OBITER

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

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

ISSN 1682-5853

O B I T E R

2024 Vol 45 1

O B I T E R
2024 Vol 45 1

AN APPRAISAL OF THE ROLE OF RITUALS AND THEIR WAIVER IN THE CONCLUSION OF A CUSTOMARY MARRIAGE

Aubrey Manthwa
LLB LLM LLD
Associate Professor, Department of Public Constitutional and International Law
University of South Africa

Perfect Lekolwana
LLB
LLM Student, University of South Africa

SUMMARY

The validity of customary marriages remains a topical issue in South Africa and the most litigated aspect of customary law. The problem is that courts often do not pay attention to the role that rituals play in the validity of a customary marriage. Courts do not always investigate the relevant living law to determine if indeed the traditional group involved allows for waiver of a ritual in conclusion of a customary marriage. Living law refers to the day-to-day norms of communities that base their lives on customary law. Living law is affected by different factors such as acculturation and urbanisation.[1] The focus of this article is on some of the different traditional groups in South Africa and looks at case law in South Africa in terms of how traditional groups deal with the role of rituals in determining the conclusion of a customary marriage. The article argues that what is happening is problematic because customary law is not given the recognition it is afforded by the Constitution. The article argues that understanding rituals can play an important role in helping courts to determine whether a customary marriage has been concluded in a particular case. Rituals are also observed to integrate a bride into the groom's family; however, there are rituals that may be waived without affecting the validity of a customary marriage. Integration of the bride is a broader term requiring scrutiny because this process includes different and varying rituals that are observed in the conclusion of a customary marriage. In customary law, rituals are significant because they are associated with legitimising certain occurrences, such as the change of a surname and the coronation of a king. This article argues that courts should appreciate the significance of rituals in the conclusion of a customary marriage. In addition, courts should understand which rituals are so important that they cannot be waived.

[1] Manthwa "The Interplay Between Proving Living Customary Law and Upholding the Constitution" 2019 *Stell LR* 465.

1 INTRODUCTION

The observance of rituals is significant in customary law as it can be equated to a traditional and religious process, aimed at legitimising changes and developments in a community.[2] Traditionally, the observance of a ritual is accompanied by the slaughtering of an animal, which invites spiritual benignity by the spilling of blood.[3] Changes or developments that often require the performance of a ritual include the birth of a child, changing a surname and the return of a long-lost daughter.[4] For the purposes of this article, only rituals performed in the conclusion of a customary marriage and their significance are analysed, although other rituals are also mentioned to provide context. The rituals involved in a customary marriage, and analysed here, have legal implications as they may determine whether a customary marriage is regarded as binding.[5]

The living-law requirement for the conclusion of a customary marriage often includes that *lobolo* be delivered and that the bride be integrated into the groom's family.[6] Although a requirement for the conclusion of a customary marriage might be shared by different traditional groups, such a requirement might not have the same significance for every group. An example is evident in *MM v MN*,[7] where the court concluded that consent of the first wife is a requirement for the validity of a subsequent polygynous customary marriage. The court reached this conclusion in developing customary law of the Tsonga group. However, the court acknowledged that consent of the first wife might not have the same significance in other traditional groups.

The objective of this article is to determine the significance of rituals performed in the conclusion of a customary marriage and whether all rituals could be waived, as courts often do not pay attention to the role that rituals play in determining the validity of a customary marriage. It is argued that rituals can play an important role in assisting the court to determine whether a customary marriage has been concluded in a particular case. In the main, courts are inconsistent when determining whether a customary marriage is valid. This has serious implications for vulnerable partners, especially women, as they can leave an intimate relationship without legal recourse if a declaration of invalidity is made by a court. This article provides a general discussion of the significance of rituals in African culture, including a discussion of the right to culture. This is followed by a discussion of case law relating to rituals and the integration of the bride in the conclusion of a customary marriage. Emphasis is placed on some traditional groups such as

---

2 Ndima *Re-Imagining and Re-Interpreting African Jurisprudence Under the South African Constitution* (LLD thesis, UNISA) 2013 77.

3 Soga *Intlalo kaXhosa* (1937) 129–130.

4 Ndima *Re-Imagining and Re-Interpreting African Jurisprudence* 150.

5 Van Niekerk and Nkosi "The Unpredictable Judicial Interpretation of Section 3(1)(*b*) of the Recognition of Customary Marriages Act 120 of 1998: *Eunice Xoliswa Ngema v Sifiso Raymond Debengwa* (2011/3726) [2016] ZAGPJHC 163 (15 June 2016)" 2018 *THRHR* 350.

6 *Motsoatsoa v Roro* [2011] 2 All SA 324 (GSJ).

7 *MM v MN* 2013 (4) SA 415 (CC).

the Nguni and Tswana traditional groups. The article names some of the rituals and explains whether or not they can be waived.

2 THE SIGNIFICANCE OF RITUALS FOR SOUTH AFRICAN TRADITIONAL GROUPS

Traditional groups have various rituals they observe and regard as important – to the extent that their non-observance would result in the invalidity of a customary marriage. Rituals in customary law are significant because they are associated with legitimising certain occurrences such as the integration of the bride into the groom's family, the change of a surname and the coronation of a king. Another example is the ritual observed to introduce a child to the ancestors as a new member of the family. A new member must be formally introduced through the observance of a ritual. The newborn child of a married couple would not be recognised as having been accepted into the family by the ancestors unless the rituals have been observed.[8] The non-observance of rituals carries the risk that the ancestors may unleash their wrath on the child. Similarly, a bride may not be recognised as such without the performance of a certain ritual regarded as essential for the conclusion of a customary marriage. Such rituals may include dowing with milk, depending on the traditional group involved.[9]

The Xhosa traditional group observes *utsiki* after the arrival of the bride at the groom's family to integrate her as their *umakoti* (daughter-in-law).[10] *Utsiki* involves slaughtering an animal. The bride must eat goat meat and drink sour milk from a goat. A bride does not automatically acquire the status of *umakoti* or become a full member of the groom's family when *lobolo* has been delivered, or when she has entered the groom's home.[11] A Kenyan expression articulates the importance of rituals in the context of integration of the bride as follows:

> "A sheep is killed, the fat of which is fried and the oil is used to anoint the bride in a ceremony of adoption into the new clan. After she has been admitted as a full member of the husband's family, she is free to mingle with its members and take an active part in the general work of the homestead."[12]

Ndima posits that the importance of a ritual can be seen in the restoration of equilibrium in society, and gives the example of attaining a university qualification:

> "University graduates need the ritual of a graduation ceremony which confers on them the degrees that they have already passed during assessments. In this way society gets thereby informed and assured that the students do not only claim to be graduates but have been recognised as such by those

---

8 Mtuze *The Essence of Xhosa Spirituality – and the Nuisance of Cultural Imperialism: Hidden Presences in the Spirituality of the amaXhosa of the Eastern Cape and the Impact of Christianity on Them* (2002) 26.

9 See Bakker "Integration of the Bride as a Requirement for a Valid Customary Marriage: *Mkabe v Minister of Home Affairs* [2016] ZAGPPHC" 2018 *PELJ* 6.

10 Ndima *Re-Imagining and Re-Interpreting African Jurisprudence under the South Africa Constitution* 78.

11 Tamsanqa *Ithemba liyaphilisa* (1979) 125.

12 Kenyatta *Facing Mount Kenya* (1938) 173.

> qualified to do so at a graduation ceremony arranged for that purpose. Hence their certificates proclaim that they were conferred at the congregation of the university."[13]

Rituals are generally significant in terms of customary law owing to the legitimate purpose they serve. Integration of the bride, like the delivery of *lobolo*, emerged in agrarian settings where families lived close together for defence and agricultural purposes. Since wealth, rights and obligations were communal in nature, integration was observed by the family and was accompanied by traditional ceremonies that marked the link between the material and spiritual worlds. This is the context of the practice. In the legal pluralism debate, the courts often do not focus on the agrarian social settings of this custom. Part of the reason that families observe the practice is the need to introduce the bride to the ancestors as a new member of the groom's family by observing a ritual. The bride's change of status from her family to the groom's family must be marked by a ceremony and communication with the ancestors because the ancestors must bless her integration into the groom's family and accept her as one of their own.[14] This might involve slaughtering an innocent animal to invite divine beneficence through the spilling of blood. Integration signifies to the community, the collective families of the bride and groom, and the living, that the bride is recognised as a legitimate member of the groom's family.[15] In the case of a ritual to conclude a marriage, the ritual is significant because it gives the woman the added responsibility of protecting the family and her husband's reputation, and of maintaining her dignity once her status has changed.[16] In *Fanti v Boto*,[17] the court observed the following:

> "All authorities are in agreement that a valid customary marriage only comes about when the girl (in this case the deceased) has been formerly transferred or handed over to her husband or his family. Once that is done severance of ties between her and her family happens. Her acceptance by the groom's husband and her incorporation into his family is ordinarily accompanied by well known extensive ritual and ceremonies involving both families."[18]

Customary law can adapt and change, and as a result a ritual might be waived, but it must not be presumed that this has happened. Rituals embody the transfer of teachings about culture and respect for the individual and community.

2 1 The right to culture

The Constitution of the Republic of South Africa, 1996 (the Constitution) protects the rights of everyone to observe their culture, and this extends to rituals performed in conclusion of a customary marriage. It is important to note that customary law is subject to the Constitution, which requires that

---

13 Ndima *Re-Imagining and Re-Interpreting African jurisprudence under the South Africa Constitution* 78.

14 Bennett *A Source Book of African Customary Law for Southern Africa* (1991) 192.

15 Ndima *Re-Imagining and Re-Interpreting African Jurisprudence* 77.

16 *Ibid*.

17 *Fanti v Boto* 2008 (5) SA 405 (C).

18 *Fanti v Boto supra* par 22.

rituals and practices must be consistent with the Constitution as supreme law of the land. However, the right to observe certain rituals is part of the right to culture as recognised by sections 15, 30 and 31 of the Constitution. The law must allow people to observe the culture of their choice and the court must consider the legitimate purpose served by rituals in the conclusion of a customary marriage. Section 31(1) of the Constitution, for example, states that

> "persons belonging to a cultural, religious or linguistic community may not be denied the right, with other members of the community – to enjoy their culture, practise their religion and use their language."

The section can be interpreted broadly as it does not mention any specific culture but refers to all cultures. The right to culture gets further impetus in section 185 of the Constitution, which provides for the creation of a Commission for the Promotion and Protection of the Rights of Cultural, Religious and Linguistic Communities. The right to culture embodies the need and right to belong to a community and to be part of a collective. It emphasises the sense of belonging to a community as part of a person's culture. Culture is not static; it can change from time to time as a particular society changes. The change in culture is brought about by the people who live in a community at a particular time.[19] The community also shapes the rituals observed as part of its culture. Cultural rights are by their nature group-oriented, as individuals share their culture with other groups and communities.[20] The court must weigh up competing interests, such as the rights of indigenous people to live by their customary laws and observe rituals, versus rights protected by the Constitution, including an individual's right to equality and dignity.[21] Decisions must be made on a balance of probabilities, which must always reflect the living law of communities.[22]

The right to culture is also recognised in international instruments such as the Universal Declaration of Human Rights.[23] Article 27(1) of the Declaration provides that "everyone has the right freely to participate in the cultural life of the community". Similarly, the International Covenant on Civil and Political Rights (ICCPR)[24] protects people's right "to enjoy their own culture, to profess and practise their own religion, or to use their own language".[25] South Africa is a signatory to the above treaties and is bound to observe their provisions.

South Africa has varying traditional groups that observe rituals for different purposes. The right to culture is pivotal also to the recognition of the right to dignity and respect, which lies at the centre of human rights protection. The right to culture, however, must be observed in ways that are consistent with

---

19 Matsumoto *Culture and Psychology: People Around the World* 2ed (2000) 24.

20 Devenish *A Commentary on the South Africa Bill of Rights* (1998) 422.

21 Lewis "Judicial 'Translation' and Contextualization of Values: Rethinking the Development of Customary Law in *Mayelane*" 2015 *PELJ* 1126.

22 *ND v MM* (2020) ZAGPJHC 113 par 27; see also Marwick *The Swazi: An Ethnographic Account of the Natives of Swaziland Protectorate* (1996) 123–124.

23 UNGA *Universal Declaration of Human Rights* 217 A (III) (1948).

24 UNGA *International Covenant on Civil and Political Rights* 999 UNTS 171 (1966). Adopted: 19/12/1966; EIF 23/03/1976.

25 Art 15(1) of the ICCPR.

the Constitution's Bill of Rights. Any ritual or cultural practice inconsistent with the Constitution will thus be declared unconstitutional.

Maluleke posits that practices that traditionally served a legitimate purpose may today fall short of consistency requirements of the Constitution owing to their infringement of rights such as the right to equality.[26] He gives examples, such as virginity testing, male circumcision and *ukuthwala*, which have elements of human rights violation.[27] *Ukuthwala* is a cultural practice that involves the abduction of a woman by a man for the purpose of persuading her family to enter into negotiations to conclude a customary marriage between the woman and the man.

It cannot be denied that many customary law practices and rituals are currently observed in ways that violate human rights. The ignominy flowing from this is the stigma that customary law in general does not care about the protection of human rights. However, it can be argued that customary law does respect and protect human rights as it does not allow rape, the killing of children or the abuse of women and children in the name of culture.[28]

Customary law has its own normative framework that is found in the concept of *ubuntu* and captures the notion of human rights.[29] *Ubuntu* embodies African values and, if properly understood, the concept has the same connotations as human rights.[30]

The legitimate purpose served by rituals should not be lost, as they support the social, political and legal organisation of society, and the protection of vulnerable members' interests.[31]

The problem facing the observance of rituals today is distortion, as has been the case with *ukuthwala* and *ukuthwasa ebudodeni* or *intonjane* (initiation to manhood or womanhood). Some of these practices have led to the raping and killing of thousands of young children and should be abandoned altogether.[32] However, these practices should not be declared unconstitutional if observed without infringement of human rights. Rituals should be practised safely in a way that protects the rights to life, human dignity and bodily integrity of young children and women.

Better regulation of rituals is likely to be embraced by communities. Education programmes and reporting of crimes against children can assist in addressing the distortion of rituals. As Diala argues, many people have grown up with distorted *ukuthwasa ebudodeni* versions of customary law and believe that they are observing legitimate practices, while in reality indigenous law and rituals were distorted as a result of collaboration among

---

26 Maluleke "Culture, Tradition, Custom, Law and Gender Equality" 2012 *PELJ* 10.

27 Maluleke 2012 *PELJ* 13.

28 Mahao "O se re ho morwa 'morwa towe!' African Jurisprudence Exhumed" 2010 *CILSA* 326.

29 *Ibid*.

30 Dlamini "The Clash Between Customary Law and Universal Human Rights" 2002 *SJ* 26.

31 Ndima *Re-Imagining and Re-Interpreting African Jurisprudence* 56.

32 Nduna, Siswana, Ewing and Vilancuos "Changes in Gender Norms Are Making Initiation Safer for South African Boys" (2015) *The Conversation* https://theconversation.com/ (accessed 2022-09-13).

colonial officials and African leaders.[33] An example of a distorted practice or ritual is found in the facts of *S v Jezile*, in which a child was raped, and where *ukuthwala* was used as a ground of justification.[34] However, it cannot merely be concluded that the observance of rituals is a problem. The voices of people who live their daily lives based on these practices and observe these rituals need to be heard.

The law should not speak on behalf of people as if they cannot speak for themselves. This is problematic – a violation of the right to self-determination in terms of section 235 of the Constitution.[35] Cultural self-determination is a community's collective right. It is associated with ethnic, linguistic, religious and cultural communities living in a defined territory and sharing a culture, customs and heritage.[36] This right requires that courts and other state institutions recognise that indigenous people have the right to decide which laws they want applied to them. Courts must not consider issues not brought before them, as happened in *Sengadi v Tsambo*,[37] where the court declared integration of the bride unconstitutional, although the parties had not raised this issue. Twala J argued that customary law must be developed to be consistent with the Constitution.[38] However, the problem is that a court might see an opportunity to develop customary law judicially, even when the parties have not raised constitutionality as an issue, and more importantly, when there are no grounds to declare the said rituals inconsistent with the Constitution. It is argued that courts often take this opportunity to develop customary law because they want to make customary law progressive and protect vulnerable partners. This does not mean that courts can impose recognition on the framework of customary marriages when requirements for a customary marriage have not been met.

If a party brings a matter to court, this does not mean that they want a ritual or practice declared unconstitutional. The problem could be that they want the ritual or practice changed to reflect the needs of a modern society or to promote gender equality. The court must explore doing this without deciding on the constitutionality of the practice.[39]

Similarly, any ritual observed in the conclusion of a customary marriage may be declared unconstitutional. However, it cannot merely be assumed that rights are inconsistent with the Constitution. Rights must be tested against the Constitution and competing interests must be weighed. The right

---

33 Diala and Kangwa "Rethinking the Interface Between Customary Law and Constitutionalism in Sub-Saharan Africa" 2019 *De Jure* 194–197.

34 2016 (2) SA 62 (WCC).

35 Van der Vyver "The Right to Self-Determination of Cultural, Religious and Linguistic Communities in South Africa" 2011 *PELJ* 18.

36 Mailula "Abdication of Judicial Responsibility, Cultural Self-Determination and the Development of Customary Law: Lessons from *Shilubana*" 2008 *SAPL* 232.

37 *Sengadi v Tsambo* 2019 (4) SA 50 (GJ).

38 *Sengadi v Tsambo supra* par 35–40; see also Radebe "Tsambo v Sengadi (244/19) [2020] ZASCA 46 (30 April 2020); Sengadi v Tsambo; In Re: Tsambo (40344/2018) [2018] ZAGPJHC 666; [2019] 1 All SA 569 (GJ) (8 November 2018) Assessing the Insurmountable Challenge in Proving the Existence of a Customary Marriage in Terms of Section 3(1)(b) of the Recognition of Customary Marriages Act 120 of 1998 and the Misplacing of Gender Inequality" 2022 *De Jure* 81.

39 *Sengadi v Tsambo supra* par 40–44.

to culture is not absolute and will in some cases be tested, for example against the right to equality, and may be limited by a law of general application in terms of section 36 of the Constitution.[40] Section 211 of the Constitution recognises customary law to the extent that it is consistent with the Constitution.

2 2 Judicial pronouncements

The requirements of a customary marriage in terms of the Recognition of Customary Marriages Act[41] (the RCMA) are that both parties must be at least 18 years of age and must consent to the marriage.[42] The RCMA further provides that the marriage must be negotiated and entered into according to customary law.[43] This has been interpreted to include that *lobolo* and the integration of the bride are requirements for a customary marriage. The court should desist from discounting the importance of certain rituals when approached to determine the validity of a customary marriage when a certain ritual has not been performed. Courts must take steps to be informed of the importance of that ritual. Case law in some matters recognises that integration of the bride is a requirement for the conclusion of a customary marriage. However, courts generally focus on the integration of the bride without looking at the significance and roles of rituals. For example, in *Mthethwa v Road Accident Fund*,[44] and *Mxiki v Mbata in re: Mbatha v Department of Home Affairs*,[45] the court concluded that a customary marriage could not be concluded without integration of the bride. It reached this conclusion without considering the traditional groups involved. In cases such as *C v P*,[46] and *Mkabe v Minister of Home Affairs*,[47] however, the court recognised the validity of a customary marriage, notwithstanding that the bride had not been integrated. In *Mkabe v Minister of Home Affairs*, the court concluded that integration of the bride could not be considered an essential requirement to the extent that a marriage would not be valid if the custom had not been observed.[48] The court concluded that constructive integration of the bride should be recognised and the marriage should be valid; thus, integration does not have to be physical.[49]

It is submitted that the court cannot merely conclude that constructive integration of the bride is acceptable if the court does not understand the role and significance of rituals in concluding a customary marriage. In cases such as *Nthejane v Road Accident Fund*,[50] and *Matlala v Dlamini*,[51] the court

---

40 Grant "Human Rights, Cultural Diversity and Customary Law in South Africa" 2006 *Journal of African Law* 7.
41 120 of 1998.
42 See s 3 of the RCMA.
43 S 3(1)(*b*) of the RCMA.
44 [2010] ZAGPJHC 138.
45 [2016] ZAGPPHC 893.
46 [2017] ZAFSHC 57.
47 [2016] ZAGPPHC 460.
48 *Mkabe v Minister of Home Affairs supra* par 35.
49 *Mkabe v Minister of Home Affairs supra* par 38 and 40.
50 [2011] ZAFSHC 196.
51 [2010] ZAGPPHC 277.

was prepared to recognise a valid customary marriage based solely on the delivery or partial delivery of *lobolo*. Integration was thus not seen as necessary. In *Mmutle v Thinda*,[52] the court concluded that integration of the bride was a ceremonial gesture that could be waived. The court held that integration should not be regarded as significant to the extent that its non-observance should affect validity of a customary marriage.[53] However, the court did not consider which rituals should be observed as part of integration and whether these had been observed.

In *Motsoatsoa v Roro,*[54] the court held that integration is important because it taught both men and women about their duties and responsibilities as husbands and wives, and their responsibilities to their new families.[55] This is a step that cannot be waived in Tswana law. In fact, most traditional groups in South Africa would not allow this ritual to be waived. However, if there is evidence from the traditional group concerned that a certain ritual is no longer important for concluding a customary marriage, then that ritual might be waived. In all these cases and many others, the court did not further interrogate the integration of the bride or the role of rituals.[56] This could have been done by looking at rituals and determining which ones were so significant that they affected the validity of a customary marriage if not observed.

It is argued that integration is a broader term that requires scrutiny because different rituals for different traditional groups are observed as part of integration when concluding a customary marriage. A broader view focuses on the legitimate purpose served by a particular ritual. It is argued that courts adopt a narrow view of integration of the bride. As a result, they merely argue that integration is flexible, and that any ritual observed during integration can be waived. A ritual can be waived if the traditional group concerned allows the waiver of the ritual in question. Evidence must be sought from the community concerned before the court can recognise waiver. It could be argued that courts are motivated by a flexible approach that focuses on recognition by a family, but the identification of the involved traditional group is an important step. Courts should scrutinise the role of all rituals and treat these rituals with the respect they deserve according to the Constitution.

3 RCMA AND RITUALS

As stated above, section 3(1)(*b*) of the RCMA provides that a customary marriage "must be negotiated and entered into or celebrated in accordance with customary law".[57] Maithufi posits that section 3(1)(*b*) determines that a marriage must be concluded based on the system of customary law of the

[52] [2008] ZAGPPHC 352.
[53] *Mmutle v Thinda supra* par 51.
[54] *Supra.*
[55] *Motsoatsoa v Roro supra* par 19.
[56] Manthwa "Handing Over the Bride as a Requirement for Validity of a Customary Marriage – *C v P* (1009/2016) [2017] ZAFSHC 57 (6 April 2017)" 2019 *THRHR* 656.
[57] See heading 2.1 above.

parties.[58] It is argued that this provision must be interpreted to include important rituals in the conclusion of a customary marriage. Although section 3(1)(*b*) does not expressly provide that the integration of the bride is required, it is argued that integration is necessary to conclude a customary marriage in living law.[59] Court decisions must be consistent with what communities are doing.[60] Section 3(1)(*b*) enables courts to recognise cultural nuances and differences in practices, but it also requires that courts somehow determine and take into account the importance of a ritual for a particular traditional group.[61]

There is no standard approach to determining the validity of a customary marriage because customary law is not a single law system with consistent norms across the board.[62] As stated above, the RCMA does not provide clarity on the requirements for or conclusion of a marriage. Consequently, it has been left in the hands of courts whose decisions are not consistent with the living law of communities. Section 3(1)(*b*) might give rise to unpredictability as it allows inconsistent interpretations by courts. Courts might interpret the same set of facts and reach different conclusions about the integration of the bride; some might conclude that integration and a ritual involved cannot be waived, while others might disagree.[63] Mwambene and Kruuse argue that courts indicate that a ritual can develop or change in one group but stay the same in another. The question is: which criteria does a court use to reach such a conclusion?[64]

It is regrettable that courts do not consider the significance of rituals and gloss over the nuances when determining the validity of a customary marriage. Some rituals, such as *utsiki*, are so important that they cannot be waived. The validity of a customary marriage is affected if *utsiki* is waived. Courts must understand that practices differ from one community to the next. For example, a similar ritual in another traditional group may not have the same significance as *utsiki* in the Xhosa group.[65]

It is argued that courts must not assume that practices are the same in all traditional groups because the problem of ossifying customary law arises, and courts rob themselves of an opportunity to tap into the rich history of

---

58 Maithufi "The Requirements for Validity and Proprietary Consequences of Monogamous and Polygynous Customary Marriages in South Africa: Some Observations" 2015 *De Jure* 278.

59 Himonga and Moore *Reform of Customary Marriage, Divorce and Succession in South Africa: Living Customary Law and Social Realities* (2015) 92.

60 Kruuse and Sloth-Nielsen "Sailing Between Scylla and Charybdis: *Mayelane v Ngwenyama*" 2014 *PELJ* 1722.

61 Manthwa "An Appraisal of the Hurdles With Ascertaining the Applicable Customary Law When Determining Conclusion of a Customary Marriage – *ND v MM* (18404/ 2018) (2020) ZAGPJHC 113 (12 May 2020)" 2022 *Speculum Juris* 227.

62 Osman "Precedent, Waiver and the Constitutional Analysis of Handing Over of the Bride [Discussion of *Sengadi v Tsambo* 2018 JDR 2151 (GJ)]" 2020 *Stell LR* 84; Manthwa 2019 *THRHR* 652–662.

63 Van Niekerk and Nkosi 2018 *THRHR* 348.

64 Mwambene and Kruuse "Form Over Function? The Practical Application of the Recognition of Customary Marriages Act 1998 in South Africa" 2013 *AJ* 310; Mwambene and Sloth-Nielsen "Talking the Talk and Walking the Walk: How Can the Development of Customary Law Be Understood?" 2010 *Law in Context* 32.

65 Osman 2020 *Stell LR* 85.

customary law and to understand the significant role of rituals.[66] Courts need to consider the important roles played by rituals to understand that mere integration of the bride is not the sole purpose of integration of the bride.

If there is an argument for recognising a marriage despite the waiver of integration, the court must ascertain whether the traditional group concerned allows the ritual to be waived. For example, in terms of the Swati traditions, *libovu* (smearing a bride with red ochre) cannot be waived during integration as it marks an important stage in the conclusion of a customary marriage.[67] Smearing *libovu* on the faces of the parties is an important stage in the conclusion of the marriage.[68] A bride-to-be is not regarded as a wife until she is smeared with *libovu*. In *ND v MM*,[69] the father of the plaintiff had testified that *libovu* is so significant that it could not be waived. The plaintiff, on the other hand, argued that she had been integrated into the groom's family through symbolic integration.[70] The court therefore emphasised the importance of hearing evidence from living law on rituals that play a significant role in the conclusion of a customary marriage. In such cases, someone from the community must testify on the position of living law so that the court does not make decisions without evidence.[71]

Rituals and their inclusion in customary law should be studied to assist courts in determining which rituals can be waived and which not. The Constitutional Court concluded in *MM v MN*[72] that the living law of the communities had to be visited to determine how they observed a particular practice. Similarly, in *Moropane v Southon*,[73] the Supreme Court of Appeal concluded that a fact-intensive inquiry was needed to determine how a community observed certain rituals. The above discussion highlights that courts in some cases adopt a narrow view of integration of the bride and its accompanying ritual. Courts will consequently conclude that symbolic, constructive or ceremonial integration of the bride took place. It is, however, important for courts to be informed by what communities are doing.

4 DETERMINING THE CONTENT OF LIVING LAW

Determining the content of living law is the way forward to inform courts on the significance of rituals. Courts have often concluded that their biggest challenge is determining the true content of a norm before endorsing it in court. In *Bhe v Khayelitsha Magistrate; Shibi v Sithole* (*Bhe-Shibi*),[74] the Constitutional Court held that it was not able to determine this because the task was insurmountable.[75] In *MM v MN*,[76] the Constitutional Court

---

66 Niekerk "Reflections on the Interplay of African Customary Law and State Law in South Africa" 2012 *SUBB Iurisprudentia* 13.

67 *ND v MM supra* par 19.

68 *ND v MM supra* par 21.

69 *Supra.*

70 *ND v MM supra* par 13.

71 *President of the Republic of South Africa v Gumede* 2009 (3) SA 152 (CC) par 29–30.

72 *Supra.*

73 *Moropane v Southon* [2014] ZASCA 76.

74 2005 (1) SA 580 (CC).

75 *Bhe-Shibi supra* par 59.

76 *Supra.*

embraced the difficult challenge of determining the content of living law by listening to community members on whether consent of the first wife is needed as a requirement for conclusion of her husband's second marriage. More of this approach is needed to assist the court in determining the content of living law. The court *a quo* was criticised for treating consent as a requirement even though it was not clear that consent of the first wife was indeed a requirement.[77] Kruuse and Sloth-Nielsen, for example, are not convinced that consent in *MM v MN* was observed out of a sense of obligation.[78] They write that "if courts are not alive to the finer distinctions between behavioural norms, there is a concern that 'law' and 'customary law' will lose any distinctive meaning".[79] This is an important consideration because new practices may be alleged in court out of self-interest, and the court cannot run the risk of recognising every practice as law.[80] Similarly, with rituals, the court must determine whether a ritual is needed for the conclusion of a customary marriage.

The decision of the Constitutional Court in *MM v MN*[81] to visit living law is still welcomed despite the mentioned difficulties, because the court faced the insurmountable task it had previously shied away from in *Bhe-Shibi*.[82] The shortcomings are a lesson for the road ahead and can assist courts in dealing more effectively with conflicting evidence and other challenges. This is not made easier by the fact that courts are likely to hear conflicting evidence on the subject. For the survival of customary law, it is argued that the court must not merely conclude that integration of the bride can be waived – it must be convinced of the importance of a ritual before this conclusion can be reached. The court cannot argue for example that *ukumemeza* can be waived without evidence from living law. *Ukumemeza* is a ritual that is observed as part of integration of the bride. In *Mabuza v Mbatha*,[83] the court concluded that *ukumemeza* could be waived since customary law had developed to the extent that *ukumemeza* was today observed differently.

This was a problematic conclusion because the court merely assumed that *ukumemeza* was observed differently; it had heard no evidence to support this conclusion.[84] Some judges in South Africa appear to have very little knowledge of customary law. For example, Sibisi criticised Hlophe J in *Mabuza v Mbatha* for lacking an understanding of the distinction between *ukumemeza* and integration of the bride.[85] Sibisi argues that *ukumemeza* and integration of the bride are two separate events in the conclusion of a

---

77 Manthwa "Proof of the Content of Customary Law in Light of *MM v MN*: A Constitutional Approach" 2017 *THRHR* 307.

78 Kruuse and Sloth-Nielsen "Sailing between Scylla and Charybdis: *Mayelane v Ngwenyama*" 2014 *PELJ* 1720–1725.

79 Kruuse and Sloth-Nielsen 2014 *PELJ* 1721.

80 *Ibid*.

81 *Supra.*

82 *Supra.*

83 2003 (4) SA 218 (C).

84 Manthwa "Towards a New Form of Customary Marriage and Ignorance of Precedence: *Mbungela v Mkabi* 2020 1 SA 41 (SCA)" 2021 *TSAR* 204.

85 Sibisi "Is the Requirement of Integration of the Bride Optional in Customary Marriages?" 2020 *De Jure* 96.

customary marriage.[86] *Ukumemeza* is a ritual that is observed as part of integration of the bride, but does not refer to the entire practice of integration.[87] *Mabuza v Mbatha* might serve as authority that a ritual pertaining to the validity of a customary marriage might be waived, but integration should not be waived in its entirety.[88] Regrettably this precedent has served as a central reference for determining validity of a customary marriage. First, evidence is needed to determine if indeed the Nguni traditional group allows for the waiver of *ukumekeza*; this cannot be assumed because the practice might be so important that a customary marriage would not be recognised as valid without its observance. As stated earlier, a rich body of literature is available to assist courts in determining how indigenous communities have traditionally arranged their daily lives and how rituals are observed today.[89] The Constitutional Court in *Shilubana v Nwamitwa*[90] provided the following finding:

> "[W]here there is a dispute over the legal position under customary law, a court must consider both the traditions and the present practice of the community. If development happens within the community, the court must strive to recognise and give effect to that development, to the extent consistent with adequately upholding the protection of rights. In addition, the imperative of section 39(2) must be acted on when necessary, and deference should be paid to the development by a customary community of its own laws and customs where this is possible, consistent with the continuing effective operation of the law."[91]

Experience might play a role, but in the final analysis someone who is well acquainted with the living law must testify on the position in living law.[92] If it is alleged in court that a practice exists, the alleger has the responsibility to prove that it truly exists. This can be done by calling witnesses. This is important as there are uncertainties about certain aspects that might contribute to the validity of a customary marriage, such as the stage of its conclusion.[93] Guidelines on the conclusion of a customary marriage are provided in legislation, but legislation has not addressed many of the challenges, such as the stage of conclusion of a customary marriage.[94] The key is that even if the bride was integrated, the validity of a customary marriage might still be affected if certain important rituals were waived during integration. The approach of the court when interpreting section 3(1)(*b*) of the RCMA, and ascertaining whether a customary marriage has been concluded, is to look at whether integration of the bride is still necessary. The court then concludes that integration is either needed or it is not

---

86 *Ibid*.

87 Bakker 2018 *PELJ* 6–12.

88 Sibisi 2020 *De Jure* 100.

89 Nhlapo "Homicide in Traditionally African Societies: Customary Law and the Question of Accountability" 2017 *AHRLJ* 1.

90 *Shilubana v Nwamitwa* 2009 (1) SA 66 (CC).

91 *Shilubana v Nwamitwa supra* par 49.

92 See *President of the Republic of South Africa v Gumede supra* par 29–30 and *MM v MN supra* par 48.

93 Sibisi 2020 *De Jure* 90.

94 Osman "The Consequences of the Statutory Regulation of Customary Law: An Examination of the South African Customary Law of Succession and Marriage" 2019 *PELJ* 6.

needed, without focusing on the significance of rituals.[95] This approach by courts needs to change. Also, their interpretation of section 3(1)(*b*) of the RCMA needs to recognise that the section can be interpreted in a way that recognises the significance of rituals.

It is argued that one reason that courts recognise a customary marriage as valid despite non-compliance with primary rituals is the need to protect vulnerable partners from the harsh consequences of an intimate relationship that is not recognised as a marriage. There is a need to protect vulnerable partners from the harsh consequences of a marriage being declared invalid. However, courts need to explore other avenues to protect such parties. They do not have to undermine the significance of rituals in concluding a customary marriage.[96] Some rituals may no longer play a significant role owing to the changing nature of customary law. Customary law is affected by different factors, such as acculturation and urbanisation, that can result in people observing customary law differently. However, courts may not merely assume that customary law is observed differently, or that certain rituals are no longer required.

5 CONCLUSION

Rituals play a significant role in customary law; they give legitimacy to an occurrence such as the conclusion of a customary marriage or other events such as the integration of the bride. Courts must understand that integration of the bride is a broader term, and satisfying this requirement does not merely entail the recognition of symbolic integration. It is therefore important that courts not treat customary law as a single system of law, accepting that symbolic integration is sufficient for all traditional groups to conclude a customary marriage. Courts must look at every case on its own merits. They must establish the importance of a certain ritual and whether its waiver affects the validity of a customary marriage. Thus, the court cannot adopt an approach that treats rituals as having the same significance for all traditional groups. Avenues should be explored to protect the parties involved when it is found that a customary marriage has not been concluded because a significant ritual has not been observed. However, this does not mean that courts should recognise a marriage as valid when a significant ritual has been waived. Rituals must be observed in ways that reflect the legitimate purpose they serve. Courts must recognise the importance of tapping into the living law of communities, and should look at the rich history of literature available on customary law. Courts must further recognise that integration and rituals are needed in terms of section 3(1)(*b*) of the RCMA.

---

95 *Mxiki v Mbatha in re: Mbatha v Department of Home Affairs* [2014] ZAGPPHC 825*; Ndlovu v Mokoena 2009 (5) SA 400 (GNP); Mthethwa v Road Accident Fund supra; Mkabe v Minister of Home Affairs supra*.

96 Manthwa 2022 *Speculum Juris* 230.

DECOLONISING LABOUR LAWS AND REPOSSESSING SUBALTERN EPISTEMOLOGIES: A REVIEW OF SOUTH AFRICAN AND NAMIBIAN MINEWORKERS' FIGHT FOR LABOUR RIGHTS

Tapiwa Victor Warikandwa
LLB LLM LLD
Senior Lecturer, School of Law, University of Namibia

SUMMARY

In the historical and current transformation discourses in South Africa and Namibia, the concept of decolonisation is no longer a mere abstract concept. Decolonisation is now a fundamental policy and regulatory imperative that is heavily centred on, among other things, the land question and debates around the historical as well as present-day use of indigenous cheap and unskilled labour in underpaid sectors of industry –particularly the mining sector. During the colonial era, as the mining industries in South Africa and Namibia expanded, a substantial number of migrant labourers and local workers entered the mines. To safeguard these mineworkers' legal rights, labour laws were passed. Despite the implementation of such labour laws, regular strikes were a feature of the mining industries in South Africa and Namibia at the time. In the post-colonial dispensation, the South African mining industry has been characterised by numerous strike actions, while in Namibia, widespread dissatisfaction with working conditions has been noted. This raises the question of whether or not South Africa and Namibia have made progress in defending mineworkers' labour rights. This question is critical when viewed through the lens of a post-colonial society governed by a constitutionalised labour law framework. While there has arguably been a noticeable improvement in mineworkers' employment conditions, labour-related inequities continue to characterise the mining industries in South Africa and Namibia in the post-colonial era. Profiteering, capitalism, safeguarding the security of tenure of foreign mining corporations, and the persistent need to ensure the ease of doing business in the mining sector appear to take precedence over defending mineworkers' rights. Thus, this article explores the labour rights discourse developed by South African and Namibian mineworkers, as well as the applicable labour legislation. A strong case is made for reconsidering the extent to which South African and Namibian labour laws have been decolonised. This is done in a manner that is attentive to investment security and sustainable growth of the mining sector in the two countries as well as the realisation of African mineworkers' fundamental labour rights.

1 INTRODUCTION

Despite its distributive objectives and arguable philosophical foundations, contemporary labour law appears to be failing to fully redress colonially-induced injustices in labour-related aspects of the mining sector. As a result, there is a need to refocus the study of labour-related aspects of mining in South Africa and Namibia by addressing what happens when the existing labour law framework does not fully address historically-rooted injustices, and instead favours business interests and profiteering. It appears that mining industry investors have become the drivers of the law, supplanting constitutional imperatives, the decent work agenda driven by international law, core labour standards, indigenous laws and subaltern African epistemologies relevant to labour relations on the continent. It must be appreciated that labour regulation in South Africa and Namibia cannot be conceptualised outside of a concise understanding of the historical, socio-political and economic contexts informing the formulation of labour laws in the two countries.[1] It is critical to note that, in the post-independence era, labour regulation has arisen as a critical concern in the mining sectors of South Africa and Namibia. A historical overview of labour regulation in the Southern African Development Community (SADC) provides a more comprehensive picture of how capital/business-controlled political and economic forces in SADC have shaped labour relations in mines. The polarised character of the region's past and the present domination of political and economic forces have made decolonising labour regulations a complex and contentious issue.[2]

Various economic sectors in South Africa and Namibia (for example, the mining industry, banking and financial sectors, retail sectors, employment sector, among others) have had to deal with the postcolonial repercussions of injustices orchestrated by the colonial and/or apartheid regimes. Affirmative action measures focusing on transformation, nationalisation policies and movements such as the controversial (as well as racially polarising) "#feesmustfall" and "#Rhodesmustfall" have aimed at redressing colonial injustices in labour relations in the two countries. However, from the perceived view that not enough has been done (from a legal, socio-political and economic level) to empower indigenous mineworkers (who are the focal point of this article), endless calls continue to be advanced for the decolonisation of the regulatory, socio-political, religious and economic spheres in South Africa and Namibia. Endless strike actions in South Africa's mining sector, highlighted by the tragic Marikana Lonmin Mine killings during an unprotected strike, give urgency to such calls. It should be noted that all of these developments are largely informed by polarised views: on the one hand, they are informed by business-oriented capitalist ideologies that define the current labour relations regime in South Africa and Namibia; on the other hand, a radical socialist ideology is underpinned by an arguably

---

1 Pelders and Nelson "Living Conditions of Mine Workers From Eight Mines in South Africa" 2019 36(3) *Development Southern Africa* 265–282.

2 Botha and Fourie "Decolonising the Labour Law Curriculum in the New World of Work" 2019 82 *THRHR* 177.

"economically devoid" ideology for decolonising the two countries' current labour law regimes.

This article emphasises the importance of having a labour law regime that promotes the recognition of mineworkers' rights and interests in South Africa and Namibia. The labour laws affecting the mining sector in the two countries are thus scrutinised in order to determine their adequacy for improving the welfare of mineworkers in the post-colonial era. This is owing to the fact that the history of labour legislation and its impact on the mining sector in South Africa and Namibia have been marked by inequalities and resource exploitation by corporates (mostly foreign-owned investors) that provide minimal benefits to local communities, but which place a strong emphasis on profiteering and securing businesses' security of tenure, as well as the ease of doing business, rather than on empowering workers.[3]

The language of the labour laws in the two countries has not *per se* been reinforced by empowerment and/or redistributive terms but rather features general conceptualisations of creating employment relationships that do not pay particular attention to the need to transform the livelihoods of mineworkers substantially and sustainably. Workers' rights have frequently been provided for by law without particular attention being paid to their accessibility/realisation in a neoliberal economic order that arguably thrives on exploiting cheap labour in the mines (through low wages, poor working conditions, limited workplace inspections, long working hours, poor occupational health and safety, minimal skills transfer and limited participation of locals at managerial level and in black economic empowerment and employee share-ownership schemes, among other issues).

Mineworkers have historically been the weaker party in the employment relationship and have long been overlooked by mining businesses as an important and/or substantial stakeholder.[4] Workers (particularly mineworkers) are emerging as essential stakeholders in businesses as a result of the introduction of human rights, individual and collective labour rights, core labour standards, and good corporate governance principles. This has resulted in repeated requests for equitable salaries (not just minimum wages), skills transfer, and an increase in the proportion of indigenous people in mine management, among other significant issues. Observing occupational health and safety requirements and ensuring effective individual and collective bargaining, in addition to consultations and negotiations on changing or improving employment circumstances, have now become critical issues in mining labour relations and practices.[5]

---

3 Massey "Class Struggle and Migrant Labour in South African Gold Mines" 1983 17(3) *Canadian Journals of African Studies* (*CJAS*) 429–448. See also Harington, McGlashan and Chelkowska "A Century of Migrant Labour in the Gold Mines of South Africa" 2004 *The Journal of the South African Institute of Mining and Metallurgy* (*JSAIMM*) 65.

4 Pelders and Nelson 2019 *Development Southern Africa* 265–266.

5 Tshoose "Placing the Right to Occupational Health and Safety Within a Human Rights Framework: Trends and Challenges for South Africa" 2014 47(2) *The Comparative and International Law Journal of Southern Africa* 276–296.

Thus, from the perspectives of both sustainable economic growth (as inspired by the fourth and fifth industrial revolutions) and the decolonisation agenda, there is an obvious need to modify labour laws in order to eradicate poverty and poor labour practices in South African and Namibian mines. There may be a need to reformulate labour laws in the two countries in order to match them with the decent work, decolonisation and transformation agendas of these societies. Such transformation must broaden workers' power bases so that they emerge as significant stakeholders in a company's operations rather than just as vehicles of corporate capitalist and/or profiteering agendas. Human rights, labour rights, core labour standards and constitutionalism should inform a renewed emphasis on decolonising labour legislation while promoting corporates' business interests, security of tenure and best practices.[6] The objective implied in this method is to ensure that mineworkers are not exploited while corporations reap substantial returns from natural resource extraction in South Africa and Namibia. The larger aim of achieving a win-win strategy to exploiting natural resources in South Africa and Namibia will be ensured by a reform of labour laws; win-win situations in mining can also be realised by negotiating and drafting strong mining agreements or contracts. Owing to a lack of competence in Africa in negotiating and structuring win-win mining contracts, additional measures must be put in place to defend mineworkers' best interests. Emphasis is placed on labour laws as they originate from non-legal processes that include socio-political and cultural issues. Labour laws impacting the mining sectors in both nations are thus scrutinised in order to assess their relevance to the decolonisation objective in the twenty-first century.

2 HISTORICAL CONTEXT OF LABOUR PRACTICES IN MINES DURING THE APARTHEID ERA

The discovery of extractive mineral resources (particularly gold) in the Transvaal region of South Africa around the year 1886 triggered an immediate demand for cheap labour in the newly constructed mines.[7] Thus, at this time, labour practices were characterised by the exploitation of inexpensive labour from African indigenes. Migratory labour from SADC countries (mainly Malawi, Lesotho, Zambia and Zimbabwe) provided a significant pool of workers with poorly protected and promoted rights.[8] Mining corporations had little trouble attracting desperate mineworkers ready

---

6 Botha and Fourie 2019 *THRHR* 265. See also Arthurs "Labour Law After Labour" in Langille and Davidov (eds) *The Idea of Labour Law* (2011) 16; and Rycroft and Le Roux "Decolonising the Labour Law Curriculum" 2017 38(3) *Industrial Law Journal* 1473.

7 Stewart *Labour Time in South African Gold Mines: 1886–2006* (doctoral thesis, University of the Witwatersrand) 2012; see also Ramela *The Evolution of Occupational Structures in South Africa 1875–1911: An Analysis of the Effects of the Resource Curse and Blessing* (master's thesis in Economics, Stellenbosch University, South Africa) (2018); and South African History Online "Grade 8–Term 2: The Mineral Revolution in South Africa" (2015) sahistory.org.za (accessed 2022-12-12).

8 Vosloo "Extreme Apartheid: The South African System of Migrant Labour and Its Hostels" 2020 34 *Image & Text: A Journal for Design, University of Pretoria* 1–33. See also Massey 1983 *CJAS* 429; Delius "The History of Migrant Labour in South Africa (1800–2014)" (2017) https://doi.org/10.1093/acrefore/9780190277734.013.93 (accessed 2022-12-12).

to earn a living at any cost. It is hardly surprising, then, that by 1894, over 100 000 African indigenes (dubbed "Wenela" workers) were employed in Johannesburg's gold mines.[9] This meant that working conditions remained appalling and earnings remained extremely low. Because of the poor working conditions and extremely low wages, the majority of gold mine personnel were from other countries in the SADC region, with few South African indigenes interested in working in mines.[10] The abundant foreign cheap labour allowed mine owners to offset their "increased" production costs.

As a result, cheap labour became an important component of the mining industry, driving mine owners to form the Native Labour Association (NLA) in 1896.[11] The NLA's main objectives were to recruit cheap labour and to standardise wage levels in all South African mines. The NLA served as the foundation for establishing a monopoly of cheap labour sources.[12] Cheap labour from migrants and a few indigenous South Africans was viewed as a source of reserve employees who could be relied on during periods of economic boom when demand for labour increased, and who could be discarded during times of recession at little or no extra expense to the employer. This manner of exploiting cheap labour led the 1955 Tomlinson Commission to point out:

> "The elastic source of labour helps to increase the flexibility of the South African economic system. In periods of prosperity and boom conditions it serves as a medium to obviate relative scarcities of unskilled labour or to limit their intensity, while during depression, the labour supply shrinks automatically. For the industrialist and businessman, the additional labour signifies that the elasticity of the labour supply is maintained, or at all events, is not greatly decreased, so that wages need not be raised at all, or not much to attract labour."[13]

However, Tanzania and Zambia called for an end to the use of cheap labour in mines in the 1960s.[14] The Anglo-American Corporation (AAC) then proposed a salary increase for mineworkers in 1962.[15] The AAC hoped that, by adopting this approach, it would be able to entice more South Africans to work in mines. The AAC's ideas were met with opposition by mine owners,

---

9 Maloka "Mines and Labour Migrants in Southern Africa" 1997 10(2) *Journal of Historical Sociology* 213–224.

10 Harington *et al* 2004 *JSAIMM* 65.

11 Schutte "The Origins of Wenela and Teba" (1977) https://www.uj.ac.za/library/information sources/special-collections/Documents/TEBA%20-%20The%20origins%20of%20 WENELA%20and%20TEBA.pdf (accessed 2022-12-12).

12 The foundation set by the NLA in turn led to the establishing of the Employment Bureau of Africa (TEBA) which at some point supplied in excess of half a million contract workers to South Africa's mines on an annual basis.

13 Massey 1983 *CJAS* 429.

14 Mendes, Bertella and Teixeira "Industrialisation in Sub-Saharan Africa and Import Substitution Policy" 2014 34(1) *Brazilian Journal of Political Economy* 120–138. See also Lemon "State Control Over the Labour Market in South Africa" 1984 *Freedom and Boundaries* 189–208; and Freund "Labour and Labour History in Africa: A Review of the Literature" 1984 27(2) *African Studies Review* 1–58.

15 Massey 1983 *CJAS* 429–434.

who opposed measures to eliminate the employment of cheap labour. As a result, the mining industry continued to rely on cheap labour.

A neo-Marxist study on southern Africa predicted that pre-capitalist wealth accumulation mechanisms would be integrated into the postcolonial capitalist sector.[16] This has proven to be a reality, as the majority of indigenous African miners now employed by neoliberal mining companies barely make ends meet. This subsistence model based on labour in capitalist-controlled firms has its roots in colonial business and labour laws that pushed young Africans to work in settler-controlled mines in exchange for meagre wages. Workers were paid wages commensurate with the average cost of reproducing their labour power. As is the situation in the contemporary labour relations setting on mines, anything that a mineworker generated in addition to the value of their earnings would accrue to the mine owner/capitalist.[17] This surplus then serves as the foundation for capitalist accumulation through reinvestment or, in some cases, ostentatious expenditure. As a result, any mechanism aiming at exogenously lowering the cost of production, which is frequently carried by impoverished mineworkers, has typically met with capitalist opposition. This is owing to the fact that lower manufacturing costs mean capitalists give workers much lower wages while generating enormous profits. It is no surprise, then, that the mining industry has been marked by persistent labour unrest over poor working conditions and low salaries.

The bulk of mineworkers in apartheid South Africa and Namibia were paid approximately 150 rands (150 Namibian dollars) per month in 1977. This figure remained well below the subsistence wage of 217 rands (217 Namibian dollars) "Household Effective Level" for African families at the time.[18] This pattern of remuneration prompted some scholars, such as Arrighi, to suggest that in southern Africa, a conventional wage for mine employees is fixed to the subsistence needs of a solitary worker.[19] Arrighi argued that

> "[t]he real wage rate came to be customarily fixed at a level that would provide for the subsistence of a single worker while working in the capitalist sector and a small margin to meet the more urgent of cash requirements of his family (which continued to reside in the peasant sector)."[20]

It is not surprising, then, that most mineworkers in South Africa and Namibia have been paid low wages for almost 60 years.[21] Furthermore, almost 90 per

---

16 Williams and Satgar (eds) *Marxisms in the 21st Century: Crisis, Critique and Struggle* (2013) 220. See also Satgar (ed) *Capitalism's Crises: Class Struggles in South Africa and the World* (2015) 20, 211; and Satgar (ed) *The Climate Crisis: South African and Global Democratic Eco-Socialist Alternatives* (2018) 70, 168.

17 Massey 1983 *CJAS* 429–434. See also Hofmeester and De Zwart (eds) "Colonialism, Institutional Change, and Shifts in Global Labour Relations" (2018) oapen.org (accessed 2022-12-11).

18 Massey 1983 *CJAS* 429–434.

19 Arrighi "Labour Supplies in Historical Perspective: A Study of the Proletarianisation of the African Peasantry in Rhodesia" 1970 6(3) *Journal of Development Studies* (*JDS*) 200.

20 Arrighi 1970 *JDS* 200.

21 Massey 1983 *CJAS* 429–434.

cent of African employees were employed on short-term contracts at mines in South Africa and Namibia.[22] The underlying assumption by mining companies in this contract-labour regime was that workers would find it difficult to organise because they were constantly hired and dismissed. The apartheid labour regulation regime prohibited migrant mineworkers from working for more than two years at a time, whereas indigenous South African mineworkers could not work for more than 18 months without returning home.[23] Because workers were given nine-month contracts, mining turnover rates were always at 100 per cent every year.[24]

The colonial mining labour system also established a control mechanism through large-scale compound housing.[25] Through this housing system, employers could control workers both on and off the job. Because mineworkers were not permitted by law to establish houses at their workplaces, the large-scale compound system was employed as a way for mining companies to save operating expenses while increasing social control. This system was first used in South African diamond mines in the 1800s.[26] Under this housing regime,

> "[a]ll black workers were housed in the mines in large barracks-like hostels; entrance and exit were strictly controlled; and even the most private of workers' activities were subject to surveillance. Before a worker could leave the job, for example, he had to go through a careful process of inspection in case he had purposely swallowed a diamond. One Tswana ex-miner who had worked in the Kimberley diamond mines at the turn of the century described the inspection process as follows: There was a law on the diamond mines that at the end of the job you had to go through detention for two weeks because they thought that you might have swallowed a diamond."[27]

Wilson stated that, in 1972, over 80 000 migrant workers were accommodated in large-scale compound houses, in different mines in South Africa.[28] In a single mine, large-scale compound houses accommodated almost 5 000 workers with each room containing no fewer than 16 persons at any given time. The large-scale compound houses were not *per se* meant to control theft of minerals. Instead, they were intended to suppress and diffuse mineworker unrest. Mineworkers were thus exploited in search of profits for mine owners or companies, as evidenced by the history of labour practices and relations during the colonial era. This prompted resistance from mineworkers as they became confrontational and/or combative, resulting in numerous strikes and riots as well as contract terminations at

---

22 Crush, Ulicki, Tseane and Van Veuren "Undermining Labour: The Rise of Subcontracting in South African Gold Mines" 2001 27(1) *Journal of Southern African Studies* 5–31. See also Kenny and Bezuidenhout "Contracting, Complexity and Control: An Overview of the Changing Nature of Subcontracting in the South African Mining Industry" 1999 *JSAIMM* 186.

23 Lucas "Mines and Migrants in South Africa" 1985 75(5) *The American Economic Review* 1094–1108.

24 Massey 1983 *CJAS* 429.

25 Bezuidenhout and Buhlungu "From Compounded to Fragmented Labour: Mineworkers and the Demise of Compounds in South Africa" 2011 43(2) *Antipode* 237–263.

26 Massey 1983 *CJAS* 430.

27 *Ibid*.

28 Wilson *Migrant Labour* (1972) 3 11.

steadily higher rates. The 1971 Ovambo strike in Namibia is thought to have ignited the strikes and riots in South African and Namibian mines.[29] The Ovambo strike, which began in November 1971, was primarily a protest against the mines' unfair contract labour structure. Following the Ovambo strike, 50 other mine strikes and riots were recorded over a three-year period. These strikes and riots occurred primarily at the Sover Mine in South Africa's Cape region.[30] The exploitative conditions in South Africa's mines prompted Malawi's late President, Kamuzu Banda, to prohibit the transfer of migrant labour to South Africa's mines in 1974.[31] Mozambique followed suit in the same year, following the dethronement of the Caetano government in Portugal.[32] These developments marked the beginning of a rapid change in the political paradigm as most countries in the SADC region became independent. There was great expectation that independence would result in considerable improvements in labour relations and procedures in South African and Namibian mines. Nonetheless, even after several years of independence, some mineworkers continue to live in compounds, are subjected to hazardous working conditions, and are paid inadequate wages, among other things. Post-independence labour laws have been crafted so as to promote profiteering and minimal gains for impoverished mineworkers. This state of affairs has been justified by arguments to the effect that mining is capital intensive, hence the need for mining corporations not to be subjected to regulatory rigidity, a development that would be likely to lead to capital flight. The argument is that it is preferable to encourage ease of doing business and tenure security for "much needed" international mining investors who will create jobs for locals. However, in an era when corporate social responsibility, corporate citizenship, good corporate governance, and human rights protection are key fundamentals in doing business, questions arise about the benefits of the current labour law regimes in South Africa and Namibia for traditionally exploited mineworkers. The next section of this article therefore explores the labour regulation regimes in the two countries and points out why they may not be of much benefit to mineworkers. The related challenges posed by the current nature of labour laws are set out.

3 THE SOUTH AFRICA AND NAMIBIA LABOUR LEGAL FRAMEWORK AND THE CURRENT CHALLENGES

Namibia and South Africa were both ruled by apartheid, and therefore they shared regulatory frameworks in a variety of sectors, including labour legislation. This section discusses the labour rules that affect the mining

---

29 Bauer *Labour and Democracy in Namibia, 1971–1996* (1998) 18–40. See also Sharp *Waging Nonviolent Struggle: 20th Century Practice and 21st Century Potential* (2005) 205–215.

30 Massey 1983 *CJAS* 433–434.

31 Daimon "Settling in Motion: Nyasa Clandestine Migration Through Southern Rhodesia Into Union of South Africa: 1920s–1950s" (undated) https://www.wider.unu.edu/sites/default/files/Daimon%2C%20Anusa_Paper.pdf (accessed 2022-12-11).

32 Wilson "Minerals and Migrants: How the Mining Industry Has Shaped South Africa" 2001 130(1) *Daedalus* 99–121.

industry. The key issues of such legislation are highlighted in order to demonstrate that there is still work to be done in decolonising labour laws in South Africa and Namibia.

3 1 South Africa

In South Africa, labour law has been viewed as a critical component of the post-apartheid era.[33] There was great hope among African indigenes that the post-apartheid era would be marked by the prevalence of social justice based on a transformational constitution and its underlying values. This is why the recent decision by South Africa's Constitutional Court to jail former President Jacob Zuma for 15 months for failing to appear before a Commission of Inquiry into corruption was met with violent protests. However, it is highly debatable in a decolonising society underpinned by African value systems such as *ubuntu* that, in the name of "constitutionalism", an elderly liberation hero should be sentenced to prison by the country's apex court, the Constitutional Court, with no possibility of appeal.[34] The point here is not to advocate for the former head of state's non-accountability for violating the laws of the country, but to determine if his imprisonment was consistent with the underlying principles of *ubuntu* in a decolonising South Africa. The realisation that the modern justice system and the accompanying legislative framework still echoes with colonial and/or apartheid "injustices" could have fuelled the rage of some South Africans. While not supporting illegalities or unbecoming behaviour, African traditions, and value systems do not advocate for the humiliation of elders in the manner in which former President Jacob Zuma was treated. Dialogue could have broken the impasse that resulted in the former president's conviction. The imprisonment of former President Jacob Zuma raises fundamental concerns about whether the post-apartheid era in South Africa is characterised by decolonised laws. The fixation with jail terms is not African; rather it is Eurocentric. African value systems usually prioritise rehabilitation over humiliating and insulting elders. The imprisoning of former President Zuma, however divisive, establishes a foundation for examining the labour regulations that govern the mining sector in South Africa and Namibia.

Apart from the Constitution,[35] which seems to be broad but entails numerous rights that on the face of it are arguably not entirely accessible to the Black majority in the country, the Basic Conditions of Employment Act[36] (BCEA), the Labour Relations Act[37] (LRA), the Employment Equity Act[38]

---

33 Pons-Vignon and Anseeuw "Great Expectations: Working Conditions in South Africa Since the End of Apartheid" 2009 35(4) *Journal of Southern African Studies* 883–899; Leibbrandt, Woolard, McEwen and Koep "Employment and Inequality Outcomes in South Africa" (undated) https://www.oecd.org/employment/emp/45282868.pdf (accessed 2021-12-10).

34 Secretary of the Judicial Commission of Inquiry into Allegations of State Capture, Corruption and Fraud in the Public Sector Including Organs of State v Zuma [2021] ZACC 18.

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

36 75 of 1997. See also the Basic Conditions of Employment Amendment Act 11 of 2002.

37 66 of 1995.

38 55 of 1998.

(EEA), the Occupational Health and Safety Act[39] and the Mine Health and Safety Act[40] regulate labour matters, and are thus applicable to labour relations in the mining sector. It is imperative to observe that regardless of the sizeable number of labour laws regulating the mining sector in South Africa, the sector has frequently registered a high number of protected and unprotected strike actions.[41] Among such strike actions was the regrettable Lonmin Mine strike, which resulted in the shooting of 22 mineworkers who were demonstrating for wage increases (the shooting has now been termed the Marikana massacre).[42] Such continual strike actions and riots in the mining sector indicate that the labour regulation regime in South Africa may not be aligned to the socio-political, cultural and economic context of the country. Perhaps the capitalist model that informed the apartheid regime still operates under the guise of a modern and supposedly progressive constitutional dispensation.[43] The labour laws appear to be failing to play their role in addressing the inequality gaps in the labour relations domain. The generally accepted argument by scholars such as Botha and Fourie has been that there has been a vast improvement in workers' rights and issues relating to health and safety in South Africa.[44] This theoretically permissible contention is attributed to the role that has been played by the National Union of Mineworkers, the Association of Mineworkers and Construction Union, and the Congress of South African Trade Unions in negotiating for improved workers' rights in post-apartheid South Africa. However, the reality remains that mineworkers are still subjected to unfavourable working conditions,[45] live in compounds/shanty towns,[46] and are subcontracted,[47] leading to meagre wages.[48] Artisanal miners remain unprotected by labour laws.[49] This is the same pattern that prevailed during the apartheid era.

---

39 85 of 1993.

40 29 of 1996.

41 Amnesty International "South Africa: Mining Gathering Must Confront Human Rights Violations" (2020) https://www.amnesty.org/en/latest/news/2020/02/south-africa-mining-gathering-must-confront-human-rights-violations/ (accessed 2022-12-10).

42 See Farlam, Hemraj and Tokota "The Marikana Commission of Inquiry: Report on Matters of Public, National and International Concern Arising out of the Tragic Incidents at Lonmin Mine in Marikana, in the Northwest Province" (Farlam Report) (31 March 2015) https://www.sahistory.org.za/archive/marikana-commission-inquiry-report-matters-public-national-and-international-concern (accessed 2022-10-12). See also South African History Online "Marikana Massacre 16 August 2012" (undated) https://www.sahistory.org.za/article/marikana-massacre-16-august-2012 (accessed 2022-12-11).

43 Plagerson and Stuart "Social, Economic and Environmental Policy Complementarity in the South African Mining Sector" 2018 UNRISD Working Paper, No 2018–7, United Nations Research Institute for Social Development (UNRISD), Geneva. See also Lane, Guzek and Van Antwerpen "Tough Choices Facing the South African Mining Industry" 2015 115 *JSAIMM* 471.

44 Botha and Fourie 2019 *THRHR* 191.

45 International Labour Organisation "South Africa Could Do More for Miners, says ILO Mining Specialists" (2012) https://www.ilo.org/global/about-the-ilo/newsroom/news/WCMS_187783/lang--en/index.htm (accessed 2022-12-10).

46 Pelders and Nelson 2019 *Development Southern Africa* 265–282.

47 Benya "Women, Subcontracted Workers and Precarity in South African Platinum Mines" 2015 48(1 & 2) *Labour, Capital and Society* 68–91.

48 Heiberg "South Africa's NUM Union Seeks 15% Wage Hike From Gold Miners and Eskom" (1 April 2021) Reuters (2021) https://www.reuters.com/article/uk-safrica-mining-wages-

In the case of *Naptosa v Minister of Education, Western Cape*,[50] the court observed that labour law, although a complex and significantly polarising subject, was premised on a socio-political and economic compromise between employers and organised labour. The idea implicit in this approach is to protect the constitutionally-enshrined right to fair labour practices. Other rights that must be protected include the rights to privacy, equality, freedom of association and freedom of expression. However, in the mining sector, such rights are not easily accessible, as was illustrated in the case of *Nhlapo v Sasol Mining Ltd.*[51] In this case, the recognition of mineworkers' right to strike and to be protected by trade unions as well as the right to health and safety were in issue. The workers had embarked on an unprotected strike by sitting in, underground, at the end of their shifts. Mine safety prevented additional shifts from going underground. The shop steward leaders engaged with the striking workers and headed the calls to surface. However, the management proceeded to dismiss the striking workers. The court held that while the workers' misconduct was serious, the dismissals were inappropriate. It is worth asking what prompted the mineworkers' dismissal when an *ubuntu* approach would have placed emphasis on engagement that served the best interests of a transforming society. The management in this case made no effort to engage with the recognised workers' shop stewards. The South African LRA regards unprotected strikes outside of section 64 as being unlawful and thus as demanding a disciplinary sanction.[52] However, this collective bargaining system significantly weakens the worker and contributes to low wages. Mineworkers will be reluctant to undertake strike actions to cripple the employer's operations in order to achieve the objectives of the strike action. Owing to the language of the LRA in item 6 of Schedule 8, to the effect that an unprotected strike constitutes misconduct, employers have often used this provision as ammunition for dismissing striking workers.[53]

The position adopted by the courts is also at times not helpful to the noble cause of impoverished mineworkers to get fair wages. For example, in the case of *National Union Mineworkers obo Shayi v Sishen Iron Ore Company (Pty) Ltd*,[54] the court held that the decision to dismiss workers who went on an unprotected strike that led to a loss of 140 million rands by the employer

idUSKBN2BO4ID/ (accessed 2022-12-10). See also Zenda "Pay Us Before We Die: Ex-South African Miners Plead" (2021) https://www.fairplanet.org/story/%E2%80%9Cpay-us-before-we-die%E2%80%9D-ailing-ex-south-african-miners-plead/ (accessed 2022-12-10).

49 World Bank 2020 *State of the Artisanal and Small-Scale Mining Sector* (2020) 17–34; World Bank "Better Working Conditions Can Improve Safety and Productivity of Artisanal and Small-Scale Miners Around the World" Press Release No. 2021/145 (4 May 2021).

50 [2000] ZAWCHC 9; 2001 (2) SA 112 (C).

51 [2019] ZALC JHB 260.

52 See Item 6 of Schedule 8 of the LRA.

53 *Association of Mineworkers and Construction Union obo Rantho v Samancor Western Chrome Mines* [2021] 3 BLLR 236 (LAC). In this case mine workers participated in two unprotected strike actions. The employer, Samancor Western Chrome Mines sent text messages to workers to return to work. The workers complied but were all subjected to a disciplinary action and subsequently dismissed on account of Item 6 of Schedule 8 of the LRA.

54 [2017] ZALCJHB 271.

was fair. The court was of the view that the employer had reasonably discharged the onus of demonstrating that the dismissal was fair as provided for in section 192 of the LRA. It must be questioned whether the fairness alluded to extends to addressing matters of inequality that have characterised the mining sector in South Africa. Often, the operational requirements and losses suffered by the employer take precedence. There is therefore nothing in the language of the LRA or related legislation that places significance on the transformative aspect of the country's labour laws. The courts also appear not to contextualise the inequalities characterising labour relations in the mining sector. The common law must be seen to close the gap that exists in legislation insofar as transformation and decolonisation are concerned. However, owing to the fact that the labour laws were never drafted from an Afrocentric context, the disregard of mineworkers' genuine interests will continue to be dismissed on the grounds of their failure to promote free market policies and/or the neoliberal economic agenda and its policies.

The fact that the LRA provides for social justice in section 1 and at the same time provides for disciplinary sanctions against workers who engage in unprotected strikes is a paradox. Although it is accepted that workers' rights are not absolute, as they have to be balanced with the rights of the employer and third parties, there is a need to understand that South African society is underlined by inequalities that labour relations deeply entrench. Deliberate efforts must thus be made to close the gap between these inequalities. This is why the South African Constitution was drafted with the intent, among other things, of addressing inequalities in the country. The South African Constitution, in principle, seeks to address injustices promoted by the apartheid regime and aims at realising transformation in society. To this end, section 23(1) provides for the right to fair labour practices. The same Constitution further provides for the intrinsic rights to dignity,[55] equality[56] and fairness.[57] However, the Constitution is not an instrument of direct recourse with regard to labour matters, as it is envisaged that labour legislation ought to give effect to section 23(1) of the Constitution.[58]

Although labour law now affords indigenous African workers' rights such as freedom of association, organisation and the right to strike, incidents such as the Marikana massacre raise questions about the substance of such rights. It appears that workers' rights to organise must be subject to corporate interests. Further, affirmative action and black economic empowerment language is not expressly retained in all labour laws and is limited to the EEA and the Broad-Based Black Economic Empowerment Act

---

55 S 10 of the Constitution. See also the Preamble of the Universal Declaration for Human Rights (UNGA 217 A (III) (1948)); Steinmann "The Core Meaning of Human Dignity" 2016 19 *Potchefstroom Electronic Law Journal* 3–34.

56 S 9 of the Constitution.

57 Kapdi, Sulaiman and Hofmeyr "The Standard of Fairness in South African Law – A Case for the Petroleum Industry" (2017) https://www.lexology.com/library/detail.aspx?g=b2951f76-904a-4bd8-aa42-942e27fd2b10 (accessed 2022-10-10).

58 *Chirwa v Transnet Limited* [2007] ZACC 23; 2008 (4) SA 367 (CC); 2008 (3) BCLR 251 (CC); [2008] 29 ILJ 73 (CC).

(BBBEA).[59] Black Economic Empowerment (BEE)[60] has been significantly welcomed in South Africa. Furthermore, in the case of *Kievits Kroon Country Estate (Pty) v Mmoledi*,[61] the court held that workers' cultural beliefs must be protected. However, traditional healers' "medical" certificates are not yet recognised in proving the existence of illness.

The BEE approach gives impetus to the Constitution's section 9(2), which provides for adopting special measures to ensure equality in society. Inequality was characterised in the case of *Leonard Dingler Employee Representative Council v Leonard Dingler (Pty) Ltd*[62] to include discrimination of a worker on racial grounds. It must be understood that BEE and measures such as affirmative action seek to ensure full and equal enjoyment of rights.[63] However, whether contemporary South African society reflects an equal society or is regressing further, especially when the effects of COVID-19 are factored into the equation, is questionable.

Positives have nonetheless been realised insofar as male chauvinistic tendencies leading to sexual harassment are concerned.[64] Domestic workers have been offered protection in the Constitution, the LRA, the EEA and the BCEA to the extent that they fall into the definition of "employee".[65] However, the majority of workers in the informal sector are still excluded from express protection by the labour laws of South Africa. While they may satisfy the rebuttable presumption of the employment test set out in the LRA, the Skills Development Act,[66] the BCEA, and the Code of Good Practice: Who Is an Employee,[67] there is no evidence in the existing legislation that there are deliberate efforts to promote and protect the rights and interests of this category of workers. It is evident that independent contractors and self-employed persons are excluded from the ambit of the law. It must be observed that while tests such as the supervision-and-control test, dominant control test, organisation or integration test and the economic-dependency test have been introduced to protect workers, there is a greater need to protect workers in the post-apartheid era. Radical changes in the world of work in the twenty-first century and post-apartheid South Africa have led to employers structuring employment relations in an informal manner. Informal working arrangements aimed at cutting the costs of doing business and

59 53 of 2003.

60 Kruger "The Impact of Black Economic Empowerment (BEE) on South African Businesses: Focusing on Ten Dimensions of Business Performance" 2011 15(3) *Southern African Business Review* 207; Warikandwa and Osode "Regulating Against Business 'Fronting' to Advance Black Economic Empowerment in Zimbabwe: Lessons from South Africa" 2017 20 *Potchefstroom Electronic Law Journal* 2–43.

61 [2013] ZASCA 189.

62 (1998) 19 ILJ 285 (LC).

63 *Minister of Finance v Van Heerden* 2004 (11) BCLR 1 125 (CC).

64 *Campbell Scientific Africa (Pty) Ltd v Simmers* (2016) 37 ILJ 116 (LAC). See also *K v Minister of Safety and Security* [2018] ZAECPEHC 82; [2019] 1 All SA 415 (ECP); and s 60 of the EEA.

65 Wiego and Informality Project "Domestic Workers' Laws and Legal Issues in South Africa" (2014) http://www.wiego.org/sites/default/files/resources/files/Domestic-Workers-Laws-and-Legal-Issues-South-Africa.pdf (accessed 2021-12-11).

66 97 of 1998.

67 Issued in terms of s 200A of the LRA, GN 1774 in GG 29445 of 01-12-2006.

maximising profits have led to workers being deprived of basic statutory rights.

The Fourth Industrial Revolution (4IR) has also brought about technological changes to the organisation of work, which has, in the process, created new types of workers. As such there is a need to explore further the scope of labour laws and/or their boundaries[68] insofar as the mining sector is concerned. Changes brought about by 4IR have also impacted the mining sector.[69] Mechanisation is likely to change the manner in which mineworkers are controlled and how they work. Furthermore, a number of mineworkers are likely to be replaced by machines, causing further inequalities in South African society. There is therefore a need to revise labour laws to address related and anticipated challenges to mitigate the unemployment that could arise from 4IR, as well as current inequalities in South African society.

3 2 Namibia

Namibia's mining industry carries a high risk of industrial accidents owing to the nature of mining operations.[70] As such, the country's post-apartheid labour laws ought to be crafted in a manner that ensures workers' safety at the workplace. The right to safe and healthy working conditions is crucial at the national, regional and international levels. The African Charter emphasises the right to work under equitable and satisfactory conditions.[71] The International Labour Organization's (ILO) Convention on Health and Safety in Mines[72] requires that national legislation should provide for safety and health in mines and frequent inspections by designated labour inspectors. Sadly, the regulation of health and safety in the Namibia mining industry has been neglected.

Health and Safety in Namibia's mining industry was initially regulated by the Mines, Works and Minerals Ordinance.[73] After the enactment of the Labour Act,[74] the Schedule to the Act, in terms of section 116, repealed section 93 of the Ordinance and those parts of the Ordinance pertaining to the health and safety of workers employed in or in connection with mining and prospecting operations. Section 139 read in conjunction with Schedule 2 of the Minerals Act[75] repealed the entire Ordinance except for provisions relating to the appointment of, and the powers, duties and functions of, the

---

68 *Uber South Africa Technology Services (Pty) Ltd v National Union of Public Service and Allied Workers* (*NUPSAW*) [2018] 4 BLLR 339 (LC).

69 Deloitte "The Future of Mining in Africa: Navigating a Revolution" (2018) https://www2.deloitte.com/content/dam/Deloitte/za/Documents/energy-resources/za_Future_of_mining.pdf (accessed 2022-12-12) 8.

70 Alberto *A Critical Analysis of the Impact of the Namibian 1992 Labour Act on the Health and Safety Regulation in the Namibian Mining Industry* (master's thesis, University of Pretoria) 2017.

71 Art 15 of the Organization of African Unity's African Charter on Human and Peoples' Rights CAB/LEG/67/3 rev. 5, 21 I.L.M 58 (1982). Adopted: 27 June 1981.

72 ILO Occupational Safety and Health Convention C155 (1981). Adopted 22/06/1981.

73 Mines, Works and Minerals Ordinance 20 of 1968.

74 6 of 1992.

75 33 of 1992.

Chief Inspector of Mines, and provisions relating to the safety and health of persons employed in the mines. The 1992 Minerals Act, unlike the 1992 Labour Act, sought to revive the 1968 Ordinance insofar as health and safety were concerned. Take note that the Minerals Act was passed after the Labour Act of 1992, which had earlier repealed all provisions concerning health and safety in the 1968 Ordinance. There is therefore a conflict of laws and confusion as to which law to follow. Such confusion can only favour the employer and not the worker.

Further laws were to be passed to govern the labour sector in Namibia. These include the 2004 Labour Act,[76] which was meant to repeal the 1992 Labour Act but never became fully operational. This implies that the 2007 Labour Act[77] now governs labour relations in Namibia. Health and Safety provisions of the 1992 Labour Act were imported into the 2007 Labour Act. Part XI of the 1992 Act imposes a positive duty on employers to ensure the health and safety of workers. The same language is retained in the 2007 Labour Act. The confusion informing the regulation of health and safety of employees at work in Namibia has resulted in the Ministry of Mines and Energy pointing out that the Health and Safety Regulations promulgated under Ordinance 20 of 1968 remain valid. However, the 1992 Labour Act provides otherwise, although the 1992 Minerals Act reinstates the 1968 Ordinance. There is no doubt that such confusion retards the effectiveness of protecting workers' rights in the mining sector. There is therefore a need to develop principled laws that effectively regulate health and safety in Namibia's mining sector. Such development can only be realised if decolonisation of the same laws is made a priority.

4 CALLS FOR DECOLONISATION

Decolonisation is a concept that has been debated for a long time and now extends to the potentially polarising calls for decolonising labour laws.[78] National labour laws have been "modernised" and now no longer carry an apartheid but rather a capitalist agenda.[79] Regulatory flexibility informed by the World Bank's ease-of-doing-business principles now characterises labour laws in the world.[80] The plausible principle underlying investor-friendly labour legislation is to attract investors, in certain cases at the expense of workers' welfare and best interests. The discriminatory apartheid labour laws have been substituted by modern laws that, on the face of it, "promote and

---

76 Labour Act 15 of 2004.

77 Labour Act 11 of 2007.

78 Botha and Fourie 2019 *THRHR* 177.

79 Freund "Labour Studies and Labour History in South Africa: Perspectives From the Apartheid Era and After" 2013 58(3) *International Review of Social History* 493–519.

80 Arvo "Labour Regulations Throughout the World: An Overview" World Bank Jobs Working Paper no. 16 (2018). See also Lee, McCann and Torm "The World Bank's 'Employing Workers' Index: Findings and Critiques – A Review of Recent Evidence" 2008 147(4) *International Labour Review* 416–432 https://www.ilo.org/public/english/revue/download/pdf/s6_notes_lee_mccann_torm.pdf (accessed 2022-10-10) 416; and Bakvis How the World Bank & IMF Use the Doing Business Report to Promote Labour Market Deregulation in Developing Countries (2006) https://library.fes.de/pdf-files/gurn/00171.pdf (accessed 2022-10-10).

protect" workers' rights. Questions are thus raised as to the tangible changes that such labour laws have brought post-independence. In particular, the labour laws largely reflect the Eurocentric narrative and not so much the Afrocentric view, which is underpinned by the *ubuntu* philosophy. It is thus questioned if the neoliberal-aligned labour laws embrace the collective African view and experience.

In light of African experiences and views, which are not expressly reflected in the labour laws in South Africa and Namibia, there is a need to interrogate how such laws promote inclusivity and the social and structural transformation agenda. It is thus critical to conceptualise decolonisation of labour laws in a manner that demands the formulation of laws that have due regard for indigenous norms and standards while embracing progressive Eurocentric narratives and related legal epistemologies. In this regard, there is a need to embrace a holistic conceptualisation of decolonisation that is socio-political, economic and discursive. It is in this regard that epistemological decolonisation assumes significance. It is driven by value systems such as *ubuntu*. This implies that the formulation of labour laws, as is the case with any other laws, is not relegated to a mere attempt to conceive of employer-employee relations from a contractual point of view but rather proceeds from a humane perspective. In other words, labour laws must be formulated from an Afrocentric perspective of what is humane. The idea here is that decolonised labour laws must be inclusive of the Afrocentric value systems and must not be Eurocentric and hegemonic.

Labour laws in contemporary South Africa and Namibia need reform to embrace humaneness (accentuated by *ubuntu*). This process of reform must be informed by the cross-cutting effects of labour law. Labour law extends or is connected to a vast array of laws such as international law, constitutional law, administrative law, corporate law, law of contract, and civil and criminal law.[81] The complex nature of labour law implies reforming it will have far-reaching effects on other laws in the two countries, as far as the decolonisation agenda is concerned. The need to decolonise labour laws assumes importance at a time when discourses around the 4IR agenda have reached a crescendo in the context of businesses suffering from COVID-19-induced economic shocks. Weak labour laws that are not decolonised will lead to massive unemployment and complicate the employment relationship between employer and worker.

Labour laws are no longer connected to their main objective of creating harmony between parties in an employment relationship. This is attributed to the fact that in contemporary society, workers have diminished labour and social protection. Furthermore, informal workers (for the purposes of this article, workers employed in the artisanal mining sectors often known as *makorokoza/zama zama* in SADC countries) have largely remained excluded from labour law recognition and protection.[82] This is because

[81] Botha and Fourie 2019 *THRHR* 177.

[82] ILO "International Labour Standards (ILS) 4.a2: Bringing the Unprotected Under the Law" The Regulatory Framework and the Informal Economy (19 March 2013) https://www.ilo.org/wcmsp5/groups/public/---ed_emp/---emp_policy/documents/publication/wcms_210446.pdf (accessed 2022-10-11).

postcolonial labour law has not aligned itself with aspirations to inclusivity in South Africa and Namibia. Businesses and governments are aligning themselves with a global capitalist agenda that has ushered in a global apartheid agenda.[83] This has led to laxity in labour regulation in pursuit of attracting investors and realising the 4IR agenda. This evident race to the bottom has improved mining companies' security of tenure but impoverished many African workers in the two countries.[84]

Labour laws now seem to adopt a market-oriented perspective of aggressive profiteering at all costs. This explains why Western and particularly Asian investors operating in the African mining industry often practise poor labour standards but are never brought to account for their unethical business practices. Special economic zones where labour regulation is lax or from which they are exempted have seen complaints being raised over poor labour conditions, debates over land expropriation and the prevalence of debates around lost revenue for governments.[85] Governments are advised by neoliberal economic institutions such as the Bretton Woods institutions (i.e., the International Monetary Fund (IMF) and the World Bank) not to overregulate labour matters for fear of stunting economic growth and prosperity. The free market and neoliberal economic policies championed by these institutions have led to more investors in the mining sector, more resource plunder of Africa's extractive natural resources and the realisation of minimal returns to mineworkers. This has occurred in the belief that labour laws must not be crafted so as to interfere with market forces/free market policies.

