*bb*) of the RCMA. If the existing marriage was in community of property, the court must effect a division of the joint estate. In the case of a marriage that is subject to the accrual system, the court must effect a transfer of the accrual to the poorer spouse. Overall, the court must ensure an equitable distribution of the property (s 7(7)(*a*)(ii) of the RCMA).

[81] S 7(7)(*a*)(iii) of the RCMA.

[82] S 7(8) of the RCMA.

[83] S 7(7)(*b*)(iii) of the RCMA.

contract.[84] The written contract must also be sent to each registrar of deeds in the area in which the court is situated.[85]

The most important question is how the matrimonial property issue is resolved in cases where subsequent customary marriages are concluded without a written contract as envisaged. On the face of it, one might apply the precedent set in *MM v MN*[86] (also confirmed by *Ramuhovhi*),[87] – that is, the subsequent marriage will be out of community of property. It is submitted that this is not ideal precedent. The question before the Constitutional Court in *MM v MN* did not concern the applicable matrimonial property system where the husband failed to comply with section 7(6). The issue concerned the requirements for a valid subsequent customary marriage. Since the Constitutional Court found that the subsequent customary marriage was null and void because it did not comply with the requirements for a valid polygynous customary marriage, the question of matrimonial property did not arise in this case. Had this question been before the Constitutional Court as the main question, the court may have come to a different conclusion when considering the impact that the exclusion of community of property can have on women. A woman can easily be deprived of her house property or personal property if it is registered in the name of her husband.[88] To guard against similar occurrences, section 8(4)(*b*) of the RCMA empowers a court to order a redistribution in divorce proceedings.

Recently in *Sithole v Sithole,*[89] the Constitutional Court held that section 21(2)(*a*) of the Matrimonial Property Act, as amended by the Marriage and Matrimonial Property Law Amendment Act,[90] was unconstitutional in that it prescribed that all civil marriages between African people entered into before 2 December 1988 were automatically out of community of property.[91] The parties argued that this differentiation discriminated unfairly against African people whose civil marriages were entered into under the Black Administration Act.[92] The court agreed with this argument. It held that the basis of the differentiation was racial discrimination and segregation based on the notion that African and White people were not worthy of the same treatment and governmental protection.[93] The State had failed to show any

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[84] S 7(9) of the RCMA.

[85] *Ibid.*

[86] *Supra.*

[87] *Supra.*

[88] Pienaar 2003 *Stell LR* 263.

[89] 2021 (5) SA 34 (CC).

[90] 3 of 1988. On 2 December 1988, the Marriage and Matrimonial Property Law Amendment Act 3 of 1988 was passed. It provides that all civil marriages entered into by African persons on or after 2 December 1988 are in community of property. However, African parties to civil marriages entered into before 2 December 1988, which were automatically out of community, had two years from 2 December 1988 to amend the applicable matrimonial property system to include community of property. The applicant in *Sithole v Sithole* fell within the category of persons who were married prior to 2 December 1988 and had failed to change the matrimonial property system before the deadline on 1 December 1990. Therefore, her marriage remained out of community of property, in terms of section 22(6) of the Black Administration Act 38 of 1927.

[91] *Sithole supra* par 1.

[92] 38 of 1927. Also see *Sithole supra* par 11.

[93] *Sithole supra* par 44.

legitimate basis for the continued retention of section 21(2)(*a*), and therefore, the Constitutional Court confirmed that it was unconstitutional.[94] Following this decision, the legal position is that all civil marriages entered into before 2 December 1988 are now automatically in community of property, save where the parties have specifically excluded community of property.[95] This decision points yet again to the devastating impact of the exclusion of community of property on women. This case supports the argument above that *MM v MN* is not ideal precedent insofar as it held that the subsequent customary marriage will be out of community of property if section 7(6) was not complied with.

It is submitted that the legal position now applicable to old polygynous customary marriages as a result of the amendment in 2021, as discussed above, is best suited in cases where the husband failed to comply with section 7(6) of the RCMA. In this situation, the wife will share equally with her husband in house property, regardless of who has it registered in their name. Any children born of the marriage will benefit from the house property. The interests of the other wives will be equally protected in that they will each share equally with their husband in their house property. With respect to family property, all the parties to the polygynous marriage will share equally. This is certainly better than complete exclusion of community of property, as held in *MM v MN*.

4 FORFEITURE OF PATRIMONIAL BENEFITS

4 1 Forfeiture under the common law

Forfeiture is not unique to the Divorce Act[96] (DA). It originates in Roman law.[97] The general purpose of forfeiture was to ensure that a guilty party to a marriage does not benefit from the dissolution of a marriage that he or she has wrecked.[98] In the past, marriage was a sacrosanct union between a husband and a wife.[99] Divorce was very rare[100] and was dependent on the commission of marital fault. In every divorce case, courts had to identify the guilty spouse and the innocent spouse. Only the innocent spouse could initiate divorce proceedings. In other words, a guilty party could not institute divorce proceedings.[101] In *Schwartz v Schwartz*,[102] the husband was the guilty spouse in that he was living in adultery with his mistress, Miss Lintvelt, a teacher at his daughter's school.[103] The husband had tried to institute divorce proceedings in 1978, prior to the DA, but had to withdraw as he was

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94 *Sithole supra* par 47.

95 *Sithole supra* par 59.1.

96 70 of 1979.

97 *Swil v Swil* 1978 (1) SA 790 (W) 792H.

98 *Murison v Murison supra*.

99 Barratt, Domingo, Amien, Denson, Mahler-Coetzee, Olivier, Osman, Schoeman and Singh *Law of Persons and the Family* 2ed (2017) 236.

100 This is in contrast to the present where the divorce rate is very high. See Heaton and Kruger *South African Family Law* 13.

101 Barratt *et al Law of Persons and the Family* 334.

102 *Schwartz v Schwartz* 1984 (4) SA 467 (A).

103 *Schwartz v Schwartz supra* 470C.

the guilty spouse.[104] He was advised that "the chances were not so good in getting a divorce".[105]

A forfeiture order could only be made adjunct to a divorce or a separation order.[106] A party to a marriage could not simply approach the courts for this order without simultaneously seeking to have the marriage dissolved.[107] In Roman law, the grounds upon which the order could be made were malicious desertion, adultery, incurable mental illness and imprisonment of at least five years.[108] Under Roman-Dutch law, forfeiture was developed further. The grounds upon which an order of forfeiture could be made were adultery and malicious desertion. An interesting feature about malicious desertion as a ground for a divorce or forfeiture is worth mentioning. If a party relied on malicious desertion as a ground, he or she was required to approach the court first for an order calling on the deserting spouse to restore conjugal rights. A divorce or forfeiture order was only competent if, on the return day, the deserting spouse had failed to restore conjugal rights.[109] It is no longer competent for courts to issue orders for restitution of conjugal rights.[110]

4 2 Forfeiture under the Divorce Act

Section 9(1) of the DA provides for forfeiture. It supersedes the common law. It reads:

> "When a decree of divorce is granted on the ground of irretrievable break-down of a marriage the court may make an order that the patrimonial benefits of the marriage be forfeited by one party in favour of the other, either wholly or in part, if the court, having regard to the duration of the marriage, the circumstances which gave rise to the break-down thereof and any substantial misconduct on the part of either of the parties, is satisfied that, if the order for forfeiture is not made, the one party will in relation to the other be unduly benefited."

Based on section 9(1), the requirements of a forfeiture order may be summarised as follows. Forfeiture may only be ordered in divorce proceedings, and the ground for the divorce must be the irretrievable breakdown of the marriage. Only a patrimonial benefit may be forfeited. The patrimonial benefit to the other party must be undue. The court must employ three factors to determine whether the benefit is undue. These factors are the duration of the marriage, the circumstances which gave rise to the breakdown of the marriage and any substantial misconduct on the part of either spouse. Finally, the court has a narrow discretion to order total or partial forfeiture.

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104 *Schwartz v Schwartz supra* 470F–G.

105 *Schwartz v Schwartz supra* 470H.

106 Sibisi 2022 *Obiter* 264.

107 *Ibid*. In the case of *Vergottini v Vergottini* 1951 (2) SA 848 (W), the court refused to grant an order for forfeiture of patrimonial benefits because there were no divorce or separation proceedings.

108 Sibisi 2022 *Obiter* 264.

109 *Ex parte Boshoff NO: In re Boshoff v Boshoff* 1953 (3) SA 237 (W) 238B.

110 S 14 of the DA.

The requirements above raise various questions of interest. The requirement that the proceedings should be divorce proceedings is interesting because divorce is not the only way of dissolving a marriage. Although a marriage may be dissolved through death, divorce and annulment,[111] a forfeiture order may not be made when a marriage is dissolved through death and annulment. In *Monyepao v Ledwaba*,[112] the Supreme Court of Appeal held that a forfeiture order could not be granted when the marriage was dissolved through death.[113] Notwithstanding that the litigants were two wives of the deceased, the court also held that a forfeiture order could only be granted to a party to a marriage against the other spouse.[114] This reasoning is problematic because by its nature, a customary marriage has more than two spouses. The two wives of the deceased were parties to the marriage. This decision may also be criticised for adopting a literal interpretation. Had the court considered the rationale behind forfeiture, which is to ensure that a person does not unduly benefit from a marriage that he or she has wrecked,[115] it may have arrived at a different decision. Furthermore, the facts of the case were such that, had the marriage ended in divorce, forfeiture may have been ordered. Briefly, one of the litigant wives, the respondent, had entered into a civil marriage during the subsistence of the customary marriage with the deceased.[116]

Another interesting requirement is that a forfeiture order may only be made if the ground for the divorce is the irretrievable breakdown of a marriage. This is interesting because the irretrievable breakdown of a marriage is not the only ground for a divorce. In terms of section 3(*b*) read with section 5 of the DA, a person may also obtain a divorce decree on the ground of mental illness and continuous unconsciousness. However, section 9(2) specifically states that forfeiture may not be ordered where the ground for a divorce is mental illness and continuous unconsciousness. It was important for the legislature to clarify the law in cases of ill health because originally, under Roman law, an order for forfeiture of patrimonial benefits could be made against persons who suffered from incurable mental illness.[117] The legislature confirmed that this position was not received in South African law. On the face of it, this protection of the ill is a welcome feature as such persons are not in control of their circumstances, and nor can they defend themselves in divorce proceedings involving forfeiture. It is submitted that the seeming protection is quickly removed when one considers that the irretrievable breakdown of a marriage may be used to obtain a divorce decree even when one spouse is mentally ill or unconscious – in which case, forfeiture becomes possible.

Section 9(1) is clear regarding what may be forfeited – a patrimonial benefit. This patrimonial benefit may be forfeited in whole or in part. There is often confusion among students of law and some practitioners regarding the

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[111] Heaton and Kruger *South African Family Law* 113.
[112] [2020] ZASCA 54.
[113] *Monyepao v Ledwaba supra* par 21.
[114] *Ibid.*
[115] Hahlo 1984 *SALJ* 457.
[116] *Monyepao v Ledwaba supra* par 19.
[117] Marumoagae "The Regime of Forfeiture of Patrimonial Benefits in South Africa and a Critical Analysis of the Concept of Unduly Benefitted" 2014 *De Jure* 85 91.

meaning of forfeiture of patrimonial benefits as a whole – also known as complete forfeiture. Some assume that this means that a person forfeits everything, including what they brought into the marriage. This is not the case. In South African law, a party to a marriage cannot forfeit what they brought into the marriage.[118] For this reason, forfeiture as a whole does not mean that a party to a marriage forfeits what they brought into the marriage. They only forfeit what they stand to benefit by virtue of the marriage. This may be illustrated as follows. Bonny and Bonela are married in community of property. The joint estate is worth R1.5 million. Bonny contributed R600 000 and Bonela contributed R900 000. On dissolution of their marriage, they are each entitled to R750 000. Bonny will get R150 000 more than what she contributed. This R150 000 is a patrimonial benefit, which may be forfeited. Whole forfeiture means that the whole R150 000 is forfeited. Partial forfeiture means a portion of the R150 000 is forfeited. The extent of partial forfeiture is usually denoted in percentage form.[119] However, Bonny cannot forfeit the R600 000 because she brought it into the marriage. Heaton criticises the rule that a person cannot forfeit what they brought into the marriage. She points out that forfeiture is only effective when ordered against the poorer spouse.[120] The example given above supports this argument. Bonny is the poorer spouse; forfeiture will only be effective when ordered against her. If it were ordered against Bonela, it would not be effective because he contributed the most into the joint estate.

A patrimonial benefit has been clearly illustrated, but how can it be defined? The DA does not define it. Sibisi submits that a patrimonial benefit is one that accrues to a party to a marriage by virtue of the marriage.[121] A party does not contribute towards the acquisition of the benefit in question. They acquire this benefit by being married. This is the principal reason that a person cannot forfeit what they brought into the marriage because it is not a patrimonial benefit. A patrimonial benefit includes an accrual claim and a benefit in terms of an antenuptial contract.[122] Section 9(1) makes it clear that a patrimonial benefit may be forfeited if the other party will, in relation to the other, be unduly benefitted. This brings into purview the meaning of undue benefit. Marumoagae submits that an undue benefit is one that accrues to a person whose conduct does not justify such a person receiving it.[123] In *Molapo v Molapo*,[124] an undue benefit was described as one that is disturbingly unfair. Sibisi submits that an undue benefit refers to something that a guilty party to a marriage acquires in the absence of any moral or legal

[118] See generally *M v M* LP (unreported) 2017-06-19 case no 1070/2014. Bonthuys ("The Rule That a Spouse Cannot Forfeit at Divorce What He or She Has Contributed to the Marriage: An Argument for Change" 2014 *SALJ* 439 445) argues that a person should forfeit everything, including what they brought into the marriage. She observes, with authority, that the rule that a person could forfeit everything has never been expressly overturned by our courts.

[119] Sibisi 2022 *Obiter* 267.

[120] Heaton "Striving for Substantive Gender Equality in Family Law: Selected Issues" 2005 *South African Journal of Human Rights* 547 557.

[121] Sibisi 2022 *Obiter* 266.

[122] Hahlo 1984 *SALJ* 457.

[123] Marumoagae 2014 *De Jure* 98.

[124] FSB (unreported) 2013-03-2014 case no 4411/10 par 22.13.

entitlement.[125] He also adds that a spouse who does not contribute to the growth of the marital estate, in circumstances where they are able to do so, should also forfeit a patrimonial benefit. Should such a spouse benefit, the benefit will also be undue.[126]

In *Wijker v Wijker*,[127] the then-Appellate Division held that in deciding whether a benefit is undue, a court must make a value judgment, taking into account the three factors that appear in section 9(1) of the DA.[128] These factors are: the duration of the marriage; the reason for the irretrievable breakdown of the marriage; and any substantial misconduct. While a court is enjoined to consider all these factors, it is not essential for a party to plead and prove all three factors for a court to award an order of forfeiture of patrimonial benefits.[129] The existence of at least one of the factors is sufficient for a forfeiture order. It is clear from studying these factors that the fault principles have not been completely left out of divorce jurisprudence.[130] Reference to substantial misconduct bears testimony to this. Nevertheless, a forfeiture order may be made in the absence of marital fault. It may be made solely on the basis that the marriage was of a short duration.[131] What constitutes a short duration is unclear. However, in *Botha v Botha*,[132] the Supreme Court of Appeal suggested that a short duration was a marriage of less than 10 years.

As noted above, courts should also consider the reason for the irretrievable breakdown and any substantial misconduct. It is submitted that substantial misconduct and marital fault have the same meaning. These refer to conduct that is considered serious enough to break the bond of marriage.[133] These include adultery, malicious desertion, imprisonment and abuse.[134] However, it is not required that the substantial misconduct must have led to the breakdown of the marriage. It is well known that many marriages can withstand marital misconduct, and it would be undesirable if only substantial misconduct that led to the irretrievable breakdown of the marriage was considered for the purposes of a forfeiture order. The factors make it clear that the court must consider substantial misconduct, alongside the reason for the breakdown of the marriage.

The factors may be criticised for taking into account only the duration of the *marriage* relationship between the parties. These days, it is not uncommon for marriages to be preceded by an extended period of cohabitation or universal partnership, and also to build an estate together during this informal period. In addition, it is not uncommon for the parties to get married only at a later stage. However, should the marriage terminate,

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125 Sibisi 2022 *Obiter* 268.
126 *Ibid.*
127 [1993] 4 All SA 857 (AD).
128 *Wijker v Wijker supra* par 19.
129 *Matyila v Matyila* 1987 (3) SA 230 (W) 234G.
130 Van Heerden *et al Family Law in South Africa* 178.
131 *T v R* 2017 (1) SA 97 (GP) par 20.18.
132 2006 (4) SA 144 (SCA) par 13.
133 Phajane *Substantial Misconduct as a Factor in the Determination of Forfeiture of Patrimonial Benefits at Divorce in South Africa* (LLM dissertation, North-West University) 2022 31.
134 Bonthuys 2014 *SALJ* 451 and Phajane *Substantial Misconduct* 18–19.

courts are only enjoined to consider the duration of the marriage relationship and nothing beyond that. It is a decided point in our law that courts do not have unfettered discretion to award forfeiture. They are confined to the three factors above.[135] Thus, the courts do not enjoy a discretion to consider the duration of the parties' entire relationship. It is relevant to the present discussion that a customary marriage is not an event but a culmination of a series of events,[136] during which parties may live together and pool their resources towards a common home. Courts should consider this period as well. However, each case must be decided on its own facts.

5 FORFEITURE OF PATRIMONIAL BENEFITS IN POLYGYNOUS CUSTOMARY MARRIAGES

Before embarking on this part of the article, it is important briefly to restate the matrimonial property rules in polygynous customary marriages. With respect to old polygynous customary marriages, property is divided into three categories – family property, house property and personal property. With respect to new polygynous customary marriages, matrimonial property is regulated by a court-approved contract, as envisaged in section 7(6) of the RCMA. However, if there is no court-approved contract, the decision in *MM v MN*[137] applies. The polygynous customary marriage will be out of community of property. It should be recalled that *MM v MN* is criticised above on the ground that the issue before the court did not concern the patrimonial consequences of the marriage.

That said, how should forfeiture provisions be applied in the context of polygynous customary marriages? This article is concerned with a situation where a court orders forfeiture in divorce proceedings between a husband and one of his wives. As pointed out above, by virtue of section 8(4)(*a*) of the RCMA, section 9 of the DA is applicable to the dissolution of customary marriages, and a patrimonial benefit may accordingly be forfeited. Thus, if any property can be defined as a patrimonial benefit, it stands to be forfeited if the court orders forfeiture. Property that would otherwise be regarded as personal property may qualify as a patrimonial benefit if acquired by virtue of the marriage.

In cases where section 7(6) of the RCMA was complied with, the terms of the court-approved contract will determine what property qualifies as a patrimonial benefit for the purposes of section 9 of the DA. However, where there was non-compliance with section 7(6), any subsequent customary marriages will be out of community of property in light of *MM v MN*.[138] If the marriage is out of community of property, there will be no patrimonial benefit for the less affluent spouse and there will be nothing to forfeit. The only remedy for this spouse is a redistribution of assets in terms of section 7(3) of

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[135] *Wijker v Wijker* 1993 (4) SA 720 (A) 727. See also Marumoagae "Factors Justifying Forfeiture of Patrimonial Benefits Orders: *Molapo v Molapo* (2013) ZAFSHC 29 14 Mar 2013" 2015 *Obiter* 232.

[136] *Mbungela v Mkabi* 2020 (1) SA 41 (SCA) par 21.

[137] *Supra*.

[138] Notably, this part of the decision in *MM v MN* was followed in the recent decision, *Monyepao v Ledwaba* (SCA) unreported case 1368/18 of 27 May 2020.

the DA. Section 8(4)(*a*) and (*b*) of the RCMA introduces redistribution of assets as a remedy in divorce proceedings in all customary marriages, regardless of when the marriage was concluded. However, section 7(5)(*c*) of the DA provides that a court must take into account any forfeiture order in terms of section 9 of the DA. This means that a forfeiture order does have an influence on any possible redistribution-of-assets order.

On the argument that *MM v MN* is not ideal precedent, the same position applicable to old polygynous marriages should apply where a court-approved contract was not complied with. In which case, matrimonial property will be divided into house property, family property and personal property. In this situation, it is recommended that when a forfeiture-of-patrimonial-benefits order is made in divorce proceedings between a husband and one of his wives, it should apply with respect to the property of the house of the wife concerned as well as the wife's share in the family property to the extent that these may be defined as a patrimonial benefit. It should be noted that since it is only the husband who contributes to the family property, he cannot forfeit anything in the latter category of property. A person cannot forfeit what they brought into the marriage.

Although personal property may easily be classified as a patrimonial benefit, as pointed out above, it is recommended that forfeiture of patrimonial benefits should not apply to personal property. Perhaps an exception may be made with respect to luxurious items that are a patrimonial benefit. These items usually come at a price and should be forfeited in favour of the innocent spouse.

The factors named in section 9(1) of the DA – the duration of the marriage, reasons for the irretrievable breakdown of the marriage, and any substantial misconduct – do not present a problem. They can be applied as they are, the only exception being that what may qualify as substantial misconduct at common law, or in a monogamous marriage, may not be seen in the same light in polygynous marriages. For instance, adultery may be seen differently in polygynous marriages. Malicious desertion may also be seen differently in polygynous marriages. Since there is more than one wife, the fact that the husband distributes his time among all his wives should not be seen as desertion by any of the other wives.

6 CONCLUSION

This article has discussed matrimonial property in polygynous customary marriages. It has shown that matrimonial property in polygynous marriages differs from matrimonial property in monogamous customary marriages. It has also discussed the distinction between matrimonial property in old polygynous customary marriages and that in new polygynous marriages. In addition, it has highlighted the complexities involved. It has recommended that, by default, property should be divided into house property, family property and personal property in both old and new polygynous customary marriages, where section 7(6) of the RCMA has not been complied with. This article criticised *MM v MN* insofar as the court held that, in cases where section 7(6) is not complied with, the marriage will be out of community of property. It argued that *MM v MN* is not good precedent on the question of

matrimonial property in polygynous customary marriages where section 7(6) has not been complied with, because this question was not the main issue before the court. The issue before court in that case concerned the requirements for a valid subsequent customary marriage. As the court pointed out, section 7(6) is not a requirement for validity.

This article therefore recommends that since matrimonial property in polygynous customary marriages is distinctive, the same should be the case with the application of forfeiture of patrimonial provisions as set out in section 9(1) of the DA. When a court orders forfeiture of patrimonial benefits in divorce proceedings between a husband and one of his wives, the order should apply in relation to house property of the wife concerned and a share in family property insofar as these may be defined as patrimonial benefits. The rule that a person cannot forfeit what he or she brought into the marriage should apply. However, an exception should be made with regard to personal property. Although personal property may be a patrimonial benefit, courts should not order forfeiture in relation to these. The case should be different if the patrimonial benefit is a luxury item, in which cases it should be forfeited. If the parties did conclude a section 7(6) contract, which is less likely to be the case, patrimonial benefits will be determined with reference to the terms of the contract.

PROVIDING A LEGAL DEFINITION FOR CYBERBULLYING IN SOUTH AFRICA

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SUMMARY

Traditional bullying is not a new phenomenon, and this behaviour has plagued many countries. It has received a wide interpretation by many academics seeking to define this concept. Bullying itself may take various forms and it has developed and adapted to changing times throughout history. One such adaptation arose owing to the expansion of the Internet – in the form of online bullying or cyberbullying. Although bullying has been given various definitions, cyberbullying in South Africa has not been given a legal definition, and perpetrators are therefore not disciplined in the appropriate manner. Introducing a legal definition would assist law enforcement to regulate cyberbullying and protect victims from harm. Advances in technology have created many opportunities for people to communicate across the world. At the same time, they have also created unintended consequences, such as allowing online users to harm each other. Although bullying has existed for a long time, the threat of cyberbullying online is arguably worse than its traditional counterpart. Scholars have attempted to provide definitions of cyberbullying. However, there is confusion and there are contradictory views regarding the characteristics of this conduct. Recommendations are made on what the requirements should be for a legal definition of cyberbullying. A comparative analysis of the United States and Canada is relied upon to establish clarity on this conduct.

1 INTRODUCTION

Bullying has existed for a long time and has been prevalent mainly in schools and has therefore resulted in schools enacting codes of conduct in attempts to address and curb bullying. Advances in technology have also had the unintended consequence of allowing bullying to manifest online and this became known as "cyberbullying". South African law cannot effectively address and regulate cyberbullying conduct if there is no adequate legal definition. A failure to define this conduct may therefore prove to be an impediment to its regulation. Authors have acknowledged that cyberbullying is a social problem that requires a legal response.[1] One purpose of the law should be to protect the Internet user against acts of cyberbullying, which one author has described as the "cancer" of social networks.[2] The seriousness of cyberbullying cannot be understated. Constant cyberbullying

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1 Murray *Information Technology Law: The Law and Society* (2016) 164.

2 Morgese "Cultivating the 'Anti-Bullying Bill of Rights' throughout the Nation: What Others Can Learn from the Garden State" 2013 *Nova Law Review* 351 354.

may result in "cyberbullicide", which refers to unrelenting cyberbullying (usually on social media) resulting in the suicide of the victim.[3]

Cyberbullying is arguably more damaging to victims than traditional bullying because extensive information can be quickly uploaded and spread widely through the Internet for others to see, thus making the effects of cyberbullying greater.[4] "Widely" means that messages and images can be sent multiple times to different users, thereby increasing the degradation of the victim.[5] The omission of specific cyberbullying legislation creates difficulty for victims wishing to obtain adequate redress, as there is no clear approach to regulating this conduct.[6] Cyberbullying involves multiple forms, and scholars have submitted that this creates difficulty in defining it. As there is no universal definition of cyberbullying, it is problematic to determine accurately the prevalence of this conduct.[7]

2 BULLYING

A "bully" may be defined as someone who demeans or harasses others, particularly those who are seen as inferior to the bully.[8] Traditional bullying may be defined as:

> "Repeated and harmful behaviour that is deliberate and harassing, with the intention to cause, or should be known to cause, fear, intimidation, humiliation, distress and/or harm to another person's body, feelings, self-esteem or reputation."[9]

Olweus defines bullying of a student as being exposed, repeatedly and over time, to negative, intentional and aggressive actions with the intent to inflict injury or discomfort to the victim by other students.[10] Scholars have also accepted that bullying involves "intentional, aggressive behavior, carried out repeatedly against victims who were unable to defend themselves".[11] Bullying is therefore unwanted, deliberate and repetitive behaviour that

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3 Chisholm "Review of the Status of Cyberbullying and Cyberbullying Prevention" 2014 *Journal of Information Systems Education* 77 78.

4 Dooley, Pyzalski and Cross "Cyberbullying Versus Face-to-Face Bullying: A Theoretical and Conceptual Review" 2009 *Journal of Psychology* 182 187.

5 Ahlfors "Many Sources, One Theme: Analysis of Cyberbullying Prevention and Intervention Websites" 2010 *Journal of Social Sciences* 515 516.

6 Cassim "Formulating Adequate Legislation to Address Cyber-Bullying: Has the Law Kept Pace With Advancing Technology?" 2013 *South African Journal of Criminal Justice* 1 6.

7 Langos "Cyberbullying: The Shades of Harm" 2014 *Psychiatry, Psychology and Law* 1 2.

8 Willard "Educator's Guide to Cyberbullying, Cyberthreats and Sexting" (2005) https://cdn.ymaws.com/www.safestates.org/resource/resmgr/imported/educatorsguide.pdf (accessed 2018-06-17) 1 5.

9 Mackay "Respectful and Responsible Relationships: There's No App for That" *Report of the Nova Scotia Task Force on Bullying and Cyberbullying* (29 February 2012) https://antibullying.novascotia.ca/sites/default/files/Respectful%20and%20Responsible%20Relationships%2C%20There%27s%20no%20App%20for%20That%20-%20Report%20of%20the%20NS%20Task%20Force%20on%20Bullying%20and%20Cyberbullying.pdf (accessed 2020-10-01) 1 39.

10 Olweus "Annotation: Bullying at School: Basic Facts and Effects of a School Based Intervention Program" 1994 *Journal of Child Psychology and Psychiatry* 1171 1173.

11 Cartwright "Cyberbullying and the Law of the Horse: A Canadian Viewpoint" 2017 *Journal of Internet Law* 14 15.

creates a power imbalance between perpetrator and victim.[12] It is characterised by repeated and intentional physical or emotional aggression, including humiliation, teasing, mockery, harassment, violence or a threat of violence, social exclusion and the spreading of rumours.[13] Repeated acts of traditional bullying not only instil fear in the victim, but also cause psychological harm owing to its ongoing nature.[14] The intention of the bully is to inflict harm on the victim using their power or even knowledge to overwhelm the victim.[15] Farrington opines that it is common in bullying that the victim and bully know each other, and it occurs where a more powerful child repeatedly oppresses a less powerful child over a prolonged period.[16] American scholars submit that bullying may be defined as repeated and intentional physical and/or emotional aggression against another in which there is a power differential between the aggressor and the victim.[17]

De Wet therefore proposes the following characteristics of bullying:

a) intentional behaviour;
b) frequency and duration of the behaviour;
c) reaction of the victim;
d) a power imbalance between bully and victim;
e) misuse of the power owing to the imbalance between the parties; and
f) the inability of the victim to defend him- or herself.[18]

Bullying may include a wide range of conduct, including but not limited to insulting, demeaning or intimidating behaviour that has the effect of lowering the self-esteem or self-confidence of the victim.[19] Although bullying usually comprises direct contact, it may also include other forms such as physical, verbal, psychological and indirect acts.[20]

Farrington submits that because bullying involves children, it causes immediate harm or distress to the victim and may cause long-term negative consequences.[21] This is because bullying is aimed at destroying social relationships, personal self-esteem and social status.[22] Patchin and Hinduja summarise the possible impacts bullies may have on victims:

a) suicidal tendencies;

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12 Shariff and Hoff "Cyber Bullying: Clarifying Legal Boundaries for School Supervision in Cyberspace" 2007 *International Journal of Cyber Criminology* 76 80.

13 Neiman, Robers and Robers "Bullying: A State of Affairs" 2012 *Journal of Law & Education* 603 607–608.

14 Dooley *et al* 2009 *Journal of Psychology* 182 183.

15 Kowalski, Morgan and Limber "Traditional Bullying as a Warning Sign of Cyberbullying" 2012 *School Psychology International* 505–506.

16 Farrington "Understanding and Preventing Bullying" 1993 *Crime and Justice* 381 383–384.

17 Neiman *et al* 2012 *Journal of Law & Education* 603 607–608.

18 De Wet "School Principals' Bullying Behaviour" 2010 *Acta Criminologica* 96 113–114.

19 Rycroft "Workplace Bullying: "Unfair Discrimination, Dignity Violation or Unfair Labour Practice?" 2009 *Industrial Law Journal* 1431 1434.

20 Van der Bijl "Corporate "Assault": Bullying and the Aegis of Criminal Law (Part 1)" 2014 *Tydskrif vir die Suid-Afrikanse Reg* 482 483. An example of an indirect act is social exclusion, in which people indirectly exclude another from their social group or activities and the victim is therefore isolated or victimised.

21 Farrington 1993 *Crime and Justice* 381 382.

22 Dooley *et al* 2009 *Journal of Psychology* 182 185.

b) eating disorders;
c) depression;
d) other chronic illnesses;
e) social exclusion;
f) running away from home; and
g) responding with acts of violence or engaging in criminal activities.[23]

Owing to the effects of bullying, it is submitted that a clear definition is required for proper regulation and prevention of bullying, in addition to cyberbullying. To make matters worse, bullies no longer require physical contact to bully another as technology has allowed bullies to contact their victims through mobile devices and home computers.[24]

3 CYBERBULLYING

Historically, bullying consisted of youth violence that affected children and teenagers within the school environment. However, technology has developed to facilitate online aggression and has been termed "cyberbullying".[25] Since the Internet was introduced, the traditional definition of bullying has undergone certain changes: electronic communications introduced cyberbullying, which is not defined by the face-to-face interaction associated with traditional bullying.[26] Bullies no longer require physical contact to bully another as technology has allowed bullies to contact their victims through mobile devices and home computers.[27] A major issue concerning cyberbullying is that attempts to curb this offence may not keep up with the rapid development of technology.[28] It is therefore crucial to ensure that a definition of cyberbullying can apply to current and future forms of cyberbullying.

Cassim defines cyberbullying as the use of digital technology or technological devices by a person to threaten, embarrass, harass, hurt or humiliate another person.[29] A "cyberbully" is therefore defined as someone who repeatedly uses electronic media to cause harm or humiliation to another person online; the victim may be a targeted individual or an unknown random victim.[30] Although scholars have attempted to define cyberbullying, there is no consistency in the definition of this concept.[31] It may be defined as any intentional, repetitive and harmful conduct towards

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[23] Patchin and Hinduja "Bullies Move Beyond the Schoolyard: A Preliminary Look at Cyberbullying" 2006 *Youth Violence and Juvenile Justice* 148 151.

[24] Beran and Li "The Relationship Between Cyberbullying and School Bullying" 2007 *Journal of Student Wellbeing* 16.

[25] Patchin and Hinduja 2006 *Youth Violence and Juvenile Justice* 148.

[26] Cartwright 2017 *Journal of Internet Law* 14 15.

[27] Beran *et al* 2007 *Journal of Student Wellbeing* 16.

[28] Smit "Cyberbullying in South African and American Schools: A Legal Comparative Study" 2015 *South African Journal of Education* 1 4.

[29] Cassim 2013 *South African Journal of Criminal Justice* 1 2.

[30] Ahlfors 2010 *Journal of Social Sciences* 515 516.

[31] Burton and Mutongwizo "Inescapable Violence: Cyber Bullying and Electronic Violence Against Young People in South Africa" 2009 *Centre for Justice and Crime Prevention* issue paper no 8 1 3.

another person through electronic means.[32] Anderson and Sturm suggest that cyberbullying is the new form of bullying that affects children because electronic devices facilitate communication and socialisation, which is often deliberate, hostile and repetitive in this group.[33]

To make regulating cyberbullying easier, identifying its characteristics may prove useful in establishing its conduct. Below is a suggested list of the characteristics of cyberbullying.

3 1 Characteristics of cyberbullying

3 1 1 Children

(i) South Africa

Smit argues that although the terms "cyberbullying" and "cyber harassment" are sometimes used interchangeably, cyberbullying usually applies to the electronic harassment of minors.[34] Other South African scholars agree with this sentiment and propose that cyberbullying involves children predominantly.[35] Burton and Mutongwizo submit that cyberbullying is a danger most commonly related to young people and children, owing to their vulnerability when making use of online platforms and applications.[36] Cassim opines that cyberbullying involves adolescents, which encompasses teenagers, minors and children.[37] It is submitted that it is important to determine to which age group cyberbullying applies because the remedies may differ according to the age of the perpetrator.

(ii) United States (US)

Schwartz submits that cyber harassment, cyberstalking and cyberbullying are often used interchangeably when referring to harmful online conduct. However, cyberbullying pertains to minors, whereas similar conduct relating to adults constitutes cyber harassment or cyberstalking and this indicates that age plays an important defining feature in establishing the particular

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[32] Du Preez and Prinsloo "An Exploration of Bullying in School Context with Specific Focus on Cyberbullying as a Form of Cybercrime in Tshwane, Gauteng" 2017 *Acta Criminologica* 103 104–105.

[33] Anderson and Sturm "Cyberbullying From Playground to Computer" 2007 *Young Adult Library Services* 24–25. The authors submit that children are often cyberbullied by their friends, peers or anonymous students online. The authors further suggest that older children are more likely to commit and experience cyberbullying than younger children because older children have more access to and a better understanding of electronic devices and of the Internet.

[34] Smit 2015 *South African Journal of Education* 1 3.

[35] Laubscher and Van Vollenhoven "Cyberbullying: Should Schools Choose Between Safety and Privacy?" 2015 *Potchefstroom Electronic Law Journal* 2218 2249.

[36] Burton and Mutongwizo 2009 *Centre for Justice and Crime Prevention, Issue Paper No 8* 11–6. The authors argue that young people are the group most at risk because they are vulnerable targets online, especially in terms of instant messaging.

[37] Cassim 2013 *South African Journal of Criminal Justice* 1 2. In his fn 3, Cassim describes cyberbullying as conduct committed by a group of people, usually adolescents. Children are therefore a key element in the definition of cyberbullying.

type of conduct.[38] Smith concurs and states that "cyber harassment" and "cyberbullying" are often used interchangeably by scholars; other scholars acknowledge that cyberbullying involves harassment between minors, usually within the school context.[39]

Fukuchi is also of the view that the major difference between cyber harassment and cyberbullying is that cyberbullying involves the victimisation of minors by other minors, whereas cyber harassment involves online harassment between adults.[40] Cyberbullying, therefore, does not occur if an adult harasses or bullies a minor, and only includes acts by a minor perpetrated toward another minor.[41]

(iii) Canada

Scholars have concluded that cyberbullying is most common and harmful against adolescents.[42] A major issue in addressing cyberbullying in Canada is that there is no accepted definition of the phenomenon and this is partly owing to the various forms it may take, using different technologies.[43] The department of justice acknowledges that the definitions of cyberbullying and cyber harassment often overlap: some incidents that are classified as cyberbullying may also be criminal harassment under section 264 of the Criminal Code. However, the main difference between the two types of conduct is that cyberbullying is used to describe harmful use of technology among students.[44]

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38 Schwartz "Criminal Liability for Internet Culprits: The Need for Updated State Laws Covering the Full Spectrum of Cyber Victimization" 2009 *Washington University Law Review* 407 409–410. The author argues that students and juveniles are usually involved in cyberbullying.

39 Smith "Protection of Children Online: Federal and State Laws Addressing Cyberstalking, Cyberharassment, and Cyberbullying" (19 October 2009) Homeland Security Digital Library https://www.hsdl.org/?abstract&did=735549 (accessed 25 May 2020-05-25) 1 4. See also National Conference of State Legislatures "State Cyberstalking, Cyberharassment and Cyberbullying Laws" (20 December 2010) https://www.csg.org/sslfiles/dockets/2012cycle/32B/32Bdocmins/Cyberstalking,%20Cyberharassment%20and%20Cyberbullying%20Laws.pdf (accessed 2020-07-30).

40 Fukuchi "A Balance of Convenience: The Use of Burden-Shifting Devices in Criminal Cyber Harassment Law" 2011 *Boston College Law Review* 289 292.

41 Stringer "Cyberbullying: Louisiana's Solution to Confronting the Latest Strain of Juvenile Aggression" 2012 *Louisiana Law Review* 1129 1134.

42 Cappadocia, Craig and Pepler "Cyberbullying: Prevalence, Stability, and Risk Factors During Adolescence" 2013 *Canadian Journal of School Psychology* 171 172–173. According to these authors, cyberbullying was at its peak during a student's middle-school years. See also Talwar, Gomez-Garibello and Shariff "Adolescents' Moral Evaluations and Ratings of Cyberbullying: The Effect of Veracity and Intentionality Behind the Event" 2014 *Computers in Human Behavior* 122 123.

43 Broll, Dunlop and Crooks "Cyberbullying and Internalizing Difficulties Among Indigenous Adolescents in Canada: Beyond the Effect of Traditional Bullying" 2018 *Journal of Child Adolescent Trauma* 71–72. See also Deschamps and Mcnutt "Cyberbullying: What's the Problem?" 2016 Canadian *Public Administration* 45 46. The authors allude to the fact that there are still problems and debates surrounding the definition of cyberbullying in Canada.

44 Department of Justice "A Handbook for Police and Crown Prosecutors on Criminal Harassment" (9 January 2017) https://www.justice.gc.ca/eng/p-pr/cj-jp/fv-vf/har/EN-CHH2.pdf (accessed 2020-10-01) 1 17.

It is clear from the submissions of other scholars that certain harmful online conduct directed at children, and particularly students, will constitute cyberbullying.

3 1 2 Intention

(i) South Africa

As a result of cyberbullying involving children, one must be careful in defining its conduct to avoid punishing non-actionable conduct. The *Le Roux* case also set out important considerations regarding chilldren:

a) They are vulnerable and immature and are still developing emotionally and intellectually.
b) They have easy access to electronic devices and often experiment with them, which may lead to the creation of inappropriate messages or images.
c) They sometimes react unreasonably and spontaneously and without thinking.
d) They often like to make jokes about others that can be bland or tasteless.
e) Expression is vitally important to the development of children, and the Constitution affords appropriate protection for freedom of speech that is in their best interests.[45]

Burton and Mutongwizo argue that the elements of cyberbullying are similar to bullying in that the key element is the repeated nature of the act of intentional aggression towards another.[46] The main assessment should be whether the perpetrator intended to harm a victim because this is inherent in what makes cyberbullying morally wrong.[47] These arguments illustrate that the elements of cyberbullying are interrelated and do not exist in isolation. A perpetrator must intend on causing harm to the victim, or a victim must have suffered harm as a result of the perpetrator's willful act.

It is submitted that, because there is little South African legal authority on cyberbullying, it is still unclear as to how the intention element should be assessed. This is also important considering that cyberbullying involves children, and some children may not possess the mental capacity to appreciate the nature of their wrongdoing, as stated in the *Le Roux* case. At the same time, a child who is cyberbullied by another child should be allowed to obtain redress for harmful conduct. Intention should therefore be analysed together with repetitive harmful conduct, because a repetitive wrongful act may indicate an intention to cause harm to another.

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45 *Le Roux v Dey* 2011 (3) SA 274 CC par 57.
46 Burton and Mutongwizo 2009 *Centre for Justice and Crime Prevention Issue Paper No 8* 1.
47 Langos 2014 *Psychiatry, Psychology and Law* 1 5.

(ii) US

In the US, the intention requirement focuses on whether the conduct was committed wilfully. The Megan Meier Cyberbullying Prevention Bill[48] was never passed but it contained useful information regarding cyberbullying. For example, the Bill defined cyberbullying as:

> "any communication, with the intent to coerce, intimidate, harass, or cause substantial emotional distress to a person, using electronic means to support severe, repeated, and hostile behavior."[49]

As there is no explicit federal legislative definition of cyberbullying, one must rely on definitions provided by scholars. Hinduja and Patchin argue that cyberbullying involves wilful and repeated harm inflicted through the medium of electronic text.[50] Stringer submits that the online behaviour must be intentional or deliberate and not merely accidental.[51] This element considers whether the act in question is purposeful or committed deliberately to cause another harm.[52] The intention element may be assessed in two ways: first, as to whether the intention in sending the electronic communication was to harm the victim; and secondly, a foreseeability assessment, as to whether the cyberbully intended their electronic communication to be spread to a large audience, where it might also be forwarded by others online.[53]

Rodkin and Fischer argue that, since cyberbullying involves children as both victims and perpetrators, the law may revisit the requirement of intention because cyberbullying may include conduct that is reckless or negligent in the use of electronic media.[54] This is important in instances where children play harmful jokes or attempt to tease others online; there may not be an intention to bully another online, but the conduct may negligently cause harm to another child.

(iii) Canada

Canadian Bill Belsey is regarded as one of the first people to coin the term "cyberbullying". He defined it as

> "[t]he use of information and communication technologies to support deliberate, repeated, and hostile behaviour by an individual or group, that is intended to harm others."[55]

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48 H.R.1966 – 111th Congress (2009–2010).

49 S 3(*a*) of the Megan Meier Cyberbullying Prevention Bill.

50 Patchin and Hinduja 2006 *Youth Violence and Juvenile Justice* 148 152–153.

51 Stringer 2012 *Louisiana Law Review* 1129 1134.

52 Patchin and Hinduja "Measuring Cyberbullying: Implications for Research" 2015 *Aggression and Violent Behavior* 69 70.

53 Rodkin and Fischer "Cyberbullying From Psychological and Legal Perspectives" 2012 *Missouri Law Review* 619 623.

54 Rodkin and Fischer 2012 *Missouri Law Review* 619 624.

55 See Belsey "Cyberbullying: An Emerging Threat to the 'Always On' Generation" (24 March 2019) http://www.billbelsey.com/?cat=13 (accessed 2020-07-19); see also Kift, Campbell and Butler "Cyberbullying in Social Networks and Blogs: Legal Issues for Young People and Schools" 2010 *Journal of Law, Information and Science* 60 62.

Cases have also attempted to define cyberbullying. One court gave the following definition:

> "The use of electronic technology, including social media, text messaging, websites and email, in a manner that is intended to cause, or should reasonably be known to cause, fear, intimidation, humiliation, distress or other forms of harm to another person's body, feelings, self-esteem, reputation or property."[56]

Some Canadian scholars have argued that cyberbullying can also include unintentional conduct because children often do not understand and do not appreciate the difference between jokes and intentional harm.[57] In other words, a perpetrator may not intend causing harm, but nevertheless sends a communication that is likely to cause the victim harm. The intention requirement may also be difficult to prove because one cannot easily determine the emotional responses of parties involved, or the tone of online communications.[58] Yet, on the basis of such communications, one is assessing whether there is an intention to bully through online means or whether the cyber bully was reckless in their communications. This contrasts to Belsey's definition of cyberbullying provided earlier, where electronic communication is intended to cause harm to another. Again, these elements cannot be viewed in isolation because the use of technology to harass, ridicule or insult another indicates an intention to cause harm to that person.[59]

The definitions above stipulate that the communication can be sent either maliciously with the intention of harming another or recklessly, involving a risk of harm to another person. This indicates that both an objective and subjective standard may be used to determine whether the perpetrator caused harm to the victim. There are, however, no definitions of "malicious" or "reckless" in the legislation. In *Crouch v Snell*,[60] the court defined "malice" as "acting with culpable intent".[61]

A crucial issue raised by scholars is the importance of identifying *whose* perspective is adopted for purposes of a definition of cyberbullying; if one adopts the perpetrator's perspective, then the focus is on the intent of the bully and the bully may say they did not think their conduct would be hurtful;[62] whereas if one adopts the victim's perspective, then one relies on the impact of the victim who may be sensitive rather than objective, indicating the need to adopt a compromise perspective that relies on the reasonable victim in the circumstances and how they might regard the cyberbullying.[63] Mackay proposes that the reasonable victim approach is

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56 *Yenovkian v Gulian* 2019 ONSC 7279 par 60.

57 Talwar *et al* 2014 *Computers in Human Behavior* 122.

58 Vaillancourt, Faris and Mishna "Cyberbullying in Children and Youth: Implications for Health and Clinical Practice" 2017 *The Canadian Journal of Psychiatry* 368 369.

59 Kift *et al* 2010 *Journal of Law, Information and Science* 60 63.

60 2016 346 CRR (2d) 273.

61 *Crouch v Snell supra* par 80.

62 Mackay https://antibullying.novascotia.ca/sites/default/files/Respectful%20and%20Responsible%20Relationships%2C%20There%27s%20no%20App%20for%20That%20-%20Report%20of%20the%20NS%20Task%20Force%20on%20Bullying%20and%20Cyberbullying.pdf 1 41.

63 *Ibid.*

correct – where the perspective focuses on the victim and responds to the problem, while also trying to correct the negative impact on victims.[64]

3 1 3 Aggression and harm

(i) South Africa

Online aggression is a key characteristic of cyberbullying. However, some types of cyberbullying may be more harmful than others; in some instances, the harm may be trivial.[65] There are different forms of cyberbullying; the harm also depends on how widely the communication is spread online, which may exacerbate the effect on a victim. Popovac and Leoschut argue that the use of different types of technology in committing cyberbullying may result in differing levels of harm.[66] Some communications posted online may merely be intended as cyber jokes and not to cause harm to the victim. However, although intended as a joke, it may not be perceived as one.[67] This is where the intention element becomes important.

In South Africa, there is no clear test to determine whether victims have suffered harm in relation to cyberbullying. The question is whether South Africa should opt for a subjective and or an objective test. One must then also rely on comparative analysis to determine how other jurisdictions have defined such harmful conduct. A final determining factor of harm will depend on what type of cyberbullying has been committed.[68]

(ii) US

Scholars characterise cyberbullying as an act of aggression that is intended to cause harm through repetitive conduct occurring between individuals whose relationship involves a power imbalance.[69] Goodno opines that cyberbullying may cause significant harms to victims.[70] It has been proposed

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[64] *Ibid.*

[65] Langos 2014 *Psychiatry, Psychology and Law* 1 16.

[66] Popovac and Leoschut “Cyber Bullying in South Africa: Impact and Responses” 2012 *Centre for Justice and Crime Prevention Paper No 13* 1 4–5. The authors submit that people will suffer differing degrees of harm depending on the type of cyberbullying committed. They corroborate their view by way of illustration in which a person receiving an aggressive text message may experience a different effect compared to someone who is defamed on a public platform.

[67] Vandebosch and Van Cleemput “Defining Cyberbullying: A Qualitative Research Into the Perceptions of Youngsters” 2008 Journal of *CyberPsychology & Behavior* 499 501.

[68] The types or forms of cyberbullying are discussed later on in this research. As will be seen, more severe forms of cyberbullying may cause the victim more distress than other forms. Every case will therefore have to be determined on its own merits.

[69] Whittaker and Kowalski “Cyberbullying via Social Media” 2015 *Journal of School Violence* 11 11–12.

[70] Goodno “How Public Schools Can Constitutionally Halt Cyberbullying: A Model Cyberbullying Policy That Considers First Amendment, Due Process and Fourth Amendment Challenges” 2011 *Wake Forest Law Review* 641 644.

that cyberbullying may cause severe psychological, emotional and social harm to victims.[71]

Patchin and Hinduja aver that online harm may be difficult to establish because harm focuses on the effect on the victim and is often subjective. However, they propose that harm may refer to physical, emotional, psychological or behaviourial harm. Barnett submits that harm generally refers to a reasonable fear of harm and not physical harm, and the author further suggests that most US statutes rely on educational harm – harm that has the effect of disrupting or substantially interfering with a student's school performance.[72] Fenn highlights two tests that may be used to determine harm: first one analyses the defendant's conduct and whether the harm would not have occurred but for the defendant's conduct; secondly, one asks whether the defendant's conduct is material and a substantial factor in causing harm to another.[73] These proposals are useful for South Africa in establishing its own assessment of whether harm has occurred as a result of cyberbullying.

(iii) Canada

Cyberbullying may also be known as cyber aggression, electronic bullying, or Internet harassment and may simply be defined as aggression that occurs via technology or through the Internet.[74] Li submits that cyberbullying may have several negative effects and the ability to inflict serious psychological, emotional, or social harm.[75] Other scholars have argued that the harmful effects of cyberbullying include physical and emotional harm, isolation, loss of reputation, low self-esteem and in extreme cases, suicide.[76]

In *R v PSD*,[77] the court stated that the transmission of intimate images causes significant harm, especially where consent has not been granted and may result in severe emotional trauma to victims where others can access such images.[78] The court held further that this trauma exists particularly when victims are young persons and females. When the conduct constitutes cyberbullying, young women tend to take their own lives owing to the effect of online torment.[79] The aggressive conduct therefore causes some form of reasonable harm to the victim.

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71 Patchin and Hinduja 2006 *Youth Violence and Juvenile Justice* 148 155. This may stem from public embarrassment as a victim's online life may have an effect in the real world. The authors argue there is sometimes no separation between online and offline as rumors and mistreatment that originated online could also continue offline.

72 Barnett "Cyberbullying: A New Frontier and a New Standard: A Survey of and Proposed Changes to State Cyberbullying Statutes" 2009 *Quinnipiac Law Review* 579 598.

73 Fenn "A Web of Liability: Does New Cyberbullying Legislation Put Public Schools in a Sticky Situation?" 2013 *Fordham Law Review* 2729 2745–2746.

74 Shapka, Onditi and Collie "Cyberbullying and Cybervictimization Within a Cross-Cultural Context: A Study of Canadian and Tanzanian Adolescents" 2018 *Child Development* 89.

75 Li "Cyberbullying in Schools: An Examination of Preservice Teachers' Perception" 2008 *Canadian Journal of Learning and Technology* 75 76.

76 Talwar *et al* 2014 *Computers in Human Behavior* 122.

77 2016 BCPC 400.

78 *R v PSD supra* par 9.

79 *Ibid*.

3 1 4 Repetition

(i) South Africa

Although cyberbullying may include similar traits to traditional bullying, the element of repetitiveness may become an issue in acts of cyberbullying. A problem with requiring repetition is that it may have the consequence of dismissing a single incident, although such an incident may still have a severe effect on the victim. A single aggressive act online may result in continued and widespread harm to the victim because the act is available online where it can be relived repeatedly or distributed widely.[80] Historically, bullying has always been regarded as repetitive conduct and therefore cyberbullying may follow this trait. The comparative analysis in other jurisdictions addresses this issue.

(ii) US

According to US scholars, online acts of bullying are often repeated towards another user, and it is not usually a once-off incident, as is argued below. Patchin and Hinduja propose that the element of repetition is one of the most important, and easily identifiable facets of bullying.[81] Schwartz argues that a once-off act would not constitute cyber victimisation because it may overly or unfairly penalise a perpetrator who has committed such conduct out of anger, as opposed to someone who has engaged in repetitive acts.[82]

Patchin and Hinduja aver that one online publication may not constitute cyberbullying. However, some communications may "go viral" and a single post that is visible and shareable by others may meet the criterion of repetition in cyberbullying if there is evidence of distribution.[83] It has been argued, therefore that the repetition requirement in cyberbullying may feature in various ways, such as where the conduct occurs more than once, or where a single incident is repeatedly transmitted to an unknown and ever-growing audience.[84]

(iii) Canada

As mentioned for other jurisdictions, a problem with requiring repetition is that the act may have been committed only once, but the Internet allows that communication to be shared or viewed multiple times.[85] Since electronic

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[80] Dooley *et al* 2009 *Journal of Psychology* 182 183.

[81] Patchin and Hinduja 2015 *Aggression and Violent Behavior* 69 70.

[82] Schwartz 2009 *Washington University Law Review* 407 430.

[83] Patchin and Hinduja 2015 *Aggression and Violent Behavior* 69 70. The authors advance their argument by illustration. They submit that where a student posts a single hurtful communication on a publicly viewable website, this would constitute cyberbullying if the wrongdoer knew or should have known that the post was visible to others. Furthermore, owing to the public nature of the website, other users may share or further distribute the communication online.

[84] Rodkin and Fischer 2012 *Missouri Law Review* 619 625; for e.g., an online video posted once as revenge pornography.

[85] Vaillancourt *et al* 2017 *The Canadian Journal of Psychiatry* 368 369.

devices can share and distribute communications widely, scholars argue that the repetition requirement may have to change; a single act may lead to repeated victimisation as soon as harmful material is posted or shared online.[86]

Although bullying is usually characterised as repetitive conduct, it may be that some single acts should constitute cyberbullying.[87] Requiring repetition as an essential characteristic may also exclude extreme single incidents.[88] Thus it appears that repetition is not an essential characteristic in Canada, a great departure from other jurisdictions.

3 1 5 Power imbalance

(i) South Africa

As mentioned, a power imbalance is a key element in traditional bullying, where victims are unable to defend themselves.[89] Since cyberbullying is not defined in South African legislation, there is little authority on its elements and there seems to be no indication that a power imbalance is an essential element.

(ii) US

Cyberbullying may be characterised by a power imbalance – where victims are cyberbullied repeatedly and cannot defend themselves.[90] Whereas a power imbalance in traditional bullying refers to physical attributes and social status, in cyberbullying this may relate to proficiency; some Internet users are able to manipulate technology better than others and use this to commit their harmful online acts.[91] Although a perpetrator may have little power in the real world, they may possess superior technological skills, allowing them to overpower or overwhelm a victim.[92]

Unequal and coercive power over another is a distinguishing feature in bullying; in cyberbullying, this requirement may be met through anonymity,

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[86] Peter and Petermann "Cyberbullying: A Concept Analysis of Defining Attributes and Additional Influencing Factors" 2018 *Computers in Human Behavior* 350 355. The authors submit that even where the communication is deleted, it may have been shared or downloaded before deletion, thus resulting in the communication being spread and repeated despite the original perpetrator only acting once.

[87] Mackay https://antibullying.novascotia.ca/sites/default/files/Respectful%20and%20Responsible%20Relationships%2C%20There%27s%20no%20App%20for%20That%20-%20Report%20of%20the%20NS%20Task%20Force%20on%20Bullying%20and%20Cyberbullying.pdf 1 43.

[88] Mackay https://antibullying.novascotia.ca/sites/default/files/Respectful%20and%20Responsible%20Relationships%2C%20There%27s%20no%20App%20for%20That%20-%20Report%20of%20the%20NS%20Task%20Force%20on%20Bullying%20and%20Cyberbullying.pdf 1 39.

[89] Laas and Boezaart "The Legislative Framework Regarding Bullying in South African Schools" 2014 *Potchefstroom Electronic Law Journal* 2667 2669. See also De Wet 2010 *Acta Criminologica* 96 113–114.

[90] Dooley *et al* 2009 *Journal of Psychology* 182 183.

[91] Patchin and Hinduja 2006 *Youth Violence and Juvenile Justice* 148 152.

[92] Bauman "Cyberbullying: What Does Research Tell Us?" 2013 *Theory into Practice* 249.

as an unknown user is enough to constitute a threat and a power imbalance.[93]

(iii) Canada

Some scholars argue that a power imbalance is a key characteristic of cyberbullying and this may relate to the technology used to carry out the cyberbullying.[94] Canadian scholars submit that a power imbalance may arise through online anonymity, as the victim cannot identify his or her aggressor.[95] Other power imbalances relate to online supporters of the perpetrator encouraging or joining the acts of cyberbullying, or the victim being part of a marginalised group that is less powerful than the perpetrator in terms of status.[96] Although scholars make these submissions, there is nothing indicated in any laws regarding a power imbalance. The power imbalance requirement, according to scholars, has apparently changed from physical power to psychological power.

3 1 6 Electronically through electronic devices

(i) South Africa

Electronic communications sent through electronic devices are a feature that distinguishes cyberbullying from traditional bullying. An electronic communication may be defined as "a communication by means of data messages".[97] Furthermore, a "data message" can be defined as "data generated, sent, received or stored by electronic means, where any output of the data is in an intelligible form".[98]

However, Mienie makes an important argument: a definition of cyberbullying and the characteristics of electronic devices should not specify the type of act or device because the definition should be open to accommodate future technological evolution that may be used to commit cyberbullying.[99] Laubscher and Vollenhoven argue that the rapid increase in the popularity of social media has allowed cyberbullying to proliferate.[100] Acts of cyberbullying are unlikely to decrease in the future owing to the sophistication and evolution of technology that allows for easy perpetration of this type of behaviour.[101]

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93 Rodkin and Fischer 2012 *Missouri Law Review* 619 625–626.

94 Vaillancourt *et al* 2017 *The Canadian Journal of Psychiatry* 368 369.

95 Cappadocia *et al* 2013 *Canadian Journal of School Psychology* 171 172. The authors submit that the aggressor could be any youth regardless of their popularity or physical attributes.

96 Vaillancourt *et al* 2017 *The Canadian Journal of Psychiatry* 368 369.

97 S 1 of the Electronic Communications and Transactions Act 25 of 2002.

98 S 1 of the Cyber Crimes Act 19 of 2020.

99 Mienie "Managing Cyber-Bullying in Schools: Lessons Learnt From American and Australian Law" 2013 *Southern African Public Law* 146 149

100 Laubscher and Van Vollenhoven 2015 *Potchefstroom Electronic Law Journal* 2218 2220.

101 Burton and Mutongwizo 2009 *Centre for Justice and Crime Prevention Issue Paper No 8* 1 3.

(ii) US

US scholars submit that there are two major electronic devices that cyberbullies use to harass their victims from afar. The first devices used to send harassing, obscene, insulting or defamatory e-mails or instant messages are personal computers, and the second are cellular phones.[102] The Megan Meier Cyberbullying Prevention Bill defined "electronic means" as "any equipment dependent on electrical power to access an information service, including email, instant messaging, blogs, websites, telephones, and text message".[103] A "communication" was defined as "the electronic transmission, between or among points specified by the user, of information of the user's choosing, without change in the form or content of the information as sent and received".[104]

(iii) Canada

A definition of electronic communication is provided in the Intimate Images and Cyber-Protection Act as:

> "Any form of electronic communication, including any text message, writing, photograph, picture recording or other matter that is communicated electronically."[105]

This definition is crucial because it explains the electronic requirement of cyberbullying, which is an important feature in all jurisdictions. The online component of cyberbullying is what classifies it as cyberbullying and it involves using the Internet or technology to send or post text or images that cause threats, hurt or embarrassment to another person.[106] A majority of Canadian youth have access to technological devices, and rely heavily on these electronics, which increases their risk of being cyberbullied.[107]

Although the above analysis has attempted to provide the characteristics of cyberbullying, the many forms that it may take can further complicate its regulation. Each form may also have its own definition and therefore exhibit its own characteristics. Below are examples of forms of cyberbullying.

3 2 Forms of cyberbullying

Cases around the world have illustrated the many forms that cyberbullying may take. Various jurisdictions have contained the same or similar forms of cyberbullying. Scholars have made attempts to list the several forms of cyberbullying and certain websites also contain information as to what may constitute cyberbullying. According to the Centre for Justice and Crime Prevention in South Africa, cyberbullying may take various forms. However,

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[102] Patchin and Hinduja 2006 *Youth Violence and Juvenile Justice* 148 153–154.

[103] S 3(*b*)(2) of the Megan Meier Cyberbullying Prevention Act.

[104] S 3(*b*)(1) of the Megan Meier Cyberbullying Prevention Act.

[105] S 3(*e*) of the Intimate Images and Cyber-Protection Act, Ch 7 of the Acts of 2017.

[106] Talwar *et al* 2014 *Computers in Human Behavior* 122 123.

[107] Coburn, Connolly and Roesch "Cyberbullying: Is Federal Criminal Legislation the Solution?" 2015 *Canadian Journal of Criminology and Criminal Justice* 566 567.

these forms mirror those listed by American scholar Nancy Willard, and South Africa may have borrowed these from the US. They include the following:[108]

a) *Flaming or trolling* takes place on public platforms and include online messages that are often heated, vulgar, angry or threatening in nature. "Flaming" occurs where there is abusive language used in online groups or bulletin boards on the Internet.[109] Trolling may include flaming because it involves messages designed to attract undue responses or "flames" that often provoke futile arguments.[110]

b) *Harassment* is repeatedly sending cruel, threatening or offensive online communications to a specific individual. It is submitted that harassment against children falls under the definition of cyberbullying.

c) *Denigration* involves the sending or uploading of online publications of cruel gossip or rumours about another person with the intention of damaging that person's reputation or friendship. This may also involve uploading digitally altered pictures of the victim that portray the victim in a harmful or sexualised way. Denigration is therefore not limited to written communication but may also comprise pictures or videos that spread rumours or make fun of the victim.[111]

d) *Online impersonation* occurs where the perpetrator gains access to the account of the victim and uses the victim's account to send online communication to others that has a damaging effect on the victim's reputation. The perpetrator usually sends negative or inappropriate communications impersonating the victim with the intention of damaging the victim's friendships or attempting to get the victim in trouble. Other scholars have submitted that online impersonation may involve creating a fake account on the Internet of another person, without that person's consent and with the intent to harm or threaten that person.[112]

e) *Outing or trickery* occurs where the perpetrator shares the victim's secrets, embarrassing pictures or information online with other people without the consent of the victim. The perpetrator may take embarrassing pictures of the victim and upload them on social media, and only the original poster can remove these publications.[113]

f) *Exclusion* usually involves excluding a person from an online group, which may cause emotional stress to the victim. This is seen as a type

[108] Pillay and Sacks "Cyberbullying – A Shrouded Crime: Experiences of South African Undergraduate Students" 2020 *The Oriental Anthropologist* 370 373–374; see also Willard https://cdn.ymaws.com/www.safestates.org/resource/resmgr/imported/educators_guide.pdf 1. For the similar Canadian forms, see Kift *et al* 2010 *Journal of Law, Information and Science* 60 64–65.

[109] Van der Merwe, Roos, Eiselen, Nel, Erlank and Mabeka *Information and Communications Technology Law* (2021) 540.

[110] Nekmat and Lee "Prosocial vs Trolling Community on Facebook: A Comparative Study of Individual Group Communicative Behaviors" 2018 *International Journal of Communication* 1 3.

[111] Weber and Pelfrey *Cyberbullying: Causes, Consequences and Coping Strategies* (2014) 104.

[112] Cox "Protecting Victims of Cyberstalking, Cyberharassment, and Online Impersonation Through Prosecutions and Effective Laws" 2014 *Jurimetrics* 277 280.

[113] Weber and Pelfrey *Cyberbullying: Causes, Consequences and Coping Strategies* 103.

of social bullying because an individual is intentionally excluded from online groups or online discussions.[114]

g) *Cyberstalking* comprises online threats of harm or repeated online intimidation, involving threatening or harassing messages.

h) *Happy slapping* is a new form of cyberbullying in which the perpetrator walks up to someone and slaps the victim (or uses some other physical violence), while someone records it and uploads the video clip.[115]

The submission being made is that cyberbullying can encompass an array of online misconduct, which adds to the difficulty of defining the conduct. The inclusion of online harassment and online stalking also makes it confusing to differentiate these three forms of conduct.

4 CONCLUSION

From the above analysis, it is clear that cyberbullying has certain essential characteristics. The US and Canada provide insight as to what requirements South Africa may rely on to develop a legal definition for cyberbullying. It is clear that an electronic communication is what characterises bullying as cyberbullying. Whilst traditional bullying has always been characterised by intentional conduct, some authors believe that the intention element in sending an electronic communication may be done recklessly or negligently in causing harm to another. As it stands, the South African position should opt for intention on the part of the cyberbully because a reckless or negligent threshold may be too low for children to attract liability.

The repetition requirement is debatable in both South Africa and Canada. However, traditional bullying has always been characterised as repetitive conduct, and cyberbullying may well follow this approach. Cyberbullying, however, may be spread multiple times online, although there may only be a single original electronic communication. One would also have to determine the intention of the cyberbully and whether the intention was to harm the victim or cause the electronic communication to be spread and shared widely.

It is therefore proposed that the main characteristics of cyberbullying are: an electronic communication, causing harm, and featuring intention, repetitiveness and children. Power imbalance can be another factor that is indicative of a cyberbully's intention and aggression. Repeated online acts of harm show an intention to inflict harm on the victim; hiding behind an anonymous name may also reveal an intention to hide from liability.

The following definition is proposed for cyberbullying in South Africa: "an electronic communication having the intention to cause repeated harm to a child". As discussed earlier, an electronic communication includes more than just text messages or words and also encompasses pictures and videos. "Repeated" looks at whether the cyberbully intended the harm to spread

[114] Bullying UK "What is Cyberbullying?" (undated) https://www.bullying.co.uk/cyberbullying/what-is-cyberbullying/ (accessed 2022-07-30).

