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SOCIAL SECURITY FOR PERSONS WITH DISABILITIES IN SOUTH AFRICA: COMPLIANCE WITH ARTICLE 28(2) OF THE CONVENTION ON THE RIGHTS OF PERSONS WITH DISABILITIES

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SUMMARY

The United Nations Convention on the Rights of Persons With Disabilities (CRPD) was adopted in 2006 in order to address continued marginalisation of persons with disabilities. Since the adoption of the CRPD, the rights of persons with disabilities have received more scrutiny than previously. The Preamble to the CRPD states that "persons with disabilities continue to face barriers in their participation as equal members of society and violations of their human rights in all parts of the world". The founding principle of the CRPD is that persons with disabilities are entitled to participate fully and equally in society, irrespective of their individual disability. To achieve this goal, the CRPD provides for a number of rights that must be implemented by States Parties that have signed and ratified it. The rights included in the CRPD contribute towards the achievement of full and equal participation in society. Article 28 of the CRPD guarantees two rights that contribute towards the achievement of full and equal participation in society of persons with disabilities. These are the right to an adequate standard of living, and the right to social protection.

This article establishes the scope and content of the right to social security as a component of the rights guaranteed in article 28. To this end, the obligations created by the CRPD related to social security provided by States Parties are established. The current South African social security system pertaining to persons with disabilities is discussed and analysed to determine whether it is compliant with the obligations created in article 28 of the CRPD. Finally, shortcomings in the existing social security system are identified and potential remedies suggested to address these.

1 INTRODUCTION

Persons with disabilities are among the most marginalised in societies around the world.[1] The United Nations Convention on the Rights of Persons With Disabilities (CRPD) was adopted in 2006 in order to address such continued marginalisation.[2] Since the adoption of the CRPD, the rights of persons with disabilities have received more scrutiny than previously.[3] The Preamble to the CRPD states that "persons with disabilities continue to face barriers in their participation as equal members of society and violations of their human rights in all parts of the world". The founding principle of the CRPD is that persons with disabilities are entitled to participate fully and equally in society, irrespective of their individual disability.[4] To achieve this goal, the CRPD provides for a number of rights that must be implemented by States Parties that have signed and ratified it.[5] The rights included in the CRPD thus contribute towards the achievement of full and equal participation in society. Article 28 of the CRPD guarantees two rights that contribute towards the achievement of full and equal participation in society of persons with disabilities. These are the right to an adequate standard of living, and the right to social protection.

1 1 The right to an adequate standard of living

Article 28(1) of the CRPD provides:

> "States Parties recognize the right of persons with disabilities to an adequate standard of living for themselves and their families."

Article 28(1) provides that persons with disabilities have the right to an adequate standard of living, which includes certain necessities (food, clothing, housing) and the continual improvement of living conditions of persons with disabilities.[6] The proper implementation of the right to an adequate standard of living will empower persons with disabilities to participate fully and equally in society, on an equal basis with others.[7]

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1 Agmon, Sa'ar and Araten-Bergman "The Person in the Disabled Body: A Perspective on Culture and Personhood From the Margins" 2016 15 *International Journal of Equity Health* 146 147.

2 United Nations (UN) *Convention on the Rights of Persons with Disabilities* A/RES/61/106 (2006). Adopted: 13/12/2006; EIF: 03/05/2008.

3 Basson "Towards Equality for Women With Disabilities in South Africa: The Implementation of Articles 5 and 6 of the Convention on the Rights of Persons with Disabilities" 2021 9 *African Disability Rights Yearbook* 3 3.

4 *Ibid*.

5 Signature accompanied by ratification makes the CRPD binding on such States Parties.

6 UN Ad Hoc Committee on an International Convention *Compilation of Proposals for a Comprehensive and Integral International Convention to Promote and Protect the Rights and Dignity of Persons With Disabilities* (A/AC.265/CRP.13) submitted at the second session of the Ad Hoc Committee, 16–27 June 2003, New York.

7 Basson "State Obligations in International Law Relating to the Right to an Adequate Standard of Living for Persons With Disabilities" 2017 21 *Law, Democracy and Development* 68 79.

1 2 The right to social protection

Article 28(2) of the CRPD provides that States Parties recognise the right to social protection of persons with disabilities and that States Parties "shall take appropriate steps to safeguard and promote the realization of this right". Social protection is considered one of the means through which persons with disabilities can achieve an adequate standard of living and thereby achieve full and equal participation in society.[8] Social protection measures are generally aimed at promoting social justice and enabling economic equity.[9] The inclusion of the right to social protection in the CRPD is the first time that this right has been expressly guaranteed for persons with disabilities in international law.