The application of the humanistic (*ubuntu*) philosophy, however, would focus on the protective agenda of labour law. It is generally accepted that workers (in this case mineworkers) are usually the weaker party in the employment relationship. This imbalance in power relations thus demands that deliberate measures be put in place to protect the worker who is vulnerable. Labour laws must be viewed as a mechanism to address labour violations in the workplace.[86] At the same time, labour laws must be seen to protect the interests of businesses from disruptions by organised workers and ensure the organisation of producing goods or services.[87] Regrettably, the narrative that labour is a market transaction appears to be overtaking the importance of protecting workers from the prevalent commodification of labour in the twenty-first century and from the substitution of labour as underlined by 4IR. While the ILO through its core labour standards and

---

83 Satgar "Neoliberalized South Africa: Labour and the Roots of Passive Revolution" 2008 41(2) *Labour Capital and Society* 38–69. See also Khor *Rethinking Globalisation: Critical Issues and Policy Choices* (2001) 1–141.

84 Andrews, Elizalde, Le Billon, Hoon Oh, Reyes and Thomson *The Rise in Conflict Associated With Mining Operations: What Lies Beneath?* (2017) https://cirdi.ca/wp-content/uploads/2017/06/Conflict-Full-Layout-060817.pdf (accessed 2022-10-11) 11.

85 UNCTAD "Special Economic Zones" (2019) https://unctad.org/system/files/official-document/WIR2019_CH4.pdf (accessed 2022-10-11) 128. See also ILO "Promoting Decent Work and Protecting Fundamental Principles and Rights at Work in Export Processing Zones" (2017) https://www.ilo.org/wcmsp5/groups/public/---ed_emp/---emp_ent/---ifp_seed/documents/publication/wcms_584474.pdf (accessed 2022-10-11).

86 Botha and Fourie 2019 *THRHR* 177.

87 *Ibid*.

decent work agenda discourages the commodification of labour, free market policies and the neoliberal economic agenda appear to promote a different objective. Workers are regarded as assets of the business and not hired parties. Evidently, this is why the legally enforceable rights and obligations of an employment contract are rarely respected by the employer. Labour laws and the market society that inform such laws regard labour as a commodity. These issues are discussed in more detail in the next section of this article.

4 1 The capitalism agenda in labour law

Karl Marx advanced the theory of capitalist exploitation.[88] This theory is succinctly amplified in English classical economists' economic doctrines (i.e., Adam Smith and David Ricardo)[89] as well as French physiocrat, Francois Quesnay.[90] Exploitation, according to Smith, Ricardo and Quesnay, consisted of producing surplus or net product over and above the cost of workers' subsistence and replacement of materials used up in production, and appropriation of that surplus by a class of non-productive owners of property (i.e., capitalists, landlords and their hangers-on, and the State). Exploitation under capitalism, according to Marx, has various forms. It is related to the capital-labour relation. The key features of the capital-labour relations are that the worker enters the market as free labour in that: a) the worker is unfettered by relations of legal ownership (slavery) or obligation (serfdom) to a particular capitalist and thus is free to sell their labour power to another buyer, and b) the worker is freed or separated from ownership of the means of production, and thus has nothing to sell but their labour power.[91] Labour power is thus a commodity that is freely traded. Exploitation thus consists of expropriating the value that is in excess of what the capitalist pays for the labour power of the worker and for materials.[92] In principle, the worker spends part of the working day producing the means of subsistence for themselves and their family, while the rest of the time is spent producing surplus value for the capitalist.[93] The surplus value (the difference between the product of labour and labour power) is regarded as "unpaid labour".[94] This is regarded as profit, interest or rent for the business and revenues for the State. Workers thus do not produce their own subsistence but are exploited as a class.

The post-apartheid labour laws in South Africa and Namibia have not adequately addressed capitalist exploitation in all its inherent forms. It is thus

88 Marx Das Kapital vol 1 s 2 (1867) 83. See also Lysandrou "The Market and Exploitation in Marx's Economic Theory: A Reinterpretation" 2000 24(3) *Cambridge Journal of Economics* 325–347.

89 Adam "An Inquiry Into the Nature and Causes of the Wealth of Nations" in Campbell and Skinner (eds) *The Glasgow Edition of the Works and Correspondence of Adam Smith 1976* (1776) 2. See also Siddiqui "David Ricardo's Comparative Advantage and Developing Countries: Myth and Reality" 2018 8(3) *International Critical Thought* 426–452.

90 Schachter "Francois Quesnay: Interpreters and Critics Revisited" 1991 50(5) *The American Journal of Economics and Sociology* 313–322.

91 Marx *Das Kapital* 83.

92 *Ibid*.

93 *Ibid*.

94 *Ibid*.

not surprising that regardless of the perceived "progressive labour laws" in South Africa and Namibia, social dominance of the capitalist class over the working class still persists. Surplus value is not shared with workers and, several years after independence, indigenous workers are still excluded from ownership of the means of production. Capitalists maintain a vice-like grip over the use of labour in production and continue to exploit workers in the mining industry. The constitutional aspiration of closing inequality gaps remains a pipe dream and very few mineworkers (if any) have become owners of mining companies in the two countries. This development is attributed to the fact that labour laws are not meant to be vehicles of transformation but a basis for ensuring a decent supply of labour to the capitalists.

The capital-class relation has been sustained by post-apartheid labour laws. Thus, it is apparent that labour laws have not been decolonised. If they had been decolonised, workers would have become owners of the means of production. Employee share-ownership schemes would have constituted part of the legal text of labour laws as would matters pertaining to skills transfer and the presence of indigenous people in management. These issues have often been relegated to black economic empowerment policies and laws that are regarded as not being friendly to free market policies, the neoliberal economic order and protection of capitalists' security of tenure.

4 2 Exclusion of *ubuntu* values in labour law

Labour laws in South Africa and Namibia have been drafted with a view to advancing a capitalist and not a worker-protection agenda. It is thus not surprising that African value systems and/or norms found in *ubuntu* have been significantly excluded from the language of the law and the formal legal system.[95] The net effect of this approach is that African legal systems, the attendant judicial aspects and subsequent laws formulated remain under-developed, and they consistently fail to address the need for societal changes and/or reducing inequalities.[96] The moral theory of *ubuntu*, which offers a different conception of dignity compared to the Eurocentric human rights concept, has often been ignored in the legal drafting process.[97] *Ubuntu* provides a basis for addressing contemporary moral dilemmas that is not commonly found in Western and individualistic concepts of human rights.[98]

---

95 *Gumede v President of the Republic of South Africa* 2009 (3) SA 152 (CC) par 11 and 16–18.

96 Mokgoro "Ubuntu and the Law in South Africa" 1998 4 *Buffalo Human Rights Law Review* 15; Paper first delivered at the first Colloquium on Constitution and Law held at Potchefstroom (31 December 1997) 2.

97 Devenish A Commentary on the South African Bill of Rights (1999) 623. See also Bennett "Ubuntu: An African Equity" 2011 14(4) *Potchefstroom Electronic Law Journal* 30; and Kunene *The Essence of Being Human: An African Perspective* Inaugural Lecture presented in Durban (1996) 10.

98 Mokgoro *Ubuntu and the Law in South Africa* (1998) 2–3. See also Mbigi and Maree *Ubuntu: The Spirit of African Transformation Management* (1995) 1–7; and *AZAPO v TRC* 1996 (4) SA 562 (C) 570 par 58.

Ubuntu's jurisprudential interpretation potentially takes cognisance of a multiplicity of inherent entitlements recognised by Africans, and which are consistent with human rights.[99] It provides direction on how to address contemporary justice-related disputes.[100] It is thus crucial to demonstrate the paradox of the express omission of *ubuntu* values in South African and Namibian labour laws, a matter that citizens of the two countries frequently lament.

Ubuntu is a complex concept to define. However, its substance is discerned from the lived experiences of people in a specified context. It is not a concept that can easily be well understood from a Western perspective. The West places significance on an individual's rights/interests whereas Africans place value on the individual's rights/interests in pursuit of the best interests of a group of individuals. *Ubuntu* thus constitutes a decisive aspect in influencing social behaviour/conduct.[101] *Ubuntu* is also depicted as a value system, the philosophical basis of which is morality, humaneness, personhood and humanity.[102] It emphasises group solidarity in pursuit of the collective best interests of all members of society (regarding the availability or non-availability of resources). The key principle with *ubuntu* is "*umuntu ngumuntu ngabantu*" (translated to imply that one can only be a person through others). *Ubuntu* thus has an anti-individualistic thrust, a position contrary to the individualistic approach of the West. According to Justice Mokgoro, *ubuntu*

> "is the very quality that guarantees not only a separation between men, women and the beast, but the very fluctuating gradations that determine the relative quality of that essence. It is for that reason that we prefer to call it the potential of being human."[103]

Applying *ubuntu* values to the formulation of labour laws would imply that group camaraderie, respect, compassion, conformity, humanistic orientation, collective unity and human dignity were the central social values of labour relations.[104] In order to realise an ordered society, *ubuntu* is crucial. To this end, labour laws must be formulated with the greater good of African communities' best interests in mind and not just capitalist objectives. The interests of mine owners cannot be the basis upon which the labour laws of a country are formulated. The collective good of society should be the premise upon which labour laws are formulated.[105] Sensitivity must be shown to the past experiences of mineworkers and workers in any other industry insofar as the need to develop laws that unyoke workers from modern "smart slavery" is concerned. Deliberate efforts have to be made to

---

99 Bilchitz, Metz and Oyowe *Jurisprudence in an African Context* (2017) 32. See also Broodryk *Ubuntu in South Africa* (doctoral thesis, University of South Africa) 1997.

100 Himonga, Taylor and Pope "Reflections on Judicial Views of Ubuntu" 2013 16(5) *Potchefstroom Electronic Law Journal* 67.

101 Mugumbate and Nyanguru "Exploring African Philosophy: The Value of Ubuntu in Social Work" 2013 3(1) *African Journal of Social Work* 82.

102 Mokgoro *Ubuntu and the Law in South Africa* 2–3.

103 Mokgoro *Ubuntu and the Law in South Africa* 3.

104 Mokgoro *Ubuntu and the Law in South Africa* 2–3.

105 *Ibid*.

embed *ubuntu* value systems in the labour laws of South Africa and Namibia. It is accepted that the two countries cannot go back entirely to the pre-colonial societal settings, but there is a need to "[r]e-establish[…] contacts with familiar landmarks of modernisation under indigenous impetus".[106] Deliberate efforts must be made to close the culture gaps between Western norms and standards, and African value systems, in order to realise just and fair labour laws. Failure to close the culture gap will leave many challenges in labour relations unresolved.

The need for holistic reform and dignifying of South African and Namibian labour laws thus requires a substantial repositioning of the current state of the two countries' value systems. Policymakers and lawmakers need to be inventive in "[f]inding and or creating law reform programmes, methods, approaches and strategies that will enhance adaptation to such unprecedented change".[107] If embraced, the central values of *ubuntu* could drive labour law reform and the far-reaching process of embedding *ubuntu* values in other existing laws in the two countries. *Ubuntu* might therefore be a vital cog in developing a reformed labour law regime and jurisprudence for South Africa and Namibia. This may in turn revive sustainable African values in pursuit of the broader process of an African renaissance.

5 RECOMMENDATIONS

Labour laws in South Africa and Namibia have not been decolonised. To achieve labour law decolonisation there is a need to decolonise the minds of Africans in general, including policymakers, technocrats and legal minds.[108] Such changes must be driven by the transformation of all levels of education from primary to tertiary levels.[109] More specifically, legal education must be transformed to accommodate African value systems. Legal practitioners and legal academics need to embrace decolonisation in practice and in the lecture room. Legal interns in law firms, and law students in law schools, must be trained to think critically insofar as deliberate efforts aimed at decolonising the South African and Namibian legal systems are concerned. Corporate governance principles must also embrace *ubuntu* as a fundamental component of doing business in the two countries. The King Reports on corporate governance, which are used in both countries, do reflect the significance of *ubuntu* in conducting business but the sections on corporate citizenship and corporate social responsibility in the area of labour law do not significantly reflect the implementation of *ubuntu*. Low wages, poor working conditions and living conditions for workers still characterise the mining sector in the twenty-first century. This needs to change drastically

106 *Ibid*.

107 *Ibid*.

108 Mamdani "Between the Public Intellectual and the Scholar: Decolonisation and Some Post-Independence Initiatives in African Higher Education" 2016 *Inter-Asia Cultural Studies* 68. See also Himonga and Diallo "Decolonisation and Teaching in Africa With Special Reference to Living Customary Law" 2017 *Potchefstroom Electronic Law Journal* 5.

109 Dladla "Decolonising the University in South Africa" in Nabudere (ed) *Afrikology and Transdiciplinarity: A Restorative Epistemology* (2012) 163.

to avoid civil strife such as the violent demonstrations and looting of July 2021 in South Africa.

The theory or philosophy of law (jurisprudence) must now be deliberately taught with a view to decolonising legal thinking in South Africa and Namibia. Law students, legal practitioners and legal academics must be challenged to address colonial injustices and not simply cosy up to Western theoretical constructs that do not align with the African context. There is a need to consciously problematise the labour law regime and matrix emanating from the colonial and apartheid eras. A lot of unlearning has to take place and must be premised on deliberate efforts to reform the curriculum. It should be regarded as a disgrace that over twenty years after the advent of democracy in South Africa and Namibia, theories of law from Western countries inform how jurisprudence is taught in twenty-first century Africa. Although there is no problem in appreciating what John Locke, Thomas Hobbes, Thomas Aquinas, Jeremy Bentham and Herbert Hart postulated in their theories from a Eurocentric perspective, there is a problem in making the same theories the basis for legal education in Africa. There is a need to engage with the writings of African jurists to usher in jurisprudential decolonisation. In this way, the thinking about the law and the manner of formulating labour laws, (among other laws) will be driven by an Afro-centred way of thinking. This context- and culture-specific approach to lawmaking is what has led to development in most Asian and Western countries.

Ubuntu as a value system must be deeply embedded in legal education, legal training during internships and articles of clerkship as well as legal practice. It cannot be acceptable that Roman-Dutch law constitutes the common law of South Africa and Namibia. It must be asked what is "common" to Africa about the common law that constitutes the indigenous laws of colonisers that became transplanted in African legal systems. The fact that legal systems have not been decolonised implies that inequalities emanating from the colonial and apartheid eras cannot be sufficiently addressed. Colonial injustices persist in labour laws and in other pieces of legislation, in South Africa and Namibia, as well as in the rest of Africa. It is thus imperative that the legal systems of the two countries (and other African countries) be decolonised to usher in substantive social justice.

6 CONCLUSION

Many mineworkers are still vulnerable in the world of work, including in the formal and informal sectors in South Africa and Namibia. Such workers remain vulnerable and without social protection. Thus, labour laws in South Africa and Namibia ought to be reformed by decolonising them in order to substantially empower mineworkers, often an extremely exploited group of workers. There is a need to ensure substantive socio-economic transformation in twenty-first century societies. Mineworkers have often worked and generated substantial profits for mining companies, yet they remain impoverished 20 years after each country's embrace of democracy. Although there are arguments to the effect that labour laws have been decolonised, structural inequalities remain in both South Africa and Namibia.

There is a persistent reluctance to interrogate the elephant in the room by academics and practitioners in the legal and economic fraternities, who often prefer to endorse the convenient Western narrative of free market policies and ease of doing business. Implicit in this approach is the narrow pursuit of "investment retention" or ensuring security of tenure for investors that create any form of employment, no matter how exploitative. The argument is often that half a loaf is better than nothing. It is evident that this approach has not transformed African countries or the general welfare of their workers in the mining industry. Superficial transformation is taking place with more strike actions and riots characterising African societies. Inequality, unfairness, lack of social justice, lack of inclusivity, diversity and protection from harassment in the workplace remain ingrained in the mining sector. The role of investors, particularly the Chinese and their atrocious human and labour rights protection record, speaks volumes in the mining sector. There is thus a need to infuse the *ubuntu* philosophy and African value systems into decolonising labour laws in South Africa and Namibia, for the benefit of vulnerable and impoverished mineworkers. Failure to decolonise labour laws, and other post-apartheid laws for that matter, will lead to incessant cycles of civil strife in the not-too-distant future. Such civil strife is likely to mirror the developments that ensued after the incarceration of Mr Jacob Zuma in the pursuit of constitutional values. Constitutionalism that is devoid of *ubuntu* and African value systems will not resonate well with reasonable African people. It does not make sense that a post-apartheid era reflects similar practices and laws to those prevailing in the apartheid era, albeit crafted in a different, sophisticated and subtle form.

A "SIGN" OF THE TIMES: A BRIEF CONSIDERATION OF THE VALIDITY OF E-SIGNATURES IN AGREEMENTS AND AFFIDAVITS IN SOUTH AFRICAN LAW

Ciresh Singh
LLB LLM PhD
Associate Professor, University of South Africa

SUMMARY

The evolution of technology has changed business practices all over the world. Owing to technological and e-commerce developments, businesses can now transact with each other instantaneously across borders. The digitalisation of commerce and other traditional working methods has created a new "digital age" in human history. Digitalisation has taken over many economic activities and industries and is slowly finding its way into the legal system. Several businesses are now concluding commercial transactions and contracts electronically. Electronic signatures have consequently become essential tools for concluding legal agreements and conducting other daily business and legal practices. These new innovations have brought into question the legal validly of these transactions, and in particular the legitimacy and security of electronically signed documents.

1 INTRODUCTION

Advancements in technology have not just changed but totally transformed the way we communicate both socially and formally. Technology has made it possible for us to interact with one another from different parts of the globe. It is difficult to imagine the world today without technology. The Internet, social media, online shopping and emails have become a common part of everyday life. Technology has created and continues to create a new economic landscape, revolutionising the global economy,[1] and transforming the way we live.

[1] See Van der Merwe, Roos, Eiselen, Nel, Erlank and Mabeka *Information and Communications Technology Law* 3ed (2021) ch 6; Gereda "The Electronic Communications and Transactions Act" in Thornton, Carrim, Mtshaulana and Reyburn *Telecommunications Law in South Africa*: (2006) ch 6 263; Coetzee "The Electronic Communications and Transactions Act 25 of 2002, Facilitating Electronic Commerce" 2004 3 *Stellenbosch Law Review* 501.

The digital revolution has occurred so rapidly that its character and implications from a business and legal perspective have not yet been fully understood.[2] The age of digitalisation has changed the way we interact with one another, and from a legal perspective it has changed the way contracts and other legal and commercial transactions are concluded. Through technology, electronic contracting has become fluid and borderless and now enables traders to do business and conclude valid agreements across borders and national frontiers.[3] Most business transactions can now be performed electronically, from anywhere in the world and at any time. The growth in e-commerce has created numerous advantages for business, such as reduced paperwork and lower commercial transaction costs. However, one of the biggest challenges has always been reliability, safety concerns, and lack of clarity and understanding as to the legal validity of using e-contracts and e-signatures.[4]

In South Africa, the use of technology in the legal sphere was initially slow; in particular, there was much scepticism on the use of e-signatures in agreements and in court documents such as affidavits. Accordingly, this contribution aims to consider the legal validity of e-signatures and electronically signed documents, such as in contractual agreements and affidavits. This task is undertaken in seven parts. Parts one and two serve as an introduction and background to the topic. Part three analyses the concepts of the traditional "wet-ink" signature and the "electronic" signature, as well as their respective validity in South African law. Part four considers the concept of an electronic signature in more detail and understands the different forms of e-signature. Parts five and six respectively consider the different legislative and judicial principles governing e-signatures. This is undertaken by discussing the different Acts, Rules and case law concerning the concept of electronically signed agreements and affidavits. Part seven serves as a conclusion to this article and provides brief recommendations on how more clarity can be established on the advancement of e-signatures in South Africa.

Signatures have become an integral part of daily life and are well established in commercial and legal practice. A signature serves to consent to or confirm an agreement or legal document and is thus a vital feature in finalising a transaction. Technology, such as e-signatures, is increasingly being used in modern-day activities. The traditional wet-ink signature differs significantly in form and application from an electronic signature. Therefore,

---

2 Gereda in Thornton *et al Telecommunications Law in South Africa* 263.

3 See Coetzee "The Convention on the Use of Electronic Communications in International Contracts: Creating an International Legal Framework for Electronic Contracting" 2006 18 *South African Mercantile Law Journal* 245 246; Singh "You've Got Mail: Have Electronical Communications Become the New Registered Mail" 2022 Q1 *Without Prejudice*; Srivastava and Koekemoer "The Legal Recognition of Electronic Signatures in South Africa: A Critical Overview" 2013 21(3) *African Journal of International and Comparative Law* 427; Berman "International Divergence: The Keys to Signing on the Digital Line – The Cross Border Recognition of Electronic Contract Signatures" 2001 28 *Syracuse Journal of International Law and Commerce* 125.

4 Srivastava and Koekemoer 2013 *African Journal of International and Comparative Law* 427–429. There are various forms of electronic signature, such as passcodes and pins. For purposes of this article, only an electronic signature similar to the traditional written form used on paper is considered.

it is paramount that the laws relating to e-signatures be clear to ensure confidence and consistency with their use. Accordingly, the overall purpose of this contribution is to determine whether South Africa's current laws allow for the electronic signing of an agreement and affidavit and consider whether there is a need for a paradigm shift to allow for the more regular and confident use of e-signatures in South Africa.

2 BACKGROUND

Since the turn of the millennium, as a result of great technological advancements, many countries across the world were prompted to create or develop their e-commerce laws and build new legal frameworks for this emerging digital sector. In response to these changes, the United Nations Commission of International Trade law (UNCITRAL) developed the "Model Law on Electronic Commerce 1996" and the "Model Law on Electronic Signatures 2001".[5] These Model Laws were an early response by the international community to some of the uncertainties of e-commerce.[6] Most importantly, the UNCITRAL Model Laws provided a guideline to lawmakers around the world on how to frame their e-legislation.[7]

In South Africa, the Electronic Communications and Transactions Act[8] (ECTA) is the primary legislation governing digital communications.[9] The Act aims to address the world of e-commerce and establish legal principles to govern digitally concluded contracts and transactions in South Africa. The Act also deals with issues such as accreditation, authentication, access to e-services and consumer protection, and provides a legal framework for the legality of data messages and e-signatures.[10] The main objectives of ECTA are to promote, facilitate and regulate electronic communications and transactions.[11] The UNCITRAL Model Law on Electronic Commerce formed the foundation of ECTA. One of the underlying principles of the Model Law that was adopted by ECTA was the "functional equivalence principle". This principle recognises that electronic communications will be given the same legal recognition and be the functional equivalent of paper-based communications.[12]

---

5 See also Coetzee 2006 *SAMLJ* 246 and Eiselen "Fiddling with the ECT Act – Electronic Signatures" 2014 17(6) *Potchefstroom Electronic Law Journal* 2805.

6 See Van der Merwe *et al Information and Communications Technology Law* ch 6, 164 and UNCITRAL "Promoting Confidence in Electronic Commerce: Legal Issues on International Use of Electronic Authentication and Signature Methods" (2009) https://digitallibrary.un.org. The UNCITRAL recognised the uncertainty that may arise from the widespread growth of e-commerce and responded to this challenge by publishing the Model Laws.

7 Eiselen 2014 *PELJ* 2807.

8 25 of 2002.

9 See Van der Merwe *et al Information and Communications Technology Law* ch 2. ECTA was the product of a due diligence report on e-commerce legal issues in 1999. This report led to the *Discussion Paper on Electronic Commerce* (1999) which eventually led to the promulgation of ECTA on 2 August 2002.

10 Coetzee 2004 *Stellenbosch Law Review* 502–503. See also webinar by Lexis Nexis presented by Maggs *Legal in the Digital Age* (15 March 2022) www.lexisnexis/webinars.

11 See s 2 of ECTA, and Coetzee 2004 *Stellenbosch Law Review* 502.

12 See the Model Law on Electronic Commerce: Guide to Enactment: Part E. The Guide to Enactment discourages national laws from imposing stringent requirements on electronic

Despite the advanced technological objectives of ECTA, South African law has moved at an intermediate pace in advancing its legal environment into the digital age. Currently, most court processes are still burdened by a paper overload, and a walk through any South African regional and district court, or attorney's office will reveal a barrage of court files, printers and papers. This suggests that the move to the digital age has been slow, and despite the technological facilities available in South Africa to advance the digital process, these devices have generally not been effectively used.[13] The sluggish growth in technology in South Africa's legal system was, however, accelerated by the recent worldwide coronavirus outbreak. In South Africa, requirements on social distancing, travel restrictions and related Covid lockdown measures resulted in many commercial and legal documents being signed and concluded electronically. Moreover, technology was used to deliver documents electronically and even conduct judicial trials virtually. The emergence of the worldwide coronavirus pandemic brought to light the importance of technology and the ability to sign and conclude agreements and transactions electronically. The move to digitisation, using electronic signatures to endorse transactions, has consequently become a valuable and necessary tool to conclude agreements and sign court documents such as affidavits, dispensing with the need for physical face-to-face interaction. This approach has, however, sparked much debate around the legality of these contracts and affidavits, and in particular, the validity of e-signatures. The following sections consider the concept of an e-signature and determine whether an e-signature is validly recognised in South African law.

3 THE SIGNATURE

3 1 The traditional "wet-ink" signature

A full and detailed consideration of the history of the signature goes beyond the scope of this contribution. For purposes of this article, it is of value to note that the concept of a signature has been in existence for several millennia. The earliest relic of a signature was noted during Antiquity (3100 BCE), when Egyptians and Sumerians used markings on clay tablets to validate their identity. During the Middle Ages, Romans began using marks and other symbols on letters and contracts, as a sign of identification. By the seventeenth century, owing to the growth of business and industry, several countries such as England and the United States of America, passed legislation determining that certain contracts would only be valid if they were

transactions that are not required by paper-based transactions. Imposing stringent requirements on electronic transactions would have the effect of stifling e-commerce, which is detrimental to the concept of innovative business. The stringency of standards applied to electronic communications must be in accordance with those applied to paper-based communications. See also Van der Merwe *et al Information and Communications Technology Law* ch 2, and Papadopolous and Snail *Cyberlaw@SA III: The Law of the Internet in South Africa* 3ed (2012) 318.

13 Singh "Signed, Sealed and Delivered (Electronically): Embracing the Digital Takeover: A Brief Consideration of Electronic Signing and Delivery in South Africa" 2022 33(4) *Stellenbosch Law Review* 618 620.

signed by the contracting parties.[14] Accordingly, over the centuries the signature has developed into an important tool in business and modern life, as it is a source of authenticating one's identity and consent.

The word "sign" originates from the Latin word "*signum*" which means "mark". Over the years, legal academics and courts have formulated several propositions in an attempt to define the concept of a "signature". Similarly, the Oxford English Dictionary has provided several varying definitions for the word signature.[15] The most common proposition is that a "signature" is the signatory's name or mark, written in their own hand, on a paper document.[16] The most comprehensive definition of a signature was provided in *Putter v Provincial Insurance Co*,[17] in which the court found that any mark made by a person for the purpose of attesting the document, or identifying it as their act, is their signature thereto.[18]

According to this definition, a signature can fulfil a number of functions. First, it identifies the signatory as a party to the contract. Secondly, it expresses their intention to be bound by the contract; and, thirdly, it testifies to the true content of the agreement.[19] Consequently, in order for a signature to be valid in terms of South African common law:

a) the name or mark of the person signing must appear on the document;
b) the person signing must have applied it themselves; and
c) the person signing must have intended to sign the document.[20]

The UNCITRAL Model Law on Electronic Signatures Guide to Enactment 2001 deals with the function of signatures and provides that the functions traditionally performed by signature in a paper-based environment are to: identify a person; provide certainty as to that person's involvement in the act of signing; and associate the person with the content of the document. In essence, the primary functions of a signature are to confirm identification and intention. It naturally follows that if an e-signature can perform the same functions as a paper-based signature it should also be valid in law.[21]

---

14 See the English Statute of Frauds Act 1677.

15 Mason *Electronic Signatures in Law* 4ed (2016) 64.

16 *Harpur v Govindamall* 1993 (4) SA 751 (AD) 756–757. See also Kulehile *An Analysis of the Regulatory Principles of Functional Equivalence and Technology Neutrality in the Context of Electronic Signatures in the Formation of Electronic Transactions in Lesotho and the SADC Region* (PhD thesis, University of Cape Town) 2017 16.

17 1963 (3) SA 145 (W).

18 *Putter v Provincial Insurance Co supra* 148.

19 See Coetzee 2004 *Stellenbosch Law Review* 513; Mason *Electronic Signatures in Law* 65; Schellekens *Electronic Signatures: Authentication Technology From a Legal Perspective* (2004) 59–69. Mason and Schellekens identify seven functions of a signature, namely, identification; authentication; authorisation; integrity; originality; cautionary function; and attribution.

20 See Wong "Understanding Electronic Signatures in South Africa" (2018) https://dommisseattorneys.co.za/blog/understanding-electronic-signatures-in-south-africa/ (accessed 2023-02-01); Eiselen 2014 *PELJ* 2808.

21 See Heyink *Electronic Signatures for South African Law Firms: LSSA Guidelines* (2014) ch 2.

3 2 The electronic signature

As indicated above, one of the first forms of a signature was noted by the Egyptians. Another early form of the signature was in the Roman Empire when kings used a waxed sealed stamp on the envelope of letters. This was followed by the quill and papyrus and then by the modern-day and well-known handwritten signature using pen and paper.[22] Accordingly, over the centuries, the signature has evolved, and, as we experience the fourth industrial revolution, it only seems natural that the signature will now be developed by technology.[23]

It should be recognised that electronic documents need to be signed in the modern age, just as paper documents do. Hence, the effect of an e-signature in the online world needs to equate to a traditional "wet-ink" signature offline.[24] It follows that if an e-signature complies with the requirements and functions of a traditional signature, it should be deemed valid in law.[25] E-signatures are created using various electronic methods, and can be applied to a wide range of documents. The primary difference between a traditional wet-ink signature and an electronic signature is the nature of the act of signing. In the case of a traditional wet-ink signature, the signature is applied by the hand of the signer upon a manuscript, whereas an e-signature is applied by the use of digital software and other technical mechanisms. It is not always possible to "see" the person signing a document in the online world, hence the importance of ensuring that the person applying an electronic signature is authorised to do so.[26]

A large body of law and academic writing has recognised e-signatures.[27] Today, an electronic signature is widely recognised as the digital and functional equivalent of a handwritten signature.[28] As indicated, the functional equivalence principle, based on the UNCITRAL Model Law on Electronic Commerce and Model Law on Electronic Signatures, was heavily relied on in the drafting of ECTA.[29] As a result, several sections in ECTA have entrenched the position that an electronic signature is the functional

---

22 See webinar by Findlay *The Validity of Electronic Signatures and Cybersecurity* (23 October 2020) https://www.youtube.com/watch?v=JHfszr2KrVw (accessed 2024-01-05). See also webinar by Findlay, Singh, Hartman and Fourie "*Quo Vadis: Affidavits in the Digital Age*" (1 December 2021) https://lnkd.in/gaTZAnHW (accessed 2024-01-05).

23 Findlay https://www.youtube.com/watch?v=JHfszr2KrVw. See also Kulehile *An Analysis of the Regulatory Principles of Functional Equivalence and Technology Neutrality in Lesotho and SADC* 30–37.

24 See Schellekens *Electronic Signatures* 15 and Findlay *What You Need to Know About E-Signatures in South Africa: Think Twice Before You Sign* (2023).

25 See Eiselen 2014 *PELJ* 2808, and *UNCITRAL Model Law on Electronic Signatures* Part Two par 53–54, which provides that the minimum requirements for an e-signature are identity, authenticity, and integrity. See also Smedinghoff *Online Law: The SPA's Legal Guide to Doing Business on the Internet* (1997). Smedinghoff contends that e-signatures perform all the functions of a traditional signature, and in addition provide more security from fraud.

26 Schellekens *Electronic Signatures* 15.

27 See Van der Merwe *et al Information and Communications Technology Law* ch 2, and Papadopolous and Snail *Cyberlaw@SA III: The Law of the Internet in South Africa* 318.

28 See Findlay *What You Need to Know About E-Signatures in South Africa: Think Twice Before You Sign*.

29 See Heyink *Electronic Signatures for SA Law Firms* ch 2.

equivalent of a wet-ink signature.[30] For example, section 12 of ECTA recognises data as the functional equivalent of writing or evidence in writing by giving data messages the same legal validity as messages written on paper. It states that a requirement under law that a document or information be in writing is met if the document or information is in the form of a data message, and is accessible in a manner useable for subsequent reference to a person who either wants to rely on the existence of a particular agreement or for record purposes.[31]

Section 13 of ECTA deals with the validity of e-signature and provides:

> "(1) Where the signature of a person is required by law, that requirement in relation to a data message is met only if an advanced electronic signature is used.
> (2) Subject to subsection (1) an electronic signature is not without legal force and effect merely on the grounds that it is in electronic form.
> (3) Where an electronic signature is required by the parties to an electronic transaction and the parties have not agreed on the type of electronic signature to be used, that requirement is met in relation to a data message if
> (a) a method is used to identify the person and indicate the person's approval of the information communicated; and
> (b) having regard to all the relevant circumstances at the time the method was used, the method was as reliable as was appropriate for the purposes for which the information was communicated.
> (4) Where an advanced electronic signature has been used, such signature is regarded as having created a valid electronic signature and to have been applied properly, unless the contrary is proved."

The words "electronic signature" or "e-signature" signify the concept of a signature that is conveyed by the application of a computer or computer-like device.[32] As with the traditional wet-ink signature, several attempts have been made by academia to define the concept of an electronic signature. Some have defined it as "anything in electronic form that can be used to demonstrate a signing entity intended their signature to have legal effect".[33] Others have described it as "any symbol, mark or method, accomplished by electronic means, executed by a party with the present intent to be bound by a record or to authenticate a record".[34]

Section 1 of ECTA defines an "electronic signature" as:

> "data attached to, incorporated in, or logically associated with other data and which is intended by the user to serve as a signature."[35]

---

30 See ss 12, 13 and 22 of ECTA. See also art 11 of the *Model Law on Electronic Signatures*.

31 See Gereda *Telecommunications Law in South Africa* 270 and Snail "Electronic Signatures in South Africa" 2009 *De Rebus* 51.

32 Kulehile *An Analysis of the Regulatory Principles of Functional Equivalence and Technology Neutrality in Lesotho and SADC* 27–28.

33 See Mason *Electronic Signatures in Law* 199.

34 See Blythe "Digital Signature Law of the United Nations, European Union, United Kingdom and United States: Promotion of Growth in E-commerce With Enhanced Security" 2005 11 *Richmond Journal of Law and Technology* 1 3.

35 "Data" is defined broadly by ECTA to include electronic representations of information in any form (s 1 of ECTA). See also s 11(1) of ECTA, which provides that information is not without legal force and effect merely on the grounds that it is wholly or partially in the form

The Model Law on Electronic Signatures defines "electronic signature" as:

> "data in electronic form in, affixed to or logically associated with, a data message, which may be used to identify the signatory in relation to the data message and to indicate the signatory's approval of the information contained in the data message."

From the above definitions, it can be seen that for a signature to be recognised as a valid electronic signature, the signature must comply with the criteria of "intention" and "relationship" in that there must be a "relationship" between the document and the signature, and the person must have "intended" it to be his signature.[36] Generally, an electronic signature is perhaps better capable of fulfilling these requirements than paper-based documentation, as the electronic signature process creates an electronic audit trail and certificate that clearly identifies the intention and relationship, and evidences any tampering with the signatures. In most instances, the audit trail will be able to identify the individual applying the signature and provide the date, time and place at which the signature was applied.

The key issue and concern with e-signatures is the evidence required in proving the identity of the signer and confirming that the document has not been altered. Consequently, the main challenge with the implementation of e-signatures in place of wet-ink signatures has always been the hesitancy among businesses to adopt such technology and process, and concerns over the validity, cybersecurity and court approval or acceptance of the use of e-signatures in contracts and affidavits.[37] Several commentators have pointed out that there are many advantages to using digital signatures instead of wet-ink signatures.[38] In particular, it is much easier to identify the signatory of an e-signature than a signatory of a wet-ink document, as an e-signature will always provide a crypto-authentication or audit trail and digital track record of the signing process. One of the biggest challenges with the traditional signature is forgery. E-signatures provide a mechanism to curb forgery, as an audit trail creates a digital signing ceremony or event and provides evidence of the date, time, place and signatories of the document, thereby confirming that the signing was done correctly. In comparison, wet-ink signatures require evidence from forensic handwriting experts, witnesses or co-signees of a document to prove the authenticity of the signature.[39] Furthermore, wet-ink signatures are much easier to forge than electronic

of a data message. Accordingly, "data" is given the same legal status as conventional paper information. See also s 22(1) of ECTA.

36 See Wong https://dommisseattorneys.co.za/blog/understanding-electronic-signatures-in-south-africa/ and Eiselen 2014 *PELJ* 2809–2810.

37 See also webinar by Summers, Pearson and Podbielski "Commissioning Affidavits Over Video" https://www.tech4law.co.za/courses-on-offer/webinar/commissioning-affidavits-over-video-tech-talk-legal/ (accessed 2022-12-13), wherein Summers indicates that although South Africa does not have a great amount of e-legislation, courts have been very pragmatic with the use of technology in the law.

38 See Smedinghoff *Online Law*; Heyink *Electronic Signatures for SA Law Firms* ch 5; and Findlay *The Validity of Electronic Signatures*.

39 See Heyink *Electronic Signatures for SA Law Firms* ch 5; Kulehile *An Analysis of the Regulatory Principles of Functional Equivalence and Technology Neutrality in Lesotho and SADC* 23, and Summers *et al* webinar, wherein Podbielski provides legal examples of fraudulent signatures, and comments that wet-ink signatures can easily be falsified and have many flaws.

signatures, as once an e-signature is placed on a secure uneditable document, the document locks and is unable to be tampered with, and detects when tampering has occurred.[40] Moreover, a digital certificate can be produced confirming the date, time and place of the signature, which is not possible with a wet-ink signature. For these reasons, it can be argued that e-signed documents are much more secure than paper-based ones.

Although e-signatures are increasing being used, Schedule 2 read with section 4(4) of ECTA specifically provides for four instances where an electronic signature would not be valid. These exclusions are:

a) the conclusion of an agreement for the alienation (disposal) of immovable property as provided for in the Alienation of Land Act 68 of 1981;
b) the conclusion of a long-term lease agreement of immovable property in excess of 20 years as provided for in the Alienation of Land Act;
c) the execution of a bill of exchange as defined in the Bills of Exchange Act 34 of 1964; and
d) the execution, retention and presentation of a will or codicil as defined in the Wills Act 7 of 1953.

It must however be noted that, with the rapid growth of e-commerce, many of the transactions excluded may soon be allowed to be signed electronically. There have already been several cases where courts have allowed for the e-signing of the above-mentioned exclusions.[41] If such exclusions are removed, the use of e-signatures may become more widely recognised and acceptable in South Africa.

4 FORMS OF E-SIGNATURE

Electronic signatures can manifest in a variety of forms, all of which may demonstrate the intention of the signer to authenticate data.[42] As indicated above, the term "electronic signature" is generally used to denote the generic concept of a signature brought about by use of a computer or computer-like device. South African law provides for two categories of electronic signature in ECTA, namely, "standard electronic signatures" and "advanced electronic signatures". This two-tiered approach to e-signatures is important as ECTA recognises both simple and technologically advanced e-

[40] Findlay *The Validity of Electronic Signatures*. Findlay makes reference to the 2002 movie "Catch Me If You Can", which depicts the real-life story of Frank Abagnale who was infamous for forging signatures on paper-based documents.

[41] See *MacDonald v The Master* 2002 (5) SA 64 (O) and Cornelius "Condonation of Electronic Documents in Terms of Section 2(3) of the Wills Act" *TSAR 2*003 210, which discusses instances where a court may allow electronic documents when considering a will. In respect of wills and codicils, there is an increasing trend among testators to create video recordings of their wills and last wishes. See also Snyman "To Use Electronic Signatures or Not to Use Electronic Signatures, That Is the Question?" https://heroldgie.com/using-electronic-singatures/ (accessed 2023-02-07); and *Borcherds v Duxbury* 2021 (1) SA 410 (ECP) wherein the court found that a sale agreement relating to immovable property that was signed using an e-signature was valid, as the signature was applied with the intention of forming a binding contract.

[42] See Mason *Electronic Signatures* 197 for a distinction between electronic and digital signatures.

signatures.[43] A standard e-signature can be used whenever *parties to an agreement* require a signature to validate a contract. However, when the *law* requires a signature, only an advanced electronic signature can be used to validate the agreement. These two forms of e-signature are discussed further below.

4 1 Standard electronic signatures

Standard electronic signatures can be applied to documents that do not require special legal requirements. Standard electronic signatures include digital or scanned signatures. An example would be using an electronic NotePad or SmartPhone to sign a document or merely printing, signing and scanning the document.[44] A standard electronic signature can be used where a signature is required by the parties to an agreement, and they do not specify the type of electronic signature to be used. In this instance, section 13(3) of ECTA provides that,

> "when parties to a contract require a signature the requirement is met if an ordinary e-signature is used, provided a reliable method is used and the method used identifies the party concerned and indicates his approval of the information communicated."

Essentially, a standard electronic signature can be described as an ordinary signature that is used for signing standard documents, such as email or letters, that require mid-level authentication or assurance. However, there may be circumstances where a more secure and reliable signature needs to be used, and which requires a high-level of authentication or assurance; in such cases, an "advanced electronic" signature is required.

4 2 Advanced electronic signatures

There are instances where an electronic signature other than a standard electronic signature may be required. This will include circumstances where the law requires that an agreement or document be in writing and signed.[45] In such instances, the document can only be signed with an "advanced electronic" signature as defined by ECTA. In other words, if a signed written document is a legal requirement for a transaction, that transaction will only be valid if an "advanced electronic" signature is used.[46] Accordingly, there is a need for standard electronic signatures to be distinguished from advanced electronic signatures. The main difference between a standard electronic

---

43 See Snail 2009 *De Rebus* 51.

44 Singh "Sign on the Digital Dotted Line: Evaluating the Legal Validity of Electronically Signed Document" 2021 *De Rebus* 20.

45 For e.g., the Companies Act 71 of 2008 requires that certain transactions be signed (see ss 12, 13, 30, 51, 58, 73, 77 and 101). In such instances, only an advanced e-signature can be used to conclude a valid transaction. See Van der Merwe *et al Information and Communications Technology Law* 129–130; and Christianson "Advanced Electronic Signatures" 2012 *De Rebus* 40.

46 Coetzee 2004 *Stellenbosch Law Review* 505; Gereda *Telecommunications Law in South Africa* 270.

signature and an advanced electronic signature is that the latter is endorsed with an accreditation by an accreditation authority.[47]

Section 13(1) of ECTA states that

> "where the law requires a signature to be used the requirement is only met in relation to a data message if an advanced electronic signature is used."

Section 1 of ECTA defines an "advanced electronic signature" as

> "an electronic signature which results from a process which has been accredited by the Authority as provided for in section 37."

In order to be valid, an "advanced electronic signature" must meet the following requirements:

a) it must be uniquely linked to the signatory;
b) it must be capable of identifying the signatory;
c) it must be created using means that are under the signatory's sole control; and
d) it must be linked to other electronic data in such a way that any alteration to the said data can be detected.[48]

In practical terms, an advanced electronic signature is an electronic signature created with a digital certificate that results from a process which has been accredited by the South African Accreditation Authority, following a face-to-face identification. The criteria and standards for accreditation are set in the Regulations to the Act.[49] To date, there are only two accredited providers, namely the South African Post Office and LAWTrust.[50] This is problematic given the lack of efficiency and poor service from the Post Office, and the prohibitive costs of LAWTrust's signatures. In addition, the standards for accreditation are onerous and costly, and some argue that the costs of compliance with the standards result in South Africa having the world's most expensive advanced electronic signature.[51]

There has thus been much criticism on South Africa's advanced signature provisions. In addition to the burdensome administrative process and excessive costs of obtaining accreditation and signature, many academics argue that ECTA's provisions requiring an advanced electronic signature undermines the principle of technological neutrality.[52] Technological

---

47 See s 1 of ECTA. The authority for accreditation is held by the Department of Communication.

48 See s 38(1) of ECTA.

49 See also ss 37, 38 and 40 of ECTA.

50 See Singh 2021 *De Rebus* 20; and Gereda *Telecommunications Law in South Africa* 283. See also lawtrust.co.za.

51 See Heyink *Electronic Signatures for SA Law Firms* ch 7.

52 See Srivastava and Koekemoer 2013 *African Journal of International and Comparative Law* 430; Berman 2001 *Syracuse Journal of International Law and Commerce* 149; Snail "Electronic Contracts in South Africa: A Comparative Analysis" 2008 2 *Journal of Information, Law & Technology* 1–24; Swales "The Regulation of Electronic Signatures: Time for Review and Amendment" 2015 132(2) *South African Law Journal* 257 270). Swales argues that users should have the liberty to decide which type of technology they wish to use. Technologically prescriptive law has the potential to stifle the growth of e-commerce by restricting newer technologies from being used. Likewise, Snail suggests that

neutrality is an e-commerce principle that requires legislation to be non-prescriptive of technology, and is one of the underlying principles of e-commerce. The principle of technological neutrality proposes that law should not discriminate against or favour the use of any particular type of technology. The Model Laws do not prescribe any form or type of e-signature to be used, and advanced electronic signatures are not mentioned under the Model Laws. Thus, it has been argued that the accreditation requirement in ECTA for advanced electronic signatures violates the principle of technological neutrality and goes against the objects of the Model Laws.[53]

Conversely, others submit that advanced electronic signatures are necessary as they ensure a secure and protected environment, as they have several safeguards that authenticate the security of the signature. The accreditation requirements for these signatures serve as a safeguard against fraud and allow for a higher degree of security than standard e-signatures.[54] Accordingly, unlike standard electronic signatures, advanced electronic signatures are given special evidentiary advantages and are rebuttably presumed to be valid. Some commentators submit that an advanced electronic signature is the most secure signature available worldwide, and indicate that the cryptography behind an advanced electronic signature makes it mathematically infeasible to tamper with, as evidence of tampering will be shown – for example, by sending a warning.[55] Most advanced electronic signatures make use of a public key infrastructure (PKI), which uses two keys and an authorised cryptography provider to verify the authenticity of the signature.[56] A digital certificate confirms that the security,

South Africa should remove the stringent requirements for advanced electronic signatures and adopt a technology-neutral approach, while still providing a high level of security.

53 See Faria "E-Commerce and International Legal Harmonization; To Go Beyond Functional Equivalence?" 2004 16 *South African Mercantile Law Journal* 529, Swales 2015 *SALJ*; Srivastava and Koekemoer 2013 *African Journal of International and Comparative Law* 444. It is also noted that while the European Council Directive 1999/93/EC on electronic signatures allows for the use of advanced electronic signatures, it does not require accreditation for signatures to be valid. The EC Directive promotes technological neutrality in Recital 4 by viewing accreditation as a barrier to the development of commerce. Swales submits that the accreditation approach adopted by South Africa is cumbersome and onerous and is not in line with international standards.

54 See also Barofsky "The European Commission's Directive on Electronic Signature: Technological 'Favoritism' towards Digital Signature" 2000 24(1) *Boston College International and Comparative Law Review* 145.

55 See Department of Public Service and Administration *Electronic Signatures Guidelines* version 1.10 (12 February 2019) https://www.dpsa.gov.za/dpsa2g/documents/egov/2019/Electronic%20Signature%20Guidelines%20for%20the%20Public%20Service%20%20final.pdf (accessed 2024-01-05) par 4; Christianson 2012 *De Rebus* 40.

56 S 32(2) of ECTA provides that no person may provide cryptography products or services in the Republic until certain details, as required by the Act, are registered. In terms of Accreditation Regulation, a service provider of advanced electronic signatures must comply with the SANS 21188 PKI minimum standards. PKI involves the encryption of electronic messages. The encrypted data messages become the signature, which uniquely links the signatory to the message. In order for these messages to be decrypted, one would need to be in possession of a public key or private key. The document is signed with a private key and the recipient of the document will only be able to view the document if he enters the corresponding public key. See also ss37 and 38 of ECTA; Van der Merwe *et al Information and Communications Technology Law*; Christianson *De Rebus*; Kulehile *An Analysis of the*

integrity and identity of the signatory are upheld. This will usually also involve a face-to-face verification mechanism, which may also authenticate, *inter alia*, the biometrics, such as the fingerprints or iris scan of the signatory; and/or a pin or password belonging to the signatory. It is submitted that thumbprint verification can usually be used in addition to an e-signature to authenticate the identity of an individual, as most electronic devices such as cellphones and notepads already have such scanning ability.[57] An advanced electronic signature is a digital certificate-based signature that illustrates mechanisms to ensure security and integrity, and confirms the identity of the signer. Consequently, an advanced electronic signature is deemed reliable in law and is accepted as *prima facie* proof of its validity.[58]

Section 18 of ECTA, entitled "Notarisation, acknowledgement and certification" provides:

> "(1) Where a law requires a signature, statement or document to be notarised, acknowledged, verified or made under oath, that requirement is met if the advanced electronic signature of the person authorised to perform those acts is attached to, incorporated in or logically associated with the electronic signature or data message.[59]
>
> …
>
> (3) Where a law requires or permits a person to provide a certified copy of a document and the document exists in paper or other physical form, that requirement is met if an electronic copy of the document is certified to be a true copy thereof and the certification is confirmed by the use of an advanced electronic signature."

In South Africa, an advanced electronic signature is required for signing as a notary and/or commissioner of oaths.[60] Thus, it is submitted that an advanced electronic signature may be used for the signing of an affidavit and other court documents. The challenge with affidavits is the requirement that the documents be commissioned "in the presence of a commissioner of oaths". Regulations 1, 2 and 3 under the Justices of the Peace and Commissioners of Oaths Act[61] provide that the deponent shall sign the declaration in the presence of the commissioner of oaths. It is submitted that this requirement could be fulfilled electronically with the use of a video-conferencing system such as WhatsApp, Skye, Microsoft Teams or Zoom. Thus, the signing and commissioning of an affidavit could be done online via a video conference in which the deponent and the commissioner of oaths

Regulatory Principles of Functional Equivalence and Technology Neutrality in Lesotho and SADC 42–49, for a deeper analysis of cryptography and PKI.

57 UNCITRAL *Promoting Confidence in Electronic Commerce.* See also Bharvada "Electronic Signatures, Biometrics and PKI in the UK" 2002 16(3) *International Review of Law, Computers and Technology* 269.

58 See s 13 of ECTA.

59 See also Bechini and Gassen "Á New Approach to Improving Interoperability of Electronic Signatures in Cross Border Legal Transactions" 2008-2009 17(3) *Michigan State Journal of International Law* 703; Srivastava and Koekemoer 2013 *African Journal of International and Comparative Law* 430–440; Swales 2015 *SALJ* 257–270.

60 See Van der Merwe *et al Information and Communications Technology Law* ch 5 128–134. See also *Massbuild v Tikon Construction* [2020] 6986-2017 (GJ), where the court found that the suretyship agreement that was signed electronically was not valid, as an advanced electronic signature was not used.

61 16 of 1963.

are able to identify each other, and the signing occurs in each other's "virtual" presence, thereby complying with the Justices of the Peace and Commissioners of Oaths Act.[62] The requirement that the signing must occur in the presence of the commissioner is to ensure that the commissioner is able to identify the signer. It is contended that this identification is achievable virtually, and proof can be evidenced by a video recording. Furthermore, it must be noted that the Act is now over 60 years old, and there is a need for its practices to be reviewed in light of technological advancements.

5 E-LEGISLATION: LEGISLATIVE PROVISIONS PROMOTING E-SIGNATURES

5 1 International provisions

In view of the exponential growth of the Internet and e-commerce, international organisations have recognised the urgent need for uniform rules to be implemented to govern this growing sector. As a result, UNCITRAL developed two laws, namely the Model Law on Electronic Commerce 1996, and the Model Law of Electronic Signatures 2001. The main purpose of these Model Laws was to create a uniform set of international rules to govern e-commerce, promote the acceptance and efficiency of electronic mediums, create legal certainty by developing a safer legal electronic environment, and provide legal recognition for e-contracting and e-signatures.[63]

These Model Laws pursued the establishment of a functional equivalence approach that sought to allow electronic data to be recognised in the same manner as paper documents. This was promoted by article 5 of the Model Law on Electronic Commerce, which provides that "information shall not be denied legal effect, validity or enforceability solely on the grounds that it is in the form of a data message." Article 7 of the Model Law on Electronic Commerce deals with e-signatures and reads as follows:

> "Where the law requires a signature of a person, that requirement is met in relation to a data message if:
> (a) a method is used to identify that person and to indicate that person's approval of the information contained in the data message; and
> (b) that method is as reliable as was appropriate for the purpose for which the data message was generated or communicated, in the light of all the circumstances, including any relevant agreement."

Article 7 essentially provides that where e-signatures meet the criteria of technical reliability, they will be regarded as functionally equivalent to handwritten signatures. It further sets out general conditions under which

---

62 See *Gulyas v Minister of Law and Order* [1986] 4 All SA 357 (C), wherein the court held that "in the presence of" is analogous to "within eyeshot", in that the commissioner must be within eyeshot of the deponent to ascertain their identity and ensure the papers are correctly deposed.

63 See UNCITRAL *Model Law on Electronic Signatures With Guide to Enactment 2001* Part Two par 1–6. UNCITRAL went further to remedy the situation of international electronic contracting, and enacted the Convention on the Use of Electronic Communications in International Contracts. Adopted 23/11/2005; EIF: 01/03/2013.

electronic data can be regarded as authentic and enforceable, focusing on two of the main functions of a signature – namely, to identify the signer of the document, and to confirm the signer's consent to the contents of the document.

The Model Law on Electronic Signatures is based on article 7 of the Model Law on Electronic Commerce. The Model Law on Electronic Signatures was adopted in light of the increased use of e-signatures globally. The objectives of this Model Law are to encourage the use of electronic signatures and to promote equal treatment for all documents, whether they be in electronic or paper format. This Model Law focuses mainly on the roles or functions relating to public-key cryptography providers, which act as certification authorities for e-signatures.

Article 2 of the Model Law of Electronic Signatures defines an electronic signature as:

> "data in electronic form affixed to or logically associated with a data message and is used to identify the signatory and show his approval of the information contained within the data message."

Article 6 of the Model Law on Electronic Signatures deals with the legal recognition of an e-signature and provides that an e-signature will be valid if it is reliable and appropriate for the purpose for which it was generated or communicated in light of all the circumstances. The Guide to Enactment to the Model Law on Electronic Signatures further sets out a number of legal, technical and commercial factors that should be taken into account when determining whether the method used for signing was sufficiently reliable and appropriate.[64] The Guide sets out practical standards that are required for technical reliability and legal effectiveness to be expected from the e-signature.

The Guide to Enactment makes it explicit that the Model Law only offers a framework within which laws can be structured, and that it is not intended to set out all the requirements that may be necessary to implement any given electronic signature law. It does not set out the rules and regulations that may be necessary to implement electronic signature techniques, nor does it deal with liability, leaving national laws to determine what liability a party may be subject to in accordance with applicable law. However, the Model Laws do set out criteria against which an adjudicator might assess the conduct of the parties.[65]

Several countries across the world have adopted the Model Laws and given recognition to the validity of e-signatures. In the United States, the Electronic Signatures in Global and National Commerce Act, also known as the E-Sign Act, and the Uniform Electronic Transactions Act, were enacted in 2000. These Acts provide legal recognition to electronic records, electronic signatures and electronic contracts.[66] Likewise, Australia (the Electronic Transactions Act 1999), Germany (the Electronic Signatures Act of 2001), Canada, (the Canadian Uniform Electronic Commerce Act), and

64 See the Guide to Enactment par 58–61.
65 Mason *Electronic Signatures* 101.
66 S 101 of the US E-Sign Act.

the United Kingdom (the Electronic Communications Act 2000) provide legal recognition to electronic signatures and transactions, and provide that a transaction may not be denied legal effect solely because of its electronic format. These countries have adopted the functional equivalence approach, which provides that if a law requires a record to be in writing, an electronic record satisfies the law.[67]

5 2 Domestic (South African) provisions

South Africa has followed the global trend in recognising the legality of electronic signatures, rendering the status of electronic signatures the functional equivalent of traditional wet-ink, pen-based signatures. ECTA, like most e-legislation in foreign countries, has followed the recommendations of the Model Laws. There are several sections in ECTA that confirm the validity of the electronic signature. Section 13(2) specifically confirms that an electronic signature cannot be denied enforceability merely because it has been given electronically or through data messages. Section 13(4) further provides that "where an advanced electronic signature has been used, such signature is regarded as being a valid electronic signature and to have been applied properly, unless the contrary is proved."[68] ECTA specifically states that an electronic signature is not without legal force and effect merely because it is in electronic form,[69] clearly confirming that electronic signatures are legally recognised in South Africa.[70]

In relation to credit agreements, the validity of electronic signatures is governed by section 2(3)(*b*) of the National Credit Act[71] (NCA), which provides:

> "If a provision of this Act requires a document to be signed or initialled by a party to a credit agreement, that signing or initialing may be effected by use of– ... an advanced or electronic signature as defined in the Electronic Communications Act, 2002 (Act No. 25 of 2002), provided that:
> (i) the electronic signature is applied by each party in the physical presence of the other party or an agent of the party; and
> (ii) the credit provider must take reasonable measures to prevent the use of the Consumer's electronic signature for any purpose other than the signing or initialing of the particular document that the consumer intended to sign or initial."

---

67 S 7 of the US Uniform Electronic Transactions Act. See also s 106 of the US E-Sign Act. The United States has adopted a minimalistic approach to e-signatures and defines an e-signature as 'any electronic sound or process logically associated with a contract or record and executed or adopted by a person with the intent to sign the record. The minimalistic approach has however been criticised as it allows for a low level of security and opens the door to fraud.

68 See also art 7 of the Model Law, which establishes the presumption that an electronic signature shall be treated as a handwritten signature where it meets the criteria of technical reliability.

69 See also ss 11(1), 13(2) and 14(1) of ECTA.

70 See s 15(4) of ECTA, which provides that a data message, such as an electronic signature, produced in any legal proceedings is admissible evidence and is rebuttable proof of the facts therein. This means that once a data message is produced in court it is presumed to be factually accurate. See also *Absa Bank Limited v Le Roux* 2014 (1) SA 475 (WCC).

71 34 of 2005.

Section 2(3) provides that when the NCA requires a document to be signed, that requirement is fulfilled if an electronic signature is used, provided that the electronic signature is applied in the physical presence of the other contracting party. This provision, however, does not specify a required form of signature (whether a standard or advanced electronic signature), nor does it specify that an electronic signature is required to be applied in the manner stated in section 2(3) for the validity of a credit agreement.[72] As seen with the provisions in the Justices of the Peace and Commissioners of Oaths Act, the NCA also requires that signatories of a document must be in the "physical presence of each other". Accordingly, it is debatable whether a credit agreement is valid if it is e-signed by both parties at different times and in different locations, and whether e-signing in the "virtual" presence of one of the contracting parties is acceptable. It is submitted that an amendment to the NCA may be required to establish clarity on these points.

Another key example of the use of and support for e-signatures in South Africa is the publication of the "Electronic Signature Guidelines" by the Department of Public Service and Administration in February 2019.[73] These Guidelines essentially recognise the development of e-services in the public sector and provide support for the use of e-signatures within public service departments. The Guidelines aim to provide a framework for evaluating the appropriateness of e-signatures and seek to enable greater adoption of e-signatures across governmental departments.[74] Its primary purpose is to provide guidance to governmental departments to deploy e-signatures and ultimately modernise the public sector. The Guidelines provide detailed steps to ensure the trustworthiness of e-signed documents and encourage public departments to establish policies and frameworks to incorporate the use of e-signatures in their business.

The above-mentioned legislative provisions and guidelines not only recognise the use of e-signatures but also provide the assurance that e-signatures have the same legal validity as wet-ink signatures. Accordingly, if an e-signature is used to conclude an agreement, provided all the essential requirements are met, neither party to that agreement can repudiate the contract purely on the ground that the contract was signed electronically, rather than on paper. The following section provides some examples of where an e-signature was used in legal documents.

6 JUDICIAL PRECEDENT ON E-SIGNATURES

6 1 E-signatures to conclude agreements

The following section discusses some of the most prevalent cases interpreting e-contracts and e-signatures in South Africa.

---

[72] See Warmback and Ebrahim "Electronic Signatures, Credit Agreements and the National Credit Act" (9 October 2020) www.wylie.co.za/Articles/Read/27/Electronic-Signatures-Credit-Agreements-and-the-National-Credit-Act (accessed 2023-02-14).

[73] See Department of Public Service and Administration https://www.dpsa.gov.za/dpsa2g/documents/egov/2019/Electronic%20Signature%20Guidelines%20for%20the%20Public%20Service%20%20final.pdf.

[74] Par 1.3 and 2 of The Guidelines.

6 1 1 Jafta v Ezemvelo KZN Wildlife [2008] 10 BLLR 954 (LC)

Jafta v Ezemvelo KZN Wildlife was one of the first major cases in South Africa to interpret ECTA. Although this case did not strictly deal with an e-signature, it did confirm the recognition and validity of electronic messages in South Africa.[75] The facts of the case are complex: in summary, Jafta attended an employment interview and was offered employment at Ezemvelo Wildlife. There were some negotiations about the exact start date of the contract; as a result, emails and SMSes were exchanged between the parties.[76] The main issue before the court was whether these e-communications amounted to an acceptance of the offer of employment.

Ezemvelo did not dispute that the sending of an email was an acceptable form of communicating the offer of acceptance. However, they claimed that they never received any emails from Jafta.[77] The court confirmed that the receipt of emails and SMSes were dealt with by ECTA. With regard to emails, it was settled that emails were an effective form of communication, and that an email sent by Jafta amounted to an acceptance of the offer of employment.[78] This email, however, was never successfully received by Ezemvelo, and therefore it was necessary to consider whether an SMS also amounted to an acceptance in terms of ECTA.

In making its decision, the court considered international law and foreign law. It was trite that several international and foreign law provisions recognise the validity of e-communications. E-communications law had become international and consequently had to be applied harmoniously and uniformly.[79] By adopting international principles, such as the Model Laws, South Africa had incurred a duty to implement the unification of international e-communications law. This had already been done by ECTA and was required to be implemented by the courts. Consequently, in terms of the Model Laws, data messages had to be given the functional equivalence of paper-based solutions, and courts had to give due evidentiary weight to data messages, and recognise that any agreements formed from data messages have full legal effect.[80] The court acknowledged that e-communications were now standard forms of transacting in the information age, and anyone seeking to exclude particular forms of communication had expressly to contract out of them.[81] The court accordingly found that by communicating with Jafta by SMS, Emvelo signalled that SMS was a valid mode for

---

75 See also Papadopoulos "Short Message Services And E-Contracting" 2010 31 *Obiter* 188.

76 *Jafta v Ezemvelo KZN Wildlife* [2008] 10 BLLR 954 (LC) par 5–8.

77 *Jafta supra* par 17–29. Expert IT evidence revealed that there may have been some technical virus safeguards that blocked Jafta's emails from being received by Ezemvelo.

78 *Jafha supra* par 37.

79 *Jafta supra* par 57.

80 *Jafta supra* par 72–73, referring to ss 15, 22 and 22 of ECTA, and Singapore High Court-Suit No 594 of 2003 *SM Integrated Transware Pte Ltd v Schenker Singapore (Pte) Ltd*, and US *Shattuck v Klotzbach* 14 Mass.L.Rptr.360, 2001 WL 1839720 (Mass.Super) and *Rosenfeld v Zerneck* 4Misc.3d193. In these cases, the courts held that the typewritten names of the parties on an email constituted a valid signature.

81 *Jafta supra* par 98.

acceptance of their offer.[82] The court concluded that an SMS was an electronic communication in terms of ECTA, and therefore was a valid mode of communication for acceptance of the offer.

The *Jafta* decision was confirmed in *Mafika v SABC.*[83] In this matter, Mafika had sent an SMS to his employer confirming his intention to resign with immediate effect. The issue before the court was whether the SMS constituted a valid written resignation. In making its decision, the court considered section 12 of ECTA, which provides:

> "A requirement in law that a document or information must be in writing is met if the document or information is—
> (*a*) in the form of a data message; and
> (*b*) accessible in a manner usable for subsequent reference."

Accordingly, the court confirmed the finding in *Jafta* and confirmed that a communication by SMS is a communication in writing. Consequently, the court held that an SMS sent as a resignation amounted to a data message in terms of section 12 of ECTA.[84] The early *Jafta* and *SABC* cases confirmed the validity of emails and SMSes as valid forms of communication to conclude agreements and was the first step in recognising the validity of e-signatures. Importantly, the court in *Jafta* held if, in this modern age, one wishes not to use e-communications, one needs expressly to contract out of its use.[85]

6 1 2 FirstRand Bank t/a Wesbank v Molamugae [2018] ZAGPPHC 762

In *First Rand Bank v Molamugae,* the court considered the validity of an e-signature in a credit agreement. In this matter, Wesbank instituted action against Molamugae for the cancellation of an instalment sale agreement known as an "iContract" and the repossession of a motor vehicle.[86] The iContract was signed by the defendant online and electronically. A special watermark generated by the computer appeared on the iContract once the debtor accepted the terms and conditions by effecting his electronic signature.[87] The main issues before the court were whether an instalment sale agreement had been concluded in terms of the NCA, and whether the electronic signature was in compliance with ECTA.[88] In analysing section 2(3) of the NCA, the court held that the NCA does not provide for the form that the signature to the instalment sale agreement needs to take. As a

---

82 *Jafta supra* par 101.

83 [2010] 5 BLLR 542 (LC).

84 See also Manamela "'To Meet Is to Part': Resignation by SMS Constitutes Notice in Writing as Required by the Basic Conditions of Employment Act: *Mafika v SA Broadcasting Corporation Ltd: Case Comments*" (2011) 23 *SAMLJ* 521.

85 Papadopoulos 2010 *Obiter* 200.

86 *FirstRand Bank t/a Wesbank v Molamugae supra* par 6.

87 *FirstRand Bank t/a Wesbank v Molamugae supra* par 17.

88 *FirstRand Bank t/a Wesbank v Molamugae supra* par 27. The defendant contended that s 2(3) of the NCA was not complied with. In response, FirstRand pleaded that the agreement was completed and signed electronically by the defendant and that it constituted a valid agreement in terms of the NCA and ECTA.

result, it is quite possible for an electronic signature on the agreement to be in compliance with ECTA.[89] The court held further that in modern-day society with advanced technology, agreements are concluded without parties being in the physical presence of each other.[90] Consequently, the court found that an instalment sale agreement had been concluded electronically and was valid and binding.

On the basis of the wording of section 2(3) of the NCA and the court's interpretation in the *Molamugae* case, it is apparent that there is no prescribed form for the signing of a credit agreement that falls within the ambit of the NCA. Therefore, a credit agreement that is signed electronically, using a standard electronic or advanced electronic signature, will be valid and binding, having full force and effect in law, as if a manuscript hard copy had been signed.[91] The current legal position will prove favourable, particularly to financial institutions that seek to limit physical interaction, increase efficiency, be environmentally sustainable and keep up with the digital age.[92] Accordingly, it is submitted that the NCA needs to be amended to allow for the e-signing of documents, by removing the requirement that the parties must be in the physical presence of one another.

6 1 3 Spring Forest Trading 599 CC v Wildberry (Pty) Ltd 2015 (2) SA 118 (SCA)

Another example of judicial approval of electronic signatures is noted in the case of *Spring Forest Trading 599 CC v Wildberry (Pty) Ltd.*[93] In this matter, the Supreme Court of Appeal held that a signature affixed to an email constituted a valid electronic signature. The case dealt with the rental agreement of several car-washing mobile dispensing units. The agreement contained a non-variation clause providing that no variation or consensual cancellation would be effective unless reduced to writing and signed by both parties.[94] The court had to consider whether an exchange of emails between the parties discussing the cancellation merely recorded a negotiation, or whether the emails and footer e-signatures therein amounted to an agreement to cancel.[95] The Supreme Court confirmed that ECTA gives legal recognition to transactions concluded by email and held that the typewritten names at the end of the email correspondence between the parties constituted an electronic signature in terms of section 13(3) of ECTA.[96] The court found that the typewritten names of the parties at the foot of the emails, which were used to identify the users, constituted "data" that is logically associated with the data in the body of the emails, as envisaged in the definition of an "electronic signature". It therefore satisfied the

89 *FirstRand Bank t/a Wesbank v Molamugae supra* par 43.

90 *FirstRand Bank t/a Wesbank v Molamugae supra* par 44.

91 Warmback and Ebrahim www.wylie.co.za/Articles/Read/27/Electronic-Signatures-Credit-Agreements-and-the-National-Credit-Act.

92 Warmback and Ebrahim www.wylie.co.za/Articles/Read/27/Electronic-Signatures-Credit-Agreements-and-the-National-Credit-Act.

93 2015 (2) SA 118 (SCA).

94 *Spring Forest Trading supra* par 2–4.

95 *Spring Forest Trading supra* par 12.

96 *Spring Forest Trading supra* par 24–27.

requirement of a signature and had the effect of authenticating the information contained in the emails.[97] The court held that if there is intention for the data to constitute a signature, and such data is attached to or logically connected with other data, then it amounts to an electronic signature. Accordingly, if the parties require a signature but have not agreed on the method, the signature requirement is met under ECTA if the electronic signature method used:

a) identifies the person;
b) indicates the person's approval of the information communicated; and
c) is reliable and appropriate for the purposes for which the information was communicated, having regard to the circumstances.[98]

The *Spring Forest* case essentially confirmed the principle that the affixing of one's name upon an email footer authenticates that email and the typed name constitutes a valid e-signature. Several foreign jurisdictions have confirmed the same principle.[99] This principle affirms the courts' acceptance of technological developments and further confirms the position that contracts can be signed and concluded electronically by email.

6 1 4 Global & Local Investments Advisors (Pty) Ltd v Fouché 2021 (1) SA 371 (SCA)

In this matter, Fouché had given a written mandate to Global to invest money on his behalf.[100] The mandate provided that all instructions must be given by fax or email with Fouché's signature. Fraudsters hacked Fouché's email and instructed Global to transfer money into a third person's account.[101] The emails from the fraudsters ended with the words "Thanks Nick / Regards Nick". Fouché claimed that this transfer was contrary to their mandate, as it did not bear his signature, either electronically or in manuscript form. The court held:

> [S]ince the mandate requires a 'signature' which in every day and commercial context serves an authentication and verification purpose. In order to be able to resort to s 13(3) of the ECT Act Global would have had to show that in terms of the mandate an electronic signature was required. The word 'electronic' is conspicuously absent from the mandate. The court below cannot be faulted for concluding that what was required was a signature in the ordinary course, namely in manuscript form, even if transmitted electronically, for purposes of authentication and verification. The instruction was not accompanied by such a signature and the court below correctly held that the

97 *Spring Forest Trading supra* par 28.

98 *Spring Forest Trading supra* par 18, referring to s 13 of ECTA. See also the Missouri case of *International Casings Group, Inc. v Premium Standard Farms, Inc* 358 F.Supp.2d 863 (W.D.Mo. 2005), 2005 WL 486784, where the court held that where an email includes the name of the sender in the header or at the bottom of the email, the act of pressing the send icon on a computer constituted the authentication of the document, and it was a valid electronic signature under the Missouri and North Carolina Electronic Transactions Act.

99 See *4 Wilkens v Iowa Insurance Commissioner* 457 N W 2d 1 (Iowa Ct App 1990); *Shattuck v Klotzbach* 2001 Mass Super LEXIS 642 (Super Ct Mass 2001); *Dow Chemical Company v General Electric* 58 UCC Rep Serv 2d (CBC) 74 (E D Mich 2005); and *Faulks v Cameron* [2004] NTSC 61.

100 *Global & Local Investments Advisors (Pty) Ltd v Fouché supra* par 2.

101 *Global & Local Investments Advisors (Pty) Ltd v Fouché supra* par 3.

> funds were transferred without proper instructions and contrary to the mandate.[102]
>
> *Spring Forest* is distinguishable for the following reasons: The authority of the persons who had actually written and sent the emails was not an issue in that case as it is in the present case. The issue in that case was whether an exchange of emails between the contracting parties could satisfy the requirement imposed by them in the contract that 'consensual cancellation' of their contract be 'in writing and signed' by the parties. There was no dispute regarding the reliability of the emails, accuracy of the information communicated or the identities of the persons who appended their names to the emails. In the present case the emails in issue were in fact fraudulent. They were not written nor sent by the person they purported to originate from. They are fraudulent as they were written and dispatched by person or persons without the authority to do so. They are not binding on Mr Fouché.[103]

While the court in *Spring Forest Trading* found that an email signature amounted to a valid and binding electronic signature, in the case of *Global*, which dealt with payments made based on fraudulent emails, the court held that the mandate between the parties did not explicitly refer to an 'electronic signature' and found the signature and resultant transaction non-binding and invalid. Thus, the court in *Global* held that the email signature did not constitute a signature as required by the mandate between the parties.[104] According to this case, it is advisable that contracting parties explicitly agree to the use of electronic signatures and agree on the signing method to be used to comply with the requirements in ECTA.

6 1 5 FirstRand Bank Limited v Govender [2023] ZAGPJHC 610[105]

FirstRand Bank v Govender is one of the most recent cases involving an e-signature.[106] The facts of the case were fairly similar to *Molamugae,* in that Govender concluded a credit agreement with FirstRand for the purchase of a motor vehicle. The agreement was concluded electronically using FirstRand's iContract software. Govender defaulted on his payments in terms of the agreement and FirstRand thereafter initiated litigation and sought recovery of the vehicle.[107]

Govender denied concluding any electronic agreement with FirstRand and claimed that his brother-in-law had, without his knowledge and consent, concluded the agreement.[108] FirstRand Bank led evidence confirming that an iContract had indeed been concluded and that Govender had knowledge of

---

[102] *Global & Local Investments Advisors (Pty) Ltd v Fouché supra* par 14.

[103] *Global & Local Investments Advisors (Pty) Ltd v Fouché supra* par 16.

[104] See also *SN4, LLC, v. Anchor Bank*, FSB 848 N.W.2d 559 (Minn.App. 2014) before the Court of Appeals of Minnesota. In this case, the parties exchanged a series of emails relating to the sale and purchase of real estate. It was contended that the signature on the emails constituted a signed contract. The court rejected this argument and found that both parties explicitly agreed that they would enter into a written contract signed with manuscript signatures, hence an electronic email agreement was contrary to their intentions.

[105] See also *FirstRand Bank Limited v Silver Solutions 3138 CC* [2023] ZAKZPHC 26, wherein the court confirmed the validity of an e-signed agreement.

[106] This judgment was delivered on 1 June 2023.

[107] *FirstRand Bank Limited v Govender supra* par 1–4.

[108] *FirstRand Bank Limited v Govender supra* par 7, 20, 21, 22.

the agreement.[109] FirstRand showed that the iContract contained a watermark stamp in the middle of each contract page that proved that Govender signed the contract electronically. Prior to the e-signing, an SMS and email containing a link to the iContract was sent to Govender. Thereafter Govender received a One Time Pin, which allowed him access to the iContract. This entire process required Govender to produce his identity documents and other relevant documents after he entered the Pin, ensuring that he was the only one who would have access to the contract.[110]

On consideration of the evidence, the court concluded that the facts revealed that Govender had indeed concluded an e-contract and at all times had knowledge of its existence and validity. The court unequivocally confirmed that the validity of e-contracts and e-signatures was settled in South Africa by ECTA.[111] Accordingly, it was trite that a contract could be validly signed and concluded electronically.

6 2 E-signatures for signing as a deponent and commissioner of oaths on a court affidavit

In the recent cases of *FirstRand Bank v Briedenhann*,[112] *Knuttel v Shana*[113] and *Maluleke v JR Investments*,[114] the courts had to decide on the issue of whether a court affidavit could be signed and commissioned electronically, and whether the rules for commissioning could be relaxed under these circumstances. In *Knuttel* and *Maluleke*, the deponents to the affidavit had contracted the Covid-19 virus and this made it impossible for them to sign the affidavit in the physical presence of a commissioner of oaths. Accordingly, under the circumstances, the commissioner communicated with the deponent via WhatsApp video and the deponent signed the affidavit during the video call. Similarly, in *Briedenhann*, the applicant's affidavit had been deposed to electronically and was commissioned by way of a virtual conference. Referring to the case of *S v Munn*,[115] the courts in the above-mentioned cases confirmed that the requirement for physical face-to-face interaction was not peremptory and could be relaxed during commissioning. Consequently, the court held that the signing of the affidavit virtually was

[109] *FirstRand Bank Limited v Govender supra* par 11–15. FirstRand produced evidence of telephone recordings confirming Govender's knowledge of the agreement, and admission that he paid the instalments in terms of the agreement for over four years.

[110] *FirstRand Bank Limited v Govender supra* par 11.

[111] *FirstRand Bank Limited v Govender supra* par 24.

[112] *FirstRand Bank v Briedenhann* [2022] 3690 (ECG).

[113] *Knuttel NO v Shana* 2021 (JOL) 51059 (GJ) (unreported case no 38683/2020, 27 August 2021).

[114] *Maluleke v JR 209 Investments* [2021] 60330-2021 (GP) par 12. In this matter, the commissioner commissioning the affidavit filed a separate affidavit detailing the steps they took to ensure that there was compliance with the Justices of the Peace and Commissioners of Oaths Act.

[115] 1973 (3) SA 734 (NC). The court held that non-compliance with the regulations would not intrinsically invalidate an affidavit if there was substantial compliance with the formalities in such a way as to give effect to the purpose of obtaining a deponent's signature to an affidavit. See also Snyman and Matyeni "Solemnly Swearing Virtually" (3 March 2022) https://heroldgie.com/solemnly-swearing-virtually/ (accessed 2023-02-14).

valid, and found that there was substantial compliance with administering the oath.[116]

The three judgments mentioned are welcome findings by the courts, as not only do they confirm the courts' approval of the use of e-signatures, but they also allow for the commissioning of documents virtually, dispensing with the need for the parties to be in the physical presence of one another. This approach is indeed welcome in the digital era in which we live.[117] South Africa's legal system depends significantly on evidence being supplied by affidavits.[118] In practice, almost every court application requires a signed and commissioned affidavit. The traditional wet-ink signing of affidavits is extremely cumbersome, as the signing and commissioning process is costly and time-consuming.[119] The e-signing of affidavits could serve as an easier, faster and more cost-effective measure to undertake this exercise. In this regard, it is contended that the Justices of the Peace and Commissioners of Oaths Act should be amended by allowing for e-signing and e-commissioning of affidavits. It is noted that the Justices of the Peace and Commissioners of Oaths Act is 60 years old, and the Act needs amending to be brought in line with the current digital age.[120]

The above legal provisions and case law unequivocally affirms the validity of e-signatures in South African law. Most importantly, ECTA does not limit the operation of any law, nor does it compel anyone to use or submit information in an electronic form.[121] Gereda submits that the Act does not discriminate between paper and electronic documents, nor does it create a new way of doing business. ECTA does however facilitate, and gives legal recognition to, the new ways of doing business that are emerging through the evolution of technology.[122] In a country like South Africa, which has components of both a developing and developed society, the emergence of a digitalised economy could prove challenging to the public and private sector. Given this unique position, ECTA has done well to facilitate the use of electronic communications.[123]

---

116 See Steyn "Commissioning of Oaths in the 21st Century" 2021 *De Rebus* 9. See also the Canadian Superior Court of Justice case of *Rabbat v Nadon* 2020 ONSC 2933, where the court permitted the virtual commissioning of affidavits considering the restrictions owing to Covid-19.

117 Steyn 2021 *De Rebus* 9.

118 See Otzen and Brouwer "Remote Commissioning of Affidavits" 2020 *De Rebus* 22, referring to *Elchin Mammadov and Vugar Dadashov v Jan Stefanus Stander* (GP) (unreported case no 100608/15), which provided several steps for the commissioning of an affidavit virtually.

119 See *Quo Vadis* webinar https://www.youtube.com/watch?v=P81JYA4kffE, wherein Singh provides a summary of the signing and commissioning of a traditional wet-ink affidavit, *inter alia*, the need for the affidavit to be printed, travel arrangements to be made for commissioning, every page required to be initialled, and finally scanned and posted to the attorneys.

120 See *Quo Vadis* webinar, for comments by Fourie on the Justices of the Peace and Commissioners of Oaths Act. It is interesting to note that a recent poll by Lexis Nexis revealed that 98 per cent of legal professionals are in agreement about to having e-signatures in place for affidavits.

121 Gereda *Telecommunications Law in South Africa* 269.

122 Gereda *Telecommunications Law in South Africa* 270.

123 Gereda *Telecommunications Law in South Africa* 294.

7 CONCLUSION AND WAY FORWARD

In the introduction to this article, the question was posed whether e-signatures can be validly used to sign an agreement and court affidavit. This article has provided numerous examples of where the legislature and courts have accepted and embraced the use of technology and the validity of e-signatures in concluding agreements and signing affidavits. Furthermore, it is noted that South Africa has followed international trends by recognising e-signatures and adopting the principles in the Model Laws. In addition, South Africa has provided an extra level of security for e-signatures by requiring advanced e-signatures in instances where a high level of security is required.