[115] Mann "Social Networking Websites – A Concatenation of Impersonation, Denigration, Sexual Aggressive Solicitation, Cyber-Bullying or Happy Slapping Videos" 2009 *International Journal of Law and Information Technology* 252 263.

despite only sending one communication. The discussion of “harm” included mainly psychological and emotional harm. It is here that an objective and subjective assessment is required. One would have to assess the cyberbullying objectively to determine whether the electronic communication causes reasonable harm, and thereafter one has to look at the subjective intention of the cyberbully and the effect of the harm on the victim. This would ensure that over-sensitive cases are not penalised but also that perpetrators do not escape liability where they commit cyberbullying.

The last element is children. Cyberbullying has been shown to have harmful effects on children, which in extreme cases may lead to self-harm or suicide. A proper legislative response may assist in curbing this online conduct. However, owing to the online nature of cyberbullying, it may be difficult to regulate. Addressing cyberbullying is a tremendous task requiring assistance from schools, policy makers and law enforcement officials. Finding a suitable definition for cyberbullying will take us one step closer to addressing this harmful conduct.

RE-THINKING MANDATORY AUDITOR ROTATION: A COMPARATIVE ANALYSIS

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SUMMARY

Since formation of the European Union, there has been a worldwide upsurge in regulation of the auditing profession, which has included mandatory auditor rotation and this has also found its way into South African company law, regardless of the many arguments against it. The number of corporate scandals or company failures justifies an evaluation of the effectiveness of such regulation and a re-thinking of the concept of auditor rotation. Revisiting the arguments against and in favour of mandatory auditor rotation confirms the rational arguments against mandatory auditor rotation. These arguments are opposed to the main reason for its implementation – namely, that rotation will serve as a publicly acceptable band-aid on damaged investor confidence. Overshadowed by corporate scandals, regulators face constant pressure to enhance auditors' independence and to amend and improve regulations. To inform the South African stance, developments regarding auditor rotation in Germany and Australia are examined. An assessment of the significance of mandatory auditor rotation in the current corporate-law environment reveals that Steinhoff (Steinhoff International Holdings N.V.) failed in 2018, despite the fact that auditor-rotation legislation was in place. This supports arguments against auditor rotation and suggests that South Africa too hastily followed international trends. Mandatory auditor rotation regulations in South Africa also discourage potential candidates from entering the auditing work environment. It is submitted that the current provisions do not contribute effectively to auditor independence and are merely desperate attempts to curb the public's lack of confidence in the auditing profession. Section 92 of the Companies Act 71 of 2008, dealing with mandatory auditor rotation, should therefore be repealed.

1 INTRODUCTION

Mandatory rotation of company auditors found its way into South African company law when the legislator passed the Companies Act (2008 Companies Act).[1] Mandatory rotation was introduced under ministerial pressure and over-eagerly following the international trend, despite the many arguments against rotation of auditors.[2] Part C of the 2008 Companies Act

[1] S 92 of the Companies Act 71 of 2008.

[2] Odendaal *Regulering van die Ouditeursprofessie in Suid-Afrika* (DCom (Accounting) thesis, University of Pretoria) 2006 102; Schoeman *The Role and Liability of Auditors in Corporate Disclosures and Reporting: A Legal Analysis* (LLD thesis, University of Pretoria) 2022 160.

codifies the specific obligations concerning the appointment of auditors,[3] their resignation, the occurrence of vacancies,[4] the rotation of auditors[5] and the rights and limited functions of auditors for public and state-owned companies.[6] The same company auditor may only serve in this role for five consecutive financial years; and in the event that a company auditor ceases to serve the company after two or more consecutive financial years, such auditor may not be appointed again until after the expiry of not less than two further financial years.[7]

After formation of the European Union, there was an upsurge in co-ordination of accounting rules, regulation of the publication of annual accounts, rules pertaining to the audit of such accounts and other requirements with which an auditor has to comply.[8] Many directives soon followed, with the aim of regulating the auditing profession; more rules were instituted to regulate, among other aspects, access to the profession, professional competence, independence and impartiality, international accounting standards, public oversight, the institution of audit committees for public-interest entities and transparency reports, as well as auditor rotation.[9] Mandatory rotation of auditors was instituted for listed companies in Italy in 1975, and the results have been generally progressive, enhancing auditor independence.[10] The Sarbanes-Oxley Act of 2002 in the United States of America (USA) engendered rules such as mandatory audit-partner rotation based on European rules,[11] and South Africa followed this international trend under ministerial pressure during 2002.[12]

Despite the institution of mandatory rotation of company auditors, corporate scandals and company failures were not avoided – as evidenced by, among others, Steinhoff and VBS Mutual Bank. Although Klynveld, Peat, Marwick and Goerdeler (KPMG) were appointed as auditors of VBS Mutual Bank in 2017, certain inaccuracies in the 2016 financial statements were not reported and major fraud was committed within two years, notwithstanding the risk of being exposed by auditors to be appointed in future.[13] PricewaterhouseCoopers Advisory Service Proprietary Limited identified in the financial statements of Steinhoff irregular transactions that were

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[3] S 90 of the 2008 Companies Act.

[4] S 91 of the 2008 Companies Act.

[5] S 92 of the 2008 Companies Act.

[6] S 93 of the 2008 Companies Act.

[7] S 92(1) and (2) of the 2008 Companies Act; Blythe "The In Pari Delicto Defense for Auditors in Professional Negligence Cases: Imputation of Managers' Unlawful Acts to the Client Firm" 2015 5(2) *Accounting Economics and Law: A Convivium* 192 196 n 1.

[8] Conac, Enriques and Gelter "Constraining Dominant Shareholders' Self-Dealing: The Legal Framework in France, Germany, and Italy" 2007 4(4) *European Company and Financial Law Review* 491 505.

[9] Van der Zanden and Van der Zanden "A Description of the Historical Developments in Standard Setting and Regulations for Auditors and the Audit Firms in an International Perspective" 2013 *Dovenschmidt Quarterly* 89 91–92.

[10] Mark "Accounting Fraud: Pleading Scienter of Auditors Under the PSLRA" 2007 *Connecticut Law Review* 1097 1201.

[11] Painter "Convergence and Competition in Rules Governing Lawyers and Auditors" 2004 *Journal of Corporation Law* 397 398.

[12] Odendaal *Regulering van die Ouditeursprofessie in Suid-Afrika* 102.

[13] Motau *VBS Mutual Bank: The Great Bank Heist – Investigator's Report to the Prudential Authority* (2018).

performed over a number of years;[14] these had not been reported by the audit firm Deloitte Touche Tohmatsu before the collapse of Steinhoff's share price after the disclosure of accounting irregularities.[15] This justifies a reconsideration of the significance of mandatory auditor rotation. Questionable interactions between directors and auditors incentivise the implementation of mandatory auditor rotation, but the continuous contemptible state of affairs in corporate governance calls for an evaluation of the effectiveness of such regulation and ultimately a re-thinking of the concept.

2 REVISITING THE ARGUMENTS FOR AND AGAINST MANDATORY AUDITOR ROTATION

A study of mandatory periodic audit-firm rotation in Italian companies by Milan's Bocconi University found a multitude of benefits, of which the most important is the worthiness of the audit practice for the purpose of restoring critically damaged investor confidence in the financial accounting system.[16] Healey and Kim acknowledge numerous justified arguments against mandatory auditor rotation, but aver that they cannot be compared to these benefits.[17] The unique character of the Italian corporate governance structure should, however, be kept in mind, since most companies are family-owned and -controlled, with infuriating agency problems and conflicts among shareholder groups, which allow for active participation of internal auditors in corporate governance matters.[18]

Particular public benefits may be divided among three general areas of auditor rotation – namely, the establishment of a peer-review process to deter aggressive accounting practices and promote acute reviews upon turnover of each auditor; the avoidance of conflicts of interest that may evolve from an enduring client relationship; and, finally, the promotion of an enlarged competitive market for audit firms resulting in improved quality of audits.[19] It is further proposed that mandatory rotation may relieve audit firms from the ever-increasing burden of separating non-audit business from audit services and from constantly observing audit partners in engagements with their public-company clients.[20]

On the other hand, high engagement costs, and a contraction in audit quality occasioned by the disturbance of the ongoing relationship that normally affords comprehensive knowledge of the nature and operations of

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[14] Buthelezi "Deloitte Accuses Irba's Investigator of Bias in African Bank Probe" (10 December 2018) https://www.businesslive.co.za/bd/companies/financial-services/2018-12-10-deloitte-accuses-irbas-investigator-of-bias-in-african-bank-probe/ (accessed 2022-11-10).

[15] PWC Advisory Service (Pty) Ltd "Steinhoff's 2019 Overview of Forensic Investigation" https://docs.google.com/viewerng/viewer?url=https://cdn.24.co.za/files/Cms/General/d/8637/28d45d9efd9e477d8dd8ff4f9ad6709c.pdf 2 (accessed 2019-10-04).

[16] Healey and Kim "The Benefits of Mandatory Auditor Rotation" 2003 *Regulation* 10 10.

[17] Healey and Kim 2003 *Regulation* 10 10.

[18] Vadasi, Bekiaris and Andrikopoulos "Corporate Governance and Internal Audit: An Institutional Theory Perspective" 2019 *Emerald Publishing Limited* 1 1.

[19] Healey and Kim 2003 *Regulation* 10 10–11.

[20] Healey and Kim 2003 *Regulation* 10 10.

the business, are listed as possible reasons against auditor rotation.[21] The drawbacks and expenditures associated with poor-quality audits are far greater than the probable costs of auditor rotation; and enhanced governance can prevent misrepresentation of public-company performance, which has been the economic justification for tolerating the increased costs of auditor rotation.[22] The fact that a new auditor has to familiarise themselves with the organisation afresh on each rotational turn tends to demonstrate that auditor rotation would not impact positively on audits; rather, it is probable that the opposite is true, measured against the astronomical costs of tender proceedings and the enormous practical and operational bearing these have. All these factors may undoubtedly escalate the potential for failure by the new auditor to discover material misstatements.[23] Rotating the audit firm, and not simply the audit partner, would more effectively serve the purpose of the process, while the dedication of time and money associated with such change would then at best be justified; a different partner from the same audit firm would in any event be hesitant to condemn his or her colleagues.[24]

The absence of rotation has hypothetically severely harmful effects, as illustrated in the USA scandals of Enron, WorldCom and HealthSouth, where the auditors had been hired for longer than 10 years at the time the scandals occurred. There is a powerful enticement to verify a client's accounting decisions, including fraudulent accounting, when an audit firm is aware that its client will proceed to engage their services for the foreseeable future, as long as the firm remains favourably viewed by management. By the same token, an individual auditor may be prompted to approve indecorous accounting when mindful of the probability of being offered a top management position with his or her client.[25] The auditor's role can thus be negated, rendering him or her to be nothing more than a puppet in the hands of management.

In the USA, auditor rotation was opposed publicly for many years by the auditing industry, based on the argument that the costs of auditing would escalate should corporations be compelled to adhere to rotation. As indicated, however, the loss of investor confidence owing to incorrect or fraudulent financial statements probably will be a more serious problem than increased audit costs.[26]

McKinnon criticises the arguments in favour of a rotation system; aiming to increase audit quality by ending the relationship between a company and its auditor is an "unsound" presumption, since studies show that audit quality improves over an auditor's tenancy with a particular client, and that audit failures around detecting accounting irregularities increase notably owing to the new auditor's lack of acquaintance with a particular client.[27] Secondly,

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[21] Healey and Kim 2003 *Regulation* 10 11.

[22] Healey and Kim 2003 *Regulation* 10 11.

[23] Van der Zanden and Van der Zanden 2013 *Dovenschmidt Quarterly* 89 103.

[24] Krackhardt "New Rules for Corporate Governance in the United States and Germany: A Model for New Zealand" 2005 *Victoria University of Wellington Law Review* 319 336.

[25] Mark 2007 *Connecticut Law Review* 1097 1197.

[26] Mark 2007 *Connecticut Law Review* 1097 1201.

[27] McKinnon "Auditing the Auditors: Antitrust Concerns in the Large Company Auditing Market" 2015 *New York University Journal of Law and Business* 533 561.

rotation might not decrease concentration, since large companies will simply obtain the services of another large audit firm; in fact, this may, in the short term, aggravate the concentration problem, not to mention incur astronomical costs.[28]

In response to the regulator's presumption that auditor rotation will help alleviate complications of agency and rational favouritisms that impede audit quality, Painter warns that there is no assurance that these rules actually improve the reaction of auditors towards risk, while the degree to which these rules tarnish the movement of information from the audit client to the auditor has not been established. In light of empirical evidence indicating that the extent of an audit client's earning accruals is inversely related to the length of the auditor-client relationship, he proposes that mandatory auditor rotation in fact may have a disadvantageous effect on audit quality.[29]

A completely divergent opinion holds that the character of the free-market auditing industry is irreconcilable with the objective of auditor independence. This approach concludes, on the basis of a revision of the status of the modern financial auditing industry, that neither the Sarbanes-Oxley Act, nor any other endeavour by the legislator, nor anything short of a comprehensive overhaul of the financial audit industry, will do away with the impediments faced by auditor independence.[30] This suggests a government audit scheme that will transform the existing method of auditor compensation by introducing a mandatory, pre-determined audit fee structure that will remove anxieties of auditors that their remuneration hinges on their ability to satisfy the management of a company.[31] The "at-will relationship" between auditors and their clients would be replaced with mandatory audits that give no choice on which audit company will perform the audit, nor what the scope of the audit will be, since all audits would be conducted by government auditors. Finally, all competition would be eliminated, and auditors would be afforded the opportunity to work undisturbed – not dreading the termination of their engagement.[32] It is however doubted that a free market would assent to these propositions. Nonetheless, aspects of the suggested fee structure may be of benefit in resolving the controversy about the upsurge in fees earned for non-audit services.[33]

Kleinman, Anandarajan and Palmon quote the Public Company Accounting Oversight Board's remark that mandatory rotation will prevent audit firms from turning every new engagement into a long-term revenue stream, thereby fundamentally altering the firm's relationship with its audit client. This could meaningfully improve the auditor's role when it comes to its function "as an independent gatekeeper".[34] Rotation may enhance the independence of auditors by lessening their collusion, which usually stems

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28 McKinnon 2015 *New York University Journal of Law and Business* 533 561–562.

29 Painter 2004 *Journal of Corporation Law* 397 418.

30 Klimentchenko "Myth of Auditor Independence" 2009 *University of Illinois Law Review* 1275 1276.

31 Klimentchenko 2009 *University of Illinois Law Review* 1275 1276.

32 Klimentchenko 2009 *University of Illinois Law Review* 1275 1298–1299.

33 Schoeman *The Role and Liability of Auditors* 133.

34 Kleinman, Anandarajan and Palmon "Who's to Judge? Understanding Issues of Auditor Independence vis à vis Judicial Independence" 2012 2(1) *Accounting Economics and Law: Convivium* 23.

from ongoing professional and occasionally personal relationships; and it may have a constraining effect, given that an auditor's services will in future be reviewed by a new rotation auditor, who may discover the previous auditor's complicity in fraud.[35]

3 EFFECTIVENESS OF MANDATORY AUDITOR ROTATION

In South Africa, mandatory auditor rotation regulations are listed as causes that contribute to a less appealing general work environment for auditors.[36] In 2007, Bourne voiced the opinion that the USA's Sarbanes-Oxley Act and the South African Corporate Laws Amendment Act 24 of 2006 had enhanced auditor independence by prescribing an improved degree of separation between auditor and client.[37] It was done by introducing measures such as audit committees and auditor rotation, as well as constraints around the provision of non-audit services by an auditor to its client, in light of the generally accepted view that regulations are fundamental to ensuring that auditors maintain an objective and impartial role.[38] Though Bourne's opinion might have been sustainable in 2007, it will certainly be questioned today in the face of recent audit and accounting scandals in South Africa, as listed above.

3 1 Independence issues

In addition to all the regulations contained in the Auditing Profession Act,[39] and in the same vein as for directors, Part C of the 2008 Companies Act contains specific codifications regarding the appointment, resignation, vacancies, rotation, rights and limited functions of auditors for public and state-owned companies that are, as such, obliged to appoint an auditor on an annual basis.[40] Only registered auditors who are not disqualified in terms of section 69(8) of the 2008 Companies Act to serve as a director, and who are not a director or prescribed officer of the company, may be appointed for this audit. Section 90(2) includes a further list of persons who may also not serve as auditors of the company.[41] The position of the company auditor is

[35] Ferreira-Gomes "Auditors as Gatekeepers: The European Reform of Auditors' Legal Regime and the American Influence" 2005 *Columbia Journal of European Law* 665 683.

[36] Harber "Exploring the Nature and Consequences of a Possible Decline in the Appeal of the South African Audit Profession" 2018 *SAJAAR* 13 15.

[37] Bourne "Auditor Independence: An Analysis of the Legislation in the United States of America and South Africa" 2007 *SAMLJ* 492 501.

[38] Bourne 2007 *SAMLJ* 501.

[39] 26 of 2005.

[40] Ss 90–93 of the 2008 Companies Act. In terms of s 90(3), companies may appoint a firm as an auditor, and an individual determined by such firm according to the provisions of s 44(1) of the APA will then be responsible for performing the functions of the company auditor. S 90(3) and (4) determine that if companies that are required to appoint an auditor fail to do so when incorporating a company, then the directors of such company must appoint the first auditor within 40 business days after the date of incorporation, and such auditor holds office as company auditor until the conclusion of the first annual general meeting of the company.

[41] S 90(2)*(b)* further excludes the following persons to serve as auditors of a company.

regulated in a manner to ensure that a company has an auditor on a permanent basis who, should a vacancy arise, is replaced immediately.[42]

Overshadowed by corporate scandals, regulators are under continued pressure to enhance auditors' independence, forcing them constantly to amend and improve regulations. With a view to conforming amendments to the International Auditing and Assurance Standards Board (IAASB) International Standards,[43] the revised International Ethics Standards Board for Accountants (IESBA) Code International Standards on Quality Control (ISQC) 1 Paragraph A14 and Paragraph 25 were amended. A change was made to recognition of the familiarity threat, which is predominantly relevant in the context of financial statement audits of listed entities that require the rotation of the key audit partner. Now a straightforward requirement obliges the rotation of the engagement partner, the engagement quality control reviewer and other key audit partners.[44]

ISQC 1 now provides that the policies and procedures of a firm must stipulate the criteria for establishing the necessity to remove the circumstances "that create a threat of long association with an entity to an acceptable level … or criteria for applying safeguards to reduce the threat".[45] Mandatory auditor rotation has also been suggested as a way to ease the

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"(ii) an employee or consultant of the company who was or has been engaged for more than one year in the maintenance of any of the company's financial records or the preparation of any of its financial statements;

(iii) a director, officer or employee of a person appointed as company secretary in terms of Part B of this Chapter;

(iv) a person who, alone or with a partner or employees, habitually or regularly performs the duties of accountant or bookkeeper, or performs related secretarial work, for the company;

(v) a person who, at any time during the five financial years immediately preceding the date of appointment, was a person contemplated in any of subparagraphs (i) to (iv); or

(vi) a person related to a person contemplated in subparagraphs (i) to (v)."

Section 90(2)(*c*) requires that the person:

"*(c)* must be acceptable to the company's audit committee as being independent of the company, having regard to the matters enumerated in section 94(8), in the case of a company that has appointed an audit committee, whether as required by section 94, or voluntarily as contemplated in section 34(2)."

[42] S 91 stipulated that when a vacancy arises in the office of the only auditor of a company, the board of directors must fill the vacant position within 40 business days. The board must within 15 business days from the vacancy propose to the audit committee, a name of at least one registered auditor for consideration for appointment as the new auditor and proceed within 5 business days after delivering the proposal if the audit committee does not give written notice rejecting the proposed auditor.

[43] In April 2020, the IAASB International Standards was amended to conform with the revised IESBA Code by stipulating in ISQC 1 Paragraph A8 of the IESBA Code: "The IESBA Code provides a conceptual framework that establishes the approach which a professional accountant is required to apply when identifying, evaluating and addressing threats to compliance with the fundamental principles. In the case of audits, reviews and other assurance engagements, the IESBA Code sets out International Independence Standards, established by the application of the conceptual framework to threats to independence in relation to those engagements."

[44] IAASB's Final Pronouncement April 2020 10.

[45] IAASB's Final Pronouncement April 2020 7.

problem of large-firm concentration.[46] Although the values of mandatory rotation are frequently praised, history indicates that large corporations will not by choice select another audit firm outside of the Big Four audit firms.[47]

Where auditor rotation did not occur, a revolving-door hiring phenomenon ensued, and the independence that auditors were required to demonstrate was attenuated for the reason that, in such circumstances, they are inclined to enjoy favouritism from management. This appeared to be the order of the day during 2003, when 99 per cent of Fortune 1000 public companies and their audit committees did not have any audit-firm rotation policy in place.[48]

The Sarbanes-Oxley Act failed to resolve the auditor-rotation predicament, since audit firms were only required to rotate the lead and concurring review partners within a specific audit firm every five years. This regulation was rightly criticised as having had little or no effect at all, as it failed to diminish the financial temptation for auditors to attenuate their judgment on accounting issues. It might in fact have intensified the predicament to the extent that partners in large audit firms would compete against each other for a promotion and bonus.[49]

3 2 Auditor rotation in Germany and Australia

3 2 1 Germany

Distinctive historic events influenced the evolution of German businesses, resulting in a particular trait of German corporate law – namely, the concept of co-determination (*Mitbestimmung*).[50] Labour law and corporations law are therefore connected by several statutory provisions that regulate the rights and duties of employee representatives on supervisory boards and the rules relating to collective bargaining.[51] Co-determination legislation distinguishes German supervisory boards of publicly traded companies in terms of the perspective of shareholders and employees.[52]

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[46] McKinnon 2015 *New York University Journal of Law and Business* 533 559.

[47] McKinnon 2015 *New York University Journal of Law and Business* 533 561.

[48] Mark 2007 *Connecticut Law Review* 1097 1196–1197. Because mandatory rotation was not compulsory at that time, audit relationships naturally continued for a long time, averaging 22 years between the Fortune 1000 companies and their auditors. By 2006, at least 18 large companies in the USA, such as General Electric, Phelps Dodge, General Motors, Caterpillar, Boeing and Walt Disney had enjoyed audit relationships with the Big Four auditor firms for longer than 50 years.

[49] Mark 2007 *Connecticut Law Review* 1097 1199.

[50] Du Plessis, Großfeld, Luttermann, Saenger, Sandrock and Casper *German Corporate Governance in International and European Context* (2012) 2.

[51] Du Plessis *et al German Corporate Governance in International and European* Context 2; see also Botha *Employee Participation and Voice in Companies: A Legal Perspective* (LLD thesis, North-West University) 2015 288–369 for a comparative discussion of Germany, the EU and SA regarding board structures and co-determination.

[52] Amanbaeva *The Monitoring Role of Outside Directors and Supervisory Boards in One-Tier and Two-Tier Board Models in Public Companies in the USA and Germany* (BA (Hons) Commercial Law dissertation, Westminster International University in Tashkent) 2015 19.

Large industrial companies usually use public companies (*Aktiengesellschaft*)[53] with the usual two-tier board structure, while smaller companies use private or proprietary companies (*Gesellschaft mit beschränkter Haftung*).[54] German corporate law is typified by a two-tier board system that consists of a managing board (*Vorstand*) and supervisory board (*Aufsichtsrat*).[55] The supervisory board is elected at the general shareholder meeting and half of the members comprise employee representatives who give effect to the German system of co-determination; however, the chairperson, who has a casting vote, is elected by the shareholders, which means that the board can be branded as taking a “quasi-parity” form.[56] German corporations law is influenced by international debates on important corporate-law issues, while corporate-governance discussions are precipitated by International Financial Reporting Standards (IFRS), the introduction of rating agencies and new evaluation techniques. The private-law classification of corporations law (the regulation of specifically large public corporations) is nevertheless founded on precise and accurate statutory provisions.[57]

In the absence of corporate scandals comparable to the Enron disaster in the USA, and given the general opinion that German corporate governance functioned well, the development of the 2002 German Corporate Governance Code was inspired by a decision to entice international investors to surmount the economic crisis.[58] It was, however, difficult for investors from the USA to identify with the German corporate-governance system, which differs considerably from theirs.[59] To overcome difficulties (including the two-tier board, an absence of transparency, less emphasis on shareholder interest, lack of independence for supervisory boards and lessened independence of auditors), the German government embraced a

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53 Du Plessis *et al* (*German Corporate Governance in International and European Context*) explain the Aktiengesellschaft company as follows: Aktiengesellschaft (AG) is often translated as “joint stock corporation”. The use of the term “joint stock company/corporation” or “joint-stock company/corporation” was common when the various Joint Stock Companies Acts were passed in the 1800s in England, but the term was used long before that. This is also reflected in the titles of some of the leading textbooks of the 1800s. However, nowadays in the USA, the UK and other Anglo-American jurisdictions, the trend is to refer to companies or corporations comparable to the Aktiengesellschaft (AG) simply as “public companies or corporations”; “publicly-traded companies or corporations”; “public companies or corporations limited by shares”; or “public limited companies or corporations”.

54 Du Plessis *et al* (*German Corporate Governance in International and European Context* 6) describe the Gesellschaft mit beschränkter Haftung company (GmbH) as being comparable to the private or proprietary company. See also Van der Zanden and Van der Zanden 2013 *Dovenschmidt Quarterly* 89 90.

55 Krackhardt 2005 *Victoria University of Wellington Law Review* 319 323–324; Botha “Evaluating the Social and Ethics Committee: Is Labour the Missing Link? (Part 2)” 2017 *THRHR* 15.

56 Botha 2017 *THRHR* 15.

57 Botha 2017 *THRHR* 3.

58 For a comprehensive discussion of the influence of the convergence of corporate governance systems, see Hassel and Beyer “The Effects of Convergence: Internationalisation and the Changing Distribution of Net Value Added in Large German Firms” *Max Planck Institut für Gesellschaftsforschung Discussion Paper No 01/7* (2001) 1–29.

59 Hassel and Beyer *Effects of Convergence* 1–29.

more transparent and accessible conception of the German system.[60] Without adding many new rules to the German Corporate Governance Code, the code mainly reflects the foundation of German corporate law, with the purpose of recapping and clarifying the German system, emphasising in particular co-determination and the two-tier board structure.[61] Interestingly, there is no prescription as to rotation of auditors in German law.[62] The German Corporate Governance Code requires that the supervisory board appoint an auditor and agree on his or her fees, while the auditor has to partake in all the supervisory board meetings relating to financial statements.[63] Only two new duties for auditors were recently introduced – namely, that they must declare any prior relations with the company or its directors that affect the company's independence around their selection, possibly causing a conflict of interests;[64] and secondly, recent or actual contracts, in particular consulting engagements and future contracts for the ensuing year, must be disclosed.[65] If similar conflicts of interest arise after the auditor's appointment, then the auditor must notify the supervisory board without delay.[66] A second, similar duty ensues when an auditor discovers any facts that may adversely affect the affairs of the supervisory board.[67]

Although the German corporate-governance system appears to differ from the South African corporate-governance system since it involves a two-tier board and co-determination, it may be argued that there are similarities; in South Africa, the social and ethics committee functions as a distinct organ of a company and is therefore not a board committee[68] – hence, the proposition that the social and ethics committee can act as a division that results in a two-tier board in South Africa, and that workplace forums in the Labour Relations Act achieve similar outcomes to co-determination.[69] Valuable lessons can be learnt from German corporate governance regarding the absence of rotation of auditors and the manner in which auditor independence is regulated.

3 2 2 Australia

Mandatory rotation of only the key audit partner is required.[70] Following the German trend, the Parliamentary Joint Committee on Corporations and Financial Services thoroughly investigated whether mandatory auditor

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[60] Hassel and Beyer *Effects of Convergence* 1–29.

[61] Krackhardt 2005 *Victoria University of Wellington Law Review* 319 325–326; Davies and Hopt "Corporate Boards in Europe: Accountability and Convergence" 2013 61(2) *American Journal of Comparative Law* 301 325.

[62] Krackhardt 2005 *Victoria University of Wellington Law Review* 319 336.

[63] Krackhardt 2005 *Victoria University of Wellington Law Review* 319 334.

[64] *Ibid.*

[65] *Ibid.*

[66] *Ibid.*

[67] *Ibid.*

[68] Botha "Responsibilities of Companies Towards Employees" 2015 *PELJ* 47 47.

[69] Esser "Stakeholder Protection: The Position of Employees" 2007 *THRHR* 407 423.

[70] S 324 DA of the Corporations Act 2001 (Cth).

rotation should form part of the governance structure of auditors in Australia, and then in February 2020 made a recommendation:[71]

> "Recommendation 6
> 4.151 The committee recommends that the Financial Reporting Council, by the end of the 2020–21 financial year, oversee the revision and implementation of Australian standards to require audited entities to disclose auditor tenure in annual financial reports. Such disclosure should include both the length of tenure of the entity's external auditor, and of the lead audit partner."

The majority of review participants opposed the introduction of mandatory auditor firm rotation in Australia after observing international reactions and empirical research that does not support mandatory rotation of audit firms and which in fact proposes that mandatory auditor firm rotation could be detrimental to audit quality.[72] Consequently, an alternative solution to mandated auditor rotation was recommended – that additional disclosure of audit-firm tenure should enhance transparency and clarity concerning audit-firm tenure and tendering.[73] Clearly, and as supported by the arguments in this article, auditor independence should be accomplished by transparency towards auditor tenure rather than by forced auditor rotation.

4 CONCLUSION

Notwithstanding sound arguments opposing it, mandatory auditor rotation has been implemented mainly based on the argument that it will serve as a publicly acceptable band-aid on damaged investor confidence caused by financial scandals and precipitated by the role of auditors. In the USA, auditor rotation was particularly opposed by the auditing industry, based on cost-implication arguments. It was evident, even in 2006, that many large companies engaged the services of a single audit firm for an average of 22 years and did not have any audit-firm rotation policies. It is clear that auditors are not comfortable with the logic that auditor independence will attenuate where auditor rotation is not implemented owing to favouritism by management, or that the costs of mandatory auditor rotation are justified when regarded in terms of investor confidence lost to incorrect or fraudulent financial statements.

Following the international trend and hassled by government, South Africa introduced the concept of mandatory rotation of corporate auditors into the 2008 Companies Act, notwithstanding a total lack of evidence that auditor rotation would indeed contribute positively to audits. On the contrary, it is not unlikely that the mammoth practical and operational task facing a newly appointed auditor who has to get acquainted with the audit client's business, may just as easily increase the possibility of their failing to discover material misstatements. Research supports the conclusion that it is illogical to presume audit quality will improve by terminating the relationship between a company and its auditor. Research confirms that audit quality improves over

[71] Parliamentary Joint Committee on Corporations and Financial Services *Interim Report on Regulation of Auditing in Australia* (February 2020) 88.

[72] Schoeman *The Role and Liability of Auditors* 83.

[73] Schoeman *The Role and Liability of Auditors* 84.

the duration of an auditor’s tenancy with a specific client and that failure to discover accounting anomalies increases significantly in tandem with an auditor's lack of acquaintance with a specific audit client.

The failure of Steinhoff in 2018, despite the fact that auditor-rotation legislation was in place, underscores the arguments against auditor rotation and accentuates that South Africa followed international trends too hastily. Another far more important concern, which in the long run will have a severe influence on auditor independence, is the fact that mandatory auditor rotation regulations in South Africa have deterred potential candidates from entering the auditing work environment, which is now a less alluring situation.

Still shaken by the recent collapse of other large corporations and banks, the IAASB in typical fashion amended the IESBA Code in April 2020 to enforce rotation of the engagement partner, the engagement quality control reviewer and other key audit partners in the case of financial statement audits of listed entities. Yet again, this was a desperate move to cure a lack of confidence in the auditing profession, despite empirical evidence confirming that the extent of an audit client’s earning accruals is inversely correlated to the duration of the auditor-client relationship. The amendment has been implemented, while it is clear that mandatory auditor rotation is detrimental to audit quality.

This article recommends the repeal of auditor rotation in South Africa. It does so especially in view of the relative independence of auditors and on the basis that current provisions are not justified and do not contribute effectively to auditor independence. It further appears that these types of regulations are usually desperate attempts at curbing the public’s lack of confidence in the auditing profession, despite empirical evidence that mandatory auditor rotation is indeed detrimental to audit quality. This article therefore suggests that section 92 of the 2008 Companies Act should be repealed to rectify the over-hasty following of international trends around mandatory audit firm rotation regulations, since there is no sign that current provisions contribute effectively to auditor independence.

Lessons learnt from Germany and Australia instead suggest an approach to ensure auditor independence by means of regulations that enhance more transparent disclosure about the company’s current auditor tenure and tendering. It is also a more rational approach that recognises existing research that mandatory auditor rotation is indeed detrimental to audit quality. Following the German approach of disclosure of any prior relations with the company or its directors, and revelation of recent or actual contracts with the company or its directors, allows users of financial statements to make their own determination on the independence of appointed auditors. The German approach is favoured because it requires the disclosure of more information than the Australian approach, which only requires disclosure on the length of tenure of the external auditor and of the lead audit partner.

QUELLING THE RAGING FIRE: RESTORATIVE JUSTICE AS A RESPONSE TO VIGILANTISM IN SOUTH AFRICA*

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SUMMARY

Vigilantism is a persistent problem in South Africa. The problem largely emanates from people's dissatisfaction with how the police, or the criminal justice system, deals with crime. There are high levels of crime in communities and the general feeling is that little has been done to curb it. Thus, the acts of vigilantism fill the vacuum left by unsatisfactory law enforcement or the criminal justice system. Although vigilantism constitutes criminal behaviour that warrants punishment, vigilantes are often viewed as proactive citizens fighting crime. Put differently, vigilantism is seen as an attempt by community members to deal with crime. One crime-intervention strategy that involves the community legally in finding appropriate solutions is restorative justice. Accordingly, research indicates that restorative justice has the potential to reduce crime. Given that crime is what triggers vigilantism, there is a reason to believe that restorative justice might eliminate the chances of people resorting to vigilantism. The purpose of this article is to examine restorative justice as a method of dealing with vigilantism in South Africa.

1 INTRODUCTION

Vigilantism is not a new phenomenon in some communities in South Africa. Studies indicate that vigilantism can be traced back to the early 1930s.[1] It was previously seen as the natural response of marginalised Black people against the injustice and brutality of the apartheid regime.[2] Today, vigilantism

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* Some parts of this article are based on the author's unpublished master's dissertation titled *Restorative Justice as an Alternative Sentencing Option in South Africa: A New Approach to Crime* (University of South Africa) 2019.

1 Botha "Vigilantism in South Africa in the Pre- and Post-1994 Periods: Causes, Similarities and Differences" 2015 28(3) *Acta Criminologica* 18.

2 Mtshali "The Complex Legacy of Vigilantism in South Africa" (2019-12-26) *The New Yorker*.

is justified as filling the vacuum left by unsatisfactory law enforcement[3] or the criminal justice system.[4] In most instances, vigilantism occurs as a result of community members being dissatisfied with the way in which the police or the conventional criminal justice system deals with crime.[5] As aptly defined by Swanepoel *et al*, vigilantism includes

> "the illegal and violent acts or threats of such acts directed at individuals threatening the community order, by self-appointed law enforcement groups consisting of private citizens in reaction to the absence or ineffectiveness of formal systems and aims to reclaim order, and protected by a conspiracy of silence."[6]

Vigilantism, in other words, can be described as conduct that involves people taking the law into their own hands in an attempt to serve justice, because of the perceived failure of the government and its criminal justice agencies to deal effectively with (suspected) criminals.[7]

The 2017/18 crime statistics report released by the South African Police Service indicate that 849 people were killed in incidents that the police classified as mob justice.[8] Some commentators have suggested that the total number of deaths could be considerably higher than what has been reported. This is because it is not easy to determine motives in murder cases.[9] It was further reported during the 2019/20 count that 1 202 people lost their lives due to suspected acts of vigilantism.[10] This shows an increase by 353 deaths compared to the 2017/18 count. It is argued that incidents of vigilantism will continue to rise as long as communities feel unsafe and believe they have the capacity to protect themselves.[11] As an example, in 2021, eight people reportedly died in the hands of vigilantes in Zandspruit, Johannesburg.[12] Deaths associated with vigilantism are commonly perpetrated through stoning, torturing of suspects, and what is known as

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3 Harris *As for Violent Crime That's Our Daily Bread: Vigilante Violence During South Africa's Period of Transition* (2001) 27; Nel *Crime as Punishment: A Legal Perspective on Vigilantism in South Africa* (Doctor of Laws thesis, Stellenbosch University) 2016 3; Manyane "No One Deserves Such a Brutal and Horrible Death" (2021-05-23) *IOL News*; Nel "How South Africa Can Turn the Rising Tide Against Vigilantism (2017-02-17) *The Conversation.*

4 Nel *Crime as Punishment* 10; "Vigilantism" (2019-03-04) *The Witness.*

5 Nel *Crime as Punishment* 162; Martin "Vigilantism and State Crime in South Africa" 2012 1(2) *State Crime* 229.

6 Swanepoel, Duvenhage and Coetzee "Vigilantism: A Theoretical Perspective as Applied to People's Courts in Post–1994 South Africa" 2011 36(1) *Journal* 117.

7 Martin 2012 *State Crime* 229; Nel *Crime as Punishment* 2; Ngema "Vigilantism Don't Take Law Into Your Own Hands" (2018-05-28) *IOL News.*

8 Cupido *The Development of Vigilantism in South Africa* (Master's dissertation, Stellenbosch University) 2021 1; Lancaster "Is Mob Violence Out of Control in South Africa?" (2019-03-05) *Daily Maverick*; Pieterse "Vigilantism" (2019-03-04) *The Witness.*

9 Lancaster (2019-03-05) *Daily Maverick.*

10 Moyo-Kupeta "Mob Justice is a Language in South Africa" (2021-05-30) *IOL News.*

11 Pieterse (2019-03-04) *The Witness.*

12 Manyane (2021-05-23) *IOL News.*

necklacing (where a car tyre is placed on a suspect's shoulders and set alight).[13]

As is evident from the above, vigilantism does not reduce crime. Instead, it contributes to an increase in the overall level of crime, and undermines the rule of law.[14] Moreover, it can cause irreparable harm, as innocent people may be assaulted or even killed.[15] While there is a risk that the wrong person may be punished, those who embrace vigilantism argue that the legal system faces the same kind of problem.[16] They make reference to instances where courts have convicted and sentenced people who were falsely accused of crime.[17] Accordingly, they argue that "if mistakes are grounds for deeming something illegal or moral, then our justice system fits the bill as well".[18] It should be noted that although vigilantism does not in itself constitute a criminal offence because it is not expressly prohibited by law, vigilantes can be prosecuted for other crimes (such as murder and assault) flowing from their actions. Today, many people have been charged for vigilante-related activities.[19]

Interestingly, although the perpetrators of vigilantism may be deemed to deserve punishment,[20] they are often seen in their communities as proactive citizens fighting crime.[21] Hence, vigilantes tend to receive support,[22] even when they go as far as killing someone.[23] Vigilantism is thus seen by those who support it as an attempt to address the problem of crime.[24] If this is the case, then community members should start contributing positively to the fight against crime. In other words, they need to come up with effective and acceptable ways of dealing with crime, rather than resorting to violence. One way in which community members can find appropriate solutions to crime is to support restorative justice. There is a belief that if the State adopted more inclusive alternate methods of dealing with crime – such as restorative justice – this might increase the likelihood of citizen buy-in[25] and therefore counter vigilantism, in particular because research shows restorative justice

13 Lancaster (2019-03-05) *Daily Maverick*; Pieterse (2019-03-04) *The Witness.*

14 Sekhonyane and Louw *Violent Justice, Vigilantism and the State's Response* (2002) 4.

15 Nel *Crime as Punishment* 59–60; Pieterse (2019-03-04) *The Witness.*

16 Rokhy "Vigilantes Should Be Able to Fight Crime Without Interference" (2011-10-31) *Daily Sundial.*

17 Rokhy (2011-10-31) *Daily Sundial.* See the case of *Khanye v State* 2017 (2) SACR 630 (CC), where the court ordered the release of the accused who had spent 14 years in prison for a crime that they did not commit. It was proved in court that they were innocent.

18 Rokhy (2011-10-31) *Daily Sundial.*

19 Schnitzler, Ditlhage, Kgalema, Maepa, Mofokeng and Pigou *Guardian or Gangster? Mapogo a Mathamaga: A Case Study* (2001) 14–15; Clark "South Africans Are Taking the Law Into Their Own Hands" (2018-11-29) *Foreign Policy.*

20 Maele *Community Perceptions on Vigilantism in Matome Village* (Master's dissertation, University of Limpopo) 2018 83; Nel (2017-02-17) *The Conversation.*

21 Nel (2017-02-17) *The Conversation*; *S v Dikqacwi* [2013] ZAWCHC 67 6.

22 Manyane (2021-05-23) *IOL News*; Nel (2017-02-17) *The Conversation.*

23 Nel *Crime as Punishment* 223.

24 Martin 2012 *State Crime* 229; Nel *Crime as Punishment* 162.

25 Nel (2017-02-17) *The Conversation.*

has the potential to reduce crime, which, as indicated above, is what triggers vigilantism.

This article examines restorative justice as a way to deal with vigilantism in South Africa. Not much research has been done on restorative justice and its impact on vigilantism. The article aims to be a contribution in this field. There is however a comprehensive body of research on a restorative justice approach to wrongdoing. Moreover, studies have been undertaken focusing on the vigilantism phenomenon. This information is evaluated, analysed and interpreted to achieve the article's objective. The article begins by discussing police inefficiency and the dysfunctional criminal justice system as the cause of vigilantism in South Africa. Thereafter, it provides a brief exposition of restorative justice, followed by a discussion of the concept of community participation in dealing with crime. It further provides the reasons that community involvement in the justice process can be effective in reducing crime and in countering vigilantism. This is followed by a discussion of the current legislative framework for restorative justice practices in South Africa. The article ends with a brief conclusion and some suggestions.

2 POLICE INEFFICIENCY AND A DYSFUNCTIONAL CRIMINAL JUSTICE SYSTEM AS A CAUSE OF VIGILANTISM IN SOUTH AFRICA

Police inefficiency and a dysfunctional criminal justice system are familiar causes of vigilantism in South Africa. Reports indicate that vigilantism is prevalent in "communities where people feel they are not being serviced appropriately by the police".[26] This perception often leads to people losing trust in the police.[27] Results from the survey conducted in 2018 demonstrate that 66 per cent of participants do not trust the police.[28] In 2021, the public trust in the police declined to 27 per cent.[29] Crime in many instances is not reported to the police, because people believe that the police are failing to solve it.[30] Because of a lack of confidence in the police, many people seek assistance outside government for protection against crime, such as using private-security services.[31] For those who cannot afford similar services, vigilantism becomes an alternative option.[32] In 2019, it was estimated that 3,5 per cent of households in South Africa belong to vigilante groups.[33] According to reports, people seek help from these groups, because they are

[26] Clark (2018-11-29) *Foreign Policy.*

[27] Lancaster (2019-03-05) *Daily Maverick*; Moyo-Kupeta (2021-05-30) *IOL News.*

[28] Lancaster (2019-03-05) *Daily Maverick*; Moyo-Kupeta (2021-05-30) *IOL News*.

[29] Bruce "South Africa Must Rethink Its Community Safety System in Poor Urban Areas" (2022-11-02) *Daily Maverick*; Roberts and Gordon "South Africans Have Low Trust in their Police. Here's Why" (2022-03-28) *The Conversation*.

[30] Botha 2015 *Acta Criminologica* 26–27; Pieterse (2019-03-04) *The Witness.*

[31] Lancaster (2019-03-05) *Daily Maverick.*

[32] Lancaster (2019-03-05) *Daily Maverick*; Sekhonyane and Louw *Violent Justice* 2.

[33] Lancaster (2019-03-05) *Daily Maverick.*

seen as more effective than the police.[34] In other words, community members are forced to rely on vigilante groups for protection against crime. As one disgruntled member put it,

> "If only the police would do their job the people in the community wouldn't *have to* take the law into their own hands. I mean they are not doing anything from what I can see."[35]

There is a similar link between perceived poor functioning of the criminal justice system and vigilantism.[36] Studies suggest that people often resort to vigilantism because they feel that the courts are not executing their functions efficiently.[37] A recent survey that measured South Africans' trust in different institutions revealed that most participants (53 per cent) expressed little or no trust in the courts.[38] Based on research, the following are among the reasons that people are dissatisfied with the court system:

a) not enough convictions;
b) cases taking a long time to be finalised;
c) no proper notices for hearings are served on victims; and
d) courts being too lenient on criminals.[39]

As far as leniency is concerned, there are reports of incidents in other countries, where offenders have been attacked by members of the public after they have been acquitted or given a too-lenient sentence.[40] Similarly, in South Africa, there are instances where community members collectively pay the bail of offenders and thereafter kill them.[41] In most cases, the public is opposed to bail being granted to someone accused of serious crimes.[42] In view of this, the State often objects to the accused's bail, citing their safety as one reasons for their objection.[43]

In addition to the above-mentioned reasons, the issue of perpetrators being granted bail has also emerged as a ground for dissatisfaction.[44] Bail is perceived by some members of the public as a mechanism that serves the interests of offenders as opposed to those of victims and the wider community.[45] It is seen to allow the suspects of crime to return to their communities to flaunt their freedom and continue with criminal activities.[46]

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34 Nel Crime *as Punishment* 162.
35 *Ibid.*
36 Nel (2017-02-17) *The Conversation*; Pieterse (2019-03-04) *The Witness*.
37 Nel *Crime as Punishment* 255.
38 Moosa and Hofmeyer S*outh Africans' Trust in Institutions and Representatives Reaches New Low* (2021) 7.
39 Botha 2015 *Acta Criminologica* 24.
40 Haas *Public Support for Vigilantism* (Doctoral thesis, Leiden University) 2010 17.
41 Harris *As for Violent Crime* 33.
42 Aschaiek *Understanding Punishment and Crime Control in South Africa's Marginalized Communities* (2019) 3.
43 Khoza "Four Murder-Accused Farmers Denied Bail" (2021-04-13) *Sowetan Live.*
44 Harris *As for Violent Crime* 35.
45 *Ibid.*
46 *Ibid.*

Some researchers have attributed this perception to people's lack of knowledge about how the criminal justice system operates.[47] Accused persons are, by law, entitled to be released on bail if they meet certain requirements. Moreover, being granted bail does not mean that they will never have to stand trial. Although this bail-related misunderstanding can be seen as "understandable given that most South Africans have never experienced the benefits of a properly functioning criminal justice system",[48] it does show the extent to which due process remains an unfamiliar concept to many people.[49] This can also be seen in some of the reasons that people are dissatisfied with the police. For example, one reason that vigilante activities are supported by communities is that, in the case of theft, vigilantes not only punish perpetrators, but also get back the stolen property.[50] As part of due process, the police are required to retain the stolen property to present it as evidence of crime in the forthcoming criminal proceedings. It would thus appear to be insufficient just to address the shortcomings of the conventional criminal justice system and police inefficiency without also educating the public about due process.[51]

3 WHAT IS RESTORATIVE JUSTICE PRACTICE?

Restorative justice is a concept that is subject to various interpretations.[52] There is no consensus among scholars on a common definition of restorative justice. The absence of a universally accepted definition can be attributed to the fact that restorative justice can be applied in different contexts. Apart from dealing with crime, it can be used to resolve conflicts in schools, families and workplaces.[53] In the criminal context, restorative justice is a process that is aimed at repairing the injustice emanating from crime.[54] It proceeds from the premise that crime is conduct that results in harm to people and their relationships.[55] Restorative justice is defined by the South African Department of Justice as:

> "an approach to justice that aims to involve the parties to a dispute and others affected by the harm (victims, offenders, families concerned and community members) in collectively identifying harms, needs and obligations through

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[47] Harris *As for Violent Crime* 54; Nel *Crime as Punishment* 198–199.

[48] Harris *As for Violent Crime* 54.

[49] Harris *As for Violent Crime* 5, 54.

[50] Harris *As for Violent Crime* 21; Nel *Crime as Punishment* 197.

[51] Harris *As for Violent Crime* 55.

[52] Murhula and Tolla "The Effectiveness of Restorative Justice Practices on Victims of Crime: Evidence From South Africa" 2021 10(1) *International Journal for Crime, Justice and Social Democracy* 100.

[53] Umbreit and Armour *Restorative Justice Dialogue: An Essential Guide for Research and Practice* (2011) 183.

[54] Terblanche *A Guide to Sentencing in South Africa* 3ed (2016) 191.

[55] Allan, Beesly, Attwood and McKillop "Apology in Restorative and Juvenile Justice" 2014 21(2) *Psychiatry, Psychology and Law* 176; Batley "Restorative Justice in South Africa" in Peacock (ed) *Victimology in South Africa* 2ed (2013) 115; Zehr *Changing Lenses: A New Focus for Crime and Justice* (1990) 181.

> accepting responsibilities, making restitution, and taking measures to prevent a recurrence of the incident and promoting reconciliation."[56]

Accordingly, restorative justice acknowledges the impact of crime on community members and calls for their involvement in the search for appropriate solutions. As postulated by Sachs J,

> "central to the notion of restorative justice is the recognition of the community rather than the criminal justice agencies as the prime site of crime control."[57]

As is evident from the above definition, restorative justice emphasises that an inclusive decision-making process should be used to repair the harm caused by crime. In practice, various dialogue-orientated processes are used, and these include: victim-offender mediation; family-group conferencing; circles; and panels.[58] They are aimed at enabling the affected parties to talk about the incident of the crime and its impact, and to decide how the harm of crime should be repaired.[59] The common outcomes of these processes include:

a) an apology;
b) restitution in kind or in monetary terms, aimed at compensating the victim for the loss suffered;
c) performing some service for the victim;
d) performing community service as a way of making right to the community;
e) referral of the offender to some form of assistance programme to address some of his/her needs; and
f) a plan to address what future steps can be taken by all involved to reduce the possibility of the recurrence of the crime committed.[60]

This idea of enabling the affected parties to decide on what should happen is equivalent to returning the power of resolving conflicts of crime to where it belongs. It has long been argued that the State (its representatives) and lawyers have stolen this power from parties affected by crime.[61] From a

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56 Department of Justice and Constitutional Development *Restorative Justice: The Road to Healing* (2011) 3–4.

57 *S v M* 2007 (2) SACR 539 (CC) 62; South African Law Commission *Report*: *Sentencing (A New Sentencing Framework)* (2000) par 3.3.34.

58 Although similar in focus, these practices differ in terms of the number of people who may participate in each. Unlike victim-offender mediation for example, others involve family members, community members and other relevant stakeholders. Another difference is that with circles, the participants sit in a circle during the process.

59 Kurki "Evaluating Restorative Justice Practices" in Von Hirsch, Roberts, Bottoms, Roach and Schiff (eds) *Restorative Justice and Criminal Justice: Competing or Reconcilable Paradigms*? (2003) 293.

60 Batley "Ngwana Phosa Dira Ga a Bolawe: The Value of Restorative Justice to the Reintegration of Offenders" 2008 26 *SA Crime Quarterly* 28.

61 Christie "Conflicts as Property" 1977 17(1) *The British Journal of Criminology* 4–7; McCold "What is the Role of Community in Restorative Justice Theory and Practice?" in Zehr and Toews (eds) *Critical Issues in Restorative Justice* (2004) 168; Johnstone "Restorative Justice for Victims: Inherent Limits?" 2017 5(3) *Restorative Justice*: *An International Journal* 384.

restorative justice point of view, no matter how competent these professionals may be in performing their respective duties, they do not have the necessary knowledge to address the harm that results from crime. Only the affected parties have the required knowledge of what they need from the justice process and are therefore able to come up with appropriate responses.[62]

Since the emphasis is on the harm caused by crime, restorative justice is not only focusing on victims and their needs, but also on the harm suffered by other stakeholders, such as the community.[63] While it places less emphasis on punishment, restorative justice does require that the offender be held accountable. Accountability is achieved when offenders through their participation in restorative justice processes are made to realise the impact and consequences of their actions and encouraged to rectify the wrongs they have done.[64] According to research, this is likely to change behaviour among offenders.[65] In this context, accountability in restorative justice is not only beneficial to victims, but also to society and offenders themselves.[66]

As in most countries, restorative justice is not a new concept in South Africa. Its approach is similar to how African people deal with disputes.[67] Moreover, several pieces of legislation refer to restorative justice as one method of dealing with crime.[68] Also, its principles have been introduced into the sentencing process in several court judgments.[69]

4 RESTORATIVE JUSTICE AND THE COMMUNITY

4 1 Who is "community" in restorative justice?

From a restorative justice perspective, there are two types of community that are harmed by crime.[70] These are micro-communities and macro-communities. The micro-communities, also known as communities of care, consist of family members, friends (of both victim and offender) and other

62 Barton "Theories of Restorative Justice" 2000 2(1) *Australian Journal of Professional and Applied Ethics* 1.

63 Zehr *The Little Book of Restorative Justice* (2002) 22–23.

64 Zehr *The Little Book* 16.

65 Bidois "The Value of Restorative Justice" 2016 42(4) *Commonwealth Law Bulletin* 604; Johnstone *Restorative Justice: Ideas, Values, Debates* (2002) 13; Louw and Van Wyk "The Perspectives of South African Legal Professionals on Restorative Justice: An Explorative Qualitative Study" 2016 52(4) *Social Work* 503.

66 Zehr *The Little Book* 16.

67 Louw and Van Wyk 2016 *Social Work* 492.

68 See ss 69 and 73 of the Child Justice Act 75 of 2008; s 52(1)(*g*) of the Correctional Services Act 111 of 1998; s 2 of the Probation Services Amendment Act 35 of 2002.

69 *S v M supra*; *S v Shilub*ane 2008 (1) SACR 295 (T); *S v Seedat* 2015 (2) SACR 612 (GP); *S v Maluleke* 2008 (1) SACR 49 (T); *S v Tabethe* 2009 (2) SACR 62 (T); *S v Saayman* 2008 (1) SACR 393 (E).

70 Naudé "An International Perspective of Restorative Justice Practices and Research Outcomes" 2006 31(1) *Journal for Juridical Science* 116.

people who share meaningful personal relationships.[71] Members of a micro-community provide all kinds of support and care that we may need in life, and their concerns and opinions are most likely to influence how we conduct ourselves.[72] In essence, these are people who have an ongoing relationship of concern for both victim and offender.[73] As far as this type of community is concerned, crime largely affects relationships. For example, crime reduces trust between offenders and their family members, who often feel ashamed of offenders' conduct.[74] Moreover, family members of victims often blame themselves for what happened. They feel that they should have done something to protect their loved ones and may hold a grudge against the offender.[75] This demonstrates that crime can "produce a hostile relationship where no previous relationship existed".[76] From respective communities of care, family members need the opportunity to describe how they have been affected by crime, and to see offenders acknowledging the wrong. Communities of care further need the chance to listen to the victim describing the impact of crime; encourage good behaviour of offenders; and support the role of offenders and victims in repairing the harm caused by crime.[77]

Macro-communities, on the other hand, are comprised of groups of people who do not have a personal relationship but are defined by geographical area or membership.[78] An example of a macro-community is the area or neighbourhood in which one resides, or the state, club, or professional associations to which one might belong.[79] For this type of community, crime affects broader society because it results in a loss of a sense of public safety.[80] This, in turn, disturbs the public's sense of trust.[81] From the macro-community perspective, reparative actions should also focus on protecting the neighbourhood and society at large against crime.[82] In essence, restorative justice interventions should also focus on reducing crime. Some researchers consider crime reduction to be secondary to restorative

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71 McCold in Zehr and Toews (eds) *Critical Issues in Restorative Justice* 156; Naudé 2006 *Journal for Juridical Science* 116.

72 Gerkin *Seeking Justice for Victims and Offenders: A Needs-Based Approach to Justice* (Doctor of Philosophy thesis, Western Michigan University) 2006 66; McCold in Zehr and Toews (eds) *Critical Issues in Restorative Justice* 156.

73 Hill "Restorative Justice: Sketching a New Legal Discourse" 2008 4(2) *International Journal of Punishment and Sentencing* 54.

74 McCold in Zehr and Toews (eds) *Critical Issues in Restorative Justice* 156.

75 McCold in Zehr and Toews (eds) *Critical Issues in Restorative Justice* 156–157.

76 Heath-Thornton "Restorative Justice" (26 August 2018) https://www.britannica.com/topic/restorative-justice (accessed 2021-01-22).

77 McCold in Zehr and Toews (eds) *Critical Issues in Restorative Justice* 156–157.

78 Gerkin "Who Owns This Conflict? The Challenge of Community Involvement in Restorative Justice" 2012 15(3) *Contemporary Justice Review* 279; McCold in Zehr and Toews (eds) *Critical Issues in Restorative Justice* 156; Naudé 2006 *Journal for Juridical Science* 116.

79 Gerkin 2012 *Contemporary Justice Review* 279; McCold in Zehr and Toews (eds) *Critical Issues in Restorative Justice* 156.

80 Gerkin *Seeking Justice* 67; McCold in Zehr and Toews (eds) *Critical Issues in Restorative Justice* 157.

81 Heath-Thornton https://www.britannica.com/topic/restorative-justice.

82 McCold in Zehr and Toews (eds) *Critical Issues in Restorative Justice* 157.

justice.[83] This view ignores the restorative justice aim of addressing the harms of crime. Since this community experiences feelings of unsafety because of crime, there is a need for its members to feel safe. It is therefore difficult to see how crime reduction cannot be one of the priorities of restorative justice. In fact, there is an argument that for restorative justice to operate as a mainstream response to crime, its practices and polices need to address widely accepted goals of criminal justice (such as crime reduction) while at the same time preserving restorative principles.[84]

Since members of a macro-community have no direct ties to victims and offenders, they usually participate in restorative justice processes as parties who represent the wider community interests[85] or social norms that have been violated by the offender.[86] These representatives come from different sections of society and are usually people with a good understanding of local cultures and communities.[87] Members of this community can also participate as volunteers whose role is to facilitate (or mediate) restorative justice processes. Community volunteers play a critical role, as many restorative justice practices largely depend on them.[88] With proper training, these volunteers can be as effective as legal professionals in fulfilling their duties.[89]

Given that crime causes harm to members of each community in different ways, and that all have different needs that must be met if one is to experience a full sense of justice, both communities are key in restorative justice.

4 2 Community participation in the justice process and its potential to reduce crime

As already indicated, restorative justice emphasises community participation in the justice process. For this to happen, proponents of restorative justice contend that there is a need to "change the role of justice professionals and the mandate of the justice system to ensure that communities are

[83] Bezuidenhout "Restorative Justice With an Explicit Rehabilitative Ethos: Is This the Resolve to Change Criminality? 2007 20(2) *Acta Criminologica* 44; Doolin "But What Does It Mean? Seeking Definitional Clarity in Restorative Justice" 2007 71(5) *The Journal of Criminal Law* 432; Robinson and Shapland "Reducing Recidivism: A Task for Restorative Justice?" 2008 48 *British Journal of Criminology* 339.

[84] Robinson and Shapland 2008 *British Journal of Criminology* 340.

[85] Maglione "Communities at Large: An Archaeological Analysis of the 'Community' Within Restorative Justice Policy and Laws" 2017 25 *Critical Criminology* 457; Rossner and Bruce "Community Participation in Restorative Justice: Rituals, Reintegration, and Quasi-Professionalisation" 2016 11(1) *Victims & Offenders* 108.

[86] Dzur and Olson "The Value of Community Participation in Restorative Justice" 2004 35(1) *Journal of Social Philosophy* 95.

[87] Maglione 2017 *Critical Criminology* 457.

[88] Asadullah "Community Praxis: Exploring a Community Engagement Framework for Restorative Justice in British Columbia, Nova Scotia, and Bangladesh" 2020 5(3) *Journal of Community Safety and Well-Being* 114.

[89] United Nations Office on Drugs and Crime *Handbook on Restorative Justice Programmes* 2ed (2020) 9.

encouraged to assume greater responsibility".[90] Furthermore, communities need to be capacitated to deal with crime more effectively; which is what restorative justice aims to achieve.[91] Some scholars believe that encouraging communities to take responsibility for solving crime makes communities accountable and this strengthens them in the process.[92] The call for roles to change is consistent with the view that decision-making powers should be returned to their rightful owners. The argument is that government should relinquish its exclusive authority over prosecuting and punishing offenders[93] to enable the community to have a say in how conflicts of crime should be dealt with. In other words, a shift in roles means that community members move from being service recipients to decision makers.[94] This means that community members would be able to play a more meaningful role in the justice process than being only considered when the State needs information or witnesses.[95]

What exactly should the role of community members be in the justice process? As highlighted above, in restorative justice, they participate in identifying the harms of crime, as well as in finding ways to repair them. This includes offering the necessary support to victims and others affected by crime. Moreover, community members contribute to finding ways to prevent future crimes. This is because restorative justice interventions, as noted, also focus on addressing the underlying causes of crime.[96] One other role of the community (as discussed below) is to facilitate the reintegration of offenders. Given such roles, the participation of community members can be seen as having advantages over criminal justice agencies and may be able to deal with crime more effectively.

There have been encouraging results from community-based restorative justice programmes implemented in some areas in South Africa. One such programme is the so-called Zwelethemba model, which was introduced in Zwelethemba township, Cape Town.[97] This model was established in 1997

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90 Bazemore and Schiff *Juvenile Justice Reform and Restorative Justice: Building Theory and Policy From Practice* (2005) 68.

91 *Ibid.*

92 McCold *Restorative Justice: The Role of the Community* Paper presented to the Academy of Criminal Justice Sciences Annual Conference, Boston (March 1995) https://www.iirp.edu/news/restorative-justice-the-role-of-the-community (accessed 2022-12-12).

93 Schmid "Restorative Justice: A New Paradigm for Criminal Justice Policy" 2002 34 *VUWLR* 125; Christie 1977 *The British Journal of Criminology* 4–7; McCold in Zehr and Toews (eds) *Critical Issues in Restorative Justice* 168; Johnstone 2017 *Restorative Justice: An International Journal* 384.

94 Dzur and Olson 2004 *Journal of Social Philosophy* 94.

95 Tshehla "The Restorative Justice Bug Bites the South African Criminal Justice System" 2004 17 *SACJ* 3.

96 See also Skelton "Tapping Indigenous Knowledge: Traditional Conflict Resolution, Restorative Justice and the Denunciation of Crime in South Africa" 2007 28(2) *Acta Juridica* 234; Skelton and Batley "Restorative Justice: A Contemporary South African Review" 2008 21(3) *Acta Criminologica* 47.

97 Froestad and Shearing "Practicing Justice – The Zwelethemba Model of Conflict Resolution" in Slakmond, Campos, and Pinto (eds) *Justicia Restaurativa* (2005) 14; Martin "Vigilantism and Informal Social Control in South Africa" 2010 23(3) *Acta Criminologica* 66.

and ran until 2009. Its purpose was to "empower poor and marginalised communities to strengthen their security governance capacities".[98] Built around the process of peace making, the Zwelethemba model provided the method to resolve conflicts in the community without resorting to violence.[99] With peace-making gatherings, people who are believed to have knowledge and capacity to offer a solution that could reduce the likelihood of conflict continuing are invited.[100] Accordingly, the Zwelethemba's method of conflict resolution also focused on identifying root causes as well as future-oriented solutions.[101] It is believed that peace is likely to occur when effects of conflict are mitigated, and the chance of conflict recurring is reduced.[102] More than 113 000 disputes, ranging from sexual offences, assault and property crimes, have been resolved through this programme, before it was discontinued owing to a lack of funding.[103] Acknowledging its potential for successfully reducing contact crimes, it was recommended in 2014 that a system of community-based mediation to resolve disputes similar to the community peace-making programme be reintroduced – and this time with a call for government to provide the necessary financial assistance.[104] Thus, as far as contact crimes are concerned, a recent study that examined the effectiveness of peace-making programmes in various countries, including South Africa, showed positive results. Using peace-making techniques to prevent violence in areas notorious for gangsterism and crime, this study found that Cape Town experienced a reduction of 14 per cent in murder, 29 per cent in attempted murder and 10 per cent in serious assault cases respectively.[105]

Another interesting community-based project is the Justice and Restoration Programme (JARP) that was introduced in Phoenix, KwaZulu-Natal province.[106] It is an initiative aimed at providing an alternative method of dealing with crime and conflict in the community. Phoenix is an area that often experiences high levels of crime, unemployment and substance abuse.[107] A community survey conducted in 2006 demonstrated that crime continues to be a problem in this area and that there was a need for a holistic crime-intervention programme – hence the implementation of JARP in 2007.[108] Apart from community members, JARP involves representatives

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[98] Nel *Crime as Punishment* 332; Froestad and Shearing in Slakmond *et al* (eds) *Justicia Restaurativa* (2005) 14.

[99] Martin 2010 *Acta Criminologica* 66; Nel *Crime as Punishment* 333.

[100] Froestad and Shearing in Slakmond *et al* (eds) *Justicia Restaurativa* 17.

[101] Froestad and Shearing in Slakmond *et al* (eds) *Justicia Restaurativa* 17; Nel *Crime as Punishment* 333.

[102] Nel *Crime as Punishment* 333.

[103] Nel *Crime as Punishment* 333–334.

[104] Nel *Crime as Punishment* 334; O'Regan and Pikoli *The Report of The Commission of Inquiry Into Allegations of Police Inefficiency and a Breakdown in Relations Between SAPS and the Community in Khayelitsha* (2014) 452.

[105] Vernon *Local Peacebuilding: What Works and Why* (2019) 28.

[106] Hargovan "Doing Justice Differently: A Community Based Restorative Justice Initiative in KwaZulu-Natal" 2009 22(3) *Acta Criminologica* 68.

[107] Hargovan 2009 *Acta Criminologica* 69.

[108] *Ibid*.

from the National Prosecuting Authority, the South African Police Service, the Department of Justice and Constitutional Development, the Department of Social Development, and other relevant stakeholders. It makes use of mediation to handle cases that are referred to it either by prosecutors or the police. If mediation between victim and offender is successful and an acceptable solution is reached, this could lead to the case being removed from the court's roll.[109] An evaluation of JARP's impact on crime revealed that most offenders who participated in this programme experienced a change in their behaviour.[110] Similarly, based on its potential to reduce reoffending, it was recommended that the programme be replicated and expanded to other areas in the province.[111]

Similarly, research conducted in other jurisdictions on community-based restorative justice programmes indicates positive results. One such programme is the Restorative Community Conferencing (RCC) that was implemented in Alameda County, California USA.[112] As with JARP, apart from being a pre-adjudication diversion programme for offenders, the RCC involves, among others, the community and law-enforcement agencies in trying to find a solution to the harm caused by crime. If participants are not able to reach an agreement on a plan to repair the harm, or the offender fails to complete the plan, the case then goes through the traditional court process.[113] The results from the study done on the RCC showed that offenders were 44 per cent less likely to commit further crimes within 12 months of completing this programme than those whose cases were dealt with through the courts.[114] Moreover, there is evidence that this programme has managed to help offenders fix their relationships with family members.[115] This opportunity to mend relationships, as shown below, can go a long way to influencing behavioural change in offenders.