Article 28(2) of the CRPD guarantees the right to social protection for persons with disabilities. Social protection includes financial support and extends to goods, services and programmes aimed at realising full participation in society for all persons.[10] Article 28(2)(*b*) further provides that States Parties must ensure access to social protection programmes and poverty reduction programmes as part of the broader mandate to provide social protection to persons with disabilities. Many countries have implemented a form of poverty reduction programme called social security. The purpose of social security measures is to provide financial support to persons who require it, either permanently or temporarily.[11] Social security measures are meant to alleviate the costs and/or loss of income associated with certain contingencies.[12] Disability is widely regarded as one of the core contingencies that must be provided for in social security schemes.[13]

There are approximately 4 million persons with disabilities in South Africa.[14] This is a significant proportion of the population and they should, in theory, all have access to some form of social security benefits when they need them. Considering that South Africa has signed and ratified the CRPD,[15] and is therefore bound by its provisions, it is important to consider periodically whether the country is meeting its obligations or whether there is

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8 Preamble to the CRPD.

9 Merrien "Social Protection as Development Policy: A New International Agenda for Action" 2013 *International Development Policy* 83 93.

10 Article 28(2) lists a number of goods, services and programmes that must be provided as part of social protection.

11 International Labour Organization (ILO) *Social Security (Minimum Standards) Convention* C102 (1952). Adopted: 28/06/1952; EIF: 27/04/1955.

12 Berghman *Basic Concepts of Social Security* (1991) 9; Dreze and Sen *Social Security in Developing Countries* (1991) 15.

13 Employment injury, sickness and invalidity were all included in the ILO's *Social Security (Minimum Standards) Convention* 102 of 1952 as contingencies for which financial support must be provided.

14 This is based on a reported percentage of 6.6 per cent in Statistics South Africa "General Household Survey 2021" 2021 26. This survey excluded children under the age of five for purposes of disability.

15 Article 4 of the CRPD. South Africa ratified the CRPD on 30 November 2007; see United Nations "Treaty Body Database" https://tbinternet.ohchr.org/_layouts/15/TreatyBodyExternal/Treaty.aspx?Treaty=CRPD&Lang=en (accessed 2023-04-23).

progress towards meeting those obligations.[16] The purpose of this article is to establish what is required by States Parties in implementing the social security element of the right to social protection, as guaranteed in article 28(2) of the CRPD. The current social security measures available for persons with disabilities in South Africa are then measured against those obligations to determine whether there is compliance with article 28(2).

2 THE SCOPE AND CONTENT OF THE RIGHT TO SOCIAL SECURITY IN THE CRPD

Since international law sets standards to which states must conform, it is logical that international law be used to establish guidelines for implementation of the rights created. Article 28(2) lends itself to the generation of a number of indicators that may be used to determine whether a State Party is currently meeting its obligations in terms of article 28(2).

Article 28(2) places an obligation on States Parties to provide social protection to persons with disabilities. In interpreting this obligation, regard must be had to the context and purport of this obligation. One element of social protection includes having the financial means to provide for maintenance needs.[17] As such, social security measures that aim to alleviate income loss or additional costs incurred that were caused by disability contribute towards the broader purpose of full and equal participation in society of persons with disabilities.

Since the achievement of an adequate standard of living is the overarching goal of article 28, it stands to reason that any social security measures provided by States Parties as part of their article 28(2) obligation to provide social protection must contribute meaningfully to the achievement of an adequate standard of living. Social security benefits provided by States Parties must therefore be o0f such a nature that these benefits contribute towards achieving an adequate standard of living for persons with disabilities. In the following paragraphs, the nature of the social security benefits required in terms of article 28 is discussed.

2 1 Access to social security benefits

Article 28(2)(*b*) provides that "States Parties … shall take appropriate steps … to ensure *access* by persons with disabilities … to social protection programmes and poverty reduction programmes".[18] This means that States Parties have an obligation to implement the right to social protection. Since social security is an essential element of the right to social protection, this in turn means that social security schemes must be implemented by States Parties and, further, that persons with disabilities must have access to these schemes. States Parties must thus ensure that there are social security

[16] The CRPD itself requires that States Parties submit periodic reports on the status of the implementation of the rights in the CRPD; see article 35 of the CRPD.

[17] UN Economic and Social Council *Enhancing Social Protection and Reducing Vulnerability in a Globalizing World: Report of the Secretary General* E/CN.5/2001/2 (13–23 February 2001).

[18] Author's own emphasis.

measures available for persons with disabilities, and that persons with disabilities are able to apply for social security benefits on an equal basis with others.