Generally, courts are hesitant to acknowledge and adapt to fast-paced changes and this should be understood in the context that courts adhere to established procedures in order to promote legal certainty and justice.[124] Fortunately, South Africa's legislature and courts have moved smoothly in recognising the evolution of communication systems and technology. Moreover, in addition to judicial endorsement of e-contracts and e-signing, courts are steadily accepting technology into traditional court processes, and this is evidenced by the introduction of Caselines in Gauteng and the movement by several judges to hold trials and other proceedings virtually as opposed to in court.[125] During the height of the coronavirus pandemic that broke out in early 2020, an urgent directive was issued by the Judge President of the Gauteng Provincial Division to the effect that all cases were to be issued via Caselines. The outbreak of the virus prompted the escalated use of Caselines and also ignited the use of technology in the law by engaging in the service of documents via emails and the use of e-signatures. In 2023, it seems that this electronic process is slowly becoming the norm as more and more businesses and attorneys are using e-signing in their work process.[126]

While there has been some hesitancy in business to use e-signatures, ECTA, together with court jurisprudence and other legislation, has created certainty as to the validity of e-signatures. E-signatures are becoming an important part of commerce; thus, it is necessary for these forms to be properly regulated. Accordingly, it is submitted that some minor amendments are required to promote the use of e-signatures, and to create greater clarity on certain aspects, *inter alia*:

- *An amendment to the Justices of the Peace and Commissioners of Oaths Act to allow for signing and commissioning of documents electronically*: this can be done by inserting the phrase "virtual" in

---

[124] *CMC Woodworking Machinery (Pty) Ltd v Pieter Odendaal Kitchens* 2012 (5) SA 604 (KZD) par 2.

[125] Caselines is a digital platform introduced by the North and South Gauteng High Courts in early 2020. Caselines essentially seeks to serve as a paperless case management system for the courts wherein all court documents such as pleadings, notices and applications can be filed, uploaded and shared. See https://www.judiciary.org.za and https://sajustice.caselines.com.

[126] See ss 27 and 28 of ECTA, which provide that any public body that *inter alia* creates and accepts the filing and retention of documents may perform such filing in the form of data messages. This section effectively allows the courts to perform their functions electronically.

sections 1-3 to read thus: "a deponent shall sign the declaration in the '*virtual or physical presence'* of the commissioner of oaths." Otherwise, this can be done in the Regulations to the Act by confirming that affidavits can be commissioned electronically in the virtual presence of a commissioner. The Act is over 60 years old and the Act and Regulations need to be reviewed holistically.

- *An amendment to section 2(3) of the NCA by allowing certain credit agreements to be signed electronically anywhere*: this can be done by removing the requirement that the agreement must be signed in the physical presence of one another.
- *Allowing more accreditation providers for advanced electronic signatures*: currently, LawTrust and the Post Office are the only accreditation authorities in South Africa. An adoption of more accreditation authorities will greatly assist in promoting the use of electronic signatures in business and the legal sector.[127] Furthermore, the strict criteria and prohibitive costs of accreditation may need to be reviewed and relaxed. While it is conceded that strict regulations need to be in place to ensure the reliability of e-signatures, the challenges in obtaining accreditation defeats the aim of ECTA to enhance technology adoption in South Africa and bring us in line with international developments. Furthermore, the accreditation requirements for advanced e-signatures need to be reconsidered as such provisions violate the principle of technological neutrality and are not consistent with international standards, and potentially inhibit foreign trade.[128]
- *A reconsideration of the exclusions in section 4 of ECTA*: it is recommended that a review should be undertaken of the prohibition of e-signatures for long-term leases, transactions relating to immovable property, and wills and codicils. (Bills of exchange have become redundant in South Africa and therefore the exclusion of bills is not relevant). In this modern age, it will not be long before all documents will be signed electronically. It is submitted that, provided face-to-face and other identification mechanisms are confirmed, documents relating to immovable property and wills should be allowed to be signed electronically. Although, it is recognised that these transactions are susceptible to fraud, it is recommended that safety mechanisms can be put in place by requiring that these transactions be signed using advanced electronic signatures. Such measures will provide security to the transaction and contracting parties, and will further expedite the administrative processes for these transactions.
- *Finally, an update of the Uniform Rules of Court to allow for greater use of e-signatures*: there does not appear to be any express provision in the Uniform Rules that allows for the use of e-signatures. It is

---

127 See Van der Merwe *et al Information and Communications Technology Law* 128–130. Ss 28 and 37 provide for requirements for an "accreditation authority". It is submitted that the Minister of Communications should promote more private e-commerce service providers to be registered as accreditation authorities.

128 See Faria 2004 *South African Mercantile Law Journal* 529. South Africa's accreditation requirements are stricter than those of other states; other countries do not require the compulsory accreditation for the validity of e-signatures. This lack of uniformity could pose a hurdle during trade.

recommended that specific rules be implemented to promote the use and acceptance of e-signatures and other digital mechanisms during court process.

In light of technological developments, South Africa will hugely benefit from a review of the provisions relating to electronic signatures. In conclusion, it is trite that the digital revolution is moving fast. Technology is changing the face of the law, and the South African legal system cannot afford to stand still. Accordingly, it is submitted that provided the inclusion of technology is imputed correctly into the legal system, there should not be any prohibition against e-signing. It is clear that e-signatures are fully valid in law. Given rapid technological developments, it will not be long before pen and paper will be items of the past – indeed, an “(e) sign” of the times.

AN EVALUATION OF ALTERNATIVE DISPUTE RESOLUTION MECHANISMS IN THE AFRICAN REGION

Rashri Baboolal-Frank
LLB LLM LLD MBA
Associate Professor, University of Pretoria

Louis Naudé
LLB
LLM student, University of Pretoria

SUMMARY

Alternative dispute resolution (ADR) in Africa is growing and flourishing but the region is not a global leader in conflict resolution. The African region still has many challenges to overcome. The region has the potential to expand, grow and thrive with foreign direct investment to boost its economies and ensure stability for its infrastructure. The African region is rich in many natural resources, but, unfortunately, interstate conflict causes instability to social, political and economic rights. This article explores the weaknesses and challenges within the African region with a view to activating the potential of the region to become a global leader in alternative dispute resolution. The enforcement and implementation mechanisms of alternative dispute resolution require an evaluation of current systems to ensure that there is an animate thrust of dispute resolution. The African systems have their strengths, but an evaluation of any system always exposes weaknesses. Corruption within the African region is a common theme, since government does not play an active role in deterring corruption, and this causes the public to mistrust all initiatives that stem from government influence. The article discusses the situation in four African countries, showing that corruption, lack of education and a lack of skilled ADR practitioners cause a dysfunctional system that cannot embrace ADR. For an ADR system to function smoothly, numerous ADR practitioners are needed to resolve conflict competently. Furthermore, a selective system of favouring laws that support only the government as opposed to investors causes an imbalance, and discourages investors from investing in Africa. A way needs to be paved, not to negate international practices relating to investor disputes, but rather to work holistically with national laws, to harmonise laws and overcome any conflict of law within the region.

1 INTRODUCTION

Conflicts arise daily and form part of society. It is thus of fundamental importance when dealing with conflicts to employ mechanisms to create peace and encourage development.[1] To ensure that human rights violations are effectively eliminated in Africa, it is argued that its people should foster a culture of peace that protects human rights and aligns to overcome poverty and illiteracy.[2] African countries have made active efforts to create frameworks for the local resolution of arbitral disputes in order to attract foreign direct investment. These efforts include the adoption of modern arbitration legislation, joining arbitration-related treaties and creating arbitration centres.[3] This is the stimulus for individual human rights to be viewed objectively and recognition that it is essential to protect and realise human dignity, despite persistent challenges.[4]

This article analyses the attempts made by the African continent to attract foreign investment while confronting associated challenges. The challenges are studied in a qualitative manner, showing their nature as they are encountered by African dispute resolution mechanisms and their effect on human rights. The article highlights several aspects of the African context of dispute resolution and makes recommendations to make Africa a leader in dispute resolution.

2 INTERNATIONAL ARBITRAL PLATFORMS

The Permanent Court of Arbitration (PCA) was established as an intergovernmental organisation in the year 1899 at the Hague Peace Conference.[5] The PCA's main objective was to "facilitate an immediate recourse to arbitration for international differences, which it has not been possible to settle by diplomacy".[6] Many authors remained sceptical and reserved the view that it was merely an optimistic attempt to create a structure where international disputes could be resolved peacefully. Nonetheless, 26 states went on to establish the PCA, which has grown to having a total of 115 member states, of which 22 members are African

---

1 Muigua "Empowering the Kenyan People Through Alternative Dispute Resolution Mechanisms" (2015) http://kmco.co.ke/wp-content/uploads/2018/08/Empowering-the-Kenyan-People-through-Alternative-Dispute-Resolution-Mechanisms.pdf (accessed 2021-06-30) 13.

2 Muigua http://kmco.co.ke/wp-content/uploads/2018/08/Empowering-the-Kenyan-People-through-Alternative-Dispute-Resolution-Mechanisms.pdf 11; African News Service "Protection of Human Rights Concerns OAU" (1999) http://allafrica.com/stories/199904150006.html (accessed 2021-06-30).

3 Bosman and Kimani "Approaches to Investor State Dispute Resolution in Eastern Africa: Rwanda, Kenya and Mauritius" 2018 *Acta Juridica* 123.

4 Howard and Donnelly "Human Rights, and Political Regimes" 1986 *American Political Science Review* 805; Bosman and Kimani 2018 *Acta Juridica* 123–124.

5 Bosman "The PCA'S Contribution to International Dispute Resolution in Africa" 2014 2 *Stell LR* 309.

6 Bosman 2014 *Stell LR* 310; Convention for the Pacific Settlement of International Disputes 1907.

countries.[7] The PCA has transformed into an organisation that administers an array of dispute resolution services for arbitrations.[8] From the African continent, the PCA has taken many forms of dispute involving African parties, including resolution of boundary and maritime disputes, resolution of political conflict and resolution of investor-state disputes.[9]

The PCA does this by making use of "host country agreements" with its member states. This allows the host country to enjoy the arbitral legal framework created by the PCA.[10] The early host country agreement entered into between South Africa and the PCA in 2007 set a higher standard for regional cooperation and accessibility to international dispute resolution processes within southern Africa.[11] More than eight countries, including Mauritius and South Africa, have entered into host country agreements with the PCA and make use of these agreements to host procedural meetings and hearings.[12] The use of facilities offered by host country agreements provides incentives for local arbitration communities in the southern African region to grow by exchanging ideas and participating in spin-off activities.[13] The PCA, in addition, provides support to local dispute resolution institutions and provides knowledge and resources for the facilitation of future peaceful dispute resolutions.[14]

Foreign investor interests were protected by customary international law principles that assured minimum standards of treatment and were vindicated through courts of the host state or through the mechanism of diplomatic protection. This changed upon the creation and establishment of bilateral investment treaties (BITs).[15] It is argued that the systems used before the proliferation of BITs were not up to standard because outcomes were inconsistent with national law.[16] It is apparent that investors were dependent on the goodwill and political expedience of their own state as to whether and how a claim would be espoused, and substantive protections were not recorded in generally applicable instruments.[17]

The current system of investor-state dispute settlement (ISDS) provides that arbitral proceedings are predominantly administered under the arbitration rules of either the International Centre for the Settlement of Investment Disputes (ICSID) or the United Nations Commission on International Trade Law (UNCITRAL).[18] There has been rapid growth in

---

7 Bosman 2014 *Stell LR*.

8 Li and Ng "The Permanent Court of Arbitration in 2012" in Lavranos and Kok (eds) *Hague Yearbook of International Law* (2012) 221.

9 Bosman 2014 *Stell LR* 313.

10 Bosman 2014 *Stell LR* 319.

11 *Ibid*.

12 *Ibid*.

13 *Ibid*.

14 Bosman 2014 *Stell LR* 326.

15 Bosman and Kimani 2018 *Acta Juridica* 114.

16 Neumayer and Spess "Do Bilateral Investment Treaties Increase Foreign Direct Investment to Developing Countries?" (2005) http://eprints.lse.ac.uk/627/1/World_Dev_(BITs).pdf (accessed 2021-07-03).

17 *Ibid*.

18 Bosman and Kimani 2018 *Acta Juridica* 115.

ICSID cases and UNCITRAL-administered proceedings, which can be attributed to increased levels of foreign direct investment (FDI) and the exponential growth in the number of BITs concluded since 1962.[19] This increase is possible because ISDS systems derive largely from the dispute resolution provisions in BITs.[20]

There are divided opinions on the importance of BITs. Some scholars are of the opinion that BITs have no impact on FDI, as "investors very rarely inquire about BITs while they plan to invest", whereas other scholars have suggested that they have found direct causal links between the ability to attract FDI and the conclusion of BITs.[21] Following the findings of the United Nations Conference on Trade and Development (UNCTAD), it is prudent to support both opinions in different cases, despite the contradiction. UNCTAD concluded that a wide range of factors influence FDI flow, and the conclusion of BITs is merely a factor among many that an investor will or might consider before investing in a state.[22] UNCTAD found further that, even though such agreements cannot substitute for domestic policies on investment, they do carry value in adding an international dimension to investment as they promote stability and predictability in the resolution of disputes between states and foreign investors.[23]

The recognition of BITs by foreign states in the form of FDI is essential to African states because investments theoretically resolve many financial challenges endured by African countries. Four countries are briefly discussed to showcase Africa's attempts to promote FDI. It is important to emphasise that such attempts have caused many new challenges.

2 1 Mauritius

Mauritius has identified FDI as an important generator of income and a co-creator of employment opportunities that results in higher economic growth.[24] The government body responsible for the promotion and facilitation of investment in Mauritius is the Board of Investment of Mauritius, which encourages growth when investment takes place.[25] Mauritius enacted numerous statutes to support FDI, such as the Investment Protection Act[26]

---

19 Bosman and Kimani 2018 *Acta Juridica* 117.

20 *Ibid*.

21 Bosman and Kimani 2018 *Acta Juridica* 117–118; Neumayer and Spess http://eprints.lse.ac.uk/627/1/World_Dev_(BITs).pdf 4.

22 UNCTAD "The Impact of International Investment Agreements on Foreign Direct Investment: An Overview of Empirical Studies 1998–2014" *IIA Issues Note – Working Draft* (September 2014) https://investmentpolicy.unctad.org/uploaded-files/document/unctad-web-diae-pcb-2014-Sep%2024.pdf (accessed 2021-07-03); Bosman and Kimani 2018 *Acta Juridica* 118.

23 Bosman and Kimani 2018 *Acta Juridica* 118.

24 Bosman and Kimani 2018 *Acta Juridica* 141; OECD "Investment Policy Reviews: Mauritius 2014" (2014) https://www.oecd-ilibrary.org/finance-and-investment/oecd-investment-policy-reviews-mauritius-2014_9789264212619-en 33 (accessed 2021-07-03).

25 Bosman and Kimani 2018 *Acta Juridica* 141; OECD https://www.oecd-ilibrary.org/finance-and-investment/oecd-investment-policy-reviews-mauritius-2014_9789264212619-en 33.

26 42 of 2000.

and the Business Facilitation Act,[27] which strengthened provisions on investor protection and opened avenues to foreign ownership, in a direct attempt to attract more FDI.[28] To facilitate more investment, Mauritius created a network of Investment Protection and Promotion Agreements and double taxation treaties with other countries in an attempt to create the ideal environment and relationships for FDI.[29]

Mauritius is one of four African countries to have adopted arbitration legislation based on the UNCITRAL Model Law.[30] In 2008, Mauritius also enacted its International Arbitration Act,[31] which applies to all international arbitrations seated in Mauritius and includes provisions regarding stay-of-court proceedings and interim measures for arbitrations seated outside the borders of Mauritius.[32] In 2010, the Mauritian government entered into a host country agreement with the PCA; the PCA's first permanent office outside the Hague was thus established, making Mauritius a leader in international dispute resolution.[33]

2 2 Rwanda

The Rwandan government's commitment to attracting FDI has resulted in its undertaking a series of pro-investment policy reforms to improve the investment climate.[34] Rwanda further established the Rwanda Development Board to provide a "one-stop shop" for both local and foreign investors to set up operations in Rwanda.[35] Rwanda's National Investment Policy has tasked the Rwanda Development Board and the Ministry of Finance and Economic Planning with establishing a programme "to support joint-ventures (between FDI, government and local private sector)".[36] This was to structure a framework for private foreign investment.[37] The Rwandan government emphasised its role by enacting the relevant legal and commercial framework to promote FDI when they adopted the National Investment Strategy in 2009.[38]

---

27 21 of 2006.

28 Bosman and Kimani 2018 *Acta Juridica* 141.

29 Bosman and Kimani 2018 *Acta Juridica* 141; OECD https://www.oecd-ilibrary.org/finance-and-investment/oecd-investment-policy-reviews-mauritius-2014_9789264212619-en 33.

30 Bosman and Kimani 2018 *Acta Juridica* 142.

31 International Arbitration Act of 2008.

32 Bosman and Kimani 2018 *Acta Juridica* 142.

33 *Ibid*.

34 Bosman and Kimani 2018 *Acta Juridica* 129.

35 Bosman and Kimani 2018 *Acta Juridica* 129; WTO "Trade Policy Review Reports by the East African Community Members" (2012) https://docs.wto.org/dol2fe/Pages/SS/directdoc.aspx?filename=Q:/WT/TPR/G271.pdf&Open=True (accessed 2021-07-04) 54.

36 Bosman and Kimani 2018 *Acta Juridica* 130.

37 *Ibid*.

38 *Ibid*.

2 3 Kenya

The liberalisation of the Kenyan economy has allowed for investments in all sectors of the economy.[39] Kenya promotes export growth and FDI by maintaining two investment regimes:[40] export processing zones with tax holidays; and a manufacturing-under-bond incentive scheme in which investments operate under bonded warehouses and attract investment allowances of up to 100 per cent on capital, plant and machinery.[41] In addition, to further promote FDI, the Kenyan government established the Kenyan Investment Authority, known as KenInvest, which facilitates and promotes investment.[42] Kenya further established a government-funded arbitration centre called the Nairobi Centre for International Arbitration, thus indicating to foreign investors that the Kenyan government is committed to developing the practice of arbitration, which in return promotes FDI.[43] Kenya's foreign investors are also protected by a network of BITs.[44]

2 4 South Africa

South Africa, on the other hand, has followed a very different approach. It has been terminating its BITs since 2009 and has promulgated new national investment legislation that adopts a contrasting approach to ISDS.[45] South Africa has never been a signatory to the ICSID Convention, but was party to public investor-state proceedings under the ICSID Additional Facility Rules, which signatory obligations were terminated in 2010.[46] These proceedings resulted in the re-evaluation by the Department of Trade and Industry of South Africa's policy regarding investment protection and the adoption of an investment protection policy framework.[47]

In 2015, the South African Parliament passed the Protection of Investment Act[48] (POIA), which entered into force in 2018.[49] This Act limits the substantive protection of investors to "fair administrative treatment, national treatment, physical security of property, repatriation of funds and the right to property as protected under section 25 of the South African Constitution".[50] POIA failed to provide for ISDS through international arbitration between an investor and the host state.[51] POIA provides instead for dispute resolution through mediation, recourse to a competent South African court or

39 Bosman and Kimani 2018 *Acta Juridica* 132.
40 Bosman and Kimani 2018 *Acta Juridica* 135; WTO https://docs.wto.org/dol2fe/Pages/SS/directdoc.aspx?filename=Q:/WT/TPR/G271.pdf&Open=True 26.
41 *Ibid*.
42 Bosman and Kimani 2018 *Acta Juridica* 135.
43 Bosman and Kimani 2018 *Acta Juridica* 136.
44 Bosman and Kimani 2018 *Acta Juridica* 137.
45 Bosman and Kimani 2018 *Acta Juridica* 126.
46 *Ibid*.
47 *Ibid*.
48 22 of 2015.
49 Bosman and Kimani 2018 *Acta Juridica* 127.
50 Bosman and Kimani 2018 *Acta Juridica* 127; ss 8 and 11 of POIA.
51 Bosman and Kimani 2018 *Acta Juridica* 127.

independent tribunal, and state-to-state dispute resolution.[52] This results in a substantial narrowing of the usual protections included under BITs, such as protection against expropriation and guarantees of fair and equitable treatment.[53]

African countries mentioned above have taken extensive measures to attract FDI. The first challenge for African countries is imposed by the development of new laws and ADR mechanisms is that there is no guarantee that these "newly created" laws and ADR mechanisms will be accepted by foreign investors. Thus, "recognition" is always the challenge. These newly developed laws and ADR mechanisms carry no weight and have no purpose if foreign investors or foreign states do not recognise them.

Recognition of ADR laws and mechanisms are two-fold: first, the recognition or non-recognition of ADR laws and mechanisms by foreign investors; and secondly, the recognition or non-recognition of ADR laws and mechanisms by local people. Recognition of ADR laws and mechanisms are closely linked to education and training, which is discussed below.

In the pursuit of FDI, some states cease to remember the importance and benefits of having ADR mechanisms available to local people. An "FDI tunnel-vision" can cause the annulment of ADR laws and mechanisms when conflicts arise between national law and international ADR mechanisms and BITs. Once a conflict between national and international law arises, a state must elect either to reject international law not consistent with its national law or amend and/or develop national law in such a manner that the conflict no longer exists.

Upon reflection on the avenue South Africa has chosen to follow, electing to reject BITs and other international laws that are inconsistent with the Constitution results in the narrowing of the prospects of FDI as it creates doubt among foreign investors. The challenge posed is that countries must find a balance between the importance of FDI and the needs of their local people and their human rights.

The rejection of BITs may result in an infringement on the right of access to justice. Access to justice is a term used to refer to the "opening up" of formal court systems and structures of the law to everyone, including disadvantaged groups in society. This is undertaken by removing legal, financial and social barriers such as language, intimidation by the law and legal institutions, and a lack of knowledge or education.[54] Scholars believe access to justice comprises two dimensions, namely procedural access and substantive justice, and involves these key elements: equality of access to legal services; equality before the law; and national equity.[55]

These elements refer to persons having access (and equal access) to high quality legal services or effective dispute resolution mechanisms, and

---

[52] *Ibid*.

[53] *Ibid*.

[54] Muigua http://kmco.co.ke/wp-content/uploads/2018/08/Empowering-the-Kenyan-People-through-Alternative-Dispute-Resolution-Mechanisms.pdf 8.

[55] *Ibid*.

ensuring that everyone is treated fairly and is a recipient of equal opportunities in all fields and has access to services.[56] If the legal framework facilitating legal access is absent due to inadequate infrastructure and as a result of this lacuna created does not guarantee rights being realised it will result in an erroneous and grave injustice, and prevent access to justice.[57]

The African countries mentioned above guarantee the right of access to justice under their respective Constitutions and national laws. However, implementation or realisation is yet to be seen owing to various factors hindering effective implementation.[58] The judicial systems and ADR mechanism of these countries have been affected by various barriers to accessing justice, which include factors like the geographical location of courts, complex rules of procedure, cultural norms and high legal fees.[59] Alternative dispute resolution mechanisms can be used as an alternative to judicial systems to support and relieve the overburdened formal judicial system. These alternative dispute mechanisms, however, encounter certain challenges such as the absence of arbitration centres and the absence of the recognition of ADR mechanisms.

Many African countries have looked to Western legal systems to find a solution to their problem of backlogged court cases.[60] ADR mechanisms were seen as one solution to resolving these backlogs. However, incorporating ADR mechanisms and systems into African countries presents new challenges. At first, implementing ADR mechanisms to resolve disputes increased the courts' productivity and led to increased confidence in judicial systems.[61] Thereafter, a backlog in the ADR mechanisms was encountered, owing to a lack of mediators, a lack of money, insufficient allocation of time and the unwillingness of lawyers to participate in such ADR proceedings, which in turn held up the judicial system.[62]

One example is when Rwanda established commercial courts in 2008, intending to reduce backlogs and the process time of commercial disputes. However, congestion remained a concern.[63] In another example, Uganda vowed to bring mediation to all courts to reduce the courts' workload by eliminating cases that are suitable for mediation.[64] Uganda experienced

---

56 Schetzer and Henderson "Access to Justice and Legal Needs: A Project to Identify Legal Needs, Pathways and Barriers for Disadvantaged People in NSW" (2003) http://www.lawfoundation.net.au/ljf/site/articleIDs/EA0F86973A9B9F35CA257060007D4EA2/$file/public_consultations_report.pdf (accessed 2021-07-04) 7.

57 Muigua http://kmco.co.ke/wp-content/uploads/2018/08/Empowering-the-Kenyan-People-through-Alternative-Dispute-Resolution-Mechanisms.pdf 9.

58 *Ibid*.

59 Muigua *Settling Disputes Through Arbitration in Kenya* (2012) 22.

60 Price "Alternative Dispute Resolution in Africa: Is ADR the Bridge Between Traditional and Modern Dispute Resolution?" 2018 18 *Pepperdine Dispute Resolution Law Journal* 404.

61 Greco "ADR and a Smile: Neocolonialism and the West's Newest Export in Africa" 2010 10 *Pepperdine Dispute Resolution Law Journal* 661.

62 Price 2018 *Pepperdine Dispute Resolution Law Journal* 405.

63 Bosman and Kimani 2018 *Acta Juridica* 131.

64 Price *Pepperdine Dispute Resolution Law Journal* 404; Greco 2010 *Pepperdine Dispute Resolution Law Journal* 666–668.

114 512 cases where ADR mechanisms caused judicial backlog;[65] over 1 000 cases in one court required mediation, but had only one mediator; and the civil division of the High Court had over 9 000 pending cases but only four mediators responsible for mediation processes – an impossible task.[66] This demonstrated the lack of staff and efficient facilities to deal with such matters.

The prospects of ADR success are being challenged by the absence of sufficient government funding, since ADR's prospects of success lie within the training of more competent bodies such as mediators and arbitrators, the education of the public and the building of ADR centres.[67] It is thus difficult for Kenyan, South African, Rwandan and Mauritian people (in some cases more than others) to seek redress from both the formal court system and alternative dispute resolution mechanisms. The realisation of the right of access to justice is only as effective as the available mechanisms to facilitate it.[68]

It is worth mentioning that the right of access to justice is an essential component of the rule of law, which has been said to be the foundation of justice and security.[69] The rule of law thus instils or removes people's faith and trust in a country's legal systems and framework. Disadvantaged people may harbour feelings of bitterness, resentment and other negative feelings owing to their inability to seek redress from formal court systems or alternative dispute resolution mechanisms.[70] They may lose faith or trust in their particular country's legal system or framework, resulting in increased terrorism or theft and having adverse negative effects on the stability and peace of their respective countries.[71]

According to Muigua, it is evident that access to justice for the poor and marginalised groups of persons in Kenya is a mirage.[72] This is so for most African countries as it has been forgotten that access to justice is not only about the presence of formal court systems and ADR mechanisms, but also about the "opening up" of those formal court systems and ADR mechanisms to disadvantaged groups in society and the removal of legal, financial, educational and language barriers.[73] Muigua is of the opinion that this has

---

65 ACME Team "Is Mediation Program Backfiring on the Judiciary?" (2016) https://acme-ug.org/2016/04/10/is-mediation-programme-backfiring-on-the-judiciary-part-ii/ (accessed 2021-07-04).

66 Price 2018 *Pepperdine Dispute Resolution Law Journal* 405.

67 Price 2018 *Pepperdine Dispute Resolution Law Journal* 406.

68 Muigua http://kmco.co.ke/wp-content/uploads/2018/08/Empowering-the-Kenyan-People-through-Alternative-Dispute-Resolution-Mechanisms.pdf 10.

69 Muigua http://kmco.co.ke/wp-content/uploads/2018/08/Empowering-the-Kenyan-People-through-Alternative-Dispute-Resolution-Mechanisms.pdf 9.

70 *Ibid*.

71 *Ibid*.

72 Muigua http://kmco.co.ke/wp-content/uploads/2018/08/Empowering-the-Kenyan-People-through-Alternative-Dispute-Resolution-Mechanisms.pdf 7.

73 *Ibid*; UNDP Kenya "Kenya National Human Development Report. Human Security and Human Development: A Deliberate Human Choice" (2006) https://planipolis.iiep.unesco.org/en/2006/kenya-national-human-development-report-2006-human-security-and-human-development-deliberate (accessed 2021-07-04).

not yet been achieved in Kenya and that the poor are therefore "condemned to a life of misery without any viable recourse to alleviate the injustices".[74] This is a bleak outcome, and needs urgent governmental redress.

3 ACCESS TO KNOWLEDGE, EDUCATION AND TRAINING

Western cultures are highly individualistic, whereas African and Eastern cultures embrace a collective approach.[75] "ADR in traditional societies cannot be understood without introducing the societal structure, relationships among groups and particularly the relationship between the individual and the group."[76] Furthermore, modern ADR proceedings are private and confidential, unlike traditional customary ADR proceedings that emphasise a transparent process.[77] This indicates that education and training play a role in achieving recognition of laws. Therefore, training has to be undertaken on an international and national level so that foreign states and investors can understand the differences between their ADR mechanisms and national customary ADR.

Similarly, creating an understanding of international ADR mechanisms (for local people) would help them understand the proceedings of which they form part and increase their confidence in such proceedings, which will in turn increase the use of ADR mechanisms and access to justice. This will create understanding on both sides and eliminate miscommunications and misunderstandings. Another aspect of the education and training needed is that for lawyers and judges, many of whom oppose ADR mechanisms as they see them as a threat to their careers and to their control over non-litigation resolutions respectively.

Education plays an important role in promoting sustainable development and improving the capacity of people to address issues.[78] Training and educating lawyers and judges will create an understanding of the need for and purpose of ADR mechanisms, which will in turn eliminate the fear of ADR mechanisms and create a space where lawyers and judges make use of and support such mechanisms and the sustainable growth thereof. ADR mechanisms must consider the unique culture and needs of each country, as each has its own way of combining modern dispute resolution and traditional methods. This requires investment in education and training to eliminate the confusion of local people who are unsure which avenue to follow to resolve a dispute. Another challenge posed is that caused by a variety of factors as mentioned below.

---

74 Muigua http://kmco.co.ke/wp-content/uploads/2018/08/Empowering-the-Kenyan-People-through-Alternative-Dispute-Resolution-Mechanisms.pdf 7.

75 Price 2018 *Pepperdine Dispute Resolution Law Journal* 402.

76 *Ibid*.

77 Dickerson "Overview of Commercial Alternative Dispute Resolution in Africa" (2012) https://www.businessconflictmanagement.com/blog/2012/06/adr-in-africa/ (accessed 2021-07-04).

78 Muigua http://kmco.co.ke/wp-content/uploads/2018/08/Empowering-the-Kenyan-People-through-Alternative-Dispute-Resolution-Mechanisms.pdf 28.

4 POVERTY, CORRUPTION AND POOR MANAGEMENT

Postcolonialism, ignorance, monopoly of power, corruption, religious intolerance, poverty, racism, debt and bad management have all contributed to the abuse of human rights in Africa.[79] This has led to a widespread violation of the cultural, economic and social rights that are vital to the empowerment of ordinary people.[80] The development of ADR mechanisms and the use thereof are suppressed and slowed down by factors such as poverty, corruption, debt and bad management.

Africa suffers from poor management and corrupt activities like the illegal distribution of resources, the illegal awarding of tenders and nepotism. These corrupt activities are the result of poor or no delivery at all, meaning that there is a possibility that funds intended for the development and upkeep of ADR facilities and education programmes never serve their purpose. This results in a decrease of ADR usage, as ADR mechanisms cannot grow if there is no support or investment in them. This brings us to the final and biggest challenge encountered by ADR mechanisms in Africa.

5 IMPLEMENTATION

There is a dire need for African countries to implement and enforce the powerful ADR mechanisms. Home speaks of the concept of isomorphism. He states:

> "Isomorphic mimicry is where animals show features of other animals so as to appear more dangerous than they actually are, and so enhance their survival chances, while coercive isomorphism refers to enforced similarity of form through external pressures, but without the associated functions."[81]

He makes use of this concept to show how African states may accept international ADR mechanisms (or develop mechanisms similar to international ADR mechanisms), but fail to implement them. Therefore, they mimic ADR mechanisms, but in reality, their functions are not undertaken.[82] This means that ADR mechanisms are no better than a toothless tiger that has no power to devour and attack its prey.

African countries, in the pursuit of FDI and to provide for human rights, more often than not promulgate and pass legislation intrinsic to the development of human rights and the promotion of FDI. However, the creation and promulgation of legislation does not guarantee or foresee the implementation thereof. In this manner, "isomorphic mimicry", or adopting

---

79 Magnarella "Achieving Human Rights in Africa: The Challenge for the New Millennium" 2000 4 *African Studies Quarterly* 17.

80 Kapindu "Courts and the Enforcement of Socio-Economic Rights in Malawi: Jurisprudential Trends, Challenges and Opportunities" 2013 13 African *Human Rights Law Journal* 125.

81 Home "Land Dispute Resolution and the Right to Development in Africa" 2020 45 *Journal for Judicial Science* 73.

82 *Ibid*.

goals without necessarily performing them, is arguably the greatest challenge encountered by ADR mechanisms in Africa.[83]

Isomorphic mimicry in Africa has been portrayed in the following examples. The first is a ruling made by the African Commission on Human and Peoples' Rights (ACHPR), which found the Kenyan government to be in violation of the African Charter, and ordered it to rectify and recognise the rights of ownership of the Endorois community.[84] The Kenyan government has to date not implemented the decision of the ACHPR in the Endorois case. [85] Another example is the inherent right to dignity and the right to have such dignity respected and protected that is found in the South African and Kenyan Constitutions; yet, many cases of violation of human rights still persist.[86] Isomorphic mimicry can arise owing to multiple factors, such as lack of investment, poor management, corruption, lack of educated and competent staff, poor leadership and underdeveloped laws. Although African countries have legislation and constitutions that offer hope for their people, there remains an urgent need to facilitate the implementation of their respective constitutions and ADR mechanisms to avoid the impotence of isomorphic mimicry.

6 RECOMMENDATIONS

Implementation can be achieved by establishing mechanisms that hold authorities accountable for their actions and/or inactions. By creating a system that holds authorities accountable, factors such as poor management, corruption and nepotism will inevitably be eliminated, which will in turn ensure sustainable growth of ADR in Africa. Sustainable growth and the elimination of isomorphic mimicry will see the realisation of access to justice on a broader spectrum. ADR systems or mechanisms must have a flexible design structure rooted in satisfying the interests of parties and in administering justice in a culturally sensitive manner.[87] It is argued that such an ADR system can be achieved by adopting the following recommendations.

First, proper legislation should be enacted. This will increase the use of ADR mechanisms and increase public confidence therein. Legislation also creates a platform for review and provides a space where education and training can take place.[88] Secondly, incentives should be created to educate lawyers and judges in ADR use and development. This will increase

---

83 Home 2020 *Journal for Judicial Science* 77.

84 Muigua http://kmco.co.ke/wp-content/uploads/2018/08/Empowering-the-Kenyan-People-through-Alternative-Dispute-Resolution-Mechanisms.pdf 7; *African Commission on Human and Peoples Rights v Republic of Kenya* (006/2012).

85 Muigua http://kmco.co.ke/wp-content/uploads/2018/08/Empowering-the-Kenyan-People-through-Alternative-Dispute-Resolution-Mechanisms.pdf 7.

86 *Ibid*; s 28 of the Constitution of Kenya 2010; s 10 of the Constitution of the Republic of South Africa, 1996.

87 Price 2018 *Pepperdine Dispute Resolution Law Journal* 414.

88 Price 2018 *Pepperdine Dispute Resolution Law Journal* 415.

efficiency, revenue and client satisfaction.[89] Thirdly, the local public and foreign investors should be educated on the systems and legislation in place in relation to ADR. This will increase productivity, promote the finding of solutions and decrease miscommunications, misplaced hope and false understandings. Fourthly, both international and national governments should be encouraged to invest in capacity building through training and support for the development of ADR advocates and providers.[90] Lastly, a system that holds parties accountable for their actions and the implementation of rules and regulations should be created. In this way, progress can be measured, resulting in the removal of erroneous practices as well as people who abuse the system. In this way, ADR can grow and flourish in Africa.

7 CONCLUSION

ADR mechanisms are seen as viable conflict management mechanisms because of their focus on the interests and needs of the parties in a conflict, and they therefore boast an array of advantages if the challenges can be reduced or eliminated completely. The concept of ADR should therefore be an alternative to "Western conflict resolution". Minimising the challenges canvassed in this article will create a stable society where diverse systems can exist. This will result in respect for the rule of law and operational court systems.[91] Such a society will attract FDI which, in turn, if not mismanaged, can further address challenges encountered by African ADR, creating an environment where a right is not just the ability to do something that is among one's important interests, but a guarantee or empowerment to actually do it. The principle of *ubuntu* is to act for the collective good and in creating an African ADR framework it is aligned to the principle and ethos of *ubuntu*. [92]

---

89 Uwazie "Alternative Dispute Resolution in Africa: Preventing Conflict and Enhancing Stability" 2011 16 *African Security Brief* 5.

90 *Ibid*.

91 Abe and Ouma "A Re-assessment of the Impact of Traditional Dispute Resolution Mechanisms in Post-Conflict Africa" 2017 *Ave Maria International Law Journal* 18.

92 Muigua http://kmco.co.ke/wp-content/uploads/2018/08/Empowering-the-Kenyan-People-through-Alternative-Dispute-Resolution-Mechanisms.pdf 10.

FACILITATING AUTOMATIC EXCHANGE OF INFORMATION ON BLOCKCHAIN: A SOUTH AFRICAN PERSPECTIVE*

Ruddy Kabwe
LLB LLM
Doctoral Candidate, University of Pretoria
Lecturer, Department of Mercantile Law
University of Pretoria
Attorney of the High Court of South Africa

Princess Thembelihle Ncube
LLB LLM LLD
Lecturer, Department of Mercantile Law
University of Pretoria

SUMMARY

Exchange of information is a mechanism that enables tax authorities to share tax information across borders. Exchange of information curtails harmful practices such as tax evasion and tax avoidance by promoting cooperation between tax authorities. Recent world events have seen unprecedented levels of globalisation and novel income-earning structures. Taxpayers earn income from streams that were previously unavailable. These developments have led tax authorities to implement policies that focus on improved financial transparency and better multilateral cooperation. This article argues for the implementation of blockchain technology to facilitate exchange of information in South Africa. Blockchain is a ledger that records and stores information on an online network. Blockchain's features make it conducive for use in cross-border administration and exchange of tax information. Blockchain creates a platform for financial transparency because data stored on the blockchain is reliable and accurate. Tax information is exchanged in real time, thereby reducing tax authorities' administrative burden and enhancing cooperation.

1 INTRODUCTION

In recent years, there has been increased focus on the cross-border administration of taxes. Globalisation and digitalisation have enhanced a

* This article is partly based on Ruddy Kabwe's LLD thesis submitted in partial fulfilment of an LLD at the University of Pretoria.

taxpayer's income-earning capabilities. This, in turn, has resulted in taxpayers receiving income from sources across multiple jurisdictions. Taxpayers can also elect the source of their profits.[1] The use of technology has enabled taxpayers to bypass exchange controls, which has led to the concealment of income from domestic tax authorities.[2] The effect is that countries incur revenue losses owing to tax evasion and tax avoidance.[3]

To address these challenges, tax authorities resort to cross-border exchange of tax information. Exchange of information (EOI) is an initiative designed to ensure effective taxation of income.[4] EOI, coupled with cooperation between tax authorities across multiple jurisdictions, provides a mechanism that identifies non-compliant taxpayers and taxpayers who do not divulge worldwide income.[5] In addition to combating tax evasion and tax avoidance,[6] exchanging tax-related information is critical in enforcing domestic tax laws.[7]

In April 2013, a major policy shift in international taxation led to the adoption of automatic exchange of information (AEOI).[8] The shift was largely driven by developments around the world, particularly in the United States of America (US) and Europe, where there was overwhelming support for automatic exchange of information.[9] AEOI is the "systematic and periodic transmission of bulk taxpayer information by the source country to the residence country concerning various categories of income such as dividends and interest".[10] AEOI[11] aims to provide domestic tax authorities

---

1 Wöhrer *Data Protection and Taxpayers' Rights: Challenges Created by Automatic Exchange of Information* (2018) 7.

2 Keen and Ligthart "Information Sharing and International Taxation: A Primer" 2006 13 *International Tax and Public Finance* 81 81–82.

3 Cockfield "Protecting Taxpayer Privacy Rights Under Enhanced Cross-Border Tax Information Exchange: Toward a Multilateral Taxpayer Bill of Rights" 2010 42(2) *UBC Law Review* 419 426.

4 Wöhrer *Data Protection and Taxpayers' Rights* 3.

5 Wöhrer *Data Protection and Taxpayers' Rights* 6.

6 Wöhrer *Data Protection and Taxpayers' Rights* 2; Cockfield "How Countries Should Share Tax Information" 2017 50(5) *Vanderbilt Journal of Transnational Law* 1091 1098–1099.

7 Cockfield 2017 *Vanderbilt Journal of Transnational Law* 1094; Ligthart and Voget "The Determinants of Cross-Border Tax Information Sharing: A Panel Data Analysis" (2008) http://citeseerx.ist.psu.edu/viewdoc/download?doi=10.1.1.509.2744&rep=rep1&type=pdf (accessed 2021-08-11) 1.

8 OECD "A Step Change in Tax Transparency" (2013) https://www.oecd.org/ctp/exchange-of-tax-information/taxtransparency_G8report.pdf (accessed 2022-01-27) 4.

9 *Ibid*.

10 OECD "Automatic Exchange of Information: What It Is, How It Works, Benefits, What Remains to be Done" (2012) https://www.oecd.org/ctp/exchange-of-tax-information/automatic-exchange-of-information-report.pdf (accessed 2022-01-27) 5.

11 The process of automatic exchange of information works as follows. A taxpayer provides information to an employer or paying agent. The employer or paying agent reports information to the relevant tax authorities. The tax authorities consolidate information by country of residence. Information is then encrypted and bundled before it is sent to the residence country's tax authorities. The information is then received and decrypted. The residence country feeds the relevant information into an automatic or manual matching process. The residence country analyses the results and takes compliance action as appropriate. See OECD https://www.oecd.org/ctp/exchange-of-tax-information/automatic-exchange-of-information-report.pdf 9.

with timely information regarding non-compliance, particularly where tax has been evaded on an investment return. According to the Organisation for Economic Co-operation and Development (OECD), AEOI can increase voluntary compliance and encourage taxpayers to report all relevant information. AEOI can increase fiscal revenue and promote fairness by ensuring that taxpayers consistently pay their fair share of taxes.[12]

However, the adoption of AEOI imposes administrative challenges on financial institutions[13] and tax authorities. Financial institutions are required to familiarise themselves with new regulations, manage relationships with multiple tax authorities, and educate staff and clients on the relevant reporting requirements.[14] AEOI is also over-reliant on financial institutions' ability to collect complex information that may vary in format and timing from multiple jurisdictions. Non-compliance with the reporting obligations may result in penalties for financial institutions.[15] From a tax-authority perspective, AEOI requires resources and information technology (IT) systems to process and disseminate tax data. Moreover, the success of AEOI is dependent on having appropriate safeguards for the cross-border transfer of tax information. Some of the safeguards include adequate infrastructure for the storage, processing, and transmission of personal information to other jurisdictions.[16] Lastly, AEOI requires active reciprocity. In other words, a country is not obligated to send information to another country if the latter is unable to reciprocate. The inability to reciprocate is prominent in developing countries that lack the capacity and finances to implement AEOI effectively.[17]

Non-compliant taxpayers are more likely to conceal their income and activities if financial transparency is lacking.[18] A lack of transparency can inhibit the effective implementation of EOI. A restricted application of EOI enhances the possibility of tax evasion. Protracted tax-evasion schemes

---

12 OECD https://www.oecd.org/ctp/exchange-of-tax-information/automatic-exchange-of-information-report.pdf 19.

13 For purposes of this article, financial institutions refer to banks, trusts, brokers, custodians, asset managers, private equity funds, investment vehicles, long-term insurers, and other participants in the financial system.

14 KPMG "Automatic Exchange of Information – The Common Reporting Standard: How Financial Institutions Can Adapt to New Global Standards" (2014) https://assets.kpmg/content/dam/kpmg/pdf/2014/09/the-common-reporting-standard-v3.pdf (accessed 2022-01-27) 3.

15 Panayi "Current Trends on Automatic Exchange of Information" *University School of Accountancy Research Paper* (2016) https://accountancy.smu.edu.sg/cet/sites/accountancy.smu.edu.sg.cet/files/Current%20Trends%20on%20Automatic%20Exchange%20of%20Information.pdf (accessed 2022-01-27) 28.

16 Panayi https://accountancy.smu.edu.sg/cet/sites/accountancy.smu.edu.sg.cet/files/Current%20Trends%20on%20Automatic%20Exchange%20of%20Information.pdf 30–31.

17 Knobel and Meinzer "Automatic Exchange of Information: An Opportunity for Developing Countries to Tackle Tax Evasion and Corruption" (2014) *Tax Justice Network* https://citeseerx.ist.psu.edu/viewdoc/download?doi=10.1.1.568.218&rep=rep1&type=pdf (accessed 2021-09-26) 3; Urinov "Developing Country Perspective on Automatic Exchange of Tax Information" 2015 19(1) *Law, Social Justice & Global Development Journal* 1 13.

18 Cockfield 2017 *Vanderbilt Journal of Transnational Law* 1098.

reduce the amount of revenue collected by tax authorities, which negatively impacts public expenditure.[19]

This article argues for the adoption in South Africa of blockchain technology for the effective implementation of international AEOI. The first section of this article introduces the concept of blockchain technology and its mechanics. The second section examines the importance of and legal basis for AEOI. The third section looks at the current South African legislative framework regarding AEOI. Lastly, the article considers how blockchain technology can enhance AEOI from a South African perspective. For purposes of this article, the words "tax authorities" and "competent authorities" are used interchangeably.

2 UNDERSTANDING BLOCKCHAIN

Blockchain is a type of distributed ledger that stores and records data. Data stored on a blockchain is grouped together in a sequence of transactions. Once the data reaches a specific size, "blocks" are created.[20] These blocks are stored on the distributed ledger. Then, a hash function is used to seal a block. A hash is a unique set of numbers and letters created by a mathematical formula.[21] Each "block" is chained to another "block" by making use of the hash function.[22] Generally, a "block" contains a hash, a previous block's hash, transaction data, and a timestamp.[23] Every time a "block" is stored on a ledger, that block is chronologically appended to the end of the blockchain.[24]

It is difficult to make changes to the blockchain because it is an append-only structure.[25] No single node[26] can change, add or delete any "blocks" on the blockchain. All nodes on the blockchain network store an identical copy of the ledger. Any alteration on the blockchain can only be made if all the nodes of the blockchain network agree to that change. For example, the addition of a new block to the blockchain requires nodes to verify simultaneously the accuracy of the information through a consensus mechanism.[27] Through consensus, the nodes oversee how new blocks are added to the blockchain.[28] Consensus ensures the reliability and integrity of

---

19 Wöhrer *Data Protection and Taxpayers' Rights* 8.

20 Finck *Blockchain Regulation and Governance in Europe* (2019) 6–7.

21 OECD "OECD Blockchain Primer" (2019) https://www.oecd.org/finance/OECD-Blockchain-Primer.pdf (accessed 2021-08-21) 4.

22 OECD https://www.oecd.org/finance/OECD-Blockchain-Primer.pdf 4; Finck *Blockchain Regulation and Governance in Europe* 6–7.

23 OECD https://www.oecd.org/finance/OECD-Blockchain-Primer.pdf 4; Finck *Blockchain Regulation and Governance in Europe* 6–7; De Filippi and Wright *Blockchain and the Law: The Rule Code* (2018) 22.

24 De Filippi and Wright *Blockchain and the Law* 22; Finck *Blockchain Regulation and Governance in Europe* 7.

25 Finck *Blockchain Regulation and Governance in Europe* 7.

26 A node is a computer on the blockchain network that stores a copy of the ledger.

27 A consensus is a mechanism or a set of rules that determines how blocks are added on the blockchain.

28 Finck *Blockchain Regulation and Governance in Europe* 7.

the information stored on the blockchain. Once consensus has been reached, the ledger is updated and synchronised throughout the network. All nodes, irrespective of their location, store the same version of the ledger at any given time.

3 CHARACTERISTICS OF BLOCKCHAIN

3 1 Immutability

One of blockchain's heralded features is the inability of participants[29] to alter or delete data stored on a blockchain. It is difficult for a single party to unilaterally amend data once it has been stored on a blockchain.[30] This means that the storage of data and transactions on a blockchain cannot be undone.[31] To effect changes on a blockchain, the cooperation and consensus of most participants is required. If the required number of participants agrees to modify the blockchain, new transactional entries must be conducted in order to reflect the current state of affairs.[32]

Blockchain's immutability has several benefits. First, it is difficult for anyone to hack the blockchain. Data stored on the blockchain is not stored centrally but rather on several nodes across different locations.[33] Secondly, data on a blockchain is always reliable because no participant can tamper with the blockchain without the knowledge of the other participants on the blockchain.[34] Thirdly, all transactions are secured by cryptography.[35] As mentioned above, all "blocks" are secured by a hashing mechanism ensuring that the data stored is protected.[36]

3 2 Transparency

Blockchain relies on a peer-to-peer network and digital signatures to ensure that data stored on a blockchain remains transparent.[37] Participants with unrestricted access can download a copy of the ledger on their respective nodes. Once downloaded, a participant can view all recorded transactions since the blockchain's inception. In effect, blockchain serves as an audit platform for participants to scrutinise the authenticity of a particular transaction.[38] Participants are compelled to store accurate data on the blockchain because once a transaction is stored, that transaction must be

---

29 In the context of blockchain, a participant is any person or entity that makes a transaction on a blockchain.

30 De Filippi and Wright *Blockchain and the Law* 35.

31 OECD https://www.oecd.org/finance/OECD-Blockchain-Primer.pdf 6.

32 Kianieff *Blockchain Technology and the Law Opportunities and Risks* (2019) 8.

33 *Ibid*.

34 *Ibid*.

35 Cryptography is the science of secure communications derived from applied mathematics. See Werbach *The Blockchain and the New Architecture of Trust* (2018) 40.

36 Kianieff *Blockchain Technology and the Law Opportunities and Risks* 8.

37 De Filippi and Wright *Blockchain and the Law* 37.

38 *Ibid*.

signed with a private key.[39] All participants have a private key. A participant certifies the legitimacy of the transaction by signing it.[40]

3 3 Distributed

It is possible for the nodes on a blockchain network to be situated in various locations. The nodes are connected to each other on a network consisting of a software protocol. Owing to blockchain's distributed nature, no single node controls the blockchain.[41] The lack of a central intermediary enables the sharing of the blockchain database across national borders.[42]

The blockchain's distributed and decentralised feature is beneficial because no single party can interfere with data stored on the blockchain. In addition, there is no central server that stores information. Hence, a cyber-attack on a single node does not result in data loss because all the other nodes store the exact copy of the ledger.[43] This contrasts with central databases that store data at a single location, making them susceptible to hacking and other cyber-related attacks.[44]

4 TYPES OF BLOCKCHAIN

4 1 Private blockchain

A blockchain can be designed in various ways depending on the intentions of the participants. A private blockchain is a type of blockchain that is restricted to a group of authorised nodes or participants.[45] In a private blockchain, an administrator grants access to pre-selected participants. For this reason, a private blockchain can be categorised as a "permissioned" blockchain.[46] It should be noted that a private blockchain is highly centralised. The administrator has the right to override or edit the blockchain as it sees fit.

Private blockchains are typically designed for a specific purpose.[47] For example, a private blockchain can be used to share sensitive information with vetted participants. The design of a private blockchain prevents unauthorised parties from accessing sensitive information. Since the identity of the participants is known, there is greater accountability in the unlikely event of data breaches.

---

39 A private key is unique set of characters associated with a specific address. A private key uses cryptography to encrypt and decrypt data.

40 De Filippi and Wright *Blockchain and the Law* 35.

41 De Filippi and Wright *Blockchain and the Law* 34; OECD https://www.oecd.org/finance/OECD-Blockchain-Primer.pdf 6.

42 De Filippi and Wright *Blockchain and the Law* 34.

43 Finck *Blockchain Regulation and Governance in Europe* 18.

44 OECD https://www.oecd.org/finance/OECD-Blockchain-Primer.pdf 6.

45 OECD https://www.oecd.org/finance/OECD-Blockchain-Primer.pdf 5.

46 Finck *Blockchain Regulation and Governance in Europe* 15; OECD https://www.oecd.org/finance/OECD-Blockchain-Primer.pdf 5.

47 Finck *Blockchain Regulation and Governance in Europe* 15.

It is easier and faster to process transactions on a private blockchain (as opposed to a public blockchain) because of the limited number of participants.[48] As a result, a private blockchain is more efficient, making it simpler to manage. It is the view of the authors that a reduced number of blockchain participants significantly increases the chances of promoting privacy.

4 2 Public blockchain

Public blockchains are open for anyone to access the network, download, and run the blockchain on their respective nodes, without any restrictions.[49] The blockchain code can be read and written by any of the participants on the network.[50] The participants can also download a copy of the ledger and view all the transactions recorded on the blockchain.[51] Owing to the public blockchain's openness to the public, it can sometimes be referred to as "permissionless" blockchain. A public blockchain can be permissioned in the sense that, while the blockchain is open to anyone, only authorised participants can make changes to the blockchain network. These changes include adding new blocks to the chain.[52]

Generally, public blockchains are decentralised in nature. This simply means that no central administrator controls the network. Instead, participants run the blockchain. It is quite likely that the participants on a public blockchain do not know each other. The lack of familiarity does not preclude participants from trusting the blockchain network. The reason for this is that faith in the blockchain software code replaces reliance on any counterparty, intermediary, and mechanism that ordinarily makes a transaction trustworthy.[53]

4 3 Consortium/hybrid blockchain

A consortium blockchain is a hybrid system that combines the elements of a private and public blockchain. A consortium blockchain can be decentralised in nature. Selected participants can access and view the blockchain.[54] This implies that a consortium blockchain is not necessarily open to the public. Authorised participants can be selected to record transactions on the blockchain.[55] It is possible for all participants on the network to verify transactions before adding them to new blocks. Alternatively, a limited

---

48 Finck *Blockchain Regulation and Governance in Europe* 15; De Filippi and Wright *Blockchain and the Law* 31.

49 Finck *Blockchain Regulation and Governance in Europe* 14.

50 OECD https://www.oecd.org/finance/OECD-Blockchain-Primer.pdf 5.

51 Finck *Blockchain Regulation and Governance in Europe* 14.

52 OECD https://www.oecd.org/finance/OECD-Blockchain-Primer.pdf 5.

53 See Werbach *The Blockchain and the New Architecture of Trust* 29.

54 OECD https://www.oecd.org/finance/OECD-Blockchain-Primer.pdf 5.

55 *Ibid*.

number of participants can be selected to add new blocks to the blockchain.[56]

A consortium blockchain can have an administrator. If present, an administrator grants authorised participants access to the blockchain network. The administrator can also determine the duties of the participants. For example, the administrator can select three participants to record transactions. The three participants remain responsible for that specific task insofar as the network is functional.

5 THE IMPORTANCE OF EXCHANGE OF INFORMATION

The residence basis of taxation imposes a worldwide tax on domestic and foreign income received by resident taxpayers based on the progressive rate of a country. In terms of the source-based model of taxation, the source country imposes a tax on the domestic income received by both resident and non-resident taxpayers based on the progressive rate of the country. It can happen that income earned by a resident taxpayer in a source country is subject to double taxation. This emanates from the fact that the resident country imposes a tax on foreign income based on the worldwide taxation system while the source country taxes the same income because it originates from that country.[57] To address international double taxation, the residence country often implements a strategy in terms of which the resident taxpayer obtains a tax credit for taxes paid in the source country.

Challenges arise when taxpayers underreport, or omit to report, income received from a source country. This results in information asymmetry because the source country is in possession of tax information that is not known to the residence country. The non-compliant taxpayers are aware that their residence country does not possess extra-territorial powers to enforce domestic laws in the source country, making the possibility of being caught unlikely. The challenge is compounded by source countries that impose little or no taxation on non-residents. This encourages investment from non-residents who benefit by receiving high-mobility passive income. The presence of bank secrecy rules in source countries obfuscates tax information, which in turn attracts further foreign investments from non-residents.[58]

Tax authorities require tax information to ascertain a taxpayer's tax liability and to enforce domestic tax laws. In order for residence countries to combat tax evasion, it is essential to know whether income originates from another country. It can also happen that a taxpayer makes investments in financial institutions situated abroad. Those investments can easily remain untaxed if no information is exchanged.[59] If a taxpayer does not disclose this

---

56 *Ibid*.

57 Garbarino and Garafi "Transparency and Exchange of Information in International Taxation" in Bianchi and Peters (eds) *Transparency in International Law* (2013) 172–173.

58 *Ibid*.

59 Wöhrer *Data Protection and Taxpayers' Rights* 6.

information or if the taxpayer underreports income from an international source, the domestic tax authority cannot accurately determine a taxpayer's liability. This affects a tax authority's ability to collect revenue. As a result, countries enter into bilateral agreements to exchange tax information.[60] A residence country that shares tax information with a source country makes it difficult for tax-evading taxpayers to treat the source country as a tax haven.

6 ISSUES THAT LIMIT AUTOMATIC EXCHANGE OF INFORMATION

6 1 Bank secrecy

As alluded to above,[61] bank secrecy frustrates a residence country's ability to determine a resident's tax liability. Bank secrecy refers to a bank's obligation to treat a client's information and business activities as confidential.[62] The bank's obligation to safeguard a client's personal information is based on an agreement concluded between a bank and its client, provided that all the necessary formalities are complied with. A bank's duty to keep the financial affairs of clients confidential is based on the law of contract.[63]

Generally, countries adopt rules that aim to protect the confidentiality of client's tax information. While the non-disclosure of tax information may be beneficial insofar as protecting a client's right to privacy is concerned, the non-disclosure of financial accounts has negative consequences for residence countries. Source countries take bank secrecy seriously to the extent that any disclosure of client information by bankers warrants criminal sanctions, fines and even imprisonment.[64] The heavy-handed approach towards the disclosure of financial accounts makes it difficult for bankers and financial institutions to divulge such information when requested to do so by other countries. Taxpayers and corporations, fully aware of these provisions, continue to transfer assets to these countries while maintaining income streams. The veil of secrecy in foreign countries encourages illegal activities such as money laundering and tax evasion. Residence countries cannot

60 *Ibid*.

61 Under heading 5.

62 Msimango *A Critical Study of the Bank Secrecy Rule* (LLM mini-dissertation, University of Pretoria) 2019 ii; Meyer "Swiss Banking Secrecy and Its Legal Implications in the United States" 1978 14(1) *New England Law Review* 18 27; Auwarter "Compelled Waiver of Bank Secrecy in the Cayman Islands: Solution to International Tax Evasion or Threat to Sovereignty of Nations" 1985 9(3) *Fordham International Law Journal* 680 682 fn 6; Gregory "Lax Tax: The Threat of Secrecy Jurisdictions and What the International Community Should Do About It" 2012 20(3) *Transnational Law & Contemporary Problems* 859 863.

63 Van Jaarsveld "The End of Bank Secrecy: Some Thoughts on the Financial Intelligence Centre Bill" 2001 13(4) *South African Mercantile Law Journal* 580 587.

64 Schottenstein "Is Bank Secrecy Still Bankable?: Critical Review of Bank Secrecy Law, Tax Evasion and UBS" 2010 5(1) *Entrepreneurial Business Law Journal* 351 355.

enforce their respective tax laws because enforcement requires access to information related to accounts and financial accounts.[65]

6 2 Tax havens

The term "tax haven" has no universally accepted definition. In 1998, the OECD published a report addressing harmful tax practices in tax havens and harmful preferential tax regimes in OECD and non-OECD countries.[66] The report, among other things, identified four harmful tax practices common among tax havens.[67] The first harmful practice is a regime having no or low effective tax rates.[68] The presence of no or low taxes is an attractive proposition for foreign corporations and foreign individuals to avoid or evade taxes.[69] The presence of no or low taxes *per se* is not the sole indicator that a regime is a tax haven.[70] However, if combined with one or more factors, then a regime can be considered a tax haven.[71] Often, tax havens use their "no or low" tax status as a means to attract foreign capital.[72] The second characteristic looks at whether a specific regime is ring-fenced – simply put, whether a country fully or partially insulates itself from its own domestic market. For example, a country can explicitly exclude resident taxpayers from taking advantage of tax benefits.[73] Thirdly, tax havens lack transparency. A non-transparent regime is one that has favourable application of laws and regulations, negotiable tax provisions, and a failure to make available administrative practices widely known.[74] And lastly, tax havens lack effective exchange of information channels with other countries. This factor is characterised by an inability or unwillingness of the country to provide information to other countries. For example, a source country may be unable to provide information to a resident country because secrecy laws preclude the relevant tax authorities in the former from retrieving information from its taxpayers. Moreover, there could be certain administrative practices that preclude the cross-border transfer of information to other jurisdictions.[75] Other tax haven indices include political stability, modern communication,

---

65 See OECD "Transparency and Exchange of Information for Tax Purposes: Multilateral Co-Operation Changing the World" (undated) https://www.oecd.org/tax/transparency/global-forum-10-years-report.pdf (accessed 2022-01-03) 11.

66 OECD "Harmful Tax Competition: An Emerging Global Issue" (1998) https://www.oecd.org/ctp/harmful/1904176.pdf (accessed 2022-01-06) 3.

67 *Ibid*.

68 OECD https://www.oecd.org/ctp/harmful/1904176.pdf 26.

69 Irish "Tax Havens" 1982 15(3) *Vanderbilt Journal of Transnational Law* 449 452; Dhammika and Hines "Which Countries Become Tax Havens?" (2009) https://ssrn.com/abstract=952721 (accessed 2022-01-07) 3.

70 Leikvang "Piercing the Veil of Secrecy: Securing Effective Exchange of Information to Remedy the Harmful Effects of Tax Havens" 2012 45(1) *Vanderbilt Journal of Transnational Law* 293 298.

71 OECD https://www.oecd.org/ctp/harmful/1904176.pdf 26.

72 Leikvang 2012 *Vanderbilt Journal of Transnational Law* 298.

73 OECD https://www.oecd.org/ctp/harmful/1904176.pdf 26–27.

74 OECD https://www.oecd.org/ctp/harmful/1904176.pdf 27.

75 OECD https://www.oecd.org/ctp/harmful/1904176.pdf 29.

and transportation systems, the availability of professional services and staff, and good business facilities.[76]

Irish categorises tax havens into three main classes. The first, a "pure tax haven", is a regime that does not impose direct tax on income, profits or capital gains. Other taxes such as death duties, succession taxes or inheritance taxes are also not imposed. Corporate and individual taxpayers take advantage of these regimes by ensuring that the transactions giving rise to the income are structured to avoid taxes in the domicile country.[77] Pure tax havens are notorious for having secrecy laws. These laws make it conducive for pure tax havens to act as offshore financial centres where funds borrowed from foreign entities are advanced to other foreign entities through the intermediation of financial institutions. In addition, these transactions are conducted without the necessary exchange controls.[78]

A second class of tax haven, a "liberal tax haven", imposes direct taxes but promotes activities that advance favourable tax treatment. The tax preference activities are often promoted by government policies.[79] A third class, "tax treaty havens", are regimes that are part of tax treaties that grant favourable markets and tax terms to foreign corporations and individuals. Tax treaty havens are often used as conduits for international financing and investment transactions.[80]

As alluded to above, tax havens threaten the sovereignty of other countries. While tax havens exercise sovereignty by commercialising their own territories, they do so at the expense of other countries' ability to tax their residents efficiently. Tax havens promulgate laws that invite financial institutions to hold, receive and manage assets belonging to non-residents without providing the relevant information to authorities in the home countries.[81] These arrangements make it easier for residents to evade taxes because assets and income are not declared when filing income tax returns in the domestic country.[82] Tax havens erode a domestic country's tax base, which in turn distorts trade and investment patterns resulting in loss of revenue for the domestic country.[83]

---

76 Irish 1982 *Vanderbilt Journal of Transnational Law* 454; Leikvang 2012 *Vanderbilt Journal of Transnational Law* 300; Dhammika and Hines https://ssrn.com/abstract=952721 7–13.

77 Irish 1982 *Vanderbilt Journal of Transnational Law* 454–455.

78 Irish 1982 *Vanderbilt Journal of Transnational Law* 456.

79 Irish 1982 *Vanderbilt Journal of Transnational Law* 456–458.

80 Irish 1982 *Vanderbilt Journal of Transnational Law* 459–460.

81 Meinzer "Automatic Exchange of Information as the New Global Standard: The End of (Offshore Tax Evasion) History?" (2017) *Tax Justice Network* https://mpra.ub.uni-muenchen.de/77576/1/MPRA_paper_77576.pdf (accessed 2022-01-10) 2.

82 Meinzer https://mpra.ub.uni-muenchen.de/77576/1/MPRA_paper_77576.pdf 3.

83 Leikvang 2012 *Vanderbilt Journal of Transnational Law* 307.

6 3 Lack of adequate infrastructure/resources

AEOI is often characterised by the exchange of large volumes of data.[84] This presupposes the availability of relevant information technology infrastructure within tax administration systems to collect, process and disseminate data.[85] A lack of infrastructure can significantly impede a tax authority's ability to disseminate data to a requesting authority. Without the necessary resources, a tax administrator's administrative costs can increase significantly. The reason is clear. The absence of resources compels the tax administrator to use manual systems for the collection, processing and dissemination of data. The manual processing of data is time-consuming and costly for tax authorities. In addition, a lack of adequate infrastructure can make it difficult for certain countries to perform reciprocal obligations in terms of AEOI agreements. Put simply, certain countries focus on transmitting data to outside their borders but elect not to receive data. Rather, these countries focus on the compliance aspect of the AEOI agreements.[86]

To implement AEOI efficiently, digitalisation[87] of tax administration is required. Countries must invest in resources to modernise their tax administration by adopting new technologies.[88] The need to modernise the tax administration can be attributed to the increasing demand for tax collection, improved efficiency in the management of tax operations, and the bolstering of tax-compliance measures. The obligation imposed by exchange-of-information multilateral treaties coupled with the globalisation of business activities has contributed towards governments' push towards modernising the tax administration process.[89]

In addition to acquiring IT systems, digitalisation requires skilled personnel to address tax administration operations.[90] The appointment or training of personnel, particularly in the field of AEOI, is crucial to the successful execution of AEOI. If current personnel lack the relevant expertise in technical processes, then the cross-border administration of taxes can become complex and challenging. In some African countries, participation in AEOI is low for several reasons. Some countries' response to requests is delayed owing to a lack of skilled personnel or lack of infrastructure. Other countries are not convinced that AEOI can tackle not only tax evasion and

---

84 Gueydi and Abdellatif "The Transformation of Tax Administration Functions in the Automatic Exchange of Information Era: A Developing Country's Perspective" 2019 16(3) *eJournal of Tax Research* 780 790.

85 Gueydi and Abdellatif 2019 *eJournal of Tax Research* 793; Bird and Zolt "Technology and Taxation in Developing Countries: From Hand to Mouse" 2008 61(4) Part 2 *National Tax Journal* 791 798.

86 Gueydi and Abdellatif 2019 *eJournal of Tax Research* 793.

87 Digitalisation can be defined as "a sociotechnical process of applying digitizing techniques to broader social and institutional contexts that render digital technologies infrastructural". Digitisation is the "process of converting analog signals into digital form, and ultimately into binary digits (bits)". See Tilson, Lyytinen and Sorensen "Research Commentary: Digital Infrastructures: The Missing IS Research Agenda" 2010 21(4) *Information Systems Research* https://doi.org/10.1287/isre.1100.0318 (accessed 2022-01-13) 749.

88 Gueydi and Abdellatif 2019 *eJournal of Tax Research* 784.

89 Gueydi and Abdellatif 2019 *eJournal of Tax Research* 790.

90 Gueydi and Abdellatif 2019 *eJournal of Tax Research* 784.

transfer pricing but also be extended to improve aspects of the general tax administration system. The reluctance to implement AEOI in some African countries can also be attributed to policy makers' resistance to introduce AEOI legislative frameworks in jurisdictions that lack resources and personnel.[91]

A lack of resources can also affect taxpayers' compliance. For example, the Common Reporting Standards (CRS) AEOI obligations require financial institutions to verify financial accounts and report those accounts to the domestic tax authority. The financial institution cannot comply with this obligation if it does not have the necessary tools to perform this function. Some financial institutions may be reluctant to comply owing to the significant costs associated with modernising their IT systems.[92] Without compliance, a tax authority may be unable to fulfil its obligations in terms of the relevant CRS AEOI.

6 4 Lack of transparency

The need for transparency came to the fore after the events of the 2008 global financial crisis (GFC). The GFC was characterised by a shadow financial structure that comprised tax havens, disguised corporations, money laundering, anonymous trust accounts, false documentation and secret jurisdictions. These structures promoted illicit financial flows across borders.[93] The problem was compounded by a lack of good corporate governance and risk management by financial institutions and multinational enterprises (MNEs). Public outcry coupled with government scrutiny led to increased calls for accountability, particularly for MNEs and financial institutions. For their part, tax administrators sought increased financial transparency from MNEs.[94]

It should be noted that there is a difference between "tax transparency" and "financial transparency". Although the two terms have been used interchangeably and inconsistently, it is submitted that the two terms are mutually exclusive. Tax transparency refers to a "government's openness regarding its tax rules, agency interpretations, decision making processes, and enforcement practices".[95] The purpose of tax transparency is to ensure that governments are held accountable by empowering citizens to monitor the activities of tax authorities. In addition, tax transparency provides citizens

---

91 Von Haldenwnag, Ibrahim, Davis and Monkam "Tax Transparency and Exchange of Information (EOI): Priorities for Africa" (2019) https://www.g20-insights.org/wp-content/uploads/2018/07/TF5-5.2-Taxation_FINAL-1.pdf (accessed 2022-01-13) 6–7.

92 Gueydi and Abdellatif 2019 *eJournal of Tax Research* 790–791.

93 Task Force on Financial Integrity and Economic Development "Economic Transparency: Curtailing the Shadow Financial System" (2009) http://www.financialtransparency.org/wp-content/uploads/2009/10/the-case-for-global-financial-transparency-updated.pdf (accessed 2022-01-02) i; Tajan "Emerging From Secrecy Space: From Bank Secrecy to Financial Transparency" 2010 55(2) *Ateneo Law Journal* 447 452.

94 D'Ascenzo "Global Trends in Tax Administration" 2015 1(1) *Journal of Tax Administration* 81 92.

95 Blank "The Timing of Tax Transparency" 2017 90(3) *Southern California Law Review* 449 453.

with the awareness of the practical aspects of tax laws and policies. Citizens, with the requisite knowledge of how tax laws and policies function, are then able to partake in debates regarding government rules and actions.[96] In contrast, financial transparency refers to accessing financial accounts drawn in accordance with accepted accounting standards for purposes of auditing and filing.[97] Financial transparency also refers to tax authorities' ability to access information regarding the beneficial owners of all types of entities, and relevant information from financial institutions.[98] The Financial Transparency Coalition (FTC)[99] defines financial transparency as comprising "public records, multiple oversight mechanisms to review financial structures, a genuine curtailment of tax-evading activities, and trade conducted without disadvantaging weaker nations".[100] A closer look at the two terms indicates that the term "financial transparency" is relevant for purposes of AEOI.

It is the authors' view that financial transparency does not necessarily mean providing bulk data to tax authorities.[101] The issue is not the exchange of bulk data *per se* but rather providing high-quality and accurate data so that the relevant authorities can correctly identify beneficial ownership, bank accounts and account holders. The authors' view is supported by Cockfield, who argues that possessing more information is not necessarily ideal because tax authorities may be overwhelmed by the quantity of data that is available. The challenge is compounded by a lack of available resources to analyse the relevant data.[102] Abrahams correctly points out that the transfer of excess data can be costly and time-consuming, especially where the relevant information cannot be retrieved.[103] Merely sharing information with tax authorities because of an apparent obligation imposed by a Tax

96 Blank 2017 *Southern California Law Review* 459.

97 Garbarino and Garafi in Bianchi and Peters *Transparency in International Law* 175.

98 *Ibid*.

99 The FTC was set up in 2009 under the name "Task Force on Financial Integrity and Economic Development". The primary role of the FTC is to advocate for a more transparent financial system. The FTC uses expertise and wide reach to influence global norms and standards for financial transparency, and to close loopholes in the global financial system. See https://financialtransparency.org/about/ (accessed 2022-01-31).

100 Task Force on Financial Integrity and Economic Development http://www.financialtransparency.org/wp-content/uploads/2009/10/the-case-for-global-financial-transparency-updated.pdf 2.

101 The proliferation of cross-border tax information exchange raises concerns around obtaining accurate and relevant tax information. As correctly pointed out by Bossa and de Paiva Gomes, accessing more information does not necessarily translate to accurate and reliable tax information. The importance of acquiring accurate tax information cannot be overstated. With accurate tax information, tax authorities can correctly depict an individual's taxable income. In the author's view, the accuracy of personal income data can be a factor in determining the amount of revenue collected by a tax authority at any given time. A lack of information or the acquisition of inaccurate information can lead to losses in revenue. See Bossa and De Paiva Gomes "Blockchain: Technology as a Tool for Tax information Exchange or an instrument Threatening the Taxpayer's Privacy?" (2019) https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3540277 (accessed 2021-11-05) 9–13.

102 See Cockfield 2017 *Vanderbilt Journal of Transnational Law* 1109.

103 Abrahams *An International Comparative Study of Transparency and Exchange of Information Measures* (MCom mini-dissertation, North-West University) 2021 18.

Information Exchange Agreement (TIEA) is insufficient. The information provided by a taxpayer or legal entity must accurately depict the true identity, beneficial ownership and real management of an entity or a person conducting a financial transaction. It requires legal entities or persons conducting transactions to record the capacity in which those transactions are conducted. The legal entities' financial accounts must be accessible and prepared in accordance with internationally accepted standards to reveal the substance and form of that transaction. The relevant authorities must be able to access bank accounts, financial information and true identities without delay. Any enquiry pertaining to the accuracy of the supplied information must be performed in a timely manner with the assistance of other countries. Exemptions to international cooperation should only be invoked under exceptional circumstances.[104]

Financial transparency is crucial for the effective implementation of AEOI. The United States (US) Supreme Court in *Thor Power Tool Co v Commissioner*[105] emphasised the importance of transparency in the financial accounting process. The court held: "The primary goal of financial accounting is to provide useful information to management, shareholders, creditors, and others properly interested; the major responsibility of the accountant is to protect these parties from being misled."[106] Without financial transparency, the relevant authorities cannot know the true substance of a transaction. Financial transparency assists relevant authorities in ascertaining the nature of the transaction and, in so doing, determining whether the transaction is licit or illicit.[107] Access to financial records enables tax authorities to discern the tax-compliance levels of corporate and individual taxpayers. This can be seen as an external verification process to determine the accuracy of tax returns filed by taxpayers. Furthermore, information on beneficial ownership, combined with banking and accounting records can strengthen tax authorities' role in the enforcement and administration of taxes.[108]

7 INFORMATION EXCHANGE INSTRUMENTS

7 1 Double tax agreements

A double tax agreement (DTA) is the most prevalent form of exchanging information. DTAs are primarily based on the OECD Model Tax Convention on Income and Capital,[109] and on the United Nations Model Double Taxation

---

104 Murphy and Sagar "What Is Financial Transparency?" (2009) *Mapping the Faultlines, Tax Justice Network* https://fsi.taxjustice.net/Archive2011/Notes%20and%20Reports/FinancialTransparency.pdf (accessed 2022-01-02) 9–10.

105 439 U.S. 522 (1979).

106 *Thor Power Tool Co v Commissioner* 439 US 522 (1979) 542; see also Oortwijn "International Tax Transparency: Past, Present and Future" 2013 24(8) *International Tax Review* 10 10.

107 Tajan 2010 *Ateneo Law Journal* 453.

108 See OECD https://www.oecd.org/tax/transparency/global-forum-10-years-report.pdf 10.

109 The OECD Model Tax Convention on Income and Capital (tenth edition) was published on 18 December 2017.

Convention Between Developed and Developing Countries.[110] These agreements always contain provisions that aim to reduce double taxation.[111] DTAs are largely based on article 26 of the OECD Model Tax Convention.[112] DTAs provide relief from double taxation and incorporate information exchange provisions.[113]

7 2 Bilateral information exchange agreements

Depending on the circumstances, countries can elect to enter into bilateral information exchange agreements as opposed to DTAs. For example, a country may elect to enter into a bilateral exchange agreement with another country because the latter imposes little or no tax.[114] Bilateral information exchange agreements are also referred to as Tax Information Exchange Agreements (TIEAs). Bilateral information exchange agreements contain exchange-of-information provisions but do not necessarily contain provisions to prevent double taxation.[115] TIEAs can be used to strengthen the provisions in an existing applicable DTA by, for example, providing for structured exchange programmes specifying the type of information to be exchanged, the sharing of costs, and the use of information in criminal investigations.[116] TIEs make provision for procedural safeguards in both countries to ensure that tax information is kept confidential.[117]

7 3 Multilateral Convention on Mutual Administrative Assistance in Tax Matters

The Multilateral Convention on Mutual Administrative Assistance in Tax Matters (the Multilateral Convention),[118] as the name suggests, is a convention that is entered into between multiple countries. In doing so, countries mitigate the costs and risks that would normally have been incurred when negotiating with each participating jurisdiction.[119] The Multilateral Convention was jointly developed by the OECD and the Council

[110] This United Nations Model Double Taxation Convention Between Developed and Developing Countries was updated in 2017.

[111] Knobel and Meinzer https://citeseerx.ist.psu.edu/viewdoc/download?doi=10.1.1.568.218&rep=rep1&type=pdf 18.

[112] See art 26 of the OECD Model Tax Convention on Income and Capital.

[113] Keen and Ligthart 2006 *International Tax and Public Finance* 91.

[114] Tanzi and Zee "Taxation in Borderless World: The Role of Information Exchange" 2000 28(2) *Intertax* 58 60.

[115] Knobel and Meinzer https://citeseerx.ist.psu.edu/viewdoc/download?doi=10.1.1.568.218&rep=rep1&type=pdf 19.

[116] Keen and Ligthart 2006 *International Tax and Public Finance* 92.

[117] Cockfield 2010 *UBC Law Review* 424.

[118] OECD/Council of Europe *The Multilateral Convention on Mutual Administrative Assistance in Tax Matters: Amended by the 2010 Protocol* (2011).

[119] Knobel and Meinzer https://citeseerx.ist.psu.edu/viewdoc/download?doi=10.1.1.568.218&rep=rep1&type=pdf 20.

of Europe in 1988. The original Multilateral Convention was amended by a Protocol in 2010.[120] According to the OECD, the Multilateral Convention

> "facilitates international co-operation for a better operation of national laws, while respecting the fundamental rights of taxpayers. It provides for all possible forms of administrative co-operation between states in the assessment and collection of taxes. This co-operation ranges from exchange of information, including automatic exchanges, to the recovery of foreign tax claims."[121]

Countries who sign the Multilateral Convention also sign the Multilateral Competent Authority Agreement (MCAA).[122]

8 TYPES OF INFORMATION EXCHANGE

8 1 Information exchange upon request

Tax information upon request is the most common form of information exchange.[123] Here, the requesting country creates and sends an information request to the tax authorities in the domestic country. The domestic country considers the request and if all requirements are met, the domestic country retrieves the requested information and sends it to the requesting country.[124]

Generally, any exchange of information upon request is subject to a tax authority's ability to identify the taxpayer and the relevant financial institution.[125] Any information supplied by the requesting country to the domestic country must be clear and concise to enable the latter to accurately identify the taxpayer. If the contents of the information are ambiguous, that request can be treated as a "fishing expedition"[126] and the domestic country may decline such a request.[127] It can happen that exchange of information upon request necessitates notifying the taxpayer. If that is the case, the

---

120 See OECD "Convention on Mutual Administrative Assistance in Tax Matters" (2021) https://www.oecd.org/tax/exchange-of-tax-information/convention-on-mutual-administrative-assistance-in-tax-matters.htm (accessed 2022-01-17); Knobel and Meinzer https://citeseerx.ist.psu.edu/viewdoc/download?doi=10.1.1.568.218&rep=rep1&type=pdf 20.

121 See OECD https://www.oecd.org/tax/exchange-of-tax-information/convention-on-mutual-administrative-assistance-in-tax-matters.htm.

122 The MCAA "is a multilateral framework agreement that provides a standardised and efficient mechanism to facilitate the automatic exchange of information in accordance with the Standard for Automatic Exchange of Financial Information in Tax Matters. It avoids the need for several bilateral agreements to be concluded". See OECD "What Is the Multilateral Competent Authority Agreement" (date unknown) https://www.oecd.org/tax/transparency/documents/whatisthemultilateralcompetentauthorityagreement.htm (accessed 2023-09-06).

123 Knobel and Meinzer https://citeseerx.ist.psu.edu/viewdoc/download?doi=10.1.1.568.218&rep=rep1&type=pdf 20.

124 Knobel and Meinzer https://citeseerx.ist.psu.edu/viewdoc/download?doi=10.1.1.568.218&rep=rep1&type=pdf 20; Oberson *International Exchange of Information in Tax Matters* (2015) 27.