Another programme showing evidence-based success is the Mornington Island Restorative Justice (MIRJ) project located in Queensland, Australia.[116] MIRJ is also a community-led programme that aims to "strengthen local capacity to manage conflict in its own way, without having resort to violence or use external agencies like the police and courts".[117] Thus far, more than 100 disputes have been successfully mediated through this programme. The outcomes achieved through mediation include the prevention of escalation of violence[118] and a reduction of crime.[119] Based on the results of a 2014

[109] Hargovan 2009 *Acta Criminologica* 71.

[110] Hargovan 2009 *Acta Criminologica* 73.

[111] Hargovan 2009 *Acta Criminologica* 84–85.

[112] Baliga, Henry, and Valentine *Restorative Justice Conferencing: A Study of Community Works West's Restorative Justice Youth Diversion Program in Alameda County* (2017) 1.

[113] Baliga *et al Restorative Justice Conferencing* 3–4.

[114] Baliga *et al Restorative Justice Conferencing* 7.

[115] Baliga *et al Restorative Justice Conferencing* 13.

[116] Colmar Brunton *Mornington Island Restorative Justice Project Evaluation: Final Report* (2014) 3.

[117] *Ibid.*

[118] Standing Committee of Attorneys-General *National Indigenous Law and Justice Framework* (2013) 23.

evaluation of the MIRJ Project, most participants (91 per cent) indicated that they feel safe, because of the project's interventions in their community.[120]

The above discussion sought to demonstrate the potential of community-based restorative justice programmes to deal with crime. Therefore, there is evidence that they do result in some reduction in crime. Moreover, they tend to have a positive effect on offenders' behaviour.

5 THEORITICAL EXPLANATIONS FOR WHY RESTORATIVE JUSTICE MIGHT REDUCE CRIME AND COUNTER VIGILANTISM

There are several accounts as to why restorative justice might be effective in reducing crime. One is that it involves the community in its attempt to find solutions to crime and its consequences. Community members have a better knowledge of the root causes of crimes that are committed within it.[121] As Dzur and Olson point out, "community members have a better sense of who is doing what, when, and where in their neighborhoods".[122] Therefore, they are well positioned to know what is happening in the life of the offender and what could have led to their criminal behaviour. In this way, community members stand a good chance to break the cycle of crime.[123] According to proponents of restorative justice, this informal (social control) monitoring of criminal activity is more effective than the formal efforts of the police.[124] They argue that community members "provide a level of surveillance that can never be matched by the police in a free, democratic society".[125] Those who align themselves with this view assert that it would be difficult for law-enforcement agencies to deal with crime effectively without the involvement of local communities who know their areas.[126]

With social control there is also a threat of social ostracism that might deter crime.[127] This is simply because when an individual commits a crime, members of the community know about it and this might lead an offender to be rejected and ostracised by the community.[128] Research suggests that offenders worry about facing rejection.[129] For this reason, they are likely to

[119] Colmar Brunton *Mornington Island* 63.

[120] Colmar Brunton *Mornington Island* 110.

[121] Dzur and Olson 2004 *Journal of Social Philosophy* 95; Kgosimore "Restorative Justice as an Alternative Way of Dealing With Crime" 2002 15(2) *Acta Criminologica* 69; Manaliyo "Barriers to Community Participation in Crime Prevention in Low Income Communities in Cape Town" 2016 8(1) *International Journal of Social Sciences and Humanity Studies* 271.

[122] Dzur and Olson 2004 *Journal of Social Philosophy* 95.

[123] Kgosimore 2002 *Acta Criminologica* 73.

[124] Dzur and Olson 2004 *Journal of Social Philosophy* 95.

[125] *Ibid.*

[126] Manaliyo 2016 *International Journal of Social Sciences and Humanity Studies* 270.

[127] Dzur and Olson 2004 *Journal of Social Philosophy* 95.

[128] Chikadzi "Challenges Facing Ex-Offenders When Reintegrating Into Mainstream Society in Gauteng, South Africa" 2017 53(2) *Social Work* 293.

[129] *Ibid.*

be deterred from committing crime. These arguments taken together suggest that informal social control has more potential to reduce crime than conventional policing or the criminal justice system. Social control is however likely to achieve the desired results in societies where there is a shared interest in creating safer communities. Research demonstrates that communities that share common understandings and values tend to be more determined to achieve common interests, including maintaining safety and order.[130] Arguably, vigilantism shows that community members share a concern with the police for maintaining safe neighbourhoods.

Based on the theory of social control, restorative justice with its involvement of the community might help to counter the problem of vigilantism. This is particularly so since this theory demonstrates a potential to curb crime, which, as indicated before, is the root cause of vigilantism. When members of the community are more involved in the criminal justice process, they get to know each other well (they know who is doing what and when), and this increases informal social control.[131] Involvement "ideally strengthens the social ties that empower community members to deter crime and shame and integrate offenders".[132] Accordingly, these ties are more likely to restrain impulses that may be found to be unacceptable by the community.[133]

Aside from being powerful agents of social control, community members have the potential to influence offenders towards good behaviour. There is a view among scholars that community members communicate disapproval better than criminal justice professionals, who may be regarded as part of the system.[134] As Braithwaite notes,

> "it is not the shame of police or judges or newspapers that is most able to get through to us; it is shame in the eyes of those we respect and trust."[135]

This view is supported by research that indicates that when the most important people (community of care) in an offender's life confront them about their behaviour and make it clear that they are hurt and ashamed of it, the offender is likely to think twice.[136] One explanation for why shame that comes from those close to an individual is most likely to have a deterrent effect is that it threatens valued relationships.[137] More importantly, studies further demonstrate that offenders who previously participated in the restorative justice process consistently refer to the support they received

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[130] Manaliyo 2016 *International Journal of Social Sciences and Humanity Studies* 272.

[131] Dzur and Olson 2004 *Journal of Social Philosophy* 96.

[132] *Ibid.*

[133] Asadullah 2020 *Journal of Community Safety and Well-Being* 112.

[134] Dzur and Olson 2004 *Journal of Social Philosophy* 95.

[135] Braithwaite "Restorative Justice: Assessing Optimistic and Pessimistic Accounts" 1999 25 *Crime and Justice* 39–40. See also Dzur and Olson 2004 *Journal of Social Philosophy* 95.

[136] Barton 2000 *Australian Journal of Professional and Applied Ethics* 7–8.

[137] Harris and Maruna "Shame, Shaming and Restorative Justice: A Critical Appraisal" in Sullivan and Tifft (eds) *Handbook of Restorative Justice: A Global Perspective* (2006) 453.

from the community as having made a difference.[138] Although the kind of difference is not mentioned, it can be assumed that the difference had to do with offenders changing their behaviour, one way or another. Research has consistently demonstrated the potential of restorative justice to reduce reoffending.[139] Similarly, the more restorative justice is able to reduce crime, the more incidents of vigilantism will decline.

Another reason that restorative justice might reduce crime is its emphasis on reintegration of offenders.[140] Reintegration is a process that involves the offender correcting their wrongs and being reaccepted into the community as a law-abiding citizen. Those who are familiar with restorative justice point to the fact that it facilitates this process.[141] This is contrary to the conventional criminal justice system, which tends to hinder the process of reintegration.[142] Yet, there is evidence that failure to reintegrate offenders contributes to reoffending.[143] One of the criticisms against the conventional system is that its sanctions – isolating and alienating offenders from society – are the antithesis of reintegrative strategies.[144] This can be attributed to the system being largely punitive. Even those sanctions that are not as punitive and confining as imprisonment are not geared towards rebuilding the offender's ties with their community.[145] For example, the offender may be required to do community service or pay a fine, but the offender has fewer opportunities to convey their repentance.[146] In this way, the community is denied the chance to demonstrate its acceptance of the offender.[147] In other words, offenders are not only deprived of the opportunity to acknowledge their mistakes, but also to show that they remain part of the law-abiding community and that they are aware of its standards of acceptable behaviour.[148]

Evidence suggests that offenders need to feel a sense of belonging.[149] Furthermore, this sense of belonging can lead to changes in offenders' behaviour, as they will strive to conduct themselves in accordance with the

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[138] Pranis "Peacemaking Circles" in Johnstone (ed) *A Restorative Justice Reader* 2ed (2013) 120.

[139] Bradshaw and Roseborough "Restorative Justice Dialogue: The Impact of Mediation and Conferencing on Juvenile Recidivism" 2005 69(2) *Federal Probation* 17; Sherman, Strang, May-Wilson, Woods and Ariel "Are Restorative Justice Conferences Effective in Reducing Repeat Offending? Findings From a Campbell Systematic Review" 2015 31 *Journal of Quantitative Criminology* 1; Umbreit and Armour *Restorative Justice Dialogue* 132.

[140] Siegel and Bartollas *Corrections Today* 4ed (2016) 24.

[141] Imiera "Therapeutic Jurisprudence and Restorative Justice: Healing Crime Victims, Restoring the Offenders" 2018 *De Jure* 99.

[142] Roche *Accountability in Restorative Justice* (2003) 29.

[143] Lotter "Why a Resettlement Grant for Ex-Offenders in SA Is a Really Good Idea" (2018-09-18) *IOL News*.

[144] Roche *Accountability* 29.

[145] *Ibid*.

[146] *Ibid*.

[147] *Ibid*.

[148] *Ibid*.

[149] Dzur and Olson 2004 *Journal of Social Philosophy* 95–96.

community's standards of acceptable behaviour.[150] This is particularly so as reports indicate that ex-offenders wish to return to society as responsible citizens.[151] Just as offenders have a desire to become responsible citizens, so is there a desire in the community to see this happening. This point was emphasised in the case of *S v M*.[152] Apart from describing the community resources as capable of dealing with the immoral behaviour of an offender, the court held that the community should be seen not just as a crowd of vengeful people who want to see the casting-out of those who commit crimes but, rather as people who are also interested in the moral restoration of one of its members.[153] Put differently, apart from wanting to see offenders being held accountable for their crimes, community members also want to see offenders changing their behaviour.

Given this interest and the fact that offenders wish to be accepted back into society, community members need to play their role. Based on restorative justice reintegrative strategies, part of the community's role is to show love and care to offenders as they serve their sentences.[154] Offenders need to feel that society still cares about them and that they have a chance of being reaccepted. Therefore, when expressing their disapproval, community members need to treat offenders as members of the community who violated its norms only temporarily.[155] Although this is not an easy thing to do, proponents of restorative justice believe that community members are better able to achieve it than criminal justice professionals.[156] Research in restorative justice shows that societies that are more forgiving and respectful, while taking crime seriously, tend to have lower levels of crime than societies that humiliate offenders.[157] Arguably, restorative justice would not only facilitate the successful reintegration of offenders but would also reduce the likelihood of reoffending.

Besides the potential to reduce crime, restorative justice also has potential to provide the form of justice that the community often wants. Reports indicate that people resort to vigilantism because it provides more visible justice to the community than does the criminal justice system.[158] This is consistent with the suggestion that people may be receptive to alternative methods of dealing with crime, such as restorative justice, because they

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150 Cherry "How the Need to Belong Influences Human Behavior and Motivation. Very Well Mind" (5 March 2021) https://www.verywellmind.com/what-is-the-need-to-belong-2795393 (accessed 2021/10/25).

151 Lotter (2018-09-18) *IOL News*.

152 *Supra*.

153 Par 75.

154 Kim and Gerber "The Effectiveness of Reintegrative Shaming and Restorative Justice Conferences: Focusing on Juvenile Offenders' Perceptions in Australian Reintegrative Shaming Experiments" 2012 *International Journal of Offender Therapy and Comparative Criminology* 1065.

155 Dzur and Olson 2004 *Journal of Social Philosophy* 96.

156 *Ibid*.

157 Braithwaite "Shame and Criminal Justice" 2000 42(3) *Canadian Journal of Criminology* 282–283; Lotter (2018-09-18) *IOL News*.

158 Clark (2018-11-29) *Foreign Policy*.

tend to offer visible justice. According to the study done by Louw and Van Wyk, some people feel that alternative sentences (especially non-custodial sentences) are more 'visible' to the community, as the community does not witness punishment when the offender is in prison.[159] Chapman[160] observes that even if imprisonment can prove effective in terms of preventing crime, its impact is unlikely to be noticed or even appreciated by the public. This is because community members often see people committing crimes and not being held accountable; they do not see people *not* committing crimes.[161] With restorative justice, community members are there to witness justice in action. This is because they are actively involved in restorative justice processes, including holding offenders accountable, as indicated before. Accordingly, restorative sanctions are likely to give community members a sense that justice has been done. Indeed, justice need not be punitive for it to be recognised. Arguably, justice can also take the form of a restorative outcome that has been determined through following a fair process and that is considered satisfactory.

There is evidence that those who participate in restorative justice tend to experience the process as being fair,[162] and that this can build confidence in the justice system. Several studies indicate fairness of a process as an important factor in willingness to cooperate with the justice system.[163] In other words, people tend to cooperate with the justice system when they consider it to be fair. With the conventional criminal justice system that rarely involves the parties who are affected by crime in dealing with it or takes their needs into consideration, research suggests that these parties might experience the system as being unfair.[164] When this happens, they are more likely to go against the system.[165] This is because they feel alienated and disrespected by the justice system.[166] Vigilantism illustrates this point. Vigilantes also feel that their need for safety and security is not adequately met. Although vigilantism is commonly linked to a lack of confidence in the criminal justice system, it also indicates that the legitimacy of the justice system is at stake.[167] Interestingly, research suggests that people tend to follow the law when they find the norms to be legitimate and deserving of compliance.[168] At the same time, there is evidence that involvement of community members in the justice process can bring legitimacy to the

159 Louw and Van Wyk 2016 *Social Work* 497.

160 Chapman "Fail Better: Sentencing to Protect the Public or to Restore Justice?" 2019 19 *ERA Forum* 405.

161 *Ibid.*

162 United Nations Office on Drugs and Crime *Handbook* 9.

163 Chapman 2019 *ERA Forum* 404; Darling-Hammond, Fronius, Sutherland, Guckenburg, Petrosino, and Hurley "Effectiveness of Restorative Justice in US K-12 Schools: A Review of Quantitative Research" 2020 24 C*ontemporary School Psychology* 297.

164 Suvall "Restorative Justice in Schools: Learning From Jena High School" 2009 44 *Harvard Civil Rights-Civil Liberties Law Review* 562.

165 Darling-Hammond *et al* 2020 C*ontemporary School Psychology* 297.

166 Naudé 2006 *Journal for Juridical Science* 114.

167 Haas *Public Support* 16.

168 Haas *Public Support* 11.

proceedings and lead to increased confidence in the justice system.[169] It can therefore be argued that the perceived fairness of restorative justice processes may increase the likelihood of citizen buy-in and therefore counter vigilantism.

Moreover, since there are indications that, in some instances, vigilantism occurs because of a lack of understanding of the courts' due processes, restorative justice is a concept that most people are familiar with. As stated before, a restorative justice approach is similar to how African people resolve disputes in the customary courts. Restorative justice might therefore be an effective method for reducing vigilantism.

As far as a satisfactory outcome is concerned, studies demonstrate that those who participate in restorative justice processes tend to be satisfied with its outcomes, and this often leads to increased satisfaction with the justice system.[170] One reason accounting for a high level of satisfaction is that restitution agreements that are reached[171] and usually complied with.[172] Since community members often feel that offenders are not being held accountable, they are more likely to be satisfied if offenders comply with restitution agreements, which is one way that an offender can be held accountable for the harm they caused. Equally, this increased sense of satisfaction is likely to generate interest in restorative justice.

Despite its potential, there is one consistently mentioned concern about restorative justice. Critics see it as a soft method of dealing with crime.[173] Thus, in the context of vigilantism, the fact that people are dissatisfied with the way the criminal justice system currently deals with crime might suggest that they do not see the law as hard on offenders – hence the method (violence) commonly used to carry out vigilantism. With this understanding, restorative justice might be seen as not suitable to deal with crime. Although there may be merit in this criticism, research demonstrates that restorative justice is not necessarily a soft punishment.[174] Besides, as argued elsewhere, "we should ask what the value of a harder option is when it achieves nothing more than being harder".[175] Evidence shows that a punitive approach to criminal justice has little impact on crime reduction,[176] while restorative justice shows promising results in this regard. Thus, there is

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169 Rossner and Bruce 2016 *Victims & Offenders* 109.

170 Rossetti, Cumbo, Forbes and Bell *Victims' Justice? What Victims and Witnesses Really Want From Sentencing* (2010) 26–27; Umbreit, Coates and Vos "The Impact of Victim-Offender Mediation: Two Decades of Research" 2001 65(3) *Federal Probation* 30–31.

171 Kurki in Von Hirsch *et al* (eds) *Restorative Justice and Criminal Justice: Competing or Reconcilable Paradigms?* 298–300.

172 Naudé 2006 *Journal for Juridical Science* 112; Umbreit and Armour *Restorative Justice Dialogue* 131.

173 Gade "Is Restorative Justice Punishment?" 2021 38 *Conflict Resolution Quarterly* 144; Naudé 2006 *Journal for Juridical Science* 117.

174 Gade 2021 *Conflict Resolution Quarterly* 144.

175 Mokomane *Restorative Justice as an Alternative Sentencing Option in South Africa: A New Approach to Crime* (Master of Laws Dissertation, University of South Africa) 2019 86.

176 *S v Maluleke supra* par 26; Venter "Restorative Justice: Ruling with a Heart" (11 April 2011) *IOL News*.

reason to believe that people might consider restorative justice as a means of solving the problem of crime. This is particularly so if it can be seen "to be addressing issues of crime and disorder in a community responsive, inclusive, respectful and restorative manner".[177]

6 THE CURRENT LEGISLATIVE FRAMEWORK FOR RESTORATIVE JUSTICE PRACTICES IN SOUTH AFRICA

6 1 The Probation Services Amendment Act

The Probation Services Amendment Act[178] was the first to recognise restorative justice as a method of responding to crime. The Act lists restorative justice as part of appropriate sentencing options and empowers probation officers to initiate programmes in this regard.[179] The success of a restorative justice approach in this context depends largely on the availability of probation officers. Moreover, apart from requiring sufficient probation officers to carry out the duties in terms of this Act, they would also need to have a comprehensive knowledge of restorative justice. The good thing is that a capacity-building process has been undertaken in the past, and this saw a significant increase in the number of probation vacancies created[180] and of probation officers receiving training in restorative justice and facilitation.[181]

Pre-sentence reports are essential in assisting courts to determine appropriate sentences;[182] the fact that probation officers are responsible for preparing such reports could make it easier to introduce restorative-justice-based methods of dealing with crime.[183] As Batley notes,

> "if these reports can be written from the perspective of restorative justice, and opportunities for applying restorative options are actively explored by informed probation officers, then these officials will constitute a key occupational group for implementing restorative justice."[184]

Although pre-sentence reports create a platform for applying restorative justice in dealing with crime, they are focused on offenders. Apart from

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177 Nel (2017-02-17) *The Conversation.*

178 35 of 2002.

179 S 2 of 35 of 2002.

180 Batley "Outline of Relevant Policies" in Maepa (ed) *Beyond Retribution: Prospects for Restorative Justice in South Africa* (2005) 120.

181 Batley *A Call to Agents of Change in the Justice System*: *Guidelines in the Use of Restorative Justice in Sentencing for Magistrates, Judges, Prosecutors and Probation Officers* (2014) 19.

182 Diko, Olofinbiyi and Steyn "A Cause to Unravel the Role of Criminologists in Compiling Pre-Sentence Report: A South African Perspective" 2019 5 *Cogent Social Sciences* 4–5; Terblanche *Sentencing in South Africa* 117.

183 Batley in Maepa (ed) *Beyond Retribution* 120; *S v Dlamini* 1991 (2) SACR 655 (A) 667 E–G.

184 Batley in Maepa (ed) *Beyond Retribution* 120–121.

assisting the court in exercising their sentencing discretion,[185] the reports also assist the Department of Correctional Services to recommend types of rehabilitation programme that should accommodate offenders while in prison.[186] Accordingly, there is less emphasis on the harm of the crime to community members, and nor do such community members have a say in what should happen next. This offender-centric approach is inconsistent with the principles of restorative justice.

6 2 The Correctional Services Act

Another piece of legislation that embraces a restorative justice approach is the Correctional Services Act.[187] The Act makes provision for restorative justice practices as one of the conditions of correctional supervision. It stipulates that the offender may be required to participate in victim-offender mediation or family-group conferencing.[188] Since the Act provides no further details regarding the process or the implementation of these measures, an example of how mediation between victim and offender may function as part of a condition of correctional supervision can be seen from the approach followed in the case of *S v Tabethe*.[189] Before deciding on an appropriate sentence, the court requested the launch of victim-offender mediation, involving the offender and the victim, under the guidance of the probation officer.[190] During this process, the victim and the offender had the opportunity to discuss the crime that the latter had committed.[191] The probation officer thereafter informed the court that the parties had reconciled.[192] While this judgment may be praised for embracing restorative justice, there seems to be a tendency to focus on offenders and victims to the exclusion of the community.[193] This is so even when the courts use informal mediation to resolve legal disputes.[194]

6 3 The Child Justice Act

The latest legislation to espouse a restorative justice approach in criminal matters is the Child Justice Act,[195] which came into operation in April

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185 Terblanche *Sentencing in South Africa* 117.
186 Diko *et al* 2019 *Cogent Social Sciences* 5.
187 111 of 1998.
188 S 52(1)(*g*) of 111 of 1998.
189 *Supra*.
190 *S v Tabethe supra* 26–28.
191 *S v Tabethe supra* 33.
192 *DPP, North Gauteng v Thabethe* 2011 (2) SACR 567 (SCA) 8.
193 Anderson “Disposal of Criminal Disputes by Informal Mediation: A Critical Analysis” 2017 30(2) *SACJ* 166–167.
194 The annual report of the National Director of Public Prosecutions in 2015/16 shows that 23 908 cases were referred for informal mediation. With informal mediation, there is no wider community involvement in the process. It seems only the offender, the victim and the mediator play a role; see Anderson 2017 30 (2) *SACJ* 166–167.
195 75 of 2008.

2010. As the name indicates, this Act introduced a specific justice system for child offenders. It aims among other things to entrench the principles of restorative justice in criminal proceedings involving children.[196] In terms of this system, children in conflict with the law should as far as possible be diverted from traditional criminal prosecution.[197] In cases where diversion is not possible, the Act provides that child offenders may be tried and sentenced in child justice courts.[198]

As far as the sentencing of child offenders is concerned, there are specific principles in the Act that clearly focus on restorative justice.[199] Accordingly, restorative justice sentences are listed as part of sentences available to child offenders.[200] Moreover, the Act stipulates that in order to encourage a restorative justice approach, sentences may be used in combination.[201] In other words, restorative justice measures may be ordered as part of a sentence.[202] This approach is consistent with the recommendation by the South African Law Commission that all sentences should be implemented in ways that allow opportunities for restorative interventions.[203] For example, restorative justice could be used to justify a reduction of sentences,[204] or even a suspension thereof. This can be seen from the judgment in *S v Hewitt*,[205] where the accused's sentence was partially suspended, conditional upon payment of compensation. The trial court found the accused guilty on two counts of rape and one count of indecent assault and sentenced him to eight years' imprisonment in respect of each of the rape counts, and two years' imprisonment in respect of indecent assault.[206] His sentence on the counts of rape were partially suspended on condition that he pay R100 000 to a fund aimed at combatting the abuse of women and children.[207] Although the elements of restorative justice were not present in this case, the payment of compensation for the benefit of society can be viewed as a positive step towards restoration.[208] Indeed some

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196 See the Preamble of 75 of 2008.

197 See the Preamble and s 2(*d*) of 75 of 2008.

198 See the Preamble and s 63(1)(*b*) of 75 of 2008.

199 These principles encourage the child to understand the implications of and be accountable for the harm caused; and promote the integration of the child into the family and community; see ss 69(1)(*a*) and (*c*) of 75 of 2008.

200 S 73(1) of 75 of 2008.

201 S 69(2) of 75 of 2008.

202 Lubaale "Concessions on Custodial Sentences: Learning From the New Zealand Approach to Restorative Justice" 2017 61 *SA Crime Quarterly* 35–37; South African Law Commission *Report* par 3.1.8; Van der Merwe and Skelton "Victims' Mitigating Views in Sentencing Decisions: A Comparative Analysis" 2015 35(2) *Oxford Journal of Legal Studies* 367–372.

203 South African Law Commission *Report* par 3.1.8.

204 Lubaale 2017 *SA Crime Quarterly* 35–37; South African Law Commission *Report* par 3.1.8; Van der Merwe and Skelton 2015 *Oxford Journal of Legal Studies* 367–372.

205 2017 (1) SACR 309 (SCA).

206 *Supra* 1.

207 *Ibid.*

208 Velthuizen "Why South Africa's Tentative Moves Toward Restorative Justice Need Support" (2016-01-14) *The Conversation.*

scholars view compensation orders not only as consistent with the principles of restorative justice,[209] but also with efforts to integrate a restorative justice approach[210] into the sentencing process.

As far as community participation in the justice process is concerned, one of the objectives of this Act is to involve, where applicable, members of the community affected by the crime to encourage the reintegration of child offenders.[211] This cannot be interpreted as actively involving community members in dealing with crime. Judging by experience, even though restorative justice sentences are provided for in the Act, this in no way guarantees community participation.

7 CONCLUSION

This article demonstrates that restorative justice can help to deal with the problem of vigilantism. Apart from providing a platform for community participation in dispensing justice, research also shows that restorative justice has the potential to reduce crime. Accordingly, it can be argued that a reduction in crime might counter vigilantism, since crime is what fuels people to engage in vigilante activities. Moreover, there is evidence suggesting that communities participating in restorative justice processes tend to be satisfied with its process and outcomes and this often results in increased satisfaction with the justice system.

If South Africa is to succeed in addressing the problem of vigilantism, more emphasis should be placed on the use of restorative justice as a method of responding to crime and its consequences. The good thing is that restorative justice is not a new concept in South Africa as far as dealing with crime is concerned. The legislative framework for restorative justice practices already exists. However, despite formal recognition, restorative justice is nothing more than a footnote in the current criminal justice system. Therefore, if restorative justice is to receive greater recognition and application in dealing with crime, there is a need for a more comprehensive legislative framework.[212] Currently, the Criminal Procedure Act[213] does not make provision for restorative justice. It is thus suggested that this Act be amended to include restorative justice as one of the options for dealing with crime, following the example of the Child Justice Act.[214] Apart from this, there should be a provision in the Criminal Procedure Act, and other statutes already recognising restorative justice, requiring the inclusion of the community in restorative justice processes.

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209 Naudé and Prinsloo "Magistrates' and Prosecutors' Views of Restorative Justice" in Maepa (ed) *Beyond Retribution: Prospects for Restorative Justice in South Africa* (2005) 63.

210 Skelton and Batley 2008 *Acta Criminologica* 44.

211 See s 2 of 75 of 2008.

212 Terblanche *Sentencing in South Africa* 193.

213 51 of 1977.

214 75 of 2008.

ELECTRONIC PERSONS IN CONTRACTS

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SUMMARY

Contemporary technological developments have already progressed far beyond the electronic and digital transactions recognised under the Electronic Communications and Transactions Act 25 of 2002 (ECTA). Internationally, there are calls for the regulation not only of robots and artificial intelligence (AI) but also of sophisticated automated electronic systems and AI that now have the capability to make self-sustainable decisions and exhibit human characteristics (conceptually referred to as electronic persons). The growing legal debate is whether such systems should be afforded equal (or similar) legal status to human beings and thereby have rights and be responsible for duties – that is, be afforded the mantle of legal personhood. Alternatively, should a different liability regime apply to these systems, their operators and creators? Europe has suggested both approaches. First, in 2016, the European Parliament's Committee on Legal Affairs included recommendations to the Commission on Civil Law Rules on Robotics that suggested that electronic persons should in the future be recognised as entities having legal status and legal personality. Secondly, in 2020, the European Parliament made recommendations to the Commission on a Civil Liability Regime for Artificial Intelligence, which proposed liability structures for these systems, their operators and creators. If legal recognition were afforded, as initially suggested in 2016, this would constitute something fundamentally different from juristic persons and would have a direct influence on the way contracts are concluded and their consequences. This article explores the concepts of legal status and personality from the perspective of recognised contractual parties (natural and juristic persons), as well as that of a conceptual electronic person, which may manifest itself as either a passive electronic person (more akin to a useful tool and currently recognised under ECTA) or as a sophisticated electronic person (more akin to human-like technology). In doing so, the article explores possible liability structures that could apply to electronic persons in the South African legal framework and concludes that there is a need to update ECTA (and other legislative instruments) so as to recognise and regulate sophisticated automated systems and electronic persons. A failure to do so may mean South Africa is left behind in the wake of technological developments, and may hamper future contractual engagements.

1 INTRODUCTION

Automated electronic systems have become a regular occurrence in electronic contracting. Generally, automated electronic systems may be categorised as passive, simply being tools used by their users and to which the principles of ownership and attribution would apply.[1] Some automated electronic systems may also be categorised as "sophisticated", which means they are not subject to the constraints of ownership and attribution and are active role players within contractual engagements.[2] Sophisticated automated electronic systems are more akin to artificial intelligence (AI) and, broadly speaking, can be described as a computer program that is capable of human intelligence (including autonomous decision making), acting independently and having the ability to learn without human intervention.[3] In fact, Mgeladze and Gorgoshadze (referring to the work of Lehman-Wilzig) note that sophisticated technologies, such as AI, may exhibit inherently human characteristics such as curiosity, self-recognition, creativity, learning from mistakes, reproduction and general learning.[4] AI technologies, therefore, have the potential to mimic human behaviour.[5] If AI achieves this potential, in our understanding of the term, it may bring into question whether AI, by virtue of acting as a human being and displaying inherent human qualities, should be afforded equal (or similar) status and, like human beings, possess legal rights and duties. This possibility is not as far-fetched as one may initially think, nor is it science fiction; rather, this scenario has already been conceptually recognised in Europe with several legislative proposals to regulate AI – for example, the Artificial Intelligence Act,[6] and the European Parliament's Committee on Legal Affairs' recommendations to the Commission on Civil Law Rules on Robotics, more commonly known as the Civil Law Rules on Robotics (2016 Report).[7]

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1 Wagner "Robot, Inc.: Personhood for Autonomous Systems?" 2019 *Fordham Law Review* 591 592.

2 Wagner (2019 *Fordham Law Review* 592) distinguishes sophisticated automated systems from passive automated systems, as sophisticated automated systems shed the yoke of ownership and attribution.

3 Townsend "Software as a Medical Device: Critical Rights Issues Regarding Artificial Intelligence Software-Based Health Technologies in South Africa" 2020 *TSAR* 747 748. See also Mgeladze and Gorgoshadze "Applicability of Legal Regulations to High Artificial Intellect – Robots" 2019 *Journal of Constitutional Law* 51 51. See also art 3(b) of the European Parliament resolution of 20 October 2020 with Recommendations to the Commission on a Civil Liability Regime for Artificial Intelligence (2020/2014(INL)) https://www.europarl.europa.eu/doceo/document/TA-9-2020-0276_EN.html (accessed 2023-01-03) (2020 Report), in which the term "automated" in relation to artificial intelligence is defined to mean a system "that operates by interpreting certain input and by using a set of pre-determined instructions, without being limited to such instructions, despite the system's behaviour being constrained by, and targeted at, fulfilling the goal it was given and other relevant design choices made by its developer".

4 Mgeladze and Gorgoshadze 2019 *Journal of Constitutional Law* 52.

5 Townsend 2020 *TSAR* 748.

6 Proposal for a Regulation of the European Parliament and of the Council Laying Down Harmonised Rules on Artificial Intelligence (Artificial Intelligence Act) and Amending Certain Union Legislative Acts https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:52021PC0206 (accessed 2022-12-21).

7 European Parliament Resolution of 16 February 2017 with Recommendations to the Commission on Civil Law Rules on Robotics (2015/2103(INL) https://www.europarl.

The 2016 Report refers to the term "electronic person" and although there is not much clarity as to what exactly this term would entail, the 2016 Report suggests that, in future, such electronic persons may be recognised as entities attributed with legal status and legal personality. If an electronic person were to be elevated to enjoying personhood, as alluded to in the 2016 Report, the way in which such electronic persons would contract becomes a point of debate – specifically as to the way contractual liability would be attributed to such electronic entities. Against this background, this article considers the concept of electronic persons in contractual transactions with a specific focus on the possible attribution of contractual liability where one of the parties is an electronic person. In doing so, the article provides a glimpse into the complex future reality of contractual transactions, and argues that there is a need for proactive change within the South African legislative framework, including changes to the Electronic Communications and Transactions Act (ECTA),[8] so as to ensure that the South African legislative framework is fit for purpose for the inevitable future technological developments in contractual transactions.

2 THE BIRTH OF THE ELECTRONIC PERSON

2 1 Legal personality and status

The term "electronic person" (in the context of robots (or AI) being elevated to the status of a human being) was introduced in European legal discourse in the 2016 Report, which recommends that the Commission "explore, analyse and consider the implications of all possible legal solutions" in future legislative instruments so as to create (among other things):[9]

> "[a] specific *legal status* for robots, so that at least the most sophisticated autonomous robots could be established as having the status of *electronic persons* with specific rights and obligations, including that of making good any damage they may cause, and applying *electronic personality* to cases where robots make smart autonomous decisions or otherwise interact with third parties independently." (emphasis added)

The 2016 Report effectively recommends that sophisticated autonomous robots (SARs) be given some form of legal status (including being liable for damages caused); thus legal personality would be attributable to an artificial entity called an "electronic person".[10] In 2020, the European Parliament's Recommendations to the Commission on a Civil Liability Regime for Artificial Intelligence (2020 Report) did not pursue the concept of electronic personality further but rather provided clarity in relation to the liability structures in the use of AI.[11] Notwithstanding the 2020 Report, the status of SARs may still become a point of consideration with more complex and sophisticated technological developments on the horizon. Therefore,

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europa.eu/doceo/document/TA-8-2017-0051_EN.html#title1 (accessed 2022-12-21) (the 2016 Report).

[8] Act 25 of 2002.

[9] See par 31(f) of the 2016 Report.

[10] *Ibid.*

[11] See par 6 and 7 of the 2020 Report.

although electronic personality has not yet been legally realised, for the purpose of this discussion, the term "electronic person" is used when referring to SARs, which may include, for example, software programs, artificially intelligent systems, automated decision making, electronic agents and other manifestations of artificial intelligence, which may, under the 2016 Report, receive an elevated legal status. As electronic persons are currently devoid of legal personality (or so-called personhood), such entities lack legal rights, duties and recourse.[12]

The concepts "legal entity", "legal personality" and "legal capacity" (or "legal status") are not synonymous, but are distinct terms dealing with different aspects of the law. Take, for instance, a legal entity that may control assets but does not necessarily possess legal personality, as is the case with a trust. A trust possesses assets and liabilities but is not considered a separate legal personality;[13] there is, therefore, a distinction between the ownership of assets and the enjoyment of such assets.[14] Similarly, partnerships and voluntary associations of persons do not possess legal personality,[15] and consequently do not have legal standing to enforce rights; nor are such entities liable for juristic acts. As such, a trust, partnership and voluntary association do not have the legal capacity (or contractual capacity) to enter into a contract. Bilchitz also points out that non-human animals, who have always been considered things or objects, have also, to date, not been afforded the status of personhood and do not enjoy similar rights to their human counterparts.[16]

The term "personality" is derived from the Latin word *persona*, which the Romans attributed to a person's legal and social role, both individually and as members of society.[17] Therefore, the functioning of legal personality has a social element, and one could argue is relational to a person's engagement in society. Legal personality also refers to the capability of possessing rights and duties.[18] Thus, a person is said to have legal personality if he, she or it has by their nature, or has been conferred by law, the ability to own rights and owe duties in relation to others.[19] Thus, a person is someone (or something) who, in the eyes of the law, can have legal rights and is subject to legal duties.[20] To afford electronic persons legal status or legal personhood would mean that such a person would, at some level, be capable of having legal rights and be liable for legal duties. As legal personality and the term "person" is generally synonymous with that of a rights-and-duties-bearing unit, it would similarly apply to electronic persons.

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12 See also Bilchitz "Moving Beyond Arbitrariness: The Legal Personhood and Dignity of Non-Human Animals" 2009 *SAJHR* 38 38–72.

13 *Raath v Nel* 2012 (5) SA 273 (SCA) par 13.

14 *Ibid.*

15 *Transnet Ltd t/a Metrorail v Rail Commuters Action Group* 2003 (6) SA 349 (SCA) par 3. See also *Strydom v Protea Eiendomsagente* 1979 (2) SA 206 (T).

16 Bilchitz 2009 *SAJHR* 38–72.

17 Andrade, Novais, Machado and Neves *Artificial Intelligence Law* (2007) 362 referencing Gonçalves 304.

18 Andrade *et al Artificial Intelligence Law* 362.

19 Smith "Legal Personality" 1928 *Yale Law Journal* 283 283.

20 Hutchison, Van Heerden, Visser and Van Der Merwe *Wille's Principles of South African Law* (1991) 145.

However, Bilchitz argues that such a rights-and-duties-bearing unit may relate to having either rights or duties, or having both rights and duties collectively depending on the context.[21] Therefore, although electronic persons have yet to be recognised as legal persons, and there have been calls to attribute legal personality to an electronic person,[22] should such status be bestowed on an electronic person, it will not necessarily have the same rights or duties as are assigned to a human being. The extent of an electronic person's rights and duties after receiving legal status remains unclear. However, it appears from the language used in the 2016 Report that Europe is considering the concept of electronic persons having both "rights and obligations, including that of making good any damage they may cause".[23] The full extent of such rights and duties has yet to be established and clarified. However, it also appears that, for the moment, Europe has in the 2020 Report refrained from attaching legal status to electronic persons, but has rather clarified the liability structures of SARs, their operators and creators.[24]

2 2 Types of persons

Generally, the law recognises two categories of persons, being natural and juristic persons. Natural persons are humans and, by virtue of their very existence, are recognised in the law as possessing legal capacity. For instance, under Roman law a person was considered a human being in the "widest sense of the word",[25] and possessed legal status and thereby legal personality.[26] Under Roman law, there was also a distinction made between different categories of persons – for example, freedmen and slaves had different rights and duties according to their different legal statuses. One could even say that human beings have certain characteristics that distinguish them from animals and other objects, and Wagner describes these characteristics as, for example, "intelligence, free will, consciousness, intentionality, and emotions".[27] If one were to argue that legal status and thereby legal personality is dependent on possessing human characteristics, then AI may well, in the future, illustrate these characteristics, and bring into question whether such characteristics, if evidenced in technology, would require the law to elevate such AI to legal personhood.[28] The 2016 Report certainly seems to suggest this. However, there are legal challenges, such

[21] See also Bilchitz 2009 *SAJHR* 42.

[22] Solum "Legal Personhood for Artificial Intelligences" 1992 *North Carolina Law Review* 1231 1231–1287, which puts forward the possibility of attribution of legal personality to software programs. See also Karnow ("The Encrypted Self: Fleshing Out the Rights of Electronic Personalities" 1994 *John Marshall J Computer & Information Law* 1–16), who argues that electronic persons should be "able to own money and bank accounts, and they need to have access to credit". Karnow also proposes the term "eperson" at page 4 of his article, whereas the attribution of legal personality to smart autonomous robots was proposed in the 2016 Report 12.

[23] See par 31(f) of the 2016 Report.

[24] See par 6 and 7 of the 2020 Report.

[25] Cambell *A Compendium of Roman Law Founded on the Institutes of Justinian* (1878) 7.

[26] Cambell *A Compendium of Roman Law Founded on the Institutes of Justinian* 8.

[27] Wagner 2019 *Fordham Law Review* 594.

[28] *Ibid.*

as the extent of contractual liability that should be afforded to such electronic persons (among other things).

A juristic person, also referred to as an artificial or legal person, possesses legal status and a legal (or corporate) personality.[29] Juristic persons are created artificially by means of legal instruments and include, for example, companies, non-profit organisations and corporations recognised under the Companies Act,[30] as well as close corporations under the Close Corporations Act.[31] Legal personality, in this context, is a status assigned or determined by the law.[32] One may be tempted to group electronic persons under the same banner as just another type or category of juristic person. This would be inaccurate as juristic persons and electronic persons are characteristically different. Juristic persons are created by means of a legal fiction and have no will or intuition of their own,[33] but must act through natural persons in order to exercise the rights and duties afforded them by means of their legal personalities.[34] Watermeyer J puts it as follows:

> "Unlike an individual, an artificial person can only function through its agents and it can only take decisions by the passing of resolutions in the manner provided by its constitution."[35]

Therefore, juristic persons exist in a technical reality (or legal fiction),[36] being the

> "[p]ersonification … [of] a technical instrument designed, not only to provide a unified regulation of [hu]man's multiple relations, but also to give a stable basis to tasks of common interest."[37]

Although juristic persons deal with human interests,[38] juristic persons are certainly incapable of functioning like human beings. In this sense, juristic persons are different from sophisticated electronic persons, which, through the capabilities of AI, possess human-like qualities, intelligence and decision-making capabilities. It could be argued that sophisticated electronic persons have developed as a way of responding to ever-evolving social needs and thereby provide more efficient and reliable ways of undertaking

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[29] See, for e.g., *Cape Pacific Ltd v Lubner Controlling Investments (Pty) Ltd* 1995 (4) SA 790 (A) 803 and *Financial Mail (Pty) Ltd v Sage Holdings Ltd* 1993 (2) SA 451 (A), which refers to the concept of personality rights in the context of natural and artificial (or legal) persons. See also Bilchitz 2009 *SAJHR* 41.

[30] 71 of 2008.

[31] 69 of 1984. These artificial legal entities are created under the auspices of the Companies Act and the Close Corporations Act. These forms of legal person are artificially designed by a fiction of law and are vested with the capacity and ability to own rights, owe duties, and perform acts through the agency of natural persons. See also Yeats "Commentary on the Companies Act of 2008" 2020 *Jutastat e-publications* RS 1, 2020, Int-75.

[32] Dewey "Historic Background of Corporate Legal Personality" 1926 *Yale Law Journal* 655 655–656.

[33] Andrade *et al Artificial Intelligence Law* 362, referencing Gonçalves.

[34] Andrade *et al Artificial Intelligence Law* 363, referencing Fernandes.

[35] *Mall (Cape) (Pty) Ltd v Merino Ko -Operasie Bpk* 1957 (2) SA 347 (C) 351.

[36] Andrade *et al Artificial Intelligence Law* 362 referencing Gonçalves. See also Bilchitz 2009 *SAJHR* 41.

[37] Andrade *et al Artificial Intelligence Law* 363, referencing Gonçalves.

[38] Andrade *et al Artificial Intelligence Law* 363, referencing Fernandes.

certain actions that humans cannot sufficiently or economically perform on their own.[39]

Andrade suggests three criteria to assess whether an electronic person should be given legal personality.[40] The first is a patrimonial/personal component, which refers to the presence of a body and mind capable of reasoning and acting.[41] Sophisticated electronic persons generally operate within a physical structure (hardware) and have a logical (software) structure that makes them capable of reasoning, especially in the context of AI.[42] Juristic persons, in their current recognised form, do not possess such characteristics, but are personified through the existence of a patrimonial capability, flowing from the collective personality of the people behind them. In distinguishing individual personality and corporate personality, traditional legal theories considered the existence of a physical being with a will of its own.[43] Assessed along these lines, it may be said that the characteristics of sophisticated electronic persons are closer to human beings than those of juristic persons. This is because electronic persons have, or can have, a physical existence via their physical (hardware) elements and logical (software) elements, whereas juristic persons cannot.[44] Where a sophisticated electronic person is programmed to act independently, these devices may well be regarded as having (or at least capable of having) a will of their own, since they can perform tasks without human supervision or intervention.[45]

The second of the criteria is a teleological component, which implies that an electronic person serves a certain purpose or plays a relevant role, which must be clearly defined or identifiable, legal, and enduring as a wider purpose than simply serving a single instantaneous act.[46] Considering the underlying software component and programming of electronic persons, it is not too-far a stretch of the imagination to see how electronic persons may also satisfy this requirement.

The third of the criteria is an intentional component, which includes the need for legislative instruments to recognise electronic persons as new legal beings and afford them legal status.[47] In other words, it requires legislative intervention to recognise electronic persons as legal entities with legal personality. Considering the 2020 Report, there appears to be little political and legal will, at this stage, to achieve the intentional component to recognising electronic persons. Similarly, in South Africa, ECTA, the Close Corporations Act and the Companies Act neither contemplate nor recognise electronic persons as legal entities that possess legal personality. Therefore, as it stands, Andrade's third requirement remains unfulfilled in the South African context. Nevertheless, to remain legislatively relevant with the

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[39] Andrade *et al Artificial Intelligence Law* 364.
[40] *Ibid.*
[41] *Ibid.*
[42] *Ibid.*
[43] Andrade *et al Artificial Intelligence Law* 363 referencing Gonçalves.
[44] See Andrade *et al Artificial Intelligence Law* 364.
[45] Solum 1992 *North Carolina Law Review* 1231–1287.
[46] Andrade *et al Artificial Intelligence Law* 365.
[47] *Ibid.*

technological advances in AI and robots, South Africa will be required to consider current legislative machinery to accommodate either the concept of electronic persons as contemplated in the 2016 Report, or the liability structures of such electronic persons as contemplated in the 2020 Report.

3 CONTRACTUAL LIABILITY OF AN ELECTRONIC PERSON

3 1 Introductory comments

Technology in contracts is becoming a common phenomenon and the use of automated electronic transactions is increasing as computers, telecommunications and evolutions in the field of AI have allowed many aspects of contractual roles to be delegated to passive electronic persons. Despite such delegated roles, the principle of privity of contract underscores contracts and such passive electronic persons are often considered a mere tool of the user, and not a party to the contract (see heading 3 3 below). This notion is reinforced by section 20 of ECTA. Coetzee notes that the scope of section 20 relates to "electronic data interchange messages, online purchase forms or digital shopping carts".[48] Coetzee goes further to argue that the purpose of section 20 of ECTA is to ensure that contracts generated automatically (as a result of an electronic agent) are just as binding as those entered into directly with the supplier.[49] Therefore, passive electronic agents are simply tools used by suppliers in electronic contracts; but their use has challenges, which Erlank and Ramokanate sum up as follows:[50]

> "If a message was garbled on transmission, so that it reaches the other party stating different terms all together, a court had the luxury of choosing to enforce the contract on the original telegram or the garbled version – that is of course if the court was convinced that there was a valid contract despite the telegraphic error. In automated transactions, messages are authored by systems without any human review. If the automated message system in issue is highly autonomous, it becomes very hard to predict its behaviour, which means in turn that the user will be unable to tell what the software would or should have said or done, had it not malfunctioned. In this way, a court will be limited to only two options, either to hold that there is a contract despite the malfunction, or that there is no contract by reason of the malfunction."

As passive electronic persons develop and evolve into their sophisticated counterparts, based on AI and mimicking human behaviour and thinking, so too will the legal issues evolve. In the case of sophisticated electronic persons, the question is with whom does a consumer contract, and consequently who will be held liable for the enforcement of the contract and damages? Sophisticated electronic persons, if adorned with legal personhood, would become the contracting entity and thereby have legal status to claim rights and be responsible for damages that flow from such

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48 Coetzee "The Electronic Communications and Transactions Act 25 of 2002: Facilitating Electronic Commerce" 2004 *Stell LR* 501 517.

49 *Ibid.*

50 Erlank and Ramokanate "Allocating the Risk of Software Failures in Automated Message Systems (Autonomous Electronic Agents)" 2016 *SA Merc LJ* 201 203–204.

contractual damages. It is the focus of this article to explore contractual liability structures in the current South African legal regime, as well as contemporary theories as they may apply to electronic persons.

3 2 Basis for contractual liability

South African contractual liability is generally established by means of a two-pronged approach. The first is the application of the subjective test (also known as the will theory or intention theory),[51] in terms of which one establishes whether consensus exists between the contracting parties. For consensus to be achieved, three requirements must be met: *animus contrahendi* (being the serious intention to contract); agreement about the material terms of the agreement; and, the parties must be *ad idem*.[52] If these requirements have been met, as well as all the other requirements for a valid contract, then a contract would be formed and the contracting parties would be bound by the terms of the contract.[53] Owing to the nature of digital contracting, it would be difficult to satisfy the subjective test of the will theory, or more accurately to establish a subjective intention in an electronic person. Therefore, the objective tests to establish contractual liability appear more viable under these circumstances.

The second part of the two-pronged approach considers situations where consensus was absent or cannot be established, but where, through the conduct of one of the contracting parties, an impression is created that there is indeed consensus.[54] In this instance, contractual liability will be imputed on the strength of the reliance theory.[55] A party may, however, escape such liability in instances of *iustus error* (a reasonable and material mistake).[56] The reliance theory may be workable in contracts concluded with electronic persons as it is more objective in nature. However, the electronic person would be required to have legal personality to be an actual party to the contract.

There is a third theory, according to which contractual liability is attributed to the parties based on the objective forming of a contract. The declaration theory considers the form of the agreement, rather than the subjective intention of the parties.[57] Essentially, it is a person's expression or declaration of intent that is used to establish contractual liability.[58] Although the declaration theory may solve the problem of consent and consensus required under the will theory, it can create harsh realities in which persons

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[51] Pretorius "The Basis of Contractual Liability (2): Theories of Contract (Will and Declaration)" 2005 *THRHR* 441 442.

[52] Pretorius (2005 *THRHR* 443) notes that the elements of consensus include consensus regarding the consequence of the agreement, being legally bound to the agreement and awareness of the agreement itself.

[53] Pretorius 2005 *THRHR* 442.

[54] Pretorius "The Basis of Contractual Liability in South African Law (3)" 2004 *THRHR* 549 556.

[55] *Ibid*.

[56] Pretorius 2004 *THRHR* 557.

[57] Pretorius 2005 *THRHR* 457.

[58] Pretorius 2005 *THRHR* 457–478.

are bound to a contract that they neither wanted nor agreed to.[59] In other words, little or no consideration is given to consensus – only the formal representation of the agreement counts. Van Deventer argues that there seems to be more support for objectively determining contractual liability when dealing with electronic contracting.[60] Although Van Deventer's arguments come from the perspective of a consumer entering into an online contract, similar arguments may be used for electronic persons.

Ultimately, an electronic person would first have to be afforded legal personality before any of these theories would be applicable. Therefore, the debate on the applicable theory to establish contractual liability is purely academic at this stage. However, contractual liability in the context of electronic persons attracts additional considerations and there is the need to ensure a fair allocation of the risks and liabilities that arise from the use of autonomous intelligent systems.[61] Some of the proposed theories put forward are the risk theory, tool theory and agency theory, each of which are discussed below.

3 3 Risk theory

The risk theory applies predominantly to passive electronic persons and attaches risks to the user in cases of malfunctions or incorrect messages communicated by means of electronic structures and appears to be the basis of liability contemplated in the 2020 Report.[62] The risk theory is closely linked to the tool theory (discussed under heading 3 4 below). However, the risk theory relates more to the allocation of risk than to the functioning of the electronic person. Steyn explains the risk theory as follows:[63]

> "Where a party chooses a specific method of communication or a messenger, or an intermediary, for the communication of his [or her] offer to the other party and such offer becomes distorted or garbled in its transmission, so that the offer is communicated to the other party incorrectly, in spite of the absence of fault on the part of the first party, he [or she] must bear the loss on the basis that he [or she] bears the risk of using that method of communication or a messenger or intermediary. The same applies to communication of acceptance."

Effectively, the risk theory allocates liability that flows from the use of a chosen medium of communication to the person who opted to use that particular medium.[64] In other words, the risks and liability of using autonomous systems lie with the originator or user of that system, since they made the conscious choice to use that system.[65] As such, the consequences

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[59] Pretorius 2005 *THRHR* 459.

[60] Van Deventer "Problems Relating to the Formation of Online Contracts: A South African Perspective" 2021 *SALJ* 221.

[61] See the 2016 Report.

[62] See the 2020 Report.

[63] Steyn *A Critical Appraisal of the Decision in Sonap v Pappadogianis 1992 (3) SA 234 (A) 33, With Reference to the Basis of Contractual Liability in South African Law and Various Other Legal Systems* (LLM dissertation, University of South Africa) 1994 33.

[64] *Ibid.*

[65] *Ibid.*

of all unforeseen communications and actions of a passive electronic person are borne by the user.

The risks associated with contracting with electronic persons have not yet been fully realised. However, some of the risks related to automatic electronic transactions were summarised by Erlank and Ramokanate, who noted:

> "When the malfunction of an automated message system leads to a contract, one way of dealing with the matter would be to identify how risk is to be allocated between the programmer, the user of the electronic agent and the third party who, innocently or otherwise, concluded an agreement with the electronic agent."[66]

Erlank and Ramokanate also note that the traditional manner of addressing these risks is through exemption clauses, indemnities and disclaimers.[67] Although such exemption clauses, indemnities and disclaimers may be suitable for passive electronic persons, as they will protect the owner, user and programmer of such software from damages claims, they may be extended to sophisticated electronic persons, where they have been endowed with legal personality.

Nonetheless, Pretorius also observed that the risk theory is too poorly developed in South African law to suffice as a basis for contractual liability.[68] Thus, it remains to be seen whether the theory would be applied as a basis for contractual liability in automated transactions in South Africa.

3 4 Tool theory

Similar to the risk theory, the tool theory views electronic persons as tools of communication akin to telephones, fax machines or other electronic communication devices.[69] As such, electronic persons are considered to be a medium of their intentions.[70] Since a tool has no decision-making capabilities of its own, the consequence of this theory is that any liability flowing from the actions of electronic persons is attributed to the person who deployed, or used, or is the beneficiary of the actions of the electronic persons. The tool theory can then be described as giving effect to the principle of attribution, which is echoed in section 20 of ECTA and can be

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66 Erlank and Ramokanate 2016 *SA Merc LJ* 202.

67 Erlank and Ramokanate 2016 *SA Merc LJ* 203.

68 Pretorius "MEC for Economic Affairs, Environment and Tourism, Eastern Cape v Kruizenga 2008 6 SA 264 (Ck) MEC for Economic Affairs, Environment and Tourism, Eastern Cape v Kruizenga 2010 4 SA 122 (SCA)" 2011 *De Jure* 13 https://www.dejure.up.ac.za/images/files/vol44-1-2011/MEC%20for%20Economic%20Affairs%20v%20Kruizenga.pdf (accessed 2022-12-26).

69 Chopra and White "Artificial Agents and the Contracting Problem: A Solution via an Agency Analysis" 2009 *University of Illinois Journal of Law, Technology and Policy* 363 370–371; Weitzenboeck "Electronic Agents and the Formation of Contracts" 2001 *International Journal of Information, Law and Technology* 204 214.

70 Cross "Agency, Contract and Intelligent Software Agents" 2003 *International Review of Law, Computers and Technology* 175 180; Blake and Eymann "The Conclusion of Contracts by Software Agents in the Eyes of the Law" (2008) Conference Paper 771 773 https://www.researchgate.net/publication/221456172_The_conclusion_of_contracts_by_software_agents_in_the_eyes_of_the_law (accessed 2022-12-26).

argued to be the default theory in South African law. ECTA refers to electronic persons as electronic agents and notes that

> "a party using an electronic agent to form an agreement is … presumed to be bound by the terms of that agreement irrespective of whether that person reviewed the actions of the electronic agent or the terms of the agreement."[71]

However, the use of the term "electronic agent" is not the same as agency (which is discussed under heading 3 5 below) and the principles that underscore the tool theory are fundamentally different from the agency theory. In the tool theory, the user's actions are conveyed through the electronic persons, whereas the agency theory states that electronic persons act on behalf of the user.[72] The justification for the agency theory stems from the fact that electronic persons are taught how to perform tasks via their programming,[73] and are essentially computer programs with a set of instructions that spell out what they must do in a given scenario and how they should perform a task.[74] These sets of instructions are drafted by a programmer, who determines what the software should achieve, and, after making that determination, encodes the same instructions into computer-readable language.[75] Every program, therefore, comprises a set of bespoke instructions, carefully tailored to ensure the realisation of a predetermined outcome.

For purposes of the present discussion, the most relevant actor involved in programming is the programmer who decides what the program should achieve, and who encodes the decision into a machine-readable language. First, the programmer drafts these instructions into a text called the source code, and then translates it into an object code (which is the language a computer can understand).[76] Once this is done, the programmer's instructions become executable by the electronic person.[77] Thus, a program directs an electronic person's operations in that, when the program is run, it causes the electronic person to perform those actions as directed by the programmer's instructions. From a legal perspective, these instructions embody the programmer's will and intentions. In the case of electronic persons, these instructions invariably comprise, *inter alia*, the terms on which the electronic persons should conclude agreements with third parties, and by which actions or operations those agreements should be

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[71] S 20(*c*) of ECTA.

[72] See Weitzenboeck 2001 *International Journal of Information, Law and Technology* 217.

[73] Alheit *Issues of Civil Liability Arising From the Use of Expert Systems* (doctoral thesis, University of South Africa) 1997 57.

[74] Pfaffenberger *Quo's Computer and Internet Dictionary* 5ed (1995) 423.

[75] See Pfaffenberger *Quo's Computer and Internet Dictionary* 95 for a detailed discussion of the various stages and processes of programming.

[76] In *Haupt t/a Soft Copy v Brewers Marketing Intelligence (Pty) Ltd* 2005 (1) SA 398 (C) 410G–H, Erasmus J distinguishes between a source code and object code as follows: "The source code of a computer program is a textual description of the program, written in a programming language. The source code is not directly executable by a computer, and must first be converted into an object code which is 'machine readable', either by passing it through a compiler or loading it into an interpreter that translates and executes it one statement at a time."

[77] *Ibid.*

concluded.[78] As such, electronic persons on their own never attempt a contracting act, let alone enter into a contract by themselves – unless they were programmed to do so.[79] Thus, at the heart of every operating system is the intention of a programmer who may be acting on their own account or as an agent of the user (or owner) of the computer program. It is this reasoning that justifies the attribution of an electronic person's actions to its originator. The tool theory, when applied to the contract process, leads to the inevitable conclusion that contracts may be formed using electronic persons as mediums of expressing the parties' will and intentions, since the parties have a foreknowledge of the terms of those contracts, and they had the required intention to be bound by the contracts entered into by electronic persons. In other words, the user is deemed to have the intention to be bound by the contract concluded by the electronic persons deployed by them, since they consciously chose to use those electronic persons.[80] This is referred to as a "programmed intention".[81] It is possible to identify the consensus required for contract formation under the tool theory if the electronic persons involved properly execute the terms spelt out in the program. It is for this reason that, aside from instances of system malfunction, contracts concluded by electronic persons under the tool theory are attributed to the originator or user of the system.

The tool theory, therefore, notes that autonomous systems, such as electronic persons, are nothing more than tools to carry out human tasks. The case of *Kgopana v Matlala* may illustrate how the tool theory works practically.[82] In this matter, messages were exchanged by means of the WhatsApp messenger platform, and within these messages were offers and acceptances.[83] One may say that the technology used to exchange this information was a tool that the parties used to communicate with each other. Although the court eventually found that there was no *animus contrahendi* and therefore no binding agreement,[84] the case does illustrate the core principles of the tool theory – namely, that technology was used for a predetermined function as a tool for communication by its users and nothing more. What makes the facts in *Kgopana v Matlala* case different to sophisticated electronic persons is that the parties who sent the messages in this case were natural persons, whereas a sophisticated electronic person may send messages without the knowledge or consent of a natural person. This state of awareness may be assumed where the system acts in consonance with the laid-down programming and is supported by section 20

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78 See also Erlank and Ramokanate 2016 *SA Merc LJ* 204–205 as it relates to automated transactions.

79 *Ibid.*

80 Gringras *The Laws of the Internet* (2003) 41–42; Kerr "Bots Babes and the Californication of Commerce" 2003–2004 *University of Ottawa Law and Technology Journal* 287 294; Allen and Widdison "Can Computers Make Contracts?" 1996 *Harvard Journal of Law and Technology* 26 46; Mik "Certainty at Last? A 'New' Framework for Electronic Contracting in Singapore" 2013 *International Journal of Commercial Law and Technology* 160 174; Dahiyat "Intelligent Agents and Intentionality: Should We Begin to Think Outside the Box?" 2006 *Computer Law and Security Review Journal* 472 473.

81 *Ibid.*

82 *Kgopana v Matlala* 2019 JDR 2365 (SCA).

83 *Ibid.*

84 *Kgopana v Matlala supra* par 12.

of ECTA. It is clear that the electronic persons covered by the tool theory are not AI and do not possess a will of their own and simply perform the predefined and predetermined instructions of their creator. It goes without saying that the person who set the machine in motion ought to be held liable for its actions, just as they benefit from the autonomous actions of the machine. The shortcoming of this theory is that it does not sufficiently address liability in instances where systems malfunction and carry out actions that differ from the author's original desires and intentions in an unforeseeable manner (which is the focus area in the risk theory discussed under heading 3 3 above). The reason for this is that the underlying theoretical justification for the tool theory is that electronic persons merely act on the instructions of their creators to achieve predetermined outcomes. The tool theory is therefore unsuitable for dealing with instances where the system either malfunctions and therefore does not carry out the programmed intention, or where it is able intelligently to reach independent decisions of its own (as is the case with AI-powered systems). The use of the tool theory can also be criticised as failing to attain the standard of conscious consent required as a ground for establishing consensus for the same reasons. This can be compared with the *Bloom v American Swiss Watch* case,[85] where an act of acceptance was performed without knowledge of the offer, which, in the absence of knowledge of the offer was incapable of acceptance.[86] This is to say, in the moment that an act is being done, the person should have had a state of awareness of the terms being agreed to.[87]

The tool theory is then most appropriate for passive electronic agents as contemplated under ECTA, but is inappropriate for sophisticated electronic persons. The tool theory would also not align with the concept of attaching legal personality and status to electronic persons as contemplated in the 2016 Report. Therefore, it is not a valid contender for establishing liability in contractual transactions for sophisticated electronic persons although it works well with the current stage of technological development for passive automated electronic transactions.

3 5 Agency theory

The agency theory has been defined in several ways by different authors.[88] However, the common thread is the legal relationship that underscores the engagement between two parties. One party is considered to be the agent who acts as a representative of another party, being the principal. There is growing recognition in both academic commentary and e-commerce

85 *Bloom v The American Swiss Watch Company* 1915 AD 100.

86 See a similar example and discussion in Erlank and Ramokanate 2016 *SA Merc LJ* 215–216.

87 *Ibid*.

88 De Wet ("Agency and Representation" in Joubert (ed) *The Law of South Africa Vol 1* (1976) par 101) states that "[t]he expression 'agency' is used in such a wide variety of meanings that it cannot be regarded as a term of art denoting a specific branch of the law". Also see Ryder, Margaret and Singh *Commercial Law: Principles and Policy* (2012) 3, where it is stated that "it is virtually impossible to provide a clear all-embracing definition of agency".

legislation of such an agency structure in relation to electronic persons.[89] The proposition is that electronic persons act as agents and do everything in furtherance of the human principal behind the scenes.[90] The agency theory differs from the tool theory in that the electronic person's conduct is regarded as acting on behalf of its human principal, whereas the tool theory regards the electronic person's actions as the extension of humans, who use the electronic persons as a tool. The shortcoming with the agency analogy is that an agent is generally expected to be a person, possessing a will, intellect and discretion that can be exercised on the principal's behalf.[91]

The South African law of agency is a combination of Roman-Dutch and Anglo-American principles.[92] An agent thus represents another person (called the principal) and concludes juristic acts on the principal's behalf.[93] According to Holmes and Symeonides, two concepts underpin representation. The first is the capacity to have rights and duties (legal personality) and the second is the capacity to perform juridical acts (contractual capacity, for our purposes).[94] Although the original purpose of representation was to protect the interests of persons who themselves lacked the capacity to perform juridical acts,[95] it has grown to accommodate the right of people (who themselves possess the requisite capacity) to delegate others to act as their representatives.[96] If legal personality and contractual capacity underlie the concept of representation, then any attempt to apply the theory of agency to electronic persons must be assessed against the capability of electronic persons to have legal status (contractual capacity) and legal personality (as discussed under heading 2 above).

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[89] Fischer "Computers as Agents: A Proposed Approach to Revised U.C.C. Article 2" 1997 *Indiana Law Journal* 545 570; Cross 2003 *International Review of Law, Computers and Technology* 189; Chopra and White 2009 *University of Illinois Journal of Law, Technology and Policy* 403; Wettig and Zehendner "A Legal Analysis of Human and Electronic Agents" 2004 12 *Artificial Intelligence and Law* 111 111–135. These authors offer a comparative analysis of the similarities between human and electronic agents.

[90] *Ibid.*

[91] See Reynolds, Bowstead and Watts *Bowstead and Reynolds on Agency* (2021); Fridman *The Law of Agency* (1996) 11; Jensen and Meckling "Theory of the Firm: Managerial Behavior, Agency Costs and Ownership Structure" 1976 *Journal of Financial Economics* 305 308; Dannemann and Schulze *German Civil Code (BGB) Vol. I Books 1–3 Article by Article Commentary* (2020) 217–220.

[92] Glover "Agency in South Africa: Mapping Its Defining Characteristics" 2021 *Acta Juridica* 243–244. See also Visser, Pretorius, Sharrock and Van Jaarsveld *Gibson's South African Mercantile & Company Law* (2008) 200.

[93] Hutchison *et al Wille's Principles of South African Law* 593; De Wet in Joubert *The Law of South Africa Vol 1* par 102.

[94] Holmes and Symeonides "Representation, Mandate and Agency: A Kommentar on Louisiana's New Law" 1993 *Tulane Law Review* 1087 1092–1093; Havenga "Decision-Making by and for People with a Decision-Making Disability" 2002 *Australia Law Reform Commission Journal* 47 50.

[95] Holmes and Symeonides 1993 *Tulane Law Review* 1087 1092–1093.

[96] Ramokanate (*Modifying Contract Law Principles to Accommodate Automated Transactions in South Africa* (doctoral thesis, North-West University) 2018 62, citing De Villiers and Macintosh *The Law of Agency* (1981) asserts that this type of representation is founded on consensus and is known as conventional representation. The term "agent", as used now, mainly refers to this type. There is however also juristic representation created more by operation of law (e.g., officers of a company being designated by law to act on behalf of the company).

There are, however, different schools of thought regarding how the agency relationship may be created,[97] although only the two most prominent theories applicable in the South African context are discussed here. These are the consent theory and the power/liability theory. Glover argues that both these theories have support in South Africa.[98] The consent theory posits that agency may be created by means of a contract between principal and agent.[99] In other words, the consent theory is internally focused on the contractual relationship between agent and principal.[100] Glover points out that the benefit of this theory is that it embraces the "relational nature of agency" and is most akin to the liability structures that form part of an agency arrangement.[101] However, Glover also notes that, as this theory is internally focused, it does not sufficiently consider third-party engagements.[102] The issue of how the agency relationship arises is important in assessing the applicability of the theory to electronic persons. For instance, if an agency arises only by contract, then certain preliminary issues become a factor, such as, whether the electronic person possesses the requisite contractual capacity, and consequently whether the electronic person is capable of consensus (or *animus contrahendi*) to conclude such a contract. However, that said, there are instances in South African law where agency has been recognised despite a lack of consensus. Glover uses the examples of apparent (or ostensible) authority, estoppel and ratification to illustrate agency without consensus.[103] This still does not overcome the issue of legal capacity; unless an electronic person has been legally recognised as possessing legal personality, the application of agency would be limited owing to the limited legal nature of electronic persons.