For social security benefits to be accessible by persons with disabilities, unduly restrictive qualifying criteria should be avoided when awarding social security benefits. Such avoidance would prevent social security benefits from excluding persons with disabilities who genuinely need the financial benefits offered. The aim of social security for persons with disabilities should therefore be to include as many recipients as reasonably possible.

2 2 Adequacy of social security benefits

When investigating whether social security benefits contribute towards realising an adequate standard of living, and achieving full and equal participation in society, the level of benefit paid must be taken into consideration. While any financial assistance for persons in poverty-stricken circumstances is valuable, this financial assistance should facilitate equal participation in society.[19] In situations where state-provided financial assistance is the only source of income for a person, such assistance should take into consideration the unique financial needs of each recipient, in order to alleviate the particular financial burdens that that person experiences.[20] The adequacy of social security benefits refers to the level of benefit received by each person and how this benefit contributes towards the achievement of full and equal participation in society.[21] In providing benefits that meaningfully contribute towards full and equal participation in society, the financial needs of persons and the resources available to States Parties for distribution must be balanced for optimal efficacy.[22]

Social security benefits should provide a recipient with income to meet their basic individual needs, and ultimately facilitate full and equal participation in society. Since the aim of social security benefits is to relieve the person with the disability of both the costs borne and any income lost as a result of disability, it is submitted that States Parties should be cognisant of the financial consequences faced by persons with disabilities. Benefits provided to a person with a disability who has lost income should therefore aim to replace that income (at least partially) as well as cover the expenses incurred as a result of the disability experienced. In other words, it is submitted that social security benefits provided to persons with disabilities should consist of two components – an income replacement component, since the recipient may not be able to work, and a further benefit aimed at relieving the costs borne by the recipient in relation to their disability. The determination of which of these components is payable should be done on a

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19 Wiid *The Right to Social Security of Persons With Disabilities in South Africa* (doctoral thesis, University of the Western Cape) 2015 160.

20 *Ibid*.

21 Wiid *The Right to Social Security of Persons With Disabilities in South Africa* 238.

22 Chenwi "Unpacking Progressive Realisation, Its Relation to Resources, Minimum Core and Reasonableness, and Some Methodological Considerations for Assessing Compliance" 2013 46(3) *De Jure* 742 744.

case-by-case basis to take into consideration the unique nature of disability and its impact on the person experiencing it.

In summary, social security benefits for persons with disabilities should be adequate to meet their financial needs. In determining an adequate amount, both income replacement and increased costs should be taken into consideration.

2 3 Use of social security benefits to realise other rights

The provision of financial assistance to persons with disabilities creates opportunities for social inclusion and better participation in society.[23] For example, the provision of adequate financial assistance may enable a person with a disability to make use of rehabilitation services or create the opportunity for further education. The provision of adequate social security benefits is thus vital for a number of related rights provided for in the CRPD.[24] In order to gauge whether a particular set of social security benefits contributes towards full and equal participation in society, the "buying power" of the amounts received must be evaluated to determine the extent to which a recipient remains financially marginalised.

3 THE RIGHT OF ACCESS TO SOCIAL SECURITY FOR PERSONS WITH DISABILITIES IN SOUTH AFRICA

Section 27(1) of the Constitution provides:

> "Everyone has the right to have access to (*a*) health care services, including reproductive health care; (*b*) sufficient food and water; and (*c*) social security, including, if they are unable to support themselves and their dependants, appropriate social assistance."

Section 27(1)(*c*) guarantees the right of access to social security including social assistance. This right of access to social security is not a direct right, but rather provides that a provider of social security can choose to whom it pays benefits.[25] In the context of the right of access to social security, including social assistance, the primary provider of benefits is the State.[26] In addition to the eligibility criteria that the State can apply, section 27(2) provides for internal limitations on the right of access to social security. Section 27(2) provides that the right of access to social security must be progressively realised, using reasonable measures within the resources available to the State. The impact of these limitations is discussed in the context of meeting the obligations created by article 28(2) of the CRPD below.

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23 Wiid *The Right to Social Security of Persons With Disabilities in South Africa* 304.

24 Such as the right to an adequate standard of living, which incorporates the right to social protection.

25 The eligibility criteria for social assistance in South Africa is established in the Social Assistance Act 13 of 2004 (SAA).