125 Oberson *International Exchange of Information in Tax Matters* 21.

126 According to Oberson, a "fishing expedition" is a request that merely seeks to corroborate information that already exists. See Oberson *International Exchange of Information in Tax Matters* 21.

127 Oberson *International Exchange of Information in Tax Matters* 21.

taxpayer can elect to frustrate the administration process by concealing or destroying important information.[128]

It is important to note that the requested information must be relevant at the time a request is made. The foreseeability requirement ensures that the requesting jurisdiction does not go on fishing expeditions. In other words, there should be a close link between the information requested and the reason for the request. A domestic country is not obligated to provide information where it can be shown that the request for information was irrelevant.[129]

Knobel and Meinzer correctly argue that this type of information exchange is costly and time-consuming, imposing a further administrative burden on the domestic tax authorities. They argue that tax authorities are required to retrieve, ascertain and send tax information to the requesting country.[130] Where such information is not readily available to the tax authority, reliance is placed on information supplied by financial institutions.

8 2 Spontaneous exchange of information

A spontaneous exchange of information occurs when a contracting country unilaterally initiates the supply of tax information to another country. Such information has not been requested before.[131] The successful implementation of this model depends on the cooperation and active participation of domestic tax officials.[132] The domestic tax officials may have actively to identify information that is relevant to an active tax audit investigation in another country. Once the relevant information has been identified, the tax officials send that information to the other country where it can be of use.[133] Generally, a spontaneous request is considered more effective than other models because the tax information is obtained through a detection and investigative process. The effectiveness of this model depends on the motivation of the tax officials. In this context, tax authorities may be required to implement measures to encourage the spontaneous exchange of information by tax officials.[134]

---

[128] Knobel and Meinzer https://citeseerx.ist.psu.edu/viewdoc/download?doi=10.1.1.568.218&rep=rep1&type=pdf 22.

[129] OECD "Model Tax Convention on Income and on Capital 2017 (Full Version) (commentary on Article 26)" (2019) https://doi.org/10.1787/g2g972ee-en (accessed 2021-09-26) 489.

[130] Knobel and Meinzer https://citeseerx.ist.psu.edu/viewdoc/download?doi=10.1.1.568.218&rep=rep1&type=pdf 21.

[131] OECD "Manual on the Implementation of Exchange of Information Provisions for Tax Purposes: Module 2 on Spontaneous Exchange of Information" (2006) https://www.oecd.org/tax/exchange-of-tax-information/36647914.pdf (accessed 2021-09-26) 3; Oberson *International Exchange of Information in Tax Matters* 27–28; Keen and Ligthart 2006 *International Tax and Public Finance* 83.

[132] OECD https://www.oecd.org/tax/exchange-of-tax-information/36647914.pdf 3.

[133] OECD https://www.oecd.org/tax/exchange-of-tax-information/36647914.pdf 3; Oberson *International Exchange of Information in Tax Matters* 27–28.

[134] *Ibid*.

8 3 Automatic exchange of information

In 2013, the Group of Twenty (G20)[135] countries made a commitment to combat tax avoidance and tax evasion and to promote trust in the international tax system.[136] The G20, in collaboration with the OECD, developed a single global standard for the automatic exchange of information. In terms of the standards, tax authorities are required to obtain tax information from their respective financial institutions and then exchange that information automatically with another jurisdiction. The annual submission process requires financial institutions to exchange bank account numbers, and the different accounts held by taxpayers, and to comply with common due-diligence procedures.[137]

Automatic exchange of information occurs when a country, without request, periodically transmits tax information to another country.[138] The efficacy of this model depends on the routine reporting of payments such as interest, royalties, and capital gains by financial institutions and employers. In addition, a taxpayer's change of residence, value-added tax (VAT) refunds, and dispositions of immovable property can be exchanged with the relevant country.[139] Upon receipt of this information, the domestic country can cross-check and determine if a taxpayer is compliant with its domestic tax laws.[140]

To effectively implement AEOI, four "building blocks" must be present in the domestic state. First, and perhaps evidently, AEOI can only occur if the domestic country has an international exchange agreement with the residence country. Secondly, both countries should have a domestic legislative framework that protects and safeguards the confidentiality of taxpayer information. Thirdly, domestic legislation should be amended to

---

135 The G20 was originally established by G7 Finance Ministers in 1999 because of the 1997 economic crisis. The Group has since grown to include 20 countries. After the 2008 financial crisis, the United States (US) proposed that participation of the G20 be raised to the level of Heads of Government. The G20 members account for more than 80% of the world's gross domestic product (GDP), 75% of the world's global trade and 60% of the world's population. The primary goal of the G20 is to address issues such as the global economy, tax issues and financial stability. Currently, the members include Argentina, Australia, Brazil, Canada, China, France, Germany, Japan, India, Indonesia, Italy, Mexico, Russia, South Africa, Saudi Arabia, South Korea, Turkey, the United Kingdom (UK), US and the European Union (EU). Spain is invited as a permanent guest. See https://www.g20.org/about-the-g20.html (accessed 2021-09-26).

136 See OECD "OECD Delivers New Single Global Standard on Automatic Exchange of Information" (2014) https://www.oecd.org/ctp/exchange-of-tax-information/oecd-delivers-new-single-global-standard-on-automatic-exchange-of-information.htm (accessed 2021-09-26).

137 See OECD https://www.oecd.org/ctp/exchange-of-tax-information/oecd-delivers-new-single-global-standard-on-automatic-exchange-of-information.htm.

138 OECD "Manual on the Implementation of Exchange of Information Provisions for Tax Purposes: Module 3 on Automatic (Or Routine) Exchange of Information" (2006) https://www.oecd.org/tax/exchange-of-tax-information/36647914.pdf (accessed 2021-09-26) 3; Oberson *International Exchange of Information in Tax Matters* 28.

139 OECD https://www.oecd.org/tax/exchange-of-tax-information/36647914.pdf 3; Oberson *International Exchange of Information in Tax Matters* 28.

140 OECD https://www.oecd.org/tax/exchange-of-tax-information/36647914.pdf 3.

enforce and give effect to the international exchange agreements. And lastly, the source country should be in possession of administrative and information technology (IT) capabilities.[141]

8 4 Tax examination abroad

Tax examination abroad, as the name suggests, occurs when authorised tax officials from a requesting country conduct tax examinations in the domestic country.[142] Depending on arrangements between the two countries, the authorised foreign tax officials can conduct a passive examination by merely cooperating with domestic tax officials. Active participation by a foreign tax official entails conducting interviews with taxpayers and examining the latter's tax information. The tax authorities in the domestic country can always insist on the availability of one of their representatives during the interview process. However, a foreign tax official may not compel a taxpayer to disclose information.[143]

The use of tax examination abroad for exchange of information has benefits. First, the taxpayer's compliance burden is decreased. A taxpayer need not spend time and money complying with complex tax laws in different jurisdictions. Instead, the corresponding tax authorities collaborate on matters pertaining to the taxpayer.[144] Secondly, the collaboration between the two different tax authorities decreases the likelihood that administrative work will be duplicated.[145]

8 5 Simultaneous examinations

A simultaneous examination is an extensive examination of taxpayer-related information conducted by two or more countries. The process takes place independently and simultaneously in the respective countries' territories.[146] Conducting a simultaneous examination presupposes that the countries share a mutual taxpayer – in other words, that a taxpayer is a tax resident in more than one country.[147] According to Schenk-Geers, the purpose of a simultaneous examination is to exchange information as quickly as possible

---

141 See SARS Requirements for implementing AEOI https://www.sars.gov.za/businesses-and-employers/third-party-data-submission-platform/automatic-exchange-of-information/requirements-for-implementing-aeoi/ (accessed 2021-11-12).

142 OECD *Manual on the Implementation of Exchange of Information Provisions for Tax Purposes: Module 6 on Conducting Tax Examinations Abroad* (2006) https://www.oecd.org/ctp/exchange-of-tax-information/36648066.pdf (accessed 2021-09-27) 4.

143 OECD https://www.oecd.org/ctp/exchange-of-tax-information/36648066.pdf 4.

144 *Ibid*.

145 *Ibid*.

146 OECD *Manual on the Implementation of Exchange of Information Provisions for Tax Purposes: Module 5 on Conducting Simultaneous Tax Examinations* (2006) https://www.oecd.org/tax/exchange-of-tax-information/36648057.pdf (accessed 2021-10-04) 4.

147 OECD https://www.oecd.org/tax/exchange-of-tax-information/36648057.pdf 4.

to prevent third parties from altering information that was previously requested during an initial investigation.[148]

A simultaneous examination is usually preceded by a request for information.[149] Once the relevant taxpayer has been identified, the examination seeks to determine the taxpayer's liability by: analysing tax avoidance patterns; ascertaining any unreported income; uncovering any tax avoidance and tax evasion schemes; identifying general issues relating to transfer pricing; establishing multinational business practices, complex transactions and non-compliance trends; and exchanging information in instances where profit allocation occurs in global trading.[150]

8 6 Industry-wide exchange of information

An industry-wide exchange of information is specifically designed to cater for a particular industry.[151] For this reason, industry-wide exchange of information is not meant to address a specific taxpayer.[152] The aim of an industry-wide exchange of information is for tax authorities to familiarise themselves with industry practices and operating patterns. The information retrieved by tax authorities can facilitate effective examination of industry taxpayers.[153]

To effect an industry-wide exchange, a tax authority in one jurisdiction requests information from another tax authority. The request is made in writing and usually contains details of the subject matter of the exchange, the parameters of the exchange, and the designated personnel of the respective tax authorities authorised to meet and exchange information.[154]

9 EXCHANGE OF INFORMATION WITHIN THE SOUTH AFRICAN LEGAL FRAMEWORK

9 1 The Tax Administration Act 28 of 2011

The primary enabling legislation for the exchange of information in South Africa is the Tax Administration Act 28 of 2011 (TAA). The South African Revenue Service (SARS) is responsible for the administration of the TAA.[155] In terms of the TAA, SARS is obliged to exchange information with other

---

148 Schenk-Geers *International Exchange of Information and the Protection of Taxpayers* (2009) 109.

149 OECD https://www.oecd.org/tax/exchange-of-tax-information/36648057.pdf 5.

150 OECD https://www.oecd.org/tax/exchange-of-tax-information/36648057.pdf 6.

151 Examples include the banking, pharmaceutical, oil and gas, insurance, information technology, and commodities and telecommunications industries. See OECD *Manual on the Implementation of Exchange of information Provisions for Tax Purposes: Module 4 on Industry-Wide Exchanges of Information* (2006) https://www.oecd.org/ctp/exchange-of-tax-information/36648040.pdf (accessed 2021-10-04) 3.

152 OECD https://www.oecd.org/ctp/exchange-of-tax-information/36648040.pdf 2.

153 *Ibid*.

154 *Ibid*.

155 S 3(1) of the Tax Administration Act 28 of 2011.

countries subject to international tax agreements.[156] For purposes of the TAA, an international tax agreement[157] is an agreement entered into with the government of another country in accordance with a tax Act. This also includes any agreement concluded between SARS and a competent authority of another country relating to AEOI.[158]

In terms of the TAA, natural persons and public entities are required to submit returns in the prescribed form and manner to SARS.[159] Third parties such as employers or a party that pays an amount to another person are also required to submit tax returns.[160] South African financial institutions that receive amounts on behalf of another person or have control of assets of another person are required to submit tax returns. When submitting a tax return to SARS, South African financial institutions are required to comply with the due-diligence requirements set out in a tax Act, an international tax standard or in an international tax agreement.[161] A person may be required to register as a taxpayer to submit a return in terms of the TAA, an international tax agreement or an international tax standard.[162] Although the word "person" in the TAA does not specifically refer to financial institutions, it should be noted that financial institutions are registered by mere fact that they are South African taxpayers.

Moreover, the TAA states that a foreign country's tax authority can make a request to SARS to supply the latter with information pertaining to the administration of taxes under its respective tax laws. Depending on the type of information requested, SARS is obligated to treat such information as taxpayer information.[163] SARS can also be requested by a foreign country's tax authority to collect a foreign tax debt due to the latter in terms of section 185 of the TAA.[164] Lastly, a foreign tax authority can request SARS to send a

156 S 3(3)(*a*) of the TAA.

157 It should be noted that an international agreement becomes law in South Africa once it is approved by Parliament, and the agreement is published in the *Government Gazette*. Thereafter, the agreement is enacted by Act of Parliament. See s 108(2) of the Income Tax Act 58 of 1962 read with s 231(4) of the Constitution of the Republic of South Africa, 1996 (Constitution).

158 See the definition of "international tax agreement" in s 1 of the TAA.

159 See s 25 of the TAA.

160 S 26(1) of the TAA.

161 S 26(1) and (2) of the TAA.

162 S 26(3) of the TAA.

163 S 3(3)(*a*) of the TAA.

164 S 3(3)(*b*) of the TAA. S 185 of the TAA reads: "(1) If SARS has, in accordance with an international tax agreement, received – (*a*) a request for conservancy of an amount alleged to be due by a person under the tax laws of the other country where there is a risk of dissipation or concealment of assets by the person, a senior SARS official may authorise an application for a preservation order under section 163 as if the amount were a tax payable by the person under a tax Act; or (*b*) a request for the collection from a person of an amount alleged to be due by the person under the tax laws of the other country, a senior SARS official may, by notice, call upon the person to state, within a period specified in the notice, whether or not the person admits liability for the amount or for a lesser amount. (2) A request described in subsection (1) must be in the prescribed form and must include a formal certificate issued by the competent authority of the other country stating – (*a*) the amount of the tax due; (*b*) whether the liability for the amount is disputed in terms of the laws of the other country; (*c*) if the liability for the amount is so disputed, whether such dispute has been entered into solely to delay or frustrate collection of the amount alleged to

document to the latter. SARS must treat the request for such a document as if it were a document required to be issued by SARS under a South African tax Act.[165]

9 2 The USA (FATCA) Intergovernmental Agreement

In 2010, the US Congress passed Foreign Account Tax Compliance Act (FATCA) for non-compliant American taxpayers who owned foreign bank accounts.[166] In terms of FATCA, foreign financial institutions (FFIs)[167] must report financial accounts[168] held by American taxpayers, or any other foreign

be due; and (*d*) whether there is a risk of dissipation or concealment of assets by the person. (3) In any proceedings, a certificate referred to in subsection (2) is – (*a*) conclusive proof of the existence of the liability alleged; and (*b*) *prima facie* proof of the other statements contained therein. (4) If, in response to the notice issued under subsection (1)(*b*), the person – (*a*) admits liability; (*b*) fails to respond to the notice; or (*c*) denies liability but a senior SARS official, based on the statements in the certificate described in subsection (2) or, if necessary, after consultation with the competent authority of the other country, is satisfied that - (i) the liability for the amount is not disputed in terms of the laws of the other country; (ii) although the liability for the amount is disputed in terms of the laws of the other country, such dispute has been entered into solely to delay or frustrate collection of the amount alleged to be due; or (iii) there is a risk of dissipation or concealment of assets by the person, the official may, by notice, require the person to pay the amount for which the person has admitted liability or the amount specified, on a date specified, for transmission to the competent authority in the other country. (5) If the person fails to comply with the notice under subsection (4), SARS may recover the amount in the certificate for transmission to the foreign authority as if it were a tax payable by the person under a tax Act. (6) No steps taken in assistance in collection by any other country under an international tax agreement for the collection of an amount alleged to be due by a person under a tax Act, including a judgment given against a person in the other country for the amount in pursuance of the agreement, may affect the person's right to have the liability for the amount determined in the Republic in accordance with the relevant law."

165 S 3(3)(*c*) of the TAA.

166 US Department of Treasury "Foreign Account Tax Compliance Act" (date unknown) https://home.treasury.gov/policy-issues/tax-policy/foreign-account-tax-compliance-act (accessed 2021-11-11).

167 A financial institution is defined as "a Custodial Institution, a Depository Institution, an Investment Entity, or a Specified Insurance Company". See art 1(g) of the "Agreement between the Government of the United States of America and the Government of the Republic of South Africa: To Improve International Tax Compliance and to Implement FACTA" (2015) https://www.sars.gov.za/wp-content/uploads/Legal/Agreements/LAPD-IntA-EIA-2014-04-FATCA-IGA.pdf (accessed 2021-11-12) 3.

168 A financial account is defined as: "an account maintained by a Financial Institution, and includes: (1) in the case of an Entity that is a Financial Institution solely because it is an Investment Entity, any equity or debt interest (other than interests that are regularly traded on an established securities market) in the Financial Institution; (2) in the case of a Financial Institution not described in subparagraph 1(s)(1) of this Article, any equity or debt interest in the Financial Institution (other than interests that are regularly traded on an established securities market), if (i) the value of the debt or equity interest is determined, directly or indirectly, primarily by reference to assets that give rise to U.S. Source Withholdable Payments, and (ii) the class of interests was established with a purpose of avoiding reporting in accordance with this Agreement; and (3) any Cash Value Insurance Contract and any Annuity Contract issued or maintained by a Financial Institution, other than a noninvestment-linked, non-transferable immediate life annuity that is issued to an individual and monetizes a pension or disability benefit provided under an account that is excluded from the definition of Financial Account in Annex II. Notwithstanding the foregoing, the term "Financial Account" does not include any account that is excluded from the definition of

entity in which an American taxpayer holds a substantial ownership interest, to the Inland Revenue Service (IRS).[169]

South Africa signed an intergovernmental agreement (IGA) with the US on 9 June 2014. The purpose of this agreement is to improve tax compliance and implement the relevant provisions of the FACTA agreement.[170] The FATCA agreement was gazetted on 13 February 2015 and the agreement came into force on 28 October 2014.[171] The US government uses two separate Model frameworks[172] as the basis upon which it enters into IGAs with other jurisdictions.[173] Currently, South Africa and the US have entered into a Model 1 agreement, in which financial institutions based in South Africa are required to identify and report any information pertaining to a US Reportable Account[174] to SARS. It should be noted that this agreement is reciprocal in that SARS can request tax information from the IRS. Above all, SARS is required to exchange tax information automatically pursuant to

Financial Account in Annex II. For purposes of this Agreement, interests are "regularly traded" if there is a meaningful volume of trading with respect to the interests on an ongoing basis, and an "established securities market" means an exchange that is officially recognised and supervised by a governmental authority in which the market is located and that has a meaningful annual value of shares traded on the exchange. For purposes of this subparagraph 1(s), an interest in a Financial Institution is not "regularly traded" and shall be treated as a Financial Account if the holder of the interest (other than a Financial Institution acting as an intermediary) is registered on the books of such Financial Institution. The preceding sentence will not apply to interests first registered on the books of such Financial Institution prior to July 1, 2014, and with respect to interests first registered on the books of such Financial Institution on or after July 1, 2014, a Financial Institution is not required to apply the preceding sentence prior to January 1, 2016." See art 1(s) of the "Agreement between the Government of the United States of America and the Government of the Republic of South Africa: To Improve International Tax Compliance and to Implement FACTA" https://www.sars.gov.za/wp-content/uploads/Legal/Agreements/LAPD-IntA-EIA-2014-04-FATCA-IGA.pdf 3.

169 US Department of Treasury https://home.treasury.gov/policy-issues/tax-policy/foreign-account-tax-compliance-act.

170 SARS "Guide on the US Foreign Account Tax Compliance Act (FATCA)" (2017) *Issue 2* https://juta.co.za/media/filestore/2017/03/15_Guide_on_US_Foreign_Account_Tax_Compliance_Act_FATCA_-_External_Guide....pdf (2021-11-12) 3.

171 See *GG* 38466 of 2015-02-13.

172 Model 1 entails that the financial institutions identify and report information pertaining to each US taxpayer and a US Reportable Account to the relevant revenue service. Model 2 requires the financial institutions to report the relevant information directly to the IRS coupled with information exchange upon request. See SARS https://juta.co.za/media/filestore/2017/03/15_Guide_on_US_Foreign_Account_Tax_Compliance_Act_FATCA_-_External_Guide....pdf 3.

173 SARS https://juta.co.za/media/filestore/2017/03/15_Guide_on_US_Foreign_Account_Tax_Compliance_Act_FATCA_-_External_Guide....pdf 3.

174 A US Reportable Account is defined as a "Financial Account maintained by a Reporting South African Financial Institution and held by one or more Specified U.S. Persons or by a Non-U.S. Entity with one or more Controlling Persons that is a Specified U.S. Person". See art 1(z)(cc) of the "Agreement between the Government of the United States of America and the Government of the Republic of South Africa: To Improve International Tax Compliance and to Implement FACTA" https://www.sars.gov.za/wp-content/uploads/Legal/Agreements/LAPD-IntA-EIA-2014-04-FATCA-IGA.pdf.

article 26 of the Double Taxation Convention between the Government of the Republic of South Africa and the US Government.[175]

9 3 Common Reporting Standards (CRS)

9 3 1 Origin of the CRS

On 15 July 2014, the OECD (with the backing of the G20 countries) approved a set of standards for domestic countries to obtain financial information from their respective financial institutions. These are known as the Common Reporting Standards (CRS). Once obtained, the financial information can be automatically exchanged with a residence country on an annual basis.[176] There are two important considerations pertaining to the CRS that must be noted. First, they were designed to give effect to the residence country's tax compliance. Simply put, the CRS seek to aid residence countries in their efforts to combat tax evasion and strengthen revenue collection. Secondly, the CRS are standardised to cater for the maximum number of residence countries and financial institutions.[177] Adopting different reporting standards can increase the administrative costs for tax collection on tax authorities and increase the compliance burden on businesses. Implementing standards reduces these costs and improves efficiency for all the parties involved.[178]

Upon the adoption of CRS, a financial institution is required to collect and exchange financial information such as interest, dividends, capital gains or unreported assets upon which tax has not been declared.[179] It should be noted that the scope of CRS is not limited to individual taxpayers. The application of CRS requires financial institutions to look at shell companies, trusts or other similar legal entities to ascertain whether individual taxpayers have income or any other unreported assets in those establishments.[180] It is possible for financial institutions other than banks to report financial information to the relevant domestic tax authority or directly to the residence country. Examples of other financial institutions include certain collective

---

175 See the Schedule to the "Agreement between the Government of the United States of America and the Government of the Republic of South Africa: To Improve International Tax Compliance and to Implement FACTA" https://www.sars.gov.za/wp-content/uploads/Legal/Agreements/LAPD-IntA-EIA-2014-04-FATCA-IGA.pdf; SARS https://juta.co.za/media/filestore/2017/03/15_Guide_on_US_Foreign_Account_Tax_Compliance_Act_FATCA_-_External_Guide....pdf 3.

176 See OECD "Automatic Exchange Portal" (date unknown) https://www.oecd.org/tax/automatic-exchange/common-reporting-standard/ (accessed 2021-11-15).

177 OECD "Standard for Automatic Exchange of Financial Account Information in Tax Matters" 2ed (2017) https://www.oecd-ilibrary.org/docserver/9789264267992-en.pdf?expires=1636959583&id=id&accname=oid011488&checksum=D3706B3F096F975BD1B5FB5B9C166378 (accessed 2021-11-15) 11.

178 *Ibid*.

179 OECD https://www.oecd-ilibrary.org/docserver/9789264267992-en.pdf?expires=1636959583&id=id&accname=oid011488&checksum=D3706B3F096F975BD1B5FB5B9C166378 12.

180 *Ibid*.

investment vehicles, brokers and certain insurance companies.[181] Once all the relevant information has been retrieved, the financial institution is required to perform due-diligence procedures to identify the account holder and the reportable accounts for purposes of reporting to the residence country.[182]

9 3 2 CRS within the South African legal framework

South Africa published Regulations pertaining to the CRS on 2 March 2016. The South African Regulations (CRS SA Regulations) were signed into law by then-Minister of Finance Pravin Gordhan.[183] The SA Regulations inserted a definition for an "international tax standard" in the TAA. In terms of the TAA, an "internal tax standard" means:

> "(*a*) the OECD Standard for Automatic Exchange of Financial Account Information in Tax Matters;
> (*b*) the Country-by-Country Reporting Standard for Multinational Enterprises specified by the Minister; or
> (*c*) any other international standard for the exchange of tax-related information between countries specified by the Minister."[184]

It should be noted that SARS, as the relevant competent authority, can enter into an international agreement for AEOI using the CRS with any country other than the US.

9 4 Country-by-Country reporting

9 4 1 Origin of CbC reporting

Country-by-Country (CbC) reporting is an international initiative aimed at combating tax avoidance and transfer pricing. MNE groups are required to report on operations in every jurisdiction in which they operate.[185] The initiative came about after the release of the OECD's 2013 report *Addressing Base Erosion and Profit Shifting*.[186] G20 countries implemented an Action Plan to address Base Erosion and Profit Shifting. They released a total of 15 Action Plans that were based on improving transparency, bolstering existing international standards, and introducing coherent domestic rules pertaining to cross-border activities.[187] The Action Plan that is relevant to this

---

181 *Ibid*.

182 *Ibid*.

183 *GG* No 39767of 2016-03-02 read with s 257 of the TAA.

184 See the definition of "international tax standard" in s 1 of the TAA.

185 See SARS "Country-by-Country (CbC)" (2021) https://www.sars.gov.za/types-of-tax/corporate-income-tax/country-by-countrycbc/ (accessed 2021-12-30); ATO "Country-by-Country" (2021) https://www.ato.gov.au/business/international-tax-for-business/in-detail/transfer-pricing/country-by-country-reporting/ (accessed 2021-12-30).

186 See OECD "Addressing Base Erosion and Profit Shifting" (2013) https://read.oecd-ilibrary.org/taxation/addressing-base-erosion-and-profit-shifting_9789264192744-en#page1 (accessed 2021-12-30).

187 See OECD "Transfer Pricing Documentation and Country-by-Country Reporting, Action 13 – 2015 Final Report OECD/20 Base Erosion and Profit Shifting Project*"* (2015)

discussion is the OECD's Action Plan 13: 2015 Final Report on Transfer Pricing Documentation and CbC (Action Plan 13).

In terms of Action Plan 13, MNEs are required to furnish tax administrators with information regarding their business operations and transfer pricing policies. This information must be contained in a "master file" that is made available to the relevant competent authority. Secondly, a second file called the "local file" that contains detailed transactional transfer pricing documentation specific to each country must be provided to the relevant competent authority. Thirdly, MNEs must file an annual CbC report for each tax jurisdiction in which they do business, including the total amount of revenue, income tax paid, and profit before income tax. And lastly, MNEs must identify all the entities within the group that conduct business in every tax jurisdiction and provide a description of the activities of that entity.[188] Thereafter, should a jurisdiction require information regarding the activities of a particular MNE or any of its entities in another jurisdiction, the former jurisdiction can request that the information be exchanged between participating jurisdictions.[189]

9 4 2 Country-by-Country reporting within the South African legal framework

On 23 December 2016, the then-Minister of Finance Pravin Gordhan signed Regulations for the CbC Reporting Standard for MNEs (the CbC Regulations).[190] Prior to that, South Africa had signed the Multilateral Competent Authority Agreement on the exchange of CbC reports (CbC MCAA) on 27 January 2016. As of 5 September 2023, there are 100 signatories to the CbC MCAA agreement.[191]

10 HOW BLOCKCHAIN CAN SIMPLIFY AEOI IN SOUTH AFRICA

South Africa, like most countries, relies on exchange-of-information agreements or conventions to transfer tax information to competent authorities. This multilateral approach imposes a significant administrative

https://www.oecd-ilibrary.org/docserver/9789264241480-en.pdf?expires=1640857006&id=id&accname=guest&checksum=DE1BCEBA407E953DA5952CB5DBA4AFEA (accessed 2021-12-30) 3.

188 OECD https://www.oecd-ilibrary.org/docserver/9789264241480-en.pdf?expires=1640857006&id=id&accname=guest&checksum=DE1BCEBA407E953DA5952CB5DBA4AFEA (accessed 2021-12-30) 9.

189 See ATO "Country-by-Country Reporting" (2021) https://www.ato.gov.au/business/international-tax-for-business/in-detail/transfer-pricing/country-by-country-reporting/ (accessed 2021-12-30).

190 See par (*b*) of the definition of "International Tax Standard" in s 1 of the TAA read with *GG* 40516 of 2016-12-23.

191 See the Preamble of the CbC Regulations; see also OECD "Signatories of the Multilateral Competent Authority Agreement on the Exchange of Country-by-Country Reports (CbC MCAA) and Signing Dates" (2023) https://www.oecd.org/tax/automatic-exchange/about-automatic-exchange/CbC-MCAA-Signatories.pdf (accessed 2023-09-06).

burden on SARS. To simplify the process, SARS could use a consortium blockchain to transfer tax information automatically to selected competent authorities.[192] A consortium blockchain is suitable because it can be set up to allow only certain countries or competent authorities to participate in the network.[193] This setup can be secure and promote confidentiality because tax information is exchanged with pre-selected competent authorities. The pre-selected competent authorities can also verify the data without other participating competent authorities knowing the content of the data.[194] For example, if SARS signed a Multilateral Convention with Argentina, Brazil, Venezuela and Chile, using the MCAA and blockchain technology, SARS could exchange tax information with these countries. Since the pre-selected competent authorities form part of the same multilateral treaty, they would obtain access to the same tax information in real time. SARS would not have to take additional steps to execute a bilateral exchange.[195] In other words, there would be no delays in the transmission and receipt of tax information because the process would occur automatically through computer software known as a smart contract.[196] Moreover, once tax information has been exchanged, it would be synchronised throughout the blockchain network.

SARS could benefit from using blockchain because tax data retrieved on the blockchain is transparent and easily accessible. SARS could actively use the data to administer taxes and combat cross-border tax evasion and avoidance. Important information such as the identity of the beneficial owners of companies, accounting information, arrangements like partnerships and trusts, and bank account information would be easily accessible.[197] Data transparency would make it easier for SARS and other tax authorities to trust each other because the data would originate from a trusted source. The competent authority would validate the data before it was exchanged on the blockchain. Data transparency could also boost tax authorities' audit capabilities in the process. For example, tax authorities could cross-check new tax information with data already in their possession to determine a taxpayer's tax liability.

Owing to blockchain's features, SARS could analyse tax information that is exchanged in bulk.[198] In doing so, SARS could efficiently determine whether tax information is relevant. SARS could use data analytics techniques on the blockchain to analyse tax data and possibly predict taxpayer compliance trends. In doing so, SARS could identify potential high-

---

192 Kim recommends a consortium blockchain for international exchange of tax information. See Kim "Blockchain Initiatives for Tax Administration" 2022 69(1) *UCLA Law Review* 240 299.

193 Kim 2022 *UCLA Law Review* 289.

194 *Ibid*.

195 Kim 2022 *UCLA Law Review* 300.

196 Kim 2022 *UCLA Law Review* 300. A smart contract is a computer program that automatically executes once all the conditions are met.

197 Duperrut, Thevoz, Ilves, Migai and Owens "Why – and How – African Countries Should Use Technology for Automatic Information Exchange" 2019 96(2) *Tax Notes International* 919 921.

198 See Cockfield 2010 *UBC Law Review* 459.

risk non-compliant taxpayers. These procedures could ensure that time spent scrutinising tax data would be significantly reduced.

11 CONCLUSION

AEOI has proven to be an effective tool in the fight against tax evasion and tax avoidance. The move towards AEOI and greater financial transparency has provided tax authorities with necessary tools to collect taxes that would otherwise go uncollected.

AEOI has challenges. It places a heavy compliance burden on financial institutions and other similar entities. Financial institutions are obligated to decipher taxpayer accounts and documentation to ascertain the latter's tax residency. This can be costly and time-consuming. If not done efficiently, it can frustrate the AEOI procedure. This can impose an additional burden on tax authorities. Countries that lack the necessary infrastructure and skilled personnel are unlikely to participate in AEOI. It should be noted that the adoption of blockchain for AEOI does not address these issues. In fact, adopting blockchain presupposes the availability of skilled personnel and infrastructure to facilitate a smooth adoption of blockchain technology.

This article has demonstrated that the adoption of blockchain for exchange of information purposes can be used to strengthen cooperation between authorities of different jurisdictions, improve tax collection, and promote interaction between tax authorities and taxpayers.[199] It should also be noted that blockchain is not a tool that resolves issues relating to banking secrecy and tax havens. These issues can be resolved by implementing a legislative framework that curbs rules and practices that promote a lack of transparency and which promote secrecy.

[199] Bossa and De Paiva Gomes https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3540277 12.

THE LEGAL DILEMMA OF MANAGING AND REGULATING PRIVATE CONSUMPTION OF CANNABIS IN RELATION TO THE WORKPLACE

S'celo Walter Sibiya
LLB LLM LLD
Senior Lecturer, Department of Law
University of Zululand
Admitted Attorney of the High Court of RSA

ABSTRACT

In South Africa, consumption of cannabis was a criminal offence in past decades. However, in September 2018, the Constitutional Court judgment in the *Prince* case decriminalised the private consumption of cannabis. Although the judgment was welcomed by many South Africans, including employees, its interpretation and implementation has been marred by legal ambiguity. The Constitutional Court did not prescribe how employers should manage and regulate the private consumption of cannabis in relation to the workplace. In order to maintain workplace safety, a majority of employers have adopted and enforced a zero-tolerance policy on alcohol, drugs and substance abuse. A majority of employers have relied on urinalysis testing to detect cannabis in the workplace. Some employees, after testing positive for cannabis, have been dismissed for contravening their employer's zero-tolerance policy, without conclusive evidence of impairment. This thorny issue is explored in this article. First, it seeks to examine whether merely testing positive for cannabis is sufficient to prove intoxication that may result in an employee's impairment. Secondly, the question is whether urinalysis testing precisely determines whether an employee cannot function and perform their duties normally.

1 INTRODUCTION

On 18 September 2018, the Constitutional Court – in the case of *Minister of Justice and Constitutional Development v Prince; National Director of Public Prosecutions v Rubin; National Director of Public Prosecutions v Acton*[1] – delivered a landmark judgment to decriminalise the private use, possession and cultivation of cannabis by an adult for private consumption. Although the judgment has been welcomed by many South Africans, its implementation has paved the way for numerous academic debates and legal uncertainty for law enforcement agencies, the South African National Prosecution Authority,

[1] 2018 (6) SA 393 (CC).

employers and employees in the workplace. In the aftermath of the *Prince* judgment, an employee contended that it was legal for an individual employee to use cannabis for personal consumption in their private space, and accordingly there was nothing that forbade the individual employee from coming to work after such use.[2] However, the Labour Court has dismissed the contention, ruling that the Constitutional Court judgment did not offer any protection to employees against disciplinary action should they act in contravention of company policies or disciplinary codes.[3]

In a nutshell, the failure of the Constitutional Court to provide necessary guidance on how employers should deal with the private consumption of cannabis by employees has contributed to this confusion. This article examines the thorny issue, first by examining whether merely testing positive for cannabis is sufficient to prove intoxication that may result in an employee's impairment. Secondly, it looks at whether urinalysis testing precisely determines that an employee cannot at that time function and perform their duties normally.

In order to tackle the dual issue, this article undertakes to examine the impact of the *Prince* judgment and consequences thereof, the employer's obligation to maintain workplace safety, the judicial approach on the private use of cannabis outside the workplace, and the challenges to urinalysis testing. Lastly, this article endeavours to reflect on the judicial approach to cannabis cases and provides recommendations that may pave a way forward to address the contentious issue.

2 THE RIGHT TO PRIVACY ESPOUSED BY THE *PRINCE* CASE AND ITS IMPACT IN EMPLOYMENT LAW

Over many decades, the Drugs and Drug Trafficking Act[4] criminalised the possession, cultivation or use of cannabis in South Africa. However, recently, the Constitutional Court in the landmark case of *Prince*,[5] declared certain provisions of the Drugs and Drug Trafficking Act[6] to be unconstitutional, as they infringed on the right to privacy entrenched in the Constitution. However, the terrain of the right to privacy espoused by the Constitutional Court was not clearly defined although it was extended. Contrary to the judgment of the High Court in the same matter, the Constitutional Court limited privacy to homes. The scope of the right to privacy was defined by the High Court as follows:

> "If privacy, considered to be analysed as a continuum of rights which starts with an inviolable inner core moving from the private to the public realm where

---

2 *NUMSA obo Nhlabathi v PFG Building Glass (Pty) Ltd* (2023) 44 *ILJ* 231 (LC) par 48.

3 *NUMSA obo Nhlabathi v PFG Building Glass (Pty) Ltd supra* par 63.

4 140 of 1992.

5 *Supra*.

6 140 of 1992. The Constitutional Court declared that the provisions of s 4(*b*), read with Part III of Schedule 2; the provisions of s 5(*b*) of the Drugs and Drug Trafficking Act, read with Part III of Schedule 2 and with the definition of the phrase "deal in" in s 1 of the Drugs and Drug Trafficking Act, were inconsistent with the right to privacy entrenched in s 14 of the Constitution.

> privacy is only remotely implicated by interference, it must follow that those who wish to partake of a small quantity of cannabis in the intimacy of their home do exercise a right to autonomy which, without clear justification, does not merit interference from the outside community or the State."[7]

The Constitutional Court conducted a thorough analysis of the nature and ambit of the right to privacy in terms of section 14 of the Constitution. Accordingly, Zondo ACJ held as follows:

> "What this means is that the right to privacy entitles an adult person to use or cultivate or possess cannabis in private for his or her personal consumption. Therefore, to the extent that the impugned provisions criminalise such cultivation, possession or use of cannabis, they limit the right to privacy."[8]

In addition, the Constitutional Court held that the declaration of invalidity of the prohibition of the use, or possession, or cultivation of cannabis should extend further than only when it occurs in a home or private dwelling as stipulated by the High Court order.[9] In extending the right to privacy, the Constitutional Court used an example of an adult who has cannabis in their pocket for their personal consumption within the boundaries of a private dwelling or home.[10] The court emphasised that such a person is protected not only while in a home or private dwelling, but also upon stepping out of the boundary of a home or private dwelling, provided that the cannabis remains in their pocket.[11] It was accordingly held by Zondo ACJ:

> "In my view, as long as the use or possession of cannabis is for the personal consumption of an adult, it is protected. Therefore, provided the use or possession of cannabis is by an adult person in private for his or her personal consumption, it is protected by the right to privacy entrenched in s 14 of our Constitution."[12]

Nabeelah Mia[13] contends that in its judgment, the Constitutional Court attempted to go beyond the High Court's scope of protection to include all use in private, yet it failed to clearly articulate what "in private" means. She further contends that no clear justification was pronounced by the court for extending the scope of the right to privacy.[14]

In the aftermath, the failure of the Constitutional Court to provide necessary guidance on the scope of the right to privacy has become a challenge for many employers, in particular, on how best to manage and regulate the private use of cannabis in and outside the workplace. In an *obiter dictum,* Coetzee AJ highlighted that the grey area of workplace cannabis testing emanates from the fact that urine tests disclose previous

---

7 *Prince v Minister of Justice and Constitutional Development; Rubin v National Director of Public Prosecutions; Acton v National Director of Public Prosecutions* (2017) ZAWCHC 30 (Prince (HC)) par 25.

8 *Prince (CC) supra* par 58.

9 *Prince (CC) supra* par 98.

10 *Ibid*.

11 *Ibid*.

12 *Prince (CC) supra* par 100.

13 Mia "The Problems with *Prince*: A Critical Analysis of *Minister of Justice and Constitutional Development v Prince*" 2020 10 *Constitutional Court Review* 413.

14 *Ibid*.

drug impairment and not accurate or current drug impairment.[15] Despite the *Prince* judgment protecting the right to use cannabis privately, employees have faced dismissal on the basis of a positive cannabis result in the workplace.[16] In addition, our courts have categorically denied employees any protection provided by the *Prince* judgment against disciplinary action in the workplace.[17]

3 A SAFE AND HEALTHY WORK ENVIRONMENT

The employer's common-law duty to provide safe working conditions for employees originates from the law of contract and delict:

> "An employee affected by his or her employer's breach of this duty has a claim for damages against the employer. Should the employer's negligent conduct lead to injury the employee will clearly have a delictual claim. However, should the employer be in breach of an agreement to provide safety clothing, for example, the employer's failure to do so would give rise to a contractual claim."[18]

The employer's common-law duty has been supplemented by the Occupational Health and Safety Act[19] (OHSA). In terms of section 8(1) of OHSA, every employer must provide and maintain, as far as is reasonably practicable, a working environment that is safe and without risk to the health of its employees. In addition, section 8(2)*(b)* of OHSA requires employers to take steps that may be reasonably practicable to eliminate or mitigate any hazard or potential hazard to the safety or health of employees, before resorting to personal protective equipment. It is eminently conceivable that an employee who is at work in an intoxicated state poses a greater risk to the health and safety of other employees than one who is not inebriated.[20] Thus, an employer may not allow any person who is or who appears to be under the influence of an intoxicating substance access to the workplace.[21] Neither may an employer allow any person to have intoxicating substances in their possession in the workplace.[22]

Therefore, in line with OHSA and its regulations, employers may adopt a zero-tolerance policy on alcohol, drugs and substance abuse. As a result of the high degree of safety required by companies using heavy machinery, dangerous equipment and hazardous substances, it is reasonable for such employers to have in place rules prohibiting the consumption of alcohol, drugs and substances at the workplace.[23]

---

15 *NUMSA v Bargaining Council* (2015) ZALCJHB 413 par 1–12.

16 *NUMSA obo Nhlabathi v PFG Building Glass supra* par 23.

17 *NUMSA obo Nhlabathi v PFG Building Glass supra* par 63; *Enever v Barloworld Equipment, A Division of Barloworld SA* (2022) 43 *ILJ* 2025 (LC) par 23.

18 Van Niekerk and Smit *Law@Work* 5ed (2019) 97.

19 95 of 1993.

20 Fleming "Employers' Responses to Alcohol Addiction in South Africa: The Role of the Legislative Framework" 2022 43 *ILJ* 17 23.

21 Regulation 2A of the General Safety Regulations under the Occupational Health and Safety Act 85 of 1993.

22 *Ibid.*

23 *Mthembu v NCT Durban Wood Chips* [2019] 4 BALR 369 (CCMA) par 50.

Prinsloo J, in the *Nhlabathi* case, highlighted that zero tolerance means that a particular type of behaviour or activity will not be tolerated at all and a zero-tolerance policy does not allow any violations of a rule.[24] The court pointed out that an employee's clean disciplinary record, years of service or any other mitigating factor becomes irrelevant where a zero-tolerance policy is followed and consistently applied.[25] Accordingly, the only factors considered are: whether the employee was aware of the zero-tolerance policy; whether it was consistently applied; and, whether it is justified in the workplace.[26] In upholding the application of the employer's zero-tolerance policy, the court concluded that the applicants were aware of the zero-tolerance policy, it was applied consistently, and it was justified owing to the hazardous nature of the workplace and the respondent's duty to provide a safe working environment.[27]

Tokota AJA emphasised that the adoption of such a policy creates certainty and consistency in the enforcement of discipline.[28] He further stated that such a policy must be made clear and be readily available to employees in a manner that is easily understood.[29] The application of the employer's zero-tolerance policy on the consumption of cannabis has been challenged in our various courts.

4 JUDICIAL APPROACH TO CANNABIS CASES POST THE *PRINCE* CASE

This article focuses on the judicial approach to cannabis cases in the workplace post the *Prince* judgment.

In the aftermath of the *Prince* case, the CCMA dealt with the *Mthembu*[30] case. In this case, the applicants were charged with being under the influence of intoxicating substances while on duty.[31] The applicants admitted to having smoked cannabis but argued that they had done so outside the workplace. The applicants were tested by means of a urine test and found to be under the influence of cannabis, which the applicants had admitted to. The respondent employer conducted business in the wood and chip industry, and the applicants' work involved large machinery and extremely dangerous vehicles coming in and out of the premises throughout the day. In reaching its decision, the CCMA considered the degree of danger involved in the employment.[32] The arbitrator concluded that because of the high degree of safety required of companies with heavy machinery and generally dangerous equipment, it is reasonable for employers to have in place rules prohibiting the consumption of such substances at the workplace or

---

24 *NUMSA obo Nhlabathi v PFG Building Glass supra* par 85.
25 *Ibid.*
26 *Ibid*.
27 *Ibid*.
28 *SGB Cape Octorex (Pty) Ltd v Metal & Engineering Industries Bargaining Council* (2023) 44 *ILJ* 179 (LAC) par 17.
29 *Ibid.*
30 *Mthembu v NCT Durban Wood Chips supra*.
31 *Ibid.*
32 *Mthembu v NCT Durban Wood Chips supra* par 71–72.

reporting to work under the influence of such substances.[33] The arbitrator further stated that notwithstanding the *Prince* case declaring cannabis legal, employers are still entitled to discipline employees who use cannabis or who are under the influence during working hours.[34] The arbitrator concluded that the employer's interests in ensuring health and safety in the workplace outweigh the employee's right to privacy.[35]

In March and November 2022, the Labour Court dealt with the *Enever*[36] and *Nhlabathi*[37] cases respectively. In the *Enever* case, the applicant was dismissed as a result of repeatedly testing positive for the cannabis drug, in breach of the respondent's alcohol and substance abuse policy.[38] At the time of her dismissal, the applicant occupied the position of category analyst, which was a typical office or desk position. Her position did not constitute a safety sensitive job, in that she was neither required to operate heavy machinery nor to drive any of the respondent's vehicles.[39] The applicant suffered severe constant migraines and anxiety, and she was taking medication prescribed by her doctor.[40] However, after the *Prince* judgment, she started smoking cannabis instead of taking medication.[41] Recreationally, she smoked cannabis every evening to assist with insomnia and anxiety.[42] The applicant tested positive for cannabis after a urine test was conducted and then she was placed on a seven-day cleaning-up process. Even after the seven days of cleaning-up, the urine tests continued to detect cannabis in her system.

It was not disputed that at the time of undergoing the urine test, the applicant was not impaired or suspected of being impaired in the performance of her duties, and nor was she performing any duties for which the use of cannabis would be said to be a risk to her own safety or that of her fellow employees.[43]

Ntsoane AJ rejected the employee's reliance on the *Prince* judgment decriminalising the private use of cannabis on the premise that the judgment did not excuse a breach of company policy.

In rejecting the applicant's argument, he stated:

> "I am however strongly of the view that the respondent, in the light of its dangerous environment, is entitled to discipline and dismiss any employee who uses cannabis or is under the influence whilst at work in contravention of its policy. Unfortunately, the Constitutional Court judgment does not offer any protection to employees against disciplinary action should they act in contravention of company policies."[44]

---

33 *Ibid.*
34 *Mthembu v NCT Durban Wood Chips supra* par 69.
35 *Ibid.*
36 *Enever v Barloworld Equipment, A Division of Barloworld SA supra*.
37 *NUMSA obo Nhlabathi v PFG Building Glass supra*.
38 *Enever v Barloworld Equipment, A Division of Barloworld SA supra*.
39 *Enever v Barloworld Equipment, A Division of Barloworld SA supra* par 3.
40 *Enever v Barloworld Equipment, A Division of Barloworld SA supra* par 5.
41 *Enever v Barloworld Equipment, A Division of Barloworld SA supra* par 6.
42 *Ibid.*
43 *Enever v Barloworld Equipment, A Division of Barloworld SA supra* par 8.
44 *Enever v Barloworld Equipment, A Division of Barloworld SA supra* par 23.

The court concluded that the fact that an employee was not impaired to perform duties was irrelevant as it did not in itself absolve the employee from misconduct in terms of the employer's policy.[45] The court noted a difference between the effects of alcohol and cannabis and held that there was no question that, unlike alcohol, which leaves an individual's bloodstream within a few hours after consumption, cannabis may remain present in an individual's system for a number of days or up to weeks, and that tests for cannabis do not demonstrate the degree of impairment of an employee's ability to perform their duties.[46] Unlike alcohol, the court highlighted that one cannot determine a level of impairment based on test results.[47] Accordingly, the court concluded that proof of impairment was not required (as it was with alcohol) because, with a positive result, it is automatically assumed that one is under the influence of cannabis owing to its intoxicating nature.[48]

In the case of *SGB Cape Octorex*,[49] the applicant employee (supervisor) was allegedly seen smoking dagga while on duty. The applicant denied the allegations, which resulted in urine and saliva tests being conducted. Both tests confirmed the presence of tetrahydrocannabinol (THC), and the employee was subsequently dismissed for testing positive for tetrahydrocannabinol. The applicant referred a dispute of unfair dismissal to the bargaining council and the arbitrator ruled in favour of the applicant.

On review, the Labour Court held that the contention that the commissioner had ignored the zero-tolerance approach had no substance since no evidence was adduced at the arbitration.[50] The court further held that there was no evidence that the employee had compromised the safety and integrity of other workers.[51]

On appeal, the Labour Appeal Court dealt with the implementation of the employer's zero-tolerance policy or approach. The court held that an employer is entitled to set its own standards to enforce discipline in its workplace and accordingly, the Labour Court had failed to appreciate the importance of the zero-tolerance policy.[52]

The court highlighted the importance of workplace policies as follows:

> "Where an employer sets out the code of conduct for the employees, it is expected from its employees that breaching such code undermines the authority of the employer. A breach thereof is therefore prejudicial to the administration of discipline. Furthermore, the employer in this case was

---

45 *Enever v Barloworld Equipment, A Division of Barloworld SA supra* par 20 and 25. The court noted that the applicant tested positive for cannabis and continued to test positive simply on her perpetuated act of consumption of the substance from which she made it rather clear she will not refrain.

46 *Enever v Barloworld Equipment, A Division of Barloworld SA supra* par 26.

47 *Ibid*.

48 *Ibid.*

49 *SGB Cape Octorex v Metal & Engineering Industries Bargaining Council supra*.

50 *SGB Cape Octorex v Metal & Engineering Industries Bargaining Council supra* par 7.

51 *SGB Cape Octorex v Metal & Engineering Industries Bargaining Council supra* par 16 and 17.

52 *SGB Cape Octorex v Metal & Engineering Industries Bargaining Council supra* par 7.

> concerned about the safety of its employees since they were working on heights."[53]

Tokota AJA concluded that the applicant's dismissal was fair, taking into account the nature of the employer's business and the fact that similar sanctions had been imposed on other offending employees.[54]

Subsequent to the *SGB Cape Octorex* case, Prinsloo J delivered the *Nhlabathi*[55] judgment on the eve of December 2022. This was a case in which the applicants relied on an ill-conceived defence, premised on a misinterpretation of the *Prince* judgment.[56] In this case, the applicants were dismissed after testing positive for cannabis while on duty in contravention of the employer's zero-tolerance policy on alcohol and drug abuse. The employer conducted its business in a dangerous or hazardous environment. Therefore, the employer adopted a zero-tolerance policy to maintain a safe working environment in line with OHSA.

In challenging the fairness of their dismissal, the applicants argued that the employer did not have a policy that forbade the use of dagga, as dagga was not a drug or substance.[57] The applicants further contended that they did not use dagga in the course of their duty but used it for medical reasons in their private spaces, which was in line with the *Prince* judgment, which legalised the private use of dagga.[58]

In finding that the applicants' dismissal was fair, the arbitrator acknowledged the *Prince* judgment, but maintained that the judgment did not overrule the provisions of OHSA, and that the employer was by law required to provide a safe working place.[59] The arbitrator further found that despite the decriminalisation of dagga, there was a rule, and the applicant was aware of the rule. The arbitrator concluded that the rule was valid and reasonable owing to the hazardous nature of the employer's business.[60]

On review, the Labour Court found that the Constitutional Court in its judgment did not interfere with the definition of a drug, nor did it declare dagga or cannabis to be a plant or a herb.[61]

The court lamented the applicants' misinterpretation of the *Prince* judgment:

> "The applicants' understanding of the judgments they relied upon was either very limited or totally wrong and they moved from a wrong premise when they approached their case as one where dagga was no longer to be regarded as

---

53 *SGB Cape Octorex v Metal & Engineering Industries Bargaining Council supra* par 12.

54 *SGB Cape Octorex v Metal & Engineering Industries Bargaining Council supra* par 21.

55 *NUMSA obo Nhlabathi v PFG Building Glass supra*.

56 *NUMSA obo Nhlabathi v PFG Building Glass supra* par 47. The applicant's approach was that dagga was not a drug but a herb, and that therefore it was no longer illegal to use dagga. Consequently, the use of dagga should not find its way into an employer's disciplinary code, as it was legal and could not constitute misconduct.

57 *NUMSA obo Nhlabathi v PFG Building Glass supra* par 41.

58 *NUMSA obo Nhlabathi v PFG Building Glass supra* par 65.

59 *NUMSA obo Nhlabathi v PFG Building Glass supra* par 42.

60 *NUMSA obo Nhlabathi v PFG Building Glass supra* par 43.

61 *NUMSA obo Nhlabathi v PFG Building Glass supra* par 62.

> a drug and thus automatically excluded from the Respondent's alcohol and drug policy."[62]

Prinsloo J's interpretation was similar to that of Ntsoane AJ in the *Enever* case in finding that the Constitutional Court judgment did not offer any protection to employees against disciplinary action should they act in contravention of company policies or disciplinary codes.[63]

5 CHALLENGES POSED BY URINALYSIS TESTING

In terms of South African employment law, the medical testing of an employee is permissible if it is justifiable in light of employment conditions.[64] Consequently, conducting cannabis tests in the workplace is possible and crucially important to determine whether an employee has contravened a workplace policy on alcohol, drugs and substance abuse. According to Stansfield, there is, however, no reliable test that is able to determine the immediate state of cannabis intoxication as compared to a breathalyser test for alcohol.[65] In this light, it is evident from decided case law that South African employers have relied on urine and saliva tests to detect cannabis in the workplace.[66]

The urine test analysis commonly used by employers looks for a tetrahydrocannabinol (THC) metabolite that can be present in a person's system for weeks after use.[67] According to Phifer it remains relatively easy to detect the presence of tetrahydrocannabinol metabolites in the bloodstream, but impossible to tell exactly when it was ingested.[68] He further stated that tetrahydrocannabinol can remain at low but detectable levels of 1 to 2 ng/ml for 8 hours or more without any measurable signs of impairment in one-time users.[69] However, in respect of chronic users, detectable amounts of blood tetrahydrocannabinol can persist for days.[70] In contrast, a breathalyser test can indicate a blood-alcohol level that will be considered intoxication.

Accordingly, an argument can be levelled against urinalysis testing for cannabis in that it does not give an indication of current impairment but only prior use, and is therefore not indicative of an individual's present ability to perform the job.[71] Dr Calvin Yagan (a University of KwaZulu-Natal occupational medicine registrar) stated that an employee who has smoked marijuana in the morning before coming to work may be able to function

---

62 *NUMSA obo Nhlabathi v PFG Building Glass supra* par 74.

63 *NUMSA obo Nhlabathi v PFG Building Glass supra* par 63.

64 S 7(1) of the Employment Equity Act 55 of 1998.

65 Visser "How to Deal with Cannabis in the Workplace" (January 2018) https://journals.co.za/doi/epdf/10.10520/EJC-113a482227 (accessed 2023-02-06) 45.

66 *SGB Cape Octorex v Metal & Engineering Industries Bargaining Council supra*; *NUMSA obo Nhlabathi v PFG Building Glass supra*; *Mthembu and NCT Durban Woodchips* (2019) 40 *ILJ* 2429 (CCMA).

67 *Kumalo v Lafarge Gypsum* [2013] 7 BALR 697 (MEIBC).

68 Phifer "A Sensible Approach to Workplace Drug Testing for Cannabis" 2017 2 *Journal of Chemical Health & Safety* 24 35.

69 *Ibid.*

70 *Ibid.*

71 *Kumalo v Lafarge Gypsum supra*.

optimally at work even though technically they may be under the influence.[72] He further noted that an employee who legally used cannabis on a Friday evening is likely to show traces of the drug if tested at work on Monday, even though the employee is no longer under the influence and is unlikely to be impaired.[73]

In this light, judge Coetzee AJ stressed that a distinction must be drawn between testing positive and being under the influence.[74] Accordingly, he was of the view that an employee with a positive cannabis test should not be dismissed on that account.[75] This is because cannabis consumed a few days before (which is detectable) does not mean that the person is still under the influence.[76] Urine drug testing shows past drug impairment, not accurate or current drug impairment.[77]

In an *obiter dictum*, the judge stated:

> "No reasonable commissioner could have come to the conclusion that the employee was under the influence, merely for having tested positive for cannabis. That is so unreasonable that it stands to be reviewed and set aside."[78]

Foreign jurisdictions have also made remarkable rulings on the uncertainty created by urine tests. In the Canadian case of *Entrop,*[79] the court compared and contrasted cannabis and alcohol testing. *In casu*, the court lamented that testing for cannabis through urine does not disclose that the person is impaired at the time of the test, but only shows the presence of metabolites, which only discloses cannabis consumed in the past, whereas alcohol testing by breathalyser detects the actual impairment.[80] Similarly to the *Entrop* case, the court in the Australian case *Endeavour Energy*[81] also highlighted the challenges of urine testing. The court stressed that urine testing is potentially less capable of identifying someone who is under the influence of cannabis.[82] In addition, urine testing has the disadvantage that it may show a positive result even several days after the person smoked the substance.[83] Consequently, the court pointed out that a person may be found to have breached the policy even though their actions were taken in their own time and in no way affected their capacity to do their job safely.[84]

---

72 Nair "Careful: Smoking Weed at Home Could See Your Job Go Up in Smoke" (2 June 2019) https://www.timeslive.co.za/sunday-times/news/2019-06-02-careful-smoking-weed-at-home-could-see-your-job-go-up-in-smoke/ (accessed 2023-02-02) 1.

73 Nair https://www.timeslive.co.za/sunday-times/news/2019-06-02-careful-smoking-weed-at-home-could-see-your-job-go-up-in-smoke/ 1.

74 *NUMSA v Bargaining Council supra* 413.

75 *NUMSA v Bargaining Council supra* par 17–18.

76 *Ibid*.

77 *Ibid*.

78 *NUMSA v Bargaining Council supra* par 25.

79 *Entrop v Imperial Oil Ltd* (2000), 50 O.R. (3d) 18 (C.A.).

80 *Entrop v Imperial Oil Ltd supra* par 91.

81 *Endeavour Energy v Communications, Electrical, Electronic, Energy, Information, Postal, Plumbing and Allied Services Union of Australia* (2012) FWAFB 4998 (14 August 2012).

82 *Endeavour Energy v Communications, Electrical, Electronic, Energy, Information, Postal, Plumbing and Allied Services Union of Australia supra* par 41.

83 *Ibid.*

84 *Ibid.*

6 REFLECTING ON THE JUDICIAL APPROACH TO CANNABIS CASES

For almost five years after the *Prince* judgment, managing and regulating cannabis in the workplace has been a thorn in the side of the employment relationship. In addition, in light of the *Prince* judgment, our courts have grappled with resolving the contentious issue of managing and regulating the private consumption of cannabis in relation to the workplace. One may argue that none of the labour disputes resolution forums have offered clear judicial insight into the terrain of the private consumption of cannabis outside the workplace. Rather, our courts have categorically denied any immunity provided by the *Prince* judgment to employees against disciplinary action should they act in contravention of company policies or disciplinary codes.[85] However, it may be argued that our courts have missed an opportunity to reconcile the employer's interests (ensuring a safe working environment) with the employee's interest (private consumption of cannabis) in order to achieve fairness in the employment relationship.

From decided case law, it is evident that our courts have generally accepted urinalysis results as valid and reliable without scrutinising the unfortunate consequences of such testing. Consequently, it is submitted that too much emphasis has been placed on a positive cannabis test without a further enquiry to determine an employee's impairment. The grave consequences of such an approach have included the dismissal of employees who have tested positive but who at the time of testing were not in fact impaired.

For example, in the *Enever* case, it was undisputed that, at the time of the urine test, the applicant was not impaired or suspected of being impaired in the performance of her duties, nor was she performing any duties for which the use of cannabis would be said to be a risk to her own safety or that of her fellow employees.[86] However, in its judgment, it is clear that the court rubber-stamped the positive test without having due regard to the importance of impairment. As a result, the applicant employee was dismissed.

One may thus argue that the court erred in finding that proof of impairment was not required as with alcohol because it is automatically assumed that one is under the influence of cannabis owing to its intoxicating nature.[87] It is submitted that such an argument is supported by academic literature, which revealed that traces of tetrahydrocannabinol metabolites can be detected in the bloodstream even if cannabis has been consumed a few days before. Thus, despite a positive test, one cannot conclusively say that an employee poses a threat to workplace safety if they are not impaired. In an *obiter dictum,* Coetzee J appreciated the unfortunate consequences of urinalysis testing, stating that urine drug testing shows past drug impairment and not accurate or current drug impairment.[88]

---

85 *NUMSA obo Nhlabathi v PFG Building Glass (Pty) Ltd supra* par 63.

86 *Enever v Barloworld Equipment, A Division of Barloworld SA (Pty) Ltd supra* par 8.

87 *Enever v Barloworld Equipment, A Division of Barloworld SA (Pty) Ltd supra* par 26.

88 *NUMSA v Bargaining Council supra* par 17–18.

Accordingly, it may be concluded that despite ample opportunity, our courts have missed an opportunity to scrutinise the challenges associated with urinalysis testing.

7 RECOMMENDATIONS

It remains undisputed that extra caution should be exercised when dealing with the issue of managing and regulating the private use of cannabis in relation to the workplace. Needless to say, this contentious issue involves two competing interests that require a balance to be struck in order to achieve fairness in the employment relationship. It follows that a fair approach would require weighing the interests of the employer in ensuring workplace safety (taking into account the degree of danger in the workplace environment), against an employee's right to use cannabis privately, as espoused by the *Prince* judgment and the Constitution. Implicit in the enquiry is the assumption that both employer and employee are the beneficiaries of the constitutional right to fair labour practices, and that the enquiry commences with the scales evenly balanced.[89]

It is submitted that the assertion that the employer's interests in ensuring health and safety in the workplace outweighs the employee's right to privacy is flawed.[90] The Constitutional Court comprehensively canvassed the implementation of fairness in the employment relationship as follows:

> "The focus of s 23(1) is, broadly speaking, the relationship between the worker and the employer and the continuation of that relationship on the terms that are fair to both. In giving content to that right, it is important to bear in mind the tension between the interests of workers and the interests of employers which is inherent to labour relations. Care must therefore be taken to accommodate, where possible, these interests so as to arrive at a balance required by the concept of fair labour practice. It is in this context that the LRA must be construed."[91]

While acknowledging the employer's obligation to uphold workplace safety, academic literature and judicial pronouncements have exposed the grave challenges associated with urinalysis testing as discussed above. Despite the problems with urinalysis testing, it is not submitted that private consumption of cannabis should not be managed and regulated, as a failure to do so may jeopardise workplace safety. However, it is also submitted that elevating workplace safety infringes employees' right to privacy. Accordingly, an employee's positive cannabis test should not be used as the only yardstick for dismissal in the absence of conclusive evidence of impairment that could place workplace safety at peril. In his remark in the *Tanker Services* case,[92] Grogan highlighted that whether employees are unable to perform their work depends to some extent on its nature.[93] In the *Tanker Services* case, the question was whether Mr Magudulela's faculties had

---

89 Van Niekerk *"*Dismissal for Misconduct: Ghosts of Justice Past, Present and Future" 2012 *Acta Juridica* 113.

90 *Mthembu v NCT Durban Wood Chips supra* par 69.

91 *NEHAWU v UCT* (2003) 24 *ILJ* 95 (CC) par 40.

92 *Tankers Services (Pty) Ltd v Magudulela* (1996) 9 BLLR 1109 (LAC).

93 Grogan *Workplace Law* 11ed (2016*)* 224.

been impaired to the extent that he could no longer perform the skilled, technically, complex and highly responsible task of driving an extraordinary vehicle carrying a hazardous substance. Having found that he could not safely do so in his condition, the court concluded that Magudulela's condition amounted to an offence sufficient enough to warrant dismissal.[94]

Since urinalysis testing is incapable of determining impairment after cannabis consumption, it is suggested that physical impairment testing may be useful. The recommended test would determine whether the level of tetrahydrocannabinol affects an employee's ability to perform their duties with the required capacity, care and skills. It is submitted that employers might find it challenging to adopt practical methods to detect physical impairment in cannabis matters. However, this does not mean implementation of the test is practically impossible. To address that challenge, the Standard Field Sobriety Test applied in the United States to test physical impairment may be adopted in the South African workplace.

The Standard Field Sobriety Test is a battery of three tests made up of the Horizontal Gaze Nystagmus, the walk-and-turn, and the one-leg stand test.[95] The Horizontal Gaze Nystagmus test measures an involuntary jerking of the eyeball to tracking an object using peripheral vision. Phifer stated that when an individual is impaired, nystagmus is exaggerated and may occur at lesser angles.[96] In addition, an impaired person will also often have difficulty smoothly tracking a moving object.[97] Both the walk-and-turn and one-leg stand tests are divided-attention tests that require a subject to listen and follow instructions while performing simple physical movements.[98] He concluded that impaired persons have difficulty with tasks requiring them to divide their attention between simple mental and physical exercises.[99]

8 CONCLUSION

While the *Prince* judgment has been welcomed by many South Africans – especially consumers of cannabis – the interpretation and implementation of the judgment has been contentious in the workplace. The *Prince* judgment first extended the right to privacy beyond private homes without explicitly articulating the meaning of privacy. Secondly, the Constitutional Court did not prescribe how employers should manage and regulate private consumption of cannabis in relation to the workplace. As a result of onerous safety requirements for companies using heavy machinery, dangerous equipment and hazardous substances, many employers adopted a zero alcohol, drugs and substance abuse policy to regulate the private consumption of cannabis. At loggerheads are two opposing interests: the employer's obligation to ensure a safe working environment; and the employee's right to consume cannabis privately as encapsulated in the *Prince* judgment.

---

94 *Ibid.*
95 Phifer 2017 *Journal of Chemical Health & Safety* 24 36.
96 *Ibid.*
97 *Ibid*
98 *Ibid.*
99 *Ibid.*

Practically, to ensure that employees do not jeopardise workplace safety, employers have relied on urinalysis testing to determine whether an employee has contravened a workplace zero-tolerance policy on alcohol, drugs and substance abuse. Consequently, judicial precedents have demonstrated that employees who privately consumed cannabis tested positive leading to their dismissal. However, academic literature and judicial precedent has exposed the problems with urinalysis testing in that it fails to prove current impairment. Even though South African courts have dismissed the relevance of impairment, it has been argued that if an employee tests positive without conclusive proof of current impairment, an employee may pose no threat to workplace safety. Hence, it has been recommended that employees should undergo a physical impairment test to curb the loopholes created by urinalysis testing.

THE IMPACT OF THE SOUTH AFRICAN ELECTORAL SYSTEM ON LEGISLATIVE OVERSIGHT

Shadi Maganoe
LLB LLM
Lecturer, University of the Witwatersrand

SUMMARY

This study investigates the relationship between the South African electoral system and its consequential effects on legislative oversight. Through an analysis of historical data, electoral structures, and parliamentary dynamics, this study aims to illuminate the various ways in which the chosen electoral system shapes the nature and efficacy of legislative oversight mechanisms. The study delves into the features of South Africa's electoral model, exploring how proportional representation and constituency-based elements influence the conduct of elected representatives in Parliament. In addition, this study assesses the implications of these electoral dynamics for the ability of parliamentary bodies to oversee effectively the conduct of the executive branch in order to ensure accountability and transparency in the governing process. By examining the impact of one-party dominance in Parliament as a consequence of the electoral system, this study provides insights into the intricate interplay between electoral systems and the crucial function of legislative oversight in fostering a robust democratic system.

1 INTRODUCTION

The South African electoral system is particularly inclusive owing to its broad representation of various political parties in Parliament.[1] The main objective of representation and inclusivity in the National Assembly is to enhance public accountability. Accountability not only requires public office bearers to account for their conduct, but also that they carry out their tasks with integrity. The constitutional duty to ensure public accountability thus rests with Parliament through its legislative oversight duties. The Constitution of the Republic of South Africa, 1996 (the Constitution) does not define the term "accountability", even though it is expressly included in its founding values.[2] Section 55(2) of the Constitution requires Parliament to establish accountability mechanisms to ensure effective legislative oversight. These mechanisms are required to ensure that the executive is held accountable for its exercise of public

1 Ferree "Electoral Systems in Context" in Herron, Pekkanen and Shugart (eds) *The Oxford Handbook of Electoral Systems* (2018) 1.

2 S 1 of the Constitution.

power.[3] Although the duties and functions of the legislature are clearly set out in the Constitution, the nature of the political structure in South Africa includes an electoral system that creates political party dominance, thus sidelining the legislative branch by placing it in a position where it is unable to exercise its oversight functions.[4] The party-list system has continuously defied the expectation of accountability through equal representation with a low number of seats being allocated to opposition parties in Parliament at national level. The party-list system has created one-party dominance by the ANC in the National Assembly. This study investigates the impact of the electoral system on the oversight function of the legislature. This study further investigates the issue of one-party dominance in Parliament and whether this, in turn, has resulted in stultifying the legislative oversight function.

2 THE ELECTORAL SYSTEM IN SOUTH AFRICA

The Constitution guarantees everyone the right to vote. Section 19(1) of the Constitution provides that every adult citizen is free to make political choices, which include the right to form a political party, to participate in the recruitment of members and to campaign for a political party.[5] Section 19(3) further provides that every adult citizen has the right to vote in elections for any legislative body recognised in terms of the Constitution.[6] The legislature has a duty to enact legislation that realises the provisions of section 19, including creating the electoral system that regulates elections. Parliament has the power to determine the way the electoral system is structured. However, this does not mean it has absolute authority. There are various mechanisms aimed at protecting citizens who wish to exercise their right to vote.[7] One of these safeguards is a requirement that there be a rational relationship between the structure that Parliament adopts and the achievement of a legitimate governmental purpose. As such, Parliament cannot act arbitrarily.[8] A structure adopted by Parliament would thus be deemed unconstitutional if there were no rational link between the structure and the governmental purpose.

South Africa employs a party-list system for parliamentary elections, where voters choose political parties rather than individual candidates. The Constitution stipulates the National Assembly's composition – that is, 350 to 400 members elected through the prescribed electoral system.[9] The Electoral Act mandates party registration and the submission of

---

3 S 55 of the Constitution.

4 Hudson and Wren "Parliamentary Strengthening in Developing Countries" (2007) https://odi.org/en/publications/parliamentary-strengthening-in-developing-countries/ (accessed 2022-05-10) 18.

5 S 19(1) of the Constitution.

6 S 19(3) of the Constitution.

7 *New National Party of South Africa v Government of the Republic of South Africa* 1999 (3) SA 191 (CC) par 19.

8 *Ibid*.

9 S 46 of the Constitution.

candidate lists.[10] After inspection, a list of eligible parties is compiled for elections. Voters cast a single vote for their chosen party, and, post-tally, elected party members fill parliamentary seats. Notably, the party-list system grants parties the autonomy to select representatives, making them accountable to the party rather than individual voters.[11] This structure empowers parties to remove disloyal members deployed to Parliament. This system does not give the voters an opportunity to decide on the State President and they must trust that those they have elected to Parliament will act in their best interests by electing a capable head of state.[12]

South Africa is a multiparty democracy. However, all important policy decisions are made by the ANC as it holds the majority vote in Parliament, rendering the opposition parties' vote inconsequential. An example of the authority of the ANC in the voting process is demonstrated in *Speaker of the National Assembly v De Lille (Speaker v De Lille)*[13] The Speaker of the National Assembly had ruled that part of a statement made by the respondent during parliamentary proceedings – that certain Members of Parliament (MPs) were spies – was unparliamentary. She had used the word in referring to members of the Assembly and had named such members. Mrs De Lille was then asked to withdraw this part of her statement in Parliament.[14] Later on, a member of the ANC, proposed a motion to appoint an ad hoc committee to report to the House on the conduct of Mrs De Lille for making allegations against MPs without evidence and to recommend action the House should take in light of its report. The motion was adopted by the National Assembly. However, only members of the ANC supported the motion.[15] The ad hoc committee was chaired by an ANC member, which approved a report that was sent to Parliament recommending that De Lille be directed to apologise for her statements and further that she be suspended for 15 parliamentary working days.[16]

The court held that section 57 of the Constitution makes provisions for the National Assembly to determine and control its internal arrangements, proceedings and procedures. As such, there could be no doubt that this authority was wide enough to enable Parliament to maintain internal order and discipline in its proceedings by means that it considers appropriate for this purpose.[17] It held further that Parliament did not have the constitutional authority to suspend De Lille from its proceedings in these circumstances as her behaviour was not disrupting parliamentary

10 S 26 of the Electoral Act 73 of 1998.

11 *New Nation Movement NPC v President of the Republic of South Africa* 2020 (6) SA 257 (CC) par 193.

12 De Vos "It's My Party (And I'll Do What I Want To)? Internal Party Democracy and Section 19 of the South African Constitution" 2015 31(1) *South African Journal on Human Rights* 30 41.

13 *Speaker of the National Assembly v De Lille* [1999] 4 All SA 241 (A) par 2.

14 *Speaker v De Lille supra* par 3.

15 *Speaker v De Lille supra* par 6.

16 *Speaker v De Lille supra* par 8.

17 *Speaker v De Lille supra* par 16.

proceedings.[18] The court held that her suspension was a form of punishment for making a speech (which was not unreasonably impeding the business of Parliament). Rather, it was a form of punishment for making a statement that was considered unjustified by others, including the majority party and members of the ad hoc committee.[19] The support for the motion by an ANC MP (adopted by Parliament based on the support of majority party members) demonstrates the power of party dominance in Parliament.

The court's decision was a breakthrough on the issue of political party dominance and its threat to effective accountability and, consequently, democracy. A system of Parliament constructed through one-party dominance creates an opportunity for abuse of power, where the legislature fails to hold the executive accountable owing to party loyalism. The current electoral system makes parliamentarians more beholden to their political parties and less to the constitutional principles or niceties of accountability. A potential threat to democracy by a dominant party also entails using the State's laws and resources to diminish competition in the electoral arena.[20] This is a form of a dominant party system that leads to authoritarianism.

3 THE IMPACT OF THE ELECTORAL SYSTEM ON LEGISLATIVE OVERSIGHT

There are several elements of the Constitution that limit voters' control over their elected representatives. Although the electoral system provides for collective representation, there is no direct link between legislators and voters.[21] The Constitution also excludes from Parliament MPs who leave their political parties, thus reducing any form of motivation for MPs to represent public interests by challenging the dominant party.[22] Unfortunately, rigorous parliamentary oversight by majority-party MPs places them in a difficult position if they criticise senior party leaders who could remove them from the party, and consequently from Parliament, as punishment for not toeing the party line.[23] Section 47(3) of the Constitution provides that a person loses their membership of the National Assembly if they cease to be a member of the political party that nominated them as a member of the Assembly.[24]

---

18 *Speaker v De Lille supra* par 17.

19 *Ibid*.

20 Mancebo "Stability and Governability the Benign Effects of Party Dominance in South Africa" 2021 13(1) *Insights on Africa* 56 60.

21 De Vos "Separation of Powers and the National Legislature" in De Vos and Freedman (eds) *South African Constitutional Law in Context* 1ed (2014) 120.

22 S 47(3)(*c*) of the Constitution.

23 Mattes "South Africa: Democracy Without the People?" 2002 13(1) *Journal of Democracy* 22 24.

24 S 47(3) of the Constitution provides: "A person loses membership of the National Assembly if that person–
(a) ceases to be eligible; or

3 1 Political party loyalism

Party loyalism refers to members of political parties using their positions in government to benefit the party to which they are affiliated because they are beholden to the party. Party loyalism may be seen as detrimental to democracy and good governance if one political party holds an overwhelming majority in Parliament with no possibility of change in the future. This form of majoritarian authority results in a lack of accountability, where Parliament is undermined because the very same people who must hold the government accountable act in the interests of their political parties and not in the interests of those who elected them to Parliament.[25] Although MPs must promote constitutional values above party loyalty, it is not always that simple. This is because MPs who defy their political party may face serious consequences, including being expelled from their party and losing their seat in Parliament.[26] This applies not only to members of the ANC. However, it is the best example to use as it is the governing party. The Constitution and the rules of various political parties require members to abide by the party's decisions.[27] MPs, who have a constitutional duty to hold the executive accountable while being required to toe the party line, face various difficulties.[28] De Vos affirms this by explaining that members who are seen to be disloyal are punished by removal from Parliament. For example, Makhosi Khoza openly criticised former President Jacob Zuma, and then resigned from the party after disciplinary action was threatened against her for the statement she made.[29] The trend of legislative ineffectiveness can be seen in the South African system of government where the executive seems more powerful than Parliament, owing to the relationship it has with the legislature. Although the Constitution has provided a clear mandate on the role of the legislature, implementation has proved to be a challenge owing to issues of corruption and political party loyalism.

3 2 One-party dominance in Parliament

Party dominance occurs when a particular political party dominates the government of a country over several decades, either governing on its own or as the leading partner in coalition governments.[30] One-party dominance is a system that occurs within a democratic government

(b) is absent from the Assembly without permission in circumstances for which the rules and orders of the Assembly prescribe loss of membership; or

(c) ceases to be a member of the party that nominated that person as a member of the Assembly."

25 Southall "The Dominant Party Debate in South Africa" 2005 *Africa Spectrum* 65.

26 De Vos in De Vos and Freedman (eds) *South African Constitutional Law in Context* 123.

27 *Ibid*.

28 De Vos in De Vos and Freedman (eds) *South African Constitutional Law in Context* 124.

29 *Ibid*.

30 Kassner *The Influence of the Type of Dominant Party on Democracy: A Comparison Between South Africa and Malaysia* (2014) 30.

where one party holds power for an extended period. The period that the party remains in power ensures that the ruling party can dominate both the polity and the policy-making process of the country.[31] In a procedurally democratic context of regular multi-party elections, the dominant party wins in at least four or more consecutive national elections and opposition parties exist, but are less likely to win at national level.[32] When South Africa transitioned into a democracy in 1994, the ANC won the national elections in a clean sweep, and became the governing party. Although the ANC does not display any aspects of defeat in its position as the ruling party, it has failed to hold its members accountable through party discipline.[33] Instead of holding party members accountable, the ruling party has used its power to replace disloyal MPs with loyal ones, enabling the ruling party to exclude any vote of no confidence. Apart from a formal vote of no confidence in Parliament, there are not enough effective mechanisms for the legislature to use to check executive conduct.[34]

Despite its highly proportional electoral system, South Africa has experienced majoritarian outcomes in elections, with the ANC coming out victorious in every national election since 1994.[35] This form of majoritarianism demonstrates one-party dominance despite the fact that the system strives towards perfect proportionality.[36] The ANC has been elected into power in six consecutive national elections, thus consolidating its position as the dominant party within a dominant party system. The dominant party's power is based on influence, and it goes beyond its recurring electoral victories. The ANC is strongly identified with South Africa's liberation from apartheid, which is how it has maintained its influence over the public.[37]

The ANC holds the most seats in Parliament, placing it in a better position when it comes to decision-making processes. However, it is important to clarify what this concept really means and how it affects accountability and legislative oversight. Suttner describes one-party dominance as a situation where political organisations that are electorally powerful have successfully won elections to an extent that their defeat is unlikely to occur in future.[38] The notion of the dominant party system is not new; it belongs to a well-established theory in the work of political scientists where strict prescriptions are laid down to establish whether a country qualifies as a democracy.[39] The dominant party debate relates to the question of the consolidation of democracy. Before a democracy can

---

31 Thuynsma *Political Parties in South Africa: Do They Undermine or Underpin Democracy?* (2017) 1.

32 *Ibid*.

33 Murray and Nakhjavani "Republic of South Africa" 2006 *Federalism and Foreign Relations* 212 216.

34 Mattes 2002 *Journal of Democracy* 24.

35 Ferree in Herron *et al The Oxford Handbook of Electoral Systems* 2.

36 *Ibid*.

37 Thuynsma *Political Parties in South Africa* 2.

38 Suttner "Party Dominance 'Theory': Of What Value?" 2006 33(3) *Politikon* 277 277.

39 Suttner 2006 *Politikon* 280.

be said to be consolidated, there must be a reasonable possibility of the defeat of the ruling or dominant political party. Where such potential defeat is unlikely in the foreseeable future, democracy cannot be said to be consolidated. There is a link between the concept of dominance and consolidation, as they both contribute towards political transformation, which is required for good governance.[40]

On 20 March 2002, the Cabinet resolved that an electoral task team chaired by Dr Frederik Van Zyl-Slabbert should be established to draft the new electoral legislation required by the Constitution.[41] In preparation for the 2004 national and provincial elections or any earlier elections, should the need arise, the Electoral Task Team was to draft the new electoral legislation.[42] The Task Team conducted a round-table conference with stakeholders and political parties where they presented the advantages of the existing electoral system, which included fairness, inclusivity and simplicity.[43] Although the report was conducted in 2002 in order to transform the electoral system at that time, these key characteristics play an important role and are still present in the current electoral system. Inclusivity and representation play an important role in South Africa's election process. However, the Electoral Task Team highlighted that there was a need to introduce greater accountability into democratic politics and to identify the role that the electoral system could play in this regard.[44]

The Task Team highlighted simplicity in the South African electoral system as a significant factor in ensuring that everyone could participate. This requires the voting process to be easy to understand. As such, voters must understand not only the method of voting but also the meaning of the outcome of the results.[45] Considering South Africa's past injustices, the Task Team highlighted that a simple electoral system is ideal, as a complex one requiring a higher degree of literacy would infringe on constitutional values and violate the principles of fairness and inclusivity.[46] The South African electoral system is a fairly simple one, making it ideal. However, it is important to highlight the challenges that come with it. The Task Team identified several issues regarding public accountability. Although they were not directly linked to the electoral system, these included party discipline, the role of the legislature, party funding and the doctrine of separation of powers.[47] These issues were closely linked to a lack of responsiveness from those who must account to the public, revealing weaknesses in accountability mechanisms. The lack can be linked to one-party dominance in Parliament, which becomes a threat to democracy when the governing party is assured electoral

40 *Ibid*.
41 Van Zyl-Slabbert *Report of the Electoral Task Team* (2003) 1.
42 *Ibid*.
43 Van Zyl-Slabbert *Report of the Electoral Task Team* 7.
44 *Ibid*.
45 *Ibid*.
46 *Ibid*.
47 *Ibid*.

victory and the party does not see the need to respond to the public and weed out maladministration.[48] Although there is no hierarchy in the factors mentioned, where a political party can influence the conduct of elected representatives in the legislature, and where this influence is used for individual benefit as opposed to the public good, it poses a threat to the quality of public accountability and good governance.