The second theory is the power/liability theory in which agency is created by the conferral of authority on the agent by a unilateral act of the principal.[104] The principal confers authority on an agent and the issue of a contract between the parties is secondary in the power/liability theory.[105] Therefore, this theory has been described as being externally focused,[106] and the agent's authority may either be expressly communicated to the

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[97] Glover (2021 *Acta Juridica* 245) highlights that the vicarious liability theory for agency does not find much support academically. As the consent and power/liability theory is generally used and accepted in South Africa, focus will be placed on these theories in our discussion.

[98] Glover 2021 *Acta Juridica* 250–251.

[99] Glover 2021 *Acta Juridica* 246. See also Coaker and Zeffertt (*Wille and Millin's Mercantile Law of South Africa* (1984) 457), who state that "the contract of agency arises, like every other contract, from the union of free wills of the parties to a common purpose". See also Visser *et al Gibson's South African Mercantile & Company Law* 200.

[100] Glover 2021 *Acta Juridica* 249.

[101] Glover 2021 *Acta Juridica* 246.

[102] *Ibid.*

[103] *Ibid.*

[104] See *Totalisator Agency Board, OFS v Livanos* 1987 3 SA 283 (W) par 291B–F; and Visser *et al Gibson's South African Mercantile & Company Law* 200.

[105] Glover 2021 *Acta Juridica* 248–249. In *Freeman and Lockyer v Buckhurst Park Properties* (*Mangal*) *Ltd* [1964] 1 ALL ER 630 644, Lord Diplock defined actual authority as "[a] legal relationship between principal and agent created by a consensual agreement to which they alone are parties". It was also stated in that case that the existence of actual authority presupposes the existence of a consensual relationship between the respective parties. See also Fridman *The Law of Agency* 53.

[106] Glover 2021 *Acta Juridica* 249.

agent by the principal or implied by law, depending on the circumstances of the case.[107] Expressly conferring actual authority on an agent may be done verbally or in writing via (for instance) a power of attorney.[108] Corbett JA, in *Joel Melamed and Hurwitz v Cleveland Estates (Pty) Ltd; Joel Melamed and Hurwitz v Vorner Investments (Pty) Ltd*,[109] also states that the evidence of the conferral of authority is usually found in a contract.[110] Apparent (or ostensible) authority, on the other hand, arises when a principal creates a general appearance to the public that a person has the authority to carry out certain actions in the principal's name or to act on the principal's behalf.[111] Such apparent authority need not, for example, meet the requirements of estoppel but the impression created by the principal is sufficient for apparent authority to exist.[112] Beyond these examples, the law may also confer such authority by means of estoppel and ratification.[113] The shortcoming of the risk/liability theory is that it does not take into account the consent that is often required to act as an agent.[114]

Glover argues that both the consent theory and the power/liability theory are completely reconcilable in South Africa, as they are two sides of the same coin and reflect different aspects of agency.[115] Therefore, when considering the application of agency to electronic persons, consideration must be given to both an ontological element (being the application of the power/liability theory) and a normative element (the application of the consent theory).[116] At a normative level, there must be some sort of agreement between agent and principal in which a principal authorises the agent to perform a juristic act on behalf of the principal.[117] When dealing with passive electronic persons, such consent is not possible, as passive electronic persons are considered mere tools (as discussed under heading 3 3 above). When dealing with sophisticated electronic persons, such consent is currently also not possible, as electronic persons are not yet endowed with legal personhood. It is also worth noting that the language used in ECTA is a misnomer, as the term "electronic agent" does not refer to an agent in the true sense of the word. The definition of an electronic agent is, however, wide enough to contemplate electronic persons in that it refers to "a computer program or an electronic or other automated means used

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[107] See Fridman *The Law of Agency* 33; *Hely-Hutchinson v Brayhead Ltd* [1968] 1 QB 549.

[108] Visser *et al Gibson's South African Mercantile & Company Law* 201. See also *Maasdorp v The Mayor of Graaff-Reinet* 1915 CPD 639, where Kotzèr J mentioned that "an agent may be lawfully or duly appointed or accredited by deed, power of attorney, by simple writing, by word of mouth, or even by signs".

[109] 1984 3 SA 155 (A).

[110] *Joel Melamed and Hurwitz v Cleveland Estates (Pty) Ltd; Joel Melamed and Hurwitz v Vorner Investments (Pty) Ltd supra* 166C–D. Van Zyl J also affirms this position in *Totalisator Agency Board, OFS v Livanos supra* 219 B–F.

[111] *Makate v Vodacom Ltd* 2016 (4) SA 121 (CC) par 42–59.

[112] *Ibid.*

[113] See Fridman *The Law of Agency* 98; Hutchison *et al Wille's Principles of South African Law* 598.

[114] Glover 2021 *Acta Juridica* 249.

[115] Glover 2021 *Acta Juridica* 252.

[116] Glover (2021 *Acta Juridica* 252) describes the ontological element as the internal workings of agency, often dealing with practical considerations, whereas the normative element is described as the justification for forming the agency relationship in the first place.

[117] Glover 2021 *Acta Juridica* 253–354.

independently to initiate an action or respond to data messages or performances in whole or in part, in an automated transaction."[118] Closely linked is the term "automated transaction", which is defined as

> "an electronic transaction conducted or performed, in whole or in part, by means of data messages in which the conduct or data messages of one or both parties are not reviewed by a natural person in the ordinary course of such natural person's business or employment."[119]

However, these definitions fail on a normative level of agency as electronic persons do not possess the capability to provide the requisite consent to form a contract of agency.[120]

At an ontological level, the owner may certainly create the impression that electronic persons have the authority to act on their behalf in automated electronic transactions. The characteristic feature of sophisticated electronic persons is after all to act autonomously. They possess similar characteristics to human beings, may act independently of their creators and users, and could in sophisticated scenarios stand in for their users by negotiating and concluding contracts on their behalf, just as human agents do.[121] These scenarios may very well meet the requirements at an ontological level of agency.

Yet, there remains the risk that an agent exceeds their original mandate, in which case the principal would not be liable except in instances of ostensible authority, estoppel and ratification.[122] Similarly, the risks exist that electronic persons may exceed their original mandate, and generate offers and acceptances that were unforeseen and unintended by the user.[123] Lack of legal personality, therefore, complicates the possibility of making electronic persons the subject of an agency relationship, as electronic persons are currently incapable of consenting to the relationship; and also, electronic persons lack assets against which liabilities arising from their actions may be charged. Thus, electronic persons cannot be held liable for losses arising out of a breach of their agency duties in the same way that a human agent can be. These difficulties have in many instances fuelled the call to award legal personality to electronic persons and may require consideration of a new type of juristic entity to accommodate electronic persons.[124] The agency theory falls short of the liability structures of

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[118] S 1 of ECTA. According to Erlank and Ramokanate (2016 *SA Merc LJ* 201–202), the term "electronic agents" closely resembles their human counterparts.

[119] S 1 of ECTA.

[120] See also a further example of the concept of consensus in contracts of agency in *Cean Cargo Line Ltd v F R Waring (Pty) Ltd* 1963 (4) SA 641 (A).

[121] Koops, Hildebrandt and Jaquet-Chiffelle ("Bridging the Accountability Gap: Rights for New Entities in the Information Society?" 2010 *Minnesota Journal of Law, Science and Technology* 497 538) argue that "(autonomous) electronic agents do more than just transport messages; they influence the terms of the contract and are therefore not mere messengers".

[122] See also, as an example, *Glofinco v Absa Bank Ltd t/a United Bank* 2002 (6) SA 470 (SCA); *South African Eagle Insurance Co Ltd v NBS Bank Ltd* 2002 (1) SA 560 (SCA); *Makate v Vodacom Ltd supra*.

[123] See Kerr "Ensuring the Success of Contract Formation in Agent-Mediated Electronic Commerce" 2001 1 *Electronic Commerce Research Journal* 183 194.

[124] See discussion under heading 2 (above).

electronic persons. This is largely owing to their lack of legal status and personality. For the agency theory to become a viable contender, the matter of legal status and personality must first be addressed for electronic persons.

4 CONCLUSION

South Africa has done well in recognising digital transactions through the promulgation of ECTA. However technological developments have already moved on. Internationally, there are arguments for the regulation of robots and consequently AI.[125] There is, however, a necessary distinction to be made between passive electronic persons (which function more like a tool for human use, and align with the regulations of digital technology in terms of ECTA), and sophisticated electronic persons (which mimic human characteristics and functioning, and comprise AI technology). Wagner, speaking from a US perspective, notes that:[126]

> "To date, no legal system classifies robots or other autonomous systems as legal subjects, instead leaving them to share the classification of other items made by humans: objects. Objects can be owned by legal subjects but cannot themselves be subjects or own objects. This means that the law attributes their actions-and omissions-not to the objects themselves but to the subjects responsible for them. The party responsible for the robot will usually be its owner, but perhaps other attributions are conceivable, particularly in cases where ownership and actual control diverge."

Similarly, South Africa views electronic persons as passive objects and the application of the tool theory (see heading 3 4 above) is indirectly supported in ECTA. Yet, sophisticated counterparts are challenging the *status quo* and requiring legislators and legal practitioners to think differently about AI. Glimpses of this have already been seen in legal discourse and in Europe with the 2016 Report.

Electronic persons fulfil a specific function in society and have the potential of sharing inherently human characteristics. As such, the 2016 Report suggests that legislatures should, in future, consider bestowing a special type of personhood on these types of electronic systems. Such a legal status would mean that an electronic person would function as a rights-and-duties-bearing unit. However, Bilchitz notes that legal status does not necessarily mean that both rights and duties must be bestowed; it could be either rights or duties.[127] The extent of such rights and duties would have to be clarified in legislation.

The South African legislative framework does not contemplate the legal status of electronic persons. However, electronic persons already form an integral part of contractual engagements. For this reason, this article has considered the risk and liability in contracts, in relation to both the current form of passive electronic agents and also to sophisticated electronic persons. To this end, various theories have been put forward to discuss the

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[125] Mgeladze and Gorgoshadze 2019 *Journal of Constitutional Law* 53.

[126] Wagner 2019 *Fordham Law Review* 591–612.

[127] Bilchitz 2009 *SAJHR* 42.

risk and liability structures. These include the traditional contractual will theory, declaration theory and reliance theory, which are only applicable to parties to a contract; thus, until legal personality is bestowed on an electronic person, such systems cannot be considered to be a party to a contract.[128] Turning to wider theories attributing liability and risk to electronic persons, the risk, tool and agency theories were considered.[129] Generally, the risk theory is applied by allocating risk by means of disclaimers, indemnities and exemption clauses and is generally applicable in contractual engagements.[130] The 2020 Report suggests that, for the moment, Europe advocates a form of the risk theory when attaching liability to electronic persons, their operators and creators.[131] On the other hand, the tool theory attributes any liability flowing from the actions of electronic persons to the owner or user of the software, as an electronic person is simply considered a tool of the owner.[132] The tool theory addresses liability in relation to passive electronic persons, which is supported by section 20 of ECTA, but does not contemplate the risks and liabilities that could arise in relation to sophisticated electronic persons.[133] Despite the conceptual calls to have the agency theory apply to electronic persons, the theory fails both at a normative and ontological level (irrespective of whether one is dealing with a passive or sophisticated electronic person).[134]

In conclusion, the current theoretical basis for contractual risk and liability in South Africa does not address the concept of new legal persons in the form of electronic persons; and ECTA, in its current form, would not accommodate such a development. South Africa should take cognisance of technological developments in AI and robots, as well as the developments seen in the 2016 Report (suggesting that such systems may be afforded legal personhood) and the 2020 Report (requiring a clearer liability structure for such systems). Perhaps it is time to relook at the South African legislative framework and consider to what extent ECTA or other legislative instruments may recognise and regulate sophisticated automated systems and electronic persons. A failure to do so may find South Africa left behind in the wake of technological developments and hamper future contractual engagements.

[128] See heading 3 2 (above).
[129] See heading 3 3–3 5 (above).
[130] See heading 3 3 (above).
[131] See the 2020 Report.
[132] See heading 3 4 (above).
[133] *Ibid.*
[134] See heading 3 5 (above).

THE PLIGHT OF SOUTH AFRICAN WHISTLE-BLOWERS: SEARCHING FOR EFFECTIVE PROTECTION

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SUMMARY

Daily reports in the media about the extent of corruption in South Africa and the plight of whistle-blowers who dare to report it demonstrates the inadequacy of protective measures in South Africa. The murder of whistle-blower Babita Deokaran saw other whistle-blowers go into hiding, fearing for their own safety, and calls for urgent measures to be implemented to ensure the physical safety of whistle-blowers. The United Nations Convention Against Corruption (UNCAC) contains measures that could be implemented to protect the physical safety of whistle-blowers.

Currently, the only legislation specifically protecting whistle-blowers in South Africa is the Protected Disclosures Act (PDA),[1] which only protects against detriment in the workplace. A number of other statutes provide a measure of protection, but they are fragmented and by no means adequate. A legal comparison with the United Kingdom (UK), Ireland and the United States of America (US) may provide guidelines for reform in South Africa. The UK is currently debating the Protection for Whistleblowing Bill (Bill 27) in the House of Lords to improve protection for whistle-blowers. This Bill proposes to sever the required link to employment so that *any* person reporting wrongdoing will be protected if certain requirements are met. Bill 27 also establishes the Office of the Whistleblower, which has wide-ranging powers to protect whistle-blowers. The Irish Protected Disclosures (Amendment) Act 2022 was amended to broaden the definition of "worker" to include persons not previously protected and to establish an Office of the Commissioner similar to the Office of the Whistleblower in Bill 27, although with limited power. Neither the UK nor Ireland requires whistle-blowers to report in good faith; the focus is on the message instead of the messenger. Financial rewards for whistle-blowers in the US have proved to be highly successful and could be implemented in South Africa.

It is recommended that physical protection of whistleblowers be prioritised, that a Whistle-Blowers' Office with wide-ranging powers be established, that protection be extended to persons outside the employment relationship, that whistle-blowers be rewarded for reporting on wrongdoing in prescribed circumstances, that the burden of proof be reversed and that the good faith requirement for protection be dropped.

1 INTRODUCTION

Although there are many definitions of whistle-blowing,[2] the definition given below by Transparency International is preferred because persons who

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1 26 of 2000.

2 Chaoulat, Carrión-Crespo and Licata "Law and Practice on Protecting Whistle-Blowers in the

disclose information and entities to whom information is disclosed are not limited. Whistle-blowing is defined as:

> "[t]he disclosure of information about a perceived wrongdoing in an organisation, or the risk thereof, to individuals or entities believed to be able to elect action."[3]

Whistle-blowers play an important role in the public and private sectors to expose corruption, criminal activities, infringement of human rights, and conduct threatening the environment. It is especially important in South Africa to encourage whistle-blowers to report wrongdoings in light of evidence heard by the Judicial Commission of Inquiry Into State Capture (Zondo Commission), which indicated that corruption is systemic in both the private and public sectors in South Africa.[4] This is also reflected in a report of the non-governmental organisation, Corruption Watch, which, from 2012 to 2021, received 36 224 whistle-blowing reports.[5] Unsurprisingly, according to Transparency International's 2022 public-sector corruption-perceptions index, South Africa is ranked the 72nd most corrupt country in the world out of 180 countries. The index ranking is calculated on a scale of 0 (very clean) to 100 (highly corrupt), with South Africa scoring 43/100.[6] With reference to the ongoing implosion of Eskom caused by looting and corruption at the once-exemplary power giant,[7] the current energy crisis could probably have been avoided if whistle-blowers had been sufficiently protected to come forward to uncover what was happening. Power cuts are one of the best examples of the social injustice caused by corruption. While affluent persons can buy alternative power sources, the vulnerable and poor are wholly dependent on the delivery of services by a state-owned entity.

Whistle-blowers may be inhibited from reporting on wrongdoing because they feel torn between loyalty to their employer and their conscience, regarding the harm to the public should they keep quiet.[8] There is also the very real possibility of a negative impact on their employment and danger to their own and their families' safety.

Public and Financial Services Sectors" *International Labour Organization* (2019) https://www.ilo.org/wcmsp5/groups/public/---ed_dialogue/---sector/documents/publication/wcms_718048.pdf (accessed 2023-01-23).

[3] Transparency International "Recommended Draft Principles for Whistleblowing Legislation" (November 2009) https://www.transparency.org/files/content/activity/2009_PrinciplesForWhistleblowingLegislation_EN.pdf (accessed 2023-01-31).

[4] Zondo *Judicial Commission of Inquiry Into State Capture Report: Part 1* (22 January 2022) https://www.gov.za/sites/default/files/gcis_document/202201/judicial-commission-inquiry-state-capture-reportpart-1.pdf (accessed 2023-01-23) par 458.

[5] Corruption Watch *Annual Report (2021)* https://www.corruptionwatch.org.za/wp-content/uploads/2022/03/cw-2021-annual-report-10-years-20220330-spreads.pdf (accessed 2023-01-23).

[6] Transparency International "Corruption Perceptions Index 2022" (2021) https://www.transparency.org/en/cpi/2021/index/zaf (accessed 2023-01-23).

[7] Karrim, Cowan and Masondo "The Eskom Files. Here's What Eskom Officials Bought With Their Kusile Loot" (28 March 2022) https://www.news24.com/news24/southafrica/news/the-eskom-files-heres-what-eskom-officials-bought-with-their-kusile-loot-20220328 (accessed 2023-01-10).

[8] Dungan, Waytz and Young ("The Psychology of Whistleblowing" 2015 6 *Current Opinion in Psychology* 129–133) describe this as the dichotomy between loyalty and fairness.

The discussion of case law below indicates that, in many instances, whistle-blowers, instead of being supported, have been harassed and victimised, called into disciplinary hearings,[9] dismissed,[10] and financially ruined.[11] Some had to leave South Africa for their safety,[12] and some even paid with their lives for making a disclosure.[13]

The Protected Disclosures Act (PDA)[14] is the only statute dedicated specifically to protecting whistle-blowers, but only against unfair treatment in the workplace. A number of other statutes also provide a measure of protection, but there is no integrated matrix of protection for whistle-blowers. Heading 2 of the article analyses this existing protection, pointing out the shortcomings of the current South African legal framework. Heading 3 discusses the United Nations Convention Against Corruption (UNCAC), while heading 4 discusses the European Directive on Whistleblowing (EDW),[15] which could provide guidance on improving protection for whistle-blowers in South Africa. Heading 5 considers legislation in Ireland and the United States of America (USA) and proposed legislation in the United Kingdom (UK). Heading 6 concludes the article with recommendations on improving protection of whistle-blowers in South Africa.

2 PROTECTION FOR WHISTLE-BLOWERS IN SOUTH AFRICA

Fundamental rights in the Constitution of the Republic of South Africa, 1996 (the Constitution), such as the right to be free from all forms of violence (section 12(1)(*c*)), the right to fair labour practices (section 23), and especially the right to freedom of speech (section 16) are relevant in the protection of whistle-blowers and should be given effect to in legislation. However, the court in *Tshishonga v Minster of Justice* (*Tshishonga LC*)[16] pointed out that the PDA takes its cue from the Constitution, and although whistle-blowers can rely on each of these rights, the focus should be on the "overarching objective of affirming values of democracy, accountability and equality of which the particular rights form a part".[17] In *Communication*

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[9] *Grieve v Denel (Pty) Ltd* (2003) 24 ILJ 551(LC).

[10] *State Information Technology Agency (Pty) Ltd v Sekgobela* (*Sekgobela*) (2012) 33 *ILJ* 2374 (LAC).

[11] *Mashilo v Commissioner of SA Revenue Service* Case No: 108/1822-08-2022 (*Mashilo*) par 69.

[12] Daniels "Whistle-Blower Athol Williams Health Suffered After Exposing Pariah Bain & Co" (15 March 2023) https://www.iol.co.za/capetimes/news/whistle-blower-athol-williams-health-suffers-after-exposing-pariah-bain-and-co-75ada81f-bff5-4cd9-81d7-2c43a62ddc36 (accessed 2023-03-15); Daily Investor "Andre de Ruyter Leaving South Africa for Safety" (22 February 2023) https://dailyinvestor.com/south-africa/9456/andre-de-ruyter-leaving-south-africa-for-safety/ (accessed 2023-03-15).

[13] Bhengu "Babita Deokaran's Murder Will Deter Whistle Blowers From Speaking Out, Says Goodson" (26 August 2021) https://www.news24.com/news24/southafrica/news/babita-deokarans-murder-will-deter-whistleblowers-from-speaking-out-says-goodson-20210826 (accessed 2023-01-15).

[14] 26 of 2000.

[15] Directive 2019/1937 of the European Parliament and of the Council of 23 October 2019 on the Protection of Persons Who Report Breaches of Union Law.

[16] [2007] 4 BLLR 327 (LC).

[17] *Tshishonga LC supra* par 106.

Workers Union v Mobile Telephone Networks (Pty) Ltd (*CWU*),[18] the Labour Court stated that "[t]he PDA seeks to balance an employee's right to free speech, on a principled basis, with the interests of the employer".[19] This is the ideal, but some provisions of the PDA seem biased toward the employer's interests (reputation). In balancing the rights of whistle-blowers and employers, it should also be kept in mind that reports by whistle-blowers are in the public interest and not self-serving.

The next section discusses the protection provided by the common law, the PDA, the Labour Relations Act (LRA),[20] the Protection from Harassment Act (Harassment Act),[21] the Promotion of Equality and Prohibition of Discrimination Act (PEPUDA),[22] the Employment Equity Act (EEA),[23] and the Companies Act.[24]

2 1 PDA

2 1 1 Aim of the PDA

The PDA states in its Preamble that:

> "neither the South African common law, nor statutory law makes provision for mechanisms and procedures in terms of which employees or workers may without fear of reprisals, disclose information relating to suspected or alleged criminal or other irregular conduct by their employers whether in the public or private sector."

It states further that "every employer, employee and worker has a responsibility to disclose criminal and other irregular conduct in the workplace". Importantly every employer has the *responsibility* (not a *duty*, which would signify a legal obligation) to protect their employees and workers against reprisals as a result of having made a protected disclosure. The aim of the PDA is, therefore, to

> "create a culture which will facilitate the disclosure of information by employees and workers relating to criminal and other irregular conduct in the workplace in a responsible manner by providing comprehensive statutory guidelines and protection against any reprisals."[25]

The court in *Potgieter v Tubatse Ferrochrome* (*Tubatse*)[26] remarked as follows on the creation of a culture of disclosure:

> "The fostering of a culture of disclosure is a constitutional imperative as it is at the heart of the fundamental principles aimed at the achievement of a just society based on democratic values. This constitutional imperative is in compliance with South Africa's international obligations. Article 33 of […]

[18] (2003) 24 ILJ 1670 (LC).
[19] *CWU supra* par 24.
[20] 66 of 1995.
[21] 17 of 2011.
[22] 4 of 2000.
[23] 55 of 1998.
[24] 71 of 2008.
[25] Preamble of the PDA.
[26] (2014) 35 *ILJ* 2419 (LAC).

> UNCAC enjoins party states to put appropriate measures in place 'to provide protection against any unjustified treatment for any person who reports in good faith and on reasonable grounds to the competent authorities any facts concerning offences established in accordance with that convention."[27]

But how will a culture of disclosure be fostered? It is often seen as disloyalty towards the employer or the group to report irregularities. For example, cultures in Asia place great emphasis on group cohesion and brotherhood, and less on individualism. In these countries, employees will often not be in favour of whistle-blowing.[28] In contrast, in the USA, there is a strong focus on individualism, and employees are more likely to blow the whistle. In South Africa, whistle-blowers may wrongly be viewed as "*impimpis*", informants used by the secret police during apartheid.[29] Research has indicated that employees with nonconformist, proactive personalities are more likely to blow the whistle.[30] Open discussions about the value to organisations of critical thinking and of employees pointing out weaknesses may encourage employees to report wrongdoing. They would then not feel that they are being disloyal but that they are, in fact, assisting in improving transparency and ethical behaviour that would be beneficial to the organisation and the country.[31]

2 1 2 Protection provided by the PDA

The PDA protects whistle-blowers in a labour-law context against specific forms of harm (termed "occupational detriments") for making a protected disclosure. The Act provides that no employee or worker may be subjected to any occupational detriment by their employer on account of, or partly on account of, making a protected disclosure.[32] Consequently, "[w]here an employer, under the express or implied authority or with the knowledge of a client, subjects an employee or worker to an occupational detriment, both the employer and the client are jointly and severally liable".[33] Unlike the position in some countries such as Canada, where very limited protection is offered to private sector employees,[34] the PDA does not distinguish between public and private sector employees who blow the whistle.

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27 *Tubatse supra* par 14.

28 Irawanto and Novianti "Exploring the Nature of Whistleblowing in Organizations in Asia: An Integrative Perspective" 2020 7(11) *The Journal of Asian Finance, Economics and Business* 519; Landy "Corporate Whistleblowing Meets Culture Clash in Asia" (11 January 2018) https://asia.nikkei.com/Business/Corporate-whistleblowing-meets-culture-clash-in-Asia (accessed 2023-02-28).

29 Pather "Impimpi Accusations Are 'Reckless'" (22 February 2019) https://mg.co.za/article/2019-02-22-00-impimpi-accusations-are-reckless/ (accessed 2023-02-10).

30 Dungan *et al* 2015 *Current Opinion in Psychology* 131.

31 *Ibid.*

32 S 3 of the PDA.

33 S 3A of the PDA. This section makes provision for the protection of workers engaged through an agency.

34 Vatanshi "Whistleblowing in Canada: A Call for Enhanced Private Sector Protection" 2019 9(1) *Western Journal Legal Studies* 4.

The rest of this section discusses the meaning of the terms "employee" and "worker", "disclosure", "occupational detriment", and "protected disclosure".

2 1 3 *The meaning of "employee" and "worker"*

"Employee" is defined in the same way as in other labour statutes, except that former employees are also included:

> "(*a*) any person, excluding an independent contractor, who works *or worked* [emphasis added] for another person or the State, and who receives or received, or who is entitled to receive, any remuneration; and
> (*b*) any other person who in any manner assists or assisted in carrying on or conducting or conducted the business of an employer."[35]

The definition of "worker" was added to the PDA by the Protected Disclosures Amendment Act (PDAA)[36] and is defined widely to include persons who in any manner assist an employer or client in conducting the business of such an employer or client. It includes independent contractors, consultants, agents and persons who render services through a temporary employment service.[37] The lack of an employment contract will thus not have the effect that these persons connected to the workplace are not protected. However, other persons who could have important information about wrongdoing, such as shareholders, non-executive directors, suppliers, applicants, and volunteers, are not included. Labour law protection cannot apply to these persons, but legislation could protect them against detriment such as harm to their reputation, criminal and civil liability, and disclosure of their identity.[38] There is no definition of whistle-blowing or of a whistle-blower in the PDA.

2 1 4 *The meaning of "disclosure"*

The PDA defines a disclosure as "any disclosure of information regarding any conduct of an employer, or an employee of that employer, made by any employee who has reason to believe that the information concerned shows or tends to show one or more of the following": a criminal offence; a miscarriage of justice; endangerment of the health or safety of persons; damage to the environment; unfair discrimination and a failure to comply with a legal obligation or deliberate concealment of any of these matters. Such types of conduct are termed "improprieties".

Regarding the interpretation of the listed improprieties, the Labour Court in *Van Alphen v Denel Metall Denel Munition* (*Van Alphen*)[39] held that accusations by an employee that managers in a certain department did not deal with customer complaints, and that the department was in chaos, did

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[35] S 1 of the PDA.

[36] 5 of 2017.

[37] See the definition section of the PDA.

[38] See Transparency International "Best Practice Guide for Whistleblowing Protection" (1 March 2018) https://www.transparency.org/en/publications/best-practice-guide-for-whistleblowing-legislation (accessed 2023-02-03) 11.

[39] (2013) 34 *ILJ* 2484 (LC).

not amount to a disclosure in terms of the PDA. The reason is that the relevant conduct did not point to criminal conduct or failure to comply with a legal obligation.[40] In addition, the court in *Nxumalo v Minister of Correctional Services* (*Nxumalo*)[41] did not regard an employee's allegations that he was transferred because of the pressure on officials by an influential prisoner as falling within the types of misconduct or criminal act that would constitute a disclosure.[42]

Could information previously known to the employer still qualify as a disclosure? In *City of Tshwane Metropolitan Municipality v Engineering Council of South Africa* (*Tshwane*),[43] the employer alleged that because it had previous knowledge of improprieties, a report by an employee about these matters did not amount to a disclosure. The Supreme Court of Appeal held that it would undermine the whole purpose of the PDA if a culpable employer could argue that information is not disclosure if it had previous knowledge of its own improprieties.[44] In *Tanda v Member of Executive Council, Department of Health* (*Tanda*),[45] the court held that there is no general rule that an employee's disclosure in fulfilling their duties could not constitute a protected disclosure.[46]

2 1 5 Requirements for protection depending on the identity of the recipient of the disclosure

The Labour Court in *Tshishonga LC* described the different requirements for protection, depending on the identity of the recipient, as follows:

> "The tests are graduated proportionately to the risks of making disclosure. Thus the lowest threshold is set for disclosures to a legal adviser. Higher standards have to be met once the disclosure goes beyond the employer. The most stringent requirements have to be met if the disclosure is made public or to bodies that are not prescribed, for example the media."[47]

In all disclosures, the employee must have reason to believe that the information shows or tends to show that an impropriety took place. An employee may make a disclosure to a legal adviser[48] in the course of seeking legal advice with no further requirements for protection.[49] A disclosure to the whistle-blower's employer will be protected, but only if it was made in good faith and according to any procedure required, by the employer or someone appointed by the employer, for such disclosure.[50] The

[40] *Van Alphen supra* par 39.
[41] (2016) 37 *ILJ* 177 (LC).
[42] *Nxumalo supra* par 20.
[43] 2010 (2) SA 333 (SCA).
[44] *Tshwane supra* par 47.
[45] (2022) 43 *ILJ* 2601 (LC).
[46] *Tanda supra* par 18.
[47] *Tshishonga LC supra* par 198.
[48] S 5 of the PDA. This could include a trade union representative.
[49] In *Randles v Chemical Specialities* (2011) 32 *ILJ* 1397 (LC) par 22(ii), the court held that s 5 provides protection to a person making a disclosure to a legal adviser, but not to the legal adviser making a disclosure.
[50] S 6 of the PDA.

employer must authorise rules for such a disclosure and communicate them to employees.[51] However, there is no penalty for employers who do not adopt rules for reporting.

A disclosure by a whistle-blower will be further protected if made in good faith to a member of the Cabinet (the relevant minister) or a Member of the Executive Council (MEC) of a province, if these bodies have appointed the whistle-blower's employer (whether an individual or body), or if the employer is an organ of state within the area of responsibility of the minister or MEC.[52]

A fourth category of disclosure includes those made to certain public bodies such as the Public Protector, the South African Human Rights Commission, the Commission for Gender Equality, the Auditor-General of South Africa (AGSA), or any other body dealing with the relevant conduct. Reports to these so-called section 8 bodies must also be made in good faith, but there are two additional requirements – namely, that the whistle-blower must reasonably believe that the impropriety falls within the matters that are ordinarily dealt with by these bodies (financial irregularities should, for instance, be reported to AGSA) and that the information be substantially true.[53] It could be difficult for a whistle-blower to establish which body would be the appropriate authority and what the standard is for information to be substantially true. In this regard, Transparency International criticises the extra requirements for disclosures to authorities, and recommends that no extra burden be set over and above those for disclosures to employers, since there may be many valid reasons for a worker to prefer to make the disclosure to authorities.[54]

The threshold for protection is set at the highest level for a so-called general disclosure in terms of section 9.[55] This is when the disclosure is made to the public, a journalist, or other bodies or individuals not mentioned in sections 6–8 of the PDA. Such a disclosure must be made in good faith, the employee or worker must reasonably believe that the disclosure is substantially true, and the employee must not make the disclosure for personal gain. Furthermore, at least one of the following must also apply:

- the employee must have reason to believe that they will suffer an occupational detriment if the disclosure is made to their employer;
- no person or body is prescribed in section 8 for the particular impropriety;
- the employee or worker has reason to believe that the disclosure will be destroyed or concealed if made to the employer;
- the disclosure has previously been made to the employer (and the prescribed procedure was followed) or to a section 8 body, and no action was taken within a reasonable time; and

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[51] S 6(2) of the PDA.

[52] S 7 of the PDA.

[53] S 8 of the PDA.

[54] Transparency International https://www.transparency.org/en/publications/best-practice-guide-for-whistleblowing-legislation 11.

[55] S 9 of the PDA.

- the impropriety was of an exceptionally serious nature.[56]

Moreover, it must be reasonable to make the disclosure in all circumstances of the case. To establish reasonableness, consideration must be given *inter alia* to:

- the identity of the person to whom it has been made;
- the seriousness of the impropriety;
- the likelihood that the impropriety will continue;
- whether the disclosure is in breach of a duty of confidentiality of the employer towards another person;
- any action that the employer or body has taken or may reasonably be expected to take in respect of a previous disclosure;
- whether the employee complied with the procedure prescribed by the employer for such a disclosure; and
- whether it is made in the public interest.[57]

The high threshold with myriad requirements is such that whistle-blowers may have difficulty comprehending exactly what is needed before they can be protected. Regarding the prohibition on making a general disclosure for personal gain, Transparency International recommends that:

> "if appropriate within the national context, whistle-blowers may receive a portion of any funds recovered or fines levied as a result of their disclosure. Other rewards or acknowledgements may include public recognition or awards (if agreeable to the whistle-blower), employment promotion, or an official apology for retribution."[58]

2 1 6 Duty to inform the whistle-blower

The PDAA amended the PDA so as to require employers and other bodies to acknowledge receipt of the disclosure and take a decision about it within 21 days, or refer it to another body. In the case of the latter, the person who made the disclosure must be notified.[59] The employee or worker must further be informed if the matter will be investigated and, if not, the reasons for declining to investigate. The outcome of the investigation must also be communicated to the whistle-blower within certain time frames.[60] This amendment is an improvement; previously, an employer or body could merely ignore the disclosure, and did not have to give feedback to the employee who made the disclosure. However, if the disclosure is not properly investigated, there is hardly anything that a whistle-blower can do because there is no duty on the receiver of a disclosure to report to any authority on the outcome of the investigation.

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56 S 9(2) of the PDA.
57 S 9(3) of the PDA.
58 Transparency International, principle 23 https://www.transparency.org/en/publications/best-practice-guide-for-whistleblowing-legislation 56.
59 S 3B(1) of the PDA.
60 S 3B(3)–(4) of the PDA.

2 1 7 *Meaning of good faith and reasonable belief*

In order to be protected in terms of the PDA, the disclosure of information must be made in good faith and with the reasonable belief that the information shows or tends to show that an impropriety took place. The good faith requirement applies to all disclosures (except for disclosures to a legal adviser). The case law discussed below indicates that courts often differ on the meaning of "good faith".[61]

The Labour Appeal Court (LAC) overturned the decision of the Labour Court dealing with a general protected disclosure in *Tubatse*, and held that a disclosure can still be regarded as being made in good faith even if the employee previously had the information but only disclosed it after his dismissal.[62] The LAC likewise overturned the Labour Court decision in *Baxter v Minister of Justice and Correctional Services* (*Baxter*),[63] and held that even if a disclosure were made partly with an ulterior motive, it could still be made in good faith.[64] Furthermore, in *Radebe v Premier, Free State Province* (*Radebe*),[65] the decision of the Labour Court was overturned on the ground that,

> "the nature of the information and meaning of that term [good faith] as propounded by the Labour Court is rather too narrow and introduces an element of truth and verification. It presupposes factual accuracy of the allegations made in a disclosure. The PDA does not contain such an element. The phrase 'tends to show' in section 1 cannot be equated to 'show'."[66]

The LAC in *Radebe* explained the relationship between the meaning of the terms "information", "good faith", "reasonably believe", and "substantially true" as follows: if the employee believes that the information is true, it will fortify the reasonableness of their belief, from which, in turn, their *bona fides* could be inferred.[67] The court in *John v Afrox Oxygen Ltd* (*Afrox Oxygen*)[68] further emphasised that the inquiry is not about the reasonableness of the information but about the reasonableness of the belief. Therefore, the requirement of "reasonable belief" does not entail demonstrating the correctness of the information since a belief can still be reasonable even if the information turns out to be inaccurate.[69]

This was confirmed in *State Information Technology Agency (Pty) Ltd v Sekgobela* (*Sekgobela*),[70] where the court clarified that whether the belief held by a whistle-blower is reasonable is a question of fact and the facts need not be true.[71]

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61 See the *Sekgobela supra*.
62 *Tubatse supra* par 35–36.
63 (2020) 41 *ILJ* 2553 (LAC) par 33.
64 *Baxter supra* par 83.
65 (2012) 33 *ILJ* 2353 (LAC).
66 *Radebe supra* par 33.
67 *Radebe supra* par 35.
68 (2018) 39 *ILJ* 128 (LAC).
69 *Afrox Oxygen supra* par 26.
70 *Supra*.
71 *Sekgobela supra* par 32.

The Labour Court in *Tshishonga LC* remarked as follows:

> "The standard of quality that the information must meet is pitched no higher than requiring the impropriety to be 'likely'. It is enough if the information 'tends to show' an impropriety. That anticipates the possibility that no impropriety might ever be committed or proven eventually. If the suspects are cleared, the protection will not be lost. 'Likely' and 'tends to show' must therefore mean that the impropriety can be less than a probability but must be more than a mere possibility."[72]

This analysis was followed in *Chowan v Associated Motor Holdings (Pty) Ltd* (*Chowan*).[73] Here the court added that the test of whether a person making a disclosure has reason to believe that information disclosed tends to show unfair discrimination (the conduct in issue in this case) is whether the person subjectively holds the belief, and whether the belief is objectively reasonable.[74]

The Labour Court in *CWU* held that disclosures made deliberately to harass and embarrass an employer are unlikely to be regarded as being made in good faith.[75] However, the court in *Tshishonga LC* remarked that "[a] malicious motive cannot disqualify the disclosure if the information is solid. If it did, the unwelcome consequence would be that a disclosure would be unprotected even if it benefits society".[76] This comes close to saying that the motive for a disclosure should not be considered in deciding whether it is protected.

From the above discussion, it is clear that the Labour Court and the LAC have often been in disagreement about the meaning of good faith and "reason to believe that the information shows or tends to show that there was an impropriety" and that courts have often been at pains to explain these concepts. This demonstrates just how difficult it may be for potential whistle-blowers (especially those without legal advice) to establish whether the disclosure that they intend to make will be regarded as being made in good faith.

The Minister of Justice and Constitutional Development issued Practical Guidelines for Employees in terms of section 10(4)(*a*) of the PDA,[77] which explain that good faith means that "the employee must act in a responsible and honest manner without any motives to gain any personal advantages from making the disclosure". In light of the case law discussed above, this explanation is simplistic and not helpful to would-be whistle-blowers.

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72 *Tshishonga supra* par 180 [footnotes omitted].
73 (2018) 39 *ILJ* 1523 (GJ).
74 *Chowan supra* par 47.
75 *CWU supra* par 21.
76 *Tshishonga supra* par 197.
77 GN702 in *GG* 34572 of 2011-08-31.

2 1 8 *The meaning of an occupational detriment*

The PDA provides that no employee or worker may be subjected to any occupational detriment on account of, or partly on account of, making a protected disclosure.[78] An occupational detriment includes:

- disciplinary action;
- a suspension, demotion, or denied promotion;
- harassment or intimidation;
- transfer against the will of the employee;
- refusal of transfer or refusal of promotion;
- a condition of employment or retirement altered to the employee's disadvantage;
- refusal of a reference or supplying an adverse reference;
- threats pertaining to the above; and
- being subjected to a civil claim for the alleged breach of a duty of confidentiality or being otherwise adversely affected in employment, profession or office, employment opportunities or work security.[79]

The final phrase is sufficiently wide to include other detrimental actions, but the protection would be enhanced if physical and psychological injuries were explicitly included. The listed types of detriment are all employment-based and do not cover detriment that could be suffered by "new" categories of persons now included in the term "worker" in the PDA, such as independent contractors, consultants and agents. One would expect that blacklisting and early termination of a contract, *inter alia*, should be included to protect these groups.

2 1 9 *General protected disclosures and the public interest*

The case of *Tshishonga LC*[80] is typical of what whistle-blowers who report to bodies other than their employer must often endure. Tshishonga was suspended and subjected to a disciplinary hearing on charges of misconduct after having made a disclosure of corruption by the Minister of Justice, Penuell Maduna, regarding nepotism in the appointment of liquidators. The employee reported to the Director-General of Justice and to section 8 bodies – *inter alia*, the Public Protector and AGSA (as required by section 9) – but none of these bodies took the matter further. The Minister of Justice, who was implicated in Tshishonga's disclosure, called him a "dunderhead" and hopelessly incompetent on national television.[81] He was humiliated as a result of the remarks on television, had to pay for trauma counselling, and although he was paid during his suspension, he was, in the words of the court, "denied the dignity of employment".[82] The disclosure Tshishonga

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[78] S 3 of the PDA.
[79] S 1(vi) of the PDA.
[80] 2007 (4) SA 135 (LC).
[81] *Tshishonga LC supra* par 109.
[82] *Tshishonga LC supra* par 197.

made to an investigative journalist was regarded as reasonable and thus protected because it was in the public interest, on the ground that the public service and public officials were involved.[83]

In the *Tshwane* judgment, an electrical engineer responsible for safe electrical supply systems reported that municipal officers were appointing electrical system operators without the necessary skills, which could lead to a serious safety hazard.[84] He sent a letter relating to the impropriety to high-ranking officials in the electricity department and copied the letter to the Department of Labour and the Engineering Council. He was suspended and disciplinary proceedings were commenced against him. Because the impropriety was exceptionally serious and in the public interest, the court found that this was a protected disclosure.[85]

In *Theron v Minister of Correctional Services* (*Theron*),[86] Dr Theron raised the issue of inadequate health care for prisoners at Pollsmoor Prison many times with the Department of Correctional Services and the Department of Health. When there was no response, he eventually raised his concern with the Office of the Inspecting Judge of Prisons, as well as the Portfolio Committee on Correctional Services of Parliament. Dr Theron was then charged with misconduct for contacting the judge and portfolio committee without informing his superiors. The court regarded his transfer (without his consent) to a clinic as a demotion on account of having made a protected disclosure. The court further considered a lack of medical care for prisoners as being exceptionally serious and as a disclosure in the public interest.[87]

In *Sekgobela*, the employee reported irregularities in the procurement process to the CEO, and when nothing was done, he reported them to the Public Protector. The employer took away some of his responsibilities, suspended him, called him into a hearing based on alleged incompatibility with colleagues, and he was eventually dismissed. The court found that the disclosure was in the public interest[88] and his dismissal was, therefore, automatically unfair.[89]

The above discussion highlights only a few of many cases of the detriment that whistle-blowers suffer. It indicates that despite the enactment of the PDA, and despite the fact that their disclosures were found to be protected, whistle-blowers often suffer abuse, psychological injury, dismissal, and other forms of unfair treatment in the workplace. They should be provided with protection during the whistle-blowing process, starting with legal advice on whether a disclosure would be protected, and including support during disciplinary hearings and in court.

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[83] Tshishonga LC *supra* par 263.
[84] *Tshwane supra* par 50.
[85] *Ibid.*
[86] (2008) 29 *ILJ* 1275 (LC).
[87] *Theron supra* par 10 and 13.
[88] *Sekgobela supra* par 34.
[89] *Sekgobela supra* par 25.

2 1 10 A duty to blow the whistle?

In terms of the Preamble to the PDA, employees have a responsibility to report on criminal and other irregular conduct.[90] This responsibility may, however, conflict with employees' common-law duty of good faith, which includes a duty of confidentiality and not bringing the name of their employer into disrepute.[91] Nevertheless, this duty is not absolute in the case of wrongdoing by the employer.[92]

Public servants are obligated to report corruption, fraud, nepotism and other offences that are prejudicial to the public interest.[93] The duty of a company director to act in good faith, and in the best interests of the company, in terms of section 76(3) of the Companies Act,[94] implies that a director is duty bound to report fraud, corruption and so forth, as such activities would be detrimental to the company.

The Prevention and Combating of Corrupt Activities Act (PCCAA)[95] imposes a duty on a wide range of persons in positions of authority (especially in the public service) to report corrupt transactions involving R100 000 or more to a police official.[96] Persons with such a duty include directors of companies, partners in a partnership and a person responsible for the overall management of a business.[97] Any person who fails to comply with such a duty is guilty of a criminal offence.[98]

2 1 11 Dispute resolution and remedies

An employee subjected to an occupational detriment may approach the Labour Court or the High Court for a remedy,[99] instead of a council or the Commission for Conciliation, Mediation and Arbitration, as in most other instances of unfair treatment in the workplace.[100] The Labour Court may make an order that is just and equitable, which may include an order for reinstatement or re-employment or payment of compensation and payment of actual damages.[101] An employee may also apply for urgent interim relief[102] to restrain the employer from subjecting them to a disciplinary enquiry.[103] An employee alleging that an inquiry (regarding misconduct or incapacity)

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[90] *Tshishonga LC supra* par 169.

[91] Garbers, Le Roux and Strydom (eds) *The New Essential Labour Law Handbook* 7ed (2019) 39.

[92] *Tshishonga LC supra* par 172.

[93] Cl 4.10 of the Public Service Regulations GNR 825 in *GG* 5947 of 1997-06-22.

[94] 71 of 2008.

[95] 12 of 2004.

[96] S 34(1)(*b*) of the PCCAA.

[97] S 34 (4) of the PCCAA.

[98] S 34(2) of the PCCAA.

[99] S 4(1) of the PDA. See *Young v Coega Development Corporation (Pty) Ltd (1)* 2009 (6) SA 118 (ECP).

[100] S 191 of the LRA.

[101] S 4(1B) of the PDA read with ss 158(1)(*a*)(vi) and 193 of the LRA.

[102] S 158(1)(*a*)(i) of the LRA.

[103] See *The Independent Municipal and Allied Trade Union obo Gloria Ngxila-Radebe v and Ekhurleni Metropolitan Municipality* [2010] ZALC 289.

contravenes the PDA may require an arbitrator to conduct the inquiry.[104] This provides important protection to employees. If the charges are without merit, brought by way of retaliation against an employee who has made a protected disclosure, an objective arbitrator would ensure a fair outcome.

A dismissal on account of having made a protected disclosure will be deemed to be an automatically unfair dismissal in terms of section 187(1)(*h*) of the LRA, and other occupational detriments could constitute unfair labour practices in terms of section 186(2)(*d*).[105] Although section 191(13)(*a*) of the LRA provides that such cases may be referred to the Labour Court, the court in *Van Alphen* remarked that "it seems to me that a referral to conciliation is still envisaged as a first step".[106]

The employer must further, on request, if it is reasonably possible or practicable, transfer the employee if after having made a protected disclosure they reasonably believe that they will be adversely affected;[107] the terms and conditions of the transfer may not be less favourable than the applicable terms and conditions before the transfer unless the employee consents in writing.[108]

The PDA does not exclude civil remedies, as illustrated in the *Chowan* judgment. Utterances amounting to racial and gender discrimination about Ms Chowan provided the basis for a delictual remedy being awarded to her; she had been dismissed for alleged incapacity in the form of incompatibility after a disclosure of these insults. Regarding a remedy, the court ordered payment of patrimonial damages for unlawful termination of her employment (Aquilian damages) as well as damages for impairment of her dignity, based on the *actio iniuriarum*.[109]

In *Tshishonga*, the LAC likewise distinguished between patrimonial and non-patrimonial loss.[110]

As is evident in the cases discussed above, the PDA only grants relief after the fact and does not protect the whistle-blower during the disciplinary process, unless the employee applies for an interim order to restrain the employer from subjecting them to a disciplinary hearing, or the employee applies for an arbitrator to preside at the disciplinary hearing. In many cases, whistle-blowers may feel that the remedy ordered is a Pyrrhic victory.[111] Tshishonga had to pay his own legal costs at the disciplinary hearing, at the Labour Court and the LAC. Some whistle-blowers may not be in a position to pay for legal advice and representation. The court in *Tshishonga LAC*, in

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[104] S 188(A)(11) of the LRA. See *Nxele v National Commissioner: Department of Correctional Services* [2018] 39 *ILJ* 1799 (LC) and *Tsibani v Estate Agency Affairs Board* [2021] JOL 51625 (LC).

[105] S 4(2) of the PDA.

[106] *Van Alphen supra* par 48.

[107] S 4(3) of the PDA.

[108] S 4(4) of the PDA.

[109] *Chowan supra* par 71.

[110] See a discussion of the remedy awarded in this case by Botha and Sieger "*Minister for Justice and Constitutional Development v Tshishonga* 2009 9 BLLR 862 (LAC): Just and Equitable Compensation for Non-Patrimonial Loss" 2011 44(2) *De Jure* 30; see also *Tshishonga supra* par 109.

[111] *Tshishonga supra* par 175.

deciding about the award of legal costs to the whistle-blower, remarked as follows:

> "Legal representation is a necessity in cases under the PDA not least because employees need to test their beliefs and the information they intend to disclose against the objective, independent and trained mind of a lawyer."[112]

In *Tubatse*, the argument was made that reinstatement would be inappropriate in light of the sensitive information that was divulged. Here the court remarked that if it is accepted that the disclosure rendered the employment relationship intolerable, it would "seriously erode the very protection that the abovementioned legal framework seeks to grant to whistle-blowers".[113]

2 1 12 A causal link and the onus of proof

The PDA requires that the occupational detriment should be "on account of or *partly* on account of a protected disclosure being made".[114] A causal link must thus be established between the protected disclosure and the occupational detriment. In terms of sections 186(2)(*d*) and 187(1)(*h*) of the LRA, an occupational detriment must be "on account of having made a protected disclosure". The word "partly" is excluded in the LRA. In *TSB Sugar RSA Ltd v Dorey* (*TSB Sugar*),[115] the LAC applied the formulation in the PDA in terms of which it is sufficient if the protected disclosure was but one of the reasons for the dismissal,[116] which would be to the advantage of whistle-blowers.

When considering the onus of proof, there are no special provisions for whistle-blowers in the PDA or the LRA. The LRA provides that dismissal of an employee on account of the employee having made a protected disclosure is an automatically unfair dismissal.[117] According to the LAC in *Kroukam v SA Airlink (Pty) Limited* (*Kroukam*),[118] the employee will have to raise sufficient evidence that there is a credible possibility that an automatically unfair dismissal took place.[119] The employer will then have to prove that the reason for the dismissal was not one of those grounds for an automatically unfair dismissal in section 187.[120] In deciding whether there was a causal link, the court in *Kroukam* also held that if there is more than one possible reason, it must be established which was the dominant or most likely reason for the dismissal.[121]

If the whistle-blower had not been dismissed, but was subjected to an unfair labour practice in terms of section 186(2)(*d*), the onus to prove that

[112] *Tshishonga supra* par 187

[113] *Tubatse supra* par 31.

[114] S 3 of the PDA.

[115] (2019) 40 *ILJ* 1224 (LAC).

[116] *TSB Sugar supra* par 95.

[117] S 187(1)(*h*) of the LRA.

[118] [2005] ZALAC 5.

[119] *Kroukam supra* par 28.

[120] *Kroukam supra* par 91.

[121] *Ibid.*

there was a causal link rests on the employee, since there is no indication in the LRA on whom the onus should rest regarding unfair labour practices. Consequently, the rule that "he who alleges has to prove" will be followed.[122] Bearing the burden of proof could be extremely onerous because employees will often not have access to relevant information. Transparency International recommends that the onus should rather rest on the employer so that the whistle-blower only has to prove that they made a disclosure and afterwards suffered an occupational detriment.[123]

2 1 13 Non-disclosure clauses and offences

To protect employers against false reports, section 9B of the PDA provides that whistle-blowers who intentionally disclose false information, knowing that the information is false, or who ought reasonably to have known that it is false, intending to cause harm and did cause harm, are guilty of an offence. If convicted, such a whistle-blower may be sentenced to pay a fine or imprisonment for two years or both.[124] The court will have to apply the phrase "ought reasonably to have known" to the facts of each case. Potential whistle-blowers could be afraid that a court may find that they should have known that the information was false. There are no concomitant provisions regarding sanctions to be imposed on employers or co-employees who make false allegations against a whistle-blower,[125] although the discussion of the case law above illustrates that employers often retaliate by subjecting whistle-blowers to proceedings regarding alleged disciplinary offences and poor work performance. Nortje remarks that "the criminalisation of false disclosures might nullify the effect that whistleblowing has on the prevention and combating of corruption in South Africa".[126]

A court may find that an employee making a protected disclosure concerning a criminal act, or a substantial contravention of the law or failure to comply with the law, is not liable to any civil, criminal or disciplinary proceedings if the disclosure is prohibited by another law or contract requiring the employee or worker to maintain confidentiality.[127] This provision refers *inter alia* to non-disclosure (anti-gagging) clauses in contracts. It is notable that a whistle-blower will not have immunity in all cases of having made a protected disclosure – only regarding reports on criminal activities in cases of a "substantial" contravention of the law. What constitutes a substantial contravention of the law is by no means clear and could have the effect that employees making a disclosure are in the dark about whether they will be protected until a court in each case decides about the meaning of this phrase.

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[122] See *Shoba v Commission for Conciliation, Mediation and Arbitration* [2021] ZALCJHB 161 par 12.

[123] Transparency International (March 2018) https://transparency.eu/wp-content/uploads/2018/03/2018_GuideForWhistleblowingLegislation_EN.pdf 55.

[124] S 9B of the PDA.

[125] Transparency International 28 principle 29.

[126] Nortje "Section 9B of the Protected Disclosures Amendment Act 2017" 2018 *Journal of Anti-Corruption Law* 212.

[127] S 9A of the PDA.

2 2 Protection for whistle-blowers outside the PDA

2 2 1 Companies Act[128]

In addition to the protection provided by the PDA, section 159 of the Companies Act provides protection for persons making reports on contraventions of the Companies Act and related legislation, *inter alia*, to the Companies and Intellectual Property Commission, the Companies Tribunal, the Takeover Regulation Panel, a regulatory authority, legal advisor, director, board of the company, company secretary and an auditor.[129] As with the PDA, the person must make the disclosure in good faith and must reasonably believe that the information shows or tends to show that a company, external company, director or official of a company contravened a law, failed to comply with a statutory obligation, unfairly discriminated against someone, endangered the health and safety of persons or the environment, or contravened legislation that would harm the company.[130] A director, shareholder and trade union representing an employee who makes a protected disclosure will be immune from civil and criminal liability and administrative liability.[131]

The person making the disclosure will be entitled to damages if another person intentionally causes detriment to them or threatens to cause such detriment. In contrast to the PDA, there is a presumption in the Companies Act that this conduct occurred as a result of the disclosure being made.[132]

A public or state-owned company must maintain a system to receive disclosures confidentially and to act on them. The availability of such a system must be made known to the category of persons who would be protected in the case of whistle-blowing.[133]

The categories of persons in the definition of "worker" not found in the PDA, the reversal of the burden of proof and the requirement for establishing a confidential system for receiving internal reports should inform amendments to the PDA.

2 2 2 Protection from Harassment Act

The Harassment Act provides protection to a person, or a related person, against different forms of harassment, among other things: following, watching, stalking, and unwanted communication through different means.[134] A complainant can obtain a protection order against the harasser, and if they breach the order, the harasser could be arrested.[135] A protection order may provide a measure of physical protection to whistle-blowers.

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[128] 71 of 2008.
[129] S 159(3)(*a*) of the Companies Act.
[130] S 159(3(*b*) of the Companies Act.
[131] S 159(4) of the Companies Act.
[132] S 159(6) of the Companies Act.
[133] S 159(7)(*a*) and (7)(*b*) of the Companies Act.
[134] S 1 of the Harassment Act.
[135] S 9 of the Harassment Act.

2 2 3 *Statutes that protect against discrimination*

Whistle-blowers may rely on PEPUDA or the EEA for protection if they are subjected to discrimination on prohibited grounds. The definition of "occupational detriment" in the PDA includes being subject to harassment,[136] which is prohibited in both statutes on certain grounds.

2 2 4 *Code of Good Practice on the Prevention and Elimination of Harassment in the Workplace 2022*

In accordance with the International Labour Organization's Violence and Harassment Convention 190 of 2019, which was ratified by South Africa in December 2021, governments and employers have a duty to protect workers in the world of work. The Code of Good Practice on the Prevention and Elimination of Harassment in the Workplace 2022 (Harassment Code 2022),[137] which gives effect to the Convention, enjoins employers to ensure a safe psychosocial climate to prevent harassment.[138] It follows that employers should ensure that there are safe reporting channels to protect the identity of the whistle-blower, and a culture that encourages whistle-blowing and disciplining of harassers. The Harassment Code 2022 briefly mentions the PDA as one of the statutes protecting employees against harassment.[139]

Although the different types of protection available in South African law for whistle-blowers discussed above seem to be extensive, such protection is not integrated, and as case law indicates, whistle-blowers often face severe consequences after having made a disclosure. The discussion has pointed to several shortcomings, which are addressed in the conclusion and recommendations after discussing UNCAC, the EDW, legislation in Ireland and the US, and proposed legislation in the UK.

3 UNCAC

Although several international instruments deal with corruption, UNCAC is the only legally binding universal anti-corruption instrument.[140] The purpose of this Convention is to "call for the penalization and criminalization of the most prevalent forms of corruption in both the public and the private sectors".[141] Each state party is obliged to establish anti-corruption bodies that can receive reports on corruption and which should also make provision for anonymous reporting.[142]

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[136] Part (*f*) of the definition of "occupational detriment" in the PDA.

[137] GN in *GG* 46056 of 2022-03-18.

[138] Cl 1, 8 and 9 of the Harassment Code 2022.

[139] Cl 7.6 of the Harassment Code 2022.

[140] United Nations Convention Against Corruption 2349 UNTS 41 (2003). Adopted: 31/10/2003; EIF: 14/12/2005.

[141] Foreword to UNCAC by the Secretary-General of the United Nations.

[142] Art 13(2) of UNCAC.

Furthermore, witnesses and experts who give evidence regarding offences in terms of UNCAC (such as bribery of public officials and embezzlement by public officials,[143] as well as such wrongdoing in the private sector)[144] and their family members are to be provided with protection against retaliation and intimidation.[145] Countries must establish procedures for physically protecting and relocating these persons "to the extent to which it is necessary and feasible".[146] Information about their identity or whereabouts should not be disclosed, or if disclosed, the information should be limited.[147] Countries are further enjoined to make provision for evidentiary rules protecting the safety of witnesses, such as permitting them to give testimony by means of communication technology.[148] South Africa ratified the instrument on 22 November 2022,[149] but no specific measures have been taken to ensure the safety of whistle-blowers regarding confidentiality and the physical protection of whistle-blowers and their families.

The Zondo Commission recommended that legislation be adopted to afford UNCAC protection to persons making disclosures about corruption in public procurement.[150] The Zondo Commission also recommended that protection for these persons should be provided even without request for protection, if, on the assessment of a designated authority, the informant or their family might be in danger.[151]

4 THE EUROPEAN DIRECTIVE ON WHISTLE-BLOWING

Owing to limited space, this section only briefly refers to the most salient provisions in the EDW, which could inform improved protection for whistle-blowers in South Africa.

A wide group of persons entitled to protection are included in the definition of "worker," including family members and colleagues of the whistle-blower.[152] The EDW requires member states to ensure that whistle-blowers have support to access legal aid, assistance and counselling.[153] Member states are encouraged to provide financial assistance and psychological assistance to whistle-blowers.[154] Medical and psychiatric referrals are included in forms of retaliation that are prohibited.[155] Employers in both the public and private sectors with more than 50 employees are obliged to

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143 Art 15–17 of UNCAC.
144 Art 21–22 of UNCAC.
145 Art 32(1) of UNCAC.
146 Art 32(2)(*a*) of UNCAC.
147 Art 32(2)(*a*) of UNCAC.
148 Art 32(2)(*b*) of UNCAC.
149 United Nations Office on Drugs and Crime "Signature and Ratification Status" (21 November 2021) https://www.unodc.org/unodc/en/corruption/ratification-status.html (accessed 2023-01-20).
150 Zondo *Judicial Commission of Inquiry Into State Capture Report: Part 1* par 690.
151 Zondo *Judicial Commission of Inquiry Into State Capture Report: Part 1* par 563.
152 Art 38–42 of the EDW.
153 Art 20(1)(*a*)–(*c*) of the EDW.
154 Art 20(2)–(3) of the EDW.
155 Art 19 of the EDW.

establish confidential internal reporting channels,[156] and authorities are obliged to establish safe external reporting channels that safeguard the identity of the reporting person.[157] Penalties must be imposed on persons retaliating against whistle-blowers or hindering them from making a report.[158]

5 PROTECTION FOR WHISTLE-BLOWERS IN THE UK, IRELAND AND THE US

This section discusses protection for whistle-blowers in the UK and Ireland, focusing on the UK Protection for Whistleblowing Bill 27 HL (Bill 27) and the Irish Protected Disclosures (Amendment) Act 2022 (2022 PDAA). These two jurisdictions were chosen for comparison because Ireland's Protected Disclosures 14 of 2014, like South Africa's PDA, was based on the UK's Public Interest Disclosures Act 1998 (PIDA). These three countries thus share a common basis of legislation for the protection of whistle-blowers. In Ireland, the realisation that whistle-blower protection is inadequate led to extensive amendments to their PDA in 2022, while the UK, for the same reason, is in the process of debating a Bill in the House of Lords, which, if adopted, will differ radically from PIDA in its current form. South Africa could opt either to amend the PDA or adopt a new Act. Analysing the changes and proposed changes in these two jurisdictions could provide valuable guidance on the best way to protect whistle-blowers adequately in South Africa. Protection for whistle-blowers in the US is also discussed, focusing on the financial reward system for whistle-blowers.

5 1 Protection for whistle-blowers in the UK

Whistle-blowing scandals entailing cover-ups of reports of wrongdoing, and victimisation of whistle-blowers, in the UK (many of them regarding the National Health Service)[159] were clear indicators that the protection provided by PIDA was ineffective and needed to be amended or replaced. Since the South African PDA is based on PIDA, which was inserted as Part IVA in the Employment Relations Act 2004, most of the provisions will be similar and are not discussed except where there is significant divergence.

5 1 1 Good faith

The Enterprise and Regulatory Reform Act 2013 (ERRA) made important amendments to PIDA, which *inter alia* removed the requirement that a report must be made in good faith,[160] in order to focus more on the report than on the motive of the whistle-blower.[161] ERRA added another requirement –

[156] Art 9 of the EDW.

[157] Art 11 and 12 of the EDW.

[158] Art 23 of the EDW.

[159] All-Party Parliamentary Group: Whistleblowing "The Whistleblowing Bill" (April 2022) https://www.appgwhistleblowing.co.uk/ (accessed 2023-01-30).

[160] S 18 of ERRA.

[161] Ashton "15 Years of Whistleblowing Under the Public Interest Disclosures Act 1998: Are We Still Shooting the Messenger? 2015 44(1) *Industrial Law Journal* 51.

namely, only disclosures in the public interest would be protected[162] – to ensure that employees did not seek protection for personal grievances.[163]

Even though the good faith requirement was removed, the motivation for a whistle-blower making a report still plays a role, in that compensation for the detriment suffered can be limited to 25 per cent of what the amount would have been had the report been made in good faith.[164]

5 1 2 Shortcomings of PIDA

Some of the important findings of the report on whistle-blowing by the All-Party Parliamentary Group on the shortcomings of PIDA included that:[165]

- PIDA only provides compensation to whistle-blowers after they have suffered detriment – there is no immediate protection against retaliation;
- whistle-blowers who are not "workers"[166] are not protected;
- there is no mechanism to ensure that the issue raised by the whistle-blower will be addressed;
- claiming compensation for detriment at the Employment Tribunal (ET) is complex, costly and slow;
- whistle-blowers can often not afford legal representation; and
- there is no duty on public and private organisations to set up internal reporting mechanisms.[167]

5 1 3 The Whistleblowing Bill

The above shortcomings and others are addressed in Bill 27, which was introduced on 13 June 2022 in the House of Lords by Baroness Kramer as a private members' bill. The second reading took place on 2 December 2022. If adopted, Bill 27 will replace PIDA.

The Bill signals a fundamental change in the approach to the protection of whistle-blowers. The two most significant changes are that the Bill is not employment-related and that an Office of the Whistleblower (the Office) will be established. The principal duty of the Office is to protect whistle-blowers who have made protected disclosures and to have oversight of the process of whistle-blowing.[168]

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[162] S 43B of PIDA.

[163] To close the loophole created by *Parkins v Sodexho Ltd* [2002] IRLR 109, in which it was held that employees could be protected by PIDA when making a disclosure in a purely private dispute.

[164] S 49(6A) of PIDA.

[165] All Party Parliamentary Group: Whistleblowing "Whistleblowing: The Personal Cost of Doing the Right Thing and the Cost to Society of Ignoring It" (July 2019) https://www.pslhub.org/learn/culture/whistle-blowing/all-party-parliamentary-group-whistleblowing-the-personal-cost-of-doing-the-right-thing-and-the-cost-to-society-of-ignoring-it-july-2019-r711/ par 4.1 (accessed 2023-03-18).

[166] S 43K of PIDA.

[167] Protection for Whistleblowing Bill [HL] (HL Bill 27) (13 June 2022) https://bills.parliament.uk/publications/46929/documents/2009 (accessed 2023-03-15).

[168] Cl 4(2) of Bill 27.

A protected disclosure is defined as a disclosure of information made in the public interest to specified persons on specific matters. The disclosure can be made to the Office of the Whistleblower (although the Office will encourage whistle-blowers to refer concerns to appropriate authorities),[169] a relevant person, a person whom the reporting person reasonably believes is a relevant person, or a person to whom it is reasonable for the reporting person to make the report.[170]

A relevant person includes an employer, an employer's organisation, a regulator or public authority, an organisation with statutory obligations, or a person prescribed by the Secretary of State.[171] However, there is no longer any hierarchy of persons or bodies to whom whistle-blowers have to report to receive protection in terms of PIDA. Detriment is broadly defined as that which causes disadvantage, loss or harm to a person[172] – thus, not only detriment that workers could suffer.