The party-list system allows for political party dominance. However, this does not mean that the dominant party cannot be held accountable. According to De Jager and Parkin, South Africa is a democratic state and as such the dominant party is still subject to the democratic realities of being removed from power by those who elected them.[49] The dominance of the ANC is dependent on the continued support of the public, and eventually poor performance will be punished through collective accountability. In *UDM v Speaker of the National Assembly*,[50] the court held that the general election is the most effective extra-parliamentary mechanism for holding those elected by the people accountable. It held further that political parties must be held accountable by the electorate, as it is the electorate who votes for them.[51] This form of accountability is not swift, and does not amount to immediate accountability. The process from party registration to candidate selection, elections and eventually parliamentary representation is undoubtedly time-consuming. This elongated sequence of events can be perceived as a trade-off, providing stability through established party structures. However, it potentially delays direct responsiveness for those in power. The slow nature of the electoral process as an accountability mechanism suggests that accountability unfolds gradually through the interplay of party dynamics, as opposed to offering the instant, individual-level responsiveness often associated with other electoral systems.

One-party dominance in South Africa is influenced by the State's political and electoral system. It is important to note that the link between the voters and the legislature is facilitated through political parties in both the National Assembly and the National Council of Provinces (NCOP). This means a person cannot become a member of one of the Houses of Parliament unless they are a member of a political party. De Vos explains that owing to this system, the Constitution established not only a parliamentary system of government in which the majority party in the National Assembly forms the government, but also a system of party government.[52] This is because the system cannot function in the absence of political parties. A party system is when political parties play a central role in the functioning of the government. In a party government, the executive branch is composed of members of the ruling party or coalition

---

48 Wolf "Practical Implications for the Electoral System: New Nation Movement NPC v President of the Republic of South Africa" 2021 138(1) *South African Law Journal* 58 77.

49 De Jager and Parkin *Wither the ANC's Dominance? Waning Electoral Dominance, Rising Hegemonic Dominance* (2017) 2.

50 *United Democratic Movement v Speaker of the National Assembly* 2017 (5) SA 300 (CC) par 78.

51 *Ibid.*

52 De Vos *et al South African Constitutional Law in Context* 120.

in the legislative branch. The party or coalition exercises significant control over the executive, and members of cabinet are often drawn from the ranks of the dominant party. Key characteristics of a party government include party discipline, where members of the governing party are expected to vote in line with party positions in Parliament, and the strong connection between executive and legislative branches. The party in power typically sets the agenda, formulates policies, and implements its political platform. In a party government, the party's strength and cohesion are crucial in shaping and implementing government policies.

In *New Nation Movement NPC v President of the Republic of South Africa*,[53] the Constitutional Court held that the Electoral Act was unconstitutional insofar as it provides for a purely proportional electoral system that caters only for representation by political parties and excludes adult citizens from standing as independent candidates in elections for the National Assembly and provincial legislatures. In this judgment, the applicants applied to the court seeking to invalidate the provisions of section 57A and Schedule 1A of the Electoral Act.[54] Section 57A provides that Schedule 1A applies to the National Assembly and provincial legislature elections in general. In addition, Schedule 1A provides for a party-proportional representation system, which is accomplished through party lists.[55] The applicants argued that the Electoral Act is unconstitutional for unjustifiably limiting the right of an individual to stand for public office and, if elected, to hold the office conferred by section 19 of the Constitution.[56] A further argument brought before the court was that the Electoral Act infringed on the applicants' constitutional right to freedom of association.[57]

The respondents in the matter relied on the decision of the High Court that nowhere in section 19(3)(*b*) of the Constitution does it expressly provide that standing for public office must include standing as an independent candidate as opposed to a member of a political party. The High Court also held that, by referring to a multi-party system in section 1(*d*), the Constitution entrenched a party system.[58] The High Court held further that sections 46(1)(*a*) and 105(1)(*a*) of the Constitution provided Parliament with the discretion to prescribe an electoral system that applies to the National Assembly and provincial legislatures through national legislation.[59] The Constitutional Court rejected the respondents' contention that section 19(3) must be interpreted to imply that an adult

---

53 *Supra* par 2.

54 73 of 1998.

55 *New Nation Movement NPC v President of the Republic of South Africa supra* par 3. S 19(3) of the Constitution provides that every adult citizen has the right to vote in elections for any legislative body established in terms of the Constitution, and to do so in secret; and to stand for public office and, if elected, to hold office.

56 *New Nation Movement NPC v President of the Republic of South Africa supra* par 4.

57 S 18 of the Constitution provides that everyone has the right to freedom of association.

58 *New Nation Movement NPC v President of the Republic of South Africa supra* par 5.

59 *Ibid*.

citizen must stand for and hold political office through a political party.[60] The court held that if the content of section 19(3)(*b*) entails that an adult citizen's intention to hold political office is impossible without joining a political party, this interpretation pits section 19 against section 18.[61] Instead of pitting the sections against each other, they should be read together such that the application of section 19(3) does not result in the denial of the right to freedom of association provided for in section 18.[62]

Despite the important role of political parties in the system of government, the Constitution does not provide enough guidance on the relationship between the leadership of a political party and its representatives in Parliament and the executive or how these parties must operate once they have members in both branches of government.[63] Owing to the lack of guidance, De Vos postulates that it is uncertain to what extent political party leaders can control their members in the legislature and the executive, and whether the extra-parliamentary leadership of a political party can prescribe to its members what they must say and how they should act when serving in the legislature or executive.[64] The testimony given by Dikeledi Magadzi at the State Capture Commission, where she stated that she had never asked why the ruling party took decisions that it did, and why when the party decided on taking a certain route members could not deviate, was very telling of this question. Magadzi stated that she was not in Parliament for herself and that she represented the ANC.[65] De Jager and Parkin describe this form of domination by political parties as hegemonic dominance.[66] This dominance is not merely about power but involves a more comprehensive influence that shapes the norms, values and structures of a given system. This form of influence is achieved when the dominant party obtains control of the government and party members appointed into official state positions show their loyalty by promoting the interests of the party as opposed to those of the public.[67] The dominance then results in a merger between the party and government, as members are not able to distinguish between the public good and the interests of the party to which they are affiliated.

Electoral systems play a pivotal role in shaping political competition and conflict and as such they contribute towards the destiny of the State's democratic government.[68] The ANC's dominance is drawn from the Black

---

60 *New Nation Movement NPC v President of the Republic of South Africa supra* par 63.

61 *New Nation Movement NPC v President of the Republic of South Africa supra* par 20.

62 *New Nation Movement NPC v President of the Republic of South Africa supra* par 21.

63 De Vos *et al South African Constitutional Law in Context* 121.

64 *Ibid*.

65 Gerber "'I Represent the ANC, and I Will Always Toe the Party Line' – Magadzi tells Zondo Commission" (8 February 2021) https://www.news24.com/news24/southafrica/news/i-represent-the-anc-and-i-will-always-toe-the-party-line-magadzi-tells-zondo-commission-20210208 (accessed 2022-05-10).

66 De Jager and Parkin *Wither the ANC's Dominance?* 4.

67 *Ibid*.

68 Basedau, Erdmann and Mehler (eds) *Votes, Money and Violence: Political Parties and Elections in Sub-Saharan Africa* (2007) 16.

working class and the party has long worried about losing this support owing to poor service delivery.[69] The lack of high-quality service delivery and improvement in people's lives is linked to the lack of accountability. The legislature has failed to hold the executive accountable over the years and this has created a culture of impunity, resulting in various issues such as state capture and ongoing loadshedding (forcing many South Africans to go back to using candles) and in many businesses failing.[70] The influence of the ANC as the dominant party is gradually fading as it is losing its popularity with the people of South Africa. The 2021 local government elections revealed a lack of trust in the ruling party, and this sheds a doubtful light on the role that political parties play in enhancing democracy.[71]

4 ELECTORAL REFORM TO STRENGTHEN LEGISLATIVE OVERSIGHT

4 1 From a Westminster system to proportional representation

South Africa used the British system of electing representatives in Parliament prior to 1994. It remained essentially unchanged from its implementation at unification in 1910, until it was replaced by the new electoral system that came with the Interim Constitution.[72] Five years prior to the adoption of the Interim Constitution, there were intense debates on the electoral options for the new South Africa.[73] During this process, many of the proposals for electoral reform differed with respect to technical detail.[74] However, according to Faure and Venter, an extraordinary degree of unanimity characterised the debate, at least in relation to two aspects. The first was that the old British system of elections was unfair as it overrepresented large parties in the system, especially the ruling party, and secondly, there was agreement among those who participated in the debate at that time that some form of proportional representation was highly desirable.[75]

The structure of South Africa's parliament resembles the British Westminster system, in which the executive and legislature interact, because the prime minister (who is head of government) and members of the cabinet (who collectively form the political leadership of the executive)

---

69 Haffajee "Torched by Power Cuts, the Middle-Class Will Load Shed the ANC in 2024 – Survey" (2023) https://www.dailymaverick.co.za/article/2023-03-14-torched-by-power-cuts-the-middle-class-will-load-shed-the-anc-in-2024-survey/ (accessed 2023-04-03).

70 Haffajee https://www.dailymaverick.co.za/article/2023-03-14-torched-by-power-cuts-the-middle-class-will-load-shed-the-anc-in-2024-survey/.

71 Basedau *et al Votes, Money and Violence* 7.

72 Faure and Venter *Electoral Systems and Accountability: A Proposal for Electoral Reform in South Africa* Paper presented at conference, Norwegian Institute of Human Rights, Oslo (2001) 1.

73 *Ibid*.

74 *Ibid*.

75 *Ibid*.

are appointed from the elected MPs, who form a large part of the legislature.[76] Without a clear separation of powers, checks and balances do not operate robustly in the Westminster system. This means that accountability becomes relatively easy to avoid and the executive, though constitutionally answerable to Parliament, in fact enjoys greater power than the legislature.[77] Hudson and Wren opine that although parliaments could make an important contribution towards holding the executive accountable, they seem to be ineffective because the legislature has become an imprint of the executive, and its role is to approve the plans of government; as such, parliaments are not doing enough to deliver on oversight.[78]

Democratic election processes are planned before the first vote. However, the processes are not cast in stone, and decisions on how elections should take place may be revisited.[79] South Africa has the flexibility to revisit its electoral system to encourage inclusivity and promote government accountability. Electoral reform is important. It is not always concerned with the values of shared cultural identity and freedom; rather, those who promote reform do so to encourage equality, honesty, transparency, accountability in government and political unity.[80]

African elections perform three key functions – namely, assisting in sustaining effective democratic institutions, providing the people with an effective tool to control government impunity, and enhancing public participation by allowing people to change their government when they are not satisfied with the service delivery of the current one.[81] Elections give the public an opportunity to participate in the governing process by allowing them to choose who should govern them. To ensure that government is transparent and to prevent tyranny, there must be free and frequent elections.[82] It is important to note that frequent elections are not an effective guarantee against maladministration, hence the need for electoral reform to enhance the legislative oversight role.

4 2 Party loyalism and party dominance

The lack of legislative oversight is a result of party loyalism, which means MPs are loyal first to their political party, before they serve the State in their official capacity. In *Democratic Alliance v South African*

---

76 Tan "The Singapore Parliament: Representation, Effectiveness, and Control" in Zheng, Lye and Hofmeister (eds) *Parliaments in Asia* (2013) 30.

77 *Ibid*.

78 Hudson and Wren https://odi.org/en/publications/parliamentary-strengthening-in-developing-countries/ 15.

79 Bowler and Donovan (eds) *The Limits of Electoral Reform* (2013) 1.

80 Bowler and Donovan (eds) *The Limits of Electoral Reform* 47.

81 Mbaku "Threats to Democracy in Africa: The Rise of The Constitutional Coup" (2020) https://www.brookings.edu/blog/africa-in-focus/2020/10/30/threats-to-democracy-in-africa-the-rise-of-the-constitutional-coup/ (accessed 2023-11-10) 1.

82 *Ibid*.

Broadcasting Corporation Ltd (DA v SABC),[83] the court held that the findings of the Public Protector were not binding and enforceable.[84] The President and the National Assembly did not comply with remedial actions that the Public Protector required, arguing that the Public Protector did not enjoy the same status as a judicial officer and the remedial action she takes did not have a binding effect.[85] Instead of implementing the remedial action, the President appointed the Minister of Police to investigate and report on whether he was liable for any amount in respect of the security upgrades that were made in his private home. The Minister absolved the President of any liability and found that the upgrades identified by the Public Protector as non-security features were in fact security features. To hold the President to account, the legislature established two ad hoc committees consisting of MPs to examine the reports of both the Minister of Police and the Public Protector. At the conclusion of its investigation of the reports, Parliament concluded that the President was not responsible for the irregular expenditure and absolved him of all liability.

The functions of elections and their relevance for democracy vary in every country, as do their evaluation of the quality of the electoral process.[86] Multi-party elections are a common institution in African countries, even though there are some doubts regarding the impact of the process on accountability – especially in states with political party dominance.[87] The ANC's dominance in government has revealed the dangers of one-party dominance to democracy and good governance. The report of former Public Protector Thuli Madonsela on state capture[88] provided evidence of a culture of impunity and a lack of accountability by government officials exercising state power. The report was intended to investigate alleged improper and unethical conduct of the then-President and other state functionaries relating to the improper relationship and involvement of the Gupta family in the appointment and removal of Cabinet Ministers, which resulted in the corrupt and improper award of state contracts for the benefit of the Gupta family and the power elite.[89]

---

83 *Democratic Alliance v South African Broadcasting Corporation Ltd* 2015 (1) SA 551 (WCC).

84 *Democratic Alliance v South African Broadcasting Corporation Ltd supra* par 74.

85 In *Economic Freedom Fighters v Speaker of the National Assembly* 2016 (3) SA 580 (CC) par 72, the court held: "For these reasons I have come to the conclusion that the findings of the Public Protector are not binding and enforceable. However, when an organ of state rejects those findings or the remedial action, that decision itself must not be irrational."

86 Basedau *et al Votes, Money and Violence* 144.

87 Basedau *et al Votes, Money and Violence* 7.

88 Madonsela "State of Capture: Report on an Investigation Into Alleged Improper and Unethical Conduct by the President and Other State Functionaries Relating to Alleged Improper Relationships and Involvement of the Gupta Family in the Removal and Appointment of Ministers and Directors of State-Owned Enterprises Resulting in Improper and Possibly Corrupt Award of State Contracts and Benefits to the Gupta Family's Businesses" *Report No: 6 of 2016/17* (2017) http://www.saflii.org/images/329756472-State-of-Capture.pdf (accessed 2023-03-03).

89 *Ibid.*

The legislature failed to hold former President Zuma to account, as the court held in *Economic Freedom Fighters v Speaker of the National Assembly* (*EFF 1)*[90] that he did not uphold his constitutional duties as head of state. The decision in *EFF 1* was one of many revelations of the detriments of party loyalism in Parliament. The legislature failed in its lofty duty to uphold and protect the constitutional values of section 1 of the Constitution, so promoting a culture of impunity by not holding the executive accountable. This led to incipient corruption.[91] The electoral system makes for weak, ineffective legislative oversight. For example, the *EFF1* decision was followed by several unsuccessful votes of no confidence against the then-President, even after the court found that he had violated his oath of office by not upholding the supreme law of the land.

The ineffective votes of no confidence against the former President were owing to the dominance of the ANC, as well as party political loyalism. This was evident in the vote of no confidence through a secret ballot following the court's decision in *UDM v Speaker*.[92] The vote was in favour of the majority party. However, it revealed a division of members within the ANC, leaving the party in a weaker position. The popularity of the ANC has also declined following the last local government elections, leading the ruling party towards coalitions to maintain its power. The local government elections serve as an indication of how elections can be used as an accountability mechanism by allowing the public to punish those in power by removing them from office. However, there is still a need for electoral reform to ensure that this does not only occur once every five years, leaving the public frustrated for the duration of the party's term.

The process of elections can be used as a tool to establish effective accountability bodies aimed at overseeing executive conduct through regularly replacing poorly performing political elites.[93] The impact of the electoral system on the role of legislative oversight must be revisited, and potential alternative systems should be given consideration[94] – for example, a more inclusive system of government that represents a mixed system of parliament consisting of the youth, women and persons with disabilities to bridge the gap between Parliament and the public. Where individuals representing various groups of society are included to promote their interests in Parliament, citizens will be represented in the governing process. In accordance with the recommendation for a mixed electoral system by this study, the Report of the Independent Panel Assessment of Parliament provides that the current electoral system

---

90 *Supra*.

91 *EFF 1 supra.*

92 *Supra.*

93 Mbaku https://www.brookings.edu/blog/africa-in-focus/2020/10/30/threats-to-democracy-in-africa-the-rise-of-the-constitutional-coup/ 1.

94 Govender "Report of the Independent Panel Assessment of Parliament" (2009) 94.

should be replaced with a mixed system that captures the benefits of both constituency-based and proportional representation.[95]

4 3 Active public participation in the decision-making process

The active participation of citizens in decisions that impact their lives is a foundation on which the South African constitutional democracy is built. De Vos posits that it is important for citizens to take an active part in the democratic and decision-making process because the Constitution is premised on the notion that governments must be responsive to the needs of the people and this can only be achieved through a certain degree of citizen participation.[96] He explains further that participation can be in the form of public discussions, peaceful protests and other political activities such as elections.[97] Public participation is important in ensuring government accountability. As the representative of the people, the legislature must ensure that the public takes part in decision-making processes. A lack of public participation results in an unaccountable and unresponsive government, and where government fails to be responsive to the needs of the people, it falls into a democratic deficit.[98] As such, it is important that government responds to the needs of the people in order to uphold the values of the Constitution. The current system promotes public participation and inclusivity. However, consideration as to whether the State must retain the current system must include the fact that the current constituency mechanisms are not effective enough; members often do not have enough knowledge and understanding as to what is expected of them,[99] which results in a lack of effective legislative oversight, as they are not able to ask the executive the relevant questions in order to report to Parliament with a way forward.

5 CONCLUSION

Good governance requires a range of features such as elections, competitive politics, constitutional reviews and the limitation of presidential terms as accountability mechanisms. The problem with the approach of competitive politics is that it assumes the meaning of democracy to be restricted to representative democracy. Although mechanisms have been established to protect democracy and safeguard accountability, there are other methods for protecting democracy besides strengthening opposition parties through competitive politics.[100]

---

95 *Ibid*.

96 De Vos 2015 *SAJHR* 30.

97 De Vos 2015 *SAJHR* 31.

98 *Ibid*.

99 Parliament "Oversight Model of the South African Legislative Sector" (2012) https://sals.gov.za/research/oversight_model.pdf (accessed 2023-03-18) 81.

100 *Ibid*.

The investigation into the impact of the electoral system on effective legislative oversight has revealed the intricate interplay between electoral mechanisms and the efficacy of parliamentary scrutiny. The party-list system, with its emphasis on party representation, as opposed to direct voter choice of individuals, has far-reaching implications for the nature of legislative oversight. While offering stability through established party structures, it introduces a dynamic where elected representatives are primarily accountable to their parties rather than the electorate.

The deliberate separation between voters and the selection of representatives challenges traditional notions of direct accountability, raising questions about the responsiveness of elected officials to the diverse needs and preferences of the population. Moreover, the process – from party registration to candidate selection and eventual parliamentary representation – unfolds over a considerable period, contributing to a limited understanding of accountability that evolves gradually.

In conclusion, this study underscores the importance of recognising the trade-offs inherent in the South African electoral system, balancing political party cohesion with the need for responsive and transparent legislative oversight. As South Africa continues to navigate its democratic journey, further investigation and public discourse on the implications of the electoral system are imperative for refining and strengthening the mechanisms that underpin legislative accountability in the pursuit of robust and inclusive democratic governance.

PROMOTING ADMINISTRATIVE JUSTICE FOR PRESIDENTIAL PARDONS IN SOUTH AFRICA

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

SUMMARY

The President's power to grant pardons, remit fines, penalties or forfeitures and the nature of the accountability for the exercise of such power remains unclear. The question of accountability relates to whether the President has a constitutional obligation to disclose the reasons for his decision. The nature of the power is broadly formulated and should undergo reform to enhance the attendant accountability. Over the years, there were debates on whether the granting of pardons constitutes administrative action in terms of the Promotion of Administrative Justice Act (PAJA). Because it is a power that potentially has an adverse effect on rights enshrined in the Bill of Rights, it is submitted that it should be construed in terms of PAJA. Similarly, the role of Parliament in exercising oversight over the process is unclear and inadequate. The article submits that the President should exercise the power together with the relevant Cabinet Minister, and subject to legislative endorsement.

1 INTRODUCTION

South Africa is a country that for many decades underwent racial oppression and segregation.[1] Many crimes were committed against the Black majority, with no accountability for the perpetrators.[2] It is against this backdrop that in 1973, the United Nations declared apartheid a crime against humanity.[3] Following the constitutional transition that took place between 1990 and 1996, former President Nelson Mandela sought to achieve reconciliation between the victims of apartheid and those who engaged in criminal conduct against them during apartheid. To this end, the Truth and Reconciliation

1 Leal "Constitutional Scapegoat: The Dialectic Between Happiness and Apartheid in South Africa" 2016 22 *Fundamina* 297 298.

2 Lingaas "The Crime Against Humanity of Apartheid in a Post-Apartheid World" 2015 2 *Oslo Law Review* 86.

3 UN General Assembly *International Convention on the Suppression and Punishment of the Crime of Apartheid* A/9030 (1974) 1015 UNTS 243. EIF: 18/07/1976 https://www.un.org/en/genocideprevention/documents/atrocity-crimes/Doc.10_International%20Convention%20on%20the%20Suppression%20and%20Punishment%20of%20the%20Crime%20of%20Apartheid.pdf (accessed 2023-02-06).

Commission (TRC) was established by legislative enactment, chaired by the late Archbishop Desmond Tutu.[4]

The TRC revealed the reality that post-apartheid South Africa would have to deal with issues pertaining to the pardoning of prisoners or the granting of amnesty to those incarcerated in the country's prisons. Following the adoption of the final Constitution in 1996,[5] the decision on whether to pardon prisoners vests in the President as Head of State. This is a crucial decision, which also has implications for the country's constitutional democracy. As a discretionary power bestowed on the President, it tests the independence of the judiciary and has implications for the criminal justice system. South Africa is founded on pillars of constitutional supremacy and the rule of law.[6] These principles can be undermined if the beneficiaries of early release from prison reoffend[7] owing to inadequate rehabilitation during their incarceration.[8]

In May 2002, the Pan Africanist Congress (PAC), Freedom Front Plus (FFP) and the Democratic Alliance (DA) called on former President Thabo Mbeki to release the names of 28 prisoners who were pardoned by the former statesman. The parties argued that the released prisoners' political affiliation to the governing African National Congress (ANC) played a part in securing their release from prison.[9] Allan Boesak's pardon is another instance in South Africa's history where the pardoning of an offender sparked debate among sectors of society. After his release, the DA demanded an explanation from then-President Thabo Mbeki, and called for the Justice Department to acknowledge that it made the recommendation to the former President to grant Allan Boesak a presidential pardon.[10] In response, the Justice Department argued that the decision to pardon inmates is the exclusive domain of the President.[11]

In April 2012, former President Jacob Zuma pardoned more than 35 000 prisoners in a bid to ease overcrowding in prisons. Of the prisoners, 14 600 were set to be released conditionally or unconditionally, with 20 000 of the offenders' parole or probation sentences dismissed.[12] In December 2019,

---

4 Yadav "Nelson Mandela and the Process of Reconciliation in South Africa" 2007 63 *India Quarterly* 49 52.

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

6 S 1(*c*) of the Constitution. For further reading, see The Conversation "How Pardoning Extremists Undermines the Rule of Law" (22 June 2023) https://theconversation.com/how-pardoning-extremists-undermines-the-rule-of-law-207272 (accessed 2024-01-05).

7 Bruggeman "Trump-Era Pardon Recipients are Increasingly Back in Legal Jeopardy" (22 December 2022) https://abcnews.go.com/US/trump-era-pardon-recipients-increasingly-back-legal-jeopardy/story?id=95568587 (accessed 2024-01-05).

8 McCourt and Ilminska "Pardons Are Not a Solution to Prison Overcrowding" (16 August 2012) https://www.justiceinitiative.org/voices/und-27 (accessed 2024-01-05).

9 IOL "Row Brews After Mbeki Pardons Prisoners" (13 May 2002) https://www.iol.co.za/news/politics/row-brews-after-mbeki-pardons-prisoners-86507 (accessed 2023-02-20).

10 Hartley "South Africa: DA Raises Tough Questions Over Boesak Pardon" (19 January 2005) https://allafrica.com/stories/200501190142.html (accessed 2023-02-20).

11 *Ibid*.

12 Jurist "South Africa President Pardons 25,000 Offenders to Ease Prison Overcrowding" (28 April 2012) https://www.jurist.org/news/2012/04/south-africa-president-pardons-35000-offenders-to-ease-prison-overcrowding/ (accessed 2023-02-20).

current President Cyril Ramaphosa pardoned more than 14 000 prisoners.[13] Similarly, in May 2020, the President authorised the release of low-risk inmates to combat the spread of Covid-19. In a statement, the President explained that the release was not a pardon, but a remittal of sentence and parole. They therefore continued to serve their sentence under community supervision and could be rearrested if they violated the conditions of their release.[14]

Modern democracies entrust the President with the power to grant pardons. The power is often discretionary, as only the President may grant pardons to offenders. The nature of the limitations upon the power differs in each jurisdiction.[15] In South Africa, the exercise of the power is subject to foundational principles – *inter alia*, the rule of law, constitutional supremacy and legality.[16] There are no political oversight mechanisms in relation to the granting of pardons in South Africa. Like most of the President's powers in section 84(2) of the Constitution, which he exercises as Head of State and seemingly without an *ex facie* constitutional obligation to consult any public functionary or institution, the National Assembly is not empowered to curb the exercise of the power. Such powers include, *inter alia*, presidential pardons,[17] the establishment of commissions of inquiry[18] and the appointment of Cabinet members.[19] This is despite the fact that the President is individually and collectively accountable to Parliament for the exercise of his powers and the performance of his functions.[20]

As a consequence of the exercise of the pardon power, victims affected by the decision have a corresponding right to know the rationale behind the

---

13 Maughan "News Analysis: Ramaphosa's Reprieve Paroles Two of SA's Most Contentious Prisoners" (17 December 2019) https://www.businesslive.co.za/bd/national/2019-12-17-news-analysis-ramaphosas-reprieve-paroles-two-of-sas-most-contentious-prisoners/ (accessed 2023-02-20).

14 Mitchley "Ramaphosa Authorises the Release of Low-Risk Inmates to Combat Spread of Covid-19 in Prisons" (8 May 2020) https://www.news24.com/news24/southafrica/news/ramaphosa-authorises-release-of-low-risk-inmates-to-combat-spread-of-covid-19-in-prisons-20200508 (accessed 2023-02-20).

15 In Zimbabwe, in terms of section 112 of the Constitution of the Republic of Zimbabwe 2013, the President exercises his pardon power after consultation with Cabinet and subject to the requirement to publish the decision in the *Gazette*. In South Africa, the requirement to publish presidential pardons is not expressly stated in the Constitution. In Angola, the President grants pardons in terms of article 119(O) of the Constitution of the Republic of Angola, 2010. In December 2022, he signed and approved a decree pardoning citizens convicted for celebrating Christmas. This decree, called the Amnesty Law, was approved by the National Assembly. See in this regard Verangola "President Grants Pardon to People Convicted for the Celebration of Christmas" (22 December 2022) https://www.verangola.net/va/en/122022/Politics/33793/President-grants-pardon-to-people-convicted-for-the-celebration-of-Christmas.htm (accessed 2023-03-14). In Tanzania, the President grants pardons in terms of article 45 of the Constitution of the Republic of Tanzania, 1977. Article 45(2) of the Tanzanian Constitution empowers Parliament to enact legislation that governs the procedure to be followed by the President in the process of granting pardons.

16 For a discussion of the oversight mechanisms in relation to the power, see full discussion below.

17 S 84(2)(*j*) of the Constitution.

18 S 84(2)(*f*) of the Constitution.

19 Ss 84(2)(*e*) and 91(2) of the Constitution.

20 S 92(2) of the Constitution.

decision by the President. Restorative justice plays a crucial role in this regard, in that it "advocates for a victim-centred approach to criminal justice".[21] For instance, prior to the January 2024 release of Oscar Pistorius on parole following his conviction for the murder of Reeva Steenkamp, the victim's family participated in the deliberations by the parole board on whether to release him from prison.[22] While restorative justice places victims at the forefront of the decision on eligibility for early release from prison, the extent to which it applies to presidential pardons is not altogether clear. Equally, whether the President's decision to pardon prisoners can be challenged based on the principles of restorative justice is also unclear.

Section 32 of the Constitution deals with the right of access to information that is in the possession of the State.[23] However, it is doubtful that this provision applies to the President's power to grant pardons.[24] In addition, everyone has the right to administrative action that is lawful, reasonable and procedurally fair.[25] Everyone whose rights have been adversely affected by administration action has the right to be given written reasons.[26] The Promotion of Access to Information Act (PAIA)[27] and the Promotion of Administrative Justice Act (PAJA)[28] were enacted by Parliament in 2000 to give effect to these rights.[29]

Despite these constitutional and legislative injunctions, the ambit of the President's duty to give reasons in exercising his powers as Head of State is not altogether clear. In the early years of South Africa's constitutional democracy, in *President of the Republic of South Africa v South African Rugby Football Union*[30] (*SARFU*), the Constitutional Court pronounced that the President's section 84(2) powers cannot in general be construed as administrative action, whether in terms of the Constitution or PAJA. The latter contains detailed provisions on the right to receive (and the corresponding duty to give) written reasons. As will be seen later, questions remain over the nature and extent of the President's constitutional obligation to give reasons when exercising his powers as Head of State, which includes presidential pardons.[31]

The principle of legality, as an incident of the rule of law, guides all exercises of public power.[32] Any impugned decision of the President can be

---

21 Louw "Victims' Participatory Rights in Parole Hearings: A South African Perspective" 2021 17 *British Journal of Community Justice* 42 45.

22 Wicks "Pistorius Parole Hearing: Reeva's Mom Speaks of Massive Hole Since Her Death" (24 November 2023) https://ewn.co.za/0001/01/01/pistorius-parole-hearing-reeva-s-mom-speaks-of-massive-hole-since-her-death (accessed 2024-01-05).

23 S 32(1)(*a*) of the Constitution.

24 See discussion below.

25 S 33(1) of the Constitution.

26 S 33(2) of the Constitution.

27 2 of 2000.

28 3 of 2000.

29 As mandated by ss 32(2) and 33(3) of the Constitution.

30 1999 (10) BCLR 1059 (CC) par 142.

31 Full discussion below.

32 *Fedsure Life Assurance v Greater Johannesburg Transitional Metropolitan Council* 1999 (1) SA 374 (CC) (*Fedsure*). Also refer to Okpaluba "Judicial Review of Executive Power: Legality, Rationality and Reasonableness (Part 1)" 2015 30 *Southern African Public Law* 122 123; Okpaluba "Judicial Review of Executive Power: Legality, Rationality and

tested against the rationality test.[33] The enquiry is whether, in pardoning prisoners, the means employed by the President correlates with the objectives sought to be achieved by the exercise of the power.[34] While this is a generally accepted principle, the exercise of the pardon power has implications for the doctrine of separation of powers.[35] It also has implications for the principle of judicial independence.[36] This is because it has the effect of nullifying the initial judicial determination by the court on the guilt of the prisoner. Post-1996, the high crime rates in South Africa are clearly relevant in any discussion on the President's pardon power.[37] Following the *dictum* in *Carmichele v Minister of Safety and Security*,[38] there is "a positive obligation on the State and its organs to provide appropriate protection to everyone through laws and structures designed to afford such protection".

There are often concerns that pardoning offenders poses a threat to public safety as the inmate may reoffend.[39] The debates often have to do with the socio-political realities currently bedevilling society. For instance, in 2020, there were calls to release Fees Must Fall activist Kanya Cekeshe, following his conviction on a charge of public violence and malicious damage to property.[40] He was sentenced to prison after participating in protest action against high tuition fees at university, and was part of a category of prisoners who were given a special remission of sentence by President Cyril Ramaphosa in December 2019, in recognition of Reconciliation Day.[41]

Reasonableness" 2015 30 *Southern African Public Law* 379 380; Henrico "The Rule of Law in Indian Administrative Law Versus the Principle of Legality in South African Administrative Law: Some Observations" 2021 42 *Obiter* 486 486; Freedman and Mzolo "The Principle of Legality and the Requirements of Lawfulness and Procedural Rationality": *Law Society of South Africa v President of the Republic of South Africa* (2019) (3) SA 30 (CC) 2021 42 *Obiter* 421 421.

33 Tsele "Coercing Virtue in the Constitutional Court: Neutral Principles, Rationality and the *Nkandla* Problem" 2016 8 *Constitutional Court Review* 193 205.

34 *National Energy Regulator of South Africa v PG Group (Pty) Limited* 2019 (10) BCLR 1185 (CC) par 48.

35 Bekink "Presidential Pardons: Constitutional Necessity or Political Nuisance? Some Points of Critique" 2003 18 *Southern African Public Law Journal* 371 386.

36 Udofa "The Abuse of Presidential Power of Pardon and the Need for Restraints" 2018 9 *Beijing Law Review* 113 114.

37 African News Agency "Presidential Pardons to Prisoners Slap in the Face to Victims-DA" (17 December 2019) https://www.iol.co.za/news/presidential-pardons-to-prisoners-slap-in-the-face-for-victims-da-39350140 (accessed 2023-02-06). Also refer to Tamukamoyo "What Is the Value of the Recent Presidential Pardon of Inmates in South Africa"? (15 May 2012) https://issafrica.org/iss-today/what-is-the-value-of-the-recent-presidential-pardon-of-inmates-in-south-africa (accessed 2023-02-06).

38 2001 (4) SA 938 (CC) par 44. See also Nkoane "Deciding Non-Constitutional Matters of General Public Importance in South African: Can Constitutional Values Be Used"? 2021 25 *Law Democracy and Development* 604 610.

39 African News Agency "Ramaphosa's Pardon of Inmates a Slap in the Face, Says IFP" (18 December 2019) https://www.polity.org.za/article/ramaphosas-pardon-of-inmates-a-slap-in-the-face-says-ifp-2019-12-18 (accessed 2023-02-06).

40 Mabuza and Savides "Very Happy: Fees Must Fall Activist Kanya Cekeshe is Paroled From Prison" (24 December 2019) https://www.timeslive.co.za/news/south-africa/2019-12-24-feesmustfall-activist-kanya-cekeshe-is-paroled-from-prison/ (accessed 2023-02-06).

41 Ngqakamba "Kanya Cekeshe: I Have No Regrets of Joining Powerful Fees Must Fall Movement (22 February 2020) https://www.news24.com/news24/southafrica/news/kanya-cekeshe-i-have-no-regrets-of-joining-powerful-fees-must-fall-movement-20200222

In most democracies, there are two pathways for a prisoner to be released prior to the expiry of their period of incarceration. This can take place through parole[42] or a presidential pardon.[43] In *Walus v Minister of Justice and Correctional Services,*[44] the Constitutional Court set aside the respondent's decision to reject the applicant's application for parole. The court ordered the Minister to place the applicant on parole within 10 calendar days. The judgment was met with a backlash from various sectors of society, with the court accused, *inter alia*, of promoting white supremacy.[45] There was also the view that Janusz Walus had never apologised to Chris Hani's family, political parties and South Africans at large, and therefore did not deserve to be placed on parole.[46]

This article investigates the President's power to grant pardons, remit fines, penalties or forfeitures and accountability for the exercise of this power. Secondary to the probe is the nature and extent of the President's constitutional obligations to explain the rationale behind his decision. The central argument advanced is that, because it is a power that has the potential to affect the rights of citizens adversely, the President can no longer exercise it in his capacity as Head of State, but rather must do so

(accessed 2023-02-20). See further Rabkin "#FeesMustFall Activist Kanya Cekeshe Eligible for Immediate Parole" (17 December 2019) https://mg.co.za/article/2019-12-17-feesmustfall-activist-kanya-cekeshe-eligible-for-immediate-parole/ (accessed 2023-02-20); Sobuwa "The Struggle Goes On for Kanya Cekeshe" (17 February 2020) https://www.sowetanlive.co.za/news/south-africa/2020-02-17-the-struggle-goes-on-for-khanya-cekeshe/ (accessed 2023-02-20); Ngcobo "Fees Must Fall Activist Kanya Cekeshe Released From Prison" (24 December 2019) https://www.iol.co.za/news/politics/fees-must-fall-activist-kanya-cekeshe-released-from-prison-39688085 (accessed 2023-02-20) and Qukula "Early Release of Prisoners Could Be Political Move, Says Criminal Reform Expert" (17 December 2019) https://www.capetalk.co.za/articles/370038/early-release-of-prisoners-could-be-political-move-says-criminal-reform-expert (accessed 2023-02-20).

42 Louw and Luyt "Parole and Parole Decisions in South Africa" 2009 *22 Acta Criminologica: African Journal of Criminology and Victimology* 1 4. For further reading on the definition of parole, see Van Heerden "Parole Board Administrative Action: An Encroachment on the Judicial Decisions of the Courts of Law of South Africa" 2011 24 *Acta Criminologica: African Journal of Criminology and Victimology* 17; Watney "Assessment of the South African Parole System (Part 2)" 2018 1 *Journal of South African Law* 88 and Mujuzi "Victim Participation in Parole Proceedings in South Africa" 2019 34 *Southern African Public Law* 1. Also refer to the works of Louw and Luyt "Parole Revocation in South Africa: Perspectives of Adult Male Parole Violators" 2019 32 *Acta Criminologica: African Journal of Criminology and Victimology* 48.

43 Mujuzi "Unpacking the Law and Practice Relating to Parole in South Africa" 2011 14 *Potchefstroom Electronic Law Journal* 206 240.

44 2023 (3) BCLR 224 (CC).

45 See media statement by the South African Communist Party "SACP on the Sickeningly Disappointing Constitutional Court Judgment Releasing Janusz Walus the Murderer of Comrade Chris Hani" (22 November 2022) https://www.polity.org.za/article/sacp-on-the-sickeningly-disappointing-constitutional-court-judgment-releasing-janusz-walu-the-murderer-of-comrade-chris-hani-2022-11-22 (accessed 2023-02-06). See further Nkosi, Sibanyoni and Koka "Chris Hani's Widow Lashes at Zondo for Walus's Ruling" (22 November 2022) https://www.sowetanlive.co.za/news/south-africa/2022-11-22-chris-hanis-widow-lashes-at-zondo-for-walu-ruling/ (accessed 2023-02-06); Reader Letter "The Walus Judgment Flawed, Wrong" (23 November 2022) https://www.sowetanlive.co.za/opinion/letters/2022-11-23-reader-letter-the-walu-judgment-flawed-wrong/ (accessed 2023-02-06).

46 Africa News "S.A: Parole for Anti-Apartheid Hero Killer Causes Outrage" (24 November 2022) https://www.africanews.com/2022/11/23/sa-parole-for-anti-apartheid-hero-killer-causes-outrage// (accessed 2023-02-06).

together with a Cabinet minister, in which case he would then be acting as Head of Cabinet. It is submitted that the power is too broad and should be curtailed in order to enhance presidential accountability. To this extent, the article also explores the National Assembly's constitutional obligation to exercise oversight over the President broadly when issuing pardons. Proposals are advanced for enhanced legislative oversight over the President's power to grant pardons. In the section below, the historical overview of the President's pardon power is explored in detail.

2 HISTORICAL OVERVIEW OF THE PRESIDENT'S PARDON POWER PRE-1994 AND DURING THE CONSTITUTIONAL TRANSITIONAL PHASE

The President's power to grant a pardon comprises a set of powers that were originally the royal prerogatives of the British monarch. In 1909, South Africa was declared a Union, and was led by a governor-general acting on behalf of the British monarch. Following this declaration, the Union of South Africa Act, 1909[47] was enacted. The monarch acted in person or through a governor-general acting as their representative.[48] The governor-general was appointed by the King and served at the latter's pleasure.[49] He exercised such powers and functions as were vested in him by the King,[50] and was assisted by an executive council in the exercise of his powers and the performance of his functions.[51] To this extent, those provisions of the 1910 Constitution referring to the "Governor-General in Council" were in reference to the governor-general, acting on the advice of the executive council.[52]

The 1910 Constitution was silent on whether the governor-general had the power to grant a pardon. Generally, there was no right of appeal from the Supreme Court of South Africa to the King in Council. However, the latter had the discretionary power to grant special leave to appeal from the Appellate Division.[53] Conversely, Parliament was empowered to enact legislation to limit the category of matters on which such special leave could be granted.[54] Therefore, the 1910 Constitution only contained reference to the King's powers of appeal.[55]

In 1961, South Africa became a republican state. This followed the adoption of the Constitution of the Republic of South Africa, 1961 (1961 Constitution).[56] For the first time since 1910, the Constitution contained express reference to the President's power to pardon offenders. The State President had the power to pardon or reprieve offenders, either unconditionally or subject to such conditions as he deemed fit, and to remit

47 Hereafter, the 1910 Constitution.
48 S 8 of the 1910 Constitution.
49 S 9 of the 1910 Constitution.
50 *Ibid*.
51 S 12 of the 1910 Constitution.
52 S 13 of the 1910 Constitution.
53 S 106 of the 1910 Constitution.
54 *Ibid*.
55 S 23 of the 1910 Constitution.
56 Constitution of the Republic of South Africa, Act 32 of 1961 (1961 Constitution).

any fines, penalties or forfeitures.[57] The State President had such powers and functions as were immediately prior to the commencement of the 1961 Constitution possessed by the Queen by way of prerogative.[58] All matters relating to the administration of justice fell within the purview of the Minister of Justice.[59] The 1961 Constitution did not contain detailed guidelines on how the President could exercise the pardon power.

In 1983, South Africa adopted a tricameral constitution.[60] The provision governing the President's power to grant a pardon was similar in wording and structure to the 1961 Constitution. In terms of the 1983 Constitution, the President had the power to pardon or reprieve offenders, either unconditionally or subject to such conditions as he may deem fit, and to remit any fines, penalties or forfeitures.[61]

From the early 1990s to 1996, South Africa underwent a period of constitutional transition. This resulted in the adoption of the 1993 Interim Constitution.[62] This was a period of great turbulence for the country owing to ongoing political violence, mainly between the Inkatha Freedom Party (IFP) and the ANC. In terms of the Interim Constitution, the President had the power to pardon or reprieve offenders, either unconditionally or subject to such conditions as he may deem fit, and to remit any fines, penalties or forfeitures.[63] In the exercise of this power, the President had the constitutional obligation to consult the Executive Deputy Presidents.[64]

In *Hugo v President of the Republic of South Africa*,[65] the President's decision to sign the Presidential Act No 7 (which granted a remission of sentence to all mothers in prison with minor children below the age of 12 years old) came before the court for consideration. This Act was promulgated in terms of section 82(1)(*k*) of the Interim Constitution, which provided that the President shall be competent "to pardon or reprieve offenders, either unconditionally, or subject to such conditions as he may deem fit, and to remit any fines, penalties or forfeitures". The applicant successfully challenged the Presidential Act before the High Court on the basis that it unfairly discriminated against him as a father to a son under the age of 12 years old. The President then took the matter on appeal in *President of the Republic of South Africa v Hugo*.[66] The approach followed by the Constitutional Court in the interpretation of the President's power to grant pardons is explored in detail below.

57 S 7(3)(*f*) of the 1910 Constitution.
58 S 7(4) of the 1961 Constitution.
59 S 95 of the 1961 Constitution.
60 Constitution of South Africa Act 110 of 1983.
61 S 6(3)(*d*) of the 1983 Constitution.
62 The Constitution of the Republic of South Africa Act 200 of 1993.
63 S 82(1)(*k*) of the Interim Constitution.
64 S 82(2)(*e*) of the Interim Constitution.
65 1996 (4) SA 1012 (D).
66 1997 (6) BCLR 708 (CC) par 2.

3 THE APPROACH OF THE CONSTITUTIONAL COURT IN *HUGO*

In *Hugo*, the court was asked to determine whether the rights of male prisoners were violated by the President in exercising his pardon and reprieve power through the mechanism of the impugned Presidential Act.[67] The court acknowledged that the President's powers in terms of the Interim Constitution have their origin in the royal prerogatives of the British monarch. The court also held that, as a result, "there are no powers derived from the royal prerogatives which are conferred upon the President other than those expressed in section 82(1)(k)",[68] which are stated in wide and unqualified terms. They were only subject to the requirement to act in consultation with the Executive Deputy Presidents, seemingly without the concurrence of the Cabinet.[69] The court held the view that no prisoner has the right to be pardoned, reprieved or have a sentence remitted. Such a decision lies with the President. However, should the President abuse his power in the process by acting unlawfully, a court can intervene by correcting such action and declaring it unconstitutional.[70]

The Constitutional Court held that the Presidential Act does in fact discriminate against male parents on the basis of gender and parenthood of children below the age of 12.[71] It therefore had to determine whether the discrimination was fair. As a reason for his decision, the President stated that the special remission of sentence for mothers serves the interests of their minor children. According to the expert testimony advanced before the court, mothers bear the primary responsibility for the care of minor children in care. Notwithstanding the fact that no statistical data was made available to support this assertion, the Constitutional Court accepted this line of reasoning and stated: "The generalisation upon which the President relied is a fact which is one of the root causes of women's inequality in our society."[72] The court found that the President acted in good faith but that this was not sufficient to establish whether the discrimination was fair.[73] In order to determine the fairness of the discrimination, the nature of the power and the interests it affects were instructive.[74]

The Constitutional Court affirmed the President's power to pardon in terms of the Interim Constitution and held that the power is not subject to Cabinet concurrence or legislative control.[75] According to the court: "It is not a private act of grace in the sense that the pardoning power in a monarchy may be."[76] The power is a corollary of the recognition in the Interim Constitution that the President should in his view determine when "the public

---

67 *Hugo supra* par 30.
68 *Hugo supra* par 8.
69 *Hugo supra* par 14.
70 *Hugo supra* par 29.
71 *Hugo supra* par 33.
72 *Hugo supra* par 38.
73 *Hugo supra* par 42.
74 *Hugo supra* par 43.
75 *Hugo supra* par 44.
76 *Ibid*.

welfare will be better served by granting a remission of sentence or some other form of pardon".[77] The court identified two instances in which the President's pardon power may be important. First, it may be used to correct mistaken convictions or reduce excessive sentences, and secondly, to confer mercy upon individuals if the President deems it in the public interest.[78] In summary, the President argued:

> "The decision to grant special remission of the remainder of their sentences to the categories mentioned in the Presidential Act was not lightly taken. The power is a grave one which requires careful consideration of many competing interests. It is important that due regard be had to the integrity of the judicial system and the administration of justice. Whenever remission of sentences is considered, it is necessary to bear in mind that incarceration has followed a judicial process and that sentences have been duly imposed after conviction. A random or arbitrary grant of the remission of sentences may have the effect of bringing the administration of justice into disrepute. It is of considerable importance to take into account the legitimate concerns of members of the public about the release of convicted prisoners. The levels of crime is a matter of concern to the public at large and there may well be anxiety about the release of persons who have not completed their sentences."[79]

The court rejected with disapproval the *dictum* in *Kruger v Minister of Correctional Services*,[80] where the President was found to have acted in the exercise of a prerogative power, thereby rendering a court powerless to intervene even if *mala fides* could be proven. The reasoning advanced by the court was that the learned judge in *Kruger* had failed to appreciate that the President is obliged to comply with all the terms of the Interim Constitution, including the Bill of Rights.[81] In the judgment of Goldstone J, the Constitutional Court found that the President used his discretionary power to grant pardons and remission of sentences fairly and in a manner consistent with the Interim Constitution.[82]

In the minority judgment, Kriegler J acknowledged that the President granted the pardon in good faith, rationally and to the advantage of a section of the population who suffered past discrimination. However, he argued that the discrimination is inconsistent with the prohibition against gender discrimination contained in section 8(2) of the Interim Constitution. In addition, he posited that the discrimination was not shown to be fair and was therefore invalid. Despite his contrary finding on the discriminatory aspect of the President's power, Kriegler J agreed that the appeal should succeed.[83] The basis for the dissenting views were in relation to the provisions of section 8 of the Interim Constitution, which dealt with the right to equality. In terms of the provision:

> "(1) Every person shall have the right to equality before the law and to equal protection of the law.

---

77 *Ibid*.
78 *Hugo supra* par 45.
79 *Hugo supra* par 46.
80 1995 (2) SA 803 (T) (*Kruger*).
81 *Hugo supra* par 49.
82 *Hugo supra* par 52.
83 *Hugo supra* par 64.

(2) No person shall be unfairly discriminated against, directly or indirectly, and, without derogating from the generality of this provision, on one or more of the following grounds in particular: race, gender, sex, ethnic or social origin, colour, sexual orientation, age, disability, religion, conscience, belief, culture or language.

(3) This section shall not preclude measures designed to achieve the adequate protection and advancement of persons or groups or categories of persons disadvantaged by unfair discrimination, in order to enable their full and equal enjoyment of all rights and freedoms.

(4) *Prima facie* proof of discrimination on any of the grounds specified in subsection (2) shall be presumed to be sufficient proof of unfair discrimination as contemplated in that subsection, until the contrary is established."

On a reading of the reasoning adopted by Kriegler J, the basis for his dissent was in relation to the equality provisions of the Interim Constitution. Broadly, the approach followed by the Constitutional Court should be commended. The realisation that mothers play a dominant role in society is consistent with a values-based approach to statutory interpretation.[84] Notably, the incumbent President, Nelson Mandela, did not argue against the furnishing of reasons for the exercise of the pardon power owing to its discretionary nature. However, his successors would later go on to contend that the President's Head of State powers are discretionary, and that they should not be compelled to disclose reasons for making decisions taken in terms of section 84(2) of the Constitution.[85] However, after the decision of the court in *President of the Republic of South Africa v Democractic Alliance*[86] (the *Cabinet Reshuffle* judgment), Rule 53 of the Uniform Rules of Court can be used to compel the President to furnish reasons for appointing and dismissing Cabinet members. The extent to which this *dictum* is applicable to the President's other section 84(2) powers remains unclear. This matter becomes more relevant in the context of the President's power to grant pardons.

4 PRESIDENTIAL PARDONS AND THE PAJA DEBATE

Generally, there is a constitutional obligation on all public office bearers to give reasons for decisions taken in pursuance of their constitutional powers and functions.[87] This constitutional obligation applies to all forms of public power. However, other than in terms of section 33 of the Constitution and the provisions of PAJA, the extent of the President's duty to give reasons in exercising his powers as Head of State is unclear. Everyone whose rights have been adversely affected by administrative action has the right to be

---

84 Devenish "The Theory and Methodology for Constitutional Interpretation in South Africa" 2006 69 *Journal for Contemporary Roman-Dutch Law* 238 238.

85 See the *dicta* of the court in the *Democratic Alliance v President of the Republic of South Africa* [2017] 3 All SA 124 (GP) upheld by the Constitutional Court in *President of the Republic of South Africa v The Democratic Alliance* 2019 (11) BCLR 1403 (CC) (*Cabinet Reshuffle* judgment), relating to the President's power to appoint and dismiss Cabinet members. Also see Du Toit and Ferreira "Reasons for Prosecutorial Decisions" *Potchefstroom Electronic Law Journal* 2015 18 1507 1509.

86 *Supra*.

87 S 33 of the Constitution.

given written reasons.[88] This is because the duty to give reasons is generally applicable to administrative action that falls within the ambit of PAJA.

In *Albutt v Centre for the Study of Violence and Reconciliation*,[89] the Constitutional Court had to determine whether the President is required, before exercising his pardon power, to afford the victims of crimes a hearing.[90] The case arose as an appeal out of the judgment of the North Gauteng High Court in *Centre for the Study of Violence and Reconciliation v President of the Republic of South Africa*.[91] The applicants asked the court to declare section 1 of PAJA invalid. They sought this relief in the event that the court found that section 1 of PAJA defines administrative action to include the exercise of the power to grant pardon in terms of section 84(2)(*j*) of the Constitution. The case arose from President Thabo Mbeki's announcement, resulting from the TRC, of a special dispensation of pardons for offenders who were convicted of politically motivated offences.[92] The President established a multiparty Pardon Reference Group (PRG) to assist him in considering requests for pardons. He would then seriously consider recommendations made by the PRG. However, he would form an independent opinion based on the facts placed before him.[93] The President stated that he would be guided *inter alia* by the values and principles enshrined in the Constitution, "including the objectives of nation-building and reconciliation".[94] The applicants argued that the President's power to grant a pardon in terms of section 84(2)(*j*) of the Constitution "is executive action and does not constitute administrative action".[95] They argued that properly construed, the definition of administrative action excludes the power to grant pardon.[96]

The court confirmed the well-established principle that the exercise of all public power must conform to the norms and standards of the Constitution, and to the doctrine of legality, which is part of the rule of law.[97] According to the court: "although there is no right to be pardoned, an applicant seeking a pardon has a right to have his application considered and decided upon rationally, in good faith, and in accordance with the principle of legality."[98]

---

88 S 33(2) of the Constitution.

89 2010 (2) SACR 101 (CC).

90 *Albutt supra* par 1.

91 [2009] ZAGPPHC 35.

92 *Albutt supra* par 4. Also see News24 "Mbeki Announces Pardons Deal" (21 November 2007) https://www.news24.com/news24/mbeki-announces-pardons-deal-20071121 (accessed 2023-03-14); Mail and Guardian "New Presidential Pardons to Come" (15 November 2007) https://mg.co.za/article/2007-11-15-new-presidential-pardons-to-come/ (accessed 2023-03-12); TimesLive "More Pardons For Political Crimes" (22 November 2007) https://www.timeslive.co.za/news/south-africa/2007-11-22-more-pardons-for-political-crimes/ (accessed 2023-03-14).

93 *Albutt supra* par 6.

94 *Ibid*.

95 *Albutt supra* par 39.

96 *Ibid*.

97 *Albutt supra* par 49. See further the *dicta* in *Affordable Medicines Trust v Minister of Health* 2006 (3) SA 247 (CC); *Pharmaceutical Manufacturers Association of South Africa: In re Ex Parte President of the Republic of South Africa* 2000 (2) SA 674 (CC); *Fedsure Life Assurance Ltd v Greater Johannesburg Transitional Metropolitan Council supra*.

98 *Albutt supra* par 49.

Therefore, the exercise of the pardon power must be rationally related to the objective sought to be achieved by it.[99] The executive has a wide discretion to achieve its constitutionally permissible objectives. Consequently, the courts may not interfere with the selected means because they dislike them, or because there are more appropriate mechanisms that could have been selected in the impugned decision.

The purpose of the enquiry should be to determine whether the means selected by the President are rationally related to the objective sought to be achieved by the exercise of the pardon power.[100] In reference to *Azanian Peoples Organisation (AZAPO) v President of the Republic of South Africa*,[101] the court held that victim participation is crucial to establishing what might have happened to their loved ones, and to attaining the twin objectives of nation-building and national reconciliation.[102]

Hugo illustrates why it is significant that the right to afford victims a hearing and to state their case as enshrined in the Constitution.[103] The court in *Hugo* left open the question of whether the President's pardon power constitutes administrative action. In addition, the court refrained from making a pronouncement on whether the definition of administrative action in terms of PAJA includes the President's pardon power.

Notably, the definition of administrative action in terms of PAJA does not expressly exclude the President's pardon power from the ambit of the definition of the Act.[104] However, decisions taken by the national executive authority are expressly excluded.[105] PAJA also excludes any decision taken in terms of PAIA from the definition of administrative action.[106] In terms of PAJA, "administrative action" means any decision taken, or any failure to take a decision by an organ of state,[107] when exercising power in terms of the Constitution or a provincial constitution.[108] The definition also includes an organ of state exercising a public power or performing a public function in terms of any legislation.[109]

The decisions referred to must adversely affect the rights of any person and have a direct, external legal effect.[110] Whether presidential pardons constitute administrative action is not the only crucial aspect of the debate. The Constitutional Court has not provided definitive guidance on whether the

---

99 *Ibid*.

100 *Albutt supra* par 51.

101 1996 (8) BCLR 1015 (CC) par 61.

102 *Albutt supra* par 59. Also refer to par 61.

103 S 33 of the Constitution, read together with the provisions of PAJA.

104 Govender "Judicial Review of the Pardon Power in Section 84(2)(*j*) of the Constitution of the Republic of South Africa, 1996" 2012 23 *Stellenbosch Law Review* 490 496. Also see par (*aa*) of the definition of "administrative action" in s 1 of PAJA.

105 Govender 2012 *Stellenbosch Law Review* 296. The definition of "administrative action" in PAJA excludes the executive powers or functions of the national executive, including the powers or functions referred to in ss 121(1) and (2), 125(2)(*d*), (*e*) and (*f*), 126, 127(2), 132(2), 133(3)(*b*), 137, 138, 139 and 145(1) of the Constitution.

106 Par (*hh*) of the definition of "administrative action" in s 1 of PAJA.

107 Par (*a*) of the definition of "administrative action" in s 1 of PAJA.

108 Par (*a*)(i) of the definition of "administrative action" in s 1 of PAJA.

109 Par (*a*)(ii) of the definition of "administrative action" in s 1 of PAJA.

110 See the definition of "administrative action" in s 1 of PAJA.

President has a duty to give reasons when granting pardons, on the legal provisions governing such a duty, and on whether the relevant institutions of oversight may compel him to furnish such reasons. It is submitted that such a duty should be rooted in the provisions of section 33 of the Constitution and the provisions of PAJA.

In the *SARFU* judgment,[111] in relation to the President's power to establish a commission of inquiry, the court held that the test to determine whether conduct constitutes administrative action "is not so much the functionary as the function". The focus of the enquiry should be on the nature of the power that the actor is exercising, not the arm of government to which he or she belongs.[112] According to the court: "action taken by members of Cabinet cannot be construed as administrative action for purposes of section 33 of the Constitution." Some acts of members of the executive will constitute administrative action within the meaning of section 33, but others will not.[113]

Regarding the President's section 84(2) powers, the Constitutional Court in *SARFU* held:

> "The remaining section 84(2) powers are discretionary powers conferred upon the President which are not constrained in any express manner by the provisions of the Constitution. Their scope is narrow, the conferral of honours, the appointment of ambassadors, the reception and recognition of foreign diplomatic representatives, the calling of referenda, the appointment of commissions of inquiry and the pardoning of offenders. They are closely related to policy; none of them is concerned with the implementation of legislation. Several of them are decisions which result in little or no action by the government. It is readily apparent that these responsibilities could not suitably be subjected to section 33."[114]

Seemingly, *SARFU* adopted the implementation of legislation as the test to determine whether the President's section 84(2) powers amount to administrative action within the meaning of section 33. This is troubling, given the fact that in 1996, when the Constitutional Court delivered the judgment, the Criminal Procedure Act[115] had already been in force since 1977. Similarly, the Promotion of National Unity and Reconciliation Act,[116] enacted a year earlier, was the statutory mechanism that would later go on to form the basis upon which, *inter alia*, former President Thabo Mbeki would pardon political prisoners.[117] As a matter of necessity, the President's pardon power also entailed the implementation of legislation. However, it is submitted that the legal uncertainty arises as a result of an incorrect classification of the true nature of the President's pardon power. The correct enquiry should focus on its discretionary nature and the extent of the limitations upon the exercise of the power. In *SARFU*, the court held that the President is subject to certain requirements when exercising his section 84(2) powers. He must:

---

111 *Supra* par 141.
112 *Ibid*.
113 *SARFU supra* par 142.
114 *SARFU supra* par 146.
115 51 of 1977.
116 34 of 1995.
117 Full discussion above.

- exercise the powers personally;
- not infringe a right in the Bill of Rights;
- abide by the principle of legality;
- act in good faith; and
- not misconstrue his powers.[118]

The President is also subject to the provisions of section 101(1) of the Constitution. In terms of the provision, a decision taken by the President must be in writing if it is taken in terms of legislation[119] or if it has legal consequences.[120] In addition, another Cabinet member must countersign a written decision by the President if the decision in question concerns a function assigned to the President.[121]

5 PRESIDENTIAL PARDONS AND THE DUTY TO GIVE REASONS

The values of accountability, responsiveness and openness enshrined in the Constitution mandate the President to explain the considerations he took into account in pardoning prisoners.[122] To this extent, everyone whose rights have been adversely affected by administrative action has the right to be given written reasons.[123] In addition, everyone has the right of access to any information held by the State,[124] and any information held by another person that is required for the exercise or protection of any rights.[125] The Constitution mandates Parliament to enact legislation to give effect to this right, and may take reasonable measures to ease the administrative and financial burden on the State.[126]

Pursuant to the dictates of the Constitution, Parliament enacted the Promotion of Access to Information Act (PAIA) in 2000. This Act applies to the right of access to a record held by both a public[127] and a private body.[128] The Act was enacted to give effect to the constitutional right of access to any information held by the State[129] and to information held by another person that is required for the exercise or protection of any rights.[130] However, the Act does not apply to a record of the Cabinet and its committees.[131]

The nature of the President's constitutional obligation to give reasons in the exercise of his pardon power should be understood in view of the *dictum*

---

118 *SARFU supra* par 148.
119 S 101(1)(*a*) of the Constitution.
120 S 101(1)(*b*) of the Constitution.
121 S 101(2) of the Constitution.
122 S 1(*d*) of the Constitution.
123 S 33(2) of the Constitution.
124 S 32(1)(*a*) of the Constitution.
125 S 32(1)(*b*) of the Constitution.
126 S 32(1)(*c*) of the Constitution.
127 S 3(*a*) of PAIA.
128 S 3(*b*) of PAIA.
129 S 9(*a*)(i) of PAIA.
130 S 9(*a*)(ii) of PAIA.
131 S 12(*a*) of PAIA.

of the court in *President of the Republic of South Africa v M and G Media Ltd*[132] (*Mail and Guardian*). The facts relating to this judgment had to do with the appointment by former President Thabo Mbeki of two judges to head a commission to examine the legality of the 2002 election results in Zimbabwe. The commission led to a report on the Zimbabwe election results – known as the "Khampepe Report"[133] – which found that the 2002 election results were not free and fair. Pursuant to section 11 of PAIA, the applicants in the Constitutional Court sought access to the report, following an earlier refusal by the President.[134]

The refusal by the President was based on two grounds, namely that "disclosure of the report would reveal information supplied in confidence by or on behalf of another State or international organisation, contrary to section 41(1)(*b*)(i) of PAIA". The President also argued that the report was prepared to assist him in formulating executive policy on Zimbabwe, as contemplated in section 44(1)(*a*) of PAIA.[135] The court affirmed the principle that the right of access to information held by the State gives effect to accountability, responsiveness and openness, and stated that it is impossible to hold a government that operates in secrecy to account.[136]

Relying on section 80 of PAIA, the court held that the provision permits it to examine the disputed record in secret, albeit in the parties' absence.[137] This approach can be used to test claims of secrecy and facilitate rather than obstruct access to information.[138] The court agreed with the respondents' assertion that judicial examination of the disputed record should be resorted to only in exceptional circumstances.[139]

The first reason for the court to agree was that a cautious approach to section 80 accords with the structure of PAIA. The statute stipulates the mechanism for obtaining access to information and enumerates instances where it may be refused. It also grants an overriding judicial power to examine the record, but then expressly states that the burden of proving an exemption to the disclosure of the record lies with the party claiming it. According to the court:

> "If the objects of the statutes were to create a novel form of proceeding in access disputes and invest the courts with inquisitorial powers for ready use in disputes, its provisions would not have included so plain an imposition of the burden on the holder of the information."[140]

Secondly, the provisions of section 80 clearly state that the powers it confers should only be used on rare occasions. It makes the court a party to the

---

132 2012 (2) BCLR 181 (CC).

133 Khampepe and Moseneke *Report on the 2002 Presidential Elections of Zimbabwe* (2002).

134 *Mail and Guardian supra* par 1.

135 *Mail and Guardian supra* par 2. In terms of s 44(1)(a)(i) of PAIA, the information officer may refuse access to the record of a public body if the record contains an opinion, advice, report or recommendation obtained for the purpose of assisting to formulate a policy or take a decision in the exercise of a power or performance of a duty conferred or imposed by law.

136 *Mail and Guardian supra* par 10.

137 *Mail and Guardian supra* par 125.

138 *Ibid*.

139 *Ibid*.

140 *Ibid*.

secrecy claimed and prohibits the disclosure of the record to any person, including the parties to the proceedings concerned.[141] The court ordered the release of the report. This means that a court can examine the basis upon which the President granted a pardon in terms of PAIA.

Mail and Guardian should be understood in light of a similar approach followed by the court in the *Cabinet Reshuffle* judgment.[142] Before the *Cabinet Reshuffle* judgment, it was unclear whether the President could be compelled to disclose the reasons for carrying out a Cabinet reshuffle. After the *dictum* of the court in the matter, Rule 53 of the Uniform Rules of Court could be used to compel the President to disclose the reasons for appointing and dismissing Cabinet members, despite the discretionary nature of such a power. However, this only applies to proceedings of a judicial nature. Whether parliamentary oversight mechanisms of accountability may be used to compel the President to furnish the reasons remains unclear. However, it is submitted that, using section 80 of PAIA and Rule 53 of the Uniform Rules of Court, a court can compel the President to disclose the reasons for granting pardons.

The constitutional and legislative provisions governing the President's pardon power are explored in detail below.

6 AN ANALYSIS OF THE CONSTITUTIONAL AND LEGISLATIVE PROVISIONS GOVERNING THE PRESIDENT'S PARDON POWER

The President has the powers entrusted to him by the Constitution and legislation, including those necessary to perform the functions of Head of State and head of the national executive.[143] The executive authority of the Republic is vested in the President,[144] which he exercises together with the other members of the Cabinet.[145] He exercises executive authority by implementing national legislation,[146] developing and implementing national policy,[147] coordinating the functions of state departments and administrations,[148] preparing and initiating legislation[149] and performing any other executive function provided for in the Constitution or legislation.[150]

---

141 *Mail and Guardian supra* par 128. For a general discussion by the courts on the duty to give reasons, see *Mphahlele v First National Bank* 1999 (2) 667 (CC); Brynard "Reasons for Administrative Action: What Are the Implications for Public Officials"? 2005 44 *Journal of Public Administration* 638 642; and *Transnet Limited v Goodman Brothers (Pty) Ltd* 2001 (1) SA 853 (SCA) par 5.

142 *Supra*.

143 S 84(1) of the Constitution.

144 S 85(1) of the Constitution.

145 S 85(2) of the Constitution.

146 S 85(2)(*a*) of the Constitution.

147 S 85(2)(*b*) of the Constitution.

148 S 85(2)(*c*) of the Constitution.

149 S 85(2)(*d*) of the Constitution.

150 S 85(2)(*e*) of the Constitution.

Despite any provision to the contrary and in terms of section 82(1)(*a*) of the Correctional Services Act,[151] the President may authorise the placement on correctional supervision, or the parole, of any sentenced offender, subject to such conditions as may be recommended by the Correctional Supervision and Parole Board. The President may also remit any part of the offender's sentence.[152] The provision does not affect the President's pardon power.[153] In pardoning or reprieving offenders, section 327 of the Criminal Procedure Act[154] may also be applicable.

Upon conviction, and subject to exhausting all the recognised procedures pertaining to appeal or review, the Minister may upon receipt of a petition from the affected person direct that the petition and the relevant affidavits be referred to the court that made the conviction.[155] The convicted person may file such a petition and affidavits if they are of the view that further evidence has since become available to them, and that it materially affects their conviction.[156] The court assesses the value of the evidence, and then advises the President whether, and to what extent, the evidence affects the conviction in question.[157]

Upon consideration of the finding or advice of the court, the President may direct that the conviction in question be expunged from all official records by way of endorsement. The effect is as though the conviction had never occurred *ab initio*.[158] The President may also substitute the sentence imposed with any other punishment imposed provided by law.[159] In *Liesching v S,*[160] the Constitutional Court affirmed its earlier pronouncements that section 327 of the Criminal Procedure Act is not an appeal procedure, but may only be used once all other remedies have been exhausted. According to the court, it is not a substitute for an appeal, but acts as a safety net to prevent a grave injustice.[161]

In *Minister of Justice and Constitutional Development v Chonco*,[162] the question arose whether the Minister's failure to process pardon applications, the consideration of which vests exclusively in the President in terms of section 84(2)(*j*), amounts to a breach of a constitutional obligation in terms of section 85(2)(*e*) of the Constitution. The court held that the issues raised deal with the relationship between the President's powers as Head of State, *vis-à-vis* as head of the national executive authority, and the obligations that accrue to each.[163] The Minister and the President argued that the verification, assessment and evaluation of pardon applications is not a

151 111 of 1998.
152 S 82(1)(*b*) of 111 of 1998.
153 S 82(1)(*c*) of 111 of 1998.
154 51 of 1977.
155 S 327 of the Criminal Procedure Act.
156 *Ibid*.
157 S 327(4)(*a*) of the Criminal Procedure Act.
158 S 327(6)(*a*)(i) of the Criminal Procedure Act.
159 S 327(6)(*a*)(ii) of the Criminal Procedure Act.
160 2019 (1) SACR 178 (CC) par 54.
161 *Liesching supra* par 21.
162 2010 (1) SACR 325 (CC).
163 *Chonco supra* par 18.

national executive function. They averred that the processing of pardons is conferred exclusively on the President as Head of State.[164]

In support of their contention, they advanced four reasons. They argued that it would be incorrect to divide the constitutional power to pardon into the preparatory preliminary stage and the making of the decision, which is entrusted to the President.[165] That would result in a shifting of the elements of the President's exclusive Head of State powers to the Minister, acting as a member of Cabinet. It would also lead to uncertainty regarding the constitutional obligations imposed upon the President as Head of State as opposed to the Minister in her capacity as a member of the executive.[166] They further asserted that the power conferred on the President in terms of section 84(2)(*j*) is textually, and by way of application, unrelated to the executive power granted in terms of section 85(2)(*e*).[167] The President as Head of State pardons offenders alone, while he acts collaboratively with other members of Cabinet in performing his executive authority.[168] Thirdly, they averred that each minister has a separate and specialist function and assumes the relevant responsibility as a result.[169] However, the President can transfer functions and the attendant legal obligations to a different minister. In order for the transfer to be legally binding, it must be in writing, failing which it is void *ab initio*.[170] The Minister argued on this basis that the lack of a written request from the President meant that no legal responsibility passed on to a member of Cabinet.[171]

The last basis on which they relied was that, because only the Constitutional Court may decide whether the President has failed to honour a constitutional obligation, he should have been cited as a party to the proceedings.[172] On the other hand, the respondents argued that by assisting the President in the exercise of his Head of State power, the Minister was acting in terms of section 85(2)(*e*). On this point, the Minister's responsibility and obligation arose from a source of a power that is different from a section 84 power vested in the President. Once the President made the request to process the applications, a legal obligation upon the Minister arose.[173] In the alternative, Mr Chonco argued that the Minister's inaction amounted to a failure to take a decision in terms of section 6(2)(*g*) of PAJA.[174]

The court affirmed the principle that, although

> "there is no right to be pardoned, the function conferred on the President entails a corresponding right to have a pardon application considered and decided upon rationally, in good faith, in accordance with the principle of

[164] *Ibid*.
[165] *Chonco supra* par 19.
[166] *Ibid*.
[167] *Chonco supra* par 20.
[168] *Ibid*.
[169] *Chonco supra* par 21.
[170] *Ibid*.
[171] *Ibid*.
[172] *Chonco supra* par 22.
[173] *Chonco supra* par 25.
[174] *Chonco supra* par 26.

> legality, diligently and without delay. That decision rests solely with the President."[175]

Relying on section 84(1) of the Constitution, the court found that the President has the necessary functions that go beyond the principal decision-making power, known as "auxiliary powers".[176] These powers are necessary to perform certain specific functional competencies, and where appropriate, can be relied upon by the functionary to justify legislative and executive action "necessary for the implementation of the functional competencies".[177]

According to the court, the ambit of the auxiliary powers is narrow and denotes those competencies reasonably incidental to fulfilling the functions in section 84(2). They include the President's power to request advice and initiate the processes needed to generate that advice, including the receipt and examining of pardon applications.[178] The court held that the responsibility for the preliminary process during pardon applications lies within the ambit of the President's power to request assistance.[179] Regarding the Minister's conduct in the matter, the court held that the Minister could not be held accountable for any unjust administrative action that may have occurred. This is because the question whether the impugned preliminary process amounted to administrative action was not argued before the court.[180]

While the court's classification of the nature of the President's pardon power is correct, the extent to which the President is answerable to both the offender and the victims regarding the granting of pardons remains vague. As alluded to in *SARFU*, when exercising his Head of State powers, the President may, *inter alia*, not infringe a right in the Bill of Rights. While the rationality test and the principle of legality may serve to ensure that the President complies with this constitutional mandate, it is submitted that they are inadequate for safeguarding the rights of both the victims and the offender. The discretionary nature of the President's pardon power, weighed against the rationality test, means that if he is found to have exercised the power unlawfully, the court can at most set aside the decision, and order him to exercise the power *de novo*. In addition, there is no legislative oversight over the process, and no clear duty to give reasons for granting pardons or for exercising any of the President's section 84(2) powers. It is submitted that sections 32(2) and 33(3) of the Constitution should be applicable to the President's pardon power.

7 PROCEDURAL FAIRNESS AS AN ASPECT OF PRESIDENTIAL PARDONS

The principles of procedural fairness are enshrined in section 33 of the Constitution and in PAJA, and have also been applied by the courts in

---

175 *Chonco supra* par 30.
176 *Chonco supra* par 31.
177 See further the *dictum* in *Fedsure supra* par 138.
178 *Chonco supra* par 33.
179 *Chonco supra* par 35.
180 *Chonco supra* par 42.

various judicial determinations. *Masetlha v President of the Republic of South Africa*[181] presents an interesting perspective on the President's constitutional obligation to consider the views of those affected by his decision-making. In this case, former President Thabo Mbeki effectively dismissed the Director-General of the National Intelligence Agency, Billy Masetlha, by unilaterally amending the applicant's term of office. Consequently, the court had to determine whether the power to amend an employment term in terms of sections 209(2) of the Constitution, read together with 3(3)(*a*) of the Intelligence Service Act[182] and 12(2) of the Public Service Act,[183] is executive authority or administrative action and therefore reviewable in terms of PAJA. In addition, the court had to determine whether these provisions permit the President to amend the applicant's term of office unilaterally, and whether such a decision is constitutionally permissible.

The court found that the President's powers as head of the national executive authority are not reviewable in terms of PAJA.[184] In reference to the *dictum* in *SARFU*,[185] the court affirmed the *principium* in the latter judgment that "the meaning of executive action in section 1(i)(*aa*) of PAJA has the effect of excluding distinctively political decisions and not characteristically administrative tasks such as implementing legislation".[186]

The court noted that it would not be appropriate to confine executive power to the requirements of procedural fairness.[187] Citing the *dictum ad verbum* in *Premier, Mpumalanga v Executive Committee, Association of State-Aided Schools, Eastern Transvaal,*[188] it was found that "a court should be slow to impose obligations which will inhibit the government's ability to implement policy". According to the court, procedural fairness is not a requirement.[189]

However, procedural fairness is a central component in an enquiry such as whether the President has exercised his pardon power in accordance with the dictates of the Constitution. Post-1994, when interrogating the exercise of presidential powers and functions, the courts confine the enquiry to the rationality test and the principle of legality.

In *Albutt*, the court held that rationality as an aspect of legality required the victims of politically motivated crimes to be afforded a hearing before the President could pardon political prisoners. According to Murcott,[190] the court's finding had the effect of expanding the concept of legality. The author argues that the Constitutional Court merely confirmed the victims' rights to procedural fairness without clarifying the exact procedure to be followed, in

181 2008 (1) SA 566 (CC).
182 65 of 2002.
183 103 of 1994.
184 *Masetlha supra* par 76.
185 *SARFU supra* par 141–143.
186 *Masetlha supra* par 76 n39.
187 *Masetlha supra* par 77.
188 1999 (2) BCLR 151 (CC) par 41.
189 *Masetlha supra* par 78.
190 Murcott "Procedural Fairness as a Component of Legality: Is a Reconciliation Between *Albutt* and *Masetlha* Possible"? 2013 130 *The South African Law Journal* 260 260.

addition to the exact nature and content of the rights.[191] Murcott posits that had PAJA been the basis for the court's finding, the exact nature of the victim's rights would have been reasonably clear.[192] She argues that a finding that the President's pardon amounted to administrative action would have influenced the applicable standard of procedural fairness.[193]

The correctness of Murcott's interpretation of the court's *dictum* is accepted, albeit for different reasons. Whenever the interpretation of presidential powers is at issue, it is important to distinguish between those powers he exercises as Head of State *vis-à-vis* as head of the national executive authority. Such a distinction is central to the *factum probandum* in *Masetlha* as opposed to *Albutt*. The effective dismissal of the Director-General of the National Intelligence Agency in *Masetlha* was an exercise of power by the President in his capacity as head of the national executive authority. Conversely, *Albutt* involved the President's legal status as Head of State. However, such a distinction does not negate the fact that the principle of legality leads to undue deference by the court. Procedural fairness as enshrined in section 33 of the Constitution and PAJA should be equally applicable to presidential pardons in the event that the President uses the power unlawfully. Extending the applicability of procedural fairness as enshrined in PAJA to the President's pardon power would be in accordance with section 8(1) of the Constitution. The latter affirms the applicability of the Bill of Rights to the legislature, the executive, the judiciary and all organs of state.[194] While it is settled law that no one has the right to a pardon, should the President decide to grant a pardon upon receipt of an application, the principles of procedural fairness apply *ab initio*.

Whether there is a duty to give reasons for the President's powers as Head of State remains unclear. The law should be reformed to expressly state Parliament's role in holding the President accountable for the exercise of his powers as Head of State. Legislation[195] that clearly deal with the access of information relied on by the President in decisions affecting personal rights should be enacted. Such legislation should also govern the President's duty to give reasons in the exercise of his powers as Head of State, including the power to grant pardons.

Under the next heading, the article proposes certain reforms to deal with the *lacuna* in the law identified above.

8 LEGISLATIVE OVERSIGHT OVER PRESIDENTIAL PARDONS

8 1 Legislative oversight

Except through the process of judicial review, there are no legal mechanisms to ensure reasons are given in the granting of pardons.

191 Murcott 2013 *The South African Law Journa*l 268.
192 *Ibid*.
193 *Ibid*.
194 S 8(1) of the Constitution.
195 Other than PAIA.

Besides the rationality test as an aspect of the principle of legality, there are no clear constraints on the President's pardon power. In addition, there are no express mechanisms in the Constitution or in legislation to compel the President to disclose the reasons relating to his decision to pardon prisoners. While the Constitutional Court in *Albutt* confirmed that the victims affected by the President's decision to pardon offenders are entitled to be heard in the process, it did not give clear mechanisms in terms of the Constitution or the legislation regarding how that would unfold. The lack of clarity on the President's duty to give reasons in granting pardons is also because the power is not rooted in PAJA, but forms part of a broader exercise of public power, which is subject to the broader constraints of legality review mechanisms. This is an anomaly, given the National Assembly's power to seek or obtain information from other organs of state.

It is submitted that the exercise of the President's pardon power should be subject to parliamentary endorsement. The National Assembly or any of its committees may summon any person to give evidence on oath or affirmation, or produce documents.[196] It may require any person or institution to report to it,[197] and compel, in terms of legislation, the rules and orders, any person or institution to comply with a summons issued in terms of section 56(*a*) and (*b*) of the Constitution.[198] The National Assembly may also receive petitions, representations or submissions from any interested persons or institutions.[199] This is also consistent with the autonomy conferred upon Parliament to make rules and orders concerning its business, with due regard to representative and participatory democracy, accountability, transparency and public involvement.[200]

From the foregoing, it is clear that the President may be summoned to appear before the National Assembly to explain the rationale behind the granting of pardons. However, where the President appears before Parliament but relies on the discretionary nature of the pardon power to furnish an explanation for the decision, the Constitution is silent on the legal position in such an eventuality. In practice, the President gives reasons for the decision to pardon offenders by way of a press release. However, the victims of the crimes committed by the perpetrators are not heard in the process.[201]

It is also submitted that the merits and demerits of the decision to grant pardons should be debated in the National Assembly before the President takes a final decision. Parliament should thereafter vote on the matter, and the resolution should then form the basis for the President's final decision. The issue of crime in South Africa is of national interest. Therefore, the decision to grant pardons can no longer be an absolute discretionary power vested in the President alone as Head of State.