There is, moreover, no longer a need to define "worker" as a category of persons who can make disclosures and be protected since the Bill is not employment-related. Whistle-blowers are defined as persons who have made, are making or intend to make a protected disclosure, or are perceived by a relevant person to have made, be making or intend to make a protected disclosure.[173] This means that anyone making a protected disclosure, including members of the public, could be protected, and even though someone has not yet made a report or is just perceived by a relevant person to be a whistle-blower, that person will also be protected against being subjected to detriment by a relevant person.[174]

Matters on which a whistle-blower may report within the confines of a protected disclosure are similar to matters in the South African PDA, but Bill 27 adds abuse of authority and mismanagement of public funds. Further matters may be prescribed in terms of the Bill in regulations made by the Secretary of State.[175]

The Office will refer reports by whistle-blowers to the relevant authority but may investigate the report if: the reporting person has no access to an accredited whistle-blowing scheme, or has a reasonable belief that they are being subjected to detriment; or there is a risk that the report will be destroyed or concealed; or there is a serious risk to the public.[176] The Office will establish rules for the administration of arrangements regarding whistle-blowing as well as minimum standards (including confidentiality and anonymity) for whistle-blowing policies adopted by relevant persons (including employers) and accreditation of such policies.[177]

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[169] Cl 4(4)(*a*) of Bill 27.
[170] Cl 1(3) of Bill 27.
[171] Cl 3(1) of Bill 27.
[172] Cl 3(4) of Bill 27.
[173] Cl 2 of Bill 27.
[174] *Ibid*.
[175] Cl 1(2) of Bill 27.
[176] Cl 7(2) of Bill 27.
[177] Cl 4(6) of Bill 27.

The Office will have oversight to ensure that reports by whistle-blowers are followed up and oversight regarding referrals of reports by relevant persons to other relevant regulatory bodies.[178] It will further monitor and enforce compliance with established standards,[179] prosecute offenders[180] and will be a point of contact for whistle-blowers where information, advice and support will be provided.[181] In an earlier version of Bill 27, the Office was empowered to:

- form and maintain a panel of accredited legal firms and advisory bodies to advise and support whistle-blowers; and
- maintain a fund to support whistle-blowers.[182]

Compared to the current Bill, this earlier version is more comprehensive and would be more effective in protecting whistle-blowers.

The Office has the following powers of investigation.[183] It may issue information notices to persons having information about a specific issue, and providing the information will be compulsory.[184] The Office may further issue "action notices" to relevant persons not complying with their duties, such as failing to keep reports of whistle-blowers confidential[185] and failing to provide information to the Office.[186] Interim relief orders may be issued to protect whistle-blowers pending an investigation of a complaint.[187]

If a whistle-blower is subjected to detriment, the Office may issue a redress order against the relevant person to take certain measures[188] – for example, an order to reinstate an employee or to refrain from taking certain steps, such as subjecting an employee to a disciplinary hearing. A redress order must include financial redress (which is not capped) where loss or damage has been incurred.[189] To establish whether a redress order should be issued,[190] the Office must assume that the person was subjected to detriment for being a whistle-blower until the contrary is proved.[191] The burden of proof is thus reversed. The implication of the authority of the Office to issue redress orders is that the whistle-blower does not have to turn to the ET for a remedy, which will solve issues of costs, legal representation and other difficulties experienced by whistle-blowers as pointed out by the All-Party Parliamentary Group.

The issue of relevant persons not following up on reports will be something of the past as they are enjoined to establish whistle-blowing

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178 Cl 6(2)(c) of Bill 27.
179 Cl 4(6)(b)–(c) of Bill 27.
180 Part 3 of Bill 27.
181 Cl 4(6) of Bill 27.
182 Cl 3 of Bill 27.
183 Cl 7 of Bill 27.
184 Cl 8 of Bill 27.
185 Cl 6 of Bill 27.
186 Cl 9(7) read with cl 6(2)(e) of Bill 27.
187 Cl 11 of Bill 27.
188 Cl 10 of Bill 27.
189 Cl 10(2) of Bill 27.
190 Cl 10(4) of Bill 27.
191 *Ibid.*

procedures accredited by the Office and have to report on their progress to the Office.[192] A civil penalty may be imposed if there is no compliance by relevant persons regarding information notices, action notices, redress orders and interim relief orders.[193] An appeal by a relevant person may be brought to the First Tier Tribunal against any decision or order of the Office. A further appeal on any matter of law may be brought in the Upper Tribunal.[194] No specific provision is made for protection in the case of a disclosure to the public. This seems to be unnecessary as the whistle-blower can make it to the Office, which would protect the whistle-blower.

Relevant persons may not subject, cause or permit other persons (including co-employees) to subject a whistle-blower to detriment. This could be regarded as a criminal offence, which was not the case under PIDA.[195] A person who is guilty of such an offence could be liable for a fine and, in certain circumstances, imprisonment.[196] Destroying information will likewise be regarded as an offence.[197]

The Bill provides that agreements containing confidentiality and similar clauses (non-disclosure agreements) between a relevant person and another person that would prohibit a person from making a protected disclosure are void.[198]

Should the British parliament adopt Bill 27, protection and support for a wide group of whistle-blowers will be established.[*]

5 2 Protection for whistle-blowers in Ireland

Like South Africa, Ireland based its Protected Disclosures Act 2014 on the UK's PIDA. The Irish 2022 PDAA[199] was adopted with extensive amendments to provide more effective protection to whistle-blowers and to transpose the EDW into Irish law, as Ireland as a member of the European Union, is obliged to do.

The 2022 PDAA extends protection to more categories of reporting persons. "Workers" (who are protected against retaliation after having made a protected disclosure) are widely defined to include *inter alia* employees, shareholders, non-executive directors, trainees, applicants, volunteers, persons who are being recruited and workers supplied by a third person (agency).[200] The term "whistle-blower" is not used.

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[192] Cl 3(6) of Bill 27.

[193] Cl 6 of Bill 27.

[194] Cl 18 of Bill 27. These tribunals were established by the Tribunals, Courts and Enforcement Act 2007.

[195] Cl 20 of Bill 27.

[196] Cl 20 of Bill 27.

[197] Cl 21(2) of Bill 27.

[198] Cl 22 of Bill 27.

[*] [Editorial note: The UK Government has embarked on a review of all whistleblowing legislation in 2023: see https://www.gov.uk/government/news/government-reviews-whistleblowing-laws.]

[199] 27 of 2022.

[200] S 3 of the 2022 PDAA.

A protected disclosure is defined as a disclosure of relevant information if, in the reasonable belief of the worker, it tends to show relevant wrongdoing that came to the attention of the worker in a work-related context.[201] Relevant information includes the same matters as improprieties in the South African PDA, but oppressive and grossly negligent acts of a public body as well as mismanagement by a public body, are part of the list of relevant information.[202]

In the 2022 PDAA (as in the 2014 PDA), the motivation for making a disclosure is not relevant for protection;[203] there is, thus, no good faith requirement. However, if investigating the wrongdoing was not the sole or main motivation for the disclosure, it may lead to diminished compensation, as in the UK.[204]

Workers are protected against "penalisation", which, in addition to the "usual" adverse acts by employers, includes acts such as early termination of a contract for goods and services; cancellation of a licence or permit; harm to a worker's reputation (especially on social media); psychiatric or medical referrals; and acts of employers after the employment relationship has been terminated, such as blacklisting the worker.[205] The extended list of examples of penalisation is in line with the wider definition of worker.

Like the South African PDA, the 2022 PDAA requires a reporting person to report to a hierarchy of persons or bodies with different requirements for protection. The categories to which a person may report are employers, prescribed persons and the Commissioner of the newly created Office of the Protected Disclosures Commissioner.[206]

For a disclosure to an employer, there are no extra requirements for protection.[207] For disclosure of relevant wrongdoing by someone other than the worker's employer, the worker will be protected if they reasonably believe that the information that the disclosure tends to show relates solely or mainly to the conduct of that other person.[208]

A requirement for disclosure to a prescribed person or the Commissioner is that the whistle-blower must reasonably believe that the information is substantially true.[209]

For a disclosure to someone other than an employer, prescribed person, the Commissioner or the Minister (for instance, a journalist), the requirements are similar to those for a general protected disclosure in terms of the South African PDA. However, the provision that the worker would not be protected if the disclosure were made for personal gain was not retained.

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201 S 5(2) of the 2022 PDAA.
202 S 5(3)(*g*) of the 2022 PDAA.
203 S 5(7) of the 2022 PDAA.
204 S 13 of the 2022 PDAA.
205 S 3(ii) of the 2022 PDAA.
206 S 7(2)(*a*) of the 2022 PDAA.The Protected Disclosures Commissioner is established in terms of s 10(A) of the 2022 PDAA.
207 S 6(1)(*a*) of the 2022 PDAA.
208 S 6(1)(*b*) of the 2022 PDAA.
209 S 7(1)(*b*) of the 2022 PDAA.

The Office of the Commissioner for Protected Disclosures (the equivalent of the Office of the Whistleblower in the UK Bill) will act as a facilitator, and disclosures by whistle-blowers can be referred to this Office, which will refer the report to the appropriate authority.[210] If there is no appropriate designated person or body to deal with the report, the Commissioner may investigate the report.[211] The Commissioner does not have the power to issue action or redress orders that the UK's Office of the Whistleblower does. However, the Commissioner may require any person in possession of information or documents to provide information to the Commissioner.[212] A person refusing to provide information, or who destroys information or obstructs the Commissioner in accessing information, will be guilty of an offence.[213]

In compliance with the EDW, a new section 6A requires the establishment of internal reporting channels and procedures for reporting to employers. Public bodies, as well as employers with more than 50 employees, have to establish these channels. Employers with fewer than 50 employees whose activities hold a risk to the health and safety of persons and the environment will also have to establish reporting channels.[214] It will constitute an offence to omit establishing reporting channels.[215] External reporting channels that will ensure integrity and confidentiality must be established by prescribed persons as well as the Commissioner.[216]

The amended Act includes a new provision that a disclosure shall be presumed to be protected until the contrary is proved.[217] Should the employee suffer penalisation after having made a disclosure, the penalisation will be deemed to be a result of the employee having made a protected disclosure.[218]

Regarding remedies for penalisation, the worker may approach the Circuit Court for interim relief,[219] and may claim damages in tort,[220] or refer an action in terms of the Unfair Dismissals Act 1977, but cannot do both.[221] A Workplace Relations Commissioner can order the employer to pay just and equitable compensation to the whistle-blower.[222]

Employees who knowingly make a false report could be liable for civil damages,[223] and such a report could also constitute an offence.[224]

[210] S 10C of the 2022 PDAA.
[211] *Ibid.*
[212] S 10F of the 2022 PDAA.
[213] S 10F(14)(i) of the 2022 PDAA.
[214] S 6(4) of the 2022 PDAA.
[215] S 14A(*e*) of the 2022 PDAA.
[216] S 14A(7) of the 2022 PDAA.
[217] Ss 6(8) and 12(7C) of the 2022 PDAA.
[218] Ss 12(7C) and 13(2B) of the 2022 PDAA.
[219] S 7A of the 2022 PDAA.
[220] S 13(1) of the 2022 PDAA.
[221] *Ibid.*
[222] Sch 2 par (1)(*c*) of the 2022 PDAA.
[223] S 13A of the 2022 PDAA.
[224] S 14A(2) of the 2022 PDAA.

Transparency International Ireland expressed concern that this new measure will deter whistle-blowers from making disclosures.[225]

In terms of section 14A(1) of the 2022 PDAA, it is an offence for any person to prevent a person from making a report, or to penalise or threaten them, or for a third person connected to the reporting person to bring vexatious procedures against a reporting person, breach the duty of confidentiality regarding the identity of the whistle-blower, or to fail to establish or maintain reporting channels.[226]

Although the Commissioner for Protected Disclosures does not possess the far-reaching powers of the Office of the Whistleblower in terms of Bill 27, the 2022 PDAA amendments will to a certain extent strengthen the protection of whistle-blowers in Ireland.

5 3 The reward system for whistle-blowers in the USA

In the wake of financial scandals such as the collapse of Enron and WorldCom, the Sarbanes-Oxley Act 2002 (SOX)[227] was adopted to strengthen internal control of companies and to encourage whistle-blowers to report transgressions. SOX did not succeed in its aim[228] and the Dodd-Frank Wall Street Reform and Consumer Protection Act (Dodd-Frank Act),[229] was consequently adopted to motivate employees to report securities law violations to the Securities Exchange Commission (SEC) or other appropriate bodies.[230] The Dodd-Frank Act protects whistle-blowers against retaliation and rewards them for information.[231]

Employers are prohibited from discharging, demoting, suspending, threatening, harassing, or discriminating against a whistle-blower. Whistle-blowers who have suffered retaliation may institute action in the appropriate district court.[232] Remedies for retaliation include reinstatement, double back-pay and payment of legal costs.[233] Whistle-blowers may further be rewarded by the SEC if they voluntarily provide original information (not provided previously) and the information leads to the "successful enforcement of the covered judicial or administrative action".[234] A whistle-blower will only be eligible for a reward if at least $1 million is recovered. The amount of the award must be at least 10 per cent and not more than 30 per cent of the

225 Transparency International Ireland "Protected Disclosures Amendment Act Signed into Law" (22 July 2022) https://translate.google.co.za/?sl=fr&tl=en&text=Studio%20a%20100m%20du%20vieux%20village&op=translate (accessed 2023-01-15).

226 S 14A of the 2022 PDAA.

227 18 USC §1514A.

228 Bertucci, Skufca and Boyer-Davis "Section 806 of the Sarbanes-Oxley Act: Can the Fraud Triangle Prevent Fraud in the Finance Sector?" 2021 *Journal of Corporate Accounting & Finance* 158–159.

229 Pub L No 111- 203, 124 Stat 1376 (2010).

230 15 USC 78u-6(*b*)–(*g*).

231 Bertucci *et al* 2021 *Journal of Corporate Accounting & Finance* 166.

232 15 USC §§ 78u-6(*h*)(1)(B)(i) and 78u-6(*h*)(1)(B)(iii)(I)(aa).

233 15 USC §§ 78u-6(*h*)(1)(C).

234 15 USC §§ 78u-6(6)-(*g*).

recovered amount.[235] Factors that will be taken into account to determine the amount paid to the whistle-blower are *inter alia* the significance of the information to the success of action taken and assistance provided by the whistle-blower to agencies in recovering the amounts.[236] The whistle-blower would not receive an award if they were an employee or officer *inter alia* in the Department of Justice, an appropriate regulatory authority or a law enforcement agency.[237] The reward system has proved to be highly successful. In March 2022, the SEC reported that since 2012, awards of approximately $1.2 billion were made to 249 whistle-blowers. The rewards are financed by fines paid to the SEC by corporations that have violated securities laws.[238]

Although countries in Europe do not favour rewards for whistle-blowers because it could be conducive to false reports, this is not a significant problem in the US.[239] Research by Buccirossi *et al* indicates that not only is the reward system highly effective in retrieving amounts "lost" through corruption, but it is conducive to a high reporting rate, which has a strong deterrent effect on would-be wrongdoers.[240] The authors point out that whistle-blowers will be deterred from making false reports if an effective legal system imposes penalties against defamation, perjury and information fabrication.[241]

6 CONCLUSION AND RECOMMENDATIONS

Some of the measures in UNCAC, the EDW, the Irish 2022 PDAA, Bill 27, and the US Dodd-Frank Act could be considered for implementation in legislation in South Africa to enhance the protection of whistle-blowers and encourage them to report on wrongdoing. The legislator could consider including the following recommendations in a new or amended PDA:

- adopt one comprehensive statute covering all aspects of protection for whistle-blowers, integrating the current fragmented protection in different statutes;
- provide for the physical protection of whistle-blowers;
- protect persons outside the employment relationship by not limiting protection to workers only;
- define "whistle-blower" so as to extend protection to members of the public;
- define "detriment" widely to include negative consequences for reporting persons outside an employment relationship;

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[235] 15 USC §§ 78u-6(*b*)(1)(A)-(B).

[236] 15 USC §§ 78u-(*c*)(1)(A).

[237] 15 USC §§ 78u-6h (1)(A).

[238] US Securities and Exchange Commission "SEC Awards Approximately $14 Million to Whistleblower" (11 March 2022) https://www.sec.gov/news/press-release/2022-40 (accessed 2023-01-20).

[239] Buccirossi, Immordino and Spagnola "Whistle-Blower Rewards, False Reports, and Corporate Fraud" 2021 51 *European Journal of Law and Economics* 412.

[240] Buccirossi *et al* 2021 *European Journal of Law and Economics* 416.

[241] Buccirossi *et al* 2021 *European Journal of Law and Economics* 412.

- establish a whistle-blowers' office with wide powers to advise and support whistle-blowers, to monitor the investigation of disclosures by whistle-blowers, to order redress for whistle-blowers, and to penalise persons who have subjected a whistle-blower to detriment;
- reverse the burden of proof; and
- scrap the good faith requirement and the requirement that whistle-blowers must reasonably believe that information is "substantially true".

If a new Act does not sever protection from the workplace and the definition of worker is retained, the Act should:

- be extended to include non-executive directors, job applicants, voluntary workers, unpaid trainees and suppliers;
- extend the definition of occupational detriment to include harm to a whistle-blower's reputation (especially on social media), medical and psychological referrals, blacklisting the whistle-blower, premature terminating of a supplier's contract, and suspending a licence;
- oblige employers and authorities to establish safe internal and external reporting channels, respectively, protecting the confidentiality of the identity of the whistle-blower and their family;
- criminalise retaliation against a whistle-blower, and preventing a whistle-blower from making a report.
- hold employers liable for harassment of whistle-blowers by co-employees on account of a protected disclosure if the employer knew about the harassment or reasonably ought to have known about the harassment and did not take reasonable steps to address the conduct;
- regard non-disclosure agreements prohibiting a person from making a protected disclosure as void;
- implement a reward system (including financial awards) for whistle-blowers;
- adopt a national Code of Good Practice on Whistle-Blowing as a model for a code for each workplace; and
- make mandatory the provision of training on the importance of whistle-blowing for a specific business for employers, employees, trade unions and managers.

Furthermore, the government should raise awareness in the community on the importance of whistle-blowing to eliminate corruption and other types of wrongdoing.

Some of these recommendations are far-reaching, but anything less is unlikely to make a difference to the plight of whistle-blowers in South Africa. In the interests of a just society, it is expedient that protection for whistle-blowers should be extended.

As the court in *Mashilo* remarked, the complainant in this case

> "performed one of the most underrated and thankless constitutional duties: whistleblowing. I employ the words 'underrated and thankless' advisedly owing to the fact that the legislature seems to be moving at a snail's pace in promulgating tangible legislation to protect whistle-blowers."[242]

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[242] *Mashilo supra* par 96.

DO MUNICIPALITIES HAVE THE POWER TO REGULATE THE KEEPING OF "DANGEROUS" DOGS?

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SUMMARY

Dog attacks and resultant deaths are frequent occurrences in South Africa. Pit bulls are responsible in many of these cases and there are calls for them to be banned. Dogs, however, are the property of their owners, and forcing people to give them up will amount to a deprivation of property and an infringement of a dog owner's right to property, which is protected by section 25 of the Constitution. Dogfighting is rife in South Africa and the conduct of dog owners contributes to dogs being aggressive and leads to dog attacks. In terms of the Constitution, animal control is a functional area of concurrent national and provincial legislative competence; on a strict interpretation, this means that municipalities do not have the power to legislate on the function. However, everyone is guaranteed the right to freedom and security of the person, which includes the right to be free from all forms of violence from either public or private sources. As such, the municipality (as part of the State) must respect, protect, promote and fulfil the right. Municipalities also have a duty to promote a safe and healthy environment, and the power to make by-laws on matters they may administer. They may also exercise powers that are reasonable and incidental to the effective performance of municipal functions, which is supported by the principle of subsidiarity, the fulfilment of the duties arising from section 12 of the Constitution, and the objective to promote a safe and healthy environment. A municipality that has the necessary resources can legislate and enforce by-laws on matters listed in Schedule 4A and 5A of the Constitution, provided that such action seeks to further the objectives of Chapter 2 of the Constitution and is not in conflict with measures adopted by the national and provincial spheres. The National Society for the Prevention of Cruelty to Animals (NSPCA) is responsible for animal welfare, but the responsibilities of animal welfare organisations are becoming greater as urbanisation in South Africa accelerates and animals in many disadvantaged communities are in dire need of basic animal care. The suite of local government law is geared towards the social and economic upliftment of communities, and there is legislative justification for interventions by municipalities to address matters such as the control of public nuisances, dog licensing, the operation of pounds, and the conduct of community members that can alleviate the pressure on those organisations tasked with animal care. There are a number of legislative instruments that apply to animals. A consolidation of the provisions of the various pieces of legislation into a single by-law aimed at regulating the keeping and treatment of dogs, may result in increased law enforcement and (it is hoped) increased sentences as a result of amplified enforcement, as well as improved deterrence.

1 INTRODUCTION

South Africa has the highest incidence in the world of dog-attack deaths relative to population;[1] and a large number of incidents go unreported,[2] which makes it difficult to obtain accurate statistics. Since 2004, 99 canines, of which 72 were pit bulls, have been involved in fatal attacks in South Africa, resulting in 56 deaths. Of the deaths, 38 were caused by pit bulls. Seven of the other 18 casualties were caused by rabid dogs, and no other breed of dog was responsible for more than four deaths.[3] The trauma unit at the Red Cross War Memorial Children's Hospital in Cape Town undertook a retrospective evaluation of children who had come in with dog-bite wounds over a 13½-year period. During the study period, 2 021 dog-bite injuries were treated on 1 871 children.[4]

On the one hand, more recent fatalities as a result of dog attacks have resulted in calls, including by the government, for the banning and giving-up of certain breeds of dog, especially pit bulls.[5] Some incidents enjoyed international attention.[6] On the other hand, the Pit Bull Federation of South Africa asserts that dog bites occur as a result of careless owners and that the issue must be addressed by lawmakers and responsible ownership.[7]

This requires a reflection on the extent of dog attacks in South Africa, the nature of the "pit bull breed" and the arguments for and against the imposition of a ban on such animals, as well as their surrender to animal welfare organisations. First, this article briefly enquires whether ownership of these animals could be considered a "basic" human right and whether the compulsory giving-up of certain breeds could amount to a deprivation of property. Secondly, it reviews legislation applicable to animal control and investigates whether municipalities have the authority to legislate on a functional area of concurrent national and provincial legislative competence.[8] Lastly, it proposes measures that municipalities can take to control dogs effectively in order to give effect to their duty to provide a safe and healthy

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1 Animals 24-7 "Pit Bull Data" (undated) https://www.animals24-7.org/pit-bull-data/ (accessed 2023-01-31) 1.

2 Khanyile "Brutal Dog Attacks" *Eye Witness* (26 March 2019) https://www.news24.com/SouthAfrica/News/brutal-dog-attacks-20190326 (accessed 2019-09-01) 1.

3 Clifton "More Dog Attack Deaths Fuel Alarm in South Africa, Australia, Ireland" (5 December 2022) https://www.animals24-7.org/2022/12/05/more-dog-attack-deaths-fuel-alarm-in-south-africa-australia-ireland/ (accessed 2023-03-05) 2.

4 Dwyer, Douglas and Van As "Dog Bite Injuries in Children: A Review of Data From a South African Paediatric Trauma Unit" 2007 97(8) *South African Medical Journal / Suid-Afrikaanse Tydskrif vir Geneeskunde* 597–600.

5 SA News "Government Investigating Rise in Pitbull Attacks in South Africa" (7 December 2022) https://businesstech.co.za/news/lifestyle/649589/government-investigating-rise-in-pitbull-attacks-in-south-africa/ (accessed 2023-01-31).

6 BBC News "South Africa Pit Bull Attacks: We Can't Live in a World Where Dogs Eat Children" (27 November 2022) https://www.bbc.com/news/world-africa-63727936 (accessed 2023-01-31) 1.

7 702 "Dog Attacks Not a Dog Problem but a Law Problem: Pit Bull Federation" (11 August 2022) https://www.702.co.za/articles/451891/dog-attacks-not-a-dog-problem-but-a-law-problem-pit-bull-federation (accessed 2023-01-31) 1.

8 Animal Control and Diseases listed in Part A of Schedule 4 of the Constitution of the Republic of South Africa, 1996 ("Constitution").

environment as dog bites have been described as a major public-health concern.[9]

The article uses a limited number of functional municipalities as examples. It is recognised that a large number of municipalities are dysfunctional, or in distress,[10] and that they will not be able to cope with additional obligations. Such dysfunctionality is merely a statement of fact, and does not detract from the argument that there are municipalities that can, and want to, make an important contribution towards increased health and safety, provided they have the necessary legislative tools available and that their officials are capable of using.

2 THE EXTENT OF DOG ATTACKS IN SOUTH AFRICA

Apart from the statistics quoted in the introduction, fatal dog attacks have enjoyed increased attention recently. On 27 November 2022, the British Broadcasting Corporation (BBC) reported:

> "Residents of Phomolong township in South Africa woke up to horrific screams last Sunday morning.[11] They came from a three-year-old boy as he was attacked and then mauled to death by two American pit bull terriers."[12]

An angry crowd killed one of the dogs by setting it alight and the other was euthanised by the Society for the Prevention of Cruelty to Animals (SPCA). The attack led to an upswell of opposition to the keeping of pit bulls and threats of mob justice against owners of the breed. On the same day, a girl was attacked by three pit bulls in Cape Town. They were killed by community members, who stoned them and set them alight.[13]

On 23 November 2022, a 15-month-old from the Eastern Cape Province died after being mauled by a pit bull. On 5 December 2022, it was reported that "[t]he National Council of SPCAs has had to put down two pit bulls that mauled a man to death in North-West at the weekend."[14] On 7 January 2023, it was reported that a 60-year-old man in Lichtenburg was mauled to

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[9] Engelbrecht "Management of Common Animal Bites in the Emergency Centre" 2012 30(11) *Continuing Medical Education*, [S.l.] ISSN 2078-5143. http://www.cmej.org.za/index.php/cmej/article/view/2566/2642 (accessed 2023-03-05) 401–405.

[10] South Africa, Department of Cooperative Government and Traditional Affairs "List of Dysfunctional and Distressed Municipalities" (23 May 2018) https://www.cogta.gov.za/index.php/2018/05/23/list-of-dysfunctional-and-distressed-municipalities/ (accessed 2023-02-20) 1; and Staff Writer "More Municipalities Declared Dysfunctional in South Africa" (10 November 2022) https://businesstech.co.za/news/government/642281/more-municipalities-in-south-africa-declared-dysfunctional/ (accessed 2023-02-20) 1.

[11] That would be 20 November 2022.

[12] BBC News https://www.bbc.com/news/world-africa-63727936 1.

[13] BBC News https://www.bbc.com/news/world-africa-63727936 4.

[14] Rall "Two Pit-Bulls Euthanised After Killing Man Who Climbed Into the Property They Were Guarding" (5 December 2022) https://www.iol.co.za/news/south-africa/kwazulu-natal/two-pit-bulls-euthanised-after-killing-man-who-climbed-into-the-property-they-were-guarding-b662f304-5add-4f75-8b19-993403da907b (accessed 2023-01-31).

death by his three dogs, two Staffy/pit-bull crossings and one unknown breed dog.[15]

After eight-year-old Olebogeng Mosime was mauled to death by a pit bull on 12 November 2022,[16] 49 pit bulls were handed over to the SPCA. Prior to that, 10-year-old Storm Nuku was killed by his family's two pit bulls in Gqeberha, which prompted the Sizwe Kupelo Foundation to launch a petition calling for a ban on the keeping of pit bulls as domestic pets.[17] At the time of writing, it had been signed by more than 138 000 people.

The non-profit group, Animals 24-7, has a dangerous dog data library that keeps a log of fatal dog attacks reported in the South African media since July 2004.[18] The records between 22 July 2004 and 12 November 2022 show that 65 pit bulls were involved in the deaths of 48 victims, which far exceeds the involvement of five Boerboels, four Rottweilers, two German Shepherds, and one Labrador. The frequent mention of pit bulls justifies a brief enquiry into the breed and whether they should be banned and, if so, the possible consequences of such a banning.

3 WHAT ARE PIT BULLS, SHOULD THEY BE BANNED OR SURRENDERED, AND WHAT ARE THE POSSIBLE CONSEQUENCES OF BANNING OR SURRENDERING THEM?

Pit bulls are a type of dog and not a specific breed. The American Pit Bull Terrier is one of the so-called "bully breeds" often labelled a pit bull. In fact, "pit bull" is a term used to describe a number of breeds, namely the American Pit Bull Terrier, the Bull Terrier, the American Staffordshire Terrier, and the Staffordshire Bull Terrier.[19]

According to the American SPCA, "pit bulls" are the dog of choice for dogfighting in America,[20] as is the case in South Africa.[21] One of the problems is that dogfighting is rife in South Africa; and it's not as simple as

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15 South African Police Service: Office of the Provincial Commissioner North West "Dogs Allegedly Mauled Their Owner to Death" (8 January 2023) https://www.saps.gov.za/newsroom/msspeechdetail.php?nid=44203 (accessed 2023-01-31).

16 Sithole "Gogo Recalls Last Moments With Grandson Before Pitbull Mauling" (21 November 2022) https://www.iol.co.za/the-star/news/gogo-recalls-last-moments-with-grandson-before-pitbull-mauling-2269ec6e-0f10-43d8-97a0-934c4460a138 (accessed 2023-01-31).

17 Sizwe Kupelo Foundation "Ban Pitt Bulls as Domestic Pets in South Africa" (undated) https://www.change.org/p/presidencyza-dalrrdgov-za-healthza-sapoliceservice-it-s-time-to-ban-pit-bulls-as-domestic-pets-in-sa-banpitbulls (accessed 2023-01-31) 1.

18 Animals 24-7 https://www.animals24-7.org/pit-bull-data/.

19 Dogtime.com "American Pit Bull Terrier" (undated) https://dogtime.com/dog-breeds/american-pit-bull-terrier#/slide/1 (accessed 2023-04-11).

20 ASPCA "A Closer Look at Dog Fighting" (2023) https://www.aspca.org/investigations-rescue/dogfighting/closer-look-dogfighting#:~:text=Although%20there%20are%20many%20breeds,the%20American%20Pit%20Bull%20Terrier (accessed 2023-03-05).

21 Geldenhuys "The NSPCA: Dogfighting – SA's Dirty Little Secret" https://www.friendsofthedog.co.za/dogfighting-sas-dirty-little-secret.html# (accessed 2023-03-05).

pit bulls being bred for inter-town fighting competitions – dogfighters compete right up to international level.[22] It was found that in some areas,

> "[b]reeding or owning a fierce dog is part of the local culture – to protect one's home from burglars, for instance. But some turn to dog fighting, a brutal and illegal activity, for fun and money, pitting pitbulls [sic] and other hounds bred and trained to kill against each other."[23]

In many instances, poor control over dogs that were acquired for personal or property protection result in dog bites. This is amplified by large spreads of informal and sub-economic housing estates plagued by high crime rates. There are no proper enclosures, very little money for animal care and a high need for security.

There are different levels of sophistication within dogfighting, ranging from dogfights taking place on the streets, open veld or in abandoned buildings to higher and more organised and secret levels that are difficult to locate. At these levels, the dogs used for fighting are almost exclusively American Pit Bull terriers. At the less sophisticated levels, the perpetrators might also use similar breeds. At the lowest level, dogs were commonly sourced from adverts, stolen or bred for this criminal purpose.[24]

Proponents of a ban on pit bulls, such as the Sizwe Kupelo Foundation, demand the banning and castrating of pit bulls in South Africa, basing its claim on the protection of the right to life because of the number of people who have been killed by the breed. The foundation also holds the position that government should castrate existing animals, ban breeding and regulate the ownership of pit bulls.[25] Their aim is "to prevent further breeding" and they are asking "government to consider regulating all power breeds and ensure that anyone who wants to own such [sic] breed follows a particular process, which includes a licence requirement". Political parties and trade unions have also joined in.[26]

Those opposing a ban blame irresponsible dog owners, and say "laws need to be put in place to deal with them".[27] This is supported by animal behaviour expert, Dr Sonntag, from the Faculty of Veterinary Science at the University of Pretoria, who also holds the opinion that "breed-specific legislation banning certain breeds of dogs has not been successful anywhere in the world".[28] While there are many calls on the SPCA to act, its

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22 E-mail received from the Manager: Special Investigations, NSPCA on 28 August 2019.

23 France24 "Behind Cape Town's Heavenly Beaches, the Hell of Dog Fighting" (22 February 2022) https://www.france24.com/en/live-news/20220222-behind-cape-town-s-heavenly-beaches-the-hell-of-dog-fighting (accessed 2023-01-31).

24 Dibakwane "Pit Bulls Surrendered to SPCA Tell Tale of Dog Fighting" Pretoria News (12 June 2019) https://www.iol.co.za/pretoria-news/pit-bulls-surrendered-to-spca-tell-tale-of-dog-fighting-26016011 (accessed 2019-09-01).

25 Tebele "Foundation Wants Pit Bulls Castrated, Breeding of the Dogs Regulated" (19 October 2022) https://ewn.co.za/2022/10/19/foundation-wants-pit-bulls-castrated-breeding-of-the-dogs-regulated (accessed 2023-02-01).

26 Dayimani "Pit Bull Attacks: Now EFF and Cosatu Back Calls for Ban as Saga Continues" (23 November 2022) https://www.news24.com/news24/southafrica/news/pit-bull-attacks-now-eff-and-cosatu-back-calls-for-ban-as-saga-continues-20221123 (accessed 2023-02-01).

27 BBC News https://www.bbc.com/news/world-africa-63727936 5.

28 SA News https://businesstech.co.za/news/lifestyle/649589/government-investigating-rise-in-pitbull-attacks-in-south-africa/.

stance is that its mandate is the protection of animals, not the protection of the public, which is a government function.[29] This statement is borne out by the recent conviction of a dog owner who was sentenced to a fine of R6 000, or six months' imprisonment suspended for five years, after the Cape of Good Hope SPCA opened an animal cruelty case against him for entering his brown crossbreed dog in illegal fights.[30]

The National SPCA opposes the banning of any animals. The organisation calls for stronger regulatory measures regarding the keeping, sterilisation, castration and breeding of dangerous and aggressive animals. According to the organisation, "[p]eople have been breeding and keeping these animals for all the wrong reasons, and using these animals as weapons to sell and make a profit irresponsibly and that is where you see tragedy".[31]

The stance of the Animal Welfare Society (AWS) of SA is that the public should assist by "supporting vigorous enforcement of existing laws that focus not on breed, but on owners' responsibility for their dogs' behaviour". The AWS also reported an "influx of pit bulls because people are surrendering their dogs". It proposes the introduction of "breed[-]neutral 'dangerous dogs' legislation" that prohibits dogs from running loose, and from being chained. The AWS is of the opinion that "[l]aws that ban particular breeds of dogs do not achieve these aims and instead create the illusion, but not the reality, of enhanced public safety".[32]

Lins Rautenbach, spokesperson of the Pit Bull Federation of South Africa avers:

> "[d]og bites … happen because of negligent owners. South Africa has one of the highest [dog attack] fatalities in the world. It is not a dog problem. We have an accountability and a law problem."[33]

She ascribes factors such as owners allowing dogs to roam the streets, and the failure of the police and justice system to tackle dog-bite cases. According to her, "[t]o get a mauling case opened in South Africa is almost impossible. And once it is opened, follow-through is impossible".[34]

The City of Cape Town, the Cape of Good Hope SPCA and Cape Animal Welfare Forum (CAWF) also disagree with a ban on certain breeds and propose amendments to the City's Animal Keeping By-Law, 2021.[35] They

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[29] SA News https://businesstech.co.za/news/lifestyle/649589/government-investigating-rise-in-pitbull-attacks-in-south-africa/ 4.

[30] Solomons "Cape Town Man Fined R6 000 for Entering His Dog in Illegal Fights" News24 (24 February 2023) https://www.news24.com/news24/southafrica/news/pics-cape-town-man-fined-r6-000-for-entering-his-dog-in-illegal-fights-20230224 (accessed 2023-02-28).

[31] Dean "No to Pit Bull Ban: Welfare Groups Call for 'Stronger Regulations'" (27 October 2022) https://www.dailyvoice.co.za/news/no-to-pit-bull-ban-welfare-groups-call-for-stronger-regulations-db3f2951-ce30-45e2-baae-fa3a6b35fcc3 (accessed 2023-02-01).

[32] *Ibid.*

[33] 702 https://www.702.co.za/articles/451891/dog-attacks-not-a-dog-problem-but-a-law-problem-pit-bull-federation.

[34] *Ibid.*

[35] Daily Voice Reporter "'It's the Owners, Not the Dogs': Rearing, Not Breeding, of Pit Bulls a By-Law Amendment Issue After Attacks" (24 November 2022) https://www.dailyvoice.co.za/news/its-the-owners-not-the-dogs-rearing-not-breeding-of-pit-

want to incorporate a stricter duty of care on pet owners, and regulations regarding the keeping of dangerous animals. Cape Town promulgated an amended Animal Keeping By-Law in December 2021.[36] Some of the main amendments include: a clause providing for general mandatory sterilisation[37] unless an exemption is granted, as opposed to mandatory sterilisation in specific circumstances; sections dealing with dogfighting;[38] and the development of "an environment conducive to animal care" by "providing public spaces where animals can be exercised, such as free run public spaces for dogs".[39]

A downside to the call for a ban on pit bulls is that it resulted in an increased demand for the animals. According to a breeder:

> "[people] buy them for the very reason many people are calling for their ban. They want them because they are vicious, and homes with pit bulls aren't targets by criminals."[40]

The statement about viciousness was confirmed by the NSPCA, which although not supporting calls for a complete ban on pit bulls, have said "their viciousness could not only be attributed to how they were raised by their owners" and "[t]hey were vicious in their genetic make-up".[41]

Should the call for a ban on or the surrender of a specific breed be heeded, it gives rise to the question whether it could amount to a deprivation of property, which is discussed in the next section.

4 ARE ANIMALS PROPERTY AND IS THE KEEPING OF ANIMALS A "BASIC" HUMAN RIGHT?

Dogs are the property of their owners. Section 1(1) of the Animals Protection Act[42] (APA) defines "animal" as "any equine, bovine, sheep, goat, pig, fowl, ostrich, dog, cat or other domestic animal or bird, or any wild animal, wild bird or reptile which is in captivity or under the control of any person". "[O]wner" is also defined and "includes any person having the possession, charge, custody or control of that animal".[43] These definitions make it clear

bulls-a-by-law-amendment-issue-after-attacks-492d7704-3ce1-454e-9052-728fbff3d8d0?utm_campaign=magnet&utm_source=article_page&utm_medium=related_articles (accessed 2023-02-01).

36 Province of the Western Cape: Provincial Gazette Extraordinary 8527 dated 9 December 2021.

37 S 3 of the City of Cape Town: Animal Keeping By-Law.

38 S 8 of the City of Cape Town: Animal Keeping By-Law.

39 BusinessTech "Changes to Pet and Animal Keeping By-Laws in Cape Town" (17 December 2021) https://businesstech.co.za/news/lifestyle/546600/changes-to-pet-and-animal-keeping-by-laws-in-cape-town/ (accessed 2023-02-01).

40 Bhengu "Demand for Pit Bulls Increased Since Petition Calling for Them to be Banned, Say Breeders" (21 November 2022) https://www.news24.com/news24/southafrica/news/demand-for-pit-bulls-increased-since-petition-calling-for-them-to-be-banned-say-breeders-20221121 (accessed 2023-02-01).

41 Bhengu https://www.news24.com/news24/southafrica/news/demand-for-pit-bulls-increased-since-petition-calling-for-them-to-be-banned-say-breeders-20221121 (accessed 2023-02-01).

42 71 of 1962.

43 S 1(iii) of the Animals Protection Act 71 of 1962.

that a person can be the "owner" of an animal and that animals are therefore legal objects, and the owners enjoy the protection of the Bill of Rights (BoR).

The BoR is contained within Chapter 2 of the Constitution and it enshrines the rights of all people in South Africa,[44] subject to the limitations contained in section 36 or elsewhere in the BoR.[45] The BoR applies to all law, and binds the legislature, the executive and the judiciary and all organs of state.[46] The right to property is protected by section 25(1) of the Constitution. Section 25 provides that no one may be deprived of property except in terms of law of general application, and no law may permit arbitrary deprivation of property. Property is not limited to land.[47] Even the Constitutional Court has recognised that constitutional property clauses are difficult to interpret.[48] The court did find that ownership of a corporeal movable lies at the heart of our constitutional concept of property and that it must enjoy the protection of section 25.[49]

As far as the meaning of "deprived" is concerned, if the deprivation infringes (limits) section 25(1) and cannot be justified under section 36, it is in conflict with the Constitution. A deprivation of property is "arbitrary", as meant by section 25, when the "law" referred to in section 25(1) does not provide sufficient reason for the particular deprivation or is procedurally unfair. According to the *First National Bank* case,[50] sufficient reason is to be established by:

a) evaluating the relationship between the means employed (namely the deprivation in question) and the ends sought to be achieved (namely the purpose of the law in question) – in the current case, if the municipality wants to decide to ban the keeping, breeding or inter-breeding of certain types of dog, such prohibition will have to be weighed against the purpose, which may be the promotion of a safe environment;
b) considering a complexity of relationships, including the relationship between the purpose for the deprivation and the person whose property is affected, as well as between the purpose of the deprivation and the nature of the property, as well as the extent of the deprivation in respect of such property; and
c) generally speaking, where the property in question is ownership of land or a corporeal moveable, establishing a more compelling purpose in order for the depriving law to constitute sufficient reason for the deprivation.

The *First National Bank* case is still considered the leading decision on the property clause in the Constitution. It also introduced a methodology for analysing section 25 disputes, which has significant implications for the

44 S 7(1) of the Constitution.
45 S 7(3) of the Constitution.
46 S 8(1) of the Constitution.
47 S 25(4)(*b*) of the Constitution.
48 *First National Bank of SA Ltd t/a Wesbank v Commissioner, South African Revenue Service; First National Bank of SA Ltd t/a Wesbank v Minister of Finance* (*FNB*) 2002 (4) SA 768 (CC) par 47.
49 *First National Bank supra* par 49.
50 *Supra* par 100.

application of the section 25 requirements for a valid deprivation or expropriation of property.[51] The *First National Bank* methodology consists of seven stages, but for the purposes of this article, only the first four are relevant:[52]

1. Does that which is taken away from the property holder by the operation of the law in question amount to property?
2. Does the taking away of such property by the organ of state amount to deprivation?
3. If it does, is such deprivation consistent with the provisions of section 25(1)?
4. If not, is such deprivation justified under section 36 of the Constitution?

When applied to the circumstances prevailing in South Africa, it is concluded that the answers to the questions above are: yes, yes, no and no, respectively, meaning that the seizure of animals of a certain kind based on the fact that they are of a certain kind (which may not always be easy to establish) will amount to a deprivation of property worthy of the protection afforded by section 25 of the Constitution.

5 THE CURRENT LEGISLATIVE REGIME RELATING TO DOGS

Section 2(1) of the Societies for the Prevention of Cruelty to Animals Act[53] (SPCA Act) established the National Council of Societies for the Prevention of Cruelty to Animals (NSPCA) as a body empowered to prevent animal cruelty and promote animal welfare. It could therefore be said that the concurrent national and provincial competence of animal control[54] is assigned to the NSPCA by the SPCA Act. Interpreting the SPCA Act requires that it be read in conjunction with the Animals Protection Act.[55] The NSPCA operates in the animal welfare framework that the APA establishes. The SPCA Act has a clear purpose: to promote animal welfare and prevent cruelty to animals and it has three central functions:[56]

1. to set out an extensive list of offences that constitute animal cruelty;
2. to establish a broad remedial scheme of civil and criminal punishment; and
3. to empower societies for the protection of animals.

[51] Van der Walt and Siphuma "Extending the Lessor's Hypothec to Third Parties' Property" 2015 132 *South African Law Journal* 518 538.

[52] Roux "Property" in Woolman and Bishop (eds) *Constitutional Law of South Africa vol 3* 2ed (2013).

[53] 169 of 1993.

[54] Part A of Schedule 4 of the Constitution.

[55] 71 of 1962.

[56] *National Society for the Prevention of Cruelty to Animals v Minister of Justice and Constitutional Development* 2017 (4) BCLR 517 (CC) (*NSPCA* case).

The SPCA Act gives effect to the society envisaged by the APA.[57] It sets out the functions and purposes of the NSPCA, which has the principal objective of protecting animal welfare as contemplated in the APA.

Section 2 of the APA creates a host of general offences in respect of animals, while section 2A criminalises animal fights by stating:

> "any person who–
> (*a*) possesses, keeps, imports, buys, sells, trains, breeds or has under his control an animal for the purpose of fighting any other animal;
> (*b*) baits or provokes or incites any animal to attack another animal or to proceed with the fighting of another animal;
> (*c*) for financial gain or as a form of amusement promotes animal fights;
> (*d*) allows any of the acts referred to in paragraphs (*a*) to (*c*) to take place on any premises or place in his possession or under his charge or control;
> (*e*) owns, uses or controls any place or premises or place for the purpose or partly for the purpose of presenting animal fights on any such premises or place or who acts or assists in the management of any such premises or place, or who receives any consideration for the admission of any person to any such premises or place; or
> (*f*) is present as a spectator at any premises or place where any of the acts referred to in paragraphs (*a*) to (*c*) is taking place or where preparations are being made for such acts
>
> shall be guilty of an offence and liable on conviction to a fine or imprisonment for a period not exceeding two years."

Sections 2 and 2A of the APA are quite exhaustive and they seem to provide for sufficiently strict measures to be taken in addition to the imposition of high licence fees. The NSPCA is subject to ministerial oversight.[58] Together, these Acts indicate the special and central role the NSPCA plays in protecting animal welfare in South African society.

According to the court in the NSPCA case:

> "Specific provisions of the legislation reinforce the wide ambit of the Act. For example, the NSPCA is empowered to investigate and police acts of animal cruelty. The objects of the NSPCA are broad and expansive, and include 'prevent[ing] the ill-treatment of animals' and doing 'all things reasonably necessary for or incidental to the achievement of [its] objects'. These are sweeping functions. More so when read in light of the comprehensive list of offences in the APA. Further, section 6(2)(r) of the SPCA Act compels the NSPCA to do 'everything which in its opinion is conducive to the performance of its functions or the achievement of [its] objects'. By design, the NSPCA is uniquely placed to robustly and responsively combat animal cruelty." [59]

At the time of enactment of the SPCA Act, Parliament recognised that

> "the responsibilities of animal welfare organisations are becoming greater as urbanisation in South Africa accelerates and animals in many disadvantaged communities are in dire need of basic animal care. The state is and will

[57] *NSPCA* case *supra* par 39.

[58] S 13 of the SPCA Act.

[59] *NSPCA* case *supra* par 40.

> probably remain unable to provide these services ... The [Act] gives [the NSPCA] a platform to face this challenge."[60]

This represents a shift towards empowering the NSPCA to fulfil functions the State is supposed to exercise but cannot. Fundamentally, it amounts to a recognition by the State that it cannot achieve the national goal of animal protection.

The NSPCA's functions are connected to the protection of animals and closely linked with combating criminal offences set out in the animal protection regime.[61] The majority of the provisions in the APA concern offences, but the other statutes in the animal protection regime also include a range of offences related to the mistreatment of animals.

The SPCA Act provides that societies must "co-operate with or permit the board to institute legal proceedings where the society *is capable of instituting such proceedings* under this Act, the APA or the *associated Acts*".[62] The "associated Acts" refer to:

> "five statutes that form part of the current statutory regime for protecting animal welfare and preventing animal cruelty. In its entirety, this spans seven pieces of legislation (animal protection regime)".[63]

The basis for the animal protection regime is the APA.

The other laws have various roles in safeguarding animals and governing how they are treated.[64] The treatment, training and exhibition of animals and guard dogs is regulated by the Performing Animals Protection Act,[65] while other applicable legislation includes the Veterinary and Para-Veterinary Professions Act,[66] the Medicine and Related Substances Act,[67] the Animal Diseases Act[68] and the Meat Safety Act,[69] which set standards of hygiene in animal slaughter for consumption.

Collectively, these laws establish the guidelines for the treatment, care, and usage of animals. They emphasise the idea that society should work to prevent needless cruelty to animals, especially animals that could be used for food or service.[70]

As far as the spheres of governmental functions are concerned, it should be noted that Part B of Schedule 5 of the Constitution specifically lists the licensing of dogs as a municipal function. The imposition of higher licensing fees for unsterilised females and unneutered male dogs by municipal councils is an option that is available.

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60 Debates of the National Assembly (Hansard) 25 November 1993 at 14065 (Minister of Agriculture) as referenced in the *NSPCA* case *supra* par 41.
61 *NSPCA* case *supra* par 46.
62 S 9(2)(i) of the SPCA Act, as quoted in the *NSPCA* case *supra* par 43.
63 *NSPCA* case *supra* par 43.
64 *NSPCA* case *supra* par 44.
65 24 of 1935.
66 19 of 1982.
67 101 of 1965.
68 35 of 1984.
69 40 of 2000.
70 *NSPCA* case *supra* par 45.

6 DO MUNICIPALITIES HAVE LEGISLATIVE AUTHORITY TO PROHIBIT THE KEEPING, BREEDING OR CROSS-BREEDING OF CERTAIN BREEDS OF DOGS TO PREVENT DOGFIGHTING AND OTHER NEFARIOUS ACTIVITIES?

The second certification judgment of the Constitutional Court held that municipalities have the powers and functions set out in national or provincial legislation and which must be developed within the framework provided by the Constitution.[71] Bekink and Pimstone support this view and state that the powers and functions of municipalities "must be determined by laws of competent authority"[72] and that it was the intention of the constitutional drafters that the actual powers and functions of municipalities "were to be determined by law".[73] An opposite standpoint, which is supported by the author, is taken by Steytler and De Visser who opine that it "constricts a municipality in its rights to exercise powers on its own initiative".[74]

The legislative authority[75] of a municipality is exercised by its council[76] and it is exercised, *inter alia,* by passing by-laws.[77] In this respect, municipal councils have original legislative power, as the Constitutional Court found that a municipality:

> "is no longer a public body exercising delegated powers. Its council is a deliberative legislative assembly with legislative and executive powers recognised by the Constitution itself."[78]

While municipalities have original legislative powers, to some extent they are still subject to, and under the control of, the provincial and national spheres of government.[79] This is borne out by section 151(3) of the Constitution, in terms of which "[a] municipality has the right to govern, on its own initiative, the local government affairs of its community, subject to national and provincial legislation, as provided in the Constitution"; municipal by-laws that are in conflict with national and provincial legislation are invalid.[80] National or provincial government may, on the other hand "not compromise or impede a municipality's ability or right to exercise its powers or perform its functions".[81]

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[71] *Ex Parte Chairperson of the Constitutional Assembly: In re Certification of the Amended Text of the Constitution of the Republic of South Africa, 1996* 1997 (2) SA 97 (CC), 1997 (1) BCLR 1 (CC) par 80.

[72] Bekink *Principles of South African Local Government Law* (2006) 200.

[73] Pimstone in Chaskalson (ed) *Constitutional Law of South Africa* (1999) 5A-17.

[74] Steytler and De Visser "Local Government" in Woolman and Bishop (eds) *Constitutional Law of South Africa* (2013) 22–46.

[75] S 151(2) of the Constitution.

[76] S 11(1) of the Local Government: Municipal Systems Act 32 of 2000 (Systems Act).

[77] S 11(3)(m) of the Systems Act.

[78] *Fedsure Life Assurance Ltd v Greater Johannesburg Transitional Metropolitan Council* 1998 12 BCLR 1458 (CC), 1999 (1) SA 374 (CC) par 26.

[79] Rautenbach and Malherbe *Constitutional Law* (2012) 231–233.

[80] S 156(3) of the Constitution.

[81] S 151(4) of the Constitution.

The Constitution confers upon municipalities executive authority and the right to administer the local government matters listed in Parts B of Schedules 4 and 5,[82] and section 156(2) gives them the power to make and administer by-laws for the effective administration of the matters that they have the right to administer.

However, animal control is a functional area of concurrent national and provincial legislative competence;[83] on a strict interpretation, this means that municipalities do not have the power to legislate on the function. On the other hand, everyone is guaranteed the right to freedom and security of the person,[84] which includes the right to be free from all forms of violence from either public or private sources.[85] As such, the municipality, as part of the State, must respect, protect, promote and fulfil that right.[86]

Nevertheless, a discussion on the legislative functions and powers of municipalities will be incomplete without consideration of the developmental duties of municipalities. "Development" is defined as

> "sustainable development, and includes integrated social, economic, environmental, spatial, infrastructural, institutional, organisational and human resources upliftment of a community aimed at–
> (a) improving the life of its members with specific reference to the poor and the disadvantaged sections of the community; and
> (b) ensuring that development serves present and future generations."[87]

The developmental duties of municipalities are set out in the Constitution,[88] and include the promotion of a safe and healthy environment.[89] Safety is a basic, evolutionary need.[90] To give effect to their developmental obligations, the Constitution requires municipalities to structure their budgets and administration to give effect to the basic needs of the community they serve.[91]

Although constitutionally a local authority has executive authority and the right to administer the local government matters listed in Parts B of Schedules 4 and 5 of the Constitution,[92] and any matter assigned to it by national or provincial legislation,[93] municipal powers and functions also have other origins aside from original and assigned powers. These are discussed below.

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82 S 156(1) of the Constitution.

83 Part A of Schedule 4 of the Constitution.

84 S 12 of the Constitution.

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

86 S 7(2) of the Constitution.

87 S 1 of the Systems Act.

88 S 152 and 153 of the Constitution.

89 S 152(1)(*d*) of the Constitution.

90 Komninos "Safety: Maslow's Hierarchy of Needs" *Interaction Design Foundation* (2017) https://www.interaction-design.org/literature/article/safety-maslow-s-hierarchy-of-needs (accessed 2023-02-20).

91 S 153 of the Constitution.

92 S 156(1)(*a*) of the Constitution.

93 S 156(1)(*b*) of the Constitution.

6 1 Assignment of the administration of a matter listed in Parts A of Schedules 4 and 5 of the Constitution

According to section 156(4) of the Constitution, the national and provincial governments must assign the administration of any matter listed in Parts A of Schedules 4 and 5 that necessarily relates to local government, by agreement and subject to any conditions, to a municipality if that matter would most effectively be administered locally and the municipality has the capacity to administer it.[94]

6 2 Powers concerning incidental matters

Section 156(5) grants municipalities "the right to exercise any power concerning a matter reasonably necessary for, or incidental to**,** the effective performance of its functions".[95] Powers are "reasonably necessary or incidental" if they are necessary for the exercise of either the original powers and functions bestowed or those assigned by agreement or through legislation to municipalities.

6 3 Delegated powers

Section 238 of the Constitution provides for the delegation of powers and functions from one executive organ of state (in any sphere of government) to another, provided that such delegation is consistent with any legislation in terms of which such power or function is exercised.[96] This section allows for the additional transfer of powers and functions to municipalities from any executive organ of state in either the national, provincial or local sphere of government (other than those originally bestowed or assigned).

6 4 Powers and functions in terms of agreements under the Systems Act

Local government can also obtain powers and functions through the principle of agency. Municipalities may enter into service delivery agreements/service-level agreements and memoranda of agreements with national and provincial government entities to perform certain functions on behalf of such national or provincial government entities. It needs to be noted that political, financial and administrative accountability remains with the national or provincial government entities. As with delegation of powers and functions, the municipality as agent of an executive organ of state (the

[94] The assignment of powers and functions should not be confused with the delegation of functions and powers. Assignment means a complete transfer of such power and function with no responsibility or authority remaining with the governmental institution from which the function and power is assigned. The assignee, upon transfer of the power and function, has full responsibility for the exercise of such function, which includes financial responsibility. See also the discussion of delegated powers below.

[95] The conditions and limitations should be noted.

[96] S 238(*a*) of the Constitution

principal) does not act in its own name and the risk, including financial risk, remains with the principal.[97]

This leaves the question whether municipalities can legislate on matters for which they don't have original legislative powers, where the function was neither assigned nor delegated, and where it is not the subject of an agreement.

In *Le Sueur v eThekwini Municipality*[98] (*Le Sueur* case), the municipality made changes to the eThekwini Town Planning Scheme by introducing the Durban Municipality Open Space System. One of the consequences of the decision was that no development on land could be proceeded with unless it was underwritten by environmental approval.[99] The applicants sought to have the decision set aside on the grounds, *inter alia*, that the amendments to the town planning scheme were unconstitutional, as the municipality had no executive or administrative authority over environmental matters (the environmental approval). Their contention was based on the fact that "environment" is listed as Part A of Schedule 4. As such it is a concurrent national and provincial competence and outside the functional areas listed in Part B, which is the exclusive domain of municipalities.[100] Referring to the Constitutional Court's judgment in *City of Johannesburg Metropolitan Municipality v Gauteng Developmental Tribunal,*[101] the court found that municipal planning is a function distinct to municipalities and that:

> "there is no reason why the two spheres of control cannot co-exist even if they overlap ... It should be borne in mind, that the one sphere of control operates from a municipal perspective and the other from a national perspective. Each having its own constitutional and policy considerations."[102]

The court concluded:

> "Hence, although environmental matters stood as the apparently exclusive area for National and Provincial Governance at those levels, it is clear that the authority of municipalities at Local Government level to manage the environment at that level has always been and is still recognized. It is inconceivable that the drafters of the Constitution intended by the manner in which the constitution was framed to exclude Municipalities altogether from legislating in respect of environmental matters at local level."[103]

There is criticism against the judgment as it fails to identify the source of municipal legislative authority; this may result in municipalities having

[97] It is necessary to make a clear distinction between original powers and assigned powers on the one hand, and delegated powers and agency on the other hand. The latter grouping is merely the transfer of the manner in which an executive organ of state wishes to discharge its responsibilities. It does not bestow any real executive or administrative authority upon municipalities. The functions and powers so transferred can also be revoked at any time.

[98] [2013] ZAKZPHC 6.

[99] Humby "Localising Environmental Governance: The Le Sueur Case" 2014 17(4) *PELJ* 1660 1661.

[100] Le Sueur *supra* par 16.

[101] 2010 (9) BCLR 859 (CC).

[102] *Le Sueur supra* par 20.

[103] Le Sueur *supra* par 39.

undefined legislative power,[104] and in municipalities having to rely on assignment "from competent legislature". The argument in favour of assignment before municipal action was disputed by Du Plessis and Fuo,[105] who opine that the argument

> "flies in the face of the constitutional demand for 'developmental local government', the principle of subsidiarity entrenched in section 156(5) of the Constitution, and the fulfilment of the duties arising from section 24 of the Constitution."[106]

The authors justify their view by arguing that the exercise of powers that are reasonable and incidental to the effective performance of municipal functions (referred to in section 156(5) of the Constitution) (even if these are not defined and not included in Part B of both Schedules 4 and 5) is competent. According to them,

> "[a] municipality that has the necessary resources can legislate and enforce by-laws on matters listed in Schedule 4A and 5A of the Constitution provided that such action seeks to further the objectives of section 24 of the Constitution and is not in conflict with measures adopted by national and provincial spheres."[107]

In the matter under consideration, reference to section 24 of the Constitution can be replaced by the right to freedom and security of the person, which includes the right "to be free from all forms of violence"[108] and the objective to promote a safe and healthy environment.[109] The judgment in *Nel v Hessequa Local Municipality*[110] follows the approach in *Le Sueur*. In this instance, the municipality adopted by-laws relating to the management of rivers within its area of jurisdiction. The applicant, *inter alia*, took issue with the by-laws, arguing that they were unconstitutional as municipalities have no legislative authority over the use of waters. In his judgment, Meer J stated:

> "It is therefore entirely permissible for a municipality under its authority to administer public amenities, public spaces and recreation, to make by-laws requiring inter alia that persons wishing to use boats on rivers and/or to fish in rivers in its area of jurisdiction, be licensed and to authorise officers to enforce such by-laws. It is important to note that the fact that organs of state in the national and/or provincial spheres of government may also have functional competence over rivers under the Respondents' jurisdiction, does not mean that the Respondent municipality's competence is excluded."[111]

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[104] Bronstein "Mapping Legislative and Executive Powers Over 'Municipal Planning': Exploring the Boundaries of Local, Provincial and National Control" 2015 132 (3) *SALJ* 661.

[105] Du Plessis and Fuo "Governing Authorities in the Same Boat and Tale of Two Schedules: *Marius Nel v Hessequa Local Municipality*" 2017 20 *Commonwealth Journal of Local Governance* (*CJLG*) 71.

[106] Du Plessis and Fuo 2017 *CJLG* 77.

[107] Du Plessis and Fuo 2017 *CJLG* 77.

[108] S 12(1)(*c*) of the Constitution.

[109] S 152(1)(*d*) of the Constitution.

[110] WCC (unreported) 2015-12-14 Case no 12567/2013.

[111] *Nel v Hessequa supra* par 13 and 14.

The judge found authority for his decision in the *Le Sueur* case and the Constitutional Court case of *Maccsand v City of Cape Town*,[112] where the court held:

> "[T]he Constitution allocates powers to three spheres of government in accordance with the functional vision of what is appropriate to each sphere. But because these powers are not contained in hermetically sealed compartments, sometimes the exercise of the powers by two spheres may result in an overlap. When this happens, neither sphere is intruding into the functional area of another. Each sphere would be exercising power within its own competence. It is in this context that the Constitution obliges these spheres of government to co-operate with one another in mutual trust and good faith, and to co-ordinate the actions of one another."[113]

Nel v Hessequa Local Municipality highlights the need to understand that although the three spheres of government are distinct, coordination and cooperation between them remains of paramount importance if the objectives set out in sections 152 and 153 of the Constitution are to be realised. It also demonstrates an acceptance of the existence of municipal legislative authority outside of the functional areas of Parts B of Schedules 4 and 5 to the Constitution.

7 MEASURES MUNICIPALITIES CAN TAKE TO CONTROL DOGS

The SPCA Act provides that societies must "co-operate with or permit the board to institute legal proceedings where the society *is capable of instituting such proceedings* under this Act, the APA or the *associated Acts*".[114] The phrase "associated Acts" refers to five statutes that form part of the current statutory regime for protecting animal welfare and preventing animal cruelty. In its entirety, this spans seven pieces of legislation (animal protection regime).[115] In the jurisdiction of the Hessequa Local Municipality, for example, its By-Law Relating to the Prevention of Public Nuisances and Nuisances Arising from the Keeping of Animals[116] (Nuisances By-Law) and the Municipal Health By-Law of the Garden Route District Municipality[117] are applicable to the keeping of dogs. That increases the count to nine pieces of legislation.

The Hessequa Nuisances By-Law does not deal with animal welfare and the prevention of animal cruelty, as strictly speaking these are not municipal functions and the matters are dealt with extensively in the Animal Welfare Act. As far as enforcement is concerned, members of the South African Police Services have the power to enforce all South African legislation,[118] but this is not the case for municipal law enforcement officers.[119] However, the

[112] 2012 (4) SA 181 (CC).
[113] *Maccsand v City of Cape Town supra* par 47.
[114] S 9(2)(i) of the SPCA Act.
[115] *NSPCA* case *supra* par 43.
[116] Published in Provincial Gazette Extraordinary 6588 dated 19 December 2008.
[117] Published in Provincial Gazette Extraordinary 8018 dated 10 December 2018.
[118] South African Police Service Act 68 of 1995.
[119] GN R1114 in *GG* 41982 of 2018-10-19.

latter do have the power to enforce municipal by-laws and other legislation identified in R1114.[120]

It is proposed that functional municipalities would benefit from a by-law that consolidates the relevant provisions of the assortment of legislation listed above into a single by-law aimed at addressing the behaviour of the owners of animals to prevent or reduce dog attacks, which in many cases have their origin in the maltreatment of animals. Such a by-law would enable municipal law enforcement officers to act within the ambit of R1114. The promulgation of such a by-law should be subject to the proviso that:

a) there is no SPCA or institution aligned to the SPCA in its jurisdiction;
b) SAPS lack enforcement capacity; and
c) it is a function that the municipality wishes to exercise for the purpose of providing a safe and healthy environment.

The proposal is based on the discussions above, the fact that the enforcement of the APA is not allocated to law enforcement officers appointed by municipalities,[121] and the powers granted to peace officers in the Criminal Procedure Act.[122] The training of municipal law enforcement officers for appointment as peace officers in terms of section 334 of the Criminal Procedure Act does not provide for the interpretation of multiple pieces of legislation, often resulting in a failure to enforce.

A further question arises as to whether a municipality should enact legislation to address the keeping of certain breeds of dog? This requires a brief comparative study.

In 1991, the Dangerous Dogs Act of the United Kingdom outlawed certain breeds/types of dog to protect the public from attacks. Its stated aim was to:

> "prohibit persons from having in their possession or custody dogs belonging to types bred for fighting [...] to enable restrictions to be imposed in relation to other types of dog which present a serious danger to the public; to make further provision for securing that dogs are kept under proper control; and for connected purposes."

However, since the promulgation of the law, the annual number of fatalities has continued to rise. It was found that hospital admissions for dog attacks increased by 81 per cent between 2005 and 2017.[123] Dog attack fatalities have also increased.[124] In its 2018 report, the UK House Commons Committee called on government to increase support for local authorities and police forces to ensure they have the capacity to fulfil their duties.

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[120] Van As "Kan Munisipale Wetstoepassingsbeamptes Goedsmoeds op die Publiek Losgelaat Word?" (Can Municipal Law Enforcement Officers Be Released on the Public Without Reservation) 2019 *Litnet* 504 510.

[121] GN R1114 in *GG* 41982 of 2018-10-19.

[122] S 334 of the Criminal Procedure Act 51 of 1977.

[123] UK House of Commons (Environment, Food and Rural Affairs Committee) "Controlling Dangerous Dogs" HC 1040 published on 17 October 2018 3.

[124] UK House of Commons 10.

In Scotland, Dog Control Notices were implemented as an early intervention measure; a trained municipal officer would assess the dog and situation and impose suitable restrictions or requirements on the owner.[125]

Other places across the world have achieved a substantial reduction in bite incidences by channelling resources into targeted prevention and responsible ownership strategies, rather than focusing on breed-specific legislation. The "Calgary model", for example, is widely cited as an effective approach that has achieved substantial bite reductions. This model adopted a different approach aimed at widespread education programmes, ensuring a high number of dog registrations, and enforcing strict penalties for owners of dogs involved in attacks. It boils down to education and enforcement.[126]

In 2016, the Netherlands became the first country without street dogs[127] and it was achieved through a mixture of hosting sterilisation days, enacting laws against abandonment, higher taxes, awareness campaigns, and improved policing.

In view of the discussions above, it is concluded that legislation aimed at prohibiting the keeping and breeding of certain types of dog is an exercise in futility.

Globally, over time, a variety of measures have been implemented to deal with dangerous dogs. These include:

a) requiring owners to register and license their dogs so that authorities can keep track of potentially dangerous dogs (although in the Netherlands, the introduction of a dog tax resulted in more stray dogs as people could no longer afford to keep their dogs, or refused to pay);[128]
b) introducing breed-specific legislation in terms of which the ownership of certain breeds that are believed to be dangerous were either banned or regulated more strictly;
c) making the purchase of liability insurance to cover damages for harm caused by dogs compulsory for dog owners;
d) compulsory attendance of training programmes so that owners can learn how to handle and train their dogs;
e) requiring dogs to be on leashes in public places to prevent attacks; and
f) stricter enforcement of animal cruelty and animal control legislation, which may include seizing dangerous canines.