---

196 S 56(*a*) of the Constitution.
197 S 56(*b*) of the Constitution.
198 S 56(*c*) of the Constitution.
199 S 56(*d*) of the Constitution.
200 S 57(1)(*d*) of the Constitution.
201 See par 1.

8 2 Presidential pardons and Cabinet concurrence

It is submitted that the President should exercise his pardon power subject to Cabinet concurrence. As Head of State and head of the national executive authority, the President is individually and collectively accountable to Parliament for the exercise of his powers and the performance of his functions.[202] Should the President elect to seek advice from the relevant Minister in the process, this rule applies *mutatis mutandis* to the latter. As members of Cabinet, they must provide Parliament with full and regular reports concerning matters under their control.[203]

The President's pardon power should be construed in terms of the provisions of PAJA and PAIA. The President should grant pardons subject to advice received from the Minister, in line with the administrative fairness rights derived from the Constitution. To this extent, the power to grant pardons should qualify as administrative action for purposes of section 33 of the Constitution and the applicable provisions of PAJA.

It is also submitted that the exclusion of Cabinet records from the ambit of PAIA should be removed for purposes of granting pardons.

9 CONCLUSION

As alluded to earlier, the granting of pardons should be viewed against the backdrop of the high crime rate in the country. The broad manner in which the power is conferred upon the President easily lends itself to perceptions of abuse. As an original power derived from the Constitution and vested upon the President, it encroaches on the doctrine of separation of powers. It is submitted that the broad manner in which it is conferred upon the President encroaches on the authority of the courts.

The President's duty to give reasons when granting pardons remains an illusion. This applies *mutatis mutandis* to most, if not all, of his other powers as Head of State. Save for the requirements, *inter alia*, to exercise presidential powers in good faith and subject to the principle of legality, a judicial pronouncement setting aside the President's decision to grant pardons is likely to be met with accusations of judicial overreach on executive authority. Therefore, legislative oversight mechanisms over the President's pardon power should be enhanced, for improved accountability of presidential decision-making. While a court of law may interrogate the legality and rationality of the President's decision, it is submitted that detailed guidelines should be provided in the Constitution and legislation on how the President may exercise the power, and the exact limitations that should be imposed in the process.

---

[202] S 92(2) of the Constitution.

[203] S 92(3)(*b*) of the Constitution.

TOWARDS DRAFTING ARTIFICIAL INTELLIGENCE (AI) LEGISLATION IN SOUTH AFRICA

Sizwe Snail Ka Mtuze
LLB LLM
Adjunct Professor, Nelson Mandela University
Visiting Professor, The Center for Technology & Society (CTS), FGV School of Law

Masego Morige
BCom LLB
Candidate Attorney, Snail Attorneys

SUMMARY

Artificial Intelligence also abbreviated as "AI" has been the subject of much legal debate and legal writing. This article seeks to identify internationally accepted AI principles and norms that are contained in the South African Constitution. This article also seeks to identify policy such as the PC4IR Report and legislation that regulates and accommodates the use of AI in South Africa. What emerges clearly is that there has never been a deliberate attempt to legislate AI, and that the legislation referred to is applicable by coincidence not intention. The article goes on to highlight African and BRICS policies and best practices on AI, European best practices and legal norms and values on AI, and the draft EU AI Act. The article concludes with a recommendation that South Africa introduce AI legislation as a matter of urgency.

1 INTRODUCTION TO ARTIFICIAL INTELLIGENCE

Artificial Intelligence (AI) is not the kind of utility that needs to be regulated once it is mature but needs to be regulated now. It is a powerful force, a new form of smart agency, which is already reshaping our lives, our interactions, and our environments.[1] When people think about AI, they may have visions of the future. But AI is already in use. The term Artificial intelligence (AI) is

[1] Floridi, Cowls, Beltrametti, Chatila, Chazerand, Dignum, Luetge, Madelin, Pagallo, Rossi, Schafer, Valcke and Vayena "AI4People – An Ethical Framework for a Good AI Society: Opportunities, Risks, Principles, and Recommendations" 2018 28 *Minds & Machines* (*M&M*) https://doi.org/10.1007/s11023-018-9482-5 (accessed 2023-03-30) 689.

reputed to have been coined in 1956 by American scientist John McCarthy. Gravett,[2] quoting the works of McCarthy explains:

> "[A]n attempt will be made to find how to make machines use language, form abstractions and concepts, solve kinds of problems now reserved for humans, and improve themselves … For the present purpose the artificial intelligence problem is taken to be that of making a machine behave in ways that would be called intelligent if a human were so behaving."[3]

In its simplest form, AI is defined as the recreation of aspects of human intelligence in computerised form.[4] A more sophisticated definition of AI was formulated by Gennatas and Chen, who define AI as "[t]echnology that allows humans to build intelligent machines".[5]

Since then, AI has come to encompass areas such as automated reasoning, natural language processing, expert systems, game playing, vision and learning capabilities.[6] Roberts *et al*, citing the works of Floridi, define AI as:[7]

> "a cluster of smart technologies, ranging from machine learning software, to natural language processing applications, to robotics, that has unprecedented capacity to reshape individual lives, societies and the environment."[8]

AI has many applications that act similarly to human beings in modern times. AI is used for voice-operated personal assistants like Siri,[9] self-driving cars, and text and image generators.[10] Alongside its growing power and its potential, AI raises moral and ethical questions. The technology has already been at the centre of a plethora of ethical risks and dilemmas, and multiple scandals such as the infringement of laws and rights, as well as racial and gender discrimination.[11] Belli *et al* point out that AI is being used not only for e-commerce, but also for facial recognition technologies and access to financial services, and this fact impacts not only the economy, but also

---

2 Gravett "The Dark Side of Artificial Intelligence: Challenges for the Legal System" 2020 35(1) *Southern African Public Law* (*SAPL*) https://doi.org/10.25159/2522-6800/6979 (accessed 2023-04-04) 3.

3 McCarthy, Minsky, Rochester and Shamin "A Proposal for the Dartmouth Summer Research Project on Artificial Intelligence" (1955) http://www-formal.stanford.edu/jmc/history/dartmouth/dartmouth.htm (accessed 2023-04-04) 3.

4 Ormond "Artificial Intelligence in South Africa Comes With Special Dilemmas – Plus the Usual Risks" 2023 *The Conversation* https://theconversation.com/artificial-intelligence-in-south-africa-comes-with-special-dilemmas-plus-the-usual-risks-194277 (accessed 2023-03-30) 1.

5 Gennatas and Chen "Artificial Intelligence in Medicine: Past, Present and Future" in Xing, Giger and Min (eds) *Artificial Intelligence in Medicine: Technical Basis and Clinical Application* (2020) 3.

6 Shinghal *Formal Concepts in Artificial Intelligence: Fundamentals* (1992) 1.

7 Roberts, Cowls, Hine, Mazzi, Tsamando, Taddeo and Floridi "Achieving a 'Good AI Society': Comparing the Aims and Progress of the EU and the US" 2021 27 *Science Engineering Ethics* (*SEE*) https://doi.org/10.1007/s11948-021-00340-7 (accessed 2023-02-16) 68.

8 *Ibid.*

9 Ormond https://theconversation.com/artificial-intelligence-in-south-africa-comes-with-special-dilemmas-plus-the-usual-risks-194277 1.

10 *Ibid.*

11 Belli, Venturini, Mariscal, Frati and Benussi "Regulación en IA (Regulation in AI)" (2022) https://cyberbrics.info/regulacion-e-ia (accessed 2023-03-30) 1.

people's lives and democracy itself.[12] Etzioni has suggested that there is a need to regulate artificial intelligence in order to steer its development and application,[13] but he is not as concerned as technology entrepreneur Elon Musk, who referred to AI as an existential threat to humanity.

This article commences with a short introduction to AI and then examines some generally accepted AI principles and norms. It then discusses the South African legal position on AI and initiatives on the African continent to regulate AI. Lastly, it takes a glimpse at the recent draft European Union (EU) AI Act.

2 GENERAL AI LEGAL PRINCIPLES AND NORMS

AI has the potential to transform society significantly, and it is a means to enhance human development. AI systems need to be human-centric, and developers should seek to maximise the benefits of AI solutions while minimising their risk[14] and exposure to legal claims arising from AI-related violations of basic human rights. Brand points out:

> "In the context of public law there are many questions and challenges relating to individual rights. For example the right to privacy, and regarding the role and responsibilities of government relating to policy development and regulation dealing with technological developments ... that give rise to questions about the values, ethical standards and regulatory environment relating to the current digital era, also referred to as the Fourth Industrial Revolution."[15]

Marengo states that AI systems must respect five ethical principles: respect for human autonomy, prevention of harm, fairness, substantive dimensions and explicability in the development and deployment of trustworthy AI.[16] Jobin *et al* state, according to their study of several states around the world, that:

> "eleven overarching ethical values and principles have emerged from our content analysis. These are, by frequency of the number of sources in which they were featured: transparency, justice and fairness, non-maleficence, responsibility, privacy, beneficence, freedom and autonomy, trust, dignity, sustainability, and solidarity."[17]

The Organisation for Economic Co-operation and Development (OECD) defines AI as

---

12 *Ibid.*

13 Etzioni "How to Regulate AI" (2017) https://www.nytimes.com/2017/09/01/opinion/artificial-intelligence-regulations-rules.html (accessed 2023-06-12) 2.

14 Gilburt "Ethics Guidelines for Trustworthy AI Summarised" (2019) https://towardsdatascience.com/ethics-guidelines-for-trustworthy-ai-summarised-1c86174e788b (accessed 2023-03-30) 2.

15 Brand "Algorithmic Decision-Making and the Law" 2022 12(1) *JeDEM* https://doi.org/10.29379/jedem.v12i1.576 (accessed 2023-03-30) 115.

16 Marengo *Data Protection in Charts* (2020) https://payhip.com/fmarengo (accessed 2023-07-19) 11.

17 Jobin, Lenca and Vayena "The Global Landscape of AI Ethics Guidelines" 2019 1 *Nat Mach Intell* (*NMI*) https://doi.org/10.1038/s42256-019-0088-2 (accessed 2023-02-25) 394.

> "a machine-based system that can, for a given set of human-defined objectives, make predictions, recommendations, or decisions influencing real or virtual environments. AI systems are designed to operate with varying levels of autonomy."[18]

The OECD views AI as a general-purpose technology having the potential to improve the well-being and welfare of people, contribute to sustainable global economic activity, assist in responding to key global challenges, and increase innovation and productivity. Alongside all these benefits, AI poses various challenges to our society and economy, specifically with regard to democracy and human rights, economic shifts and inequalities, competition, and transitions in labour markets.[19]

The Recommendation on Artificial Intelligence adopted by the OECD Ministerial Council on 22 May 2019 aims to encourage trust and innovation in AI by encouraging the responsible stewardship of trustworthy AI, while safeguarding human rights and democratic values, as well as existing OECD standards such as privacy, digital security risk management, and responsible business conduct.[20] The OECD Recommendation identifies five core value-based principles, which are as follows:[21]

1. "Accountability" entails that AI actors are required to be accountable for the proper functioning of the AI systems and should respect the principles.[22]
2. "Transparency and explainability" requires AI actors to provide meaningful information that is appropriate to the context, as well as consistent with the state of art, to bring awareness to stakeholders of their interactions with AI systems, to foster general understanding of AI systems, and to allow those affected by AI systems to challenge its outcome based on plain and easy-to-understand information.[23]
3. "Robustness, security and safety" requires AI systems to function in an appropriate manner and ensure that they do not impose unreasonable safety risks. AI actors should ensure traceability of its datasets, processes, and decisions made during the AI systems life cycle in order to analyse the AI system's outcomes and responses to inquiry, appropriate to the context and consistent with state of art.[24]
4. "Human-centred values and fairness" must be respected. AI actors must respect the rule of law and democratic values, as well as human rights,

---

18 OECD "*Artificial Intelligence & Responsible Business Conduct*" (2019) https://mneguidelines.oecd.org/RBC-and-artificial-intelligence.pdf (accessed 2024-03-28) 1.

19 OECD *Recommendation of the Council on Artificial Intelligence* (2019) https://legalinstruments.oecd.org/en/instruments/OECD-LEGAL-0449 (accessed 2024-03-28).

20 OECD *Recommendation of the Council* (2019) 4.

21 Naidoo, Naidoo, Bottomley, Donnelly and Thaldar "Artificial Intelligence in the Healthcare: Proposal for Policy Development in South Africa" 2022 12(1) *SAJBL* http://dx.doi.org/10.7196/SAJBL.2022.v15i1.797 (accessed 2023-02-27) 3–6.

22 OECD *Recommendation of the Council* (2019).

23 *Ibid.*

24 Expert Group on Artificial Intelligence at the OECD (AIGO) "Scoping the OECD AI Principles: Deliberations of the AIGO" *OECD Digital Economy Papers* (2019) https://read.oecd-ilibrary.org/science-and-technology/scoping-the-oecd-ai-principles_d62f618a-en (accessed 2024-03-28) 22.

which include freedom, dignity, autonomy, privacy, data protection, non-discrimination, diversity, equality, fairness, social justice and internationally recognised labour rights.[25]

5. "Inclusive growth, sustainable development and well-being" means that stakeholders must proactively partake in responsible stewardship of trustworthy AI, such as increasing human capabilities and enhancing creativity, advancing inclusion of minority populations, reducing economic, social, gender and other inequalities, as well as protecting natural environments.[26]

The OECD Recommendation makes five additional recommendations for policy makers relating to international and national cooperation for trustworthy AI.[27] These include:

1. *Building human capacity and preparing for labour market transformation*: Governments should empower people to effectively use and interact with AI systems, as well as equip them with the necessary skills.
2. *Shaping an enabling policy environment for AI*: Governments should promote a policy environment that supports the transition from the research-and-development stage to the operation-and-deployment stage.
3. *Fostering a digital ecosystem for AI*: Governments should foster the development of, and access to, a digital ecosystem for trustworthy AI.
4. *Enhance international cooperation for trustworthy AI*.
5. *Investing in AI research and development*: Governments are encouraged to consider long-term public investments, as well as encourage long-term private investments, in research and development, as well as in datasets that represent and respect privacy and data protection.[28]

During the 40th session of UNESCO's General Conference in November 2019, it adopted Resolution 37, which mandated the Director-General "to prepare an international standard-setting instrument on the ethics of artificial intelligence (AI) in the form of a recommendation".[29]

The UNESCO Resolution on Artificial Intelligence[30] does not seek to provide a single definition of AI, since such a definition would continually evolve over time in accordance with technological developments. Its ambition is to address those features of AI systems that are of central ethical

---

25 AIGO https://read.oecd-ilibrary.org/science-and-technology/scoping-the-oecd-ai-principles_d62f618a-en 21.

26 AIGO https://read.oecd-ilibrary.org/science-and-technology/scoping-the-oecd-ai-principles_d62f618a-en 20.

27 OECD *Recommendation of the Council* (2019) 8–9.

28 OECD *Recommendation of the Council* (2019) 8.

29 OECD (2021) https://read.oecd-ilibrary.org/science-and-technology/scoping-the-oecd-ai-principles_d62f618a-en (accessed 2024-03-28) 5.

30 UNESCO *Recommendation on the Ethics of Artificial Intelligence* (2021) https://en.unesco.org/about-us/legal-affairs/recommendation-ethics-artificial-intelligence (accessed 2023-06-09).

relevance.[31] Addressing risks and ethical concerns should not impede innovation and development, but should give new opportunities and encourage ethical research and innovation that anchor AI technologies in human rights and fundamental freedoms, values and principles, as well as morals.[32]

The UNESCO Recommendation approaches AI systems as systems that have the capacity to process data and information in a similar way to intelligent behaviour, and generally includes aspects of reasoning, learning, perception, prediction, planning or control. Three central elements relate to AI systems:

1. AI systems are information-processing technologies that are designed to perform at different degrees of autonomy by way of knowledge modelling and representation, as well as exploiting data and calculating correlations.
2. Ethical questions that have been raised relate to all stages of the AI system life cycle. Furthermore, an AI actor can be defined as any actor involved in at least one stage of the AI system life cycle, such as natural and legal persons, researchers, programmers, engineers and data scientists, among others.
3. AI systems raise new types of ethical issues, such as the system's impact on decision-making, labour and employment, social interaction, education, consumer protection and personal data, rule of law, human rights, and fundamental rights such as freedom of expression.[33]

UNESCO provides for various values and principles that should be respected by AI actors in the AI system life cycle, and, where appropriate be promoted through amendments to existing (and the evolution of new) legislation, regulations and business guidelines that must comply with international law, including the United Nations Charter and member states' human rights obligations, as well as internationally agreed obligations such as the United Nations Sustainability Development Goals (SDGs).[34] The values and principles are as follows:

> "[R]espect, protection and promotion of human rights and fundamental freedoms and human dignity … AI systems must be consistent with international law and human rights law; proportionality and Do No Harm, AI systems in its life cycle should ensure that they do not exceed what is necessary to achieve its legitimate aims and objectives ... fairness and non-discrimination, AI Actors are required to promote social justice, fairness and non-discrimination of any compliance with the international law; safety and security; right to privacy, and data protection; … transparency and explainability, responsibility and accountability ..."[35]

---

[31] UNESCO https://en.unesco.org/about-us/legal-affairs/recommendation-ethics-artificial-intelligence par 2.

[32] UNESCO https://en.unesco.org/about-us/legal-affairs/recommendation-ethics-artificial-intelligence Preamble.

[33] UNESCO https://en.unesco.org/about-us/legal-affairs/recommendation-ethics-artificial-intelligence par 2.

[34] UNESCO https://en.unesco.org/about-us/legal-affairs/recommendation-ethics-artificial-intelligence par 9.

[35] UNESCO *Recommendation on the Ethics of Artificial Intelligence* https://en.unesco.org/about-us/legal-affairs/recommendation-ethics-artificial-intelligence.

The Recommendation states that the trustworthiness and integrity of the AI system life cycle is essential to ensure that AI technologies will work for the good of humanity, individuals, societies, the environments and ecosystem, and that they will embody the Recommendation's values and principles.[36] However, UNESCO recognises that member states will be at different stages of readiness for implementation of the Resolution; thus UNESCO will develop a readiness assessment methodology to assist interested member states, as well as ensure support for interested member states in terms of developing a UNESCO methodology for "ethical impact assessment" (EIA) of AI technologies, sharing of best practices, assessment guidelines as well as other mechanisms and analytical work.[37]

The United Nations (UN) defines artificial intelligence as

> "the capacity for computer systems to be programmed to complement, mimic, or replace human 'thinking', for example by spotting patterns, making decisions, or predicting likely outcomes on a particular task."[38]

It is abundantly clear that international organisations such as UNESCO, the UN and the OECD have spearheaded the effort toward creating and enforcing internationally acceptable norms and values for regulating AI around the world.

3 AI IN SOUTH AFRICA

South Africa currently lacks legislation, regulation or official policy that dictates or guides the ethical use of AI,[39] and there is little legal literature about it. Adams summarises the definitions of foreign authors and defines AI as "the simulation of human intelligence by algorithms, computer programmes and machines".[40] Gravett, citing the works of Turing,[41] and Shubhendu and Vijay,[42] gives this definition:

---

36 UNESCO https://en.unesco.org/about-us/legal-affairs/recommendation-ethics-artificial-intelligence par 12.

37 UNESCO https://en.unesco.org/about-us/legal-affairs/recommendation-ethics-artificial-intelligence par 49.

38 UN "The Right to Privacy in the Digital Age" (13 September 2021) A/HRC/48/31 https://www.ohchr.org/en/hr-bodies/hrc/regular-sessions/session48/res-dec-stat (accessed 2023-04-15).

39 Adams *South African Company Law in the Fourth Industrial Revolution: Does Artificial Intelligence Create a Need for Legal Reform?* (LLM thesis, Wits University) 2021 13. Also see Brand "Responsible Artificial Intelligence in Government: Development of a Legal Framework for South Africa" 2022 14(1) *JeDEM* 142.

40 Adams *South African Company Law in the Fourth Industrial Revolution* 13.

41 Turing "Mind" 1950 59(236) *Computing Machinery and Intelligence* (*CMI*) 4337.

42 Shubhendu and Vijay ("Applicability of Artificial Intelligence in Different Fields of Life" 2013 1(1) *International Journal of Scientific Engineering and Research* (*IJSER*) 1 7) state: "Artificial intelligence is the study of ideas to bring into being machines that respond to stimulation consistent with traditional responses from humans, given the human capacity for contemplation, judgment and intention. Each such machine should engage in critical appraisal and selection of differing opinions within itself. Produced by human skill and labor, these machines should conduct themselves in agreement with life, spirit and sensitivity, though in reality, they are imitations."

> "[A] computers' ability to imitate human intelligent behaviour, especially human cognitive functions, such as the ability to reason, discover meaning, generalise and learn from past experience … machines that respond to stimulation consistent with traditional responses from human, given the human capacity for contemplation, judgment and intention."[43]

The international developments highlighted above provide useful guidance for the development of an AI legal framework in South Africa. These principles are foundational to the new AI regulation in the EU, and provide a well-founded, comprehensive, regulatory framework for the development and use of AI; thus, they are a good point of departure for countries embarking on the road of regulating AI.[44]

Brand states that, when looking at South Africa's constitutional provisions on human rights compared with the key principles for regulating AI (as referred to above), he finds that most principles are contained in the Constitution of the Republic of South Africa, 1996 (Constitution).[45] Brand also points out that "respect for human rights" can be found in sections 1 and 7 of the Constitution. Section 1 also gives effect to the principle of "transparency" and "accountability".[46] Brand goes on to state that the principle of "privacy and data governance" can be found in section 14 of the Constitution. Brand concludes that the "rule of law" principle can be found in sections 1 and 2 of the Constitution, and the principle of "non-discriminating and fairness" can be found in sections 1, 9 and 10 of the Constitution.[47] The principle of "freedom and autonomy" is also enshrined in sections 12, 13 and 16, and "dignity" is enshrined in section 10 of the Constitution.

In 2019, the South African President constituted the Presidential Commission on the Fourth Industrial Revolution.[48] The Commission's Report (PC4IR Report)[49] came up with eight key recommendations, including the establishment of an artificial intelligence (AI) institute and the review and amendment (or creation) of policy and legislation.[50] Existing legislation, although it may be loosely applicable to AI, is generic and limited in its relevance, while government policy focuses almost exclusively on economic

---

43 Gravett "Is the Dawn of the Robot Lawyer Upon Us? The Fourth Industrial Revolution and the Future of Lawyers" 2020 23(1) *PER/PELJ* http://www.scielo.org.za/scielo.php?script=sci_arttext&pid=S1727-37812020000100024&lng=en&nrm=iso (accessed 2023-02-27) 7.

44 *Ibid*.

45 Brand 2022 *JeDEM* 142.

46 Brand 2022 *JeDEM* 143.

47 *Ibid*.

48 Department of Telecommunications and Postal Services "Terms of Reference for the Presidential Commission on the Fourth Industrial Revolution" GN 209 in *GG* 42388 of 2019-04-09 https://www.gov.za/sites/default/files/gcis_document/201904/42388gen209.pdf (accessed 2023-02-27).

49 Commission on the Fourth Industrial Revolution "Summary Report & Recommendations" GN 591 in *GG* 43834 of 2020-10-23 https://www.gov.za/sites/default/files/gcis_document/202010/43834gen591.pdf (accessed 2024-03-28).

50 Commission on the Fourth Industrial Revolution "Summary Report & Recommendations" GN 591 in GG 43834 of 2020-10-23 https://www.gov.za/sites/default/files/gcis_document/202010/43834gen591.pdf; PC4IR Report.

development, and not on the appropriate use or ethical issues associated with AI.[51]

There are few pieces of legislation that already accommodate and/or promote the use of AI. One example is the Electronic Communications and Transactions Act[52] (ECT Act), which provides that an automated transaction is an electronically concluded transaction where one or both of the parties make use of automated systems (that is, a software program that communicates with or responds to third parties without any human intervention). An automated transaction is an electronic transaction performed or conducted by electronic means in which software is used without human intervention to form contracts and perform obligations under existing contracts.[53]

Section 20 of the ECT Act provides very specific rules to ensure that the resulting agreement will be fair and effective. In terms of section 20(*a*), an automated transaction may be formed where an electronic agent performs an action required by law for agreement formation. Section 20(*b*) of the ECT Act states that an agreement may be formed where all parties to a transaction (or either one of them) uses an electronic agent. In terms of this provision, a party on whose behalf software or an electronic agent has been programmed to respond by concluding contracts will be bound to the pre-programmed actions of the technology deployed. Section 20(*c*) of the ECT Act provides that a party using an electronic agent to form an agreement is, subject to section 20(*d*), 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. Section 20 of the ECT Act has created a strict statutory regime for the validity and enforceability of automated transactions. Section 20(*d*) of the ECT Act provides a party contracting with an electronic agent the right to review the transaction as a whole prior to the formation of a contract.[54]

In addition, the right of consumers not to be unlawfully targeted with unsolicited electronic communications (spam) and automated decision-making is also acknowledged in both of sections 69 and 71 of the Protection of Personal Information Act[55] (POPIA), which deals with automated decision-making. This latter provision prohibits automated decision-making where this results in legal consequences for the data subject that affect the data subject to a substantial degree and where the decision is based solely on the automated processing of personal information that pertains to the data subject's work performance, creditworthiness, reliability, location, health, personal preferences or conduct.

In addition, section 71 of POPIA provides that data subjects who are subject to automated decisions made in connection with the conclusion or execution of a contract, and where the decision has legal consequences or

---

51 Ormond "Global to Local: South African Perspectives on AI Ethics Risks" (1 September 2022) https://ssrn.com/abstract=4240356 (accessed 2023-04-15) 10.

52 25 of 2022.

53 Papadopoulos and Snail (eds) *Cyberlaw @ SA: The Law of the Internet in South Africa* 4ed (2022) 59. See also s 20(*a*) of the ECT Act.

54 Papadopoulos and Snail (eds) *Cyberlaw @ SA: The Law of the Internet in South Africa* 60.

55 4 of 2013.

can have a substantial effect on them, have the right to sufficient information about the underlying logic of the automated process and to make representations about the decision.[56] Similarly, section 5(*g*) of POPIA confers upon a data subject the right not to be subject, under certain circumstances, to any decision that is based solely on the automated processing of his, her or its personal information intended to provide a profile of such person.[57] Adams makes it clear that POPIA limits AI's ability to make decisions where those decisions use the personal information of a data subject.[58]

Thus, according to De Stadler *et al*, "automated decisions" are also permissible where there is a law or code of conduct in which "appropriate measures" are taken to safeguard the legitimate interest of data subjects.[59] Another example is found in the Financial Services Conduct Authority Rules, which include fit-and-proper requirements for intermediaries who give automated advice.[60] Furthermore, "automated advice" is defined as "the furnishing of advice through an electronic medium that uses algorithms and technology without the direct involvement of a natural person". Lastly, section 4 of the Cybercrimes Act[61] also criminalises instances where hackers could use a computer program in the form of AI to acquire, access, intercept or interfere with electronic communications or data.

The above pieces of legislation are the only laws that regulate or have relevance to AI. However, it is noteworthy that none of them were enacted with specific intention to regulate AI. The lack of regulation of artificial intelligence in South Africa has recently resulted in the courts giving scathing comments against practitioners who have used AI. In the case of *Parker v Forsyth*,[62] the court highlighted the misuse of AI in the preparation of court papers and heads of argument. The defendants' attorneys were unable to access any of the cases cited by the plaintiff's counsel, and the plaintiff's attorney was also unable to furnish them. At the hearing, the plaintiff's counsel explained that his attorney had sourced the cases through the medium of ChatGPT.[63]

The court described ChatGPT as an intelligent chatbot that uses natural language processing to create human-like conversational dialogue. It went on to state that the language model responds to questions and composes various written content, including articles, social media posts, essays and code. The plaintiff's attorneys had used artificial intelligence to conduct legal research without satisfying themselves of the accuracy thereof. It turned out the cases did not exist and that the names and cases were fictitious. As a result, the facts and decisions were fictitious.

---

56 De Stadler, Hattingh, Esselaar and Boast *Over-Thinking the Protection of Personal Information Act: The Last POPIA Book You Will Ever Need* (2021) 578.

57 Burns and Burger-Smidt *Protection of Personal Information: Law and Practice* 2ed (2023) 641.

58 Adams *South African Company Law in the Fourth Industrial Revolution* 71.

59 De Stadler *et al Over-thinking the Protection of Personal Information Act* 455.

60 S 38 of Board Notice 194 of 2017, Determination of Fit and Proper Requirement of Financial Services Providers (2017), *GG* 41321 of 2017-12-15.

61 19 of 2020.

62 [2023] ZAGPRD 1 par 85–86.

63 *Parker v Forsyth supra* par 86.

The defendants' counsel submitted that it was an attempt to mislead the court and must be met with an appropriate punitive order for costs. In deciding not to grant a costs order *de bonis propriis*, the court held:

> "[the attorneys] placed undue faith in the veracity of the legal research generated by artificial intelligence … Courts expects lawyers to bring a legally independent and questioning mind to bear on especially novel legal matters … not merely repeat in parrot fashion, the unverified research of a chatbot."[64]

The plaintiff was instead ordered to pay 60 per cent of the defendants' legal costs.[65]

So where to now with regard to AI regulation? Although there is no dedicated national legislation on AI strategy, it is addressed in the framework of the 4IR strategy currently in the making. The Department of Communications and Digital Technologies has been tasked with establishing a 4IR Strategic Implementation Coordination Council, and an AI Institute as well as with reviewing and amending existing policy and legislation.[66] Donnelly is of the view that South Africa, as a UNESCO member state, must be guided in its national legislative and policy development agenda by the 2021 UNESCO Recommendation on the Ethics of Artificial Intelligence.[67] This may change in the near future as AI software becomes more autonomous through machine learning. Countries like Kenya and Canada have adopted AI strategies already.[68]

4 RESPONSE TO AI BY AFRICA, BRICS AND G7 HIROSHIMA SUMMIT

4 1 Africa

There is a dearth of data on all aspects of AI in Africa, and much of the available information is thus anecdotal.[69] Meanwhile, there is a need for African policy responses at the national, regional, continental and international levels, aimed at ensuring that the continent's innovators, enterprises, communities, governments and other actors are able to reap AI's benefits and mitigate its threats. Sound policy approaches will be needed to enable African nations to build ecosystems that are inclusive,

---

64 *Parker v Forsyth supra* par 89–90.

65 *Parker v Forsyth supra* (case 1585/20) par 93.4.

66 Department of Communications and Digital Technologies "PC4IR Strategic Implementation Plan (PC4IR SIP): National Departments Consultation Presentation" (March 2021) https://www.dpme.gov.za/keyfocusareas/Provincial%20Performance%20Publication/Documents/PC4IR%20SIP%20Presentation_National%20Departments%20Consultation%202021.pdf (accessed 2023-03-14) 4–5.

67 Donnelly "First Do No Harm: Legal Principles Regulating the Future of Artificial Intelligence in Health Care in South Africa" 2022 25 *PER/PELJ* http://dx.doi.org/10.17159/1727-3781/2022/v25i0a11118 3/21.

68 Snyders "Unpacking the Legal Side of Artificial Intelligence" (2021) https://www.golegal.co.za/legal-artificial-intelligence/ (accessed 2023-03-14) 1.

69 Oxford Insights & IDRC "Government Artificial Intelligence Readiness Index" (2019) https://www.oxfordinsights.com/ai-readiness20192019 (accessed 2023-02-16) 5.

socially beneficial, and adequately integrated with on-the-ground realities.[70] AI is slowly making it to the agenda of continental organisations across Africa.

At the AU level, there are attempts to develop a pan-African AI strategy.[71] The African Union Convention on Cyber Security and Personal Data Protection[72] (AU Convention) is an important piece of African international law – a pioneer in data protection and cybercrime and cybersecurity law in Africa – but it has limited regulation on AI. In terms of article 9, its regulation of data processing includes the automated processing of personal information (for example, through the use of AI), and article 14.5 confers the right on all people not to be subject to

> "a decision which produces legal effects concerning him/her or significantly affects him/her to a substantial degree and which is based solely on automated processing of data intended to evaluate certain personal aspects of him/her."[73]

The AU Convention is premised on the important theme of "Information and Communication Technologies in Africa: Challenges and Prospect for Development"[74] and the Abuja Declaration.[75] As of March 2022, 13 states have ratified the AU Convention.[76] In October 2019, in Sharm-El-Sheik, Egypt, AU ministers in charge of communications, ICTs and postal services convened as the AU Specialised Technical Committee on Communication and Information Communication Technologies (STC-CICT). The Committee called on member states to establish a working group on AI based on existing initiatives and in collaboration with African institutions to study the creation of a common African stance on AI, the development of an Africa-wide capacity-building framework, and the establishment of an AI think tank to assess and recommend projects to collaborate on in line with Agenda 2063 and the SDGs.[77] In addition, the African Commission on Human and Peoples' Rights (ACHPR) adopted the Declaration of Principles on Freedom of Expression and Access to Information in Africa during its 65th ordinary

---

70 Gwagwa, Kraemer-Mbula, Rizk, Rutenberg, and De Beer "Artificial Intelligence (AI) Deployments in Africa: Benefits, Challenges and Policy Dimensions" 2020 26 *The African Journal of Information and Communication* (*AJIC)* http://dx.doi.org/10.23962/10539/30361 (accessed 2023-02-19) 3–4.

71 Teleanun and Kurbalija "Artificial Intelligence in Africa: Continental Policies and Initiatives" (2022) https://www.diplomacy.edu/resource/report-stronger-digital-voices-from-africa/ai-africa-continental-policies/ (accessed 2023-06-02) 1.

72 African Union Convention on Cyber Security and Personal Data Protection (also known as the "Malabo Convention") (2020) https://au.int/en/treaties/african-union-convention-cyber-security-and-personal-data-protection (accessed 2023-06-02) 3.

73 ALT Advisory "AI Governance in Africa" (2022) www.ai.altadvisory.africa (accessed 2023-06-03) 7.

74 Orji *Cyber Security Law and Regulation* (2012) 375; [Assembly/AU/11(XIV)], Addis Ababa, Ethiopia, 31 January 2010–2 February 2010.

75 Yankey *The AU Draft Convention on Cyber Security and e-Transactions: Cooperation Against Cyber Crime* Presented at Cyber Crime Octopus, Strasbourg, France (6–8 June 2012); CITMC-3 ([AU/CITMC/MIN/Decl.(III)], Abuja (Nigeria), 3–7 August 2010.

76 ALT Advisory www.ai.altadvisory.africa 7.

77 Gwagwa *et al* 2020 *AJIC* 5.

session in 2019.[78] The Declaration was released at a critical time when the world was confronted with global health crisis Covid-19.[79] In relation to this health crisis, it is important to note that freedom of expression, access to information and the right to privacy are essential elements of the right to health.[80] In addition, the Declaration contributes to the strengthening of the African data protection framework.

During its 31st extraordinary session held from 19 to 25 February 2021, the ACHPR adopted Resolution 473 on the Need to Undertake a Study on Human and Peoples' Rights and Artificial Intelligence (AI), Robotics and Other New and Emerging Technologies in Africa.[81] The Resolution emphasises the need for legal reform of African laws to deal with legal problems posed by the advent of AI in the context of 4IR. Resolution 473 deals with the need for comprehensive and multidisciplinary research on the legal, ethical, safety and security opportunities, and for legal reform based on the legal challenges raised by AI technologies, robotics and other new and emerging technologies in Africa.[82]

Resolution 473 also recognises that AI companies, as well as organisations and businesses that use AI technologies, robotics and other new and emerging technologies, have a significant impact on human rights protection in Africa, and that there is no comprehensive framework governing their operations to ensure that they comply with human rights obligations.[83] The Resolution calls on the AU and regional bodies to develop a regional regulatory framework that ensures that these technologies respond to the needs of the people of the continent. It is also committed to undertake a study to further develop guidelines and norms that address these concerns.[84]

In addition, the African Union (AU) Digital Strategy Information for Africa for the year 2020–2030 has proposed a continent-wide digital governance African Peer Review Mechanisms on the use of AI within member states. Therefore, the AU has prescribed rules on AI based on solidarity and cooperation to ensure that Africa's forthcoming digital infrastructure with AI is

---

78 ACHPR *Declaration of Principles on Freedom of Expression and Access to Information in Africa* (2019) https://www.achpr.org/public/Document/file/English/Declaration%20of%20Principles%20on%20Freedom%20of%20Expression_ENG_2019.pdf (accessed 2023-02-19) 9.

79 African Commission Publishes Revised Declaration of Principles of Freedom of Expression and Access to Information in Africa amid Covid-19 Crisis (2020) https://www.chr.up.ac.za/expression-information-and-digital-rights-news/2056-african commission-publishes-revised-declaration-of-principles-of-freedom-of-expression-and-access-to-information-in-africa-amid-covid-19crisis#:~:text=The%20Declaration%20is%20being%20released,of%20the%20right%20to%20health (accessed 2024-03-28).

80 *Ibid*.

81 ACHPR *Resolution on the Need to Undertake a Study on Human and Peoples' Rights and Artificial Intelligence (AI), Robotics and Other New and Emerging Technologies in Africa* ACHPR/Res. 473 (EXT.OS/ XXXI) (2021) https://www.achpr.org/sessions/resolutions?id=504 (accessed 2023-03-15) 2.

82 *Ibid.*

83 *Ibid.*

84 *Ibid*.

cooperative, transformative, inclusive, home-grown, safe and allows member states to have varied levels of "Digital Maturity".[85]

The Southern African Development Community (SADC)'s Data Protection Model Law also provides some regulation of AI, including provisions for algorithmic transparency, by providing that the Model Law's provisions are applicable to automated processing of personal information, and that data subjects' rights include the right to information[86] "about the basic logic involved in any automatic processing of data relating to him/her in case of automated decision making".[87]

Additionally, AUDA-NEPAD has published a White Paper on Regulation and Responsible Adoption of AI in Africa Towards Achievement of AU Agenda 2063 (White Paper on AI) in 2024 for public comment, where some central objectives where outlined as follows: promoting responsible AI adoption, ensuring ethical, transparent, and accountable use; strengthening African policymakers' and decision-makers' capacity and enabling the utilisation of AI technologies in partnership with the private sector; addressing AI myths, misconceptions, and policy challenges, linking policy research with stakeholders.[88]

4 2 BRICS

AI technologies are being employed for a wide range of purposes in BRICS countries (Brazil, Russia, India, China and South Africa). These technologies present opportunities to achieve faster and better results in different activities. However, they also present risks to fundamental rights and liberties, especially to the right to non-discrimination, privacy and data protection. These risks and opportunities call for regulatory action, which is being developed or is already deployed by all BRICS countries at the moment.[89] Belli is of the view that a four-pronged approach should be applied by BRICS in regulating AI: (1) rule-making processes; (2) areas of convergence; (3) using what already exists; and, lastly (4) focus on effective implementation.[90] Global digitisation and the emergence of AI-based

---

85 Ncube, Oriakhogba, Rutenberg and Schonwetter "Artificial Intelligence and the Law in Africa" (2023) 69.

86 Centre for Human Rights: University of Pretoria "The Digital Rights Landscape in South Africa" (2022) https://www.chr.up.ac.za/images/researchunits/dgdr/documents/reports/Digital_Rights_Landscape_in_SADC_Report.pdf (accessed 2023-03-30) 30.

87 International Telecommunication Union (ITU) "Data Protection: SADC Model Law" (2013) chrome-extension://efaidnbmnnnibpcajpcglclefindmkaj/https://www.itu.int/en/ITU-D/Projects/ITU-EC-ACP/HIPSSA/Documents/FINAL%20DOCUMENTS/FINAL%20DOCS%20ENGLISH/sadc_model_law_data_protection.pdf (accessed 2024-03-28).

88 AUDA-NEPAD "Taking A Continental Leap Towards A Technologically Empowered Africa at the AUDA-NEPAD AI Dialogue" (2024) https://www.nepad.org/blog/taking-continental-leap-towards-technologically-empowered-africa-auda-nepad-ai-dialogue.

89 Belli, Venturini, Frati, Mariscal and Benussi *Regulations in AI* (2022), Online Webinar organised by Latin American Initiative on Open Data (ILDA) https://cyberbrics.info/regulacion-e-ia.

90 Belli *Good and Bad Practices in AI Regulation: Examples from LatAm and BRICS Countries* Paper presented at international conference on Current and Future Challenges of Coordinated Polices on AI Regulation (2021) 14–15.

technologies pose challenges for all countries of the world. BRICS is no exception.

It is essential for BRICS to implement smart policy and create suitable conditions for the development of digital technologies, including AI. For this reason, one of the most important tasks for BRICS is to develop an adequate approach to the regulation of AI-based technologies.[91] The BRICS bloc of countries has set its sights on creating an AI study group. This was revealed by Chinese president Xi Jinping during the recent 15th Summit of Brazil, Russia, India and South Africa (BRICS Summit). South Africa hosted the annual summit of the BRICS bloc of emerging economies from 22 to 24 August 2023.[92]

4 3 G7 Hiroshima Summit 2023

Influenced by the principles provided for by the OECD, the aim of the Hiroshima Process International Guiding Principles for Organizations Developing Advanced AI Systems is to promote safe, secure, and trustworthy AI globally. It will provide guidelines for organisations developing and using advanced AI systems. The list of guiding principles is discussed and elaborated upon as a living document to build on the existing OECD AI principle, considering recent developments in advanced AI systems. The aim of these guiding principles is to assist in the uptake of the benefits of these new technologies as well as address the risks and challenges they bring.[93]

The Hiroshima Process suggests that different jurisdictions may take their own approach in implementing these guiding principles. While governments develop more detailed governance and regulatory approaches, it is important for organisations to follow these actions in consultation with other relevant stakeholders. While the organisation is still working on the guiding principles, it is committed to developing proposals in consultation with the OECD and the Global Partnership on Airtificial Intelligence ('GPAI') as well as other stakeholders in order to introduce monitoring tools and mechanisms that will assist organisations to stay accountable when implementing these actions.[94]

It is important for organisations to respect the rule of law, human rights, due process, diversity, fairness and non-discrimination, democracy and human centricity while harnessing the opportunities for innovation in the design and development and deployment of advanced AI systems; and

---

91 Cyman, Gromova and Juchnevicius "Regulation of Artificial Intelligence in BRICS and the European Union 2021 8(1) *BRICS Law Journal* https://doi.org/10.21684/2412-2343-2021-8-1-86-115 (accessed 2023-06-06) 1.

92 Moyo "BRICS Bloc Commits to Secure, Equitable Artificial Intelligence" (25 August 2023) https://www.itweb.co.za/content/mQwkoq6YpLzM3r9A#:~:text=The%20BRICS%20bloc%20of,South%20Africa%20(BRICS%20Summit (accessed 2023-08-30) 2.

93 Hiroshima Process International Guiding Principles for Organizations Developing Advanced AI Systems "G7 Hiroshima Summit" (2023) https://digital-strategy.ec.europa.eu/en/library/hiroshima-process-international-guiding-principles-advanced-ai-system (accessed 2023-11-29) 1.

94 *Ibid.*

states must abide by their obligations under international human rights law to further promote respect for and protection of human rights.[95]

These guidelines encourage organisations to identify, evaluate and mitigate risks across the AI life cycle, prior to and during the deployment and placement of advanced AI systems on the market; identify and mitigate vulnerabilities, incidents and patterns of misuse; increase accountability and ensure transparency by publicly reporting advanced AI systems' capabilities, limitations and domains of appropriate and inappropriate use; work towards responsible information sharing and incident reporting among organisations developing advanced AI systems; and develop, implement and disclose AI governance and risk management policies.[96]

The guidelines further encourage organisations to invest in robust security controls, including physical security, cybersecurity and insider threat safeguards across the AI life cycle; prioritise research to alleviate societal, safety and security risks, and prioritise investment in effective mitigation measures; develop and deploy reliable content authentication, and source mechanisms such as watermarking to enable users to identify AI-generated content; prioritise the development of advanced AI systems to address the world's biggest challenges, such as, and not limited to, the climate crisis, global health and education; implement appropriate data input measures and protections for personal data and intellectual property; and advance the development and adoption of international technical standards.[97]

5 THE PROPOSED EU AI ACT

The European Union (EU) is considering a new legal framework that aims to significantly bolster regulations on the development and use of AI. The proposed legislation, the Artificial Intelligence Act, focuses primarily on strengthening rules around data quality, transparency, human oversight and accountability. It also aims to address ethical questions and implementation challenges in various sectors, ranging from health care and education to finance and energy.[98] Roberts *et al* note that the EU released its first document addressing the issue of AI governance in May 2016 – a draft report, published by the European Parliament's Committee on Legal Affairs (JURI) entitled "Civil Law Rules on Robotics". This report called for a coordinated European approach that would employ a mix of hard and soft laws, including a new guiding ethical framework, to guard against possible

---

95 Hiroshima Process International Guiding Principles for Organizations Developing Advanced AI Systems https://digital-strategy.ec.europa.eu/en/library/hiroshima-process-international-guiding-principles-advanced-ai-system.

96 Hiroshima Process International Guiding Principles for Organizations Developing Advanced AI Systems https://digital-strategy.ec.europa.eu/en/library/hiroshima-process-international-guiding-principles-advanced-ai-system.

97 Hiroshima Process International Guiding Principles for Organisations Developing Advanced AI Systems https://digital-strategy.ec.europa.eu/en/library/hiroshima-process-international-guiding-principles-advanced-ai-system.

98 World Economic Forum "The European Union's Artificial Intelligence Act, Explained" (2023) https://www.weforum.org/agenda/2023/03/the-european-union-s-ai-act-explained/ (accessed 2023-07-10) 1

risks.[99] At its meeting in May 2018, the Committee on Digital Economy Policy (CDEP),while developing a Council for Recommendations, agreed to assemble a group of experts on AI to scope principles to cultivate trust in the adoption of AI in society.[100]

Following the announcement made by President Von der Leyen in her Political Guidelines for the 2019–2024 Commission,[101] the Commission, on 19 February 2020, published a White Paper on AI,[102] which sets out policy options on how to achieve objectives for the uptake of AI, as well as the risks associated with the use of certain technologies. The proposal aims at implementation of a legal framework for trustworthy AI.[103] Brand also points out that many high-level meeting and research groups have debated the ethical and legal considerations relating to responsible AI over the years.[104] Brand goes on to note that the European Commission's High-Level Expert Group on AI (AIHLEG) published the framework document "Ethics Guidelines for Trustworthy AI" in 2019.[105] They argue that trustworthy AI has essentially three components: first, AI must be "lawful"; secondly, AI must be "ethical"; and lastly, AI must be "robust, both from a technical and a social perspective".[106]

Brand then goes on to note that the Council of Europe's Ad Hoc Committee on Artificial Intelligence (CAHAI)[107] proposed nine principles that should underpin the regulation of AI – namely, "human dignity", "human freedom and autonomy", "prevention of harm", "non-discrimination, gender equality, fairness and diversity", "transparency and explainability of AI systems", "data protection and the right to privacy", "accountability and responsibility", "democracy" and the "rule of law". The Commission proposed specific objectives for the regulatory framework on AI to ensure that AI systems placed and used in the Union market are safe, and that the existing law on fundamental rights and Union values is respected, and to ensure legal certainty to facilitate investment and innovation in AI. In addition, the objectives included the enhancement of governance and effective enforcement of existing law on fundamental rights and safety requirements applicable to AI systems, as well as facilitating the development of a single

99 Roberts *et al* 2021 *SEE* 68.

100 *Ibid.*

101 Von der Leyen "Political Guidelines for the Next European Commission 2019–2024" (2019) https://ec.europa.eu/commission/sites/beta-political/files/political-guidelines-next-commission_en.pdf (accessed 2023-06-18) 9.

102 European Commission *White Paper on Artificial Intelligence: A European Approach to Excellence and Trust* COM(2020) 65 final (19 February 2020).

103 European Commission *Laying Down Harmonised Rules on Artificial Intelligence (Artificial Intelligence Act) and Amending Certain Union Legislative Acts* Proposal for a Regulation of the European Parliament and of the Council COM(2021) 206 final 2021/0106 (COD) (21 April 2021) https://eur-lex.europa.eu/resource.html?uri=cellar:e0649735-a372-11eb-9585-01aa75ed71a1.0001.02/DOC_1&format=PDF (accessed 2023-03-13) 2.

104 Brand 2022 *JeDEM* 134.

105 OECD Digital Economy Papers "Scoping the OECD AI Principles, Deliberations of the Expert Group on Artificial Intelligence at the OECD (AIGO)" (November 2019 291) 7.

106 *Ibid*.

107 Brand 2022 *JeDEM* 134.

market for lawful, safe and trustworthy AI applications and the prevention of market fragmentation.[108]

The European Commission's 2021 draft of the Artificial Intelligence Act[109] was the first attempt to codify a unified AI law for the EU. It seems the definition of an "artificial intelligence system" was agreed to be "a machine-based system designed to operate with varying levels of autonomy that can, for explicit or implicit objectives, generate output such as predictions, recommendations, or decisions influencing physical or virtual environments". As the AI Act is intended to prevent harm from AI, a definition of AI is fundamental.[110]

The draft AI Act proposed, a risk-based approach to regulating AI and outlined four categories of risk:[111] unacceptable risk, high risk, limited risk and minimal/no risk. Systems deemed to pose an unacceptable risk would be prohibited; these included cases of social scoring and subliminally manipulative systems.[112] For high-risk AI, including systems that are safety-critical components and those that pose specific risks to fundamental rights, specific obligations are set out for providers, importers, distributers, users, and authorised representatives of AI. Specific transparency requirements are made for limited risk systems, which include those that interact with humans, are used for biometric categorisation, or generate manipulative content (for example, deepfakes). Finally, for systems that are not high risk, voluntary codes of conduct were encouraged. Violating these regulations could lead to fines of up to 6 per cent of global turnover or 30 million euros.[113]

In closing, on the 13th March 2024, Members of European Parliament endorsed the Artificial Intelligence Act[114] ("AI Act"), which according to Lewis, is the world's first comprehensive AI law and likely to have significant influence on the quick development of AI Regulation in other jurisdictions including in the United States. However, Prof. Borges in his webinar on The European AI Act is of a different view that the AI Act is not comprehensive because it does not cover any liability and is mainly a product safety law for AI with supplements.[115]

6 CONCLUSION AND RECOMMENDATIONS

It is clear that South Africa must enact AI legislation as a matter of urgency to give effect to South Africa's policy on 4IR in the PC4IR Report as well as

---

108 *Ibid.*

109 European Commission https://eur-lex.europa.eu/resource.html?uri=cellar:e0649735-a372-11eb-9585-01aa75ed71a1.0001.02/DOC_1&format=PDF 1–4.

110 Hersey "EU AI Act Definition of AI Aligns with OECD Definition, Biometric Risk Updated" 8 March 2023 https://www.biometricupdate.com/202303/eu-ai-act-definition-of-ai-aligns-with-oecd-definition-biometric-risk-updated (accessed 2023-07-10) 1.

111 Roberts *et al* 2021 *SEE* 68.

112 *Ibid.*

113 *Ibid.*

114 European Union Artificial Intelligence Act.

115 Borges "The European AI Act 'A milestone in AI Regulation?'" (2024) University of Johannesburg, Online Webinar.

to join the regional, African and international trend to legislate on AI. Since many of the universally accepted and legal principles and norms (grounded in the UNESCO Recommendation on AI) are reflected in our Constitution, it should not be a mammoth task for our legislature to begin the process of drafting a bill on AI and commence engagement with the public and other stakeholders. It is not just a South African priority but an African priority, to keep South Africa in line with international best practice, legal rules and norms on AI.

A HUMAN RIGHTS-BASED APPROACH TO SUSTAINABLE DEVELOPMENT IN AFRICA POST-COVID-19

J C Mubangizi
Dip Ed LLB Dip LP LLM LLD
Professor, Free State Centre for Human Rights
Faculty of Law, University of the Free State

SUMMARY

The worst global disaster of the twenty-first century so far, COVID-19, has caused major disruption to people's lives and livelihoods and exposed inequalities within and among countries. Developing countries, particularly in Africa, have been hardest hit as they have had to face unprecedented challenges, with potentially extreme economic, social and sustainable development consequences. Existing challenges were worsened by COVID-19 with significant implications not only for sustainable development, but also for human rights. This article first discusses the relationship between human rights and sustainable development. The discussion then turns to the impact of COVID-19 on sustainable development with a focus on specific and relevant Sustainable Development Goals (SDGs), and on the protection and enjoyment of human rights in Africa. The article concludes by recommending a human rights-based approach as a clear and compelling direction to sustainable development in Africa in the aftermath of the devastating and unprecedented COVID-19 pandemic.

1 INTRODUCTION

There is no denying that the COVID-19 pandemic has to date been the worst global disaster of the twenty-first century. According to the 2021 Sustainable Development Goals Report,[1] COVID-19 has caused major disruption to people's lives and livelihoods. The report referred to it as

> "a crisis of monumental proportions, with catastrophic effects on people's lives and livelihoods and on efforts to realize the 2030 Agenda for Sustainable Development."[2]

There is also no denying that the pandemic exposed and intensified inequalities within and among countries.[3] Developing countries were hardest

[1] United Nations *The Sustainable Development Goals Report 2021* https://unstats.un.org/sdgs/report/2021/ (accessed 2023-01-20).

[2] UN *Sustainable Development Goals Report 2021* https://unstats.un.org/sdgs/report/2021/ 3.

[3] *Ibid*.

hit. They had to face unprecedented health and economic challenges, with potentially extreme economic, social and sustainable development consequences.[4] This was all the more so in African countries where pre-existing social and economic challenges were already more prominent than in European, American and Asian countries. Such challenges were worsened by COVID-19, with significant implications, not only for sustainable development but also for human rights.

It is common knowledge that COVID-19 was first reported in Wuhan, China, at the end of 2019. It then spread rapidly across the world, leaving untold devastation in its wake. In Africa, the first reported case of the disease was noted in Egypt on 14 February 2020.[5] Globally, the disease was declared a pandemic by the World Health Organization (WHO) on 5 March 2020.[6] The pandemic first peaked in many countries between March and August 2020, petering off between September and November 2020. However, it showed a sudden resurgence in what was labelled the second wave from December 2020. A few months later, many countries experienced a third wave that peaked between April and August 2021.[7] Several countries have experienced four, five or even six waves of the pandemic.

Since the discovery and approval of several vaccines in early 2021, however, the numbers of infected people began to decrease worldwide – more so in well-resourced developed countries than in poor under-resourced countries, particularly in Africa where the vaccine uptake was generally low. Indeed, in early 2022, owing to the introduction of vaccines, the COVID-19 pandemic began to show a decline worldwide. In June 2022, it was predicted that

> "COVID-19 deaths in the African region are expected to decline by almost 94% in 2022, compared with 2021 which was the pandemic's most lethal year."[8]

By that time (mid-2022), more than 564 million people had been infected worldwide and more than 6.3 million had died.[9] In Africa, during the same period, more than 8.7 million cumulative cases had been recorded with about 173 000 deaths.[10] As of January 2023, statistics placed total infection

---

4 See OECD "Developing Countries and Development Co-Operation: What Is at Stake?" (28 April 2020) https://www.oecd.org/coronavirus/policy-responses/developing-countries-and-development-co-operation-what-is-at-stake-50e97915/ (accessed 2023-08-24).

5 Haileamlak "COVID-19 Pandemic Status in Africa" 2020 30(5) *Ethiopian Journal of Health Sciences* 643.

6 Cucinotta and Vanelli "WHO Declares COVID-19 a Pandemic" 2020 91(1) *Acta Biomedica* 157.

7 See Chutel "Covid-19: Third Wave 'Raging At Full Force' as Africa Reaches Record Peak in Deaths – WHO" *News24* (6 August 2021) https://www.news24.com/news24/africa/news/covid-19-third-wave-raging-at-full-force-as-africa-reaches-record-peak-in-deaths-who-20210806 (accessed 2023-08-24).

8 WHO "COVID-19 Deaths in African Region to Fall by Nearly 94% in 2022: WHO Analysis" (June 2022) https://www.afro.who.int/news/covid-19-deaths-african-region-fall-nearly-94-2022-who-analysis (accessed 2023-01-23).

9 WHO "WHO Coronavirus (COVID-19) Dashboard" (2022) https://covid19.who.int/ (accessed 2023-01-23).

10 WHO Regional Office for Africa "Coronavirus (COVID-19)" (2022) https://www.afro.who.int/health-topics/coronavirus-covid-19 (accessed 2023-01-23).

at just over 660 million people worldwide with about 6.7 million deaths.[11] Africa's infection tally had risen to just over 8.9 million cases with over 174 000 deaths.

Despite the discovery and widespread use of vaccines leading to a decline in COVID-19 deaths and infections, the pandemic is far from over. Recent developments in China have clearly indicated that the pandemic is alive and well and retains the potential of spreading fast across the globe again as a result of fast-mutating variants of the virus.[12] That is why the WHO "has yet to declare an end to the COVID public health emergency introduced in January 2020."[13]

Whether the pandemic re-emerges strongly or not, however, damage has already been done. As is discussed below, the pandemic has had a dramatic and devastating impact on all facets of human life across the globe. It has presented unprecedented challenges to public health systems, social and economic activities, food systems and people's livelihoods all over the world. In so doing, it has had a negative impact on sustainable development, not only in Africa, but also in many other parts of the world, and has had a concomitant negative impact on the protection and enjoyment of human rights.

This article first discusses the relationship between human rights and sustainable development. The discussion then turns to the impact of COVID-19 on sustainable development with a focus on specific and relevant Sustainable Development Goals (SDGs), particularly on the African continent. The article then discusses the negative impact of the COVID-19 pandemic on the protection and enjoyment of human rights in Africa. The article concludes with a call for a human rights-based approach as the most appropriate framework to sustainable development in Africa in the aftermath of the devastating and unprecedented COVID-19 pandemic.

2 THE RELATIONSHIP BETWEEN HUMAN RIGHTS AND SUSTAINABLE DEVELOPMENT

The 1993 Vienna Declaration and Programme of Action[14] clearly recognised the interdependence and mutually reinforcing relationship between democracy, development and respect for human rights. The 1998 United Nations Development Programme (UNDP) Policy Document on Integrating Human Rights With Sustainable Development[15] also emphasised the link between human rights and development and concluded that

---

11 WHO https://covid19.who.int/.

12 See VOA "China's COVID-19 Surge Raises Odds of New Coronavirus Mutation" *Associated Press* (25 December 2022) https://www.voanews.com/a/china-s-covid-19-surge-raises-odds-of-new-coronavirus-mutation-/6890874.html (accessed 2023-08-24).

13 Cershberg "How Covid Will Continue to Disrupt Global Healthcare in 2023" Government Health Policy, *Reuters* (7 December 2022) https://www.reuters.com/business/healthcare-pharmaceuticals/emerging-covid-pandemic-again-2022-12-07/ (accessed 2023-01-23).

14 UN General Assembly, *Vienna Declaration and Programme of Action,* 12 July 1993, A/CONF.157/23 https://www.refworld.org/docid/3ae6b39ec.html (accessed 2023-01-24).

15 UNDP "Integrating Human Rights With Sustainable Human Development" (1998) http://www.undp-aciac.org/publications/other/undp/hr/hr-susdev98e.pdf (accessed 2023-01-24).

> "human rights and sustainable development are inextricably linked, complementary and multidimensional."[16]

Furthermore, the 2030 Agenda for Sustainable Development[17] states:

> "the achievement of full human potential and of sustainable development is not possible if one half of humanity continues to be denied its full human rights and opportunities."[18]

Human rights are usually defined as

> "rights we have simply because we exist as human beings – they … are inherent to us all, regardless of nationality, sex, national or ethnic origin, color, religion, language, or any other status."[19]

Sustainable development, on the other hand, has been broadly defined as

> "development that meets the needs of the present generation without compromising the ability of future generations to meet their own needs."[20]

According to the UN Office of the High Commissioner for Human Rights (OHCHR),

> "human rights create conditions essential for sustainable development [because] … civil, cultural, economic, political and social rights and the right to development build on each other and advance together."[21]

The relationship between human rights and sustainable development has to be seen first in the context of development generally, an issue about which much has been written. As the author has explained elsewhere,

> "the golden thread in the literature is the interdependence and mutually-reinforcing nature of the concepts of human rights and development."[22]

Put differently, it is not possible to achieve one without achieving the other to a reasonable extent. In fact, one could argue that one of the standards for measuring development should be the realisation of human rights.

It should be remembered that the formal recognition of the relationship between human rights and development occurred in 1986 when the United Nations (UN) adopted the Declaration of the Right to Development.[23] Article 1 of this Declaration explicitly acknowledges this relationship:

---

16 UNDP http://www.undp-aciac.org/publications/other/undp/hr/hr-susdev98e.pdf 8.

17 UN General Assembly *Transforming Our World: The 2030 Agenda for Sustainable Development* (21 October 2015) A/RES/70/1 https://www.refworld.org/docid/57b6e3e44.html (accessed 2023-08-24).

18 UNGA *Transforming Our World* par 20.

19 United Nations "What are Human Rights?" https://www.ohchr.org/en/what-are-human-rights (accessed 2024-04-04).

20 United Nations "Report of the World Commission on Environment and Development: Our Common Future" (The Brundtland Report) (1987) https://sustainabledevelopment.un.org/content/documents/5987our-common-future.pdf (accessed 2023-08-24).

21 OHCHR "Advancing Sustainable Development Through Human Rights" (2017) https://bangkok.ohchr.org/development/#top (accessed 2023-01-25).

22 Mubangizi "A Human Rights-Based Approach to Development in Africa: Opportunities and Challenges" 2014 39(1) *Journal of Social Sciences* 69.

23 Resolution adopted by the UN General Assembly (4 December 1986) A/RES/41/128.

> "The right to development is an inalienable human right by virtue of which every human person and all peoples are entitled to participate in, contribute to, and enjoy economic, social, cultural and political development, in which all human rights and fundamental freedoms can be fully realized."

Since the adoption of the United Nations Declaration on the Right to Development, numerous developments and changes in thinking have taken place. In the African context specifically, it is noteworthy to acknowledge that the African Charter on Human and Peoples' Rights (African Charter)[24] stands as the only regional and continental human rights instrument that recognises the right to development. According to article 22 of the African Charter:

> "1) All peoples shall have the right to their economic, social and cultural development with due regard to their freedom and identity and in the equal enjoyment of the common heritage of mankind.
> 2) States shall have the duty, individually or collectively, to ensure the exercise of the right to development."

What this implies is that, not only is development a human right, but

> "the full attainment of human rights requires the support of economic, social and cultural development. It also implies that such development is the basis for the realization of all human rights."[25]

The relationship between human rights and sustainable development is also well captured by the Netherlands Council on International Affairs. In its Advisory Report 110,[26] the Council argues that sustainable development and human rights are two sides of the same coin.[27] The report explains: "The point of departure is that they both seek the same goal: the realisation of human dignity." It further states:

> "In essence, national and international efforts to promote sustainable development and human rights serve the same purpose: the opportunity for all people to lead and shape their lives with dignity and in solidarity with others."[28]

The relationship between human rights and sustainable development can also be seen in the context of specific human rights and specific sustainable development goals (SDGs). There are certain rights that have to be realised for certain SDGs to be attained. For example, the right to an adequate standard of living is linked to SDG 1, which seeks to end poverty in all its forms everywhere.[29] The right to sufficient food is linked to SDG 2, which seeks to end hunger and achieve food security.[30] Similarly, the right to life,

---

[24] Organization of African Unity (OAU) CAB/LEG/67/3 rev. 5, 21 ILM 58 (1982). Adopted: 27/06/1981; EIF: 21/10/1986.

[25] Mubangizi 2014 *Journal of Social Sciences* 69.

[26] Netherlands Advisory Council on International Affairs (AIV) "Sustainable Development Goals and Human Rights an Indivisible Bond, No. 110 of 2019" (2019) https://www.asser.nl/media/5625/advisory-report-110.pdf (accessed 2023-01-26).

[27] Netherlands AIV https://www.asser.nl/media/5625/advisory-report-110.pdf 15.

[28] Netherlands AIV https://www.asser.nl/media/5625/advisory-report-110.pdf 17.

[29] See Goal No 1 of the Sustainable Development Goals (UNGA *Transforming Our World*).

[30] Goal No 2 of the Sustainable Development Goals (UNGA *Transforming Our World*).

the right to health and the right to enjoy the benefits of scientific progress and its application are all linked to SDG 3, which seeks to ensure healthy lives and promote well-being for all.[31]

The rights to education, rights of persons with disabilities, equal rights of women and girls in the field of education, and the right to work (including technical and vocational training) all relate to SDG 4, which seeks to "ensure inclusive and quality education for all and promote lifelong learning".[32] Similarly, the elimination of all forms of discrimination against women and violence against women and girls, speaks to SDG 5, which seeks to "achieve gender equality and empower all women and girls".[33] SDG 6, which seeks to "ensure access to water and sanitation for all" relates directly to the right to safe drinking water and sanitation and the right to health.[34] The list goes on and on. The length and depth of this article are not suited to a detailed discussion of every SDG and corresponding human right. It suffices to say that for the attainment and realisation of every SDG, there are corresponding human rights that have to be protected in order to be enjoyed. It is in that context and against that background that the impact that COVID-19 has had on sustainable development on the one hand, and on human rights (specifically in Africa) on the other, has to be understood.

3 IMPACT OF COVID-19 ON SUSTAINABLE DEVELOPMENT

Much has been said and written about the impact of COVID-19 on development generally and on sustainable development in particular. All commentators are in agreement that the pandemic has had a negative effect on achieving the SDGs and generally reversed most of the progress that had been made.[35] Both the 2021 and 2022 Sustainable Development Goals Reports[36] highlighted and revealed the devastating impacts of the COVID-19 crisis on implementation of the SDGs. The 2021 Sustainable Development Goals Report illustrated how COVID-19 caused a major disruption to people's lives and livelihoods. Commenting on the report, the United Nations Department of Economic and Social Affairs (DESA) stated:

> "While progress to achieve the SDGs had been slow even before the pandemic struck, an additional 119–124 million people were pushed back into

[31] Goal No 3 of the Sustainable Development Goals (UNGA *Transforming Our World*).

[32] Goal No 4 of the Sustainable Development Goals (UNGA *Transforming Our World*).

[33] Goal No 5 of the Sustainable Development Goals (UNGA *Transforming Our World*).

[34] Goal No 6 of the Sustainable Development Goals (UNGA *Transforming Our World*).

[35] See for e.g., Yuan, Wang, Gao, Wang, Liu, Fang and Gao "Progress Towards the Sustainable Development Goals Has Been Slowed by Indirect Effects of the COVID-19 Pandemic" 2023 184(4) *Communications, Earth & Environment* 1–13. See also Elavarasan, Pugazhendhi, Shafiullah, Kumar, Arif, Jamal, Chopra and Dyduch "Impacts of COVID-19 on Sustainable Development Goals and Effective Approaches to Manoeuvre Them in the Post-Pandemic Environment" 2022 29 *Environmental Science and Pollution Research* 33957–33987; and Martin-Blanco "The Impact of COVID-19 on the Sustainable Development Goals: Achievements and Expectations" 2022 19(23) *Int J Environ Res Public Health* 16266.

[36] UN Sustainable Goals Report 2021 https://unstats.un.org/sdgs/report/2021/ (accessed 2023-08-25) and UN Sustainable Goals Report 2022 https://unstats.un.org/sdgs/report/2022/ (accessed 2023-08-25).

> poverty in 2020. An equivalent of 255 million full-time jobs were lost, and the number of people suffering from hunger, which was already climbing before the pandemic, may have increased by 83–132 million."[37]

There are a number of other key facts and figures highlighted in the 2021 report. Chief among these is that "the global extreme poverty rate rose for the first time since 1998, from 8.4% in 2019 to 9.5% in 2020."[38] As has been mentioned earlier and is further explained later, this has direct implications for SDG 1, which calls for the eradication of poverty in all its forms by 2030. Also highlighted in the report is the fact that "the pandemic halted or reversed progress in health and poses major threats beyond the disease itself."[39] The implications for SDG 3, which deals with ensuring healthy lives and promoting well-being for all, are pretty obvious. The report further pointed out that

> "the COVID-19 pandemic adversely affected progress towards gender equality, violence against women and girls intensified and women suffered a disproportionate share of job losses and increased care work at home."[40]

This impacts SDG 5, which calls for the achievement of gender equality and empowerment of all women and girls. Furthermore, according to the report, "millions of people are without electricity and one third of the global population lack clean cooking fuels and technologies."[41] This mainly impacts SDG 7, which calls for access to affordable and clean energy for all.

Although the 2021 Sustainable Development Goals Report acknowledged that economic recovery was under way (at the time), led by China and the United States, it also pointed out that "for many other countries, economic growth is not expected to return to pre-pandemic levels until 2022 or 2023."[42] Similarly, the report conceded that whereas

> "net official development assistance increased in 2020 to a total of $161 billion, this still falls well short of what is needed to respond to the COVID-19 crisis and to meet the long-established target of 0.7% of GNI."[43]

Finally, the report indicated that while 132 countries and territories reported that they were implementing a national statistical plan in 2020, only 84 of those countries had plans that were fully funded.[44] Moreover, only four out of

---

37 See United Nations Department of Economic and Social Affairs (DESA) "Sustainable Development Report Shows Devastating Impact of COVID, Ahead of 'Critical' New Phase" (July 2021) https://www.un.org/africarenewal/news/sustainable-development-report-shows-devastating-impact-covid-ahead-%E2%80%98critical%E2%80%99-new-phase (accessed 2023-01-26).

38 UN Sustainable Development Goals Report 2021 26.

39 UN Sustainable Development Goals Report 2021 30.

40 UN Sustainable Development Goals Report 2021 36.

41 UN Sustainable Development Goals Report 2021 40.

42 UN Sustainable Development Goals Report 2021 42.

43 UN Department of Economic and Social Affairs (DESA) "Sustainable Development Report Shows Devastating Impact of COVID, Ahead of 'Critical' New Phase" *Africa Renewal* (6 July 2021) https://www.un.org/africarenewal/news/sustainable-development-report-shows-devastating-impact-covid-ahead-%E2%80%98critical%E2%80%99-new-phase (accessed 2024-04-04).

44 UN Sustainable Development Goals Report 2021 61.

the 46 less developed countries (LDCs) reported having fully funded national statistical plans.[45]

The 2022 Sustainable Development Goals Report painted an even gloomier picture. It illustrated how

> "cascading and interlinked crises are putting the 2030 Agenda for Sustainable Development in grave danger, along with humanity's very own survival."[46]

The Report highlighted how

> "the severity and magnitude of the confluence of crises, dominated by COVID-19, climate change, and conflicts, are creating spin-off impacts on food and nutrition, health, education, the environment, and peace and security, and affecting all the Sustainable Development Goals (SDGs)."[47]

The Report further detailed:

> "the reversal of years of progress in eradicating poverty and hunger, improving health and education, providing basic services, and much more."[48]

Similar to the 2021 Sustainable Development Goals Report, some of the other key facts and figures highlighted in the 2022 report have a direct bearing on several SDGs. Included among these, and impacting SDG 1, is the fact that

> "many millions more people are now living in extreme poverty and suffering from increased hunger compared to pre-pandemic levels."[49]

Impacting SDG 2 was the fact that

> "about one in ten people were suffering from hunger worldwide, with 161 million additional people having slid into chronic hunger in 2020 alone."[50]

In relation to SDG 3, the 2022 report further warned that

> "the COVID-19 pandemic was threatening decades of progress in global health, decreasing global life expectancy and basic immunization coverage and increasing prevalence of anxiety and depression and deaths from tuberculosis and malaria."[51]

Regarding the implications of COVID-19 for SDG 5, the report pointed out that the general global employment losses in 2020 and 2021 affected women disproportionately, with many increasingly burdened with unpaid care work, and increasingly affected by intensified domestic violence.[52] Other relevant facts highlighted in the report include the realisation that

---

45 *Ibid*.

46 See UN "The Sustainable Development Goals Report 2022" (Introductory Summary) (2022) https://unstats.un.org/sdgs/report/2022/ (accessed 2023-01-29).

47 *Ibid*.

48 *Ibid*.

49 UN Sustainable Development Goals Report 2022 2.

50 See IISD "SDGs Report 2022 Delivers 'Reality Check' on Reversal of Progress" *SDG Knowledge Hub* (13 July 2022) https://sdg.iisd.org/news/sdgs-report-2022-delivers-reality-check-on-reversal-of-progress/ (accessed 2023-01-29).

51 *Ibid*.

52 *Ibid*.

> "the COVID-19 pandemic had caused the first rise in between-country income inequality in a generation [and that] net official direct assistance (ODA) reached a new high of USD 177.6 billion, largely due to COVID-19-related aid, but ODA for SDG data declined by more than 18% (2020)."[53]

It is clear from the 2021 and 2022 Sustainable Development Goals Reports that COVID-19 brought about a level of economic turmoil that was as unprecedented as it was unpredictable. Many countries had to go into lockdowns, thereby not only slowing down their economies but ultimately also "paralysing a considerable part of the world economy".[54] As pointed out in the foregoing discussion, this

> "slowdown of the world economy had a direct impact on the SDGs, with a severe increase in poverty levels, unemployment, health risks and a huge uncertainty of the effects on the environmental aspects of the global goals."[55]

Whereas COVID-19 had a negative impact on sustainable development across the globe, such impact was more significant in low income countries in Africa, Asia and South America. The negative impact of COVID-19 on sustainable development in Africa can be seen and assessed in terms of specific SDGs. For example, regarding SDG 1, there is no doubt that COVID-19 led to increased poverty aggravated by economic lockdowns and job losses. It has also led to increases in relative and absolute poverty and pushed more people into extreme poverty.[56] According to Yongyi Min,

> "although the number of poor [people] was already projected to increase in 2020 and 2021, the COVID-19 pandemic is estimated to double the already deteriorating rate and will push an additional 30 million people into extreme poverty in the region."[57]

Insofar as SDG 2 is concerned, it has been argued that a reduction in global food supplies and trade owing to the pandemic resulted in food insecurity and hunger in Africa. This led to an increase in the number of people suffering from hunger and food insecurity. For example, in 2020, one in five people was facing hunger in Africa. This translated into about 46 million more people when compared with 2019.[58]

In Africa, there is probably no SDG that has been more negatively impacted by the COVID-19 pandemic than SDG 3, which seeks to ensure healthy lives and promote well-being for all. Such impact was characterised by, *inter alia*, higher disease incidence and mortality from COVID-19 and other causes, overloaded hospital systems, increases in mental health cases

---

53 *Ibid*.

54 Da Cruz and De Almeida "The Impact of COVID-19 on the Sustainable Development Agenda: A Business Opportunity to Reframe Success" (2020) https://intra.clsbe.lisboa.ucp.pt/research-note-the-impact-of-covid-19-on-the-sustainable-development-agenda-a-business-opportunity-to-reframe-the-future- (accessed 2023-08-25).

55 *Ibid.*

56 Olaomo, Folarin, Obisesan and Olayide "Impacts of COVID-19 on Sustainable Development in Africa" 2021 11(1) *African Journal of Sustainable Development* 143.

57 Min "How COVID-19 Has Impacted the SDGs in Africa" *Africa Renewal* (18 July 2021) https://www.un.org/africarenewal/magazine/august-2021/how-covid-19-has-impacted-sdgs-africa (accessed 2023-01-30).

58 *Ibid*.

as a result of the pandemic and injuries from domestic violence as a result of the lockdowns.

Also seriously affected by the pandemic was SDG 4, which deals with education and lifelong learning. School closures and the economic downturn caused by COVID-19 affected not only human capital development, but also resulted in millions of children in Africa falling below the minimum reading proficiency threshold, increasing the share of students falling behind to 85 per cent in 2020 alone.[59] Similarly, the achievement of gender equality and empowerment of all women and girls advocated by SDG 5 has been negatively impacted by the pandemic. According to Yongyi Min,

> "violence against women and girls has intensified; child marriage is expected to increase; and women have suffered a disproportionate share of job losses and increased care work at home."[60]

Other SDGs have equally and similarly been negatively impacted by the COVID-19 pandemic in various ways. Further examples of this impact include limited access to clean water (impact on SDG 6), an increase in the number of people without electricity (impact on SDG 7), an increase in urban poverty, exposure to high vulnerability and ineffective waste management (impact on SDG 8) and a lack of focus on mitigating climate action (impact on SDG 13).

It ought to be mentioned that in the specific context of Africa, a number of factors combined to compound the impact of the pandemic described above. These included, but were not limited to, poor health facilities, pre-existing socio-economic challenges, poverty, low levels of testing, poor communication, poor infrastructure, poor governance, ongoing civil strife in many areas and low levels of education. These are the very same factors that negatively affect the enjoyment and realisation of human rights in Africa. It is for this reason that we turn to the relationship between the pandemic and the protection of human rights in Africa.

4 COVID-19 PANDEMIC AND THE PROTECTION OF HUMAN RIGHTS IN AFRICA

Although there are several treaties and instruments that protect and promote human rights on the African continent, the primary African regional human rights mechanism revolves around the African Charter on Human and Peoples' Rights. The African Charter recognises all categories of human rights, including civil and political rights, as well as socio-economic and cultural rights.

Civil and political rights generally include rights to equality, human dignity, life, privacy, access to information and access to courts. They also include freedom of expression, freedom and security of the person, freedom from slavery and freedom of association. The rights of accused, arrested and detained persons also fall in this category. So too do political rights, such as the right to vote and the right to form or belong to a political party. All these

[59] *Ibid*.
[60] *Ibid*.

rights are contained in the African Charter.[61] It is not an exaggeration to say that during the COVID-19 pandemic, most civil and political rights of people in African countries, like everywhere else, were adversely affected.

Lockdowns, by their nature, restrict movement and physical interaction. This has a significant effect on several rights, including freedom of movement and freedom of association. There is no doubt that freedom of movement and association were severely affected by COVID-19 restrictions. Also negatively affected were the rights to life, privacy, human dignity, freedom and security, and access to information. For example, according to the Chairperson of the African Commission on Human and Peoples' Rights:

> "Apart from the rise in acts of discrimination, xenophobia, misinformation and hate speech, Statements presented during the 66th ordinary session of the Commission show an increased concentration of power in the hands of the executive; undue restrictions on civil and political rights, including freedom of the press and media, which are essential for access to public health information; and the abuse of the pandemic emergency to target opposition leaders, journalists and human rights defenders."[62]

Socio-economic and cultural rights were also negatively impacted by the COVID-19 pandemic. Included among the relevant socio-economic rights are property rights and rights relating to housing, health care, food, water, social security and education. Insofar as housing is concerned, it is important to note that in 2000, an estimated

> "51 million people lived in informal dwellings in Southern Africa's cities and towns. By 2018 the number had grown to 87 million."[63]

Most of these settlements lack basic amenities, such as clean running water, electricity and sanitation. It is also important to note that people who live in these informal settlements are typically poor and lack access to basic sanitation and adequate water supply. As a result, during COVID-19 lockdowns and restrictions, those people found it difficult to practise social distancing and to maintain adequate standards of hygiene in crowded surroundings.[64] In fact,

> "the so-called non-pharmaceutical strategies of physical distancing, washing hands with soap and water, and self-isolation, required access to basic but essential services such as adequate clean water."[65]

Article 16 of the African Charter provides for the right to enjoy the best attainable state of physical and mental health and enjoins States Parties to

---

61 Art 2–13 of the African Charter.

62 See Dersso "The Impact of COVID-19 on Human and Peoples' Rights in Africa" *ACCORD* (9 September 2020) https://www.accord.org.za/analysis/the-impact-of-covid-19-on-human-and-peoples-rights-in-africa/ (accessed 2023-02-10).

63 Le Roux and Napier "Southern Africa Must Embrace Informality in Its Towns and Cities" *ISS Today* (13 April 2022).

64 Mubangizi "Poor Lives Matter: COVID-19 and the Plight of Vulnerable Groups With Specific Reference to Poverty and Inequality in South Africa" 2021 65(S2) *Journal of African Law* 246.

65 *Ibid*.

> "take the necessary measures to protect the health of their people and to ensure that they receive medical attention when they are sick."[66]

The constitutions of several African countries provide for the right of access to health care services, sufficient food and water, and social security.[67] This is a critical provision relating to health generally and to COVID-19, particularly on the African continent where poverty and hunger are predominant. As the author has argued elsewhere:

> "Poor health perpetuates poverty and poverty exacerbates poor health. The same applies to food. Poor people are unable to access sufficient nutritious food. This affects their health."[68]

Social security is not any different. In Africa, where levels of unemployment and poverty are very high, protecting the right to social security is particularly important.

Article 17 of the African Charter provides for the right to education. This right has to be seen in the context of huge disparities that characterise many school systems in African countries. These disparities were further exposed by COVID-19. The closing of schools and other educational institutions was "one of the measures taken to stop the spread of the virus". In that regard,

> "a research study conducted by Human Rights Watch between April and August 2020 showed that ... the closure of schools 'exacerbated previously existing inequalities, and that children who were already most at risk of being excluded from a quality education have been most affected.'"[69]

During the lockdown, many educational institutions adopted e-learning strategies and shifted their instruction and learning to online platforms. Many children and students from disadvantaged families lacked access to technology, data, electricity and Internet connectivity, which prevented them from engaging in remote learning. Those pupils who were already disadvantaged and vulnerable were negatively affected.[70]

A discussion on the impact of Covid-19 on the protection of human rights in Africa would be incomplete without specific reference to the rights of women. There is no doubt, for example, that the pandemic exacerbated inequality between men and women. In Africa, as in many other parts of the world, women continue to be stereotyped as primary care givers responsible for childcare and domestic work that is unpaid. Studies have shown that

> "during lockdown, mothers were spending less time on paid work and more time on household responsibilities while their time doing paid work … was more likely to be interrupted with household responsibilities."[71]

---

66 Art 16 of the African Charter.

67 For e.g., s 27 of the Constitution (South Africa).

68 Mubangizi 2021 *Journal of African Law* 246.

69 Mubangizi 2021 *Journal of African Law* 247. See also Human Rights Watch "Impact of Covid-19 on Children's Education in Africa" 35th Ordinary Session (August 2020) https://www.hrw.org/news/2020/08/26/impact-covid-19-childrens-education-africa (accessed 2023-02-15).

70 Mubangizi 2021 *Journal of African Law* 247.

71 Campbell, Fredman and Reeves "Palliation or Protection: How Should the Right to Equality Inform the Government's Response to Covid-19?" 2020 20(4) *International Journal of Discrimination and the Law* 186.

Mention was made earlier of the significant effect of lockdowns on several rights, including freedom of movement and freedom of association. It could be argued that COVID-19 regulations affected freedom of movement and association for women more severely than for men.[72] Moreover, social-distancing measures also had serious consequences for women.[73] These consequences were particularly felt by rural women, when compared to their urban counterparts and men. According to one study:

> "[M]ajor effects of COVID-19 on rural women resulted from social distancing measures, where the loss of community meant that there were less opportunities for the meeting of supportive groups in safe spaces such as at churches or markets."[74]

The impact of COVID-19 on the rights of women should also be seen in the context of their participation and contribution to economic growth, their access to health care and the impact of gender-based violence. Insofar as participation in the economy is concerned, statistics show that 74 per cent of women in Africa are engaged in the informal economy sector.[75] Women are also overrepresented in the service, tourism and hospitality industry, and in the subsistence farming sector,[76] which are all areas that were strongly impacted by the COVID-19 responses, such as lockdowns. This impact is not only on women's economic rights but also on sustainable development.

Insofar as women's rights of access to health care is concerned, it has been argued that during the pandemic, many of Africa's already weak health systems placed their focus on preventing the spread of COVID-19 and prioritised

> "COVID-19 patients resulting in limitations on other critical services including those that only women need including antenatal care for pregnant women."[77]

Moreover, owing to the restrictions imposed by the COVID-19 regulations, women were unable to access health clinics for their sexual and reproductive health care services. This amounted to an infringement on their right to freedom and security of the person and on their right to bodily and psychological integrity.

Much has been written and said about the rise of gender-based violence during the COVID-19 pandemic, particularly in African countries.[78] All

---

72 See United Nations "Policy Brief: The Impact of COVID-19 on Women" (9 April 2020) https://www.un.org/sexualviolenceinconflict/wp-content/uploads/2020/06/report/policy-brief-the-impact-of-covid-19-on-women/policy-brief-the-impact-of-covid-19-on-women-en-1.pdf (accessed 2023-08-25).

73 Parry and Gordon "The Shadow Pandemic: Inequitable Gendered Impacts of COVID-19 in South Africa" 2021 28 *Feminist Frontiers* 801.

74 *Ibid*.

75 See UN Women "Women in Informal Economy" (2016) https://www.unwomen.org/en/news/in-focus/csw61/women-in-informal-economy (accessed 2023-02-20)

76 OHCHR "COVID-19 and Women's Rights: Possible Actions" (2020) https://www.ohchr.org/sites/default/files/Documents/Events/COVID-19_and_Women_Rights_7_Possible_Actions.pdf (accessed 2023-02-20).

77 *Ibid*.

78 See for e.g., Mittal and Singh "Gender-Based Violence During COVID-19 Pandemic: A Mini-Review" 2020 1(4) *Frontiers in Global Women's Health* 1–7; Roy, Bukuluki, Casey, John,

commentators are in agreement that gender-based violence increased exponentially during the pandemic. According to the African Union Commission (AUC), UN Women, the OHCHR and the United Nations Population Fund (UNFPA), ministries responsible for gender across the East African region reported a 48 per cent increase in gender-based violence cases reported to the police or through gender-based violence (GBV) toll-free lines.[79] Similar increases were reported in other regions of Africa with Southern Africa reporting a 37 per cent increase during the 2020 level 5 lockdown.[80] According to Charlotte Roy *et al,*

> "the COVID-19 pandemic had especially severe consequences for women in structurally excluded groups, such as sex workers, women with disabilities, refugees, women in rural areas and women with diverse sexual orientation."[81]

According to Leburu-Masigoa and Phuti Kgadima:

> "COVID-19 has heightened pre-existing risks of GBV against women and girls, affecting their social, economic, educational development and threaten their sexual reproductive health."[82]

It is therefore not difficult to see how GBV is not only a violation of women's human rights but also how it has had implications for sustainable development, particularly in Africa. It is also not difficult to see how COVID-19 has had a negative impact on human rights generally and concomitantly on sustainable development. It is for that reason that a human rights-based approach to sustainable development in Africa post-COVID-19 is suggested.

5 GOING FORWARD: A HUMAN RIGHTS-BASED APPROACH

A human rights-based approach is not a new idea. It is a concept that has gained credence and application over the last 20 years or so. Because of its varied application, it has also been variously defined and described. One such description is by the Scottish Human Rights Commission:

> "A human rights-based approach is about empowering people to know and claim their rights and increasing the ability and accountability of individuals and institutions who are responsible for respecting, protecting and fulfilling rights … It is about ensuring that both the standards and the principles of

Mabhena, Mwangi, McGovern "Impact of COVID-19 on Gender-Based Violence Prevention and Response Services in Kenya, Uganda, Nigeria, and South Africa: A Cross-Sectional Survey" 2022 2(7) *Frontiers in Global Women's Health* 1–9; and Dlamini "Gender-Based Violence, Twin Pandemic to COVID-19" 2021 47(4–5) *Critical Sociology* 583–590.

79 AUC, UN Women, OHCHR and UNFPA "Gender Based Violence in Africa During the COVID-19 Pandemic" (2020) https://africa.unwomen.org/en/digital-library/publications/2020/12/gbv-in-africa-during-covid-19-pandemic (accessed 2023-02-22).

80 *Ibid*.

81 Roy *et al* 2022 *Frontiers in Global Women's Health* 1–9.

82 Leburu-Masigo and Kgadima "Gender-Based Violence During the COVID-19 Pandemic in South Africa: Guidelines for Social Work Practice" 2020 18(4) *Gender & Behaviour* 16622.

> human rights are integrated into policymaking as well as the day to day running of organisations."[83]

The UN Sustainable Development Group sees a human rights-based approach in the context of development, and defines it as:

> "[a] conceptual framework for the process of human development that is normatively based on international human rights standards and operationally directed to promoting and protecting human rights. It seeks to analyse inequalities which lie at the heart of development problems and redress discriminatory practices and unjust distributions of power that impede development progress."[84]

This definition resonates with the human rights-based approach's application to sustainable development, particularly post COVID-19. In that regard, the UN envisages that under a human rights-based approach,

> "the plans, policies and processes of development [should be] anchored in a system of rights and corresponding obligations established by international law, including all civil, cultural, economic, political and social rights, and the right to development."[85]

One rationale given by the UN for a human rights-based approach is that it "leads to better and more sustainable human development outcomes".[86]

A key benefit of a human rights-based approach is that it encourages and empowers citizens to demand their rights. This highlights the importance of civil society whose role in sustainable development cannot be overstated.[87] It has been argued that civil society, for example, plays the important role of "localising" SDGs.[88] This "localisation" has been defined as:

> "the process of defining, implementing and monitoring strategies at the local level for achieving global, national and subnational sustainable development targets. It involves various concrete mechanisms, tools, innovations, platforms and processes to effectively translate the development agenda into results at the local level."[89]

Although this definition of localisation makes no mention of civil society, it is generally understood that localisation should include civil society. What this means, therefore, is that civil society plays an important role in the local

---

[83] SHRC "What is a Human Rights Based Approach?" (undated) http://careaboutrights.scottishhumanrights.com/whatisahumanrightsbasedapproach.html (accessed 2023-02-25).

[84] UN Sustainable Development Group "Human Based-Approach" (undated) https://unsdg.un.org/2030-agenda/universal-values/human-rights-based-approach (accessed 2023-02-27).

[85] *Ibid*.

[86] *Ibid*.

[87] Mubangizi "A Human Rights-Based Approach to Fighting Corruption in Uganda and South Africa: Shared Perspectives and Comparative Lessons" 2020 24 *Law Democracy and Development* 242.

[88] United Nations "Localizing the Post-2015 Development Agenda: Dialogues on Implementation" (2015) https://www.uclg.org/sites/default/files/dialogues_on_localizing_the_post-2015_development_agenda.pdf (accessed 2023-02-27).

[89] United Nations Development Group "Localizing the Post-2015 Development Agenda" https://www.uclg.org/sites/default/files/dialogues_on_localizing_the_post-2015_development_agenda.pdf (accessed 2024-04-04).

implementation of the SDGs and in monitoring progress at the local level. This should be seen in the context of the role of civil society in the promotion and protection of human rights. That role was articulated by the UN Secretary-General as follows:

> "Civil society organizations link governments and people. They are a vital voice for human rights. When civil society is muzzled, we lose an essential forum for dialogue – and we lose the lifeblood of democracy. That is why I advocate at every possible opportunity for the protection and expansion of civic space."[90]

According to the Danish Institute for Human Rights:

> "[A] human rights-based approach to sustainable development fundamentally shifts the primary objective of development from charity to the duty to respect, preserve, and fulfil human rights."[91]

It achieves this by integrating human rights rules and values into each and every aspect of development.[92] This contributes to the sustainability of development work by empowering individuals, especially the most marginalised, to engage in policy making and holding duty holders accountable.[93] Indeed, the human rights-based approach focuses on those who are most marginalised, excluded or discriminated against[94] – which makes it appropriate for sustainable development.

It is also important to note that

> "a human rights-based approach is underpinned by five key human rights principles, namely, participation; accountability and transparency; non-discrimination and equality; empowerment of rights holders; and legality."[95]

The principle of participation requires that all individuals have the opportunity to participate in decision-making processes that result in decisions affecting their rights.[96] Similarly, the principle of accountability requires that authorities be held accountable if they fail to fulfil their responsibilities to the people. When human rights violations occur, there should be adequate and effective remedies to address the violations and hold the perpetrators accountable.[97]

In the context of sustainable development and COVID-19, the principle of equality and non-discrimination is of particular importance. All forms of

---

90 United Nations, António Guterres, Secretary-General's opening remarks at Town Hall Meeting with Women's Civil Society at the Commission on the Status of Women (16 March 2022) https://www.un.org/sg/en/content/sg/speeches/2022-03-16/remarks-town-hall-meeting-womens-civil-society-the-commission-status-of-women (accessed 2023-02-27).

91 Danish Institute for Human Rights "Human Rights-Based Approach" (undated) https://www.humanrights.dk/our-work/human-rights-based-approach (accessed 2023-08-25).

92 *Ibid*.

93 *Ibid*.

94 United Nations Population Fund "The Human Rights-Based Approach" (November 2014) https://www.unfpa.org/human-rights-based-approach (accessed 2023-03-01).

95 See European Network of National Human Rights Institutions (ENNHRI) "Human Rights-Based Approach" (undated) https://ennhri.org/about-nhris/human-rights-based-approach/ (accessed 2023-03-01).

96 *Ibid*.

97 *Ibid*.

discrimination against individuals or communities on the basis of their association with COVID-19 must be prohibited and avoided.[98] The same holds true for discrimination based on any form of vulnerability, including age, gender, ethnicity or socioeconomic status. Measures to address the effects of COVID-19 on sustainable development should consider the likelihood of increased discrimination against certain groups.

Another essential principle in the context of sustainable development and COVID-19 is empowerment. The disparate impact of COVID-19 on different communities must be evaluated and addressed. To empower these communities, equitable access to health care and other resources to address the effects of COVID-19, including financial and other forms of assistance, should be made available.[99]

All of these principles should be bolstered by the principle of legality, which stipulates that all interventions, guidelines and measures to address the effects of COVID-19 must be consistent with the legal rights established by international and domestic law.[100] Importantly, the underlying human rights principle is that addressing the effects of COVID-19 should be viewed as a human rights obligation.

These are the very same principles that have in recent years become universal features of programmes of international development organisations, particularly in Africa. Such international development organisations include the United Nations (UN), the United Nations Educational, Scientific and Cultural Organization (UNESCO), the United Nations Population Fund (UNFPA), the World Health Organization (WHO) and the Joint United Nations Programme on HIV/AIDS. They also include the United Nations Development Programme (UNDP), the United Nations Children's Fund (UNICEF), the Food and Agriculture Organization (FAO), and the World Food Programme (WFP), among others. Indeed, there appears to be growing consensus among these and other organisations about incorporating these principles into all aspects of development programmes.[101]

From the foregoing discussion, it can be argued that certain key considerations should be taken into account in applying a human rights-based approach to sustainable development in Africa post-COVID-19. First, the 2030 Agenda for Sustainable Development and Africa's own Agenda 2063[102] should be used as the blueprints for achieving sustainable recovery after the pandemic. These agendas share common goals, such as poverty eradication, sustainable economic growth, and social development. The two agendas recognise the importance of collaboration and alignment in achieving their respective objectives. African countries often aim to

---

98 ENNHRI https://ennhri.org/about-nhris/human-rights-based-approach/. See also Mubangizi 2021 *Journal of African Law* 253.

99 *Ibid*.

100 *Ibid*.

101 See Carothers and Brechenmacher "Accountability, Transparency, Participation, and Inclusion: A New Development Consensus?" (2014) *Carnegie Endowment for International Peace Publications Department* https://carnegieendowment.org/files/new_development_consensus.pdf (accessed 2023-08-25).

102 African Union *Agenda 2063: The Africa We Want* (2015). Adopted 31/01/2015.

harmonise the implementation of both agendas, leveraging global partnerships and regional initiatives to drive sustainable development across the continent. Secondly, all African countries should have developed national COVID-19 recovery plans to help them accelerate their progress in achieving sustainable development, which is firmly anchored in human rights. Thirdly, African leaders should realise that human rights obligations of their countries have not been changed or lessened by the pandemic. Instead, they should realise that respect for human rights is fundamental to the success of the post-COVID-19 recovery.

These recommendations are grounded in various principles and perspectives, each of which contributes to the overall goal of achieving sustainable recovery after the pandemic while upholding human rights. Applying the 2030 Agenda for Sustainable Development and Africa's Agenda 2063 provides a unified framework that makes it easier to mobilise resources and coordinate efforts for post-pandemic recovery. Both agendas encompass a wide range of interconnected goals, including poverty eradication, gender equality, environmental sustainability, and more. By aligning recovery efforts with these comprehensive goals, countries can ensure that their strategies address multiple dimensions of development simultaneously. Developing national COVID-19 recovery plans allows countries to tailor their strategies to their unique circumstances, taking into account their specific development challenges, resources and priorities. National recovery plans provide a structured framework for coordinating efforts across various sectors and stakeholders. This coordination is essential for maximising the impact of recovery initiatives, and to avoid duplication of efforts. Regarding human rights obligations, there is no doubt that recovery firmly anchored in human rights principles is more likely to be sustainable in the long term. When people's rights are protected, they are more likely to participate in and support recovery efforts, leading to greater ownership and success of these initiatives.

At the 8th session of the African Regional Forum on Sustainable Development (ARFSD), held in Kigali in March 2022, several African leaders expressed their determination to build forward better from the pandemic.[103] With the theme "Building forward better: A green, inclusive and resilient Africa poised to achieve the 2030 Agenda and Agenda 2063", the three-day conference focused on rebuilding Africa's economies after the COVID-19 pandemic, while advancing the implementation of SDGs and Africa Agenda 2063.[104] Unfortunately, the conference failed to place human rights at the heart of recovery efforts and to adopt a human rights-based approach to the post-COVID-19 recovery programmes – a lost opportunity.

---

[103] See ECA "Unlocking Financing to Build Forward Better From the COVID-19 Crisis and Accelerate Delivery of Sustainable Development in Africa" *Eighth Session of the Africa Regional Forum on Sustainable Development* (2022) https://www.uneca.org/events/technology%2C-climate-change-and-natural-resource-management/eighth-session-of-the-africa (accessed 2023-08-25).

[104] *Ibid*.

6 CONCLUSION

The COVID-19 pandemic has affected and changed the world in many ways. It has thrust many countries into social, political, economic and health care crises. It has also had significant negative implications for sustainable development – and all the more so in African and other less developed economies where pre-existing social and economic challenges were already prominent. The impact of the pandemic on human rights was similarly, and equally, significant. It is for that reason that this article first discusses the relationship between human rights and sustainable development. The article also discusses the impact of COVD-19 on sustainable development and on the protection of human rights, before arguing for a human rights-based approach to sustainable development, particularly in the African context. Several reasons for, and advantages of, a human rights-based approach are presented, including the key principles underpinning it and the key considerations that should be taken into account in applying it. It is concluded that the human rights-based approach can offer a clear and compelling direction to sustainable development in Africa in the aftermath of the devastating and unprecedented COVID-19 pandemic.

NOTES / AANTEKENINGE

PROTECTION OF INFORMATIONAL PRIVACY IN THE WORKPLACE GIVEN THE ADVANCEMENT IN TECHNOLOGY[1]

1 Introduction

The introduction of electronic communication in the workplace has changed how employers conduct their business and, in turn, the way that employees are expected to perform their duties. Increased electronic communication services in the workplace have infused the physical employment environment with electronic communication technology. The increase in this form of communication threatens the employee's right to privacy in today's workplace, which is characterised by reliance on information communication technology (ICT), and in particular, the use of emails and the Internet to conduct business (Collier "Workplace Privacy in the Cyberage" 2002 23 *Industrial Law Journal* 1743). The purpose of this article is to suggest a frame of reference that could assist with the implementation of the Protection of Personal Information Act (4 of 2013) (POPIA) by organisations that process personal information in South Africa based on the conditions provided in POPIA.

1 1 Establishment of POPIA

POPIA was signed into law by the President of South Africa on 26 November 2013. The President announced the date for compliance with POPIA on 22 June 2020, with some sections being applicable immediately – namely, the essential part of the Act comprising provisions that include conditions for the lawful processing of personal information (Ch 3 of POPIA), codes of conduct issued by the Regulator, procedures for dealing with complaints, and the general enforcement of the Act. Organisations that process personal information were given a grace period of one year to comply with the provisions of POPIA. Non-compliance after this period could result in significant fines or imprisonment. Section 114(1) states that all forms of processing of personal information must, within one year after the commencement of the Act, comply with the provisions of the Act. Many organisations started to feel mounting pressure to comply with POPIA. It became evident that it was critical for organisations that process large

[1] This note is based on the author's LLM mini-dissertation *Principles Regulating Processing of Personal Information in the Workplace* (UNISA) 2018.

quantities of personal information to implement organisation-wide privacy initiatives to minimise their risk of data breaches.

The enactment of POPIA was to give effect to the constitutional right to privacy by introducing measures in order for personal information to be processed in a fair, responsible, and secure manner (s 14 of the Constitution of the Republic of South Africa, 1996 (the Constitution)). It also brings South Africa in line with various international regulatory frameworks, most notably the European data protection regulation (European Union "General Data Protection Regulation" (GDPR). Adopted: 2016; EIF: 25/05/2018). It is worth noting that it is not enough for an organisation to understand the provisions of POPIA; it also needs guidelines for implementation. POPIA does not provide a specific technical framework for an organisation to follow to comply with the Act. Therefore, the purpose of this article is to suggest a frame of reference that could assist with the implementation of POPIA by organisations that process personal information in South Africa.

1 2 What is privacy?

The right to privacy is one of the most important rights recognised worldwide. In many instances, it is protected as a fundamental right. Privacy is regarded as a valuable aspect of an individual's personality (South African Law Reform Commission (SALRC) *Privacy and Data Protection* Discussion Paper (Project 124 2005) 49). Two American lawyers, Brandeis and Warren, have described it as an individual's right to be left alone (Warren and Brandeis "The Right to Privacy and Birth of the Right to Privacy" 1890 *Harvard Law Review* 193). The idea of the right to privacy has been extended from the simple right to be left alone, to a far wider concept that includes a person's right to control their personal information and affairs (Roos "Privacy in the Face-Book Era: A South African Legal Perspective" 2012 129 *South African Law Journal* 378). Neethling stated that privacy is a very valuable and important aspect of personality. Sociologists and psychologists are also of the view that a person has a fundamental need for privacy (Neethling, Potgieter and Roos *Neethling on Personality Rights* (2019) 45).

2 Protection under common law

In South Africa, the right to privacy is protected under common law, which is informed by *boni mores*. Privacy is a personality interest, which in turn is a non-patrimonial interest that cannot exist independently of an individual (Neethling *et al Neethling on Personality Rights* 14; Roos *Data (Privacy) Protection* (2009) 545). Neethling defines privacy as an individual condition of life characterised by seclusion from the public or publicity (Neethling *et al Neethling on Personality Rights* 48). This condition embraces all those personal facts that the person concerned has determined should be excluded from the knowledge of outsiders (Neethling *et al Neethling on Personality Rights* 48). This definition was supported in *National Media Ltd v Jooste* (1996 (3) SA 262 (SCA)), where privacy was described as all personal information or affairs that a person has decided to keep from the knowledge of outsiders.

In terms of South African common law, a person can rely on the principles of delict for the protection of the right to privacy. A delict is wrongful, capable conduct that causes harm to another (Papadopoulos and Snail *Cyberlaw @ SAIII: The Law of Internet in South Africa* 4ed (2022) 310). In the case of *African Dawn Property Finance (Pty) Ltd v Dreams Travel Tours CC* (2011 (3) SA 511 (SCA)), the court held that the concept of *boni mores* is deeply rooted in the Constitution and its underlying values, together with some key concepts of *Ubuntu* such as human dignity, respect, inclusivity, and concern for others.

In *Bernstein v Bester NO* (1996 (2) SA 751 (CC) 788), the court held that an expectation of privacy in relation to an individual's body, home and family life, and intimate relationships is reasonable (*Bernstein v Bester NO supra* 789). However, as a person moves into communal relations and activities such as business and social interaction, the scope of the personal space decreases proportionately.

In *Investigating Directorate: Serious Economic Offences v Hyundai Motor Distributors (Pty) Ltd* (2001 (1) SA 545 (CC) 557), the court held that even when people are in their offices, in their cars, or on mobile telephones, they retain a right to privacy, since the Constitutional Court recognises that the right to privacy in section 14 of the Constitution includes "informational privacy".

The processing of data can infringe a personality interest in two ways: first, by intrusion into the private sphere, where an outsider becomes acquainted with private personal facts; and secondly, by disclosure of private facts, where an outsider acquaints third parties with an individual's personal affairs which, although known to the outsider, remain private (Neethling *et al Neethling on Personality Rights* 49). In the case of *Motor Industry Fund Administrators (Pty) Ltd v Janit* (1994 (3) SA 56 (W)), the court unequivocally accepted that privacy can only be infringed in these two ways: unlawful intrusion upon the privacy of another; and the unlawful publication of private facts about a person.

This is illustrated in *S v Naidoo* (1998 (1) BCLR 46 (D)), where the employer provided misleading information to a judge to obtain an order to tap a telephone in terms of the Interception and Monitoring Prohibition Amendment Act (77 of 1995). As the judge had granted an order based on the false information he had been given about the employee, the monitoring was declared an unlawful violation of the accused's (employee's) right to privacy. It was pointed out that an employer may monitor an employee's electronic communication if it is connected to a business activity.

In the case of *Kidson v SA Association Newspapers Ltd* (1957 (3) SA 461 (W)), the court was called upon to consider the protection of privacy in relation to photographs of nurses taken by a journalist during their leisure time without their permission. The caption to the photograph read: "97 lonely nurses want boyfriends". Kuper J determined that the publication on the nurses' alleged desire to meet persons of the opposite sex because they were lonely when off duty was an insult to the young married plaintiff, and had infringed upon her privacy.

From these cases it can be concluded that the right to privacy is firmly established under common law as an independent right to personality, and an infringement of dignity and insult play no role in deciding whether there has been a violation of privacy.

Neethling points out that the importance of the recognition of the right to privacy as a fundamental right lies in the fact that the legislature and the executive of the State may not adopt any law or take any action that infringes or unreasonably limits the right (Neethling, Potgieter and Visser *Neethling's Law of Personality* (2005) 17).

3 Protection of privacy under the Constitution

The Constitution provides that everyone has the right to privacy, which includes the right not to have the privacy of one's communications infringed (s 14 of the Constitution). Informational privacy is the particular aspect of the general right to privacy that has come to be of considerable practical importance and for the purpose of this article the focus is on informational privacy (Currie and De Waal *Bill of Rights* (2013) 323). Informational privacy restricts the collection, use and disclosure of private information. It also encompasses a related interest in having access to personal information collected by others, in order to establish its content and check its accuracy (Currie and De Waal *Bill of Rights* 323).

Informational privacy is relevant in the workplace as personal information is regularly processed in the workplace during basic management activities, including, but not limited to, hiring, payroll processing, performance evaluation, and decisions on promotion (Schwartz and Reidenberg *Data Privacy Law* (1996) 252). It should however be noted that section 14 (of the Constitution) protects the privacy of personal information to the extent that it limits the ability to gain, publish, disclose, or use information about others. Like the common law, it does not address the privacy challenges or threats posed by the developments in technology (Currie and De Waal *Bill of Rights* 317). In other words, it does not ensure that the data subject is aware that their personal information has been collected (Roos "Explaining the International Backdrop and Evaluating the Current South African Position" 2007 *South African Law Journal* 423), and it does not grant the data subject active control over personal information that is being processed (Neethling, Potgieter and Visser *Neethling's Law of Personality* 278).

4 Privacy in the employment context

The right to privacy in the context of the employment relationship is unique and very difficult to pin down. The employee has a right to privacy, but they are expected to be honest and loyal, especially during working hours, and to stand in a relationship of trust with the employer (Dekker "Vices or Devices: Employment Monitoring in the Workplace" 2004 16 *Mercantile Law Journal* 622). Employees do not have a significant influence on the processing of their personal information once it is in the hands of their employer. They also generally have limited knowledge of who is able to access their personal information. An employee typically sends and receives thousands of emails,

and certain information of a personal nature. These emails are stored on the employer's server (Lorber "Data Protection and Subject Access Request" 2004 33 *Industrial Law Journal* 180). Line managers and colleagues are also likely to send and receive emails with personal information about the employee concerned.

Through the interception of online communications, personal information can be processed, and at times used, in a wrongful manner. Employees, however, as individuals retain their status as moral agents, and clearly an employee does not forfeit all their privacy when entering the workplace (Mischke "Workplace Privacy, Email Interception and the Law: Does the New Legislation Limit Employers' Right to Read Email?" 2003 8 *Contemporary Labour Law* 73). The Commission for Conciliation, Mediation and Arbitration (CCMA) held:

> "[T]he rights to which the citizen is entitled in his or her personal life, cannot simply disappear in his or her professional life as a result of the employer's business necessity." (*Moonsamy v The Mailhouse* (1999) 20 *ILJ* 464 (CCMA) 471G)

At the same time, the employer's business necessity might legitimately affect the employee's and other stakeholders' personal rights in a manner not possible outside of the workplace. In other words, there is a clear need to balance interests (*Moonsamy v The Mailhouse supra* 471G). Neethling also points out that all persons have a fundamental need for some degree of privacy (Neethling "The Concept of Privacy in South African Law" 2005 *South African Law Journal* 19). Lack of privacy or infringement of privacy, may negatively affect a person, whether mentally or otherwise (Neethling, Potgieter and Visser *Neethling's Law of Personality* 29). Therefore, individuals have an interest in the protection of their privacy (Neethling, Potgieter and Visser *Neethling's Law of Personality* 29). Collier suggests that the protection of privacy includes the protection of personal data in an employment-law context. An employee will always be entitled to some level of privacy, meaning that an employer cannot compel an employee to relinquish all their rights to privacy (Collier "Workplace Privacy in the Cyber Age" 2002 23 *Industrial Law Journal* 1744). Consequently, there is a need for an employer to differentiate clearly between what is considered private data on the one hand, and what is business-related data on the other (Collier 2002 *Industrial Law Journal* 1744). Collier further points out that employers are required to protect their employees' personal data from disclosure to others, by putting in place a range of program systems that provide varying degrees of privacy and security of communications (Collier 2002 *Industrial Law Journal* 1744). These include encryption, anonymous remailers, proxy servers and digital cash (SALRC *Privacy and Data Protection*). Viewed from an employer's perspective, it can be argued that as an employer provides and controls the computer facilities that an employee uses, an employer has the right to control its employees' working life. An employer also has the right to protect their business interests and the integrity of their computing equipment against viruses and cyberloafing. However, this must be done in a manner that is compliant with POPIA.

5 Protection of Personal Information Act

5 1 Background

As mentioned earlier, the main objective of POPIA is to give effect to the right to privacy as provided for in section 14 of the Constitution. The Act aims to do so while bearing in mind that the constitutional values of democracy and openness, and economic and social progress within the framework of the information society, require the removal of obstacles to the free flow of information, including personal information (Van der Merwe, Roos, Eiselen, Nel and Pistorius *Information Communications and Technology Law* 3ed (2021) 234). In terms of section 1 of POPIA, "processing" (of personal information) entails:

> "any operation or activity, or any set of operations, whether or not by automatic means, concerning personal information, including–
> (*a*) the collection, receipt, recording, organisation, collation, storage, updating or modification, retrieval, alteration, consultation, or use;
> (*b*) dissemination by means of transmission, distribution or making available in any other form; or
> (*c*) merging, linking, as well as restriction, degradation, erasure or destruction of information."

The Act regulates the processing of personal information by public and private bodies in ways that will align with international standards (Van der Merwe *et al Information Communications and Technology Law* 435). POPIA applies to any processing of personal information by either a South African, or a non-South African data controller, using equipment in South Africa. This, of course, includes the processing of personal information in the workplace (Van der Merwe *et al Information Communications and Technology Law* 435).

For the purpose of this discussion, it is reasonable to infer that an employer would be the responsible party (or data controller) as defined by POPIA, since it is the employer who determines the reason for the processing of personal information. Furthermore, employers are obliged to maintain records of personal information on their employees in terms of section 3(1)(*a*) of the Basic Conditions of Employment Act (75 of 1997). This section stipulates that an employer must keep a record containing information on its employees' names, occupations, time worked, remuneration paid, date of birth, and any other prescribed information. Therefore, it is clear that in most workplace situations, the responsible party would be an employer.

It is important for employers to look to their legal obligations regarding the processing of personal information in the workplace, and to review whether they are taking adequate measures to safeguard their employees' personal data. This can be done simply by understanding their legal obligations under POPIA.

5 2 Conditions for processing of personal information

Section 4 of POPIA requires that the organisation comply with certain conditions or minimum requirements in order for the processing to be lawful. These requirements are as follows:

Accountability (s 8 of POPIA): This principle requires a responsible party (an employer) to ensure compliance with the principles of data protection. It also ensures that the final responsibility for compliance rests with the employer, even in instances where an employer has entrusted the information-collection process to an employee or a third party (Roos "Core Principles of Data Protection Law" 2006 *Comparative and International Law Journal for Southern Africa* 121).

Processing limitation (s 9 of POPIA): This entails that processing of personal information be done lawfully and in a manner that does not infringe on the privacy of the data subject (s 1 of the Act defines "data subject" as the person to whom personal information relates). In addition, the amount of personal information processed should be limited to that necessary to achieve the purposes for which the information was collected (Van der Merwe *et al Information Communications and Technology Law* 372). Section 11 of POPIA provides that information may be processed only if one of a specific set of conditions is present.

Purpose specification (s 14 of POPIA): Personal information must be collected for a specific, clearly defined, and lawful purpose related to the function and activity of the responsible party (s 13 of POPIA). Therefore, an employer may only process personal information for specified and lawful purposes. Furthermore, personal information may not be processed in a manner inconsistent with these lawful and legitimate purposes (Bygrave *Data Protection Law: Approaching Its Rationale, Logic and Limits* (2002) 61).

Further processing limitation (s 15 of POPIA): The further processing of personal information must be in accordance with the purpose for which the information was collected.

Information quality (s 16 of POPIA): Personal information should be relevant, accurate, and up to date with respect to the purposes for which it is to be processed (Roos 2006 *Comparative and International Law Journal for Southern Africa* 114).

Openness (s 19 of POPIA): This principle ensures that an employee is notified when their personal information is processed; informed of the purpose for which that information is processed; and aware of the identity of the recipients of their personal information, as well as the identity and regular address of the employer (Roos 2006 *Comparative and International Law Journal for Southern Africa* 111).

Security safeguards (s 19 of POPIA): In order to comply with this principle, an employer must ensure that personal information is protected by reasonable security safeguards against risks such as loss, unauthorised processing, destruction, use, or disclosure (Van der Merwe *et al Information Communications and Technology Law* 378). Therefore, an employer must

take organisational and technical measures to ensure that the personal information is protected (s 19(1) of POPIA).

Data subject participation (s 24 of POPIA): Employees should be allowed to participate in, and have a measure of influence over, the processing of their personal information (Roos 2006 *Comparative and International Law Journal for Southern Africa 111*). They should have a right to access their data, request correction of incorrect data, and object to specific processing activities involving their personal information.

5 3 Implementation of POPIA

South African organisations are expected to get their house in order. It is difficult to balance an employer's need for a productive and safe work environment, and an employee's right to privacy, if the organisation does not have a data protection framework or plan of action for the implementation of POPIA. It is worth noting that POPIA implementation is not purely about the law. Experts need to gather information from various disciplines of the organisation, including ICT, records management, legal, finance, human resources and communications for the proper implementation of POPIA. In developing a framework, organisations may consider the following factors.

5 3 1 The establishment of privacy governance

As a first point of departure for the successful implementation of POPIA in the organisation and to ensure that all measures that give effect to the conditions are complied with, privacy governance should be established within the organisation following a two-phased approach.

The first phase is to establish a privacy implementation programme and assign responsibilities for the roll-out of the privacy improvement roadmap and action plan to an identified manager. In addition, the organisation should define a privacy governance charter that clearly sets out accountability, roles and responsibilities for privacy across the organisation. During the second phase, the organisation should evaluate, direct and monitor its privacy programme. This would ensure that "privacy" features on the business agenda when it comes to the development of strategies (De Stadler and Esselaar *A Guide to Protection of Personal Information Act* (2015) 93).

5 3 2 Conducting a gap analysis

Organisations should conduct an environmental scan that would assist in identifying how information flows within the organisation and identify gaps that might result in a breach. This can be conducted through an interview-based approach with all the business units in the organisation.

5 3 3 Development of a privacy policy

An organisation has a legislative obligation to have a privacy policy. A privacy policy should be developed and implemented to provide meaningful guidance on achieving operational compliance with POPIA. The privacy

policy should be applicable to all stakeholders of an organisation that processes personal information, and it must be published on the employer's website. The privacy policy should include:

- the purpose for which the organisation needs to process personal information;
- the personal information processed by the organisation;
- systems and/or applications that process personal information;
- privacy risk management;
- principles for the protection of personal information that contain information security, records retention; and
- processes to review and approve, where required, the privacy policy on a periodic basis to ensure that it is aligned to the requirements of applicable legislation and privacy risks.

5 3 4 Awareness training

Induction and ongoing training and awareness programmes on information protection and privacy are required. Protecting personal information must be part of an employee's job description. Consideration should be given to providing specific tailored training and guidance to different categories of staff – for example, human resources, supplier chain, and marketing and communications – making use of various training channels such as virtual and classroom-based channels to assist in privacy awareness and training. This also addresses the accountability principle (s 8 of POPIA), which is the condition that imposes the duty to the responsible party to take measures that ensure compliance with the conditions, and measures giving effect to these conditions (Papadopoulos and Snail *Cyberlaw @ SAIII: The Law of Internet in South Africa* 310).

5 3 5 Information security risk management

The organisation should conduct regular information security assessments. A privacy risk analysis should be planned and conducted to identify all reasonably foreseeable internal and external risks to personal information as provided for in sections 19 and 22 of the Act. This can also form part of existing audit programmes (ss 19 and 22 of POPIA).

This was illustrated in the recent infringement notice that was issued to the Department of Justice and Constitutional Development (DoJ&CD). It was found guilty of being negligent in its actions to prevent a data breach that led to it losing about 1 204 sensitive files. The department failed to renew its security incident and event monitoring (Siem) and intrusion detection system licences; licences for both softwares expired in 2020. The Regulator served the department with an enforcement notice and ordered it to renew the software licences and take disciplinary action against implicated officials within 31 days. On 3 July 2023, the Information Regulator (Regulator) issued an Infringement Notice to the Department of Justice and Constitutional Development (DoJ&CD) in which it ordered the DoJ&CD to pay an administrative fine of R5 million following its failure to comply with the enforcement notice issued by the Regulator on 9 May 2023 ("Infringement

Notice and R5 Million Administrative Fine Issued to the Department of Justice and Constitutional Development for Contravention of POPIA" (4 July 2023) https://inforegulator.org.za/media-statements/).

5 3 6 Establish a robust privacy incident response programme

Owing to the legislative obligation to notify affected data subjects and the Information Regulator of unauthorised access to personal information (s 2 of POPIA), a well-publicised and understood incident response programme should be established by organisations to cover personal information, including both electronic and hard copy media and to allow for the centralised reporting of data breaches. The programme should define the breach notification procedures to the Information Regulator and affected data subjects.

6 Conclusion

Based on the above discussion, POPIA appears to be progressive. However, it does not provide a template or frame of reference for implementation. It is therefore upon the organisation to create a workplace culture of compliance that will assist with POPIA implementation, and this can be difficult. This would require the organisation to put in place a privacy governance structure that involves everyone in the organisation. The author therefore suggests that the above factors be considered by organisations when developing the framework for implementation.

Unathi Nxokweni
University of South Africa (UNISA)

INTERNATIONAL COMMERCIAL MEDIATION: INTERNATIONAL RECOGNITION AND ENFORCEMENT OF MEDIATION AGREEMENTS

1 Introduction

Global economic output has increased dramatically owing to an increase in cross-border trade, the rise of multinational corporations and globalisation (Mohammed *Commercial Cross-Border Mediation: Is There a Better Way of Promoting It?* (Master's thesis, Uppsala University) 2020 1).

The globalisation of trade has resulted in an increasing interaction between different cultures and legal traditions with different value systems and philosophical foundations, leading to increased dispute potential that could eventually develop into conflict (Mohammed *Commercial Cross-Border Mediation* 1).

The default setting for conflict resolution is widely recognised as judicially sanctioned dispute resolution – otherwise referred to as litigation (Mohammed *Commercial Cross-Border Mediation* 2). Commercial litigation processes are, however, getting more costly and burdensome (Mohammed *Commercial Cross-Border Mediation* 12).

Commercial disputes are furthermore becoming more complex because of the globalised trade landscape and increasing cross-border mobility (Mohammed *Commercial Cross-Border Mediation* 1). This poses unique challenges for litigants and courts. Typical problems encountered include governing law issues, enforcement issues, differing national administrative requirements and legal processes (Ehrenhaft "Effective International Arbitration" 1977 9(4) *Law and Policy in International Business* 1191–1228). Dispute resolution by means of litigation is subject to intrinsic characteristics that exacerbate the complexity of cross-border disputes. For instance, for EU member states, it takes between 100 and 300 days to obtain a first-instance judgment in civil proceedings (Mohammed *Commercial Cross-Border Mediation* 2).

2 International arbitration

An alternative mode of conflict resolution that has developed over the past 50 to 80 years is international arbitration (Born *International Commercial Arbitration* 3ed (2009) 68). The main difference between this dispute resolution mode and domestic proceedings is that it involves essential

questions of private and public international law, and it frequently involves awards of very high amounts (Strong "Realizing Rationality: An Empirical Assessment of International Commercial Mediation" 2016 73(24) *Washington and Lee Law Review* 1973–2085). International arbitration tribunals delivered 113 awards exceeding $1 billion dollars in 2011 (Strong 2016 *Washington and Lee Law Review* 1977).

The frequency of international commercial arbitration has also increased dramatically to over 5 000 proceedings per year (Strong 2016 *Washington and Lee Law Review* 1978).

The primary treaty dealing with international commercial arbitration is the Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York Convention) (United Nations Commission on International Trade Law (UNCITRAL) 330 UNTS 3; 4 ILM 532(1965) Adopted: 10/06/1958 EIF: 07/06/1959). The New York Convention has been signed by 170 states (New York Arbitration Convention "Contracting States: List of Contracting States" (undated) https://www.newyorkconvention.org/list+of+contracting+states accessed 2023-03-02), and it is globally considered as the most successful commercial treaty (Sorieul "Message from the Secretary of UNCITRAL" (2013) https://newyorkconvention1958.org/index.php?lvl=cmspage&pageid=10&menu=729&opac_view=-1). It deals with the enforceability of international arbitration awards and the grounds for refusal by a court to enforce such an award.

Arbitration, like litigation, is a complex and sophisticated process that frequently renders awards spanning many pages. During arbitration proceedings, a dispute is adjudicated by an individual arbitrator or a panel of arbitrators. They deliver a legally binding ruling referred to as an arbitration award.

As a result, arbitration is a popular dispute resolution mode for the resolution of commercial disputes, and, owing to the New York Convention, it is especially useful in cross-border commercial transactions.

3 International mediation

Mediation, as opposed to arbitration, is a much more flexible mode of dispute resolution. The benefits of mediation as a conflict resolution tool (in comparison to court proceedings) are similar to those of arbitration – that is, benefits in relation to confidentiality, cost-effectiveness and efficiency (Mohammed *Commercial Cross-Border Mediation* 5). The process is also substantially faster than traditional litigation, while at the same time also being much less adversarial in nature, which assists in preserving business relationships (Lindell "Alternative Dispute Resolution and the Administration of Justice: Basic Principles" 2007 51 *Scandinavian Studies in Law* 311–344). However, mediation is difficult to define. Several, equally valid definitions exist in different legal cultures. In some countries, terms like arbitration, mediation and conciliation are used interchangeably (Alexander *International and Comparative Mediation: Legal Perspectives* (2009) 15).

Moore defines mediation as:

> "the intervention in a standard negotiation or conflict of an acceptable third party who has limited or no authoritative decision-making power but who assists the involved parties in voluntarily reaching a mutually acceptable settlement of issues in dispute." (Moore *The Mediation Process: Practical Strategies for Resolving Conflict* (2004) 15)

Despite some disagreement on a definition for mediation, there seems to be agreement on the purpose of mediation – namely, "to assist people in reaching a voluntary resolution of a dispute or conflict" (Kovach *Mediation: Principles and Practice* (2004) 26).

More than 66 per cent of multinational corporates prefer commercial arbitration to traditional litigation, whether on its own or combined with other alternative dispute resolution mechanisms like mediation. This is due to the flexibility, speed and confidentiality of its processes being major advantages (Lagerberg and Mistrelis "Corporate Choices in International Arbitration: Industry Perspectives" 2013 *PricewaterhouseCoopers and Queen Mary University of London*).

The major flaw in mediation is that the resulting final agreement has an unclear legal classification. Also, historically, unlike arbitration, mediation has not generally resulted in an enforceable award.

Despite litigation and arbitration being mature established forms of dispute resolution the latter's popularity among the international business community developed only recently (Strong 2016 *Washington and Lee Law Review* 1980). In the period before the Second World War, most international commercial disputes were resolved by means of consensual processes like mediation and conciliation (Strong 2016 *Washington and Lee Law Review* 1980). The New York Convention played a significant role in the popularisation of international commercial arbitration (Strong "Beyond International Commercial Arbitration? The Promise of International Commercial Mediation" 2014 *Washington University Journal of Law and Politics* 11–41).

The cost of international commercial arbitration has increased dramatically over the last two decades. Owing to the confidential nature of these proceedings, it is difficult to estimate the costs, but costs could amount to $400 000 in administrative and arbitrators' fees in arbitrations where the amount in dispute is $10 million (Strong 2016 *Washington and Lee Law Review* 1982). This can escalate to more than $1 million in disputes involving larger amounts (Strong 2016 *Washington and Lee Law Review* 1982). In addition, the legal representatives' fees could easily be between $1 and $2 million (Strong 2016 *Washington and Lee Law Review* 1982).

The time to finalise an international commercial arbitration typically runs anything between one and two years and this does not take into consideration the time for preparation, which could be up to a further 18 months (Strong 2014 *Washington and Lee Law Review* 11–41; Cata "International Commercial Mediation: A Supplement to International Arbitration" 2015 *International Law Quarterly* 2). The main disadvantages of these extended time frames are long periods of commercial uncertainty, as well as increased interest accruing on outstanding defaults or loans (Kantor

"Negotiated Settlement of Public Infrastructure Disputes" in Weiler and Baetens (eds) *New Directions in International Economic Law: In Memoriam Thomas Walde* (2011) 214).

As a result of the increased complexity and the damages amounts involved in international commercial disputes, resolving these disputes through arbitration requires increased fact-finding, cross-border legal research and opinions, and greater investigation of damages issues (Cata *International Commercial Mediation* 3). This, in turn, motivates parties to use litigation-style techniques and to undertake broader fact discovery. Also, a significant number of arbitrations are "seated" in the United States and arbitrators from the United States are generally more likely to allow broader discovery (Strong "Increasing Legalism in International Commercial Arbitration: A New Theory of Causes, a New Approach to Cures" 2013 7(2) *World Arbitration and Mediation Review* 117). This trend has been exacerbated by electronic record keeping, which becomes another significant cost factor in international arbitration (Cata *International Commercial Mediation* 3). There is also a tendency in arbitration hearings to afford the presentation and testing of oral testimony a greater importance, which further increases costs (Cata *International Commercial Mediation* 3). These procedural elements were a cause of great concern for many commercial entities, with reference to the efficiency of this adjudication method (Seidenberg "International Arbitration Loses Its Grip" 2010 *American Bar Association Journal* 2), and have resulted in efforts to formulate more efficient arbitration rules (Rules on the Efficient Conduct of Proceedings in International Arbitration (Prague Rules) 2018).

In 2010, the ICC (International Chamber of Commerce) compiled a comparison between international commercial arbitration and international commercial mediation. The differences are substantial, with the differences in costs being staggering. In respect of the duration, a comparison revealed that a typical mediation takes one to two days to complete, with preparation time being between three to five days, compared to arbitration involving a one-to-two-week hearing and 12 to 18 months of preparation (Cata *International Commercial Mediation* 2).

In respect of costs, the comparison showed that for an international arbitration where the amount in dispute is $25 million, with three arbitrators in London, the total costs amount to $2 836 000.00, compared with an international mediation with one mediator costing $120,000.00 (Cata *International Commercial Mediation* 2).

International commercial actors have consequently been searching for alternative cross-border resolution methods. Mediation has been promoted as a possible solution by some of the foremost international organisations, such as the World Bank, the International Finance Corporation and the European Commission, as well as some private organisations like the ICC, the International Institute for Conflict Prevention & Resolution (CPR) and the International Mediation Institute (IMI) (Nolan-Haley "Mediation: The New Arbitration" 2012 17(61) *Harvard Negotiation Law Review* 1–36).

The use of mediation for the resolution of international commercial disputes has been inhibited for two main reasons. The first is that there is a

relative paucity of information in respect of the procedure, resulting in the discipline being regarded as undertheorised (Strong 2016 *Washington and Lee Law Review* 1984).

The second reason is systemic, being the initial lack of an international treaty dealing with the enforcement of settlement agreements that have been concluded as a direct result of international commercial mediation (Strong 2016 *Washington and Lee Law Review* 1985).

4 Enforcement of mediation settlement agreements

To address shortcomings in the dispute resolution landscape, in 2014 the government of the United States of America proposed that UNCITRAL consider creating an international treaty dealing with the enforcement of settlement agreements resulting from international commercial mediation (United Nations General Assembly (UNGA) "Proposal by the Government of the United States of America: Future Work for Working Group II" (2 June 2014) https://documents.un.org/doc/undoc/gen/v14/035/93/pdf/v1403593.pdf?token=kzjuHAU4KtqqODEu6o&fe=true (accessed 2023-03-02)). Working Group II, dealing with arbitration and conciliation, was mandated to consider the proposal further (United Nations "United Nations Commission on International Trade Law, Working Group ii: Dispute Settlement" Working Documents (27 November 2014) https://uncitral.un.org/en/working_groups/2/arbitration (accessed 2023-03-02)).

This was, however, not the first instance where UNCITRAL considered the enforceability of such settlement agreements as it has been discussing such possibility since 2000 (UNCITRAL Working Group on Arbitration "Settlement of Commercial Disputes: Possible Uniform Rules On Certain Issues Concerning Settlement of Commercial Disputes: Conciliation, Interim Measures of Protection, Written Form for Arbitration Agreement" A/CN9/WGII/WP108 (14 January 2000) https://documents.un.org/doc/undoc/ltd/v00/501/85/pdf/v0050185.pdf?token=vbnnRnHU5vBiaTgaOj&fe=true (accessed 2023-03-02).

A lack of empirical data has been one of the largest impediments to the negotiations in preparation for such a treaty (Strong 2016 *Washington and Lee Law Review* 1990). The urgency for an international enforcement mechanism increased owing to the rising number of legal instruments dealing with cross-border commercial mediation – such as the European Directive on Mediation in Civil and Commercial Matters, the UNCITRAL Model Conciliation Law and the UNCITRAL Conciliation Rules (Strong 2016 *Washington and Lee Law Review* 2012).

Mediation of cross-border disputes has become increasingly significant, and interest continues to grow. This is primarily due to the increased use of litigation tactics within arbitration, to such an extent that arbitration is referred to as the "new litigation" (Stipanowich "Arbitration: The 'New Litigation'" 2010 *University of Illinois Law Review* 1–60). Mediation is consequently often regarded as a useful and successful additional tool to deal with the increased costs, litigation tactics, procedural burdens, and delays of international arbitration. Settlement rates in international mediation

reportedly range between 70 and 85 per cent (Cata *International Commercial Mediation* 12).

A 2013 survey by the International Mediation Institute indicated that 75 per cent of users indicated that arbitration providers should encourage parties to attempt to settle their disputes through mediation (Cata *International Commercial Mediation* 12). This seems to indicate that international commercial mediation is gaining favour in both common law and civil law jurisdictions.

At the Convention on Shaping the Future of International Dispute Resolution in 2014, attended by more than 150 delegates from countries in North America, Europe, Asia, Australasia, the Middle East and Africa, the delegates indicated the following:

- Risk and cost reduction were the most important factor in international dispute resolution for 66 per cent of users.
- More than 75 per cent of users were in favour of using mediation as early as possible in a dispute.
- Dispute resolution clauses requiring mediation prior to litigation or arbitration were preferred by 66 per cent of users (and providers).
- Close to 80 per cent of users were in favour of arbitration institutions and tribunals exploring other appropriate resolution methods at the initial meeting.
- The need for an UNCITRAL convention on the recognition and enforcement of mediated settlement agreements was identified by 85 per cent of users and 47 per cent of advisors (Strong "Use and Perception of International Commercial Mediation and Conciliation: A Preliminary Report on Issues Relating to the Proposed UNCITRAL Convention on International Commercial Mediation and Conciliation" 2014 *University of Missouri School of Law Legal Studies Research Paper No 2014–28*).

5 The Singapore Convention on Mediation

The United Nations General Assembly recognised that the use of mediation

> "results in significant benefits, such as reducing the instances where a dispute leads to the termination of a commercial relationship, facilitating the administration of international transactions by commercial parties and producing savings in the administration of justice by States." (UNGA Resolution A/Res/57/18 (24 January 2003) http://www.worldlii.org/int/other/UNGA/2002/102.pdf (accessed 2023-03-02)).

Owing to the success of mediation in the United States of America, the government submitted a proposal in 2014 in support of future work in the area of international commercial mediation to UNCITRAL, a subsidiary body of the General Assembly (United Nations "United Nations Commission on International Trade Law: A Guide to UNCITRAL (January 2013) https://uncitral.un.org/sites/uncitral.un.org/files/media-documents/uncitral/en/12-57491-guide-to-uncitral-e.pdf (accessed 2023-03-02)). Its mission is the

facilitation of international trade and investment, and its main mandate is to promote the progressive harmonisation and unification of international trade law through conventions, model laws, and other instruments in key areas of commerce, including dispute resolution (United Nations https://uncitral.un.org/en/about).

UNCITRAL identifies impediments to international commerce and then creates solutions to such problems (United Nations https://uncitral.un.org/en/about). The lack of predictable governing law is a sure impediment to international commerce.

As a result of the proposal by the United States, UNCITRAL decided that its arbitration and dispute settlement working group would study the enforcement of international mediation agreements. This was done mainly because enforcement issues presented an obstacle to the use of mediation as a conflict resolution mechanism in international transactions. The general position is that agreements reached through mediation in international commercial transactions are enforceable as contracts between the parties. However, such enforcement may be burdensome and time-consuming. Consequently, irrespective of whether a successful mediation results in an agreed solution, the enforcement challenges that might have been the reason for mediation in the first place could result in the mediation process being costly and thus less attractive. Mediation also does not guarantee a definitive resolution to a conflict as any of the parties may later fail to comply.

The Working Group envisioned an enforcement mechanism that would provide commercial actors involved in the mediation process with greater certainty and which would not entail an inefficient and costly process. After four years of negotiation by UNCITRAL's delegations, consensus was reached on an instrument for the enforcement of settlement agreements. The settlement agreement could also serve as a procedural impediment that could be raised as a defence to prove that the disputed matter had already been resolved.

The final product was the Singapore Convention on Mediation (*United Nations Convention on International Settlement Agreements Resulting From Mediation* A/RES/73/198 (2018) Adopted 20/12/2018; EIF: 12/09/2020). As of 13 October 2022, 55 states had signed the Convention.

6 Enforcement under the Singapore Convention on Mediation

6 1 Scope

Article 1 contains the scope of the Convention. It is applicable to written international mediation agreements that were concluded with the aim of resolving a commercial dispute. A commercial dispute is not defined in the Convention.

An agreement is in writing if its content is recorded in any form (including electronic) and if it is accessible for use as a reference in the future (art 2(2)).

Mediation is defined as a process where parties to a dispute endeavour to settle the dispute amicably with the assistance of a third person. This third person is not permitted to impose a solution on the parties (art 2(3)). A mediation agreement is international in the following instances (art 1(*a*)–(*b*)):

- when at least two parties to the settlement agreement have their places of business in different states; or
- when the state in which the parties to the mediation agreement have their places of business is different from either:
  - the state in which a substantial part of the obligations under the settlement agreement are performed, or
  - the state with which the subject matter of the settlement agreement is most closely connected.

Where a party has several places of business, the relevant place of business is the one closest to the dispute to which the agreement relates. If a party lacks a definitive place of business, the party's domicile is considered its place of business (art 2(1)(*a*) and (*b*)).

6 2 Exclusions

The Convention is not applicable where the settlement agreement was concluded to resolve any of the following disputes (art 1(2)):

- consumer transactions for personal, family or household purposes;
- family, inheritance, or employment law; or
- settlement agreements aimed at resolving consumer disputes for personal, family or household purposes.

It is likewise not applicable where the settlement agreement has been approved by a court or if it was concluded during proceedings before a court, and the agreement is consequently enforceable as a judgment of the courts of the state (art 1(3)(*a*)).

Where the agreement has been recorded as an arbitration award, and is enforceable as such, the Convention is also not applicable (art 1(3)(*b*)).

6 3 Enforcement mechanism

Article 3 prescribes the enforcement mechanism. Enforcement can occur in two ways: the parties can either apply for a declaration of enforceability with the competent authority (art 3(1)) or can invoke the settlement agreement as a procedural impediment and a defence, proving that the disputed matter has already been resolved (art 3(2)).

This aspect was comprehensively debated during the negotiation phase, as the main purpose of the Convention was to provide an executable enforcement mechanism (UNGA "Report of Working Group II, 66th Session, A/CN.9/901" (16 February 2017) https://documents.un.org/doc/undoc/gen/v17/010/10/pdf/v1701010.pdf?token=iudppF3ZA9ZBL7VtIP&fe=true (accessed 2023-03-02). The product resulted in a liberal approach to

enforcement, including situations where a party does not desire the enforcement of the agreement but instead wants to use the agreement as a defence or wants to refer to the agreement during other legal processes.

The requirements to be complied with for enforcement of a settlement agreement in terms of article 3 are the following:

- the agreement must be in writing and signed by the parties (see heading 6 1 Scope; art 4(1)(*a*));
- the agreement must contain evidence to the effect that an agreement resulted from mediation – such as a signature from the mediator, or a document signed by the mediator indicating that they carried out the mediation, or an attestation by the administering institution, or any other evidence acceptable to the competent authority (art 4(1)(*b*)); and
- where electronic communications are involved, the signature requirement is met if a reliable method is used to identify the parties or the mediator, and to indicate the parties' or mediator's intention in respect of the information contained in the electronic communication (art 4(2)).

6 4 Grounds for refusal to enforce a mediation agreement

The grounds for refusal fall broadly into two categories – namely, grounds that the parties may claim (art 5(1)), and grounds that a court may raise on its own initiative (art 5(2)).

A party who wants to prevent the execution of the mediation agreement may first rely on non-compliance with the requirements of article 4.

An opposing party may also oppose enforcement on the following grounds:

- A party to the settlement agreement was under some incapacity (art 5(1)(*a*)).
- The settlement agreement is null and void, inoperative or incapable of being performed under the law to which the parties have validly subjected themselves (art 5(1)(*b*)(*i*)).
- The settlement agreement is not binding according to its terms or has been subsequently modified (art 5(1)(*b*)(*i*)*,* (*ii*)).
- The obligations in the mediation agreement have been modified or they are not clear or comprehensible (art 5(1)(*c*)).
- Granting enforcement would be contrary to the terms of the settlement agreement (art 5(1)(*d*)).
- There was a serious breach by the mediator of standards applicable to the mediator or the mediation, without which breach that party would not have entered into the settlement agreement (art 5(1)(*e*)).
- The mediator failed to disclose circumstances that raise justifiable doubts as to the mediator's impartiality or independence and such failure to disclose had a material impact or undue influence on a party,

without which failure that party would not have entered into the agreement (art 5(1)(*f*)).

Courts may refuse to enforce a mediation agreement on two grounds:

- if granting enforcement of the settlement agreement would be contrary to the public policy of the state, including national security and national interest (art 5(2)(*a*)); and
- if the subject matter of the dispute is incapable of being settled by mediation under the governing law of the nation (art 5(2)(*b*)).

7 Conclusion

The benefits of mediation as opposed to arbitration are clearly in the reduced time it takes to reach a settlement and the much-reduced costs incurred. However, liberal enforcement mechanisms may serve as a deterrent for parties when considering mediation.

The effect of a liberal enforcement mechanism is that parties have options on how they use the Singapore Convention on Mediation. The foundational protection of the integrity of mediation agreements is thus solid. It also distinguishes itself from the New York Convention, which does not have a similar mechanism.

The grounds for refusal are extensive and the effectiveness of the Convention will be determined by how these grounds are interpreted by the executing authorities.

Liberal interpretation can widen the refusal scope to such an extent that reneging on agreements post-mediation becomes too simple, decreasing the incentive for international commercial actors to revert to mediation because the enforcement issue persists.

More conservative interpretation would bolster referral to the mediation process as it would provide greater finality to participants, resulting in turn in an increase in the popularity of mediation as a viable conflict resolution mode for international commercial transactions.

LG Curlewis
University of Pretoria

E Raubenheimer
University of Pretoria

CASES / VONNISSE

THE REVOLUTION OF OUR UNDERSTANDING OF DOMESTIC WORK: THE CONSTITUTIONAL CASE OF

Mahlangu v Minister of Labour [2020] ZACC 24

1 Introduction

This case note studies the effects of the case of *Mahlangu v Minister of Labour* ([2020] ZACC 24) (*Mahlangu*) on domestic work. It argues that the historical and colonial understanding of domestic work is premised on slavery and servitude, and so the understanding of domestic work is one that for centuries has rendered Black women who perform this work invisible. This case note shows how the *Mahlangu* judgment has revolutionised our understanding of domestic work. It further argues that the exclusion of domestic work from the Compensation for Occupational Injuries and Diseases Act (130 of 1993) (COIDA) overlooked domestic work as a type of employment worthy of compensation. The *Mahlangu* judgment has effected changes to COIDA, allowing for the definition of "employee" to include domestic workers. Lastly, the case note shows that this inclusion is a step forward in regulating domestic work effectively as a form of legitimate employment and further humanising women who make up the large majority of those that do this work.

In the *Mahlangu* case, the Constitutional Court set out to look at the legality of the exclusion of domestic workers in the definition of "employee" in section 1 of COIDA. COIDA explicitly excluded domestic workers in its definition section and as a result, domestic workers were excluded from the social benefits flowing from it (COIDA s 1(xviii)(v) and s 22). In its judgment, the Constitutional Court held that the exclusion of domestic workers from the definition section was unconstitutional (*Mahlangu supra* par 131). It further held that domestic workers were entitled to social security as afforded by COIDA and thus should be included in the definition of "employee" in section 1 of COIDA as their work is crucial to their wellbeing (*Mahlangu supra* par 128).

This case note investigates the impact that the *Mahlangu* judgment has had in revolutionising our understanding of domestic work. It does so by setting out the historical understanding of domestic work. The aim of this historical understanding is to counteract our understanding of domestic work before the *Mahlangu* judgment and to demonstrate its impact in humanising domestic workers. It then lays out the facts of the case and the judgment

held by the court in the matter. This case note then lays out the purpose of COIDA and its effectiveness in protecting employees who get injured, contract diseases or even die during the course of their employment.

After setting out the historical understanding of domestic work, the case note looks at the importance of regulating domestic work, also taking into account the slave mentality associated with it. It argues that regulation of domestic work is in line with the international legal frameworks to which South Africa is party. Furthermore, it guarantees domestic workers social security and gives them better social standing. Lastly, the case note examines the introduction of COIDA to the regulatory framework and studies the impact of the *Mahlangu* judgment on COIDA and the livelihoods of domestic workers.

2 Historical understanding of domestic work

Colonialism has played a significant role in how we understand women in society. Colonial rule over women's bodies can be traced to the seventeenth century when African women were used as moles for the Caribbean (Soomer "The Manipulation of the Production and Reproduction of African Women in the Caribbean during Slavery" 2000 63 *Nigro History Bulletin* 1 6). This system of slavery was driven by capitalism and white patriarchal rule (Soomer 2000 *Nigro History Bulletin* 1 6), and reduced African woman to mere property whose sole existence was production for the white capitalist system (Soomer 2000 *Nigro History Bulletin* 1 6). Their exploitation was not limited to being property of capitalist society, but later, their reproductive labour would also be exploited (Soomer 2000 *Nigro History Bulletin* 3). The perception was that African women were strong and they would continue to labour despite pregnancy (Soomer 2000 *Nigro History Bulletin* 3).

The transatlantic slave trade had a great effect on the African diaspora (Manning "Contours of Slavery and Social Change in Africa" 1983 88 *The American History Review* 835 857); it devastatingly disrupted the African structure (Manning 1983 *The American History Review* 835 857). More women, especially in West African countries, were taken as domestic workers as their labour was understood to be more valuable than that of men (Manning 1983 *The American History Review* 841). The existence of domestic work had been prevalent until the industrial revolutions of the 1870s and 1880s (Gaitzkell, Kimble, Maconachie and Unterhalter "Class, Race and Gender: Domestic Workers in South Africa" 1983 27 *Review of African Political Economy* 86 108). Domestic work was institutionalised in South Africa by the Dutch settlement in 1652 (Jansen "Enslaved Women at the Cape: The First Domestic Workers" in Jansen (ed) *Like Family: Domestic Workers in South African History and Literature* (2019) 19). Such institutionalisation took the form of slavery in South Africa for the benefit of the Dutch East India Company (Vereenigde Oost-Indische Compagnie, or VOC). The Dutch settlement in the Cape saw the first enslavement of South Africans through the notion of domestic work (Jansen in Jansen (ed) *Like Family* 22).

The current nature of domestic work still resembles slavery. Initially, slaves were brought in for what was termed "hard labour" (Jansen in Jansen (ed) *Like Family* 31) – to wash, iron, cook, polish floors, carry water and

fetch food for their masters (Jansen in Jansen (ed) *Like Family* 22). Slaves were tasked with staying up at night until their master was asleep. This is similar to current conditions that we still witness in domestic work (for a discussion, see Muller "The Impact of Slavery on the Economic Development of South Africa" 1982 5 *Journal of Cape History* 1 24).

The experience of Black women with their work has been viewed as a triple oppression (Gaitzkell *et al* 1983 *Review of African Political Economy* 86) – based on being Black, women and poor (Gaitzkell *et al* 1983 *Review of African Political Economy* 86). This is also not foreign to other women doing domestic work but most domestic work is done by Black women (Gaitzkell *et al* 1983 *Review of African Political Economy* 86). The work also has a class character because the nature of the work makes women invisible, isolated and dependent on their employers, and they have very little labour protection and limited trade union organisation (Gaitzkell *et al* 1983 *Review of African Political Economy* 87).

Domestic work in South Africa is associated with the idea that it is work that comes naturally to women based on their gender (Gaitzkell *et al* 1983 *Review of African Political Economy* 88). Despite the work also being done by men, women are more associated with domestic work because the nature of the work is said to be house-like and attributed to marriage tasks (Gaitzkell *et al* 1983 *Review of African Political Economy* 88). Especially in South Africa, most of this work is done by Black women; Black women are serving White households (Gaitzkell *et al* 1983 *Review of African Political Economy* 88). The apartheid system, based on oppression, kept these women in an even more vulnerable position because of its exploitative nature, low wages and a lack of political organisation (Gaitzkell *et al* 1983 *Review of African Political Economy* 93).

The understanding of women's labour was confirmed in South Africa through much colonial legislation (Gaitzkell *et al* 1983 *Review of African Political Economy* 93; Johnson *Women on the Frontline* (1992) 21 33). Colonial rule shifted our understanding of African women's role in the African context, relegating her to a subhuman status below a man (Lues "The History of Professional African Women: A South African Perspective" 2005 4 *Interdisciplinary Journal* 103 123). Colonial rule further disrupted the African family unit, in that live-in domestic workers would devote most of their time to caring for their employer's homes (Maqubela "Mothering the 'Other': The Sacrificial Nature of Paid Domestic Work Within Black Families in the Post-Apartheid South Africa" 2016 14 *Gender and Behaviour* 7214 7224).

More than this, live-in domestic workers were not allowed to have intimate relations in their workplaces (Maqubela 2016 *Gender and Behaviour* 7215); they would be arrested when caught with their partners in their dwellings (Maqubela 2016 *Gender and Behaviour* 7215). This in turn disrupted family structures and life (Maqubela 2016 *Gender and Behaviour* 7215). Those domestic workers who could go home after every workday, were unable to spend sufficient time with their families as the hours they worked were long and they spent much of their time travelling (Maqubela 2016 *Gender and Behaviour* 7217 7218). The nature of domestic work points to its exploitative nature. Women involved in this line of work are not in control of their time and are also constrained in pursuing other livelihoods outside their work (Maqubela 2016 *Gender and Behaviour* 7219).

African women have over centuries been oppressed economically and socially (Lues 2005 *Interdisciplinary Journal* 103); based on their gender, they have been subjugated to their male counterparts (Lues 2005 *Interdisciplinary Journal* 104). They "naturally" occupied the position of caring for the home, which was the position they were automatically assigned in society (Lues 2005 *Interdisciplinary Journal* 104). Women who find themselves in the domestic work sector are usually Black women and, in most instances, they are household heads and earn less than their male counterparts (Lues 2005 *Interdisciplinary Journal* 104).

3 Facts of the case

The case concerns Ms Mahlangu who was employed as a domestic worker for 20 years in Pretoria (*Mahlangu supra* par 7). On 31 March 2012, in the course of her employment, Ms Mahlangu unfortunately drowned in a pool as she could not swim (*Mahlangu supra* par 7). After the incident, Ms Mahlangu's daughter, who was dependent on her mother, approached the Department of Labour, requesting compensation for her mother's death (*Mahlangu supra* par 8). She was however denied compensation and relief under COIDA on the basis that domestic workers do not fall under the definition of an "employee" in COIDA (*Mahlangu supra* par 8).

Ms Mahlangu's daughter, assisted by the South African Domestic Service and Allied Workers Union (SADSAWU), went to the High Court to have paragraph (v) of the "employee" definition in section 1 declared unconstitutional (*Mahlangu supra* par 6). The Commission for Gender Equality and the Women's Legal Centre Trust were admitted as *amici curiae* in the case (*Mahlangu supra* par 9). In 2019, the High Court in Pretoria held that paragraph (v) of the "employee" definition in section 1 of COIDA was unconstitutional (*Mahlangu supra* par 9). It did so on the basis that the section excluded domestic workers from its definition of "employee" (*Mahlangu supra* par 10).

The matter was referred in accordance with section 167(5) of the Constitution of the Republic of South Africa, 1996 (Constitution) to the Constitutional Court for the final decision on whether the provision was in fact unconstitutional. The Constitutional Court confirmed that paragraph (v) of the "employee" definition in section 1 of COIDA was unconstitutional. Most importantly, the court ruled that the order of constitutional invalidity has retrospective effect from 27 April 1994 (Socio-Economic Rights Institute "Constitutional Court Affirms the Rights of Domestic Workers" (19 November 2020) https://seri-sa.org/index.php/latest-news/1072-press-statement-constitutional-court-affirms-the-rights-of-domestic-workers (accessed 2022-01-28)). Domestic workers and their dependants were then given until November 2021 – a year after the judgment – to lodge any claims arising from 27 April 1994 (Socio-Economic Rights Institute https://seri-sa.org/index.php/latest-news/1072-press-statement-constitutional-court-affirms-the-rights-of-domestic-workers).

This ruling is of significance because not only are domestic workers and their dependants able to claim in terms of COIDA, but all domestic workers and their dependants with claims dating back to 27 April 1994 could now claim under COIDA (Matafa "Domestic Workers Need More Time to Lodge

Compensation Claims, Say Unions" (24 May 2021) https://www.groundup.org.za/article/domestic-workers-need-more-time-lodge-compensation-claims-say-unions/ (accessed 2022-01-28)). Civil society organisations have however raised concerns over the Department of Labour's failure to make domestic workers or their dependants aware that they were now able to claim under COIDA (Matafa https://www.groundup.org.za/article/domestic-workers-need-more-time-lodge-compensation-claims-say-unions/). This is because they were only given a year to do so and they could no longer claim once the time had lapsed (Matafa https://www.groundup.org.za/article/domestic-workers-need-more-time-lodge-compensation-claims-say-unions/).

The significance of the judgment was further reiterated by the words of Pinky Mashiane who is the president of the United Domestic Workers of South Africa (UDWSA). After the judgment, Pinky lamented:

> "I knew it from the start that the exclusion of domestic workers from COIDA was unconstitutional, that is why I persisted with this case and never lost hope. This is justice which has been denied domestic workers for years. It was long overdue. Now domestic workers who have been bitten by dogs, hurt themselves from falling from step ladders, and all workers who have been injured can claim for Compensation as far back as 27 April 1994. We at United Domestic Workers of South Africa are looking forward to engaging the Department of Employment and Labour about the next steps." (Matafa https://www.groundup.org.za/article/domestic-workers-need-more-time-lodge-compensation-claims-say-unions/)

This statement made by the president of the UDWSA is important for the humanisation of domestic workers, for recognising their work as employees and for moving away from the colonial gaze that treated housework as unpaid work – private work performed by women free of remuneration (Tamale *Decolonizing Family Law: The Case of Uganda Decolonisation and Afro Feminism* (2020) 285).

4 The relevance of COIDA and social security for domestic workers

In the following section, this case note studies the importance of COIDA. It does so against a backdrop of the underregulation of domestic work in South Africa. This section starts by laying out an understanding of COIDA with reference to the right to social security envisaged in the Constitution. It further lays out the dangers to which domestic workers are subjected in the course of their work and justifies their need for social security. Last, this section looks at why social security is important for domestic workers given the nature of their work and how their inclusion in the COIDA definition has revolutionised the manner in which we understand work insofar as domestic work is concerned.

5 Understanding COIDA

COIDA came into effect on 1 March 1994 (the Compensation for Occupational Injuries and Diseases Act (130 of 1993) (COIDA). It was enacted after the repeal of the Workmen's Compensation Act (30 of 1941). COIDA was enacted to give social security to workers who may be injured or

who lose their lives in the execution of their employment duties (Preamble of COIDA). The incapacity to work as a result of injury or disease is classified as the inability to work and earn income and thus falls under social security (Myburgh, Smit and Van der Nest "Social Security Aspects of Accident Compensation: COIDA and RAF as Examples" 2000 *4 Law, Democracy and Development* 43). The aim of COIDA was to provide social security for those who were no longer able to work owing to accidents or diseases (Myburgh *et al* 2000 *Law, Democracy and Development* 43). In the context of COIDA's exclusion of domestic workers, it is important to note the accidents that could also occur and the diseases that domestic workers could also contract in their employment. This is important because, as in the *Mahlangu* case, domestic workers spend a lot of their time at their places of work, but because these places are not necessarily their homes, they may not be familiar with all the utilities of these homes – an example being Ms Mahlangu drowning at work because she could not swim.

Under COIDA, the element of fault in common law is not considered in assessing claims by workers; instead liability is claimed from the insurance coverage (Myburgh 2000 *Law, Democracy and Development* 44). In harmonising COIDA to the Constitution, the court in *Jooste v Score Supermarket Trading (Pty) Ltd* ((1998) BCLR 1 106 (CC)) held that the prohibition against claiming from the employer (as in s 35 of COIDA) was not an infringement of the employee's rights, as COIDA was enacted as social legislation that would regulate relations between employer and employee, disposing of the need for employees to prove the fault requirement when claiming from COIDA (*Jooste v Score Supermarket Trading (Pty) Ltd* (*supra*)).

COIDA operates by workers contributing a portion of their salary to the compensation fund, the administration of which is the director-general's responsibility. Workers who can claim from the fund are workers who are defined as employees according to the Act's definition section. Employees who work from outside South Africa cannot claim from the scheme. However, they could claim if they incurred injuries while performing work in South Africa. The same applies to employees who perform work in South Africa but get temporary employment outside the country (s 23 of COIDA). In terms of the "employee" definition, COIDA (in contrast with the previous Act) does not exclude workers whose earnings exceed a certain amount of income, or who are homeowners. This is in accordance with article 1 of the International Labour Organization's Home Work Convention (C177 (1996) Adopted: 20/06/1996; EIF: 22/04/2000), which defines home work and stipulates that basic rights extend to everyone involved in home work. Article 7 further stipulates that this definition of home work will be extended to all the domestic laws of the countries party to the Convention.

Despite all attempts made by COIDA to include a broad spectrum of workers, prior to the *Mahlangu* judgment workers remained excluded from the definition of employees in the definitions section of the Act. This was despite their inclusion in the Basic Conditions of Employment Act (75 of 1997) and the Labour Relations Act (66 of 1995). COIDA has for years gotten away with discrimination against domestic workers (discussed below) on the basis of their gender and race. This conclusion is primarily because domestic workers are mostly Black women.

The introduction of COIDA has served an important role in protecting workers from injuries, diseases and death in the course of their employment (Myburgh *et al* 2000 *Law, Democracy & Development* 44). The Act further holds employers liable for the injuries that employees incur during the course of their employment (Myburgh *et al* 2000 *Law, Democracy & Development* 44). This is because the employee conducts economic activities for their employer (Myburgh *et al* 2000 *Law, Democracy & Development* 44). COIDA provides for benefits to be paid to employees who suffer temporary disablement, employees who are permanently disabled, and dependants of employees who die as a result of injuries sustained in accidents at work or as a result of an occupational disease (Preamble of COIDA). The Act specifies the occupational disablements that it covers (Schedule 3 of COIDA). However, it also provides for the possibility of proof that the disease was contracted at the place of employment should the disease not be in the list (Ch 7 of COIDA).

6 Importance of social security for domestic workers

The social security system that is often known as the welfare system flows from the international documents that seek to guarantee that each individual shall enjoy a certain minimum standard of living (this is in accordance with article 25(1) of the Universal Declaration of Human Rights and its subsequent documents). The idea of social security systems developed in Germany and over time spread to every part of the world (Van der Berg "South African Social Security Under Apartheid and Beyond" 1997 14 *Development Southern Africa* 482). The aim of the social security system was to provide social security protection for the industrial workforce and later for the entire population (Van der Berg 1997 *Development Southern Africa* 482). Different from the European social security system, the South African apartheid government introduced social security to protect White people from unwanted contingencies (Van der Berg 1997 *Development Southern Africa* 482).

It is argued that the exclusion of Black people from social security, more specifically the Black industrial workforce, was because the work that was done by Black people in apartheid South Africa was not considered as labour (Olivier "Critical Issues in South African Social Security: The Need for Creating a Social Security Paradigm for the Excluded and the Marginalized" 1999 2199 *Industrial Law Journal* 2203). As a result, with the introduction of occupational social security, the vast majority of Black workers who worked jobs such as farm work and domestic work were excluded from those employees who could claim social benefits (Olivier 1999 *Industrial Law Journal* 2203). These exclusions were not only archaic, but they were also laced with gender and race discrimination as the majority of people who worked as farm workers and domestic workers were Black women (Olivier 1999 *Industrial Law Journal* 2203).

As South Africa ushered in democracy in 1996, social security was expanded to all its citizens. Section 27(1)(*c*) of the Constitution states that everyone has the right to have access to:

> "social security, including, if they are unable to support themselves and their dependants, appropriate social assistance."

Section 27(2) provides that

> "[t]he state must take reasonable legislative and other measures, within its available resources, to achieve the progressive realisation of each of these rights."

Social security has further evolved as it encompasses insurance for occupational diseases and injuries and social assistance (Van der Berg 1997 *Development Southern Africa* 485).

Social security is especially important in South Africa in balancing the scales between the races, given its apartheid history. For the longest period of time, White South Africans benefitted greatly from the economy while Black South Africans lived in abject poverty. Social security was then introduced as a means to assist in alleviating poverty (Woolard "The Evolution and Impact of Social Security in South Africa" (unpublished paper (2010)). South Africa has among the highest unemployment rates (the official unemployment rate was 34,9 per cent in the third quarter of 2021 according to Stats SA ("Quarterly Labour Force Survey (QLFS) – Q3:2021" (30 November 2021) https://www.statssa.gov.za/publications/P0211/Presentation%20QLFS%20Q3_2021.pdf (accessed 2024-02-06). With very limited employment opportunities and an ailing economy, it is difficult even for those employed to guarantee a lifetime of income (Business Tech "South Africa Jobs Bloodbath: Unemployment Rate Hits New Record" (30 November 2021) https://businesstech.co.za/news/business/542704/south-africa-jobs-bloodbath-unemployment-rate-hits-new-record/ (accessed 2022-02-01)). This shows the importance of COIDA in protecting those employed in the event that they contract diseases or are injured at work.

The role of social security in South Africa is wider than the alleviation of poverty (Kaseke "The Role of Social Security in South Africa" 2010 53 *International Social Work* 164). It is also important in the ascertainment of justice. This is so because South Africa remains one of the most unequal societies in the world (Kaseke 2010 *International Social Work* 164). In light of this divide, employees' risks are not minimised in the course of their employment; even with COIDA, there remains no reintegration system to integrate employees back into the system in case of diseases and injuries (Kaseke 2010 *International Social Work* 164). The limitations for domestic workers are even greater – despite their inclusion in COIDA. As previously discussed, a large number of these employees will remain left out because of the limited time they had to launch claims for their injuries and diseases, as mandated by the *Mahlangu* judgment.

7 Regulating domestic work in South Africa

The regulation of domestic work is important for a number of reasons. To begin with, regulating domestic work is important because it is an occupation that remains scarcely regulated despite its ever-present nature (Neetha "Regulating Domestic Work" 2008 43 *Economic and Political Weekly* 26 28). Secondly, domestic work is performed mostly by women and there is very

little legislation that regulates the nature of this work (Neetha 2008 *Economic and Political Weekly* 26 28). This is important to note because domestic workers usually work under employers who are likely to exploit their labour as they mostly come from disadvantaged backgrounds (Neetha 2008 *Economic and Political Weekly* 26 28). These women with the diverse nature in domestic work then need protection from this diversity (Neetha 2008 *Economic and Political Weekly* 28). Despite its ubiquitous nature, governments in different parts of the world including South Africa have failed to regulate domestic work. The case note below studies the importance of the regulation of domestic workers and how the amendment of COIDA is essential for this purpose.

Regulating domestic work in South Africa remains an important task because the recognition of domestic work as paid labour ought also to afford domestic workers social protection. Social protection refers to protecting workers economically, socially or in any other way from any risks (Smith and Mpedi "Decent Work and Domestic Workers in South Africa" 2011 27 *International Journal on Comparative Labour Law and Industrial Relations* 315 334). To effect social protection, different measures must be put in place. These measures can be public, using legislation to better protect domestic workers (Smith and Mpedi 2011 *International Journal on Comparative Labour Law and Industrial Relations* 315 334). With this understanding, the International Labour Organization (ILO) has since identified the importance of the promotion of decent work and for work to comply with all international standards regulating work. The ILO's Domestic Workers Convention (C189 (2011) Adopted: 16/06/2011) recognises that domestic workers need protection and that national institutions must be built and protected, and effective legislation and policy that would best protect domestic workers must be implemented.