Some of these measures have proved not to be effective and therefore it is proposed that, for South African conditions, a by-law should provide for and regulate: licensing and permission to keep dogs; breeding and hawking; dogs in streets or public places; the manner in which animals are kept and treated; euthenasia and sterilisation; conditions for permission to keep dogs;

[125] UK House of Commons 26.
[126] UK House of Commons 31.
[127] Sawbridge "How Did the Netherlands Become the First Country Without Stray Dogs?" (27 July 2022) https://dutchreview.com/culture/how-did-the-netherlands-become-the-first-country-to-have-no-stray-dogs/ (accessed 2023-02-20) 1.
[128] Sawbridge https://dutchreview.com/culture/how-did-the-netherlands-become-the-first-country-to-have-no-stray-dogs/ 3.

restrictions; withdrawal of permission; exemptions; and the right of entry and inspection.

8 CONCLUSION AND RECOMMENDATIONS

As far as functions are concerned, Part B of Schedule 5 of the Constitution, lists the licensing of dogs as a municipal function. The imposition of higher licensing fees for unsterilised females and unneutered male dogs by council is an option that is available.

Animal control is a functional area of concurrent national and provincial legislative competence,[129] which means that municipalities do not have the power to legislate on the function. On the other hand, everyone is guaranteed the right to freedom and security of the person,[130] which includes the right to be free from all forms of violence from either public or private sources.[131] The municipality, as part of the State, must respect, protect, promote and fulfil that right[132] as part of their developmental duties. The exercise of powers that are reasonable and incidental to the effective performance of municipal functions (referred to in section 156(5) of the Constitution) (even if they are not defined and not included in Parts B of Schedules 4 and 5 of the Constitution) is competent. This approach is supported by the "principle of subsidiarity entrenched in section 156(5) of the Constitution, … the fulfilment of the duties arising from section 12 of the Constitution",[133] and the objective to promote a safe and healthy environment.[134] A municipality that has the necessary resources can legislate and enforce by-laws on matters listed in Schedules 4A and 5A of the Constitution, provided that such action seeks to further the objectives of Chapter 2 of the Constitution and is "not in conflict with measures adopted by the national and provincial spheres".[135]

The NSPCA operates in the animal welfare framework that the APA establishes. The Act's purpose is to promote animal welfare and prevent cruelty to animals, but the responsibilities of animal welfare organisations are becoming greater as urbanisation in South Africa accelerates and animals in many disadvantaged communities are in dire need of basic animal care. On the other hand, the suite of local government law is geared towards the social and economic upliftment of communities and there is legislative justification for interventions by municipalities to address matters such as the control of public nuisances, dog licensing, the operation of pounds and the conduct of community members that can alleviate the pressure on those organisations tasked with animal care.

A consolidation of the provisions of the various pieces of legislation into a single by-law aimed at regulating the keeping and treatment of dogs may result in increased law enforcement and, it is hoped, in increased sentences

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129 Part A of Schedule 4 of the Constitution.
130 S 12 of the Constitution.
131 S 12(1)(*c*) of the Constitution.
132 S 7(2) of the Constitution.
133 Du Plessis and Fuo 2017 *CJLG* 71 77.
134 S 152(1)(*d*) of the Constitution.
135 Du Plessis and Fuo 2017 *CJLG* 77.

(as a result of amplified enforcement), as well as improved deterrence. In 2019, for example, 12 people were sentenced to prison time – ranging from 12 months to five years – for their participation in dogfighting activities.[136] The judiciary and national prosecution authority should also be sensitised in these regards so that stricter sentences can be imposed. This is a role that the South African Local Government Association can assume.[137]

[136] Van Diemen "6 Sent to Jail for Illegal Dog Fighting, 14 Pit Bulls Rescued" *News 24* (27 May 2019) https://www.news24.com/SouthAfrica/News/6-sent-to-jail-for-illegal-dog-fighting-14-pit-bulls-rescued-20190527 (accessed 2023-02-14).

[137] S 163 of the Constitution.

AN EXAMINATION OF POLICIES REGULATING THE PARTICIPATION OF TRANSGENDER LEARNERS IN SOUTH AFRICAN HIGH SCHOOL SPORTS

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SUMMARY

South African high schools typically adopt a sex-segregated approach to sports teams and, therefore, have "boys" sports teams and "girls" sports teams. This approach is complicated by the increasing number of high school learners who identify openly as transgender. Transgender learners experience the sports policies that South African high schools choose to adopt as falling into one of three broad categories. These categories are: the restrictive approach, the partially inclusive approach and the fully inclusive approach. These approaches vary in terms of what steps they require trans learners to take in order to participate in sports teams that are consistent with their gender identity. School policies must be consistent with the Promotion of Equality and Prevention of Unfair Discrimination Act (PEPUDA) in order to be legally compliant. It is argued that the restrictive approach is inconsistent with PEPUDA, and, therefore, unlawful, as no legitimate purpose underlies it. As legitimate reasons exist for the implementation of partially and fully inclusive policies, it is argued that they are lawful. As both such policies are lawful, policymakers will have a choice regarding which set of policies to adopt. When making this choice, a school must consider which values it seeks to promote. On the one hand, there is the imperative to acknowledge the well-being and dignity of trans learners while, on the other hand, there are legitimate concerns about the fairness of competition. As dignity is both a right that is granted to everyone by the Constitution, and one of its founding values, it is argued that fully inclusive policies should be favoured as they result in the validation of trans learners' dignity. Furthermore, it is argued that high school sports should serve broader educational goals, such as teaching high school learners that their trans peers deserve the chance to live their truth in full.

1 INTRODUCTION

High schools around the world typically adopt a sex-segregated approach to sports teams and, therefore, have "boys" sports teams and "girls" sports teams.[1] South African high schools are no different in this regard. In terms of

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[1] Lenzi "The Trans Athlete Dilemma: A Constitutional Analysis of High School Transgender Student-Athlete Policies" 2018 67(3) *American University Law Review* 841.

this approach, inclusion in the "boys" sports teams is the exclusive preserve of those whose birth certificates designate them as male, and inclusion in the "girls" sports teams is the exclusive preserve of those whose birth certificates read "female". This approach has been complicated by the increasing number of high school learners who identify openly as transgender ("trans").[2]

In the absence of a centralised authority on all aspects of school sport, young people who do not identify as either male or female experience the sports policies that South African high schools choose to adopt as falling into one of three broad categories. These categories, as formulated by Lenzi,[3] are the restrictive approach, the partially inclusive approach and the fully inclusive approach.

In terms of the restrictive approach, trans learners are prohibited, without exception, from participating in teams that do not correspond with their sex as classified in the population registry.[4] Conversely, the fully inclusive policy, is the converse of the restrictive approach, and, therefore, allows trans learners to participate, without exception, in teams that are congruous with their gender identity. Lastly, the partially inclusive policy requires trans girls to undergo specific medical procedures in order to participate in girls' teams.[5] However, this policy does not require trans boys to undergo any interventions of this nature.

School policies must be consistent with the Promotion of Equality and Prevention of Unfair Discrimination Act[6] (PEPUDA) in order to be legally compliant. Although the Act does not expressly prohibit discrimination on the ground of gender identity, its respective non-discrimination provisions are broad enough that they can be interpreted to contain such prohibitions. In this paper, it is argued that the restrictive approach is inconsistent with PEPUDA, and therefore unlawful, as no legitimate purpose exists that could justify discriminating between cisgender and transgender learners on the basis of gender identity. As legitimate reasons exist for the implementation of partially and fully inclusive policies, it is argued that they are lawful. The author's arguments are shaped by the lens of the research question: are South African high school sports policies that regulate the participation of transgender learners in accordance with their gender identity compliant with South Africa's equality laws?

As both partially and fully inclusive policies are lawful, policymakers have a choice regarding which policy to adopt. When making this choice, a school must consider which values it seeks to promote. On the one hand, there is the imperative to acknowledge the well-being and dignity of trans learners, while on the other hand, there are legitimate concerns about the prevention of injury and fairness of competition. As dignity is both a right that is granted to everyone in the Constitution, and one of the founding values of the Constitution, it is argued that fully inclusive policies should be favoured as

2 *Ibid.*
3 *Ibid.*
4 *Ibid.*
5 *Ibid.*
6 4 of 2000.

they result in the validation of trans learners' dignity. Furthermore, high school sports should serve broader educational goals, which should include teaching high school learners that their trans peers deserve the chance to live their truth in full, including participating in sports teams that are congruent with their gender identity.

This article begins by providing a brief history of sex-segregated sport in South Africa and an explanation of trans identity. There follows a discussion of the legal framework in which the author assesses the lawfulness of the three different policy approaches in relation to the Constitution,[7] PEPUDA, and domestic and foreign jurisprudence. This assessment involves an appraisal of, not only the legal justifications for sex-segregated sports, but also those of a social nature.

2 EXPLANATION OF TERMS

In this article, the author adopts the following definitions of the terms "sex", "intersex", "gender", "cisgender" and "transgender":

"Sex" refers to a category that is assigned at birth on the basis of anatomical and biological features.[8] In addition to external genitalia, these biological features include the composition of hormones and chromosomal DNA.[9]

An "intersex" individual is a person who exhibits both male and female sex characteristics and, therefore, is not considered to be male nor female.[10]

Unlike sex, "gender" is not assigned. Rather, it is a category of identity that is claimed by the individual and is independent of the individual's sex.[11] It follows that gender is a cultural and social construct, with the content of the notions of "male" and "female" being attributed within a heteronormative context.[12] Gender, when understood progressively, is inseparable from a sense of self-identification and interiority.[13] Accordingly, gender is more concerned with cultural meanings attached to gender roles and the psychology of individuals than it is with their biology. "Gender identity", in turn, is the personal sense of one's own gender.[14]

A "cisgender" individual wholly identifies with the sex that was attributed to that person at birth. The term "transgender", on the other hand, refers to an

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

8 Newcombe "Blurred Lines: Intersexuality and the Law" 2017 109(2) *Law Library Journal* 227.

9 Visser and Picarra "Victor, Victoria or V? A Constitutional Perspective on Transsexuality and Trans-Genderism" 2012 28(3) *South African Journal on Human Rights* 508.

10 Newcombe 2017 *Law Library Journal* 227.

11 *Ibid.*

12 Klein "Who Decides Whose Gender? Medico-Legal Classifications of Sex and Gender and Their Impact on Transgendered South Africans' Family Rights" 2014 14(2) *Ethnoscripts* 13.

13 *Ibid.*

14 Wilson, Marais, De Villiers, Addinall and Campbell "Transgender Issues in South Africa, With Particular Reference to the Groote Schuur Hospital Transgender Unit" 2014 104(6) *South African Medical Journal* 449.

individual whose gender identity does not correspond with the sex assigned to that individual at birth.[15]

3 SETTING THE SCENE

There is little-to-no literature to be found on the specific topic to be engaged with in this article. Although much has been written about transgender individuals in South Africa, the issue of the legal compliance of high school sports policies in regulating the participation of transgender learner athletes has not been canvassed. Given this gap, the author has chosen to review literature that deals with congruent issues. The author has also taken a thematic approach to the literature review, in which the history of sex-segregated sport, transgender identity, the dilemma of trans athletes, the potential benefits of sports participation for transgender learners, and current models for incorporating transgender athletes into sex-segregated sports are considered.

A review of South African literature illustrates that trans individuals, both inside and outside educational institutions, encounter societal prejudice and barriers to exercising their rights on a daily basis. Sanger's[16] work, in conjunction with Moloi's,[17] is used to determine the position of transgender individuals in South African society and assists in placing their lived experiences at the centre of this article. American studies analyse arguments that arise in the context of devising trans-inclusive policies[18] but there is little-to-no South African case law on discrimination in sports. The American articles are thus particularly useful in learning how courts approach the issue of discrimination in sport, as issues of discrimination in high school sports have come before American courts in the past.

Most literature that pertains to queer issues is written from a Western perspective in terms of which the concerns, views and challenges of White, cisgendered, masculinist and middle-class queers are considered to be the default.[19] This article forms part of a small, but growing, group of writers in the global South attempting to place gender-diverse, feminist and queers of colour at the centre of their work.[20] This article considers, for the first time, the legal compliance of the three main categories of transgender high school sports policies in their application to South Africa learners.

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[15] Luvuno, Ncama and Mchunu "Transgender Population's Experiences With Regard to Accessing Reproductive Health Care in Kwazulu-Natal, South Africa: A Qualitative Study" 2019 11(1) *African Journal of Primary Health Care & Family Medicine* 1.

[16] Sanger *Young and Transgender: Understanding the Experiences of Young Transgender Persons in Educational Institutions and the Health Sector in South Africa* (Gender DynamiX Research Report) 2014.

[17] Moloi *KwaZulu-Natal Transgender and Gender Non-Conforming Needs Assessment Report: 2012* (2013).

[18] Lenzi 2018 *American University Law Review* 841.

[19] Coates "Collateral Damage: Warfare, Death, and Queer Theory in the Global South" 2019 25(1) *GLQ: A Journal of Lesbian and Gay Studies* 132.

[20] *Ibid*.

3 1 History of sex-segregated sport

Sports were traditionally exclusively the purview of men and boys.[21] The key objective of the promotion of team sports by educational and religious institutions in the nineteenth century was to engender in the male participants "masculine qualities such as physicality, aggression and dominance".[22] The few sporting opportunities offered by these institutions to females largely focused on socialising and fitness as opposed to competition.[23] Furthermore, these opportunities tended to have different rules grounded in stereotypical conceptions of male physical superiority.

The history of sex-segregated sport in South Africa can be traced to British colonialism.[24] The gender binary was a key component of the Judeo-Christian ideology that British colonialists imposed on indigenous peoples. These colonialists excluded women from participation in sports and used sports as a material and ideological cornerstone for the perpetuation of male superiority (socially, physically and economically) over women.[25]

Owing to the historical constraints faced by women in sports, their participation in "male-type" sports, such as rugby, is far less acceptable than their participation in "female-type" sports, such as netball. In comparison to racial segregation, this approach of separating male and female athletes on the basis of birth went largely unchallenged, both in South Africa and globally, until the early 2000s when it was contested by an increasing number of individuals who identify openly as trans.[26] There is evidence of women who participated in all-male teams prior to the 1960s, but it was only at the end of the 1960s that South African women challenged the gendered nature of sports and formed their own teams and sporting associations.[27]

3 2 Understanding transgender identity

Traditional notions of gender and sex have been challenged by a more liberal discourse. The first major departure offered by the liberal perspective is that gender and sex are not definite concepts. The second departure is that gender and sex are not binary.[28]

The values at the heart of the traditional conception of gender and sex are certainty and stability, which encourages the use of distinct discursive

[21] Buzuvis "Transgender Student-Athletes and Sex-Segregated Sports: Developing Policies of Inclusion for Intercollegiate and Interscholastic Athletics" 2011 21(2) *Seton Hall Journal of Sports & Entertainment Law* 24.

[22] *Ibid.*

[23] *Ibid.*

[24] Pelak "Women and Gender in South Africa Soccer: A Brief History" in Alegi and Bolsmann (eds) *South Africa and the Global Game: Football, Apartheid and Beyond* (2013) 112.

[25] *Ibid.*

[26] Lenzi 2018 *American University Law Review* 844.

[27] *Ibid.*

[28] Van Schalkwyk "Rejecting the Theoretical Basis of the Alteration Act: Analysis of Sex and Gender Binaries Through the Optic of the First Case of National Coalition and Comparative Foreign Jurisprudence" 2018 55 *Responsa Meridiana* 34.

binaries and classifications;[29] whereas, the value at the heart of the progressive perspective, which extends the discursive boundaries of "gender" and "sex", is individual freedom. This understanding is congruent with modern medical, psychological and scientific views,[30] and it is therefore submitted that the traditional conception of gender and sex is anachronistic.

Trans predispositions are deeply ingrained and have presented in two-year-old children.[31] Some trans individuals who want their bodies to better display their gender identity opt to undergo gender-reassignment surgery and/or hormonal therapy. Other individuals, for a number of reasons, continue their lives as a gender that differs from their birth sex.[32]

The process of transitioning largely depends on the physical development and age of an individual. The World Professional Association for Transgender Health (WPATH) has established different medical protocols for transitioning sportspersons, with age being a key factor. WPATH recommends that young children seeking to transition should not undergo medical intervention and, in that case, the transition should rather be exclusively social.[33] Upon impending puberty, doctors may prescribe hormone blockers to defer its commencement. It is recommended that postpubescent young adults undergo cross-gender hormone treatments and/or chest reconstruction surgery.[34]

For purposes of this article, it is important to note that gender reassignment surgery for patients under the age of 18 is strongly discouraged by WPATH. A further constraint to undergoing the procedure is cost, which varies between R450 000 and R600 000, so disproportionately affecting individuals from lower socio-economic classes in South Africa.[35] The situation is exacerbated by the fact that medical-aid providers in South Africa are reluctant to cover gender procedures as they are categorised as "cosmetic".[36] Indeed, gender-affirming procedures have only been paid for by one medical aid in the country, namely Bankmed.[37] Despite the fact that trans patients and advocates describe the procedures as non-cosmetic, medical aids have disagreed with this assertion and have, consequently, maintained the institutionalised erasure of transgender patients.

Many trans individuals are thus left with little choice but to turn to government hospitals, which provide the procedure for free. However,

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[29] Katyal "The 'Numerus Clausus' of Sex" 2017 84(1) *University of Chicago Law Review* 391.

[30] Van Schalkwyk 2018 *Responsa Meridiana* 34.

[31] Zaliznyak, Yuan, Bresee, Freedman and Garcia "How Early in Life do Transgender Adults Begin to Experience Gender Dysphoria? Why This Matters for Patients, Providers, and for Our Healthcare System" 2021 9 *Sexual Medicine* 6 8.

[32] Griffin and Carroll *On the Team: Equal Opportunities for Transgender Student Athletes* (2010) 9.

[33] World Professional Association for Transgender Health *Standards of Care for the Health of Transsexual, Transgender, and Gender Nonconforming People* 7ed (2011) 17.

[34] *Ibid*.

[35] Crawford "How Can I Get on the Waiting List for Gender Reassignment Surgery?" (3 March 2022) https://www.groundup.org.za/qanda/529/ (accessed 2023-05-23).

[36] *Ibid*.

[37] Furlong "Changing Your Gender in South Africa" (15 September 2015) https://www.groundup.org.za/article/changing-your-gender-south-africa_3305/ (accessed 2019-03-07).

waiting times at these facilities are approximately 20 years.[38] As a result of both WPATH's protocols and the financial costs of the procedure, an overwhelming majority of trans high school athletes are living their lives as a gender that differs from their birth sex.

3 3 The "dilemma" of transgender athletes

At the core of the sex-segregated approach to sports is the belief that females and males differ biologically. Numerous scientific studies have shown that, generally, females have objective physical disadvantages.[39] Females, on average, have less muscle mass and shorter limbs.[40]

The athletic performance of prepubescent boys and girls is largely indistinguishable. However, upon the onset of puberty, which tends to coincide with entering high school, physical differences between the two sexes become blatantly manifest.[41] Research indicates that if males and females were not separated, the latter would not have opportunities to compete in individual sports.[42]

It has been argued by distinguished academics on trans sportspersons that the differences in the apparent physical competitive abilities between the sexes are exaggerated.[43] It has been asserted that physical differences, observed by researchers, between females and males do not reflect definite distinctions, but rather averages. Moreover, advantages that males enjoy in terms of strength and size (which are considered by some as the most important factors determining success in sports) may be overcome by natural talent and skill.[44]

While it is true that not all girls are physically inferior to boys, the physical differences between males and females are pronounced to the extent that a school policy that did not distinguish between the sexes would result in the disenfranchisement of girls in high school sports.[45] Although some talented girls might compete against their male counterparts, such a policy would discourage the average girl from participating in sports.[46] It is submitted that there may be no need for sex segregation in sports that are primarily skills-based such as shooting or bowling.[47] However, a majority of sports reward attributes such as strength, speed and body size. It is in these sports, such

38 Thomas "How South Africa's Healthcare System Is Failing Our Trans Community" (29 June 2022) https://ewn.co.za/2022/06/29/how-south-africa-s-healthcare-system-is-failing-our-trans-community (accessed 2023-05-23).

39 Heather "Transwoman Elite Athletes: Their Extra Percentage Relative to Female Physiology" 2022 19 *International Journal of Environmental Research and Public Health* 1.

40 *Ibid.*

41 Skinner-Thompson and Turner "Title IX's Protections for Transgender Student Athletes" 2013 28 *Wisconsin Journal of Law, Gender & Society* 287.

42 Lenzi 2018 *American University Law Review* 853.

43 Buzuvis 2011 *Seton Hall Journal of Sports & Entertainment Law* 35–36.

44 Buzuvis 2011 *Seton Hall Journal of Sports & Entertainment Law* 37–38.

45 Lenzi 2018 *American University Law Review* 854.

46 *Ibid.*

47 *Ibid.*

as rugby and basketball, that boys would enjoy an undue competitive advantage.

Accordingly, the traditional model of school sports is challenged by the presence of trans learners. When South African high schools are drafting sports policies with respect to transgender learners, the intrinsic biological differences between the sexes must be acknowledged. A trans girl who has not undergone any medical intervention has a biological edge over her cisgender counterparts whose bodies produce considerably less testosterone.[48] Nevertheless, following approximately a year of medical intervention in the form of hormone therapy, any former physical advantage is significantly reduced.[49] These treatments have been shown to decrease the muscle mass and, in some cases, even the height of trans girls.[50] Moreover, the body-fat percentage of individuals who have undergone these treatments increases significantly. By the conclusion of the treatment, trans girls have comparable levels of estrogen and testosterone in their bodies to their cisgender peers.[51]

However, trans girls who have undergone these treatments may nevertheless enjoy some biological advantages over their cisgender peers. Hormone therapy cannot alter a trans girl's "male skeletal" structure, which includes the length of her limbs and the structure of her hips.[52] Consequently, it has been argued that these individuals enjoy an undue competitive advantage in sports such as basketball and rugby, which generally favour large physical frames.[53]

In situations where a trans girl began therapy before the full development of her male skeletal structure, it has been found that these physical differences are considerably diminished.[54] Therefore, concerns over fairness on the playing field in school sports are unfounded when a trans girl who took hormone blockers upon the onset of puberty did not develop secondary male sex characteristics.[55]

Concerns regarding competitive fairness are not as complicated where trans boys who have not undergone any medical intervention compete against their cisgender counterparts. Research indicates that trans boys enjoy no perceptible biological advantage over cisgender boys. This is the case even when the trans boy is receiving testosterone treatments.[56] It is possible that these boys may violate a school or sporting association's anti-drug or doping rules that prohibit the use of certain performance-enhancing

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[48] Buzuvis 2011 *Seton Hall Journal of Sports & Entertainment Law* 38.

[49] Harper "Race Times for Transgender Athletes" 2015 6(1) *Journal of Sporting Cultures and Identities* 8.

[50] Buzuvis 2011 *Seton Hall Journal of Sports & Entertainment Law* 39.

[51] *Ibid*.

[52] Lenzi 2018 *American University Law Review* 855.

[53] *Ibid*.

[54] *Ibid*.

[55] *Ibid*.

[56] Pilgrim, Martin and Binder "Far From the Finish Line: Transsexualism and Athletic Competition" 2003 13(2) *Fordham Intellectual Property, Media and Entertainment Law Journal* 498.

substances, such as testosterone.[57] However, a common-sense solution would be for the policy to include a medical exception that allows trans boys to undergo testosterone treatments provided that the level of testosterone in their bodies is not dissimilar from the average cis boy.[58]

3 4 Potential benefits of sport participation for transgender learners

There are no conclusive statistics on the number of learners who participate in high school sports in South Africa. However, it is clear that those who do participate enjoy numerous academic, mental and physical benefits.[59] Participating in school sports reduces a learner's risk of obesity and heart disease.[60] Moreover, participating in school sports may get learners into the habit of being active, which may continue once they have left high school.[61] In addition, physically active learners are less likely to suffer from mental illnesses, such as anxiety and depression, and tend to perform better academically than their non-active peers.[62] Lastly, through participation in school sports, learners tend to learn values such as teamwork, perseverance and sportsmanship.[63]

Transgender learners are a vulnerable group in South Africa, and they deserve equal access to the physical and mental benefits that are associated with participation in sports. It is common for trans learners to lack a sense of belonging in their school community.[64] Participation in sports can play a key role in reducing marginalisation and feelings of isolation. The acceptance of an openly trans player in a single-gender team can result in a powerful validation of a learner's identity.[65]

Lastly, the adoption of trans-inclusive policies has the potential literally to save learners' lives. Alarmingly, almost half of trans people seriously consider suicide at least once during the their life.[66] However, research shows that trans individuals are considerably less likely to self-harm when they have strong support systems and when they feel included in the wider

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[57] Pilgrim, Martin and Binder 2003 *Fordham Intellectual Property, Media and Entertainment Law Journal* 513.

[58] Pilgrim, Martin and Binder 2003 *Fordham Intellectual Property, Media and Entertainment Law Journal* 498.

[59] Van Hout "Participation in Sport and the Perceptions of Quality of Life of High School Learners in Theewaterskloof" 2013 19(3) *African Journal for Physical, Health Education, Recreation and Dance* 612.

[60] Buzuvis 2011 *Seton Hall Journal of Sports & Entertainment Law* 46.

[61] Skinner-Thompson and Turner 2013 *Wisconsin Journal of Law, Gender & Society* 297.

[62] *Ibid*.

[63] *Ibid*.

[64] Reygan "Sexual and Gender Diversity in Schools: Belonging, In/Exclusion and the African Child" 2019 36 *Perspectives in Education* 2 98.

[65] Lenzi 2018 *American University Law Review* 856.

[66] Hatzenbuehler "The Influence of State Laws on the Mental Health of Sexual Minority Youth" 2017 171 *JAMA Pediatrics* 4 322.

community.[67] Accordingly, trans-friendly policies can be a matter of life and death for many trans learners.

4 CURRENT POLICIES FOR INCORPORATING TRANSGENDER ATHLETES INTO SEX-SEGREGATED SPORTS

4 1 The Olympic model

Prior to 2003, the International Olympic Committee (IOC) required all female athletes to undergo sex-verification testing.[68] This policy subjected female athletes, both those with and without intersex conditions, to humiliating treatment.[69] Indeed, it was only after undergoing testing that several individuals became aware of their intersex condition.[70]

In 2004, the IOC adopted its first transgender-inclusive policy.[71] This policy made provision for transgender athletes to compete in athletic meets that are congruent with their gender identity. The IOC was commended for being progressive. However, the policy was criticised for being overly rigid. The policy required athletes to undergo gender reassignment surgery and to undergo hormonal therapy for a period of two years. Once this had been done, the athlete had to obtain official government recognition of their new sex status.[72] It is submitted that this particular requirement demonstrated a lack of understanding of the issues that trans individuals encounter, such as the prohibitive cost, and the fact that a significant number of countries do not recognise sex changes.[73]

The IOC's revised policy, adopted in 2015, has been praised for being more consistent with prevailing notions of gender.[74] The current guidelines do not require an athlete to obtain official government recognition of their new sex status. Moreover, the requirement of undergoing gender reassignment surgery was discarded.[75] The new policy allows for trans men to compete in the male category without any exceptions. Trans women, on the other hand, are required to complete hormone therapy before they can compete in the female category.[76] The requirements for trans women effectively require them to take a two-year break from competing. The policy requires their testosterone levels to be suppressed for a minimum of 12 months before their first event in the female category. Given that it takes a

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67 *Ibid*.

68 Buzuvis 2011 *Seton Hall Journal of Sports & Entertainment Law* 22.

69 Skinner-Thompson and Turner 2013 *Wisconsin Journal of Law, Gender & Society* 289.

70 Leong "Against Women's Sports" 2017 95(5) *Washington University Law Review* 26.

71 Buzuvis 2011 *Seton Hall Journal of Sports & Entertainment Law* 21.

72 *Ibid*.

73 Ghoshal and Knight *Rights in Transition: Making Legal Recognition for Transgender People a Global Priority* (Human Rights Watch World Report) 2016.

74 Lenzi 2018 *American University Law Review* 858.

75 Shrader "Uniform Rules: Addressing the Disparate Rules That Deny Student-Athletes the Opportunity to Participate in Sports According to Gender Identity" 2017 51(2) *University of Richmond Law Review* 659.

76 Lenzi 2018 *American University Law Review* 858.

year, on average, for a trans woman's testosterone levels to be sufficiently suppressed, the rule is effectively a two-year requirement.[77]

4 2 The high school model

The South African Schools Act[78] regulates all schools in South Africa. However, the Act is silent on the issue of school sports. Currently, there is no national school sports policy in South Africa, as the 2009 Draft School Sport Policy for Public Schools in South Africa was never officially adopted. It was intended that the policy would apply to all schools in South Africa and would regulate the delivery of school sports to all learners.[79] In terms of the policy, school sports committees must draft the sport policy for each particular school.[80] In the absence of the policy, the formulation of school sports policies differs from school to school. Typically, the principal and school governing board are involved in the process. The policies that have been developed by schools in South Africa can broadly be placed into three categories – namely, restrictive policies, partially inclusive policies and fully inclusive policies.[81]

5 ANALYSIS AND DISCUSSION

The Constitution is the supreme law of the Republic of South Africa and any law or conduct that is inconsistent with it is invalid.[82] Section 9 of the Constitution prohibits the State and any person from unfairly discriminating against individuals or groups of individuals on 16 listed grounds, and on grounds that are analogous to them.[83] Although gender identity is not a listed ground in the Constitution, it could be argued that it is an analogous ground, and thus that discrimination on the ground of gender identity is, despite the lack of explicit constitutional recognition, prohibited by the Constitution. Some academics strongly favour this view.[84] However, owing to the principle of subsidiarity,[85] the debate concerning whether "gender identity" is an analogous ground in South Africa's Constitution is not material to the object of this article.

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77 *Ibid.*

78 84 of 1996.

79 The Department of Basic Education & Department of Sports and Recreation "The 2009 Draft School Sport Policy for Public Schools" (2009) 4.

80 The Department of Basic Education & Department of Sports and Recreation "The 2009 Draft School Sport Policy for Public Schools" 10.

81 Lenzi 2018 *American University Law Review* 845. These categories are engaged with further in the next section of the article.

82 S 2 of the Constitution.

83 S 9(3) of the Constitution.

84 See Thoreson *Beyond Equality: The Post-Apartheid Counternarrative of Trans and Intersex Movements in South Africa* (2013).

85 In the case of *Mazibuko v City of Johannesburg* 2010 (4) SA 1 (CC) par 73, the Constitutional Court, in its explanation of the operation of the principle of subsidiarity, stated that "where legislation has been enacted to give effect to a right, a litigant should rely on that legislation in order to give effect to the right, or alternatively challenge the legislation as being inconsistent with the Constitution".

The consequence of the application of this principle is that litigants who claim that they have been discriminated against but who do not seek to challenge the constitutionality of legislation must rely on the provisions of PEPUDA.[86] Therefore, a trans plaintiff challenging a discriminatory high school sports policy will have to rely on PEPUDA.

PEPUDA was enacted to give effect to section 9(4) of the Constitution, which affirms that discrimination by private individuals, and not only by the State, is prohibited. Section 1 of PEPUDA defines discrimination as “any act or omission, including a policy which directly or indirectly withholds benefits, opportunities or advantages from any person on one or more of the prohibited grounds”. Prohibited grounds listed in section 1 of PEPUDA include the 16 grounds listed in section 9(3) of the Constitution, as well as “any other ground where discrimination based on that other ground undermines human dignity”.

The Act acknowledges that discrimination can occur through an act or omission. Therefore, it is not only policies that expressly exclude trans learner athletes from participating in sports teams that are subject to scrutiny under PEPUDA. The inclusion of the word “omission” means that silence in policies on the issue of trans participation in sports teams may also qualify as discrimination.

In light of the above, it is clear that policies that differentiate between transgender and cisgender learners constitute discrimination as they result in the withholding of opportunities from transgender individuals. The opportunity in question is the opportunity that cisgender learners have to participate in sports teams that are congruent with their gender identity.

Although trans learners may not have this opportunity and, therefore, policies of this nature discriminate against them, whether this discrimination has occurred on a prohibited ground is contested. In jurisdictions such as the United States of America, discrimination against trans persons is considered to be sex or gender discrimination.[87]

However, it is argued that South African courts should not adopt this approach, as doing so may be misleading. These categories are typically used in cases in which “women” and “men” receive different treatments.[88] Dealing with discrimination against transgender persons as discrimination on the basis of gender identity would be more accurate.

PEPUDA does not explicitly prohibit discrimination on the ground of gender identity. However, the Act does prohibit discrimination on any ground that causes or perpetuates systematic disadvantage or undermines human dignity.[89] In *Hoffmann v South African Airways*,[90] the Constitutional Court held that discrimination on the ground of HIV is prohibited by the Constitution (despite the fact that HIV status is not listed in section 9(3)), as

[86] De Vos, Freedman, Brand, Gevers, Govender, Lenaghan, Mailula, Ntlama and Sibanda *South African Constitutional Law in Context* (2014) 452.

[87] See *Glenn v Brumby* 663 F.3d 1312 (11th Cir. 2011).

[88] See Smith “Equality Constitutional Adjudication in South Africa” 2014 14(2) *African Human Rights Law Journa*l.

[89] S 1 of 4 of 2000.

[90] 2000 (11) BCLR 1211 (CC).

discrimination on this ground undermines the dignity of HIV-positive individuals.[91] This judgment is helpful as it demonstrates what factors a court will look at when determining whether discrimination on a particular ground perpetuates systematic disadvantage or undermines human dignity.

In *Hoffmann*, the court stated that HIV-positive people have been stigmatised and marginalised and, therefore, constitute a vulnerable minority.[92] It stated that the existence of societal prejudice results in an "assault" on the dignity of HIV-positive persons; allowing discrimination on this basis would therefore have a "devastating" impact on HIV-positive persons.[93]

The same logic could be applied to the discrimination faced by trans persons. Despite South Africa's progressive Constitution, transgender individuals face discrimination in areas such as housing and in the workplace, which hinders them from attaining qualifications and employment.[94] Workplace discrimination, societal prejudice and hostility experienced by trans individuals pose serious barriers to their well-being and livelihoods.[95]

Trans high school learners, in particular, are a vulnerable group. A significant majority of transgender learners at South African schools have experienced discrimination in the form of bullying.[96] Moreover, reports indicate that sometimes teachers are responsible for the bullying. In primary school, gender identities are less prominent as learners are less easily identifiable with regards to their gender or sexuality. Trans learners at these institutions avoid drawing attention to themselves, and therefore "fit" into the normative gender binary. Where trans learners are bullied in primary school, it is often not because they are "trans" but because they are mistakenly considered to be "gay" as a result of their gender expression. In light of the above, bullying of trans learners is less common in primary school than it is in high school.

In high school, the intensity of bullying increases and a lack of protection from teachers leaves trans learners particularly vulnerable.[97] The intensity and nature (emotional, physical and verbal) of the bullying experienced by trans learners depends on several interrelated factors, such as the locality of the school (rural or urban), the socio-economic circumstances of the school (middle-class or working class), the personality of the trans learners and the manner in which they express their gender identity.[98] As a result of puberty

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[91] *Hoffmann v South African Airways supra* 28.

[92] *Hoffmann v South African Airways supra* 32.

[93] *Hoffmann v South African Airways supra* 28.

[94] Moloi *KwaZulu-Natal Transgender and Gender Non-Conforming Needs Assessment Report: 2012* 12.

[95] *Ibid.*

[96] Sanger *Young and Transgender: Understanding the Experiences of Young Transgender Persons in Educational Institutions and the Health Sector in South Africa* 19.

[97] Sanger *Young and Transgender: Understanding the Experiences of Young Transgender Persons in Educational Institutions and the Health Sector in South Africa* 22.

[98] *Ibid.*

(and its accompanying socialisation), gender differences and gender roles become more pronounced in high school.

Although there are reported instances of individual teachers supporting trans learners, it is nevertheless clear that there is an absence of support systems that guarantee structured and comprehensive interventions.[99] Owing to the absence of systems that address the specific needs of transgender learners, an overwhelming majority of them enter a school environment that is potentially unwelcoming.[100] Accordingly, it is likely that a court will find that discrimination on the ground of gender identity is an analogous ground of discrimination, and that PEPUDA prohibits such discrimination.

However, a court's determination that gender identity is a prohibited ground of discrimination in terms of PEPUDA would not be the end of the enquiry. The court would have to consider the factors listed in section 14 of PEPUDA to determine whether the discrimination in the particular circumstance is unfair and hence unlawful. It is these factors that are applied to the three different categories of sports policies considered in this article. Jurisprudence indicates that the primary question that the court will ask when weighing up these factors is whether a legitimate purpose exists behind the discrimination that outweighs the interests of the complainant to be protected from discrimination.[101]

6 THE THREE SETS OF POLICIES

In this section of the paper, the author explains the three broad categories of policies and considers their compliance with the provisions of PEPUDA. Once the lawfulness of these three sets of policies has been determined, the author recommends which set South African high schools should adopt.

6 1 The restrictive approach

In terms of the restrictive approach, trans learners are prohibited, without exception, from participating in teams that do not correspond to their sex as classified in the population registry.[102] It is possible for trans learners to have their sex, as classified in the population registry, changed in terms of the Alteration of Sex Description and Sex Status Act.[103] The Act states that certain classes of individual may apply to the Department of Home Affairs to have the sex description in their birth record changed – namely, intersex people, people whose sexual characteristics have evolved naturally, and people who have undergone surgical or medical sex reassignment.[104] Trans people are distinguishable from intersex people and therefore will not be able to have their sex description changed in terms of this provision.

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99 *Ibid.*

100 *Ibid.*

101 *MEC for Education: KwaZulu-Natal v Pillay* 2008 (1) SA 474 (CC) par 98.

102 Lenzi 2018 *American University Law Review* 860.

103 49 of 2003.

104 S 2(1) of 49 of 2003.

Furthermore, a very low percentage of human beings experience the natural evolution of their sexual characteristics.[105] Therefore, an overwhelming majority of trans people can only change their sex, in terms of the Act, by undergoing surgical or medical sex reassignment.

Section 6 of PEPUDA provides:

> "Neither the State nor any person may unfairly discriminate against any person."

To determine whether a set of policies unfairly discriminates against transgender individuals, the test set out by the Constitutional Court in *Harksen v Lane NO*[106] must be applied. This test states that if there is a differentiation between people or categories of people, then a rational connection must be present between the distinction and a legitimate purpose that the policy seeks to address.[107] In the case of restrictive policies, there is a differentiation between cisgender individuals who are permitted to participate in sports teams that are consistent with their gender identity, while transgender learners are unable to do so without meeting onerous requirements.

There are five legitimate purposes on which a school could potentially rely for policies of this nature to be declared fair and therefore lawful. These are: preserving athletic opportunities for girls; shielding boys from potential stigma; preventing injury; preventing gender fraud; and promoting competitive fairness. These purposes are evaluated in light of the *Harksen* test to determine whether discrimination in terms of restrictive policies can be rendered fair.

6 1 1 Preserving athletic opportunities for girls

School officials may argue that sporting opportunities for cisgender girls may be threatened should transgender girls be permitted to participate in sports teams that correspond with their gender identity.[108] However, this argument is unconvincing. As a relatively low portion of adolescents identify as trans,[109] it is unlikely that the participation of trans girls in girls' sports will result in a substantial decrease in the opportunities that are available to cisgender girls. Accordingly, there is no rational connection between the differentiation and the purported purpose.

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105 Bertelloni, Maggio, Federico, Baroncelli and Hiort "17β-Hydroxysteroid Dehydrogenase-3 Deficiency: A Rare Endocrine Cause of Male-To-Female Sex Reversal" 2006 22 *Gynecological Endocrinology* 9 488.

106 1998 (1) SA 300 (CC).

107 *Harksen v Lane NO supra* par 42.

108 See *Clark v Ariz. Interscholastic Ass'n* 695 F.2d 1126, 1131 (9th Cir. 1982).

109 Husakouskaya "Becoming a Transgender/Intersex Internal Migrant in Urban Gauteng: Challenges and Experiences of Transition While Seeking Access to Medical Services" 2015 1(1) *Studentisches Online-Journal der Universität Oldenburg* 57.

6 1 2 Shielding boys from potential stigma

Schools may support the restrictive policy on the basis that cisgender boys may be embarrassed if they were to lose to a perceived "girl". However, on the strength of the *Hoffmann* judgment, it is clear that personal prejudice cannot justify unfair discrimination.[110] The court stated that prejudice, whether direct or indirect, cannot be tolerated if we are to achieve the goal of equality as fashioned in our Constitution.[111] Therefore, the purported purpose behind the differentiation is illegitimate.

6 1 3 Safeguarding against gender fraud

Some officials may assert that, in the absence of strict gender binaries, there is an increased risk of gender fraud.[112] Proponents of this argument assert that it is conceivable that a cisgender boy may exploit trans-friendly policies and pretend to be transgender in order to face a lower level of competition. This argument is wholly discredited by empirical evidence and displays a deep misunderstanding of the notion of "gender identity".[113] The aspiration of a trans person to transition is a genuine one.[114] Moreover, in the last 40 years that sex-verification testing has been done by the IOC, there has not been a single reported incident of gender fraud.[115] Therefore, no credible evidence exists to suggest that a cisgender boy, in order to gain competitive advantage, would expose himself to transphobic prejudice.

In order to address the gender fraud concern, schools could include a clause in their policy requiring a learner's gender identity to be genuinely held.[116] In the event that a learner contests the sincerity of a trans competitor's status, the trans learner could be put under an obligation to prove that their identity has been consistently affirmed in a constant fashion.[117] It is acknowledged that this proposal would place a burden on the trans child. However, it is submitted that such a burden is consistent with PEPUDA, as it is rationally connected to safeguarding against gender fraud in high school sports in order to ensure fairness in competition and would therefore be a legitimate purpose.

6 1 4 Preventing injury

The safety of learners is of paramount importance. However, this concern cannot justify the use of a restrictive policy. With respect to trans boys, there is no legitimate safety concern that could justifiably prevent them from

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[110] *Hoffmann v South African Airways supra* 37.

[111] *Ibid.*

[112] Lenzi 2018 *American University Law Review* 882.

[113] *Ibid.*

[114] Griffin and Carroll *On the Team: Equal Opportunities for Transgender Student Athletes* 9.

[115] Martowicz, Budgett, Pape, Mascagni, Engebretsen, Dienstbach-Wech, Pitsiladis, Pigozzi and Erdener "Position Statement: IOC Framework on Fairness, Inclusion and Nondiscrimination on the Basis of Gender Identity and Sex Variations" 2023 57 *British Journal of Sports Medicine* 28.

[116] Lenzi 2018 *American University Law Review* 883.

[117] *Ibid.*

competing on boys' teams.[118] It is indisputable that some females are physically able to compete with males. Furthermore, in these circumstances, a trans boy plaintiff would be voluntarily assuming the risk of injury.[119] South African law recognises that there are instances in which an individual may voluntarily engage in behaviour that poses a substantial risk of injury. The individual will, subsequently, not be able to sue for any resulting injuries.

In *Hattingh v Roux*,[120] the Western Cape High Court held that delictual liability may be excluded owing to the application of the *volenti non fit injuria* (voluntary assumption of risk) principle in the case of sports injuries that occur in the ordinary course of the practice of sports. However, in order for the principle to apply, six requirements have to be met. These requirements essentially consider whether the person, who freely and voluntarily gave consent, had the capacity to give consent, and whether the individual was aware of the nature and extent of the risk of potential prejudice.[121] Provided that a trans boy plaintiff satisfies these requirements, there is no reason for a trans boy who has a biologically female body to be barred from participating on boys' teams. It is submitted that a policy that allows trans boys to participate in boys' sports teams is consistent with our existing law and respects the autonomy of the individual. Accordingly, a policy that bars a trans boy from participating in boys' sports teams will be unlawful on the grounds that there is no legitimate purpose behind the discrimination.

However, different considerations arise in the event of a trans girl competing against cisgender girls. In high-contact sports, such as boxing, wrestling, rugby and martial arts, a trans girl may be physically superior to her cisgender competitors.[122] Cisgender girls may have legitimate safety concerns in these circumstances. This worry may be counterbalanced by weight divisions. However, it is submitted that a school would have a legitimate reason for preventing trans girls from competing in these circumstances in the absence of medical intervention, and therefore, a rational connection between the differentiation and purported purpose exists.[123]

6 1 5 Promoting competitive fairness

School administrators may be concerned that, in the absence of a restrictive policy, playing fields will not be level. This worry is unconvincing with respect to trans boys, who are likely to be disadvantaged by participating in boys' sports teams, as cisgender boys will, on average, be stronger and larger.[124] Nevertheless, it may be legitimate to monitor the testosterone levels of trans

[118] Lenzi 2018 *American University Law Review* 883.
[119] *Ibid.*
[120] 2011 (5) SA 135 (WCC).
[121] Ahmed "Voluntary Assumption of Risk as a Defence, Excluding Delictual Liability With Regard to Sports Injuries: Hattingh v Roux 2011 (5) SA 135 (WCC)" 2012 33(2) *Obiter* 415.
[122] Lenzi 2018 *American University Law Review* 883.
[123] Lenzi 2018 *American University Law Review* 884.
[124] *Ibid.*

boys to ensure that they do not gain an unfair advantage over their cisgender peers.[125]

Different considerations of fairness apply in circumstances in which trans girls participate in girls' teams. As some trans girls may be biologically male, they may unfairly dominate their cisgender competitors. In America, the appellate court of New Jersey has found that a rule preventing biological males from competing against biological females is justified on the basis of average physiological differences.[126] It is submitted that a South African court is likely to reach the same conclusion, as the promotion of competitive fairness is a legitimate objective that may be undermined by the presence of biological males in girls' sports teams. However, these concerns may be addressed by requiring trans girls to reduce the level of certain hormones, such as testosterone, which have been shown to give them an advantage over their cisgender counterparts.[127] Including this requirement in a school policy would adequately address fair-play concerns.

6 2 The fully inclusive approach

A fully inclusive policy allows trans learners to participate in teams that are congruent with their gender identity. In light of the multiple social challenges faced by trans individuals, as illuminated earlier in the article, it is indisputable that ensuring that trans athletes feel accepted and have their identity validated is a legitimate purpose. Accordingly, school officials may justify fully inclusive policies on this basis.

It is submitted that a constitutional challenge by a cisgender girl who was omitted from a team in favour of a trans girl is unlikely to succeed. The promotion of greater inclusion at the expense of "perfect competition" would be deemed legitimate. In cases of contact sports, a female plaintiff may challenge these policies on the basis that competing against an opponent with a male body endangers her. Nevertheless, a court may find the policy lawful as it is aimed at achieving legitimate educational goals that were detailed under heading 3 4 above.

6 3 The partially inclusive approach

A partially inclusive policy requires trans girls to undergo specific medical procedures in order to participate in girls' teams. However, the policy does not require trans boys to undergo any interventions of this nature. Unlike the restrictive approach, partially inclusive policies do not require the learners to change their sex as classified in the population registry. Owing to concerns of injury and fair competition, there would be a legitimate reason to require trans girls to undergo medical intervention, in the form of hormonal therapy, before they can compete in girls' sports teams.

It is submitted that these policies are lawful, as trans girls are not denied access to participate in sports. Rather, they are merely confined to the boys'

[125] *Ibid.*
[126] Griffin and Carroll *On the Team: Equal Opportunities for Transgender Student Athletes* 16.
[127] Leong 2017 *Washington University Law Review* 41

sports teams. Despite the fact that there is evidence that suggests that it is detrimental to the health and well-being of trans girls to not have their identity universally affirmed,[128] school officials may determine that the interests of their cisgender counterparts weigh more heavily. This is because maintaining a level playing field and reducing the risk of injury are legitimate goals. Partially inclusive policies impose differentiations that are rationally connected to achieving these legitimate goals.

The issue of discriminatory athletic policies that facilitate safety and fair play has not come before South African courts yet, but American courts have consistently upheld policies of this nature.[129] It is likely that a South African court may determine that these polices are aimed at achieving a legitimate purpose – that is, maintaining the integrity of girls' sports.

However, these policies are not necessarily lawful and compliant with PEPUDA. One can imagine a situation in which a trans girl plaintiff, who is similar to her cisgender counterparts in terms of ability and physicality, may successfully challenge the policy's application to her.[130] This is so, as the test for determining the fairness of policies in terms of PEPUDA considers the specific circumstances of the complainant.[131]

It is submitted that, in order to prevent policies from being declared unlawful by courts, school officials should include an exemption in their policies that allows trans girls who can prove that, despite not undergoing any medical intervention, they pose no risk of injury or physical superiority by competing in girls' sports teams.[132]

7 WHAT SET OF POLICIES SHOULD SOUTH AFRICAN HIGH SCHOOLS ADOPT?

A court is likely to determine that both fully inclusive and partially inclusive policies are compliant with PEPUDA and are lawful. Accordingly, high school sports policymakers have a choice regarding which of these two policies to adopt.

There are several reasons why it is not ideal for South African schools to adopt partially inclusive policies. The financial constraints of medical procedures faced by trans individuals who wish to align their gender with their sex have been explained earlier in this article. As a result of these constraints, a partially inclusive policy may unduly burden a learner who cannot afford medical intervention. Moreover, these policies may pressurise a trans girl who would otherwise not desire medical intervention to pursue it.[133] These trans girls who do not seek medical intervention, for either of the two aforementioned reasons, will be barred from participating in girls' sports

[128] Skinner-Thompson and Turner 2013 *Wisconsin Journal of Law, Gender & Society* 298.

[129] *Sandison v Mich. High Sch. Athletic Ass'n*, 64 F.3d 1026, 1035 (6th Cir. 1995).

[130] Lenzi 2018 *American University Law Review* 888.

[131] S 14 of 4 of 2000.

[132] *Ibid.*

[133] Shell "Transgender Student-Athletes in Texas School Districts: Why Can't the UIL Give All Students Equal Playing Time?" 2016 48 *Texas Tech Law Review* 1072.

teams and will, therefore, be unable to make a complete social transition. This circumstance is highly undesirable as research demonstrates that a complete social transition significantly improves the emotional well-being of a trans individual.[134] In addition, there is a concern that trans girls may be effectively "outed" to their classmates should they be barred from competing in girls' sports teams in the absence of medical intervention.

The above concerns demonstrate reasons why the partially inclusive approach should not be adopted by South African high schools. However, these reasons do not, in themselves, illustrate why fully inclusive polices should be adopted. In addition to the fact that fully inclusive policies do not suffer from the aforementioned difficulties, these policies are also more in line with constitutional values. Dignity, alongside equality and freedom, is one of the founding values of the Constitution.[135] Furthermore, the Constitution provides that everyone has inherent dignity and has the right to have their dignity respected and protected.[136] Therefore, as both sets of policies are constitutional, the policy that best protects the rights of trans learners to have their dignity respected and protected should be preferred.

While partially inclusive policies do not adequately protect and respect the dignity of trans learners as they may result in their "outing", the case of Yearwood, who won the girls' state championship, illustrates how fully inclusive policies can affirm the dignity of trans individuals.[137] Kate Hall, who finished second in the 100m sprint behind Yearwood, stated:

> "I can't really say what I want to say, but there's not much I can do about it … You can't blame anyone … From what I know [Yearwood] is really nice and that's all that matters. She's not rude and obnoxious."[138]

This incident, albeit an anecdotal one, suggests that preventing the trans girls from participating in girls' sports teams may not be worth the emotional toll that they face from exclusion. What occurs in circumstances like this is larger than a single athletics event or a particular athlete. High school sports should serve broader educational goals, which should include teaching high school learners that their trans peers deserve the chance to live their truth in full, including participating in sports teams that are congruent with their gender identity. The fact that high schools should serve broader educational goals is consistent with the Preamble of the South African Schools Act, which expresses the need for South African high schools to be involved in the project of combatting all forms of unfair discrimination and intolerance in society.

8 CONCLUSION

The legality of sports policies adopted by high schools in respect of trans learners has never been tested in South Africa. However, this, and related issues, have arisen in various jurisdictions such as the United States of

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[134] Skinner-Thompson and Turner 2013 *Wisconsin Journal of Law, Gender & Society* 298.

[135] S 1 of the Constitution.

[136] S 10 of the Constitution.

[137] Lenzi 2018 *American University Law Review* 844.

[138] *Ibid.*

America and Canada. This article has considered the three categories of policies into which South African high school sports policies fall – namely, the fully inclusive approach, the partially inclusive approach and the restrictive approach.

The author has shown that the restrictive approach is inconsistent with PEPUDA and therefore unlawful, as there exists no legitimate purpose that could justify such a policy. As legitimate reasons exist for the implementation of partially inclusive policies, the author has argued that these are lawful. The same argument applies to fully inclusive policies.

Accordingly, when deciding which policies to adopt, a school must consider what values it seeks to promote. While it is imperative to acknowledge the dignity of trans learners, legitimate concerns over fairness of competition and safety exist. The Constitution, which is the supreme law of the land, has a key role to play in weighing up these competing interests. As dignity is both a right that is granted to everyone in the Constitution and one of the founding values of the Constitution, the author has argued that fully inclusive polices should be favoured as they result in the validation of trans learners’ dignity. Moreover, high school sports should seek to achieve broader educational goals, such as teaching cisgender learners to tolerate, accept and celebrate their trans peers who are fully living their truth by participating in sports teams that are consistent with their gender identity.

CASES / VONNISSE

THE INTRODUCTION OF "FREE, PRIOR AND INFORMED CONSENT" TO THE LAND REFORM LEGAL LEXICON

***Baleni v Minister of Mineral Resources* 2019 (2) SA 453 (GP)**

1 Introduction

Although decided four years ago, *Baleni v Minister of Mineral Resources* (2019 (2) SA 453 (GP) (*Baleni*)) stands out regarding four significant features and it remains surprising that the decision has not attracted more attention in connection with the land-reform programme. The first feature was the interpretation of the Interim Protection of Informal Land Rights Act 31 of 1996 (IPILRA). The second feature was the emphasis on customary law in the interpretation of IPILRA. The third feature was the application of multiple international-law instruments in the interpretation of IPILRA. The fourth feature was the court's conclusion that these international-law instruments determine that no decisions may be taken regarding the lands of indigenous peoples without the latter's "free, prior and informed consent" (FPIC). This conclusion has far-reaching implications for the South African land-reform process introduced by section 25 of the Constitution of the Republic of South Africa, 1996 (the Constitution).

2 Purpose of IPILRA

The aim of IPILRA is to provide for the temporary protection of certain rights and interest in land that are not adequately protected by law for the duration of the land-reform process. Originally intended as a temporary measure, but owing to the complexity of the land reform programme, the application of the Act has been extended on an annual basis. The specific aim of IPILRA is to protect insecure rights held by many South Africans, especially in the previous so-called national states, self-governing territories and the South African Development Trust land. These so-called "informal rights" enjoy protection against deprivation similar to that afforded to traditional property rights. "Informal right" is broadly defined in section 1(1)(iii) of IPILRA. It includes the use of occupation of or access to land in terms of:

> "(a) any tribal, customary or indigenous law or practice of a tribe.

(b) the custom, usage or administrative practice in a particular area or community.
(c) the rights or interest in land of a beneficiary under a trust arrangement in terms of which the trustee is a body or functionary established under an Act of Parliament.
(d) beneficial occupation of land for a continuous period of not less than five years prior to 31 December 1997.
(e) the use or occupation of any erf as if the person is the holder of Schedule 1 or 2 rights under the upgrading of Land Tenure Rights Act 112 of 1991, although that person is not formally recorded as such in a land rights register."

Section 2(1) of IPILRA declares that holders of such informal rights may not be *deprived* of any such rights without their *consent*.

3 Facts

Transworld Energy and Mineral Resources (SA) Pty (Ltd) (TEMR) applied for mining rights in the Xolobeni area in the Eastern Cape. Most of the applicants (who can be seen to be a "community" in terms of section 1 of IPLRA) lived in close proximity or even within the proposed mining area. It was not disputed that the applicants held informal rights to the land as defined in section 1 of IPILRA, and that they occupied such land in accordance with their laws and customs. It was also not disputed that the "community" was unequivocally opposed to the proposed mining activities. The applicants consequently applied for a number of declaratory orders, *inter alia* that the proposed mining activities would constitute a "deprivation" of their informal rights to land as contemplated in section 2(1) of IPILRA and, that being so, under this provision their full and informed *consent* was required prior to the granting of any mining licence.

TEMR and the State rejected the submission that such consent was required, and relied on the provisions of the Mineral and Petroleum Resources Development Act 28 of 2002 (MPRDA), which merely require "consultation" with a "community" before awarding mining rights to an applicant (e.g., TEMR) for such rights. The respondents submitted that the MPRDA trumped IPILRA.

In a nutshell, there was a fundamental dispute as to the interpretation of and relationship between IPILRA and the MPRDA regarding the "consent" requirement in section 2(1) of IPILRA. The court had to consider the interaction between the MPRDA and IPILRA and decide whether the *consultation* requirement contained in the MPRDA was included in the exclusions from the *consent* requirement contained in IPILRA. Complicating the issue was the fact that both the MPRDA and IPILRA were enacted to redress this country's history or economic and territorial dispossession and marginalisation owing to apartheid. Both Acts had as their purpose the restoration of land to Black people who were the victims of historical discrimination.

4 The applicants

On the Wild Coast, there is an area known as uMgungundlovu, which is part of a coastline of great natural beauty. The sands on this coastline are extremely rich in titanium. Several hundred people (the applicants) have lived on this land for centuries according to their traditions and customs. These households are known in isiMpondo as the "imizi" and consist of approximately 650 individuals. The applicants represented 68 of these imizi and comprised 128 adults. As stated, it was not in dispute that the applicants held informal rights to the land as defined by IPILRA and that they occupied the land in accordance with their laws and customs.

5 The respondents

The respondents consisted of TEMR, the Minister of Mineral Resources (and the latter department's Director-General, Deputy–Director General and a regional manager); and the Minister of Rural Development and Land Reform (and a Director-General of that department). These respondents comprised virtually the full array of state departments concerned with the exploitation of mineral resources and rural development and land reform.

It is an understatement to describe the dispute between the applicant community and the respondents as one of David-and-Goliath proportions.

6 The MPRDA

In terms of the MPRDA, the State (and no longer the common-law owner of the land) becomes custodian of all mineral resources on behalf of all the people of South Africa. As stated by the Constitutional Court in *Bengwenyama Minerals (Pty) Ltd v Genorah Resources (Pty) Ltd* (2011 (4) SA 113 (CC) (*Bengwenyama*) (par 31)), the MPRDA aims to place the country's mineral and petroleum resources under the control of the State and to expand opportunities in the industry to historically disadvantaged persons – by considering and preferring applications for prospecting rights to historically disadvantaged persons and to communities who wish to prospect on communal land. Similar sentiments were expressed by Mogoeng CJ in *Agri SA v Minister of Minerals v Energy* (2013 (4) SA 1 (CC) (*AgriSA*) (par 1)), when he stated that legislative measures had been taken to facilitate equitable access in the mining industry to address gross economic inequality.

What these two Constitutional Court judgments were attempting to convey was summarised by the Constitutional Court in *Maledu v Itereleng Bakgatla Mineral Resources (Pty) Ltd* (2019 (2) SA 1 (CC) (*Maledu*) (par 1)), in which that court quoted Frantz Fanon's *The Wretched of the Earth* ((1963) 43):

> "For a colonized people the most essential value, because the most concrete, is first and foremost the land which will bring them bread and, above all, dignity."

The Constitutional Court in *Maledu* embellished on this quote by stating that the clamour for redistribution of land in South Africa has not only heightened the interest in land but has also put at centre stage the socio-political discourse raging in the country (par 2).

Section 22(4)(*b*) of the MPRDA emphasises the importance of *consultation* in light of the impact of the granting of a mineral right on surface rights. *Bengwenyama* sees this consultation as comprising the involvement and active participation of the landowner in respect of possible interference with rights in respect of property, and meaning that the landowner must get all necessary information on everything that is to be done on the property (par 65–67) – in addition to the consultation process being procedurally fair.

The MPRDA goes no further than requiring consultation before the mineral right is granted. This has fundamental implications, the most important of which – as held in *Bengwenyama* (par 47) – is that the Minister may grant a mining right against the will of the common-law owner of the land, provided that there was prior consultation. At best for the landowner, section 5A(c) of the MPRDA states that the landowner is entitled to 21 days' notice prior to commencement of the mining operations.

7 IPILRA requirements

In contrast to the MPRDA, IPILRA requires *consent* before the granting of a mineral right. As with the MPRDA, IPILRA together with other pieces of legislation intended in terms of section 25(6) of the Constitution to redress the gross inequalities of the past. Section 25(6) of the Constitution specifically refers to past unequal access to land and insecurity of tenure, and states:

> "A person or community whose tenure of land is legally insecure as a result of past racially discriminatory laws or practices is entitled to the extent provided by an Act of Parliament, either to tenure which is legally secure or to comparable redress."

As stated in *Mashava v President of the Republic of South Africa* (2005 (2) SA 476 (CC) (par 51)), our "shameful history" has to be redressed. IPILRA was adopted specifically to protect those who held insecure tenure because of the failure to recognise customary tenure. The short title of IPILRA sets out as its purpose to provide temporary protection "of certain rights and interests in land which are not adequately protected by law; and to provide for matters connected therewith".

Section 1 of IPILRA defines a "community" as "any group or portion of a group of persons whose rights in land are derived from shared rules determining access to land held in common by such group". *Baleni* held the Umgungundlovu community (applicants) to be such a community (par 54). This was not disputed by TEMR. (Even in terms of section 1 of the MPRDA, the applicants would be regarded as a community, being "[a] coherent, social group of persons with interests or rights in a particular area of land which the members have or exercise communally in terms of an agreement, custom or law".) *Baleni* held that IPILRA is in the main concerned with the

protection of informal rights in land of those communities (such as the applicants) as defined in the Act and that, in terms of section 2(1) of IPILRA, the consent of a holder of an informal right is required before he or she may be deprived of property (par 55). Section 2 of IPILRA determines:

> "Deprivation of informal rights to land.
>
> (1) Subject to the provisions of subsection (4), and the provisions of the Expropriation Act, 1975 (Act No. 63 of 1975), or any other law which provides for the expropriation of land or rights in land, no person may be deprived of any informal right to land without his or her consent.
>
> (2) Where land is held on a communal basis, a person may, subject to subsection (4), be deprived of such land or right in land in accordance with the custom and usage of that community.
>
> (3) Where the deprivation of a right in land in terms of subsection (2) is caused by a disposal of the land or a right in land by the community, the community shall pay appropriate compensation to any person who is deprived of an informal right to land as a result of such disposal.
>
> (4) For the purpose of this section the custom and usage of a community shall be deemed to include the principle that a decision to dispose of any such right may only be taken by a majority of the holders of such rights present or represented at a meeting convened for the purpose of considering such disposal and of which they have been given sufficient notice, and in which they have had a reasonable opportunity to participate."

Because IPILRA recognises that there can be informal rights that are not held individually, but as a "community", the Act provides that a "person" can include a community – hence section 2(2), which requires communal consent under the circumstances set out in section 2(1) above.

7 1 "Deprivation"

Does the grant of mineral rights over the land of the applicant community constitute a deprivation (in terms of section 2(1) of IPILRA) of their informal rights that would mean that the applicants' consent was required? The court in *Baleni* (par 61), after referring to *Maledu* (par 98–102), accepted that the granting of mineral rights to TEMR constituted a "deprivation" in terms of section 2(1) of IPILRA, and that this triggered the *consent* requirement referred to in section 2(1). The court clearly saw the nature of a mining right as being invasive, intruding on the rights of the owner of the land or holder of informal rights to the land, thus constituting a "deprivation" of such rights.

Having accepted that the granting of a mineral right on the land of an informal rights holder was a deprivation of such rights, the court was confronted with an added question. This was whether in terms of section 2(1) of IPILRA the requirement of consent in the event of a deprivation was subject to the provisions of the "Expropriation Act … or any other law which provides for the expropriation of land or rights in land". Did this mean that the MPRDA was "*any other law*" and thus excluded from IPILRA's consent requirement?

The court was not persuaded that, on a plain reading of section 2(1) of IPILRA, it could be inferred that the reference to "any other law" was a reference to the MPRDA (par 63). The court (par 63) was in agreement with

AgriSA (par 67–70) that the granting of a statutory mineral right under the MPRDA did *not* constitute expropriation.

7 2 IPILRA and the MPRDA: Different purposes

Taking the above into account, the court in *Baleni*, having regard to the overall purposes of the MPRDA and IPILRA and the historical context within which those two Acts operated, came to the conclusion that the two Acts purported to serve different purposes (par 75). The MPRDA set out to regulate mining activities in South Africa for the benefit of all South Africans. IPILRA, on the other hand, was enacted first to provide for the temporary protection of certain rights and interests in land that were not otherwise adequately protected by law owing to racially discriminatory laws of the past. Secondly, the provisions of IPILRA had to be interpreted benevolently so as to afford the holders of informal rights to land the fullest protection. Thirdly, during the interpretative exercise, the mischief that IPILRA sought to remedy must be kept uppermost in mind. Allied to this was the constitutional imperative to construe legislation (like IPILRA) in a manner consistent with the Constitution.

Despite holding, as mentioned above, that the MPRDA and IPILRA serve different purposes, the court, taking into account the status now afforded to customary law, could see no reason why the two Acts could not operate alongside one another (par 76). However, communities such as applicants must be afforded broader protection under IPILRA than the protection afforded to common-law landowners as contemplated under the MPRDA, when mining rights are considered by the Minister. As held by the court:

> "That is not to say that the MPRDA does not apply. It does, but so does the IPILRA which imposes the additional obligation upon the Minister to seek the consent of the community who hold land in terms of customary law as opposed to merely consulting with them as is required by the MPRDA." (par 9)

Seen in this way, the court held that the MPRDA and IPILRA can be interpreted and read harmoniously, except that, taking the clear purpose of IPILRA into account, the *consent* of holders of informal rights to land is required before they may be deprived of their land (par 76).

8 FPIC

The court's major contribution to our jurisprudence in the context of the land reform programme was that indigenous communities must be given special protection in that, before being deprived of their informal rights and interests in land, it was necessary to gain their consent. Here the court applied various international-law instruments to justify this approach (par 78–82). These instruments all state that indigenous communities (such as the applicants) may grant or refuse their "*free*, *prior and informed consent*" (FPIC) regarding developments (such as mining) that will significantly affect their lives on the land where they live.

The seeds of FPIC were planted in common article 2 of the International Covenant of Civil and Political Rights (ICCPR) 999 UNTS 171 (1966)) and of the International Covenant on Economic, Social and Cultural Rights (ICESCR) 993 UNTS 3 (1966)), which declares:

> "All peoples may, for their own ends freely dispose of their natural wealth and resources, without prejudice to any obligations arising out of international economic co-operation, based upon the principle of mutual benefit, and international law. In no case may a people be deprived of its own means of subsistence."

FPIC has evolved into a norm of customary international law (Barrie "International Law and Indigenous People: Self-Determination, Development, Consent and Co-Management" 2018 51 *CILSA* 171). It is to be welcomed that Basson J in *Baleni* introduced FPIC into our land reform debate, and it is for this reason that it is surprising that the decision has not attracted the attention it deserves.

FPIC has had a major impact in countries with significant indigenous communities who are also grappling with land-reform issues. Random examples of such communities can be found in Australia (McRae *Indigenous Legal Issues* (2003); Host and Owen *Its Still In My Heart, This Is My Country* (2009)); Canada (Isaac *Aboriginal Law* (2004), Wilkins *Advancing Aboriginal Claims* (2004); Henderson *First Nations Jurisprudence and Aboriginal Rights* (2006); Newman *Revisiting the Duty to Consult Aboriginal Peoples* (2014); Barrie "The Canadian Court's Approach to the Duty to Consult Indigenous Peoples: A Comparative Approach" 2020 53 *CILSA* 1); New Zealand (Knafla and Westra *Aboriginal Title and Indigenous Peoples* (2010); McHugh "Aboriginal Title in New Zealand: A Retrospect and Prospect" 2004 2 *New Zealand Journal of Public and International Law* 139); and the United States of America (Prevar *The Rights of Indians and Tribes* (2002); Sulton *Irredeemable America* (1985); Roberts The *American Indian in Western Legal Discourse* (1991)).

The court accepted that international law plays an important part in interpreting statutes. Section 233 of the Constitution (par 37) provides that "every court must prefer any reasonable interpretation of the legislation that is consistent with international law".

The international-law imperatives that the court referred to (in emphasising that IPILRA requires FPIC of the applicant uMgungundlovu community before the proposed mining rights on their land could be granted) were the following: (i) *General Recommendation No XXIII: Indigenous Peoples* (1997) issued in terms of the Convention on the Elimination of All Forms of Racial Discrimination (CERD) (660 UNTS 195 (1965)); (ii) *General Comment 21: Right of Everyone to Take Part in Cultural Life* (E/C.12/GC/21 (2009)) of the ICESCR (ratified by South Africa); (iii) the *Angela Poma Poma v Peru* decision [2009] UNHRC 93 of the Human Rights Committee of the ICCPR and (iv) *Centre for Minority Rights Development (Kenya) and Minority Rights Group International obo Endorois Welfare Council v Kenya* 2009 AHRLR 75 (ACHPR 2009), a decision of the African Court of Human and People's Rights (*Endorois* decision).

Since these international-law instruments and international-tribunal decisions are a significant part of Basson J's judgment regarding FPIC, these are now more extensively discussed.

8 1 General Recommendation XXIII issued in terms of CERD

According to the Recommendation:

> "3. The Committee is conscious of the fact that in many regions of the world indigenous peoples have been, and are still being, discriminated against and deprived of their human rights and fundamental freedoms and particular that they have lost their land and resources to colonists, commercial companies and State enterprises. Consequently, the preservation of their culture and their historical identity has been and still is jeopardized.
>
> 4. The Committee calls in particular upon States parties to:
>
> (a) Recognize and respect indigenous distinct culture, history, language and way of life as an enrichment of the State's cultural identity and to promote its preservation;
>
> (b) Ensure that members of indigenous peoples are free and equal in dignity and rights and free from any discrimination, in particular that based on indigenous origin or identity;
>
> (c) Provide indigenous peoples with conditions allowing for a sustainable economic and social development compatible with their cultural characteristics;
>
> (d) Ensure that members of indigenous peoples have equal rights in respect of effective participation in public life and that no decisions directly relating to their rights and interests are taken without their informal consent.
>
> 5. The Committee especially calls upon States parties to recognize and protect the rights of indigenous peoples to own, develop, control and use their communal lands, territories and resources and, where they have been deprived of their lands and territories traditionally owned or otherwise inhabited or used without their free and informed consent, to take steps to return those lands and territories. Only when this is for factual reasons not possible, the right to restitution should be substituted by the right to just, fair and prompt compensation. Such Compensation should as far as possible take the form of lands and territories."

8 2 General Comment 21 of the ICESCR

The General Comment states:

> "[36] … States parties must therefore take measures to recognize and protect the rights of indigenous people to own, develop, control and use their communal lands, territories and resources, and, where they have been otherwise inhabited or used without their free and informed consent, take steps to return these lands and territories."

8 3 *Angela Poma Poma v Peru* decision of the ICCPR's Human Rights Committee

The complainant in this matter owned an alpaca farm in a region of Peru where she and her family raised alpacas and llamas as their only means of

subsistence. These farming activities were practised according to the traditional customs of the family as part of the way of life for thousands of years and passed from generation to generation. Owing to water-diversion projects by the State, the grazing lands dried out. This situation was exacerbated when the government approved the drilling of wells, which led to the degradation of the pastures of farmlands, and this led thousands of animals to perish, which deprived the community of their only means of survival. It was not in dispute that the complainant was a member of an indigenous group and that the raising of llamas was an essential element of her community's culture as a form of subsistence. The committee took into account the failure of the State properly to consult with the affected community and to obtain their consent to the water-diversion projects that had had such a dramatic impact on the community's economic activities:

> "7.6 In the Committee's view, the admissibility of measures which substantially compromise or interfere with the culturally significant economic activities of a minority or indigenous community depends on whether the members of the community in question have had the opportunity to participate in the decision-making process in relation to these measures and whether they will continue to benefit from their traditional economy. The Committee considers that participation in the decision-making process must be effective, which requires not mere consultation but the free prior and informed consent of the members of the community. In addition, the measures must respect the principles of proportionality so as not to endanger the very survival of the community and its members."

8 4 The ACHPR's *Endorois* decision

The Endorois, an indigenous community, used to have their home around Lake Bogoria in the Rift Valley province of central Kenya. From the earliest times, they were regarded by neighbouring peoples as the *bona fide* owners of the land and their customary rights to "hold, use and enjoy" their lands went undisturbed, even under British colonial administration. Upon independence from Britain in 1963, the British Crown's claim to Endorois land passed to the relevant Kenyan County Councils, who were bound under section 115 of the Kenyan Constitution to hold the land in trust for the benefit of the Endorois community. In 1973, the Kenyan government evicted them from their ancestral land and went on to establish the Lake Hannington Game Reserve (re-gazetted and renamed the Lake Bogoria Game Reserve in 1978). The Endorois were thus deprived of their ancestral land, which was central to their religious beliefs and traditional cultural practices.

The Endorois sought restitution of their land with legal title as well as compensation for all the loss they suffered through the loss of their property, development and natural resources. The ACHPR found that Kenya not only failed to consult the Endorois people but also failed to obtain their "prior, informed consent, according to their customs and traditions" (par 291). The Commission ordered Kenya to recognise the rights of ownership of the Endorois people and restore their ancestral land. The State was also ordered to pay adequate compensation to the Endorois people for all loss suffered. (This case is discussed in depth by Barrie (2018 *CILSA* 171) and

by Beukes ("The Recognition of Indigenous Peoples and their Rights as a People: An African First" 2010 35 *SAYIL* 216)).

8 5 Supplementary support

Besides these four specific international-law tribunal decisions and developments referred to in *Baleni*, the court's approach receives further overwhelming support. The Indigenous and Tribal Peoples Convention (International Labour Organization C169 (1989) EIF: 05/09/1991) in article 4 states that "special measures shall be adopted as appropriate for safeguarding the persons, institutions, property, labour, cultures and environment of indigenous and tribal persons" and that "such special measures shall not be contrary to the freely-expressed wishes of the peoples concerned". The World Commission on Dams (in *Dams and Development: A New Framework for Decision-Making* (2000) 12) stated:

> "In a context of increasing recognition of the self-determination of indigenous peoples the principle of free, prior and informed consent to development plans and projects affecting those groups has emerged as the standard to be applied in protecting and promoting their rights in the development process."

A similar standard is emphasised by the World Bank (*Striking a Better Balance: The Final Report of the Extractive Industries Review* (2000) 21) when it concluded that indigenous peoples have the right to participate in decision-making and to give their free, prior and informed consent throughout each phase of a project cycle.

The right to FPIC has also been recognised within the Inter-American human-rights system. In the case of the *Saramaka People v Suriname* (Inter-Am Crt, HR (Ser C) No 172), the Inter-American Court of Human Rights held:

> "When planning development projects within traditional Saramaka territory, the safeguard of effective participation that is necessary when dealing with major developments or investment plans that may have a profound impact on the property rights of members of the Saramaka people to a large part of their territory must be understood to additionally require the free, prior and informed consent of the Saramakas, in accordance with their traditions and customs." (par 137)

This same approach was followed by the Inter-American Court of Human Rights in the case of the *Kichwa Indigenous People of Saryaka v Ecuador* (Inter-Am Crt HR, (Ser C) No 245). In this case, the court held that, by failing to consult the Sarayaku people on the execution of a project that would have a direct impact on their territory, the State had failed to comply with the principles of its own domestic law but also with the principles of international law; it had failed to

> "adopt all necessary measures to guarantee the participation of the Sarayaka people … in accordance with their values, practices, customs … in the decisions made regarding matters … that could have an impact on their territory, their life and their cultural and social identity affecting their rights to communal property and the cultural identity." (par 232)

Although the term “consent” is not used, this term can be clearly implied in the quoted paragraph. In the case of the *Kalina and Lokono Peoples v Surinama* (Inter-Am Crt HR (Ser C) No 309), a dispute originated between the State and the Kalina and Lokono indigenous peoples owing to the State’s actions in creating nature reserves on their territories without consulting them. The court concluded that the State had failed in not meeting its obligation of ensuring “free, prior and informed consultation” with the Lokono peoples (par 207 and 212). Here too, despite not using the term “consent”, it is clearly implied by the court (par 202–203; see Tomaselli and Cittadino “Land, Consultation and Participation Rights of Indigenous Peoples in the Jurisprudence of the Inter-American Court of Human Rights” in De Villiers, Marko, Palermo and Constantin (eds) *Litigating the Rights of Minorities and Indigenous Peoples in Domestic and International Courts* (2021) 148, 169).

9 UNDRIP

The international developments, recommendations and international-tribunal decisions discussed above have all been encapsulated in article 10 of the United Nations Declaration on the Rights of Indigenous Peoples (UN General Assembly (2007) A/Res/61/295) (UNDRIP), which declares:

> “Indigenous peoples shall not be forcibly removed from their lands or territories. No relocation shall take place without the free, prior and informed consent of the indigenous peoples concerned and after agreement on just and fair compensation and, where possible, with the option of return.”

Repeated use of UNDRIP has gained it wide acceptance internationally and domestically. In the landmark case of *Cal v Attorney-General of Belize and Minister of Natural Resources and Environment* (Claims No 171 and 172 of 2007 (18 Oct 2007) par 131–133), the Supreme Court of Belize referred to UNDRIP as upholding the constitutional rights of the Maya people to their lands and resources. In Bolivia, UNDRIP was adopted at national level as Law No 3760 of 7 November 2007 and incorporated into the new constitution that was promulgated on 7 February 2009 (UN Permanent Forum on Indigenous Issues *Information received from the Governments* UN Doc E/C 19/2009/4/Add 2 (24 Feb 2009) par 26 and 57).

In a further landmark ruling, the ACHPR in the *Endorois* decision (par 155 and 204) held that UNDRIP is applicable to all African states regardless of whether they voted in its favour at the UN General Assembly – and regardless of whether indigenous rights are recognised as such in the state’s constitutional and legal framework. Sections 30, 31, 39(2), 39(3) and 211 of the South African Constitution accommodate customary law as part of the Constitution. South Africa, together with all UN member states except four – the United States, Australia, New Zealand and Canada – voted in favour of UNDRIP. The latter four states have since endorsed UNDRIP. (UNDRIP is analysed in detail by Barrie in “The United Nations Declaration on the Rights of Indigenous Peoples: Implications for Land Rights and Self-Determination” 2013 2 *THRHR* 292).

10 FPIC in a South African context

Basson J in *Baleni* has introduced FPIC into our legal lexicon – especially in regard to its application to the land reform programme. FPIC may be described as a broad and comprehensive right, with attendant obligations on the State. FPIC must be distinguished from consultation, which consists merely of an exchange of views, and which in most instances excludes decision-making on the part of the indigenous peoples (e.g., holders of informal rights to land).

It is submitted that, for practical purposes, FPIC should be interpreted as follows: "*Free*" means the absence of coercion and outside pressure, including monetary inducements. Indigenous peoples such as the applicants must be able to say "no" and not be threatened with or suffer retaliation if they do so. "*Prior*" means that there must be sufficient time to allow information-gathering and -sharing processes to take place, including translations into traditional languages. Verbal dissemination according to the decision-making processes of the indigenous peoples is imperative. This process must take place without time pressure or constraints. "*Informed*" means that all relevant information reflecting all views and persons must be available for consideration by the indigenous community concerned. This includes the input of traditional elders and traditional knowledge holders. The decision-making process must allow adequate time for the indigenous peoples to consider impartial and balanced information as to the potential risks and benefits of the proposal under consideration. "*Consent*" is the clear and compelling demonstration by the indigenous peoples concerned of their agreement to the proposal under consideration. The mechanism used to reach agreement must itself be agreed to by the indigenous peoples concerned and must be consistent with their customary decision-making structures and criteria. Agreements must be reached according to the traditional consensus procedures.

Ayoade ("Towards 'Free, Prior, Informed Consent' in Natural Resource Development Projects" 2019 44 *SAYIL* (journal not paginated)) sets out a conceptual basis of FPIC and its nature and extent (see further MacKay "Indigenous People's Rights to Free, Prior and Informed Consent and the World Bank's Extractive Industries Review" 2004 4 *Sustainable Development and Policy* 50; McGee "The Community Referendum: Participatory Democracy and the Right to Free, Prior and Informed Consent to Development" 2009 27 *Berkeley J Int L* 570; Tamarg "An Overview of the Principle of Free, Prior and Informed Consent and Indigenous People in International Law and Practices" 2005 9 *Australian Indigenous Law Reporter* 111).

The author's submissions and references to the interpretation of FPIC in the South African context must be augmented by noting the importance of customary law in our new constitutional dispensation, as was emphasised in *Bhe v Magistrate Khayelitsha* (2005 (1) SA 580 (CC) (par 41)):

> "Quite clearly the Constitution itself envisages a place for customary law in our legal system. Certain provisions of the Constitution put it beyond doubt that our basic law specifically requires that customary law should be

> accommodated, not merely tolerated, as part of South African law, provided the particular rules or provisions are not in conflict with the Constitution. Sections 30 and 31 of the Constitution entrench respect for cultural diversity."

As stated by Basson J in *Baleni* (par 70), the status of customary law has likewise been acknowledged and endorsed by the Constitutional Court in *Alexkor Ltd v Richtersveld Community* (2004 (5) SA 460 (CC)):

> "While in the past indigenous law was seen through the common law lens, it must now be seen as an integral part of our law. Like all law it depends for its ultimate force and validity on the Constitution. Its validity must now be determined by reference not to common law, but to the Constitution. The Courts are obliged by section 211(3) of the Constitution to apply customary law when it is applicable, subject to the Constitution and any legislation that deals with customary law. In doing so the courts must have regard to the spirit, purport and objects of the Bill of Rights. Our Constitution ... does not deny the existence of any other rights or freedoms that are recognized or conferred by common law, customary law or legislation, to the extent that they are consistent with the Bill of Rights.
>
> …
>
> It is clear, therefore that the Constitution acknowledges the originality and distinctiveness of indigenous law as an independent source of norms within the legal system. At the same time, the Constitution, while giving force to indigenous law, makes it clear that such law is subject to the Constitution and has to be interpreted in the light of its values. Furthermore, like the common law, indigenous law is subject to any legislation that is consistent with the Constitution and that specifically deals with it. In the result, indigenous law feeds into, nourishes, fuses with and becomes part of the amalgam of South African law." (par 51)

11 Conclusion

The conclusion of Basson J in *Baleni,* succinctly put, was that, in keeping with the purpose of IPILRA, the applicants have the right to decide what happens to their land (par 83). As such, they may not be deprived of their land without their consent. Where the land is held on a communal basis, the community must be placed in a position to consider the proposed deprivation and be allowed to take a communal decision in terms of their custom and community on whether they consent or not to a proposal to dispose of their rights to their land.

A declaratory order was made that the Minister of Mineral Resources lacked any lawful authority to grant a mining right to TEMR in terms of the MPRDA unless the provisions of IPILRA were complied with by all the respondents representing the State. It was also declared that in terms of IPILRA the Minister of Mineral Resources was obliged to obtain the *full and informed consent* of the applicant uMgungundlovu community as informal holder of rights in land before granting any mining right to TEMR in terms of the MPRDA.

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DISTINGUISHING THE FORMS OF COMMON PURPOSE LIABILITY

S v Govender 2023 (2) SACR 137 (SCA)

1 Introduction

In the case of *S v Govender* (2023 (2) SACR 137 (SCA)), the Supreme Court of Appeal (SCA) was required once again to examine the common purpose doctrine, which although it has been in use in South African law for the past century, has in recent years seen significant development, in its expansion from being applied solely to a prior agreement, to also being applied in the case of an active association between two or more persons. The importance of distinguishing between these different forms of the common purpose doctrine has concomitantly also become increasingly important.

As the court points out in *S v Mzwempi* (2011 (2) SACR 237 (ECM) par 56), prior-agreement common purpose encompasses "any conduct which falls within the wide and general common design", whereas active-association common purpose is "restricted to particular conduct". Thus, in active-association common purpose, the association is with a "specific act" by which the crime was committed by another participant in the common purpose (*S v Tilayi* 2021 (2) SACR 350 (ECM) par 27, citing Snyman *Criminal Law* 6ed (2014) 260). It follows that, given the "marked differences" (*S v Tilayi supra* par 27) between the two forms of common purpose:

> "in a case where the state seeks to place reliance on the doctrine of common purpose, the trier of fact will be required to determine the nature of the common purpose relied upon, what the scope of that common purpose happened to be, and whether the accused was a participant, and remained a participant, in the common purpose." (*S v Tilayi supra* par 28)

The discussion below examines the significance of the distinction between the different forms of common purpose doctrine, in light of the SCA judgment in the case of *Govender*.

2 Facts

The appellant was convicted on two counts of murder, along with contraventions of the Firearms Control Act (60 of 2000), in the Gauteng Division of the High Court, following events that took place at a club in Kyalami in Johannesburg. After leave to appeal to a full bench of the High Court was initially refused, the Supreme Court of Appeal granted the appellant special leave to appeal (par 1).

The context for the fateful events (set out in par 2–4) was that the appellant attended a function at the club in question, along with his wife and a group of friends, including one Latchman (first accused), who was the appellant's co-accused in the trial court. The appellant and his wife were waiting outside the venue when two of the appellant's friends emerged from the club, one with a bloody nose. The appellant took a firearm from his holster, and brandished it in the presence of witnesses, one of whom tried to restrain the appellant from going back into the club. These urgings fell on deaf ears.

At this point, the first accused appeared, whereupon the appellant and first accused walked up the stairs in the direction of the club. When halfway up the stairs, the first accused took the firearm from the appellant. The exchange of the firearm occurred without any force on the part of the first accused, and there was no evidence of anything militating against a consensual handing over of the weapon on the part of the appellant (par 5). Very shortly thereafter, shots were fired, as a result of which the two victims were shot dead. Both victims had earlier been involved in an argument with the appellant and his friends, which had turned violent (par 7–8).

The first accused's defence involved a simple denial that he was involved in any of the events that took place (par 9). The appellant chose not to give evidence in his defence, although through his counsel he put forward a different version of events to that of one of the witnesses, which indicated that he returned to the club to retrieve his gun, which had been taken from him (par 10).

3 Judgment

The SCA (per Siwendu AJA, Schippers and Carelse JJA, and Nhlangulela and Unterhalter AJJA concurring) dismissed the appeal against conviction (par 23, 26) and reaffirmed the correctness of the mandatory life sentence handed down by the court *a quo* (par 24–25). It found that the State had proved all the requirements for liability beyond reasonable doubt (par 14), and that the submissions by appellant's counsel seeking to introduce a different version of events were implausible and "unsustainable" (par 17). The failure of the appellant to testify himself was also a factor that counted against him (par 21–22), and appellant's failure to report the loss of his firearm to the police further undermined his allegations of a scenario absolving him from liability (par 20). By contrast, the witnesses testifying for the prosecution were unshaken in their testimony, which clearly evidenced the appellant's guilt (par 17–19).

The basis upon which the court found the appellant to be liable for the two killings was that he had acted (with *dolus eventualis* (see par 15–16)) in common purpose with the first accused (see par 11–13). It is submitted that the court's path to the verdict, and the verdict itself, are beyond reproach, being logically ordered and clear. However, some of the reasoning employed in reaching such verdict is worthy of closer consideration, and such reasoning is consequently examined in the discussion that follows.

4 Discussion

4 1 The doctrine of common purpose in *Govender*

The appellant's challenge to the finding that he and the first accused had acted in common purpose was unsuccessful; he had argued that such a conclusion amounted to "conjecture and speculation" and was not consistent with the evidence (par 11). The court noted that although there was no evidence of any prior agreement (between the first accused and the appellant) to murder the deceased, common purpose can be established without any prior conspiracy, and may be "inferred from the conduct of the participants" (par 12). This form of common purpose liability, founded on active association, may be established if the authoritative requirements laid down in the Appellate Division case of *S v Mgedezi* (1989 (1) SA 687 (A) 705I–706C) are met (as the court points out (par 13)):

> "The accused must have: (a) been present at the scene where the violence was committed; (b) been aware of the assault on the victim by someone else; (c) intended to make common purpose with the person perpetrating the assault; (d) manifested his sharing of a common purpose by himself performing an act of association with the conduct of the perpetrator; and (e) have the requisite *mens rea*."

The court proceeds to note that *dolus eventualis* suffices for liability – that is, where the accused has "foreseen the possibility that the acts of the perpetrator may result in the death of the victim, and reconciled himself with that eventuality" (par 13).

In finding that the appellant could be held liable for murder based on active-association common purpose, the court made the following statement (par 12):

> "The concept of active association is wider than that of agreement, since it is seldom possible to prove a prior agreement. Consequently it is easier to draw an inference that a participant associated himself with the perpetrator."

4 2 The nature of common purpose liability

It is well established that common purpose liability comprises two categories: liability arising from "prior agreement, express or implied, to commit a common offence"; and, where no such prior agreement can be established, liability that "arises from an active association in a common criminal design with the requisite blameworthy state of mind" (*S v Thebus* 2003 (2) SACR 319 (CC) par 19). These categories operate distinctly, although Burchell argues that the two forms of common purpose may overlap in practice. Burchell contends that if there is a prior agreement among members of a group to commit crime A (which is then committed) and crime B is also foreseen by members of the group as a possible consequence of committing crime A, then if the conduct requirement of crime B is fulfilled, the group members can be liable for both crime A and crime B (Burchell *Principles of Criminal Law* 5ed (2016) 477), provided that there is "a specific agreement

to commit crime A and … some similarity in nature between crime A and crime B" (Burchell *Principles of Criminal Law* 478).

There are two basic difficulties with Burchell's formulation. (For further critique, see the views of Hoctor "A New Category of Common Purpose Liability" 2016 *Obiter* 666.) These difficulties are: (i) it does not demonstrate any "overlap" between the two "extremes" (as Burchell *Criminal Law* 477 terms them), as the commission of both crime A and crime B are incorporated in the prior-agreement form of common purpose liability, albeit that *dolus eventualis* applies to crime B; and (ii) the requirement that there be some similarity between crime A and crime B is not consistent with any legal precedent (not even in the case of *S v Mzwempi* (*supra* par 42), which supports Burchell's critique of the common purpose doctrine, and which Burchell in turn supports (*Criminal Law* 479)). In the recent case of *S v Tilayi* (*supra*), the court states that the two forms of common purpose, though distinct, are not necessarily mutually exclusive. The court proceeds to point out (par 24):

> "[A] finding that the unlawful act falls outside an existing prior agreed to common design, does not mean that it cannot also be found to have been done in the furtherance of a common purpose that arose spontaneously, or by active association before, during or after the execution of the earlier agreed to common design. Furthermore, the execution of the agreed common purpose may also satisfy the requirements for active association."

It is clear that what the court has in mind is not a commingling of, or relationship between, the forms of common purpose (as Burchell suggests), but rather that even if an act was not contemplated in the prior agreement, it may still form part of a common purpose to act – albeit that the common purpose is based on spontaneous agreement or active association, rather than a plan to commit a crime. This approach, which is correct, is elaborated upon below, in the context of the discussion of the development of the different forms of common purpose.

4 3 The development of the different forms of common purpose liability

The notion of common purpose as a prior agreement (or "prior conspiracy") has been part of South African law from the first cases in which the doctrine was employed. So, for example, in *R v Taylor* (1920 EDL 318 327), the court held that there was "a common purpose or agreement to proceed to violence", and in *R v Garnsworthy* (1923 WLD 17 19), common purpose was characterised as when "two or more persons combine in an undertaking for an illegal purpose". Such a conception of common purpose is closely analogous to the inchoate offence of conspiracy (where two or more persons agree to (i) commit, or (ii) assist in, or (iii) procure the commission of a crime (Kemp, Walker, Palmer, Baqwa, Gevers, Leslie and Steynberg *Criminal Law in South Africa* 4ed (2022) 313), where liability is similarly founded upon the parties coming to an agreement.

By the middle of the twentieth century, it was established that a common purpose could arise spontaneously. In *R v Mkize* (1946 AD 197 206),

Greenberg JA, writing on behalf of the court, and following the judgment of Tindall JA in *R v Duma* (1945 AD 410 415), stated that a "previous conspiracy between the persons concerned" was not required, but

> "it is sufficient if they act in concert with the intention of doing an illegal act, even though this co-operation has commenced on an impulse without prior consultation or arrangement."

This approach was further confirmed by Murray AJA in *R v Mtembu* (1950 (1) SA 670 (A) 684), where it was stated that "even in the absence of a plan determined in advance", liability could follow in terms of common purpose if "upon the impulse of the moment" the appellant had joined in an unlawful attack (see also, *inter alia*, *R v Tsosane* 1951 (3) SA 405 (O) 408A; *S v Maree* 1964 (4) SA 545 (O) 553D–F).

It seems that the first use of the term "active association" in the context of the common purpose doctrine was also in the *Mtembu* case (*supra*), where Murray AJA describes a situation where the accused "sees the actual perpetrator about to take action which may have certain consequences and by *active association* with the perpetrator in such action he incurs liability for what the perpetrator thereafter causes" (685). The term was sparingly used in this context thereafter, appearing in *R v Mgxwiti* (1954 (1) SA 370 (A) 374, 375) and *S v Mavhungu* (1981 (1) SA 56 (A) 66C–D) before it was used by Botha AJA in *S v Khoza* (1982 (3) SA 1019 (A) 1053H), prior to the same judge employing this term in the seminal cases of *S v Safatsa* (1988 (1) SA 868 (A)) and *S v Mgedezi* (*supra*). Since then, the notion of active-association common purpose has been very frequently applied in practice, receiving its constitutional imprimatur in *S v Thebus* (*supra*); it has consequently appeared regularly in criminal case law.

However, even if active-association common purpose by definition arises on the spur of the moment (*S v Safatsa supra* 898A–B), this does not mean that prior-agreement common purpose cannot also originate spontaneously. As Van Zyl DJP has stated in *Tilayi* (*supra* par 21, footnotes omitted):

> "When the common purpose is founded on an agreement, the agreement need not be express. It may be implied, in that it is inferred from all the circumstances. An agreement to commit an offence '… is generally a matter of inference deduced from certain acts of the parties accused, done in pursuance of a criminal purpose in common between them'. A common purpose may consequently be found to have arisen extemporaneously. Its existence is inferred from the fact that a number of persons act together in circumstances which are indicative of an intention to achieve a single common objective."

That an agreement may be established by implication, and inferred from the circumstances of the case, has been confirmed by both the Constitutional Court (in *S v Tshabalala* 2020 (2) SACR 38 (CC) par 49) and the SCA (see, e.g., *S v Carter* 2007 (2) SACR 415 (SCA) par 26; and *S v Sibuyi* 1993 (1) SACR 235 (A) 249*h*). That a common purpose based on a prior agreement may arise spontaneously may be illustrated by the example proffered by Botha AJA in *S v Khoza* (*supra* 1053D–E):

> "[I]f, immediately before he commenced his assault on the deceased, accused No 2 had said to the appellant: 'Let us kill this man', and the appellant had replied: 'I agree', there can be no doubt that the appellant would have been guilty of murder, despite the fact that his own assault on the deceased in no way contributed to the deceased's death."

An example of such extemporaneous agreement establishing common purpose immediately preceding unlawful conduct may be found in *S v Mambo* (2006 (2) SACR 563 (SCA)), where it was held (par 17):

> "The evidence against appellant 1, that he uttered the word 'skiet' as appellant 3 cocked the firearm … constitutes sufficient proof that he shared a common purpose with appellant 3 – which might have been formed on the spur of the moment – to cause the death of the orderly. He, too, was therefore correctly convicted of murder."

(For an earlier example of a similar spontaneous common purpose, where the appellants collaborated in a deadly assault with the intent of avoiding arrest, see *R v Du Randt* 1954 (1) SA 313 (A).)

Given that both the prior-agreement and active-association forms of common purpose can arise in circumstances that can be classified as spontaneous, and given that "[t]he two forms apply to different sets of circumstances, have different conditions for their application, and must not be invoked when those circumstances and conditions are not present" (*S v Tilayi supra* par 28), it is crucially important properly to identify the form of common purpose that finds application in a particular case.

The functioning of the prior-agreement form of common purpose was authoritatively laid down in the Appellate Division case of *S v Madlala* (1969 (2) SA 637 (A) 640F–H):

> "It is sometimes difficult to decide, when two accused are tried jointly on a charge of murder, whether the crime was committed by one or the other or both of them, or by neither. Generally, and leaving aside the position of an accessory after the fact, an accused may be convicted of murder if the killing was unlawful and there is proof–
>
> *(a)* that he individually killed the deceased, with the required *dolus*, e.g., by shooting him; or
>
> *(b)* that he was a party to a common purpose to murder, and one or both of them did the deed; or
>
> *(c)* that he was a party to a common purpose to commit some other crime, and he foresaw the possibility of one or both of them causing death to someone in the execution of the plan, yet he persisted, reckless of such fatal consequence, and it occurred; see *S v Malinga and Others*, 1963 (1) SA 692 (AD) at p. 694F–H and p. 695; or
>
> *(d)* that the accused must fall within *(a)* or *(b)* or *(c)* – it does not matter which, for in each event he would be guilty of murder."

This dictum has since been approved in numerous decisions in the SCA (formerly the Appellate Division) (see e.g., *S v Dhlamini* 1971 (1) SA 807 (A) 817G–H; *S v Maxaba* 1981 (1) SA 1148 (A) 1155G–1156A; *S v Daniëls* 1983 (3) SA 275 (A) 323E–G; *S v Safatsa supra* 896F–897A; *S v Nzo* 1990 (3) SA 1 (A) 7B–D; *S v Majosi* 1991 (2) SACR 532 (A) 536I–537C; *S v Sithebe* 1992 (1) SACR 347 (A) 354G–H; *S v Lebopa* 1997 JDR 0297 (SCA) 11–12; *S v Masango* 1997 JDR 0379 (SCA) 6) as well as the High Court (see e.g.,

S v Tilayi supra par 25). Typically, these decisions have underscored the rule laid down in (*c*) of the *Madlala* dictum – that where X, a party to a common purpose to commit a certain crime, foresees the possible commission of another crime, then liability for such further crime may follow for X, even if there is no direct causal link between X's conduct and the coming about of the unlawful harm. Liability is thus founded on the common purpose, the prior agreement, which establishes the "conspiracy" between the parties. On this basis, the "conspirators" can be held liable not only for the crime that forms the basis of their collaboration, but also for any other crimes that are foreseen as possible consequences of their mutual endeavour. Liability can even extend to negligence-based crimes such as culpable homicide, where the members of the common purpose *ought* to have foreseen the possibility of death occurring as a result of their conduct (Burchell *Principles of Criminal Law* 498–499).

The prior agreement that establishes this form of common purpose liability approximates liability for the inchoate offence of conspiracy. Like the offence of conspiracy, there must be an agreement (a "meeting of the minds"), which may be either express or implied (Hoctor *Snyman's Criminal Law* 7ed (2020) 253). Unlike the conspiracy offence, the agreement itself in common purpose does not suffice for liability, and a party to the common purpose can withdraw from it after the agreement has been concluded, and in so doing avoid liability for the ensuing crime (Hoctor *Snyman's Criminal Law* 231).

The functioning of the prior-agreement form of common purpose is clearly demonstrated in *S v Nzo* (*supra*). The appellants were members of an undercover ANC group that had entered Port Elizabeth in order to engage in sabotage there. The deceased, Mrs Tshiwula, was killed by Joe (a member of the group), after she had threatened to expose what the group were doing to the authorities. While the appellants were not involved in the killing, their ongoing association with the group based on the common purpose (despite foresight of the possibility of the murder being committed) was held to be determinative of liability. The majority judgment, which approved and followed the dictum set out above in *S v Madlala* (*supra* 640F–H), was required to deal with the defence counsel's contention that common purpose liability was inapplicable (7D–G):

> "Appellants' counsel argued, however, that this principle does not apply in a case like the present one. His argument went as follows: The ANC is an organisation with thousands of members in this country and several others. Some of its members are known to have committed a multitude of crimes in the execution and furtherance of its objectives. It is foreseeable that they might also do so in future. But, since liability cannot conceivably be imputed to every member for every foreseen crime so committed by all other members, the imputed liability of a member is limited to crimes with which he specifically associates himself. This is so because liability on the basis of the doctrine of common purpose arises from the accused's association with a particular crime and is not imputed to him where he associates himself, not with a particular crime, but with a criminal campaign involving the commission of a series of crimes. In such a case he can be convicted, apart from crimes in which he personally participated, only of those with which he specifically associated himself. And in the present case, although the appellants were actively involved in the campaign, there is no evidence that they associated themselves with Mrs Tshiwula's murder."

The majority of the court rejected this argument as "shrouded in a veil of irrelevant matter", in that neither "the general question of the liability of members of the ANC for crimes committed by other members" nor "the appellants' liability merely as members of the organisation" was in question; rather, the court was concerned with "the actions of three individuals" (Joe and the two appellants), who "formed the active core of the ANC cell in Port Elizabeth" and "functioned as a cohesive unit in which each performed his own allotted task" (7G–J). In fact, the majority held that the appellants' liability fell to be determined within a narrow ambit – that it was:

> "[t]heir design … to wage a localised campaign of terror and destruction; and it was in the furtherance of this design and for the preservation of the unit and the protection of each of its members that the murder was committed." (7I–J)

Hefer JA for the majority stresses that to argue that the appellants' participation in the execution of the common design is insufficient, and that evidence of their association with the murder as such is required to render them liable, entails a disavowal of the principles stated in *S v Madlala* (*supra* 640G–H (8E–F). Hefer JA continues, stating that to argue that the reference in par *(c)* to "some other crime" was intended as a reference to a particular crime and not a series of crimes is plainly not so, and in a case like the present one there is no logical distinction between a common design relating to a particular offence and one relating to a series of offences (8F–H).

MT Steyn JA wrote the minority judgment in *Nzo*, and held that in fact, contrary to the majority's view, the common purpose doctrine relates to specific crimes committed by a number of persons (15H–I). However, in making this statement, MT Steyn JA cites the *Madlala* case along with the cases of *Safatsa* (*supra*) and *Mgedezi* (*supra* 15G–H). Unlike the prior-agreement form of common purpose, the active-association form, of which the latter two cases are textbook examples, does focus on specific criminality, and specific crimes (as MT Steyn JA points out 15G–I). MT Steyn JA (with whom the court in *Mzwempi supra* par 111 and Burchell *Criminal Law* 478–479 agree) unfortunately treats the circumstances in *Nzo* as an example of active-association common purpose, as opposed to prior-agreement common purpose.

The broad approach envisaged by the prior-agreement form of common purpose may further be illustrated by the judgment in *S v Mitchell* (1992 (1) SACR 17 (A) 21). In this case, the appellants formed a common purpose to throw stones at persons they would pass on the road, from the back of the vehicle on which they were travelling, and duly loaded stones on the vehicle for this purpose (21D–G). The appellants therefore formed a common design to commit a series of assaults, in that whenever they passed anyone on the road, they would throw stones at them. The court further elaborates (21G–H):

> "True to their design, when shortly after they left the café and a cyclist was encountered, second appellant threw one of the stones at him. Had the issue arisen, the other three would, on the basis of common purpose, also have been responsible for second appellant's actions. Similarly, had first appellant thrown one of the stones at deceased, second appellant and the other two would have been parties to his crime. In both cases this would be so even

> though they acted individually rather than in concert. The throwing of a stone by any one of them would have been imputed to each member of the group and not (as was argued) be regarded as the independent act of the individual perpetrator only."

It should be noted that while the prior-agreement common purpose provides for a broad ambit of liability, certain "stringent conditions", principally related to the proof of such agreement, nevertheless apply, as pointed out in *S v Banda* (1990 (3) SA 466 (BG) 501D–F); an accused "cannot be found guilty of sharing a common purpose with other accused by a process of osmosis".

However, in contrast, if reliance is placed on the active-association form of common purpose, there must be proof that the accused person associated himself, not with a wide and general common design, but with a specific criminal act that the other participant(s) committed (Hoctor *Snyman's Criminal Law* 229). This distinction in application between the different forms of common purpose is evident from the differing judgments in *S v Nzo* (*supra*). The majority, which held that there was a prior agreement between the parties to carry out criminal conduct, had no difficulty in finding that the appellants were correctly convicted on the basis of common purpose, given their foresight of the possibility that the victim could be killed, and their reconciliation with this possibility. The minority, which did not find liability could be attributed in this way while essentially applying active-association common purpose, held that the appellants could not be convicted of the murder of the victim.

A further illustration flows from the cases of *S v Phetoe* (2018 (1) SACR 593 (SCA)) and *S v Tshabalala* (*supra*). Without going into the broader discussion of whether common purpose could apply to rape (which was in any event definitively held to be so in the *Tshabalala* case) and how the differing perspectives of the courts affected the differing verdicts, these are the important considerations for the purposes of the current discussion. A group of young men, including Phetoe and Tshabalala, embarked on a rampage, including acts of housebreaking, rape, assault and robbery in the Tembisa township in Gauteng. Ultimately, the SCA held that Phetoe could not be found guilty in respect of the commission of the rapes. Phetoe was convicted in the court *a quo* as an accomplice to rape on the basis of common purpose. However, the SCA found that there was no proof of a prior agreement between the parties to commit rape, and given that he could not be identified at the dwellings where the rapes took place, he could not be convicted on this basis (*S v Phetoe supra*). By way of contrast, the Constitutional Court in *S v Tshabalala* (*supra* par 10) held that the High Court had correctly established that the attackers had acted in terms of a prior-agreement common purpose to rape (acting as a "cohesive whole", using the same adjective as did the majority judgment in *Nzo*), and as a result there was no difficulty in upholding the rape convictions.

One of the primary factors that differentiates the two forms of common purpose is that of presence at the scene of the crime. Whereas in the case of a prior agreement to commit a crime, it is not required for the purposes of liability that the actor be present when the harm occurs (see e.g., *S v Yelani* 1989 (2) SA 43 (A) 46D–H; *S v Nzo supra*; *S v Khundulu* 1991 (1) SACR

470 (A) 479E–F; *S v Lungile* 1999 (2) SACR 597 (SCA) par 14), for active-association common purpose, the courts have, following the authoritative list of requirements set out in *S v Mgedezi* (*supra* 705I–706C), consistently required that the actor be present if they are to be held liable for the crime in question (*S v Motaung* 1990 (4) SA 485 (A) 510I–J; *S v Jacobs* 2019 (1) SACR 623 (CC) par 106). It is, however, further required for active-association common purpose liability that the actor do more than merely be present at the scene of the crime: there must be an active association with the common purpose by means of some kind of overt or objectively ascertainable conduct (*S v Khumalo* 1991 (4) SA 310 (A) 357A–E; *S v Mzwempi supra* par 123). Once again, this would not be a requirement in respect of prior-agreement common purpose liability.

As pointed out in *S v Banda* (*supra* 501E–G), the active-association form of common purpose

> "may not be used as a method or technique to subsume the guilt of all the accused without anything more. It cannot operate as a dragnet operation systematically to draw in all the accused. Association by way of participation, and the *mens rea* of each accused involved, are necessary and essential prerequisites."

Having examined the nature of common purpose liability, and its development through the South African case law, we can return to an assessment of some aspects of the application of the doctrine in *Govender*.

4 4 Difficulties with the application of the common purpose doctrine in *Govender*

There are a couple of issues that bear clarifying in the *Govender* judgment. First, in explaining the basis on which it found (correctly, it is submitted) that the appellant had the necessary intention in order to be found guilty of murder by way of the common purpose doctrine, the court indicates that (at a minimum) the appellant had *dolus eventualis* in respect of the use of the gun in the club by the first accused (par 15). The court indicates that this conclusion may be established on the basis of inferential reasoning, taking into account the appellant's reaction to the armed entrance into the club (citing *S v Kramer* 1972 (3) SA 331 (A) 334F), and consequently holding that the appellant "must have foreseen" that the first accused would use the firearm, which is indeed what occurred (par 16). In the course of this reasoning, the court states that "[t]his was not a case where the common purpose arose spontaneously or on the spur of the moment" (par 16). This is a curious remark. As discussed above, there would be no obstacle to a prior agreement developing spontaneously, where this is borne out by the evidence. However, the court specifically indicated that its finding was that there was no prior agreement between the appellant and the first accused, and that the finding was that the common purpose was in the form of active association (par 12), which, by definition, develops on the spur of the moment.

A further query relates to the statement (par 12) that the active-association form of common purpose is "wider" than that of prior agreement, as it is

"seldom possible to prove a prior agreement", and it is thus "easier to draw an inference that a participant associated himself with the perpetrator". The source of this statement is Snyman (*Criminal Law* 5ed (2014) 267). Snyman continues his discussion to explain that agreement "whether express or implied, is merely one form of active association" (Snyman *Criminal Law* 5ed (2014) 267, citing Matzukis and Whiting). The statement thus refers to the broad classification of common purpose as active association, in all its forms. Averring that all forms of common purpose amount to active association (see Matzukis "The Nature and Scope of Common Purpose" 1988 *SACJ* 226 231–2, followed by Snyman in his earlier editions of *Criminal Law*, including 5ed (2008) 267n33, where Whiting "Joining in" 1986 *SALJ* 38 39–40 is also (incorrectly) cited in support of this view) can however only give rise to confusion and difficulty in keeping the distinction between the two forms of common purpose settled and clear, as is required by their different natures, requirements and modes of application (as discussed above). In any event, Snyman's statement, adopted in *Govender*, seems to be clearly incorrect in light of the development of the doctrine, as well as recent authoritative case law.

That it may be difficult to establish an agreement, and that it would be easier to draw an inference from the accused's conduct as to whether he intentionally associated with the perpetrator, are axiomatic from an evidentiary perspective, and these statements require no further comment. However, it is now well established that the active-association form of common purpose is in fact *narrower* than the prior-agreement form. In *Dewnath v S* ([2014] ZASCA 57 par 15), the SCA held:

> "[T]he most critical requirement of active association is to curb too wide a liability. Current jurisprudence, premised on a proper application of *S v Mgedezi & others*, makes it clear that (i) there must be a close proximity in fact between the conduct considered to be active association and the result; and (ii) such active association must be significant and not a limited participation removed from the actual execution of the crime."

This statement was cited with approval by the SCA in *S v Machi* (2021 JDR 1741 (SCA) par 36) and the Constitutional Court in *Makhubela v S; Matjeke v S* ([2017] ZACC 36 par 38).

As Snyman indeed points out, the distinction between prior-agreement and active-association common purpose is that the former merely requires that the accused agreed with the "wide and general" common design of the conspirators, whereas the latter requires that the accused associate himself with "the specific act whereby the other participant(s) committed the crime" (Hoctor *Snyman's Criminal Law* 229). Taking into account the fact that the accused need not be present at the crime in respect of prior-agreement common purpose, and that where there is a prior-agreement common purpose, actual active association with the crime at the time of its commission is not required (Hoctor *Snyman's Criminal Law* 229; see further discussion above), it is evident that "liability arising from active association is more restrictive in nature than liability arising from a prior agreement" (Hoctor *Snyman's Criminal Law* 229; *S v Mzwempi supra* par 77).

The statement in *Govender* is therefore unfortunately misleading (as is an identical statement in the case of *S v Ntshaba* 2022 JDR 0279 (ECG) par 12; see the criticism of Hoctor "Recent Cases: General Principles of Criminal Law" 2022 *SACJ* 222 224–225). As the dictum in *Dewnath* authoritatively states, the role of active-association common purpose is to limit the liability of the accused in the context of group crime. Where there is prior-agreement common purpose, the basis for liability is much broader. Theron J in *S v Jacobs* (*supra* par 72) employs the terminology used in Kemp, Walker, Palmer, Baqwa, Gevers, Leslie and Steynberg *Criminal Law in South Africa* 2ed (2012) 235, now 4ed 284), referring to prior conspiracy (or prior-agreement common purpose) as a bilateral or multilateral act of association and common purpose by conduct (spontaneous or active association) as a unilateral act of association. Drawing the distinction between the different forms of common purpose in this way is useful in underlining the disparity in their respective breadth of application. While the prior-agreement form of common purpose is, like the inchoate offence of conspiracy, founded upon mutual agreement between the participants to commit a crime or crimes, in respect of active-association common purpose, the accused is held individually liable based on his or her own action in joining in the commission of a crime that is already underway (but *not* yet completed; where the harm has already been caused at the point that the accused acted, this is the so-called "joining-in" situation, which by definition excludes common purpose liability (Hoctor *Snyman's Criminal Law* 232–233)). This approach, stated authoritatively in *Mgedezi* (*supra*), has been applied in the SCA cases of *S v Buthelezi* (1999 JDR 0587 (SCA) 45-46) and *S v Botha* (2006 (1) SACR 105 (SCA) par 14), where the basis for liability was, in each case, the appellant intentionally joining with or associating in the ongoing assault of the victim, despite the absence of proof of prior agreement. The *Mgedezi* judgment was also cited in *S v Le Roux* (2010 (2) SACR 11 (SCA) par 17), where the SCA held that unlike a "general and all-embracing approach", which as has been demonstrated above applies in the case of prior-agreement common purpose,

> "the conduct of the individual accused should be individually considered, with a view to determining whether there is a sufficient basis for holding that a particular accused person is liable, on the ground of active participation in the achievement of a common purpose that developed at the scene."

5 Concluding remarks

Despite the ongoing development in the common purpose doctrine (see most recently its extended application to the crime of rape in *S v Tshabalala supra*), and its regular appearance in criminal cases, the crucial distinction between the forms of common purpose is not always drawn, to the detriment of legal clarity. Thus, when Kemp *et al* (*Criminal Law in South Africa* 4ed 285n35) state that the requirements for active-association common purpose laid down in *S v Mgedezi* "in fact apply equally to all cases involving common purpose" and that [i]t is just that they are more or less self-evident in cases where there is a prior conspiracy", this fails to take account of the important difference in the elements and ambit that the authors otherwise clearly delineate. The requirements for active-association common purpose

are necessarily more narrowly constrained, since they deal with the particular factual scenario where an accused spontaneously joins in the commission of a crime. Since there is no question of the establishment of the existence of a prior agreement, and the conduct of the accused is required to be evaluated, often in the case of the criminal activity of a large group, there need to be stricter safeguards in place than would apply in the case of a prior agreement, where proof of the conspiracy (or even spontaneous agreement) is the essential requirement.

An example of the kind of difficulty that lack of clarity on the distinction between prior-agreement common purpose and active-association common purpose can bring may be found in the case of *S v Bantom* (2019 JDR 1784 (ECP)). It should immediately be noted that justice was done in this case, and that the court's treatment of the evidence is exemplary. However, it is noteworthy that the attack on the victims, with fatal consequences for one of the victims, was categorised as "not pre-planned, but was decided upon shortly before the attack started" (par 12). The mutual decision to attack is clearly a prior agreement, which is affirmed by the court's assessment of the state witness's testimony that the accused "spontaneously decided to carry out a robbery" (par 33). However, the court later contrarily asserts that the attack, was not pre-planned, nor subject to a prior agreement, but occurred when the accused "identified the opportunity to rob", upon which the accused "did not hesitate to act as a predatory group intent on achieving their objective" (par 92). The presence of an agreement is indicated by the court noting that resistance from the victim fatally wounded was "not only foreseen but anticipated", which was why the victim was subject to a rushed attack from behind (par 94). The court then, however, proceeds to apply the active-association common purpose doctrine (citing the cases of *Safatsa supra*, *Thebus supra,* and *Mgedezi supra* in this regard) and finds the accused guilty of murder on this basis (par 98–110). The point may simply be made that if the accused were indeed acting on the basis of a prior agreement, even if such prior agreement was formed very shortly before the attack ensued – as the court indicates occurred – it would not be necessary to prove all the elements for active-association common purpose to establish liability (cf the view of Kemp *et al Criminal Law in South Africa* above), and the process of proof would have unfolded very differently.

In sum, courts should strive for clarity in differentiating between the two forms of common purpose, and should not merely elide this crucial distinction by a default resort to bolstering their reasoning by employing the elements of active-association common purpose, no matter how tempting this may be. While both forms of common purpose play an important role in founding liability where two or more persons together engage in criminal conduct, prior agreement (aligned to "conspiracy" or "common design") is essentially and fundamentally different in its innate quality from spontaneous active association in criminal conduct that has already begun through the acts of another or others.

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PUTATIVE PRIVATE DEFENCE IN CRIMINAL LAW

Tuta v The State 2023 (2) BCLR 179 (CC)

1 Introduction

In a country like South Africa, plagued as it is by violent contact crime, it is not surprising that the defences of private defence and putative private defence are often raised by accused in criminal trials. On 17 February 2023, the Minister of Police, Bheki Cele, released the third-quarter crime figures for the period October to December 2022. Some of the South African crime statistics revealed in these figures include 7 555 murders (82.1 per day, which had increased from 74 per day in the previous quarter); 15 545 sexual assaults (169 per day, an increase from 154 in the previous quarter); 50 582 assaults with intent to do grievous bodily harm (550 per day, an increase from 505 in the previous quarter) and 37 829 violent robberies (411.2 per day, an increase from 371 in the previous quarter) (Baxter "Latest SA Crime Stats: 82 Murders Per Day Reveal 'Unabated Slaughter' of South Africa's Citizens" (17 February 2023) www.SAPeople.com (accessed 2023-02-23) 1).

It is trite that, for a conviction in a criminal court, the prosecution is tasked with proving the accused's liability beyond reasonable doubt. Case law and scholars confirm this (*S v MRC* [2023] ZAMPMBHC 8 94; *S v Kesa* [2023] ZAECMHC 6 25; *S v Mncube* [2023] ZAKZPHC 15 165; *Kapa v S* [2023] ZACC 67; *Mohlalhlane v S* [2023] ZAGPPHC 94 10; *Director of Public Prosecutions, Gauteng v Pistorius* [2015] ZASCA 204 52–3; Hoctor *Snyman's Criminal Law* (2020) 85; Burchell *Principles of Criminal Law* (2016) 51; Mokoena "The Right to Remain Silent: A One-Eyed Approach to Truth-Seeking?" 2015 2(2) *Journal of Law, Society and Development* 120 130). As an element of a crime, unlawfulness does not simply lie in fulfilment of the definitional elements of a crime. There are instances where, notwithstanding fulfilment of the definitional elements of a crime, the conduct is justified or legally regarded as objectively reasonable. These instances are known as grounds of justification and technically serve to exclude unlawfulness. A ground of justification, if successfully raised, is therefore a complete defence to any criminal charge. There is not a *numerus clausus* of valid grounds of justification in South African criminal law; the test remains whether the accused's conduct was objectively reasonable in the particular situation.

One such ground of justification is private defence. A person acts in private defence, and therefore lawfully, if they use the minimum force necessary to ward off an unlawful human attack that has commenced, or is imminently threatening, upon their or somebody else's protected legal

interests such as life, physical integrity, property, reputation or dignity. The defensive act in private defence must be: necessary to protect the threatened interest; directed at the attacker; reasonably proportionate to the attack; and perpetrated with the knowledge that it is performed in private defence (Hoctor *Snyman's Criminal Law* 85; Burchell *Principles of Criminal Law* 122, 125; Kemp *Criminal Law in South Africa* (2018) 98; *R v Attwood* 1946 AD 331 340; *S v TS* 2015 (1) SACR 489 (WCC); *S v Papu* 2015 (2) SACR 313 (ECB) 10; *S v Ngobeni* [2014] ZASCA 59; *S v Mkhize* [2014] ZASCA 52; *Ehrke v S* [2012] ZAGPPHC 189 12; *S v Grigor* [2012] ZASCA 95; *Ngubane v Chief Executive Director of Emergency Services, Ethekwini Metropolitan Services* 2013 (1) SACR 48 (KZD) 27; *S v Steyn* 2010 (1) SACR 411 (SCA) 16; *S v Engelbrecht* 2005 (2) SACR 41 (W) 228; *S v Ferreira* 2004 (2) SACR 454 (SCA) 45; *S v Trainor* 2003 (1) SACR 35 (SCA) 41; *S Mkosana* 2003 (2) SACR 63 (BCH) 90; *S v Makwanyane* 1995 (3) SA 391 (CC) 138; Hoctor "General Principles and Specific Offences" 2014 *SACJ* 63 65; Goosen "Battered Women and the Requirement of Imminence in Self-Defence" 2013 16(1) *Potchefstroom Electronic Law Journal* 70 71; Botha "Private Defence in the South African Law of Delict: Rethinking the Rethinker" 2013 *SALJ* 130(1) 154 155; Hoctor "General Principles and Specific Offences" 2018 *SACJ* 31(3) 437 438; Hoctor "General Principles and Specific Offences" 2020 *SACJ* 31(3) 751 752; Goosen and Hoctor "Comparing Self-Defence and Necessity in English and South African Law: R v Riddell [2018] 1 All ER 62; [2017] EWCA Crim 413" 2019 *Obiter* 140(3) 191 193; *Walker* "Determining Reasonable Force in Cases of Private Defence: A Comment on the Approach in S v Steyn 2010 (1) SACR 411 (SCA): Comments" 2012 *SACJ* 84).

Unlike private defence, putative private defence is not a ground of justification that excludes unlawfulness. Putative private defence exists where an accused is under the mistaken belief that they are conducting themselves in private defence whereas there is no such ground of justification in the circumstances (Maharaj "Fight Back and You Might Be Found Guilty: Putative Self-Defence" 2015 *De Rebus* 34). According to Snyman, a putative ground of justification is one that does not legally exist (Hoctor *Snyman's Criminal Law* 84). If an accused labours under the genuine but erroneous belief in the existence of a ground of justification, their conduct remains unlawful (*S v Makaula* 2020 JDR 1746 (ECM) 20; *Nene v S* [2018] ZAKZPHC 46 29; *DPP, Gauteng v Pistorius* 2016 (1) *v* SACR 431 (SCA) 53; *S v Mdlalose* 2020 JDR 1804 (MN) 22; *S v Teixeira supra* 26; *S v Van Zyl* [1996] All SA 336 (W) 340; Botha "Putative Self-Defence as a Defence in South African Criminal Law: A Critical Overview of the Uncertain Path to *Pistorius* and Beyond" 2017 *Litnet* 3). The accused lacks the knowledge that they are, in reality, acting unlawfully. While the accused's conduct remains unlawful, the absence of knowledge of unlawfulness results in a lack of intention, since knowledge of unlawfulness is an integral part of intention (*S v Dougherty* 2003 (2) SACR 36 (W) 34; *S v Mostert* 2006 (1) SACR 560 (N) 569 f–g; S *v Joshua* 2003 (1) SACR 1 (SCA) 29; *S v De Oliveira* 1993 (2) SACR 59 (A) 63; *S v Campher* 1987 (1) SA 940 (A) 955d–e).

The accused's mistaken belief that they are acting lawfully in private defence must be honest and genuine but need not be rational or reasonable

(Hoctor *Snyman's Criminal Law* 297; Hoctor 2020 *SACJ* 752; *S v Papu supra* 12; *S v De Oliveira supra* 65d; *Nene v S supra* 29; *S v Mdlalose supra* 22; *S v Ngobeni supra* 13). If, on the facts, there could be no honest and genuine belief on the accused's part in the lawfulness of their defensive act, putative private defence cannot exist. In *DPP, Gauteng v Pistorius* (*supra* 53) Leach JA (Mpati, Mhlantla and Majiedt JJA and Baartman AJA concurring) rejected the appellant's reliance on putative private defence stating:

> "Not only did he not know who was behind the door, he did not know whether that person in fact constituted any threat to him. In these circumstances, although he may have been anxious, it is inconceivable that a rational person could have believed he was entitled to fire at this person with a heavy calibre firearm, without taking even that most elementary precaution of firing a warning shot (which the accused said he elected not to fire as he thought the ricochet might harm him). This constituted prima facie proof that the accused did not entertain an honest and genuine belief that he was acting lawfully, which was in no way disturbed by his vacillating and untruthful evidence in regard to his state of mind when he fired his weapon."

While the accused's mistaken belief in the existence of private defence must be honest and genuine, Hoctor (2020 *SACJ* 752) correctly questions the court in *S v Makaula* (*supra* 29) where the court states that the appellant has not "established" the story of an attack by means of an empty bottle on him or that his life was in danger when he stabbed the deceased to death. There is no onus on an appellant to adduce proof of innocence or to lay a factual basis for his mistaken belief in the lawfulness of his defensive actions (Burchell *Principles of Criminal Law* 116). The prosecution must prove liability beyond reasonable doubt. It is trite that the onus rests on the State to prove beyond reasonable doubt that an accused acted unlawfully or that they realised or ought reasonably to have realised that they were exceeding the bounds of private defence (see *S v Ngobeni supra* 11; *S v Motleleni* 1976 (1) SA 403 (A) 407; *S v Ngomane* 1979 3 SA 859 (A) 863; *S v Goliath* 1972 (3) SA 1 (A) 11 and *S v Ntuli* 1975 (1) SA 429 (A) 436). The court in *S v Teixeira* (*supra* 765) confirmed that it remains the task of the State to prove beyond reasonable doubt that the accused's conduct was not justified but unreasonable and, consequently, unlawful. The investigation should therefore be directed at what the nature of the appellant's mistaken belief was, and not at whether the appellant has laid a factual basis for his mistaken belief. This approach was endorsed by the Appellate Division in the case of *R v Difford* (1937 AD 270 272) (and cited by Hoctor 2020 *SACJ* 753 and *S v Mdlalose supra* 32):

> "No onus rests on the accused to convince the Court of the truth of any explanation he gives. If he gives an explanation, even if the explanation is improbable, the Court is not entitled to convict unless it is satisfied, not only that the explanation is improbable, but that beyond any reasonable doubt it is false. If there is any reasonable possibility of his explanation being true, then he is entitled to his acquittal."

It is trite that, for private defence to succeed as a ground of justification, the test is objective in the sense that the attack and the defensive action must meet certain objective requirements (*Mugwena v Minister of Safety and Security* 2006 (4) SA 150 (SCA) 157). The accused's subjective belief,

whatever it may be, has no impact on the validity of private defence as a ground of justification (Hoctor "General Principles of Criminal Law" 2022 *SACJ* 35(2) 22 228). The Constitutional Court in *Tuta v The State* (2023 (2) BCLR 179 (CC)) was recently tasked with making a finding on the correct legal test to be applied to the existence of the defence of putative private defence. In this contribution, the Constitutional Court's decision is analysed.

2 Facts in *Tuta v The State*

The applicant was convicted by the High Court on a count of murder and a count of attempted murder. He was sentenced to life imprisonment on the count of murder and 15 years' imprisonment on the count of attempted murder. He then approached the Constitutional Court to seek leave to appeal and an order setting aside his conviction and sentence. The majority of the court granted leave to appeal, the appeal was upheld, and the conviction and sentence were set aside. The order of the High Court was replaced with an order stating that the accused is found not guilty and acquitted and his immediate release from prison was directed.

The factual background is the following. On 2 March 2018, the applicant accompanied his friend to his residence in Sunnyside, Pretoria. *En route* to his friend's residence, they realised that they were being followed by an unmarked red motor vehicle with occupants wearing civilian clothing. Upon this realisation, the applicant and his friend panicked and ran away, believing that the occupants of the vehicle intended to harm them. They ran in different directions. It later transpired that the two occupants of the unmarked motor vehicle were, in fact, police officers on duty, patrolling Sunnyside, Pretoria, in civilian clothing.

According to the testimony of the surviving occupant of the vehicle, Constable Makgafela, he and his partner, Constable Sithole, attempted to arrest the applicant after he and his friend ran away. The police officers suspected the applicant of being in possession of a stolen laptop because it appeared to them as if the applicant was hiding a laptop under his tracksuit jacket. They pursued him, first in the unmarked car, and thereafter on foot. Constable Makgafela gave chase. He testified further that, even though he was wearing civilian clothing, he also wore a bullet-proof vest bearing the South African Police Service (SAPS) insignia, which he removed to give chase to the applicant, after realising that it slowed him down. Constable Makgafela and his partner overpowered the applicant. While his partner held the applicant down, Constable Makgafela returned to their vehicle to fetch handcuffs. The applicant, using a flick knife that was in his pocket, then stabbed Constable Sithole. Upon his return to the applicant, the applicant stabbed him (Constable Makgafela) in the head. Constable Sithole was admitted to Muelmed Hospital but succumbed to the stab wound on the same day. Constable Makgafela was hospitalised for 34 weeks and is left with a severely injured left eye that has affected his eyesight (3–5).

The applicant testified in the High Court and admitted to stabbing both police officers. He testified that he thereafter left the scene immediately to seek help and, after failing to receive assistance from security guards in the vicinity, went to his residence. At his residence he told the security guards

there what had happened and also telephoned his sister to tell her what had happened. He explained to her that he had stabbed two men who tried to rob and abduct him. He further testified that his sister accompanied him to a police station, where he reported the incident the following day. He was informed by the police that a case could not be opened because the applicant could not identify his attackers. The applicant then left his contact details and residential address with the police officer on duty. He was arrested later that day at his residence. The applicant handed over the denim jacket that he had been wearing the previous night. When the police demanded he hand over the stolen laptop, the applicant informed them he had not been carrying a laptop at all (6–7).

Despite pleading not guilty to both counts in the High Court, the applicant was convicted on the charges of murder and attempted murder, and he received the minimum sentence for causing the death of a police officer, which is life imprisonment. The High Court found no substantial and compelling circumstances that permitted it to deviate from the minimum prescribed sentence. The applicant was sentenced to 15 years' imprisonment on the count of attempted murder. The applicant's application to the High Court for leave to appeal against his conviction was refused. Thereafter the applicant lodged an application for leave to appeal with the Supreme Court of Appeal. That application was also dismissed on the basis that it had no reasonable prospects of success. Six months later the applicant filed an application to the Supreme Court of Appeal in terms of section 17(2)(*f*) of the Superior Courts Act (10 of 2013), requesting the President of the Supreme Court of Appeal to reconsider the court's decision to refuse the application for leave as there were exceptional circumstances to do so. The President of the Supreme Court of Appeal dismissed the application for reconsideration. In a further appeal to the Constitutional Court, the applicant advanced two grounds that, he contended, engaged the Constitutional Court's jurisdiction and served as the basis for the applicant's leave to appeal against his conviction. The first ground was the infringement of the applicant's right to a fair trial in terms of section 35(3) of the Constitution of the Republic of South Africa, 1996 (the Constitution). The second ground was that the matter raises an arguable point of law of general public importance that ought to be considered by the Constitutional Court, namely, the High Court's misapplication of the test for putative private defence (14). This discussion is limited to the second ground. Unterhalter AJ (Madlanga J, Majiedt J, Mathopo J, Mhlantla J, Theron J and Tshiqi J concurring) delivered the majority judgment, while Kollapen J (Mlambo AJ concurring) delivered a dissenting judgment. For the sake of brevity, the discussion is limited to the majority judgment.

3 Parties' submissions

The applicant contended that the Constitutional Court had jurisdiction on the basis that the case raised an arguable point of law of general public importance that ought to be considered by the court. In making this submission, the applicant relied on the statement by Madlanga J (Jafta J and Nkabinde J concurring) in *Paulsen v Slip Knot Investments 777 (Pty) Limited* (2015 (3) SA 479 (CC) 30), namely that the interests-of-justice factor aims to

ensure that the Constitutional Court does not entertain any and every application for leave to appeal brought to it. Coming to this court's non-constitutional appellate jurisdiction, Madlanga J considered the question whether the interests of justice do not come into the equation and opined that they do. Madlanga J stated that this is what the words "which ought to be considered by that Court" in section 167(3)(*b*)(ii) of the Constitution are directed at. If it is not in the interests of justice for the Constitutional Court to entertain what is otherwise an arguable point of law of general public importance, then that point is not one that "ought to be considered by [this] Court". The interests-of-justice criterion is firmly entrenched in the Constitutional Court's jurisprudence on applications for leave to appeal involving constitutional matters. Madlanga J further stated that, whatever its true provenance in respect of applications for leave to appeal on constitutional matters from the Supreme Court of Appeal, he was unable to conceive of any basis why it should not be applicable in that case. On the non-constitutional appellate jurisdiction, the court in *Paulsen* borrowed from the Constitutional Court's existing jurisprudence on interests of justice.

The applicant's written submission in *Tuta* was that there was an incorrect application of the test for putative private defence by the trial court. He contended that the trial court had failed to apply the correct legal test to determine whether his defence, that he acted in putative private defence, was reasonably possibly true (18). Some confusion arose as the applicant's written submission did not exactly correspond with his oral submission. While the written submission made reference to a misapplication of the test for putative private defence, during oral submissions, the applicant argued that the trial judge misunderstood the test. The applicant's submissions relied primarily on the contention that the trial court failed to articulate the test for putative private defence correctly and that it conflated the requirements for fault and negligence when articulating the test. This incorrect understanding of the test for putative private defence, the applicant argued, constituted a failure of justice (23).

The respondent submitted that it was not in the interests of justice for leave to be granted. The respondent also relied on the Constitutional Court's decision in *Paulsen* (*supra* 30) but emphasised the words of Madlanga J in *Paulsen* that "the interests of justice factor aims to ensure that the court does not entertain any and every application for leave to appeal brought to it" (25). The respondent further submitted that the applicant's legal counsel had the opportunity to raise any complaints with the trial judge but failed to do so. The submission was accordingly that the applicant's rights were not infringed, and no irregularities occurred (26).

The respondent further submitted that the applicant was well aware that he was pursued by police officers. The police officers were wearing bullet-proof vests with the South African Police Service's insignia, and it was not disputed that the streetlights were on when the applicant was spotted by the police. The respondent contended that the police officers had clearly identified themselves to the applicant. It followed that the applicant did not act in putative private defence and the convictions should stand (27).