Domestic work remains fundamental to most families in South Africa (Chen "Recognizing Domestic Workers, Regulating Domestic Work: Conceptual, Measurement, and Regulatory Challenges" 2011 23 *Canadian Journal of Women and the Law* 167 184). Domestic workers keep families afloat by performing tasks such as cleaning, cooking and laundry for pay (Chen 2011 *Canadian Journal of Women and the Law* 167 184). Yet, most domestic work performed by women is informal and falls outside the regulatory frameworks of work (Chen 2011 *Canadian Journal of Women and the Law* 167 184). This is because of the intimate nature of domestic work; domestic workers work very closely with families and most of their work is associated with their gender. It has since been difficult to completely regard this work as formal work (Chen 2011 *Canadian Journal of Women and the Law* 170). Heterogeneity in most instances has also been recognised as a contributing factor in the lack of formalisation of domestic work (Chen 2011 *Canadian Journal of Women and the Law* 172). In some instances, it is hard to ascertain the nature of the employment or even the employer of the domestic worker (Chen 2011 *Canadian Journal of Women and the Law* 172).

Domestic work was important for African women during the apartheid rule. The economy segregated Black women and these women were not able to perform skilled labour (Gaitzkell *et al* 1983 *Review of African Political Economy* 100). Domestic work thus allowed them some sort of an entrance

into the country's economy (Gaitzkell *et al* 1983 *Review of African Political Economy* 101).

The definitional exclusion can also be found elsewhere in different parts of the world. In America, domestic workers were excluded from the definition of "employee" in their National Labor Relations Act of 1935 and the Social Security Act of 1935 (Nilliasca "Some Women's Work: Domestic Work, Class, Race, Heteropatriarchy, and the Limits of Legal Reform" 2011 377 *Michigan Journal of Race & Law* 380). This is quite similar to South Africa as the exclusion of domestic workers was accompanied by that of agricultural workers, just as in South Africa. These exclusions excluded domestic workers from the market and denied them recognition as workers in matters that are important for market regulation (Nilliasca 2011 *Michigan Journal of Race & Law* 380).

The transition towards democracy brought some change to the regulation of paid domestic work. The Constitution as supreme law of the country was enacted in 1996 and provides for rights for all workers in South Africa, inclusive of domestic workers (s 23 of the Constitution). The Labour Relations Act (66 of 1995) also recognises the rights of domestic workers. The Basic Conditions of Employment Act (75 of 1997) further regulated domestic work, prescribing rights for domestic workers.

8 Conclusion

Domestic workers as employees have for centuries been excluded from the benefits of economic activities. This is so because, owing to slavery and colonialism, domestic work was not recognised as formal employment. As such, it was crucial for legislation to be enacted to protect domestic workers' rights. Despite the Labour Relations Act and the Basic Conditions of Employment Act, domestic workers enjoyed no insurance should they be injured or lose their lives in the course of their employment. This was so until the judgment in the *Mahlangu* case.

This case note has set out the importance of recognising domestic work and of including domestic workers in COIDA's definition of "employee" for purposes of insurance. It has set out the history of domestic work and how it has served to exclude these workers from the benefits of the country's economy, perpetuating their subjugation further. COIDA has been analysed to understand why it excludes domestic workers from the definition section of employees. Last, the case note maps out the importance of social security, especially for workers. It shows how the retrospective inclusion of domestic workers is set to revolutionise our historical understanding of domestic workers and their work.

Thuli Zulu
Wits University

ASSESSING THE INVESTIGATIVE POWERS OF THE COMPETITION COMMISSION IN MERGER REGULATION AND CHALLENGES POSED BY THE DIGITAL ERA

S.O.S Support Public Broadcasting Coalition v South African Broadcasting Corporation (*SOC*) *Limited* [2018] ZACC 37

1 Introduction

The South African Competition Commission (the Commission) is celebrated as the most efficient and effective body in implementing competition law. The Commission is an independent and impartial body whose primary function includes investigating and prosecuting complaints raised against firms for failing to report notifiable mergers. Over the past decade, it has reviewed several mergers and successfully prevented many anti-competitive market structures (Blignaut, Ntshingila, and Hobson-Jones "Time to Overhaul the Merger Review Process?" 2016 16 *Without Prejudice* 37 12; Prins and Koornhof "Assessing the Nature of Competition Law Enforcement in South Africa" 2014 18(1) *Law Democracy and Development* 136 140; Kelly and Unterhalter (eds) *Principles of Competition Law in South Africa* (2017) 60).

While the Competition Act (89 of 1998) (CA) empowers the Commission to conduct investigations, the scope and extent of these investigative powers has been unclear. This question was the subject of protracted litigation between the parties in *S.O.S Support Public Broadcasting Coalition v South African Broadcasting Corporation* (*SOC*) *Limited* ([2018] ZACC 37). In that case, the Constitutional Court was called upon to decide whether the Commission's investigative powers included the authority to subpoena witnesses to appear before it. The decision of the court is a welcome addition to competition law jurisprudence insofar as it creates legal certainty concerning the powers of the Commission, especially in light of recent amendments to the Competition Amendment Act (18 of 2018) (CAA), which now broadens the scope of the Commission's authority and powers. However, in light of some of the arguments that were brought up regarding missing documents, the case also serves as a warning of the challenges that the authorities may face in a more digital economy, especially relating to their exercise of investigative powers in the context of digital security, encryption and offsite storage of information. This note provides a chronological discussion of the facts, evaluates the court's decision, highlights possible challenges to future investigations and provides concluding remarks.

2 Summary of the facts

On or about 3 July 2013, the South African Broadcasting Corporation (SABC) entered into a five-year channel licensing agreement with MultiChoice. The terms of the agreement were that the SABC undertook to develop and produce an entertainment channel for MultiChoice, which would consist mainly of content from the SABC's substantial archive of programmes and which MultiChoice would have exclusive rights to market and distribute. Furthermore, the SABC agreed to transmit free-to-air channels (FTA) on its digital terrestrial television (DTT) platform in respect of which MultiChoice would have non-exclusive marketing and distribution rights. In terms of the agreement, MultiChoice undertook to pay more than R500 million to the SABC over a period of five years (par 7). The applicants in the matter argued that the licensing agreement constituted a merger as defined by section 12 of the CA, and that the parties were obliged to notify the Commission of such merger, while the respondents opposed that view, resulting in a protracted legal battle.

In February 2015, the applicants made an application directly to the Competition Tribunal for an order compelling the SABC and MultiChoice to notify the Competition Commission of the agreement, alternatively, asking for an order that the Commission exercise its investigatory powers to determine if the agreement amounted to a notifiable merger (par 9). The tribunal dismissed the applicants' application on 11 February 2016, finding that the agreement did not give rise to a notifiable acquisition of control (see s 12(1)(*a*) of the CA) of the SABC by MultiChoice. The tribunal further refused to grant the alternative relief sought because the applicants had failed to make a *prima facie* case that the conclusion of the agreement constituted a merger (par 10).

The applicants appealed against the tribunal's decision to the Competition Appeal Court, which set aside the tribunal's decision on 24 June 2016. The Competition Appeal Court directed the SABC and MultiChoice to provide the Competition Commission with all documentation connected to the implementation of the agreement of 3 July 2013. The Competition Commission was directed to file with the tribunal within 30 days of receiving the information and documentation from the SABC and Multichoice, a report recommending whether or not the agreement gave rise to a notifiable merger (par 13).

Under the directive of the Competition Appeal Court, the Commission lodged an investigation into whether the television licensing agreement entered into between the parties amounted to a notifiable merger as defined by the CA. In pursuance of the order, the SABC and MultiChoice handed over a limited number of documents, claiming that the bulk of the documents sought by the Commission either did not exist, could no longer be traced, or were irrelevant (par 15). The Commission could not make any determination based on the documents furnished by the parties and, as such, applied to the Competition Tribunal for an order authorising it to interrogate the executives and board members of the SABC and MultiChoice who initiated, negotiated and concluded the agreement. The application was objected to by the SABC and MultiChoice, who contended that the tribunal had no

jurisdiction to hear the matter. The tribunal conceded to the SABC and MultiChoice's objections and rejected the application for an order authorising the Commission to interview the SABC and MultiChoice executives and board members (par 15).

On an urgent basis, the Commission again approached the Competition Appeal Court for a declaratory order declaring that the Commission was authorised to exercise its investigative powers set out under Part B of Chapter 5 of the CA, which powers include powers to subpoena witnesses to appear before it (see s 49A of the CA). On 28 April 2017, the Competition Appeal Court held that its June 2016 order could not be construed as giving section 49A powers to the Commission. The Appeal Court further held that the June 2016 order expressly confined the Commission's source of inquiry to documentation only (par 18).

The applicants, supported by the Commission, appealed to the Constitutional Court against the April 2017 decision of the Competition Appeal Court. In the Constitutional Court, the applicants maintained that the Commission had powers to investigate notifiable mergers and that inherent in those powers was the ability to interrogate individuals involved in the negotiation and conclusion of the agreement. The SABC and MultiChoice contended that the Commission's powers to investigate were confined to a "desktop study" of the documents produced in the initial stages of the investigation; thus, it was barred from interviewing witnesses (par 24).

While the applicants, as well as the Commission, also sought an order to adduce new evidence that had come to light after initiation of the case in the tribunal in 2015, the pith of the matter and the focus of this comment was the interpretation of the CA concerning the investigative powers of the Competition Commission – specifically, whether the powers to investigate mergers in terms of section 21 of the CA read with the powers set out in Part B of Chapter 5 of the Act granted the Commission authority to conduct interviews and interrogation of witnesses in this particular matter. MultiChoice contended that the Act, as it was framed at the time, did not confer any of the powers contained in Part B of Chapter 5 on the Commission to investigate alleged contraventions of section 13A of the Act. It relied on section 21(1)(*c*) of the Act, which limited the investigatory powers to investigations of alleged infringements of Chapter 2 of the Act (par 40).

After considering the papers filed and the arguments presented, the court ruled in favour of the applicants in respect of the Commission's investigative powers. It made the following order:

> "1. Leave to appeal is granted.
> 2. The appeal is upheld, and the Competition Appeal Court's order of 28 April 2017 is set aside and replaced with the following:
> (a) It is declared that the order handed down by the Competition Appeal Court on 24 June 2016 does not preclude the Competition Commission from exercising its non-coercive and coercive investigative powers in terms of Part B of Chapter 5 of the Competition Act 89 of 1998 for purposes of discharging its obligations under paragraph 3 of the June 2016 order.
> (b) The Competition Commission is directed to file its report with the Competition Tribunal, as contemplated in paragraph 3 of the June 2016 order, within 30 court days of this order.

(c) The first and second respondents are ordered jointly and severally to pay the costs of the application, including the costs of two counsel." (par 90)

3 Evaluation of the court's decision

3 1 *Functions and powers of the Competition Commission*

The functions of the Competition Commission are provided under Chapter 4 of the Act (s 21 of the CA). One of the functions of the Commission with which this note is concerned is the consideration of mergers in terms of Chapter 3 of the Act. The Commission is responsible for authorising, with or without conditions, prohibiting or referring mergers of which it receives notice (s 21(1)(*e*) of the CA). A merger occurs when one or more firms directly or indirectly acquires or establishes direct or indirect control over the whole or part of the business of another firm (s 12(1)(1) of the CA). The establishment of direct or indirect control was at the heart of the matter in this case (see s 12(2)(*g*) of the CA).

In terms of section 11(5) of the CA, mergers may be categorised into small, intermediate or large. Parties to a small merger do not have to notify the Commission but may voluntarily do so (s 13(1) of the CA). A party to an intermediate or large merger must notify the Competition Commission of that merger in the prescribed manner and form (s 13A(1) of the CA). It follows that the parties may not implement that merger until it has been approved, with or without conditions, by the Competition Commission in terms of section 14(1)(*b*), the Competition Tribunal in terms of section 16(2) or the Competition Appeal Court in terms of section 17 (s 13A(3) of the CA). It is established that the Competition Commission is mandated to investigate intermediate and large mergers in terms of section 21(1)(*e*), read with section 12A(1) and section 13B of the CA. The fulcrum of the applicants' initial 2015 case in the Competition Tribunal was that the SABC and MultiChoice had concluded a merger and had failed to notify the Commission in terms of section 13A of the Act. Emanating from the 2015 matter, the issue for determination in this particular case was whether the Commission had the power to subpoena individuals believed to have information material to the investigation into whether or not the SABC and MultiChoice had concluded a notifiable merger.

In determining the powers of the Commission, the court noted that "the Commission gets its original investigative powers from the Competition Act and not the June 2016 order" (par 28); and having established that the Commission's powers were statutory, the only question left was to determine whether the Competition Appeal Court's decision of June 2016 precluded the Commission from exercising its powers. The court held that the provisions of the CA must be interpreted to give effect to their purpose in the context of the Act as a whole. To this end, section 1(2)(*a*) of the CA demands that its provisions be interpreted in a manner consistent with the Constitution of the Republic of South Africa, 1996, and which gives effect to the purposes of the Act set out in section 2 (par 30). This approach is consistent with the purposive interpretation of statutes described by Sachs J

– that is, the need for judges not to follow the literal meaning of the words or grammatical structure of the sentence, but to be guided by the design or purpose that lies behind the statute (*S v Mhlungu* 1995 (3) SA 867 (CC) 916). Using this interpretive approach, the court dismissed MultiChoice's contention that section 21(1)(*c*) limited the Commission's powers to investigating contraventions of Chapter 2. It held that the long title of the CA stated that the Commission is responsible for the investigation of mergers. Section 21(2)(*c*) read with section 13B put beyond question that the Commission is authorised to investigate notifiable mergers in Chapter 3 of the CA (par 42).

The court held further that the power to investigate whether a transaction constitutes a notifiable merger stemmed from section 13A(1) and (3) read with section 59(1)(*d*)(i) of the CA. The sections imply that the Commission is authorised to investigate transactions to determine whether they constitute or give rise to a notifiable merger. Regarding the powers under Part B of Chapter 5, the court held that the investigative powers apply to any investigation that the Commission may conduct in terms of the CA, including a merger investigation (par 47). The purpose of section 13A(3) of the CA is to ensure that the Commission examines as many mergers as possible. In that vein, section 49A had to be construed broadly to give effect to that objective. The powers of search and summons granted in sections 49 and 49A were thus vital to the Commission's powers to investigate a merger (par 48).

Concerning the investigation, it was not meant to be a rudimentary "desktop" evaluation of the documents submitted by the parties to a merger or a transaction giving rise to a merger (par 50). The Commission's investigatory powers were not granted by the June 2016 order, and in the absence of any prohibition in the June 2016 order relating to the Commission's use of its coercive and non-coercive statutory powers, the Commission's statutory powers remained intact (par 51). The court found that the Competition Appeal Court erred in finding that the Commission's investigative powers in compiling its report were "expressly confined exclusively to the documents set out in the order" (par 65). Therefore, the Commission had powers to exercise its statutory powers of investigation in the matter (par 87). The authors agree with the reasoning of the court in declaring the powers of the Commission and add that the Commission is a creature of statute. Therefore, the powers and limitation of its authority are found in the enabling statute i.e., the CA. In this case, the CA gives the Commission powers to subpoena witnesses in terms of section 49A. Why the respondents raised a lack of investigative powers as an issue in the first place confounds the mind as they should have been aware of the nature and effect of statutory powers granted to the Commission.

3 2 Separation of powers

The Competition Appeal Court held that its June 2016 order did not and could not be read to give the Commission powers in terms of section 49A of the Act. It further held that the order was "clear and unambiguous" and that it "expressly confined the source of the inquiry to be conducted by the Commission *exclusively* to documentation as set out in the order" (par 18).

As alluded to in 3.1 above, the authors concur with the Constitutional Court's decision that the investigative powers of the Commission stemmed from a statute and not from a court order. It is submitted that a court order that restricted or sought to restrict the statutory powers of the Commission would amount to an unwarranted breach of the "separation of powers" doctrine.

The doctrine of separation of powers clearly provides that the legislature promulgates the law, the executive designs policies to implement and enforce the law, and the judiciary interprets and applies the law. Therefore, the judge must apply the law and not make it. The authors are mindful of the fact that a complete separation of powers might not be attainable as there have to be checks and balances between the different branches of government, lest one branch exercise its powers unconstitutionally (see Maqutu "When the Judiciary Flouts Separation of Powers: Attenuating the Credibility of the National Prosecuting Authority" 2015 18 *Potchefstroom Electronic Law Journal* 2672 2674*; Doctors for Life International v Speaker of the National* Assembly 2006 (6) SA 416 (CC) par 37; *Ex Parte: Chairperson of the National Assembly, In re: Certification of the Constitution of the Republic of South Africa* 1996 (4) SA 744 (CC) par 109).

The Commission's powers to investigate and summon witnesses are spelt out by the legislature in Chapter 5 of the CA. Thus, in its investigation, the Commission is confined to the already-existing powers. If the Commission were to exceed the powers afforded to it by statute, the courts would then be required to intervene. This was not the case in the matter at hand; in this case, the Commission's prayer to subpoena witnesses was well within the ambit of its powers granted by section 49A of the Act. There was thus no need for the Competition Appeal Court to overstep its function and attempt to make a new law for the Commission. The Competition Appeal Court is mandated to review the tribunal's decisions, consider appeals from the Tribunal (s 37(1) of the CA), and not conduct investigations on behalf of the Commission or curtail statutory powers of the Commission. The Competition Appeal Court has no mandate to investigate complaints or mergers and was not involved in the Commission's initial investigation; it was, therefore, not in a position to direct which evidence should or should not have been examined by the Commission. Langa J once stated:

> "It is a necessary component of the doctrine of separation of powers that courts have a Constitutional obligation to ensure that the exercise of power by other branches of government occurs within Constitutional bounds; but even in these circumstances, courts must observe the limits of their powers." (*Glenister v President of the Republic of South Africa* 2009 (1) SA 287 (CC) par 33)

The Constitutional Court's decision *in casu* expunged the decision of the Competition Appeal Court and, in so doing, prevented the creation of an improperly founded precedent.

4 Digitalisation as a potential challenge to the Commission's investigative powers

The case clarified the powers of the Commission in the traditional context and also augmented the challenges that technological developments have

brought insofar as investigations by the competition authorities are concerned. Digitalisation and the development of advanced technologies have given rise to a significant change in the manner in which data is obtained, stored and preserved. In previous years, an individual would memorise the contents of an incriminating document and thereafter destroy, hide or lock it in a safe. However, in this digital day and age, especially in the corporate world, documents containing trade secrets, clientele lists, or company agreements containing sensitive information are usually kept as electronic documents on a computer's hard drive. To restrict access, passwords or passcodes are used. Most documents containing incriminating information or company secrets are stored in an encrypted format that would require an encryption key to decipher. A further level of security would be encrypting a document and storing it in the cloud by way of a cloud-based server. Only the cloud server user would be aware of such a server and/or document (Theophilopoulos "Electronic Documents, Encryption, Cloud Storage and the Privilege Against Self-Incrimination" 2015 132 *South African Law Journal* 596 599). In the face of these technological advancements, the efficiency of the Commission's investigations rests upon the successful collection and processing of digital evidence and interviews with individuals who are believed to know the passcodes, passwords or encryption keys to such evidence.

It is submitted that although access to encrypted documents or digital evidence was not an issue specifically raised in this case, it might as well have been, owing to documents being reported as missing or non-existent (par 15), a standard consequence of encryption. This argument is supported by Kerr's explanation of the nature of digital evidence. He suggests that there are often two steps to searching for and retrieving evidence when dealing with digital evidence. The first step is to search for the physical device, whereas forensic investigators in the second electronic step would search the physical device for information or data (Kerr "Search Warrants in an Era of Digital Evidence" 2005 75 *Mississippi Law Journal* 85 86). Where evidence is stored on a physical device and is encrypted and the second search is not conducted at all or not properly, this may result in reports of missing or non-existent documents and/or information. In light of the above possibilities, the question then arises: what powers does the Commission have in a situation where documents and other data are stored on a physical device but are encrypted, therefore appearing as missing or non-existent?

It is argued that the Constitutional Court decision confirming the Commission's investigative powers also empowers the Commission to interrogate witnesses in connection with encrypted documents. Kathree-Setiloane AJ held that even though the Competition Appeal Court had interpreted its order as limiting the investigation to documents, the Commission's statutory investigative powers remained intact (par 65). The Commission, it is suggested, had and has the authority to interrogate witnesses where documents provided by parties do not provide enough information, are missing or are secured through passwords, passcodes or encryption keys. The authors proffer that the powers to subpoena documents and/or witnesses include the power to retrieve passwords, passcodes or encryption keys, as the case may be, in order to access the information contained in those documents. This would particularly be the

case where a witness voluntarily discloses to the authorities that documents exist that are secured by password, passcode or encryption key. In other instances, the Commission may realise during their investigation that gaining access to a document on the physical device requires a password or passcode. It is worth noting that at present, the South African common or statutory law is insufficient to deal with the conflict between the privilege against self-incrimination and compelling an individual to provide a password, passcode or an encryption key in order to gain access to electronic documents that would incriminate them. It is our submission that this could have been the case with the documents reported as incomplete, missing or non-existent, and may pose a challenge for the Commission in conducting its investigations in future unless a pronouncement is made specifically in relation to digital data encryption. The authors predict that data and/or document encryption and access to such documents will soon be the centre of litigation in competition forums and in our courts generally.

It is also worth noting that the advent of the Protection of Personal Information Act (4 of 2013 (POPIA)) and its standards regarding accessing and processing any personal information belonging to another person, coupled with the challenges of digitalisation such as encryption, may also pose a challenge to the investigative powers of the Commission. In terms of POPIA, a person or company in South Africa that can obtain, handle or store the personal information of another individual, whether in the context of their employment or as a service provider, is required to take steps to protect the confidentiality of this information. Section 5(*h*) and (*i*) of POPIA permit a data subject to institute a complaint to the Regulator or commence civil proceedings for any interference with their personal information. Considering the provisions of POPIA insofar as individuals have a right to protection of their personal information and confidentiality, the authors foresee the possibility that "malicious compliance" with POPIA may be used as a defence to frustrate and delay investigations by the Commission.

For instance, were the Commission to subpoena certain documents in line with its confirmed investigative powers, a firm might raise the defence that the requested documents (encrypted or otherwise) contain the personal information of their employees, clients and or suppliers, and that complying with the subpoena would thus violate provisions of POPIA. However, it is important to stress that section 6 provides that POPIA does not apply to processing personal information by or on behalf of a public body where the purpose of disseminating personal information is the detection or prevention of crime or investigation and proof of an offence. As a consequence, it is submitted that the Commission, which is a public body whose investigations serve the public's interest, should be able to access personal information that would otherwise be protected under POPIA, where it has reasonable suspicion about or preliminary evidence of conduct in contravention of the CA.

Another issue that has been highlighted by the advent and application of POPIA is that of jurisdictional conflict. With specific reference to POPIA, where the Commission is in the middle of an investigation and has subpoenaed documents, individuals may stymie the investigation by instituting complaints to the Information Regulator or even commencing civil

proceedings regarding section 5, and then refusing to comply with the subpoena citing the *sub judice* principle. While the example of POPIA is used, various industry regulators are responsible in different sectors where the Commission may institute investigations, thereby raising questions of jurisdiction, overlapping functions, and duplication of administrative processes. For example, in the *SABC/MultiChoice* case, both entities were regulated by the Broadcasting Complaints Commission of South Africa (BCCSA); the Commission had also recently conducted a data market enquiry within the telecommunications industry, where the Independent Communications Authority of South Africa (ICASA) is the regulatory body; and lastly, the Commission had also conducted investigations in the banking sector, where the Financial Sector Conduct Authority (FSCA) is the primary regulatory body.

While the possibility of duplication of investigations or complaints and the conflict between the Commission and industry regulators is real, it must be borne in mind that the South African legal system recognises the principle of concurrent jurisdiction (Ngwepe "Serving Two Masters: Concurrent Jurisdiction Between the Competition Commission and the Independent Communications Authority of South Africa: Notes" 2003 120(2) *South African Law Journal* 243). The CA confirms this principle and provides that insofar as the Act applies to an industry or sector that is subject to the jurisdiction of another regulatory authority, which authority has jurisdiction in respect of conduct regulated in terms of Chapters 2 or 3 of the Act, the Act must be construed as establishing concurrent jurisdiction in respect of that conduct (s 3(1A)(*a*) of the CA). The CA also provides for the establishment of procedures to manage areas of concurrent jurisdiction and to foster cooperation with industry regulators (s 82(3) of the CA). The Commission has been proactive in this regard and has gone on to conclude Memoranda of Understanding (MOUs) with various industry regulators to facilitate the cooperation contemplated by the Act (https://www.compcom.co.za/mou-with-sector-regulators-in-south-africa/). Therefore, in matters where there may be conflicting powers or duplication of processes, the above MOUs will be cardinal to the resolution of same.

5 Conclusion

The issue for determination by the court was not a complex one insofar as the law regarding statutory powers is unambiguous, and neither was the decision controversial; however, it cannot be trivialised. The investigative powers of the Competition Commission, which ensure its efficacy, were being challenged, and the apex court's confirmation of the Commission's powers serves two main goals. First, it restated that where a court, tribunal or Commission is a creature of statute, its powers and authority are governed by statute and nothing else. The confirmation of the Commission's powers enabled the Commission to conduct a full and further investigation into the SABC/MultiChoice agreement, whereafter it deemed the parties to have concluded a merger in terms of section 12 of the Act. Secondly, the judgment confirms the principle of separation of powers by admonishing the Competition Appeal Court for attempting to limit powers granted to the Commission by statute. The principle was further evidenced by the court's

steering clear of the parties' primary dispute, namely whether SABC and MultiChoice had indeed concluded a merger.

As an unintended consequence, while restating the law and creating legal certainty through the confirmation of the Commission's powers, the judgment also highlighted a key issue that is noteworthy in the digital era and in the advent of the Fourth Industrial Revolution relating to the search, seizure, preservation and presentation of digital evidence in future investigations. Although the court's decision was a victory for the applicants and the Commission, the Commission still has its work cut out in conducting investigations in the digital era. Given the ever-increasing prevalence of technology and the advent of data encryption and securing documents through cloud servers, the Commission might face challenges in exercising the investigative powers confirmed by the court.

Simbarashe Tavuyanago
University of the Free State

Kudzai Mpofu
University of the Free State

IMPROVING AN EXISTING OR ERECTING A NEW OR ADDITIONAL STRUCTURE BY ESTA OCCUPIERS: AN ANALYSIS OF

Daniels v Scribante 2017 (4) SA 341 (CC), *Erasmus v Mtenje* [2018] ZALCC 12, and *De Jager v Mazibuko* [2020] ZALCC 7*

1 Introduction

The conduct of occupiers (i.e., occupiers in terms of the Extension of Security of Tenure Act 62 of 1997 (ESTA)) was central in three court judgments in recent years. The first judgment in the matter of *Daniels v Scribante* (2017 (4) SA 341 (CC)) is widely regarded as a progressive and transformative judgment, and as having opened the door for ESTA occupiers to improve their dwellings (Davis "The Right of an ESTA Occupier to make Improvements without an Owner's Permission after *Daniels*: A Different Perspective" 2019 136 *South African Law Journal* 420 422). In *Daniels v Scribante* (*supra*), the Constitutional Court considered whether an ESTA occupier has a right to make improvements to a dwelling to make it habitable (On the meaning of habitability in the context of ESTA occupiers, see Ngwenyama *A Common Standard of Habitability? A Comparison Between Tenants, Usufructuaries and Occupiers in South African Law* (LLD dissertation, Stellenbosch University) 2020 121–144). The court found that ESTA affords an occupier the right to make improvements to their dwelling without the consent of the owner (*Daniels v Scribante supra* par 57 and 60). However, the court pointed out that meaningful engagement between an owner or person in charge and an ESTA occupier was still necessary, because the exercise of an occupier's right to make improvements could potentially encroach on an owner's right to property (s 25 of the Constitution of the Republic of South Africa, 1996 (the Constitution)) (*Daniels v Scribante supra* par 61–62 and 64). Since the judgment in *Daniels* was delivered, some ESTA occupiers, without prior consent or engaging meaningfully with the owner or person in charge, have improved or erected new structures – both inside (*Erasmus v Mtenje* [2018] ZALCC 12 par 1, 9 and 13), and

* This case note is partly based on the ideas developed in the doctoral thesis submitted by the author for the completion of the degree of Doctor of Laws at Stellenbosch University, Cape Town, South Africa. The author would like to extend his deepest appreciation to Nikita Roode and David Barraclough for reading and commenting on earlier drafts of this case note. Their views and comments greatly helped improve the piece. All shortcomings are those of the author and should not be attributed to any of these persons or institutions.

outside the demarcated parcel of land where they reside (*De Jager v Mazibuko* [2020] ZALCC 7 par 1).

Despite the ESTA occupiers' need to improve or erect new structures, *Daniels* is context-sensitive (Boggenpoel "Property" 2017 3 *Juta's Quarterly Review of South African Law* 2.1; Boggenpoel & Slade "Where Is Property? Some Thoughts on the Theoretical Implications of *Daniels v Scribante*" 2020 10 *Constitutional Court Review* 391) and is therefore not blanket authority to engage in building operations anywhere on private farmland without prior, meaningful engagement with the owner or person in charge (*De Jager v Mazibuko supra* par 20). Furthermore, reliance on *Daniels v Scribante* (*supra*) must be clearly justified (*Erasmus v Mtenje supra* par 15). It is in this context that the case note emphasises that, where the current dwellings of ESTA occupiers are not suitable for human habitation and it is necessary to improve them or erect new buildings, the improvement must be done after proper meaningful engagement between the ESTA occupier and the owner or person in charge in accordance with the general guidelines set out in *Daniels v Scribante* (*supra*). This is because the principles established in *Daniels v Scribante* (*supra*) set the scene for the much-needed balancing of rights between ESTA occupiers and owners, by alluding to the fact that ESTA occupiers are obliged to engage meaningfully with owners or persons in charge prior to embarking on improving or building new structures.

The first part of this case note sets out and analyses case law that has dealt with improving or building new structures. The next part explores the competing rights and interests of ESTA occupiers and owners in relation to improving or erecting new structures. The third and final part of the contribution highlights and emphasises the importance of meaningful engagement before an ESTA occupier improves or erects a new dwelling on property belonging to another.

2 Case law on ESTA occupiers improving an existing (or erecting a new or additional) structure

2 1 Improving an existing structure: Daniels v Scribante

In *Daniels v Scribante* (*supra*), the occupier was residing on a farm owned by a private owner, with rights protected in terms of ESTA (par 3). The ESTA occupier wished to effect basic improvements, at her own expense, to her dwelling (par 8). She had resided in the dwelling with her family for 16 years (par 4). The owner and the person in charge accepted that the dwelling was in an uninhabitable state and lacked the most basic of human amenities such as running water (par 7). The ESTA occupier successfully argued in the Constitutional Court that her rights in terms of sections 5 and 6 of ESTA included the right to make improvements to her dwelling (par 10). The owner and the person in charge made a counter-argument that all the ESTA occupier's rights were located in section 6 of ESTA (par 27). The right to make improvements to the ESTA occupier's dwelling was not one of the rights specified in section 6 of ESTA and therefore, they argued, this meant

that the occupier had no rights in terms of ESTA to effect any improvements to her dwelling (par 27).

The Constitutional Court rejected this approach to the interpretation of ESTA (par 28–29, citing with approval the cases of *Thoroughbred Breeders' Association v Price Waterhouse* 2001 (4) SA 551 (SCA) par 12 and *Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs and Tourism* 2004 (4) SA 490 (CC) par 90). The court found this reading of section 6 of ESTA to be unduly narrow, considering the constitutional context and the purpose for which ESTA was enacted (par 29). The Constitutional Court found that the living conditions of the ESTA occupier did not accord with human dignity in terms of section 5 of ESTA (par 31). Moreover, the court pointed out that the notion of "reside" in section 6(1) of ESTA and "security of tenure" in section 6(2)(*a*) must mean, at the very least, that the dwelling be habitable (par 32). This statement points towards a standard of habitability in the context of ESTA occupiers (On the standard of habitability, see Ngwenyama *A Common Standard of Habitability?* 121–144). While the Constitutional Court accepted that the constitutional rights enjoyed by ESTA occupiers were circumscribed to the extent provided for in ESTA (which does not mention the right to make improvements), the court said that to deny an occupier the right to make the dwelling habitable was to deprive that occupier of her human dignity (par 27 and 33–34). As a result, the court concluded that ESTA affords an occupier the right to make improvements to her dwelling without the consent of the owner (par 57 and 60). However, the court said that it was necessary for the owner or person in charge and the ESTA occupiers to engage meaningfully regarding any improvements to the existing structure (par 62). This is because when an ESTA occupier exercises her right to make improvements, this conduct has the potential to infringe an owner's right to property in terms of section 25 of the Constitution (par 61). As the parties had failed to engage meaningfully regarding the implementation of the proposed improvements, the court ordered them to do so (par 64 and 71). The conduct of occupiers erecting a new structure in the context of ESTA was also highlighted in *Erasmus v Mtenje* (*supra*). This case is discussed below.

2 2 Replacing tents by erecting a new structure: Erasmus v Mtenje

In *Erasmus v Mtenje* (*supra*), the occupier had a guaranteed right to reside on land in terms of ESTA. The ESTA occupier and his family were residing on a portion of immovable property belonging to the owner (par 3). The ESTA occupier was living in a small, rented room and was found by the owner to be operating an illegal spaza shop on the property (par 9). On the instructions of the owner, the building in which the ESTA occupier resided and operated the small store was subsequently destroyed (par 9). Owing to the building being demolished, the ESTA occupier and his family were left destitute in three army-styled tents in the same area where the destroyed building was initially built (par 9). After some time, the tents were no longer fit for human habitation as they started to fall apart. Importantly, the tents could not protect the ESTA occupier from, for example, weather conditions.

This led the ESTA occupier, without obtaining the owner's permission, to build a structure for himself and his family to ensure that he was protected from harsh conditions (par 12–13). It should be mentioned that the structure was not completely built (par 14). Furthermore, the ESTA occupier erected the structure to avoid living in the undignified conditions that he had endured for a decade, while residing in tents (par 13). The structure was temporary as it was built out of corrugated iron sheets and poles. The floor of the structure consisted of combined sand and concrete and there were no internal partitions. The structure had seven windows, a double door at the front and a single door at the back, but not all the windows had glass (par 15).

The court conducted an *in loco* inspection to determine the living conditions of the ESTA occupier and his family, as well as the physical condition of the structure (par 2). The court was called upon to decide whether the newly erected structure was fit for human occupation. The inspection showed that the previous structure of the ESTA occupier had double brick walls outside and a concrete floor. Moreover, the inspection indicated that the ESTA occupier's current location lacked lavatory facilities. As such, the ESTA occupier and his family had to use the nearby veld as a toilet facility (par 14). The inspection also revealed that the ESTA occupier had been denied a tap to access water. The only water supply was through a municipal tank or from a tank placed near the fence where the main house was located. Furthermore, the inspection revealed that the new structure was incomplete and not yet habitable. The ESTA occupier and his family were therefore still living in the tents (par 14). According to the court, following the judgment of *Daniels v Scribante* (*supra*) concerning the habitability of a dwelling, the new structure that the ESTA occupier built was not habitable (par 14). However, the court found that replacing tents with an informal structure offers ESTA occupiers better *protection from the elements* and offers the ESTA occupiers of these tents *some measure of human dignity* (par 34). This statement confirms the standard of habitability for ESTA occupiers (For details on the standard of habitability, see further Ngwenyama *A Common Standard of Habitability?* 121–144). The court's reliance on human dignity to inform the standard of habitability of a newly erected dwelling (as shown in *Erasmus v Mtenje supra*) properly upholds the human dignity afforded to ESTA occupiers by section 5 of ESTA, which reinforces the provisions of section 10 of the Constitution.

In *Erasmus v Mtenje* (*supra*), the owner sought interdictory relief and a demolition order from the Land Claims Court. The interdict was sought to prevent the ESTA occupier from continuing to build the structure that was erected without the consent of the owner (par 1 and 16). Moreover, the interdict was sought to prevent the ESTA occupier from living in the structure and to order the occupier to vacate the structure. Furthermore, the owner wanted to be formally authorised to demolish the structure (par 1 and 16). The court had to decide whether the owner had met the requirements for an interdict. These requirements were: the existence of (a) a clear right; (b) an injury actually committed or reasonably apprehended; and (c) the absence of similar protection by any other ordinary remedy. However, the court was not satisfied that these requirements were met (par 16–18). The court found that

the fact that the applicant (Erasmus) owned the property might have given her a clear right to launch an application of this nature under Roman-Dutch law. However, it was found that this was no longer the position under the new constitutional dispensation (par 19). The court mentioned that an ESTA occupier is entitled to certain residential rights in respect of land they reside on and use. This entails, at the very least, a right to live on habitable land with dignity (par 19). The court concluded that the owner had failed to fulfil the first requirement of an interdict and it was therefore not necessary to deal with the other requirements (par 19). The court in *Erasmus v Mtenje* (*supra*) mentioned that despite a breakdown in the relationship between the ESTA occupier and the owner, it was important for both parties to engage meaningfully with each other concerning the issue at hand, prior to taking the law into their own hands. In this regard, the court essentially reinforced the earlier *dictum* of the court in *Daniels v Scribante* (*Erasmus v Mtenje supra* par 33, citing *Daniels v Scribante supra* par 62). It should be mentioned that the duty to engage meaningfully with the owner rests on the ESTA occupier in relation to ensuring that the ESTA occupier's dwelling is in a habitable state (*Daniels v Scribante supra* par 62–65). Therefore, an ESTA occupier's failure to engage meaningfully with the owner regarding the necessity to upgrade the occupier's living conditions was contentious. To deny an ESTA occupier the right to upgrade his dwelling in the circumstances was, according to the court in *Erasmus v Mtenje* (*supra*), "too formalistic and unjust" in light of South Africa's history of dispossessions (par 33, referring to *Daniels v Scribante supra* par 67).

The conduct of an ESTA occupier in erecting a new and additional structure outside the demarcated area was dealt with in *De Jager v Mazibuko supra*. This case is briefly discussed below.

2 3 Erecting a new additional structure outside the demarcated residential area: De Jager v Mazibuko

In *De Jager v Mazibuko* (*supra*), the owner and person in charge launched an urgent application against an ESTA occupier, who had resided on the farm for 20 years with the consent of the owner in accordance with section 6(1) of ESTA (par 1 and 6). The relief sought by the owner and person in charge was to restrain the ESTA occupier from erecting an additional structure on the farm without the owner's written consent (par 1). The structure was situated outside the ESTA occupier's demarcated residential area (par 1). The ESTA occupier and her family were permitted by the person in charge to occupy and use a demarcated area on the farm for residential purposes (par 6). The family was allowed to erect three structures in a demarcated parcel of land (par 6). The family originally comprised nine members, but had since expanded to 28 members (par 6). The ESTA occupier asserted that the existing three structures were in such a state of disrepair that they were not fit for human habitation (For the standard of habitability, see Ngwenyama *A Common Standard of Habitability?* 121–144) and could not accommodate the family. As such, the ESTA occupier had to erect additional dwellings to accommodate all her family members (par 6). The owner and person in charge contended that they did not give the ESTA

occupier consent to erect the additional structures outside the demarcated area and, as such, the structures had to be demolished (par 1 and 13). They also averred that the ESTA occupier knew she only had the right to reside on and use the three structures situated in her demarcated parcel of land (par 8). This position meant that the ESTA occupier could not occupy or reside on any other part of the farm without written consent (par 8). The owner and person in charge further denied that the three structures were unfit for human habitation (par 13).

The Land Claims Court in *De Jager v Mazibuko* (*supra*) found that the ESTA occupier's conduct, in erecting additional structures outside the demarcated area without the owner's consent, amounted to a deprivation of the owner's property in terms of section 25(1) of the Constitution (par 22). The court also pointed out that the construction of the new additional structures was contrary to the ESTA occupier's rights as set out in section 6(1) of ESTA (par 22). The Land Claims Court referred to *Daniels v Scribante* (*supra*) and stated that when an ESTA occupier intends to improve her current dwelling, she needs to engage meaningfully with the owner to balance the conflicting rights and/or interests of ESTA occupiers and owners or persons in charge (*De Jager v Mazibuko supra* par 22, citing *Daniels v Scribante supra* par 64). The court was of the view that the same procedural approach endorsed in *Daniels v Scribante* (*supra*) regarding improvements should be adopted in the context of the building of a new additional structure (par 22). As the ESTA occupier did not engage with the owner or person in charge before building a new additional structure outside the demarcated area, the court mentioned that the occupier must approach the owner or person in charge and inform them that her current dwellings were in disrepair and that it was necessary either to improve or build new structures (par 22). If an inspection of the structures by the parties showed that the dwellings were in need of repair, such repairs or improvements must be conducted in accordance with the principles established in *Daniels v Scribante supra* (par 22 and 24). As the ESTA occupier was not opposed to the idea of making improvements to the dwelling in the demarcated area, the court ordered the ESTA occupier, her family and the builders to stop any construction work on the farm outside the demarcated area without the owner's written consent (par 22, 24 and 28). This order meant that the ESTA occupier had to demolish the erected structures and remove all building materials and equipment outside the demarcated area of the farm (par 28). The following section analyses the cases of *Daniels v Scribante* (*supra*)*, Erasmus v Mtenje* (*supra*) and *De Jager v Mazibuko* (*supra*).

2 4 Analysis

The decisions of *Daniels v Scribante* (*supra*), *Erasmus v Mtenje* (*supra*) and *De Jager v Mazibuko* (*supra*) are each unique: *Daniels v Scribante* (*supra*) concerned improving an existing structure; *Erasmus v Mtenje* (*supra*) was about replacing tents with a new structure; and *De Jager v Mazibuko* (*supra*) dealt with erecting new additional structures outside the demarcated piece of land. At the centre of each of these cases, however, is the important question about whether the ESTA occupier is living in a dwelling that

protects his or her human dignity. The question of occupation should not primarily be concerned with whether there is a roof over the ESTA occupier's head and four walls to the dwelling (*Daniels v Scribante supra* par 31). According to the Constitutional Court in *Daniels v Scribante* (*supra*), occupation for ESTA occupiers is also about ensuring that an occupier's dwelling is in line with the right of access to adequate housing, the right to human dignity, and the right to security of tenure (*Daniels v Scribante supra* par 31). Therefore, the dwelling of ESTA occupiers should be compatible with human dignity and other fundamental rights, as pointed out by Madlanga J in *Daniels v Scribante supra* par 31.

While *Daniels v Scribante* (*supra*) dealt with improvements to an existing building, *Erasmus v Mtenje* (*supra*) was concerned with the building of a new structure. In principle, there is arguably no difference between improving an existing building, which includes the addition of outside paving, and replacing tents with an informal structure (*Erasmus v Mtenje supra* par 34). This is particularly so as the existing building and the informal structure both aim to ensure better protection from the elements and to give the ESTA occupier some measure of human dignity (*Erasmus v Mtenje supra* par 34). Here, human dignity means that ESTA occupiers are entitled to reside on property belonging to another under conditions that are humane, and which offer a dignified standard of living (*Sibanyoni v Holtzhausen* [2019] ZALCC 11 par 55). This is in line with section 5(*a*) of ESTA, having due regard to section 10 of the Constitution. The ESTA occupier in *Daniels v Scribante* (*supra*) was therefore entitled to improve an existing structure to achieve a certain habitable standard and to live with human dignity (*Daniels v Scribante supra* par 31–34). Likewise, it was also correct for the court in *Erasmus v Mtenje* (*supra*) to allow an ESTA occupier to erect a new structure for the same purpose of achieving an acceptable standard of habitability. This is because occupying tents that are leaking can hardly be said to amount to living in a structure of habitable state and with human dignity (*Erasmus v Mtenje supra* par 35).

The *De Jager v Mazibuko* (*supra*) case is distinguishable from the *Daniels v Scribante* (*supra*) case in that Mrs Mazibuko was not involved in improving her current dwelling to make it habitable (*De Jager v Mazibuko supra* par 19). Instead, she was erecting new additional structures outside the area demarcated for her to live in, without the consent of the owner (*De Jager v Mazibuko supra* par 19). Mrs Mazibuko's case is not about the right to make improvements to her current dwelling, aimed at achieving a dignified standard of living. It is about Mrs Mazibuko wanting to erect new additional structures outside the demarcated parcel of land because the three current dwellings in which she and her family live cannot accommodate the expanded family (*De Jager v Mazibuko supra* par 20). In cases such as *De Jager v Mazibuko* (*supra*), *Daniels v Scribante* (*supra*) is not authority for Mrs Mazibuko to engage in building new additional structures anywhere on the owner's farm – particularly if Mrs Mazibuko's current dwellings seem not to offend her right to live in accordance with human dignity, as recognised by the Constitutional Court in *Daniels v Scribante* (*De Jager v Mazibuko supra* par 20). This finding should not be construed to mean that, where a dwelling is uninhabitable and affects the human dignity of the ESTA occupier, the

occupier may improve or build new structures in total disregard of an owner (*Daniels v Scribante supra* par 61). However, the ESTA occupier must follow proper procedure to challenge the status quo of an uninhabitable dwelling, as elaborated on in more detail below. While it is clear that an ESTA occupier is not entitled to act in a manner that disregards the owner's rights and interests, the next section unpacks the specific rights that ESTA confers respectively on the owner or person in charge, and an occupier.

3 Rights conferred by ESTA on owners and occupiers

Section 5 of ESTA provides:

> "Subject to limitations which are reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom, an occupier, an owner and a person in charge shall have the right to–
> (*a*) human dignity;
> (*b*) freedom and security of the person;
> (*c*) privacy;
> (*d*) freedom of religion, belief and opinion and of expression;
> (*e*) freedom of association; and
> (*f*) freedom of movement,
> with due regard to the objects of the Constitution and this Act."

It is clear that section 5 of ESTA recognises the rights of an ESTA occupier, an owner and a person in charge. This means that an owner or person in charge enjoys the exact same rights as an occupier (*Daniels v Scribante supra* par 61). These rights can only be limited based on grounds that "are reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom" (s 5 of ESTA, originating from s 36(1) of the Constitution). The enjoyment of these rights may sometimes create tension between an owner and the ESTA occupier enjoying their respective rights (*Daniels v Scribante supra* par 61). For example, where an ESTA occupier without consent improves or erects new structures, an owner's right to property in terms of section 25 of the Constitution may be infringed (*Daniels v Scribante supra* par 61). In such circumstances, an ESTA occupier must act so that their conduct does not disregard the owner's right to property (*Daniels v Scribante supra* par 61). The total disregard of an owner's right to property may intrude on an owner's right to human dignity in terms of section 5(*a*) of ESTA. This is because the right to human dignity informs the right to property. (See Marais & Muller "The Right of an ESTA Occupier to Make Improvements Without an Owner's Permission After Daniels: *Quo Vadis* Statutory Interpretation and Development of the Common Law?" 2018 4 *South African Law Journal* 766 774, especially fn 66. See further, *Shoprite Checkers (Pty) Ltd v MEC for Economic Development, Eastern Cape* 2015 (6) SA 125 (CC) par 43–51; *Dawood v Minister of Home Affairs; Shalabi v Minister of Home Affairs; Thomas v Minister of Home Affairs* 2000 (3) SA 936 (CC) par 35.) It is here that section 6 of ESTA, which contains the rights and duties of the ESTA occupier in respect of where they live, is important. Section 6(1) provides as follows:

> "Subject to the provisions of this Act, an occupier shall have the right to reside on and use the land on which he or she resided and which he or she used on or after 4 February, 1997, and to have access to such services as had been agreed upon with the owner or person in charge, whether expressly or tacitly."

Section 6(1) of ESTA acknowledges that occupiers have the right to reside and use land as has been agreed upon with the owner or person in charge (see also, *Nkosi v Buhrmann* [2001] ZASCA 98 par 48, where the court mentioned that s 6(1) of ESTA is concerned with conferring on an occupier rights of residence, use of land and services, but subject to the owner's consent or agreement). Section 6(1) of ESTA therefore prohibits conduct that has the impact of frustrating the exercise of rights conferred by ESTA, such as the right to use land (see also, in this regard the Preamble of ESTA, which holds that "[t]he law should extend the rights of occupiers, while giving due recognition to the rights, duties and legitimate interests of owners"; *Sibanyoni v Holtzhausen supra* par 56). In terms of a pending amendment, section 6(2) of ESTA will provide:

> "Without prejudice to the generality of the provisions of section 5 and subsection (1), and balanced with rights of the owner or person in charge, an occupier shall have the right–
> […]
> (dB) to take reasonable measures to maintain the dwelling occupied by him or her or members of his or her family."

(Paragraph (dB), is a pending amendment. This paragraph (dB) is to be inserted by section 3(*a*) of the Extension of Security of Tenure Amendment Act 2 of 2018. The amendment will take effect as from a date determined by the President of the Republic of South Africa in terms of a proclamation in the *Gazette*, which date has not yet been determined.)

According to the Constitutional Court in *Hattingh v Juta* (2013 (3) SA 275 (CC)), the phrase "balanced with the rights of the owner or person in charge" in section 6(2) of ESTA means that a just and equitable balance must be struck between the rights of an ESTA occupier and those of the owner (*Hattingh v Juta supra* par 32). The effect of this statement would be to infuse justice and equity into the matter at hand (*Hattingh v Juta supra* par 32). For example, where there are tensions between an owner's right to property and an ESTA occupier's right to improve or build new structures, the rights of the owner and occupier, as required by ESTA, must be balanced and reconciled (*Daniels v Scribante supra* par 61; *Erasmus v Mtenje supra* par 33 and 37; *De Jager v Mazibuko supra* par 14; Pienaar "Land Reform" 2020 3 *Juta's Quarterly Review of South African Law* 2.4). This position means that the right to use land afforded to an ESTA occupier is therefore not an "open-ended, unlimited or unfettered" right that can be exercised by the occupier without prior consent from the owner (*De Jager v Mazibuko supra* par 14, citing *Nkosi v Buhrmann supra* par 49; Pienaar 2020 *Juta's Quarterly Review of South African Law* 2.4). Section 6(2) of ESTA allows for the balancing of the rights of the owner and ESTA occupier without prejudice to the rights contained in section 5 of ESTA. This balancing exercise has been embarked upon explicitly by the court when it ordered that an ESTA occupier's entitlement to make improvements or erect new

structures required that the parties meaningfully engage with each to avoid the violation of an owner's right to property under section 25 of the Constitution and those set out in ESTA (*Daniels v Scribante supra* par 61–65; *Erasmus v Mtenje supra* par 33 and 37; *De Jager v Mazibuko supra* par 20, 22 and 24). Meaningful engagement will ensure respect and concern for the parties' rights to human dignity, equality and freedom.

Apart from section 6(2) of ESTA, requiring that the rights of the owner and ESTA occupier be balanced, section 6(2)(dB) will (perhaps more deliberately and expressly) include the right to make improvements without the owner's consent, as was held in *Daniels* and advocated for by Marais and Muller (2018 *South African Law Journal* 766, 774–791). Arguably, the right to make improvements also comprises the right to build or erect new structures aimed at maintaining the dwelling in a habitable state and to enable the ESTA occupier to live in conditions of human dignity (see, for e.g., *Erasmus v Mtenje supra* par 34 and 35; *De Jager v Mazibuko supra* par 20 and 22). However, to improve or build new structures cannot be done without prior meaningful engagement with the owner or person in charge, as is analysed in more detail below.

4 Necessity of meaningful engagement between owners and occupiers under ESTA

When an ESTA occupier wants to improve or build new structures, it is required that an ESTA occupier approach the owner or person in charge to raise the question of the proposed improvements (*Daniels v Scribante supra* par 64). Moreover, it is necessary for the ESTA occupier to have regard to the owner's right to property, which is informed by the right to human dignity (see Part 3 above). If an ESTA occupier acts in a manner that does not take into consideration an owner's right to property, such a conduct might be unreasonable (De Vos, Freedman, Brand, Gevers, Govender, Lenaghan, Mailula, Ntlama, Sibanda and Stone "Socio-Economic Rights" in De Vos and Freedman (eds) *South African Constitutional Law in Context* (2014) 717). It is here that the concept of meaningful engagement (developed in *Occupiers of 51 Olivia Road Berea Township & 197 Main Street Johannesburg v City of Johannesburg* (2008 (3) SA 208 (CC)) is important. Although *51 Olivia Road Berea Township* (*supra*) was concerned with an eviction of unlawful occupiers, the obligation to engage meaningfully could also be applied to other contexts in which an occupier wishes to improve or build new structures to attain a standard of habitability and conditions that conform to human dignity.

This position stems from the Constitutional Court's remarks in *Daniels v Scribante* (*supra*), where it pointed out that, although consent from an owner is not a requirement to make improvements, meaningful engagement between the owner or person in charge and an ESTA occupier is necessary prior to the implementation of the proposed repairs or improvements (*Daniels v Scribante supra* par 62). The concept of "meaningful engagement" generally means a process in which two or more parties talk and listen to each other meaningfully in order to achieve certain objectives.

In this regard, meaningful engagement is used as a deliberative tool to resolve disputes and to increase the understanding and sympathetic care of the parties affected, if the parties are willing to participate in the process (see, generally, *51 Olivia Road Berea Township supra* par 14–15. See further, Muller "Conceptualising 'Meaningful Engagement' as a Deliberative Democratic Partnership" 2011 3 *Stellenbosch Law Review* 472 743–744 and 753–756; Muller "Conceptualising 'Meaningful Engagement' as a Deliberative Democratic Partnership" in Liebenberg and Quinot (eds) *Law and Poverty: Perspectives From South Africa and Beyond* (2012) 301–302 and 311–314; Mahomedy *The Potential of Meaningful Engagement in Realising Socio-Economic Rights: Addressing Quality Concerns* (LLM thesis, University of Stellenbosch) 2019 3–8; Chenwi and Tissington *Engaging Meaningfully with Government on Socio-Economic Rights – A Focus on the Right to Housing* (2010) 9; Chenwi "'Meaningful Engagement' in the Realisation of Socio-Economic Rights: The South African Experience" 2011 26 *Southern African Public Law* 128 129; Liebenberg "Engaging the Paradoxes of the Universal and Particular in Human Rights Adjudication: The Possibilities and Pitfalls of 'Meaningful Engagement'" 2012 12 *African Human Rights Law Journal* 1 13–28; Van der Berg "Meaningful Engagement: Proceduralising Socio-Economic Rights Further or Infusing Administrative Law With Substance?" 2013 29 *South African Journal on Human Rights* 376 381–388; De Vos *et al* in De Vos and Freedman *South African Constitutional Law in Context* 717–718). In relation to erecting new structures, if the ESTA occupier and owner or person in charge do not engage meaningfully, the occupier may be faced with two equally unsatisfactory options: (a) automatic eviction, leading to homelessness, if they leave the dwelling owing to intolerable living conditions; or (b) continued residence in a property that is undignified and which is not habitable (*Daniels v Scribante supra* par 32 and 52; *Erasmus v Mtenje supra* par 8–9 and 12–14). In such circumstances, the ESTA occupier and the owner or person in charge should engage meaningfully with each other to see if they can agree on the nature of the improvements and manner in which the improvements will be implemented (*Daniels v Scribante supra* par 64, 68 and 71. Compare *51 Olivia Road Berea Township supra* par 13–14). Such an action will help balance and reconcile the conflicting rights and/or interests of an ESTA occupier and an owner or person in charge (*Daniels v Scribante supra* par 62).

There is no exhaustive list of the parameters of meaningful engagement (*51 Olivia Road Berea Township supra* par 14). However, the Constitutional Court in *Daniels v Scribante* (*supra*) made certain points about the implementation of repairs or improvements. The ESTA occupier and the owner or person in charge must agree on: (a) the time at which the builders will arrive and leave the farm; (b) the movement of the builders on the farm; and (c) the need for the approval of building plans relating to the improvements (*Daniels v Scribante supra* par 71). In the case of improving or building new structures, an ESTA occupier who wishes to effect repairs or improvements is obliged to make reasonable efforts to engage meaningfully with the owner or person in charge before that occupier effects such improvements (*Daniels v Scribante supra* par 64; *Erasmus v Mtenje supra*

par 33, 35 and 37; *De Jager v Mazibuko supra* par 20 and 22; Pienaar 2020 *Juta's Quarterly Review of South African Law* 2.4). If an ESTA occupier tries to engage meaningfully with an owner, and an owner refuses, the occupier should approach a court and not resort to self-help (*Daniels v Scribante supra* par 65; *Erasmus v Mtenje supra* par 35. See further, *Motswagae v Rustenburg Local Municipality* 2013 (2) SA 613 (CC) par 14; *City of Tshwane Metropolitan Municipality v Link Africa (Pty) Ltd* 2015 (6) SA 440 (CC) par 87 and 152). As such, the process of meaningful engagement will be successful only if both the ESTA occupier and the owner or person in charge act reasonably and in good faith (*51 Olivia Road Berea Township supra* par 20; De Vos *et al* in De Vos and Freedman *South African Constitutional Law in Context* 718). In this regard, the ESTA occupier and the owner or person in charge are required to be open and transparent with each other, because lack of openness, transparency and participation is counterproductive to meaningful engagement (*51 Olivia Road Berea Township supra* par 20; De Vos *et al* in De Vos and Freedman *South African Constitutional Law in Context* 718).

5 Conclusion

The anticipated impact of the decision in *Daniels v Scribante* (*supra*) on ensuring that ESTA occupiers live in dwellings that are suitable for human habitation seemingly came to fruition upon a first reading of the judgment in *Erasmus v Mtenje* (*supra*), but not in the judgment of *De Jager v Mazibuko* (*supra*), delivered three years after *Daniels v Scribante* (*supra*). Nevertheless, it is clear from the principles that have been set out above that when an ESTA occupier intends to improve or build new structures, they need to engage meaningfully with the owner or person in charge. In this regard, the ESTA occupier must approach the owner or person in charge and inform them about the current condition of their dwelling, that it is in a state of disrepair, and that it is necessary to improve that dwelling or erect new structures. The parties should then inspect the property and, if the inspection shows that the dwelling is in need of repairs, such repairs or improvements must be conducted in accordance with the principles established in *Daniels v Scribante* (*supra*). Such an engagement will ensure that the conflicting rights and/or interests of ESTA occupiers and owners or persons in charge are balanced and not infringed. Where an ESTA occupier tries to engage meaningfully with an owner or person in charge and the engagement does not result in an acceptable outcome, the ESTA occupier should approach a court to have the dispute arising from the failure to engage resolved by a court. This is because self-help in the form of improving existing structures or erecting new structures on private land without prior engagement with the owner or person in charge is not permitted under our law.

Lerato Rudolph Ngwenyama
University of South Africa

LOCUS STANDI IN IUDICIO – THE RIGHT OF A PARENT TO CLAIM MAINTENANCE ON BEHALF OF AN ADULT DEPENDENT CHILD

Z v Z 2022 (5) SA 451 (SCA)

1 Introduction

This matter dealt with an appeal to the Supreme Court of Appeal (SCA) from the Eastern Cape Local Division of the High Court in respect of a claim for maintenance by one parent on behalf of the adult dependent children against the other parent. The facts of the case were as follows. Mrs Z (the mother) and Mr Z (the father) were married on 10 January 1995. Two children were born of the marriage. The marriage deteriorated and Mr and Mrs Z separated for a period. Both parents continued to support their children financially. Mr Z had been maintaining the children by depositing amounts directly into their individual bank accounts. The marriage relationship between mother and father deteriorated, resulting in Mrs Z initiating divorce proceedings and claiming from Mr Z, *inter alia,* maintenance for herself and the two major and financially dependent children. Although they were majors, in that they were both over the age of 18, the children were financially dependent on their parents at the time of the divorce. The daughter (B) was a student and unemployed. As part of her studies, she was required to do practical training and received remuneration from time to time for the work she did for a social media company. Notwithstanding these efforts to maintain herself, B remained financially dependent on her parents. Insofar as the adult dependent son (R) was concerned, he was mobile only by means of an electric wheelchair owing to injuries sustained in a motor car accident. Despite obtaining a probationary internship in January 2021, R was still financially dependent on his parents. Owing to his injuries, it was uncertain whether he would be able to continue working as the work required long hours of sitting which caused him to suffer pressure sores, making prolonged sitting impossible.

In defending the action, Mr Z raised a special plea, claiming that Mrs Z could not lodge a claim for maintenance on behalf of the children born of the marriage, since they were both adults and, therefore, had the necessary capacity to claim maintenance on their own behalf *(Z v Z* par 2). As a result, Mr Z contended that Mrs Z lacked the *locus standi in iudicio* to initiate a claim on behalf of the major children.

2 Question of law

The issue that both the Eastern Cape High Court and the SCA were required to consider was whether a parent can institute a claim for maintenance against the other parent on behalf of their adult dependent child. In other words, the courts were called upon to decide whether a parent has the necessary *locus standi in iudicio* to lodge a claim against the other parent on behalf of an adult dependent child.

3 The decision of the courts

The decisions of both the Eastern Cape High Court and the SCA are discussed.

3 1 The decision of the Eastern Cape High Court

In the court *a quo* (*Rosemary Ann Zeelie v Johannes Andries Zeelie* (unreported) 2021-03-09 Case no 903/2019), Mr Z (the defendant) entered a special plea that, as their two children were now adults, they should pursue their maintenance claim against him in their own names, because they had the necessary legal capacity to do so. Furthermore, he pleaded that the plaintiff lacked the necessary *locus standi* to pursue maintenance claims on behalf of the children. The special plea had to be argued before the hearing of the divorce action could commence. The plaintiff based her claim in large on section 6 of the Divorce Act (70 of 1979) (Divorce Act), claiming that it regulates the position in the best interests of the children to ensure that the current position regarding the financial support paid to the children be maintained. The plaintiff maintained that while she agreed that the children had the necessary capacity to initiate maintenance proceedings in their personal capacity, this did not remove the duty of the parents to demonstrate that the current arrangement was not the best that could be made under the circumstances.

Zilwa J, deliberated in considerable depth on the cases – often in conflict with one another – on which both the plaintiff and defendant relied.

The plaintiff relied on the judgments in *JG v CG* (2012 (3) SA 103 (GSJ)), *Bursey v Bursey* (1999 (3) SA 33 (SCA)), *SJ v CJ* (2014 (4) SA 350 (GSJ)) and *AF v MF* (2019 (6) SA 422 (WCC)) to support her claim that she had the required *locus standi* to lodge a claim for maintenance against her spouse on behalf of their adult dependent children.

On the other hand, the defendant referred to the judgments in *Smit v Smit* ((1984) All SA 52 (O)), *Butcher v Butcher* ((2009) JOL 23359 (C)), *LW v LW* (North Gauteng High Court (unreported) 2019-06-22 Case No 2148/2007) and *Sikatele v Sikatele* ((1996) 1 All SA 445 (TK)) to support his argument that the children themselves should be joined as parties to the action regarding the aspect of their post-divorce maintenance by the defendant.

Judge Zilwa's approach to each case referred to by the applicant is now considered.

With reference to the decision in *JG v CG*, Judge Zilwa stated that the *ratio* of allowing the mother's claim in this case rested on the fact that the plaintiff had herself incurred expenses pertaining to the maintenance of the children, and on this basis, she would be entitled to claim the contribution for such expenses from the other parent. Zilwa J further stated that the distinguishing factor between *JG v CG* and the present case before the court was that there was no contention by the plaintiff that the children resided with her, and that she had incurred expenses for their maintenance for which the defendant would in part bear responsibility. The adult dependent children in the matter before the court, each incurred their own maintenance expenses and paid for those from, *inter alia*, the monies that were deposited directly into their bank accounts by the defendant. Zilwa J, therefore, concluded that the factual matrix in the *JG v CG* case was totally different from that of the present case before the court.

In the *Bursey* case, the meaning and effect of an order for the maintenance of a child until they become self-supporting was considered. In this matter, the parties had divorced, and a consent paper had been concluded between them in terms of which, the respondent (the father of the child) undertook to pay maintenance to the appellant (the mother of the child) until the child became self-supporting. Judge Zilwa stated that the judgment in this case was not directly relevant to the point in issue in the present matter before the court.

In *SJ v CJ*, the wife had lodged a claim for maintenance on behalf of her major son in terms of Rule 43 against her husband. The son resided with the parties in the marital home. Judge Zilwa found that this case was not relevant to the case before him as the factual matrix in *SJ v CJ* differed from that in *Z v Z*. In *Z v Z*, the dependent adult children did not reside in the matrimonial home.

Zilwa J also stated that the decision in *AF v MF* could not be regarded as authority for the position that a parent has *locus standi* to institute a claim for maintenance against the other parent in respect of their adult dependent children. The *AF v MF* case merely highlighted the vulnerability of young adult dependents and the stress that they undergo when their parents divorce. The case also highlighted the difficulty for a child where they are required to institute a claim for maintenance in their own name against the parent.

Zilwa J concluded his consideration of the cases relied on by the plaintiff by stating that in none of the cases was one parent permitted to claim maintenance for adult dependent children who were not residing with that parent and where they were running their own financial affairs with some income of their own, as was the position in the case before the court.

The court then turned its attention to the cases the defendant used to support the special plea filed by him – namely, *Smit v Smit* (*supra*), *Butcher v Butcher* (*supra*), *LW v LW* (*supra*) and *Sikatele v Sikatele* (*supra*).

In *Smit v Smit*, the court held that the difference between a maintenance claim for a child and a claim for an adult dependent offspring of divorced parents lay in the principle that a parent has *locus standi in iudicio* to initiate

a claim on behalf of a child, while adult offspring must claim in their personal capacity directly from the respective parent. In terms of section 1 of the Children's Act (38 of 2005) (Children's Act), a "child" is defined as a person under the age of 18 years. Where a child has attained majority, the adult dependent offspring of a parent must claim support against one or both parents to the extent that they may have a claim for support.

Zilwa J considered the judgment in *Smit* and held that that there was no dispute that the dependent adult children may very well have a claim for support against the defendant. The court held that, in the present case, the adult dependent children ought to pursue claims for maintenance in their own name and not through the plaintiff.

In the *Butcher* case, the court held that if adult dependent children are joined as parties in the divorce proceedings and claim maintenance in their own name, this is not a bar to giving effect to section 6 of the Divorce Act. In a similar vein, the decisions in *LW v LW* and *Sikatele v Sikatele* lend authority to the position that adult dependent children must be joined in divorce proceedings to enable them to claim maintenance from the defendant.

The plaintiff's reliance on section 6 of the Divorce Act was also dismissed for the following reasons:

a) Section 6 does not prescribe the manner or machinery that the court must use to ensure that the interests and welfare of minor or dependent children of the marriage are satisfactorily catered for before a decree of divorce is granted.
b) Section 6 does not appear to tamper with the ordinary procedural law regarding the aspects of *locus standi* that adults generally enjoy in (enforcing or defending their rights or interests.
c) Section 6 does not make a decree that a parent or parents of adult dependent children at the time of the divorce proceedings has the right, duty or entitlement to take up the cudgels on behalf of such adult dependent children on the aspect of ensuring their welfare prior to the granting of the divorce decree (*Rosemary Ann Zeelie v Johannes Andries Zeelie supra* par 25).

Zilwa J, therefore, held that the children had the legal capacity to initiate their own maintenance proceedings against their father and concluded that the children concerned must be joined as parties to the divorce action. Consequently, the court *a quo* held that the plaintiff could not claim maintenance on behalf of her adult dependent children from their father.

An appeal was lodged with the SCA. A discussion of the SCA decision follows.

3 2 The decision of the SCA

In granting the special plea, the High Court highlighted the need for a proper interpretation of section 6 of the Divorce Act. The judgment of the SCA did not consider the reasoning and judgment of the court *a quo* in great detail,

but rather approached the legal question from a different perspective – namely, the proper interpretation of section 6 of the Divorce Act.

3 2 1 Interpretation of section 6 of the Divorce Act

The primary issue before the SCA concerned the interpretation of section 6 of the Divorce Act.

The SCA referred to the judgment in *Cool Ideas v Hubbard* ([2014] ZACC 16), which confirmed the (now well-established) test on statutory interpretation as being that the words in a statute must be given their ordinary grammatical meaning, unless doing so would result in absurdity. This test is, however, subject to the following three interrelated provisos: that the statutory provisions should always be interpreted purposively; that the relevant statutory provision must be properly contextualised; and that all statutes must be construed consistently with the Constitution – that is, where reasonably possible, legislative provisions ought to be interpreted to preserve their constitutional validity.

The SCA analysis of section 6(2) and (4) demonstrated that these subsections respectively empower the court to order any investigation it may deem necessary by a legal practitioner representing a child to ensure that the provisions made or contemplated with regard to the welfare of any minor or dependent child of the marriage are satisfactory or are the best that can be effected under the circumstances.

The court took cognisance that the words “minor” and “dependent” used in section 6(1)(*a*) and (3) are not found in subsection (4), which instead uses the word “child”. The ordinary grammatical, properly contextualised meaning of the words in these subsections lends weight to the argument that subsection (4) also applies to the incidence of the duty by parents to support a major dependent child when a court grants a divorce between parties to a marriage relationship.

Furthermore, the ordinary grammatical, properly contextualised meaning of the words used in section 6(1)(*a*) and (3), as well as the rationale of section 6, lend support to an interpretation of section 6 that grants a parent *locus standi in iudicio* to claim maintenance on behalf of adult dependent children upon divorce from the other parent. The Divorce Act does not require an adult dependent child to be a party to, or to be joined to, the divorce proceedings between their parents. Furthermore, a divorce order terminating a marriage between the spouses only binds the parents, and the adult dependent child can claim for maintenance from the parent(s) in terms of the Maintenance Act 99 of 1999.

The SCA stated that an interpretation of section 6 of the Divorce Act that excluded a parent from having *locus standi in iudicio* to claim for maintenance from the other parent on behalf of an adult dependent child would not pass constitutional muster, as it would infringe the adult dependent child’s right to dignity, emotional well-being and equality. Furthermore, to allow such an interpretation of section 6 would result in the absurdity of excluding a parent from having *locus standi in iudicio* to claim

for maintenance for and on behalf of a school-going child born of the marriage merely because they have reached the age of 18.

The SCA, therefore, held that an interpretative analysis of section 6(1)(*a*) and (3) of the Divorce Act leads to a recognition of parents' *locus standi in iudicio* to claim maintenance for and on behalf of their dependent adult children upon their divorce. Given the words used in their ordinary grammatical meaning, properly contextualised, and the manifest purpose of section 6, an interpretation that preserves the section's constitutional validity is reasonably possible.

3 2 2 The age of majority

The enactment of the Children's Act reduced the age of majority from 21 to 18 years. Parents have both a common-law and a statutory duty of support towards their children according to their means. This duty of support means that parents are under a legal obligation to provide for the needs of the children by either providing the items that they need or alternatively, by providing money towards payment for these items. Where a child has two parents, the duty of support is shared between the two parents on a *pro rata* basis according to the means of the parents. In other words, the parent who earns more or who has more means of other kinds is obligated to provide more child support than the other parent.

This duty of support will remain intact for as long as the parent is able to supply the support and the person who is claiming the support is in need of it. The majority status of the child does not dissolve a parent's duty to provide support to the child. This position prevailed even prior to the enactment of the Children's Act when the age of majority was 21 years old.

The court recognised that at the age of 18 years the majority of children are still in the process of completing their secondary education, or have just started their tertiary education, and therefore, remain financially dependent on their parents long after they reach the age of majority. The court also took cognisance of the fact that it often takes time for young adults to obtain employment. Therefore, the fact that children lose some of the protective measures afforded to them on the basis that they have reached the age of majority in terms of section 1 of the Children's Act is problematic, as, in most cases, 18-year-old persons lack the financial independence that is commonly associated with majority.

The court proceeded to cite various cases that support the position that parents have a legal duty to support their children, even when a marriage is terminated by divorce, and that this duty of support is not dissolved when a child reaches the age of majority. The court also confirmed that section 6 of the Divorce Act recognises the duty to support an adult dependent child, and a maintenance order does not replace or alter a divorced parent's common-law obligation to support their dependent children.

Having established that the parental duty to support adult dependent children is recognised by section 6 of the Divorce Act, the court furthermore, stated that insofar as the duty of support is concerned, section 6(1)(*a*) and

(3) do not distinguish between a minor and a major dependent child. Furthermore, section 6(3) allows the court to make any order it deems fit with regard to the maintenance claim of an adult dependent child.

3 2 3 The best interests of a minor or dependent adult child of the marriage

Cognisant of the best-interests-of-the-child standard, the SCA echoed a sentiment expressed in *JG v CG* (*supra* par 46) that dependent children should for as long as possible not be involved in the conflict between divorcing parents, and it is undesirable for children to have to take sides. The court acknowledged, rather, that it is in the best interests of a child to maintain a meaningful relationship with both their parents after a divorce. Therefore, to interpret section 6 as excluding a parent from having *locus standi in iudicio* to claim maintenance from the other parent on behalf of an adult dependent child would not be in a child's best interests. The court cited the case of *AF v MF* (*supra* par 75), where it was correctly observed that:

> "[c]ourts should be alive to the vulnerable position of young adult dependants of parents going through a divorce. They may be majors in law, yet they still need the financial and emotional support of their parents. The parental conflict wrought by divorce can be profoundly stressful for young adult children, and it is particularly awkward for the adult child where the parents are at odds over the quantum of support for that child. Moreover, where one parent is recalcitrant, the power imbalance between parent and child makes it difficult for the child to access the necessary support. It is unimaginably difficult for a child to have to sue a parent for support – the emotional consequences are unthinkable."

At paragraph 25, the court observed that

> "[i]t is important to protect the dignity and emotional wellbeing of young adult dependants of divorcing parents by regulating the financial arrangements for their support in order to eliminate family conflict on this score and create stability and security for the dependent child."

The court furthermore cited *Bannatyne v Bannatyne* ([2002] ZACC 31; 2003 (2) SA 363 (CC) par 30) to highlight the disparities

> "between mothers who upon divorce face the double disadvantage of being overburdened in terms of responsibilities and under-resourced in terms of means and fathers who remain actively employed and generally become economically enriched. Effective mechanisms for the enforcement of maintenance obligations are thus essential for the simultaneous achievement of the rights of the child and the promotion of gender equality."

The SCA, therefore, held that an interpretative analysis, leads to the inevitable conclusion that section 6(1)(*a*) and (3) of the Divorce Act vests parents with the requisite legal standing to claim maintenance for and on behalf of their dependent adult children upon their divorce.

The SCA held that given the words, used in their ordinary grammatical meaning, properly contextualised, and the manifest purpose of section 6, an interpretation that preserves its constitutional validity is reasonably possible.

The special plea filed by the father failed, and the SCA upheld the appeal with costs. The order of the Eastern Cape High Court was, therefore, set aside.

4 Legal implications and discussion

Parenthood automatically gives rise to the legal obligation of maintenance of a child. This is evidenced by section 28 of the Constitution, the common-law parental duty of support and sections 18(2)(*b*) and 1(1) of the Children's Act. Furthermore, section 6 of the Divorce Act also refers to the parental duty of support and maintenance. It is trite law that the parental duty of support is not terminated when a child reaches the age of majority, provided the child is still financially dependent on the parents. Therefore, the biological children of parents are allowed to bring a maintenance claim, even where these children are well over the age of majority.

This duty of support arises at the birth of the child. In the case of the common law, this duty of support subsists until the child is financially independent. This means that a biological child may have a claim for maintenance against their parents even when they are well over the age of majority. The problem facing the initiation of such a claim is in the practical execution of the claim and this is most evident with respect to an adult child who is still financially dependent on their parents for financial support.

In terms of section 17 of the Children's Act, a person attains the age of majority on their eighteenth birthday. However, despite such majority, the individual nonetheless remains in the position of a child as the age of majority does not automatically mean that they have the maturity, capability or independence normally associated with majority status. The case under consideration questions the practical execution of lodging a claim for maintenance, and whether an adult dependent child is required to lodge a claim for maintenance for themselves. The effect such application for maintenance would have on the welfare of children who find themselves having to institute proceedings against a parent and the potential negative consequences such application may have on the parent-child relationship in light of the recognised advantages of family preservation must be considered. Furthermore, while a child has attained the age of majority, this does not automatically mean that the child has the maturity, ability, independence and attributes usually associated with majority status. Although South African legislation makes provision for the right to maintenance, consideration must be given to the effect that an application for maintenance has on the welfare of a child who has to institute proceedings against a parent, and the potential negative consequences such application may have on the parent-child relationship in light of the recognised advantages of family preservation.

Where there are financially dependent major children born to parents whose relationship has broken down irretrievably, and a divorce has been initiated, the question arises as to whether one parent of the children has *locus standi in iudicio* to claim maintenance from the other parent on behalf of their adult dependent child. In some instances, the High Court has held

that a parent does in fact have the requisite *locus standi*, while other judgments have concluded to the contrary (see discussion of the court cases by the High Court under heading 3 1 above). The reason that courts have reached opposing decisions in this regard is that the adult dependent child has *locus standi in iudicio* by reason of being a major, and therefore has the legal capacity to claim maintenance on their own behalf.

However, in circumstances where an adult dependent child does not wish, for whatever reason, to initiate maintenance proceedings against their parent, the question arises as to whether the parent of the child has the necessary *locus standi in iudicio* to lodge a claim for maintenance against the other parent. Where a financially dependent adult child has the necessary capacity, does a parent no longer have the legal capacity to initiate proceedings on their behalf?

Section 28 of the Constitution recognises that children are especially vulnerable to violation of their rights and that they need special protection, especially given the South African legal past, where children's rights were often neglected and unlawfully infringed. It is for this reason that, although children can invoke rights conferred upon everyone in terms of the Constitution, they are afforded special protection by virtue of section 28. Moreover, section 28(2) specifically prescribes that a child's best interests are of paramount importance in every matter relating to the child. Section 28(2) constitutionalises both the South African common-law rule relating to the child's best interests and its recognition in international law (see article 3 of the United Nations Convention on the Rights of the Child; and article 4(1) of the African Charter on the Rights and Welfare of the Child).

Section 9 of the Children's Act similarly requires that the standard of the child's best interests is of paramount importance and must be applied in all matters concerning children. Case law has demonstrated that the principle of the child's best interests is applied in matters involving children, especially in matters where a child's parents are getting divorced. In the implementation of the standard of the best interests of the child, divorce courts are required to make meaningful and informed decisions pertaining to children born of the marriage so that the welfare of the children is protected. As can be imagined, when parents are getting divorced, it is often extremely stressful for the children. To have a prolonged and acrimonious battle between parents regarding the care, custody and maintenance of the children is obviously not in the best interests of the children. Section 6(4) of the Children's Act emphasises the need for a quick and non-confrontational divorce.

It is submitted that the High Court in this case did not properly consider the effect that application for maintenance by a child against their parent can have on their relationship. The court in this instance did not concern itself with the preservation of a healthy relationship between the divorcing parties and their children despite taking cognisance of the *AF v MF* case, which highlights the vulnerability and stress of young adult dependants when their parents are divorcing. It is submitted that children born of the marriage, even if they are adults, should be as far removed from the divorce proceedings as possible.

While R and B had the necessary mental capacity and ability to institute a claim for maintenance in their own names, it is submitted that the High Court did not consider the physical disability and challenges experienced by R because of the car accident.

It is furthermore submitted that while the High Court established that both R and B were financially dependent on their parents, the decision of the court that they had to be joined in the divorce proceedings in respect of their claim for maintenance was not in the best interests of the adult dependent children as required in terms of section 6 of the Divorce Act.

For this reason, it is submitted that the SCA's approach to the legal issue – that a proper interpretation of section 6 of the Divorce Act had to be undertaken – is the correct approach.

5 Conclusion

A maintenance claim is ancillary to the common-law duty of support, and both parents remain responsible for the upkeep of their children during and after divorce. The overall theme of this SCA case concerns the judicial interpretation of the provisions of the Divorce Act with respect to the *locus standi* of a parent to initiate maintenance proceedings on behalf of a child. Case law has provided varied interpretations of section 6. As such, either parent has the necessary *locus standi* to claim maintenance from their estranged partner on behalf of their adult dependent children.

The court considered the vulnerable position of mothers of adult dependent children, and their position when faced with limited resources and being left to bear the continuing (and in instances such as the case considered, increased) financial responsibility to provide the necessary care for their children during a divorce, while fathers "remain actively employed" and become "economically enriched" during and after the proceedings.

The judgment is to be welcomed, as it has now affirmatively resolved the question whether a parent can claim maintenance on behalf of adult dependent children from the divorced partner. Furthermore, the SCA resolved the conflicting High Court decisions by providing the proper interpretation of sections of the Divorce Act.

R Denson
Nelson Mandela University

G van der Walt
Nelson Mandela University

EDITORIAL NOTE / REDAKSIONELE NOTA

OBITER is published triannually and welcomes contributions in English.

Contributions are received throughout the year and will be subject to peer-review prior to being accepted for publication. An English summary not exceeding 300 words must accompany the submission of full-length articles, which must preferably not exceed 7000 words.

All contributions must be sent *via* email to Adriaan.VanDerWalt@mandela.ac.za (Editor) in a file written in a recent version of Microsoft Word. It may be required that a hard copy of a contribution be sent to the following address: The Editor, *OBITER*, Faculty of Law, PO Box 77000, Nelson Mandela University, Port Elizabeth, 6031.

Page charges will be levied. The tariff is R180,00 per page.

—