4 The test for putative private defence

At his trial in the High Court, the applicant relied on the defence of putative private defence. The Constitutional Court referred to the decision in *De Oliveira* (*supra* 14–16) where Smalberger J (Nienaber JJA concurring) distinguished clearly between private defence and putative private defence:

> "It subsequently transpired that the defence was rather one of putative private defence ('putatiewe noodweer'). From a juristic point of view the difference between these two defences is significant. A person who acts in private defence acts lawfully, provided his conduct satisfies the requirements laid down for such a defence and does not exceed its limits. The test for private defence is objective – would a reasonable man in the position of the accused have acted in the same way (S v Ntuli 1975 (1) SA 429 (A) at 436E). In putative private defence it is not lawfulness that is in issue but culpability ('skuld'). If an accused honestly believes his life or property to be in danger, but objectively viewed they are not, the defensive steps he takes cannot constitute private defence. If in those circumstances he kills someone, his conduct is unlawful. His erroneous belief that his life or property was in danger may well (depending upon the precise circumstances) exclude *dolus* in which case liability for the person's death based on intention will also be excluded; at worst for him he can then be convicted of culpable homicide."

In *De Oliveira supra,* Smalberger J correctly opined that an accused who kills another, believing his life to be in danger, when, objectively, it is not, still acts unlawfully. Where such an accused kills another in the mistaken but genuine belief that his life is in danger, the accused lacks the intention to act unlawfully (*Tuta v The State supra* 46). As stated above, knowledge of unlawfulness is an integral part of intention. If it is lacking, the Constitutional Court correctly pointed out, the accused cannot be guilty of murder. Such an accused may still be guilty of culpable homicide depending on whether his belief that his life was in danger was reasonable. Putative private defence thus clearly excludes culpability in the form of intention, not unlawfulness. Culpability on a charge of murder is judged according to what the accused subjectively believed. Put differently, intention is a purely subjective state of mind (*S v Mdlane* [2023] ZAGPJHC 206 19; *S v Dube* 2010 (1) SACR 65 (KZP) 6–8; *S v Humphreys* 2013 (2) SACR 1 (SCA) 13; *S v Makgatho* 2013 (2) SACR 13 (SCA) 10). The required culpability on a charge of culpable homicide is negligence. Negligence is determined on the basis of the reasonableness of that belief (*Tuta v The State supra* 46; *S v Van As* 1976 (2) SA 921 (A) 927; *S v Ngubane* 1985 (3) SA 677 (A) 134; *S v Savoi* 2014 (1) SACR 545 (CC) 91).

It should also be briefly stated at this point that the test for unlawfulness and the test for negligence are often confused with one another, and used interchangeably in our case law. This is unfortunate. It is trite that the test for unlawfulness is whether the accused's conduct was objectively reasonable and therefore justified in light of all the surrounding circumstances. Given the fact that there does not exist a *numerus clausus* of valid grounds of justification in South African criminal law, an accused's conduct may still be regarded as being objectively reasonable despite the absence of a known ground of justification in the circumstances. To determine unlawfulness, the accused's conduct is viewed *ex post facto* and objectively and the question is asked whether the *boni mores* regard the conduct as objectively

reasonable or socially adequate in the circumstances. The accused's conduct is not measured against that of the reasonable person in the same circumstances (Burchell *Principles of Criminal Law* 114; Hoctor *Snyman's Criminal Law* 81; Snyman "The Two Reasons for the Existence of Private Defence and Their Effect on the Rules Relating to the Defence in South Africa" 2004 *SACJ* 178; *S v Engelbrecht supra* 332). The test for negligence as a form of culpability, on the other hand, is that of the reasonable person in the same circumstances as the accused. Here the accused's conduct is measured against that of the fictitious reasonable person or *diligens paterfamilias* (Burchell *Principles of Criminal Law* 421; Hoctor *Snyman's Criminal Law* 187; *S v Botha* 2019 (1) SACR 127 (SCA) 18; *S v Ntuli supra* 436; *S v Melk* 1988 (4) SA 561 (A) 578). The words of Smalberger J in *De Oliveira* (*supra* 14–16) – that "[t]he test for private defence is objective – would a reasonable man in the position of the accused have acted in the same way" – tend to obscure the difference in these two tests (see also *S v Ntuli supra* 436 where Holmes JA, (Hofmeyr JA and Van Zijl AJA concurring) held that "[t]he test for private defence is objective ... would a reasonable man in the position of the accused have acted in the same way?").

Before evaluating the merits of the applicant's submissions, Unterhalter AJ in *Tuta* first had to establish whether the Constitutional Court had jurisdiction to hear the matter. As stated previously, the applicant relied on putative private defence. He submitted that he had genuinely believed that his life was in danger at the hands of two assailants and that he had stabbed these assailants to protect himself, not realising that they were police officers. His belief was both genuine and reasonable. Although he was not objectively acting in self-defence, he submitted that he is guilty of neither murder nor culpable homicide (47). The trial court did not accept this submission but rather that of the surviving constable, who testified that he had informed the applicant, on apprehending him, that he and the deceased were police officers. This finding, the court found, excluded the applicant's reliance on putative private defence as he could not have held a genuine belief that his life was in danger. It follows that the stabbing of the police officers was intentional (48).

The applicant's second ground of appeal before the court was that the trial judge had failed to have regard to all the evidence led at trial from which the applicant's subjective state of mind might have been inferred. The submission was that, had the trial judge done so, he would have concluded that it was reasonably possibly true that the applicant did not realise that his assailants were police officers and that he genuinely believed that his life was in danger. The State would then not have discharged its burden to prove the applicant's liability on the counts of murder and attempted murder (49). Unterhalter AJ held that this ground of appeal ran into a "threshold difficulty" (50). The incorrect application by the trial court of the well-established legal defence of putative private defence raised neither a constitutional issue nor an arguable point of law. If the trial court made no error of law in formulating the test for putative private defence, then the misapplication of the correct test to the evidence before the trial court is not a matter that engages the Constitutional Court's jurisdiction. The failure by a trial court properly to evaluate the evidence is not an error of law but an error of fact and the court's jurisdiction does not extend to such issues (50). In oral

submissions, however, the applicant submitted that the trial court had, in addition, failed to formulate the correct test for putative private defence and then applied the wrong test to the evidence. That is an error of law, which carried the risk of an unsound conviction and an unfair trial. That engaged the Constitutional Court's jurisdiction, according to Unterhalter AJ (51).

The court was laden in its consideration of whether the trial judge did make an error of law in his formulation of the test for putative private defence (54). The record filed by the parties with the court did not correspond with the papers referred to by counsel during oral submissions. The High Court judgment filed by the parties was also not the judgment referred to by counsel during oral submissions. The judgment in the record filed with the court was an unsigned *extempore* judgment that stated:

> "[T]he accused defence firstly amounts to private defence, or more commonly known as self-defence. *A defence excluding unlawfulness, where the test is objective, and secondly, putative self-defence which relates to the accused state of mind and where the test is objective*. The test to be applied in respect of the accused, he generally held it mistakenly believed that he was acting in lawful self-defence, or whether his belief was also held on reasonable doubt." (21, 55)

The judgment signed by the judge, which is available on SAFLII and found in the court file stated:

> "The accused's version, as mentioned above is that he acted in self-defence, and that he did not know that the people who attacked him were policemen executing their duties. As mentioned above, *his defence amounts to putative self-defence. The test is subjective, in other words, what the accused had in mind, objectively considered.* It follows that the accused's defence firstly amounts to private defence, or more commonly known as self-defence, a defence excluding unlawfulness, where the test is objective, and secondly putative self-defence, which relates to the accused's state of mind and where the test is subjective, in respect of whether the accused genuinely, albeit mistakenly, believed that he was acting in lawful self-defence, or whether his belief was also held on reasonable grounds." (22, 56)

The court inferred that the trial judge, having handed down the *extempore* judgment in court, edited that judgment afterwards and produced the signed judgment that was placed in the court file (57). It is clear that the *extempore* judgment, as it was transcribed, contains a clear error of law where it states that "putative self-defence which relates to the accused state of mind and where the test is objective". That is incorrect. The court again referred to the decision in *De Oliveira* (*supra* 63), where it was held that, when an accused on a charge of murder relies upon putative private defence, the trial court must decide whether the State has proved beyond reasonable doubt that the accused subjectively had the intention to commit murder or whether the accused held the honest but mistaken belief that he was entitled to act in private defence (58). In deciding which of the two conflicting documents was the lawful judgement, the court referred to common-law authorities (60) and finally held that the *extempore* judgment must stand. The court held that, following a conviction, an accused is entitled to know the reasons a court relied upon to exercise its coercive powers of punishment. Those reasons must be clearly and precisely formulated. An accused convicted of a crime must be able to understand the basis of the court's decision, not least so as

to exercise the right to seek leave to appeal. That is properly done when the accused stands before the court and the judgment is handed down. An accused convicted and sentenced by a court must be able to rely upon the reasons a court provides when its judgment is given (60). That is the curial pronouncement that reflects the authority of the court. A person convicted of a crime should not be required to suffer the *ex post* reformulations and explanations that a trial judge considers, on reflection, to best express the reasons for the judgment. This approach, it was held, better accords with the constitutionally entrenched rights of an accused to a fair trial and the duties of a court to pronounce with finality upon the case before it (61). The *extempore* judgment of the trial judge was accordingly taken to state the legal test the judge relied upon to assess the putative private defence (64).

The relevant passage from the *extempore* judgment (quoted above) demonstrates that the trial judge held the test for putative private defence to relate to the accused's state of mind, but that the test was nevertheless objective. The court considered different ways in which to interpret this statement. One possible interpretation was that there was a transcription error or that the word "objective" was said in error and the trial judge meant to say "subjective" (66). The trial judge was contrasting private defence, a defence excluding unlawfulness where the test is objective, and putative private defence, which relates to the accused's state of mind. It would make logical sense then to cast putative private defence as a defence tested on a subjective basis, and hence the court's inference that the trial judge may simply have misspoken. The court then made reference to paragraph 8 of the signed judgment, where the following sentences appear: "[a]s mentioned above, his defence amounts to putative self-defence. The test is subjective, in other words, what the accused had in mind, *objectively considered*" (emphasis added).

The second sentence, cited by the court, had no analogue in the *extempore* judgment, but it was considered to be a clear indication of what the trial judge considered the test to be for putative private defence to which he had sought to give expression in his *extempore* judgment (67). The court was then tasked with considering what the trial judge understood by the gloss upon the test for putative private defence, namely that the accused's state of mind had to be ascertained "objectively considered" (68). The pertinent question was whether the trial judge invoked a consideration of reasonableness in determining the accused's state of mind and that, even if the accused acted in the genuine but mistaken belief that his life was in danger, putative private defence was considered to require his mistake to be reasonable. Unterhalter AJ correctly held that, if that was what the trial judge held, there was definite confusion as how the defence of putative private defence impacts the required culpability in respect of the crimes of murder and culpable homicide (69). An accused who holds the genuine but mistaken belief that his life is endangered lacks the intention to act unlawfully and this renders him not guilty of murder. The issue is simply what belief the accused held at the relevant time. Whether the accused's mistaken belief, though genuinely held, was reasonable or not, determines whether the accused had the required culpability of negligence for a conviction of culpable homicide.

The court found that there was an appreciable risk that the trial judge, in formulating the test for putative private defence in the signed judgment, imported objective considerations of reasonableness into the test, and thereby disregarded how putative private defence excludes intention for the crime of murder. Any ambiguity on this score had to be resolved in favour of the applicant (70).

The erroneous importation by the trial judge of reasonableness into the test for putative private defence in the signed judgment affected the Constitutional Court's interpretation of what was said in the *extempore* judgment (namely, that the test for putative private defence is objective). It cast doubt, in the court's view, on the possibility that the statement in the *extempore* judgment was either a transcription error or a slip of the tongue. That is so because the signed judgment indicates that the trial judge did consider putative private defence, on a charge of murder, to require some objective degree of reasonableness. At the very least, the contents of the signed judgment supported the conclusion that the trial judge was confused as to the test for putative private defence (71). An analysis of the signed judgment indicated to the court that the trial judge was not clear as to the distinction between the concepts of private defence and putative private defence in his appreciation of the requirements for putative private defence. The possibility that, in characterising the test as objective in the *extempore* judgment, the trial judge meant to import some considerations of reasonableness into his appreciation of the test for putative private defence could accordingly not be discarded (73). This left the court unable to confirm that the *extempore* judgment gave expression to an obvious error, and thus the relevant passage of the *extempore* judgment (quoted above) had to be read as it appeared from the transcript.

On pronouncing on the correct test for putative private defence, Unterhalter AJ held that the trial judge had made a "conspicuous error of law" in the *extempore* judgment (74). The court held that putative private defence is not determined on the basis of a test that is objective (also confirmed in *Director of Public Prosecutions, Gauteng v Pistorius supra* 52; *S v Ntuli supra* 436; *S v De Oliveira supra* 63; *S v Pakane* 2008 (1) SACR 518 (SCA) 19; *S v Sataardien* 1998 (1) SACR 637 (C) 644). Burchell (*Principles of Criminal Law* 131) states that "a distinction must be drawn between private defence as a defence excluding unlawfulness, which is judged objectively, and 'putative' or 'supposed' private defence, which relates to the mental state of the accused".

The Constitutional Court held that the central issue at the trial of the applicant should have been whether the State had proved beyond reasonable doubt that the applicant subjectively had the intention to commit murder (74). If it was reasonably possibly true that the applicant entertained the honest but mistaken belief that his life was threatened by the occupants in the unmarked red motor vehicle, and that he was entitled to act in private defence, then the State would not have proved its case. The reasonableness of the applicant's subjective belief is irrelevant to this enquiry. The reasonableness of the applicant's subjective belief is only relevant to the question of whether the applicant was guilty of culpable homicide (Burchell *Principles of Criminal Law* 421; Hoctor *Snyman's Criminal Law* 183; *S v*

Ngema 1992 (2) SACR 651 (D) 656; *S v Goosen* 1989 (4) SA 1013 (A) 1027; *S v Bernardus* 1965 (3) SA 287 (AD) 307). In *S v Burger* (1975 (4) SA 877 (A) 877 879), Holmes JA (Trollip JA and Galgut AJA concurring) described the determination of negligence with reference to the criterion of the reasonable person or *diligens paterfamilias* as follows:

> "*Culpa* and foreseeability are tested by reference to the standard of a *diligens paterfamilias* ('that notional epitome of reasonable prudence' – *Peri-Urban Areas Health Board v. Munarin*, 1965 (3) S.A. 367 (A.D.) at p. 373F) in the position of the person whose conduct is in question. One does not expect of a *diligens paterfamilias* any extremes such as Solomonic wisdom, prophetic foresight, chameleonic caution, headlong haste, nervous timidity, or the trained reflexes of a racing driver. In short, a *diligens paterfamilias* treads life's pathway with moderation and prudent common sense."

The Constitutional Court held that the trial judge's invocation of an objective test for putative private defence constituted an error of law. This error of law was fundamental to the accuracy of his findings as to the liability of the applicant on the charges of murder and attempted murder (74; see also *R v Bhaya* 1953 (3) SA 143 (N) 840). The trial judge had believed Constable Makgafela's evidence and had summarily disbelieved the applicant. Crucially, he disbelieved the part of the applicant's testimony that he was not informed by Constable Makgafela that his pursuers were not assailants but, in fact, police officers. In following this strict, binary approach, the trial judge had failed to consider whether the applicant in fact appreciated what had been communicated to him by Constable Makgafela. The applicant's evidence was that he was sworn at by his pursuers in a language he did not fully understand (76). The trial judge should have carefully assessed the applicant's version in order to ascertain whether it might have been reasonably possibly true. Such assessment necessitated thorough consideration of what occurred after the applicant stabbed the police officers.(76)

As discussed above, the applicant testified that he told the security guards in the vicinity that he was being pursued and sought help immediately after the stabbing. He subsequently went to his residence and reported the matter to the security guards there as well. He also telephoned his sister upon his arrival at his residence and told her what had happened. He explained to her that he stabbed two men who tried to rob and abduct him. The applicant and his sister went to the police station to report the matter the following day. The police declined to open a case because the applicant could not identify his attackers. The applicant was arrested at his residence later the same day. From Constable Makgafela's testimony that he did not know the applicant, the court inferred that the police only knew of the applicant's place of residence as a result of the applicant's report to the police (77). Even though this evidence was not challenged by the State, the trial judge rejected it as "inconsistent and improbable" (78), without explaining how the police came to learn of the applicant's identity and physical address save for the applicant's report to the police, as he testified. The Constitutional Court regarded the applicant's conduct after the stabbing incident to accord with his version that he was under the impression that he was being attacked by assailants, that he was in mortal danger and that he had stabbed Constable Makgafela in the belief that he needed to protect himself.

Had the trial judge applied the test for putative private defence correctly and focused his assessment on the applicant's state of mind, he could (and would) not simply have rejected the post-stabbing conduct of the applicant as improbable (78). The applicant's evidence regarding his post-stabbing conduct was uncontradicted and borne out by his arrest at his place of residence later the same day. This evidence was clearly supportive of the applicant's account of his state of mind at the time of the stabbing. The trial judge's outright rejection of the applicant's post-stabbing conduct was regarded by the court as indicative of the fact that the trial judge did not have the applicant's state of mind at the forefront of his assessment (79). Instead, the trial judge's assessment of the applicant's defence was marked by what he reasoned to be objective considerations and probabilities. This was the ambiguity that lay at the heart of the trial judge's formulation of the test for putative private defence. The trial judge made the fundamental error of judging the mind of the applicant on the basis of "what the accused had in mind, objectively considered", and hence on the basis of reasonableness. That is not the correct test. The correct test for putative private defence, to exclude intention on a charge of murder, is simply what the subjective state of mind of the accused was.

The majority of the court consequently found that the trial judge had made a fundamental error of law, which was fatal to the applicant's conviction and sentence by the trial court. The applicant's appeal on this ground succeeded, his conviction and sentence for murder and attempted murder were set aside (80), and his immediate release was ordered (81).

5 Conclusion

The Constitutional Court in *Tuta v The State* (*supra*) has eradicated all possible confusion regarding the correct test to be applied to the defence of putative private defence. Private defence should also be clearly distinguished from putative private defence. Private defence is a ground of justification that excludes unlawfulness if various objective criteria are met. The test for private defence is therefore objective. Given that all crimes have unlawfulness as an element, no criminal liability can ensue if private defence is raised successfully. Putative private defence relates to a subjective, mistaken (but genuine) belief in an accused's psyche, which excludes knowledge of unlawfulness and, consequently, intention. The test for putative private defence is therefore subjective. No criminal liability can ensue on a charge of an intentional crime if putative private defence is raised successfully. An accused who puts up a putative private defence can still be convicted for a crime of negligence if the State manages to prove negligence on the accused's part beyond reasonable doubt.

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LEGAL ASPECTS OF THE FOURTH INDUSTRIAL REVOLUTION (4iR) – (with specific reference to ChatGPT and other software purporting to give Legal Advice)

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SUMMARY

In the present article, the author explains the tremendous impact that Artificial Intelligence (AI) is likely to have on society in general. After a historical overview that covers the Fourth Industrial Revolution, the article also considers how the various legal disciplines are likely to be affected by the arrival of AI. This includes an evaluation of the legal advice likely to be given by new "experts" from these two disparate fields.

1 INTRODUCTION

Not all readers of the present article will have been old enough to view the movie *2001: A Space Odyssey*. The two human astronauts had the privilege(?) of having on board a computer, imaginatively named "HAL" (Heuristically-Programmed Algorithmic Computer). This early example of Artificial Intelligence (AI) was supposed to help them with navigation, and controlling their spaceship. However, suddenly, there was mutiny from the robot.

> "Open the bay doors, HAL!" "I'm sorry Dave, I'm afraid I can't do that."

We are also privileged(?) to live in these times of unprecedented progress in high technology, despite the ancient Chinese proverb: "May you not be cursed to live in interesting times". Who would have thought that a computer would one day be able to advise us on the differing (and sometimes confusing) nomenclature used by UK and US English experts, respectively, when discussing motor cars and motoring components? Although the Fourth Industrial Revolution (4iR) has been dealt with in a comparatively recent

work,[1] ChatGPT (Chat Generative Pre-Trained Transformer) and its siblings have been too much of a novation to be dealt with, or even dreamt of, in that work. For this reason, the author offers the present article on the legal effects and problems that may arise from using ChatGPT and similar AI-systems in today's world.

2 BACKGROUND

Toffler[2] differentiates between three major historical phases or waves in the development of mankind, which depended on the economic framework current at the time. According to Toffler, the first wave of development came when man settled on a specific piece of land to generate income for himself and his family – in perpetuity. In some cases, a man was even known by his piece of land as the latter became part of his distinctive title – for instance, "The Earl of Oxford" and the "Duke of Northumberland" in England, or the "Markgraf von Essen" in Germany or Austria.[3]

The second wave came about as steam and smokestacks started a mass-manufacturing industry that drew millions of people from a life in the countryside to the cities. This often led to a clash of cultures; the Civil War in the United States from 1861 to 1865 was not just about the freeing of slaves but also about agriculture[4] yielding its predominant position to industry.[5] The widespread use of electricity at a later stage not only strengthened this wave but was also a *conditio sine qua non* for the all-important third wave.

The latter arrived with the invention and ever-increasing use of the computer. Computers were no longer confined to giant halls containing (often-hidden) mainframes with scores of dumb terminals telling would-be users that "Burroughs is down" ("Burroughs" being the brand of mainframe computer then installed at the University of Port Elizabeth) – now they showed their friendly faces on every employee's desk. In countries such as South Africa, a sizeable section of the population has by now eschewed the possession of an expensive desktop personal computer, seemingly quite content to do all their business on a palm-sized cell-phone.

3 WHAT EXACTLY DOES THE FOURTH INDUSTRIAL REVOLUTION (4IR) COMPRISE?

A new development has not only added to Toffler's trilogy but also re-arranged it to some extent. This novation has been described as follows:

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1 Van der Merwe, Roos, Eiselen, Nel, Erlank and Mabeka *Information and Communications Technology Law* (*ICT Law*) 3ed (2021) 65, 119–120, 384–385 and 647.

2 Toffler *The Third Wave* (1980).

3 The latter titles were done away with in 1919 after the First World War.

4 Especially the growth and labour-intensive harvesting of cotton in the southern states.

5 For instance, the weaving of cotton into dress materials in factories in the northern states.

> "The Fourth Industrial Revolution is really a 'revolution within a revolution' and deals with new applications for high technology such as artificial intelligence, robotics, self-driving vehicles (such as those from Tesla) and the 'Internet of Things' relating to physical objects that have become 'more intelligent' by gaining embedded sensors, firmware and software that helps 'them' to connect and swap data with other similar devices over the Internet."[6]

The first three industrial revolutions may (roughly) be described as: the manufacturing, marketing, buying and selling by means of coal, steam and gas (1iR); doing the same after the advent of electricity (2iR); and again, by means of the computer and digital technology (3iR). The fourth stage has been brought about by computers (as well as cell-phones) becoming much more "intelligent", so as to "think" and "advise" their users instantly and on a vast scale.

The legal implementation of 3iR has proved difficult enough to accomplish, since the law (as well as lawyers) are generally conservative. A notable exception has been the outstanding work on this topic by German scholar Schwab.[7] His research gauges the impact that 4iR will have on a number of important areas, on not only a national, but also a global scale. The author speaks of "a profound and systemic change". After an overview of its historic development, Schwab discusses the drivers behind this change, as well as the impact this change is likely to have on the economy, business, society and the individual. Even more penetrating is his analysis in a summarising index that covers topics such as implantable technology, "our digital presence", "Vision is the New Interface", wearable internet, ubiquitous computing, "A Supercomputer in your Pocket", storage for all, the "Internet of and for Things", the "Connected Home", "Smart Cities", "Big Data for Decisions", driverless cars and "Artificial Intelligence and Decision-making".[8] The list continues with "Artificial Intelligence and White-Collar Jobs", robotics and services, "Bitcoins and the Blockchain", the "Sharing Economy", governments and the blockchain, 3D-printing and manufacturing, 3D-printing and human health, 3-D printing and consumer products, "Designer Beings" and finally "Neurotechnologies".

While all these topics are important and merit further discussion, the limited scope of the present article requires a focus on only two.

These are "Artificial Intelligence[9] and Decision-Making" and to a lesser degree, "AI and White-Collar jobs." Dealing with the first concept, Schwab states:

> "Beyond driving cars, AI can learn from previous situations, to provide input and automate, complete future decision-making processes making it easier

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6 Van der Merwe *et al Information and Communications Technology Law* 65.

7 Schwab "The Fourth Industrial Revolution" (2016) https://www.weforum.org/about/the-fourth-industrial-revolution-by-klaus-schwab (accessed 2023-12-17).

8 A personal favourite of the present author, and the subject of the latter part of this article.

9 "AI" from now on.

> and faster to arrive at concrete conclusions based on data and past experiences."[10]

Most of the rest of this article is devoted to the legal consequences that may arise from the "advice" given by clever machines running software such as "ChatGPT" from Microsoft, "Bard" from Google, "Bedrock" from Amazon and similar programs.

Dealing with the second concept, "AI and White-Collar Jobs", Schwab is of the opinion that in future AI might "replace a range of functions performed today by people".[11] He quotes an Oxford Martin School study that predicts that 47 per cent of US jobs in 2010 were "highly likely to become computerized in the next 10–20 years". In the discussion that follows, attention is also given to the effect clever machines may have on the present-day labour market.

4 THE RAMIFICATIONS OF LEGAL ADVICE GIVEN BY ARTIFICIAL INTELLIGENCE

One of the best discussions on this topic was written by South African author Erlank, although published as a chapter in an overseas *Festschrift*.[12] He argues that the new machine world "needs little (or no) human supervision, that many present job *types*[13] will simply disappear and that a considerable re-skilling and up-skilling will have to take place in the labour market". He then shows convincingly that considerable changes will need to be made by "a technocratic, legal, academic corps" in updating legislation such as the recent Cybercrime Act,[14] the Protection of Personal Information Act[15] and similar Acts of Parliament. The changes will also have severe implications for the future careers of paralegals and for legal education in general.

In another article on the same topic, Mukhova[16] shows how the previous phases of development (1iR, 2iR and 3iR) focused on scalable efficiency (doing things right) while moving towards scalable adaptability (doing the right thing). She predicts that 4iR will bring significant changes to the way we live, interact and do business, and that about one-third of activities in 60 per cent of all occupations will become automated. A combination of legal reform

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10 Schwab https://www.weforum.org/about/the-fourth-industrial-revolution-by-klaus-schwab 137.

11 Schwab https://www.weforum.org/about/the-fourth-industrial-revolution-by-klaus-schwab 138.

12 Erlank "The Fourth Industrial Revolution (4iR) and the Law: Challenges and Opportunities" in Akkermans and Berlee (eds) *Sjef Sache: Essays in Honour of Prof. Mr, Dr. JHM (Sjef) van Erp on the Occasion of his Retirement* (2021) 519–534.

13 Italics by the present author.

14 19 of 2020.

15 4 of 2013 (POPIA).

16 Mukhova "A Lawyer in the Fourth Industrial Revolution" (2018-11-1) *Without Prejudice* https://www.bing.com/search?q=Muchova+%22A+Lawyer+in+the+Fourth+Industrial+Revolution%22&FORM=AWRE (accessed 2023-12-17).

and partnerships between government, academia, private businesses and the professions (especially legal) will be required for future participation by these groups.

On the legislative front, a most promising development has been the European Union (EU) putting forward an advanced proposal for an AI Act.[17] It is wide-ranging, requiring providers of generative AI technologies (such as ChatGPT) to inform users that the content of a certain web page has been machine-generated, to provide summaries of any copyrighted materials used in training their AI systems and to take great care that certain new activities, such as machine surveillance, do not infringe upon fundamental rights. Where relevant, attention will be drawn to the EU's draft legislation in discussing the various legal fields as set out below.

5 HOW THE DIFFERENT LEGAL FIELDS ARE LIABLE TO BE AFFECTED BY "ADVISORY" 4IR SYSTEMS

5 1 AI Advisory 4iR systems like "Chat-GPT": implications for the law in general

The area of legal liability for advisory 4iR systems (or those humans "responsible" for the supervision of such systems) is brand new – so new that many interesting ideas have been broached, not in learned tomes of jurisprudence, nor even in legal journals with a high turnaround time before publishing, but on the Internet.

A good starting point for anyone desiring a good background on this rapidly changing field is the extensive article "Brave New World of Artificial Intelligence".[18] The author starts by asking what we really want from AI and whether ChatGPT is "dangerous". She then explains that a "chatbot" can give convincing advice, perhaps because the advice is almost indistinguishable from that given by a human expert in the field. It is also quite polite and succeeds in pleasing people, while purporting to give accurate information. The author then gives some examples to show the latter is not always the case. For instance, in answering the question "What is the largest mammal that lays eggs?", ChatGPT replied, "Elephants".

The program then proceeded to explain that these are large eggs and its other sentences followed nicely upon the opening statement. Niehaus then shows that the program was perhaps also designed to be a "people-

[17] An agreement towards such an enactment was reached on 9/12/23 – see Lomas "EU Lawmakers Back Transparency and Safety Rules for Generative AI" (11 May 2023) https://techcrunch.com/2023/05/11/eu-ai-act-mep-committee-votes/ (accessed 2022-05-22). See also under the last part of the next heading.

[18] Niehaus "Opinion Piece" (2023) https://nstf.org.za/wp-content/uploads/2023/02/23FebEDsMessage.pdf (accessed 2023-12-08).

pleaser". Her contribution deserves an extended quotation in the present article because of the dangers that it exposes in some of the latest arrivals on the software scene.

> "Another research paper related to ChatGPT shows how they trained the AI to predict what humans preferred. The researchers noticed that the metrics used to rate the outputs of natural language processing AI resulted in machines that scored well on the metrics, but didn't align with what humans expected. The following is how the researchers explained the problem: 'Many machine learning applications optimize simple metrics which are only rough proxies for what the designer intends. This can lead to problems, such as YouTube recommendations promoting click-bait.'
>
> So the solution they designed was to create an AI that could output answers optimized to what humans preferred. To do that, they trained the AI using datasets of human comparisons between different answers so that the machine became better at predicting what humans judged to be satisfactory answers. The paper shares that training was done by summarizing Reddit posts and also tested on summarizing news. The research paper from February 2022 is called *Learning to Summarize from Human Feedback*.
>
> The researchers write: 'In this work, we show that it is possible to significantly improve summary quality by training a model to optimize for human preferences. We collect a large, high-quality dataset of human comparisons between summaries, train a model to predict the human-preferred summary, and use that model as a reward function to fine-tune a summarization policy using reinforcement learning.'
>
> In other words, the 'chatbot' strives to be popular amongst humans and might therefore provide us with answers that are interesting, but which do not always fit the parameters of a 'truthful reply'."

The author ends off her interesting and ground-breaking discussion with a quote from Professor Marwala.[19] The latter, in turn, quotes American science fiction writer Asimov:

> "It is only afterward that a new idea seems reasonable. To begin with, it usually seems unreasonable. It seems the height of unreason to suppose the earth was round instead of flat, or that it moved instead of the sun, or that objects required a force to stop them when in motion, instead of a force to keep them moving, and so on."[20]

When Marwala later on lists 11 attributes required of a leader in the twenty-first century, he lists "4iR thinking" among them.

Niehaus then proceeds to explain exactly what a "chatbot" amounts to, by making use of a definition from IBM, the computer and software company:

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[19] At the time, still vice-chancellor of the University of Johannesburg and addressing a National Science and Technology Forum discussion forum (see "The Importance of Innovative Thinking in the 4iR" http://www.nstf.org.za/Creative-economy-science-and-the-4iR (accessed 2023-12-17)).

[20] Marwala https://www.dailymaverick.co.za/opinionista/2023-01-19-artificial-intelligence-is-on-the-cusp-of-bringing-radical-change-to-the-criminal-justice-system/.

> "A chatbot is a computer program that uses artificial intelligence (AI) and natural language processing (NLP) to understand customer questions and automate responses to them, simulating human conversation."[21]

She also provides a very useful definition of the business use to which such an AI chatbot might be put:

> "Business use is equally varied. Marketers use AI chatbots to personalize customer experiences, IT teams use them to enable self-service, and customer contact centers rely on chatbots to streamline incoming communications and direct customers to resources."[22]

Looking at the reception of AI systems in general (without concentrating on a specific application like ChatGPT), it seems clear that the EU has taken the lead. This is evident from the website of British firm of attorneys Burges and Salmon. Here one finds a useful survey of the differing reaction of legislatures of the UK, EU and USA to the phenomenon of AI. In the general overview "Artificial Intelligence (AI) Law, Regulation and Policy Horizon Scanning: What Significant Developments Are Expected in 2023 in the UK, EU and US?",[23] the reader is given a useful overview of the differing reactions of legislatures in these countries and areas to the legal problems that AI is likely to present. One is then provided with an interactive map (or flowchart) of these developments. Each item is clickable and takes the reader to the full text of the source document concerned. This is an excellent and effective new way of imparting and accessing knowledge by means of interactive media, rather than by means of the printed word. Another website from the same firm has published a diagram that explains AI in its many permutations (not clickable). In order to get to the real meat of the AI Act, one has to visit the website again, since it also contains a useful glossary.[24] Here, terms such as "artificial intelligence", "data", "data subject", "expert system", "machine learning", "metadata" and "personal data" are authoritatively defined.

A slightly negative note on this legislation has been sounded in an article by Perrigo.[25] The author states:

> "[B]ehind the scenes, OpenAI has lobbied for significant elements of the most comprehensive AI legislation in the world – the E.U.'s AI Act – to be watered down in ways that would reduce the regulatory burden on the company."

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21 Niehaus https://nstf.org.za/wp-content/uploads/2023/02/23FebEDsMessage.pdf.

22 *Ibid.*

23 Burges and Salmon Ltd "Artificial Intelligence (AI) Law, Regulation and Policy Horizon Scanning: What Significant Developments Are Expected in 2023 in the UK, EU and US?" (24/01/2023) https://passlenet.s3.amazonaws.com/Passle/5d9604688cb6230bac62c2d0/MediaLibrary/Document/2023-02-01-10-43-08-102-BurgesSalmonAIRegulationHorizonScanning-24January2023.2.pdf (accessed 2023-05-22).

24 Burges and Salmon Ltd "The Artificial Intelligence (AI) Law, Regulation and Policy Glossary" (24 January 2023) https://www.lexology.com/library/detail.aspx?g=a65c2879-7861-452d-8a2d-625491bcfb95 (accessed 2023-12-17).

25 Perrigo "Exclusive: OpenAI Lobbied the EU to Water Down AI Regulation" (20 June 2023) https://time.com/6288245/openai-eu-lobbying-ai-act/ (accessed 2023-12-17).

Apparently these "improvements" have now made their way into the present text of this Act, which may soon be finalised. The issue was whether the new systems should be considered "high risk", in which case they would be subject to "stringent legal requirements including transparency, traceability, and human oversight". OpenAI (and its investor Microsoft) successfully argued against this classification in the *Open AI White Paper on the European Union's Artificial Intelligence Act*.[26]

The final draft of the Act has now been approved by the EU Parliament.[27] After final discussions, the new Act may even become the law of the continent by early 2024.

With regard to AI, the United States has been less responsive but there are signs that the FBI is now starting to take an interest in the matter.

5 2 The effect AI advisory systems (such as 4iR) may have on labour law

Mention has already been made of the upheaval brought about by the Second Industrial Revolution;[28] an entire generation became urbanised within their own lifetimes. In contrast, the Third Industrial Revolution happened within a decade and the latest 4iR seems to be playing itself out in a matter of months.

The above developments have also had an effect on labour relations. Instead of a well-populated group of militant trade unionists, membership of such organisations has reached historic lows. Workers seem happy to trade a possibly secure lifetime income for a more exciting career of upskilling and even re-skilling, thus ensuring career mobility.

In a recent article entitled "AI and Labour",[29] Surianarain and Hlatshwayo take an optimistic view on this question. In their opinion, AI (coupled with a youth-led customer-service ethos) has helped to solve three issues. The first is how AI can deal with questions of extensive scale.

> "The chatbot can streamline simple queries and direct them appropriately without losing the human feel. At the same time, our actual human guides are freed up to address more complex queries. Neither of these experiences is out of touch with the lived reality of the unemployed work-seeker. During the three-week DBE recruitment drive, the chatbot handled 37,000 chats,

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[26] See https://commission.europa.eu/publications/white-paper-artificial-intelligence-european-approach-excellence-and-trust_en (20 June 2023). The present author has had access to this document and, as it stands, it seems to support the OpenAI argument.

[27] On 14 June 2023.

[28] For instance, both parents of the present author had grown up on the "platteland" (countryside), but had to move to Port Elizabeth because of the labour opportunities presented by the GM and Ford assembly plants in that harbour city.

[29] Surianarain and Hlatshwayo "AI and the Employment Crisis – Friend or Foe?" (27 March 2023) https://www.harambee.co.za/ai-and-the-employment-crisis-friend-or-foe/ (accessed 2023-05-23).

> providing assistance 24/7, which further drove inclusivity because unemployment does not keep office hours."[30]

A second issue addressed by the use of AI was freeing human guides in the organisation "without taking them off their phones or out of the contact centre". This was accomplished through the intervention of a chatbot called "Coachmee". Surianarain and Hlatshwayo also opine that a third issue that AI is likely to help them solve is increased engagement among customers, which should help the latter search and apply for more relevant jobs, in keeping with their specific skill-sets.

Finally, the article deals with an all-too-practical issue in present-day South Africa.

> "For too many young South Africans, arguing over data costs, let alone AI, is a luxury: they don't have access to broadband, let alone electricity."[31]

Even adult South Africans are growing more worried about the ever-worsening availability of electricity from Escom (Electricity Supply Commission). The best-laid AI-plans in South Africa will have to deal with the possibility of no power for periods of four hours a day.

Brederode[32] wrote another interesting article on the interface between labour and AI. The author makes the valid point that we often miss an important facet of the AI story, namely "that it often relies on a large human workforce". This is borne out by no less an authority than Sonam Jindal, the programme lead for AI, labour and the economy at "The Partnership on AI".[33] Speaking on an NBC (National Broadcasting Company) News interview earlier in May 2023, Jindal said humans have to provide feedback to AI tools in order to "train" their systems, humans have to perform labelling of images or content as explicit or unsafe, and human input will still be sorely needed to perfect such systems ultimately.[34]

Brederode then draws attention to organisations such as "Sama", "a US-based machine-learning training institution that hires workers from Kenya, Uganda and India to label data for clients like Google, Meta and Microsoft". Sama was used by OpenAI to "train" ChatGPT, probably their most well-known program. Another such an AI training tool is Amazon's "Mechanical Turk", mostly manned by freelance workers known as "turkers". A typical labour problem seems to be that many of these workers were paid less than

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[30] *Ibid.*

[31] *Ibid.*

[32] Brederode "The Unseen Human Workforce Behind AI, Including ChatGPT" (23 May 2023) https://www.news24.com/news24/tech-and-trends/news/the-unseen-human-workforce-behind-ai-including-chatgpt-20230523 (accessed 2023-05-23).

[33] A US-based AI research institute.

[34] Jindal "ChatGPT is Powered by These Contractors Making $15 an Hour" (6 May 2023) https://www.nbcnews.com/tech/innovation/openai-chatgpt-ai-jobs-contractors-talk-shadow-workforce-powers-rcna81892 (accessed 2023-01-17).

the statutory minimum wage and had to work overtime without adequate compensation.

5 3 The effect AI advisory systems (4iR) may have on copyright

Partly in response to a report of the Copyright Review Commission and the Draft Intellectual Property Policy of 2013, the South African government embarked on a revision of South African copyright.[35] In June 2015, Cabinet approved publication of the Copyright Amendment Bill 2015 in the *Government Gazette*[36] for further feedback, and after a month also published the Copyright Amendment Bill 2015 for public comment.

Comment on the Bill has varied widely. It has been argued that it would introduce radical amendments to the Copyright Act,[37] such as partial implementation of the WCT,[38] the WPPT,[39] the Marrakesh Treaty as well as the Beijing Treaty. The new Act would also introduce some controversial measures, for instance state ownership of "orphan works" in perpetuity and the imposition of onerous local content requirements on broadcasters, to mention only two of these. Most of the commentary has been negative. For instance:

> "This unconstitutional legislation is being imposed regardless of the cost to local creative industries or education. An international bridgehead for Big Tech will turn South African creators into virtual slaves whose labour will be denied its fair value."[40]

The authors claim further that the Bill's "initial laudable intentions" have since been replaced by a demand for user rights, by copyright exceptions and an undefined "fair use" provision. This would "disempower creators and authors" and would seriously weaken protection of published materials used for educational purposes.

For purposes of the present article, the above debate (although intriguing) will be left aside while attention is drawn to the effect that ChapGPT and its family of AI programs is likely to have on copyright. The latter confluence is dealt with engagingly in the article "Artificial Intelligence, Copyright Infringement and Protection: A Legal Quagmire?"[41] Hlomani and Rens opine that the latest AI model raises three copyright issues:

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35 Van der Merwe *et al Information and Communications Technology Law* 319.

36 See GN 646 in *GG* 39028 of 2015-07-27.

37 98 of 1978.

38 The WIPO (World Intellectual Property Organisation) Copyright Treaty (WCT 1996).

39 The WIPO Performances and Phonographs Treaty (WPPT 1996).

40 Tomaselli and Pieterse "Opinionista" (24 May 2023) https://www.dailymaverick.co.za/opinionista/2023-05-24-sas-copyright-amendment-bill-threatens-livelihoods-and-weakens-protections/ (accessed 2023-05-23).

41 Hlomani and Rens "Artificial Intelligence, Copyright Infringement and Protection: A Legal Quagmire?" (24 May 2023) https://www.dailymaverick.co.za/opinionista/2023-05-24-sas-

> "Should outputs from AI models be protected by copyright? Do AI models infringe upon human authors' copyright when the model's output are based on the creative productions of human authors? And can these outputs be considered creative for legal purposes?"

Hlomani and Rens remark (in a lighter vein) that a short answer might simply be "that the law is unclear". In a longer answer, they consider that because the lines of code that make ChatGPT run, as well as any text produced by that code, are not the result of human labour and creativity, these would not be subject to copyright since they lack human authorship. They also cite other reasons for not extending copyright protection to AI-produced works. Since the machine makes use of a multitude of pre-existing information or texts, most of which might themselves be subject to copyright, the new AI-generated text cannot be considered "truly original", a requirement for copyright. If ChatGPT is used in training, permission might have to be sought from all producers of material used by the program in such training unless such material already forms part of the public domain. The authors feel that this might specifically raise problems for artists when their work is used to create training programmes. Even if the original creators do have such rights, it might be difficult and expensive to try and enforce these internationally.

In another article, authored by Collett,[42] the author warns that "ChatGPT's feedback, like every office gossip, despite sounding convincing, is often incorrect, misleading, and faced with inherent bias". She opines that the whole process of consulting this new machine "raises copyright red flags in many countries, including in South Africa". Because the program "mines" many sources of information without the necessary permission, the users of ChatGPT, as well as the firm OpenAI,[43] might be liable for copyright infringement as soon as the scale of work copied is too great to fall under the "fair dealing" defence.

Collett also wonders who the true "owner" of the copyright material used by ChatGPT would be. Because the program is trained on a multiplicity of sources, it could be argued that the (many) creators of the source materials "could have some claim to the copyright in the ChapGPT generated content". However, a counter argument might be that it is OpenAI that has copyright to the content since its machine really "generated" the content.

In closing her interesting discussion, the author shows that the present Copyright Act is already 45 years old and "certainly did not contemplate artificial intelligence technologies when it was drafted". Even though new

copyright-amendment-bill-threatens-livelihoods-and-weakens-protections/ (accessed 2023-05-25).

[42] Collett "What You Need to Know About ChatGPT and Copyright" (1 March 2023) https://www.engineerit.co.za/article/what-you-need-know-about-chatgpt-and-copyright (accessed 2023-03-25).

[43] The owner and creator of the program.

legislation is hovering in the wings,[44] she awaits the balancing of rights by the legislature, courts and other organisations with interest.

One particular tension is now arising with owners of copyrighted material that is being placed upon “shadow library” websites[45] by companies such as OpenAI and Meta in order to train the latter’s AI robots to anticipate and answer any possible queries.[46] The Authors Guild (an advocacy group for writers) has now published an open letter warning high-tech companies to first seek permission from and then reward authors for their legally copyrighted works.

This has also been reflected in the Afrikaans press,[47] which quotes two instances where copyrighted works from authors Tremblay and Awad have been “scraped” to render accurate and concise summaries of their works for Internet searches. In order to do this, ChatGPT allegedly uses “deep learning” techniques, a form of artificial intelligence that extracts the gist of these works for interested users of the Internet. The article also quotes Professor Bruce Watson,[48] who warns that excessive regulation of AI will simply force knowledgeable users (and producers) to navigate around such restrictions. In fact, such legislative “overkill” might lead to an entire country or region falling behind in today’s rapid AI developments.

5 4 The effect AI advisory systems (4iR) may have on investments in the stock market

In a fascinating article by Sanlam investment advisors,[49] they opine that AI has experienced “a step change” over the last six months as a result of the rise of ChatGPT and similar AI tools. They go so far as to call AI

> “a transformative investment theme of very long duration, and its longer-term social and economic impact could be comparable to that of the railways, the internal combustion engine, the telephone or television.”

It is interesting to note that all the examples cited are drawn from the Second Industrial Revolution (2iR) and do not even include the computer, a critical example from the Third Industrial Revolution (3iR). The authors make the familiar point that AI will remove a lot of “dull, repetitive rules-based work”,

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[44] See under the beginning of heading 5 3 above.

[45] Such as “Bibliotik” and “Library Genesis”.

[46] Milmo “Sarah Silverman Sues OpenAI and Meta Claiming AI Training Infringed Copyright” (10 July 2023) https://www.theguardian.com/technology/2023/jul/10/sarah-silverman-sues-openai-meta-copyright-infringement (accessed 2023-12-17).

[47] Peyper “Hofgedinge Kom Oor ChatGPT se ‘Skrapery’” (9 July 2023) https://www.netwerk24.com/netwerk24/sake/tegnuus/hofgedinge-kom-oor-chatgpt-se-skrapery-20230708 (accessed 2023-08-23).

[48] AI expert from the University of Stellenbosch.

[49] SPW Contributors “The Role of AI in a Diversified Portfolio” (31 May 2023) https://sanlamprivatewealth.sanlam.com/resources/investments/the-role-of-AI-in-a-diversified-portfolio/ (accessed 2023-05-31).

but realistically add that "many jobs in the developed world are likely to disappear in the coming years due to AI-enabled automation". It will be key to "reskill" workers, in which event the benefits of AI should outweigh the downsides.

One aspect upon which the Sanlam investment advisors should be uniquely qualified to comment turns on investment portfolios. They urge investors to

> "think about how AI will affect the earnings and long-term growth trajectories of the companies they invest in – companies that use and deploy AI can build even stronger moats around their existing businesses, but those that fail to engage run the risk of becoming irrelevant."[50]

The authors then divulge their "core thesis", which is that they expect AI "to permeate the entire economy over time". Investors should therefore base their future investments on the "levels of adoption and engagement with AI" shown, as well as the richness of data sets owned or controlled by certain companies.

Another article investigating the correlation between ChatGPT and the stock market is tantalisingly entitled "Can ChatGPT Predict the Stock Market? A Ground-Breaking Study Investigates".[51] Herbst cites a much more extensive paper on this topic entitled "Can ChatGPT Forecast Stock Price Movements? Return Predictability and Large Language Models".[52]

In rather florid language,[53] Herbst praises the illuminating nature of the cited article:

> "Unflinchingly, it lacerates through academia's knotted thickets, ushering in a tantalising foretaste of a future where algorithms conduct our fiscal affairs with a maestro's finesse."

Whatever the style of writing, Herbst makes the valid point that "large language models (LLMs)" constitute the key to progress with regard to AI. The two professors cited by Herbst screened a number of news outlets for credibility, "enabling them to discern and rank the reliability of these sources". This may lead to an investment world where AI "could profoundly transform investment strategies and bolster investor confidence", although Herbst also warns of risks such as "irrelevant responses, inherent bias, data privacy and the reliability of AI predictions". This is the balance that every potential user will have to strike in order to achieve a positive balance sheet.

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[50] *Ibid.*

[51] Herbst "Can ChatGPT Predict the Stock Market? A Ground-Breaking Study Investigates" (31 May 2023) https://www.moneyweb.co.za/financial-advisor-views/can-chatgpt-predict-the-stock-market/ (accessed 2023-05-31).

[52] Herbst cites the authors as Dr A Lopez-Lira and Dr Y Tang from the University of Florida but with no publication particulars.

[53] One wonders whether Herbst did not perhaps make use of ChatGPT itself in writing the article, perhaps instructing it to use the style Shakespeare would have used.

5 5 The effect AI advisory systems (4iR) may have on privacy and data protection

South Africa is fortunate in having already enacted its Protection of Personal Information (POPI) Act.[54] The EU has now also weighed in with a draft General Data Protection Regulation (GDPR).[55] The USA is looking at possible regulation of ChatGPT by the Federal Trade Commission[56] and has also called for an investigation by the Federal Bureau of Investigation and Central Intelligence Agency.[57]

Although how a program such as ChatGPT will affect the law in this regard is not specifically addressed in the EU's regulations, the EU deserves acclaim for the deep thought that has gone into any future AI-related legislation. The present author was privileged to hear an address on the topic by Professor Borges from the Institute of Legal Informatics at Saarland University in Germany.[58] Focusing on the civil side of liability (or tort law), Borges discussed the AI Act of the EU. He did so under four headings: Prohibited Practices; Protection of Systems Against Risk; the Need for Transparency; and a fourth category where no additional protection, over and above the normal systems security, should be needed. A major stumbling block in law might be the present requirement of "behaviour" for liability: it is doubtful that a machine would be seen to "behave" in this sense. It is equally doubtful that a machine could be "at fault", and therefore present law will not be able to hold a machine culpable in the case of injury or damage.

It is interesting to compare the above draft with another EU draft directive, namely that on "New Product Liability". The latter places considerable emphasis on proving matters: article 8 deals with "Disclosure of Evidence" and article 9 with "Burden of Proof". These matters are referred to again in the discussion about evidence under heading 5 7 below.

In his conclusion, Borges admits that "the draft Directive on AI liability falls short". On the other hand, he opines that "the draft new Product Liability Directive might shift liability towards the manufacturer of AI systems". This

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[54] 4 of 2013.

[55] See https://www.gdpr-info.eu/ (accessed 2023-06-06).

[56] Bloomberg "OpenAI's ChatGPT Bot Probed by US Federal Trade Commission Over Consumer Harms" *Daily Maverick* (13 July 2023) https://internal.dailymaverick.co.za/article/2023-07-13-openais-chatgpt-bot-probed-by-us-federal-trade-commission-over-consumer-harms/ (accessed 2023-07-21).

[57] Vincent "CIA to Investigate How Generative AI (like ChatGPT) Can Assist Intelligence Agencies" *Daily Maverick* (16 February 2023) https://defensescoop.com/2023/02/16/cia-to-investigate-how-generative-ai-like-chatgpt-can-assist-intelligence-agencies/ (accessed 2023-07-21).

[58] Borges "A Legal Framework for AI. The Example of European Legislation", as part of a discussion forum on the "Pitfalls of Artificial Intelligence", virtually delivered on 19 May 2023 see https://nstf.org.za/wp-content/uploads/2023/05/23NSTF_PitfallsofArtificialIntelligence_ProfBorges.pdf (accessed 2023-12-17).

would be an interesting and positive development, also in the opinion of the present author.

5 6 The effect AI advisory systems (4iR) may have on criminal law

Has the above development been a gift to hackers? In a recent contribution to this debate by Marwala and Mpedi,[59] the authors refer at the outset to an article for the International Bar Association (IBA) entitled "Artificial Intelligence (AI) in Criminal Justice: Invasion or Revolution?".[60] The international view will be revisited presently, but first our local expertise is analysed. South Africa is fortunate in having an updated Cybercrimes Act,[61] which provides cures for some of the defects in the old Electronic Communication and Transactions Act.[62]

Marwala and Mpedi refer to ChatGPT and opine that "the case for AI in the criminal justice system is overwhelming".[63] This is because "AI technology, such as ChatGPT" would address "the plethora of challenges that plague the criminal justice system" by means of "efficient and effective use of resources" while also "modernising the criminal justice system though a proactive approach".[64] The authors are sensitive to possible drawbacks to these systems – for instance, the fact that US programs such as "Idemia" and "Rekognition" might contain a colour bias against "dark-skinned faces". For this reason, they conclude that "AI is not a universal remedy for all the challenges facing the criminal justice system, although it does present new and exciting opportunities for the sector."[65]

In the IBA article that the local authors have referred to at the outset, the two French authors seem to be slightly more careful about welcoming AI:

> "Although the use of AI in criminal justice is meant to fulfil fundamental legal principles such as public order and security, it can also create negative externalities by amplifying pre-existing prejudices and errors, and consequently undermine the efficiency of justice and law enforcement."[66]

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59 Marwala and Mpedi "Artificial Intelligence Is on the Cusp of Bringing Radical Change to the Criminal Justice System" (19 January 2023) https://www.dailymaverick.co.za/opinionista/2023-01-19-artificial-intelligence-is-on-the-cusp-of-bringing-radical-change-to-the-criminal-justice-system/ (accessed 2023-05-31).

60 Idder and Coulax "Artificial Intelligence (AI) in Criminal Justice: Invasion or Revolution?" (13 December 2021) https://www.dailymaverick.co.za/opinionista/2023-01-19-artificial-intelligence-is-on-the-cusp-of-bringing-radical-change-to-the-criminal-justice-system/ (accessed 2023-05-31).

61 19 of 2020.

62 25 of 2002.

63 Marwala and Mpedi https://www.dailymaverick.co.za/opinionista/2023-01-19-artificial-intelligence-is-on-the-cusp-of-bringing-radical-change-to-the-criminal-justice-system/.

64 *Ibid.*

65 *Ibid.*

66 Idder and Coulax https://www.dailymaverick.co.za/opinionista/2023-01-19-artificial-intelligence-is-on-the-cusp-of-bringing-radical-change-to-the-criminal-justice-system/.

After just a brief history of AI, the authors do recognise its positive role in criminal justice, for instance, its potential for efficiency "by reducing time-consuming tasks and human error". One example is systems that have been taught to recognise car number plates "even with poor resolution or low ambient light", *inter alia* by the Canadian police. By means of its power of detecting typical suspicious activities, AI may also play a role in the prevention of crime. An interesting new advantage of AI would also lie in "predictive justice, which is the statistical analysis of a large amount of case law data – mainly previously rendered court decisions – in order to predict court outcomes".[67] This same amount of processing power might also be useful in predicting recidivism. In their conclusion Idder and Coulax also warn that even though AI might curb criminal behaviour, it might also increase discrimination against minorities and harm fundamental principles of fair trial and the protection of privacy. To the present author this seems to represent the conundrum of an age-old search by criminal justice to find a balance between "crime control" and "due process", as clearly explained by the author Herbert Packer in his seminal work *The Limits of the Criminal Sanction.*[68]

In an article focusing strictly on the continent of Africa,[69] Sigsworth quotes figures from a 2021 Interpol report that lists South Africa as the African country with the greatest number of cyber threats for that year. He then opines:

> "The widespread personal use of AI applications such as ChatGPT and resemble.ai increases concerns about potential abuses."

As a countermeasure, however, AI also gives the police and private security companies advantages to combat cybercrime. The article cites applications such as VumaCam's licence plate recognition system in Johannesburg, and "Earth Ranger" to dismantle poaching rings in Tanzania and Malawi. All such systems come with the risk, however, of government suppression of citizens' right to privacy.

In any discussion of cybercrime, cyber security also becomes important. If the latter is adequate, the chance of the former being committed diminishes meaningfully. In an article entitled "Cybercrime: One of 2023's Biggest Risks to SA Businesses",[70] Cakwebe points out that the Fourth Industrial Revolution has brought about innovations "such as artificial intelligence, the

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[67] Idder and Coulax https://www.dailymaverick.co.za/opinionista/2023-01-19-artificial-intelligence-is-on-the-cusp-of-bringing-radical-change-to-the-criminal-justice-system/ One wonders whether this would include both the court's finding as well as the sentence that should be imposed.

[68] Packer "The Limits of the Criminal Sanction" (1968); see also a review of this work – Katz (untitled review) 1969 *University of Pennsylvania Law Review* 640.

[69] Sigsworth "AI Poses Multitude of Risks and Rewards for Organised Crime in Africa: Policing Must Adapt" (11 July 2023) https://dailymaverick.co.za (accessed 2023-07-12).

[70] Cakwebe (8 February 2023) https://www.fanews.co.za/article/short-term-insurance/15/general/1217/cybercrime-one-of-2023-s-biggest-risks-to-sa-businesses/36294 (accessed 2023-05-31).

internet of things and robotics", which have all combined to change ways of doing business. He issues the following warning, however: "Simultaneously, however, the developments have run parallel to the rocketing of cybercrime".[71] Cakwebe cites a review of cyberattacks[72] by the organisation for "Small and medium sized enterprises" (SME). According to this review one in three respondents suffered a cyberattack, with a breakdown of percentages as follows:

> "malware (30%), phishing (26%), ransomware (25%), denial of service (13%) and theft of funds (13%). This is despite more than 60% of SME's believing that they were not viable targets for cybercriminals."

The last-mentioned article by Cakwebe also espouses "basic cyber-security components like firewalls and anti-virus software" as well as training employees in this regard as being necessary stepping stones towards a "well-rounded cyber-security posture".[73] Of course, once security is reasonably foolproof, the need for the intervention of the criminal law and courts becomes less important.

5 7 The effect AI advisory systems (4iR) may have on evidence

This aspect raises an interesting conundrum for a trial judge being confronted by "expert evidence" coming from an AI system. Should this machine be seen as a true expert witness because of its undoubted and deep background knowledge in almost any area? How exactly should its expert "qualifications" be tested and evaluated? On the other hand, should such evidence not perhaps be treated in terms of the cautionary rule and not be accepted as evidence in court unless supported by an "independent" (human?) expert?

South Africa has recently had an unfortunate experience with regard to AI evidence. Reported in the weekly *Sunday Times* newspaper under the headline "Magistrate Rebukes Lawyers Over ChatGPT 'Bogus Cases'", the presiding magistrate found that counsel had simply repeated "in parrot fashion" research done by a chatbot, without verifying those sources for themselves.[74] In the defamation case concerned, lawyers acting for a plaintiff in a defamation case[75] in Parkwood, Johannesburg, had tried to use eight non-existent "judgments" generated by the ChapGPT website

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[71] *Ibid.*

[72] Published in the "*FA review*"". The present author has to confess ignorance as to the true meaning of this acronym – does it represent "Financial Advisor", "Financial Advisory" or "Fiscal Agent"?

[73] *Ibid.*

[74] Rabkin "Magistrate Rebukes Lawyers Over ChatGPT 'Bogus Cases'" (9 July 2023) https://www.timeslive.co.za/sunday-times/news/2023-07-09-magistrate-rebukes-lawyers-over-chatgpt-bogus-cases/ (accessed 2023-12-22).

[75] *Michelle Parker v Amanda Forsyth* Regional Magistrates Court Johannesburg (unreported) 2023-06-29 Case No 1585/20.

www.techtarget.com, without checking the real existence of these "sources". The court remarked as follows:

> "Despite their best efforts, however, the Defendant's attorneys were unable to access any of these cases. The Plaintiff's attorneys were unable to furnish them with copies of the cases either."[76]

In the end, plaintiff's counsel was forced to concede that "the names and citations are fictitious, the facts are fictitious, and the decisions are fictitious".[77] Fortunately for the plaintiff, the matter turned only upon the procedural matter of costs, and the court decided not to make a punitive order in this regard.

Again, the EU seems to have taken the lead in this area. Mention has been made[78] of its draft directive on "New Product Liability" where article 8 deals with "Disclosure of Evidence" and article 9 with "Burden of Proof". A fresh source of uncertainty arises because Continental Europe generally subscribes to the inquisitorial system of proof, whereas most English-speaking countries subscribe to the accusatorial system of proof. The latter system contains a mass of exclusionary rules because of its genesis in a jury-based system, although South Africa has not used the jury system since the 1950s.[79] Would one new worldwide set of treaty-based rules ever cover both systems of proof satisfactorily?

Some of these matters might be dealt with in terms of the EU's latest AI legislation as will be seen under the following heading.

6 CONCLUSION – THE NEED FOR SPECIALISED LEGISLATION

A question that has recently come to the fore is whether the pace of development in AI should be "paused".[80] Sender and Bekker give a brief overview of developments in computing, including the comparatively recent appearance of the Internet, "big data" and machine learning, leading later to "deep learning" and finally to easily useable tools such OpenAI's ChatGPT 3.5. The last-mentioned is a popular example of a "large language model" (LLM) that can simulate human "brain synapses and cognitive processes". In this way, an LLM can respond to human questions asked in natural language.

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76 *Parker v Forsyth supra* par 88.

77 *Parker v Forsyth supra* par 87.

78 See heading 5 5 above.

79 According to rumour, this transpired because no jury (composed of lay persons) would convict anyone of IDB (Illicit Diamond Buying). People felt that diamonds were God's gift to all people and not only to the De Beers Diamond Company.

80 Sender and Bekker "To Pause or Not to Pause AI? That Is the Question – We Are at a Transformative Moment in Human History" (9 July 2023) *Daily Maverick* https://www.dailymaverick.co.za/article/2023-07-09-to-pause-ai-or-not-to-pause-ai-that-is-the-question-we-are-at-a-transformative-moment-in-human-history/ (accessed 2023-07-12).

Everything seemed acceptable until companies with the necessary human and financial capital embarked on the quest for "Artificial General Intelligence" (AGI). An AGI refers to "an AI agent that is comparable to or 'smarter' than a human".[81]) Sender and Bekker differentiate between two moral approaches: "teleological and deontological perspectives". The first approach requires one to look at the final goal of the enterprise and the final outcomes and consequences in this regard. Will this be "significant advancements and improved quality of life" or "mass unemployment, the exacerbation of social inequalities and a monopolisation of AI power and control"?[82] Sender and Bekker do not (yet) place their bets on which eventuality is most likely to occur. The second approach emphasises "adherence to moral principles and duties". This would involve scrutinising and weighing values such as free research against biases and discrimination based on training data. It also involves the contentious dispute between using open-source and closed-source software (which is also a long-lasting copyright issue).

Mention has already been made of the EU's pioneering role in specialised legislation with regard to AI. In an article entitled "EU Lawmakers Back Transparency and Safety Rules for Generative AI",[83] Lomas describes the latest amendments to the bloc's draft AI legislation, which deals with:

- "real-time" remote biometric identification systems in publicly accessible spaces;
- "post" remote biometric identification systems, with the only exception of law enforcement for the prosecution of serious crimes and only after judicial authorisation;
- biometric categorisation systems using sensitive characteristics (for example, gender, race, ethnicity, citizenship status, religion, political orientation);
- predictive policing systems (based on profiling, location or past criminal behaviour);
- emotion-recognition systems in law enforcement, border management, workplace, and educational institutions; and
- indiscriminate scraping of biometric data from social media or CCTV footage to create facial recognition databases (violating human rights and right to privacy).

Lomas adds that Members of the European Parliament (MEPs) have agreed on a number of important amendments to the EU's latest AI legislation, including "foundational models which underpin generative AI technologies like OpenAI's ChatGPT".[84] Commentators from the digital rights group EDRi[85] are

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[81] What is worrying is that these skills could, *inter alia*, include "computer law", which for the present author means a potential loss in personal job security!

[82] Sender and Bekker https://www.dailymaverick.co.za/article/2023-07-09-to-pause-ai-or-not-to-pause-ai-that-is-the-question-we-are-at-a-transformative-moment-in-human-history/.

[83] Lomas https://techcrunch.com/2023/05/11/eu-ai-act-mep-committee-votes/.

[84] *Ibid.*

worried, however, about "predictive policing", which might amount to "a form of automated racial profiling", especially because of the degree to which "mass surveillance practices" are being used across Europe. The group also lists some other uses of AI, mostly relating to privacy, that "are just too harmful to be allowed".[86]

It is important throughout to bear in mind that, while laudable, the EU's efforts in this regard remain a work in progress that may still be amended before reaching a final form.

Even though South Africa has not yet produced draft legislation in this regard, an interesting local White Paper does provide some pointers to the future. In March 2019, the South African Department of Science and Technology produced a "White Paper on Science, Technology and Innovation".[87] After an introduction setting out the evolution and performance of a National System of Innovation (NSI), the Paper looks to the future and to a final "Coherent and Inclusive National System of Innovation". This should include "investment in science that has enabled knowledge breakthroughs in, for example, biotechnology, *AI*,[88] nanotechnology, synthetic biology and the basic sciences". In Chapter 4,[89] the "Fourth Industrial Revolution" (4iR) is specifically mentioned. Requirements for a successful implementation in South Africa would necessitate "a coordinated national policy response", "new institutional arrangements to manage convergence" as well as expanded research and development "aimed at the enabling technologies". These developments would necessitate research at universities and, it is hoped, would strengthen an appropriate South African strategy for AI. In this regard, a changed regulatory framework, able to address "issues such as the impact of the fast-changing ICT/telecommunication and AI environment" is needed. This should also include a steering committee to look at "potential job losses in affected industries".[90]

Notwithstanding that South Africa has not yet seen any draft legislation in this regard, valuable research (in areas such as AI and programs such as ChatGPT) is being carried out at South African universities like the University of the Western Cape, North-West University and Rhodes University.

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85 European Digital Rights, an association of human rights organisations from across Europe.

86 See, for instance, "Why EU Needs to Be Wary That AI Will Increase Racial Profiling" (22 April 2021) https://edri.org/our-work/optimising-injustice-ai-used-to-predict-crime-will-increase-discrimination-and-surveillance/ (accessed 2023-12-17).

87 Approved by the SA Cabinet and available online at https://www.gov.za/sites/default/files/gcis_document/201912/white-paper-science-technology-and-innovation.pdf or hard copies from the Director-General, Department of Science and Technology, Private Bag X894, Pretoria 0001.

88 Artificial Intelligence (own emphasis).

89 Specifically at par 4.11.4 of the White Paper.

90 *Ibid.*

A universal issue to be resolved in order to pass adequate legislation has been raised in the discussion of tort law under heading 5 5. In the event of “mistakes” by 4iR, should strict liability be imposed upon its owner or the person using the program? Perhaps the company manufacturing or marketing the software, usually with “deep pockets”, would form a more attractive target for civil or criminal litigation? Why not cite, or charge, both these groups in order to hold them “individually and severally liable”?

Whatever its end goal, it is clear that the world, including South Africa, is in urgent need of perspicacious and flexible legislation in this regard. The arrival of 4iR will have deep-ranging legal as well as social consequences, probably surpassing that of the arrival of the printing press and of the personal computer.

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