26 Strydom *Essential Social Security* (2006) 7.

"Social protection" has been defined in South Africa by the Taylor Commission. According to the Commission,

> "[c]omprehensive social protection for South Africa seeks to provide the basic means for all people living in the country to effectively participate and advance in social and economic life, and in turn to contribute to social and economic development."[27]

The term "social security" is undefined in South African law.[28] The reason for this lack of a definition is simple: the concept of social security is in a state of flux and is considered too dynamic to be confined to a single definition.[29] In addition, the understanding of social security as a concept may differ from country to country, and even from person to person.[30] It would therefore be difficult to construct a definition of social security that includes the various conceptualisations of social security. Despite the general consensus that social security cannot be defined, numerous institutions have put forward explanations of the term in order to provide some clarity as to what social security means in a particular context. The preferred South African description was suggested in 1997 by the Department of Welfare (now known as the Department of Social Development).[31] According to the White Paper for Social Welfare,

> "[s]ocial security covers a wide variety of public and private measures that provide cash or in-kind benefits or both, first, in the event of an individual's earning power ceasing, being interrupted, never developing or being exercised only at unacceptable social cost and such person being unable to avoid poverty and secondly, in order to maintain children."[32]

The White Paper considers that social security measures are to include cash benefits as well as benefits that are "in-kind" and that such benefits could include the provision of health care, housing and other social services. Social security measures are therefore not limited to the provision of financial benefits to persons in the South African context, although it could be argued that these goods and services are better categorised under the broader category of social protection. While the importance of the provision of these services for persons with disabilities cannot be denied, the focus of this article is the adequacy of cash benefits provided to persons with disabilities in terms of the social security system applicable in South Africa.

The White Paper's explanation of social security refers to "public and private measures" aimed at providing financial and other types of support to needy individuals. Social security for persons with disabilities in South Africa thus consists of both public and private measures, which can broadly be categorised as social assistance and social insurance, respectively.[33] The

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27 Taylor *Transforming the Present – Protecting the Future: Report of the Committee of Inquiry into a Comprehensive System of Social Security for South Africa* (2002) 41.

28 Olivier *Introduction to Social Security* (2004) 13.

29 Strydom *Essential Social Security* 6.

30 Pieters *Social Security: An Introduction to the Basic Principles* (2006) 1.

31 Department of Welfare *White Paper for Social Welfare: Principles, Guidelines, Recommendations, Proposed Policies and Programmes for Developmental Social Welfare in South Africa* (1997).

32 Department of Welfare *White Paper for Social Welfare* 1997 49.

33 Department of Welfare *White Paper for Social Welfare* 50.

source of such assistance depends on the type of social security measure in place, but is usually the individual themselves, the State or a combination of both.[34] The primary objective of social security legislation is to provide a framework in terms of which financial support can be provided to individuals in need of such financial assistance.[35] The purpose of this assistance is to provide income in situations where a person is unable to provide for their own financial needs.[36]

3 1 Social assistance for persons with disabilities in South Africa

The primary social assistance available to persons with disabilities in South Africa is the state-administered disability grant, which is non-contributory.[37] The Social Assistance Act[38] provides the eligibility criteria for this grant – primarily, reaching the prescribed age (currently 18), and providing proof of disability that prevents the person from being able to provide for their own maintenance needs. In addition, the applicants for the disability grant are means-tested, and applicants who exceed the asset and income thresholds will have their applications denied.[39]

In addition to the disability grant, there are two further grants that may be paid to persons with disabilities in certain circumstances. The grant-in-aid is paid to disability grant recipients who need full-time care by a third party.[40] This supplemental grant consists of monthly payments of R480 per recipient.[41] Social relief of distress is a grant that is paid independently of any other grants in situations of crisis where a person with a disability requires temporary financial assistance.[42]

3 2 Social insurance for persons with disabilities in South Africa

Social insurance is the branch of social security comprising measures aimed at providing financial security for employees in the event that they become unable to work.[43] Participation in most social insurance schemes is inextricably linked to employment, and is thus only available to persons who

34 Strydom *Essential Social Security* 6.
35 ILO *Introduction to Social Security* (1984) 3.
36 *Ibid*.
37 Liffmann "Scope of Application" in Olivier *Social Security Law: General Principles* (1999) 50.
38 13 of 2004.
39 Regulations relating to the application for and payment of social assistance and the requirements of conditions in respect of eligibility for social assistance GN R898 in *GG* 31356 of 2008-08-22.
40 Olivier *Social Security: A Legal Analysis* (2003) 217.
41 South African Government "Grant-in-aid" (no date) https://www.gov.za/services/social-benefits/grant-aid (accessed 2023-04-23).
42 South African Government "Social Relief of Distress" (no date) https://www.gov.za/services/social-benefits/social-relief-distress (accessed 2023-04-23).
43 S 9 of the SAA.

are (or previously were) employed.[44] Social insurance measures include occupational retirement funds,[45] the Compensation for Occupational Injuries and Diseases Fund[46] and the Unemployment Insurance Fund.[47] The benefits paid by each of these funds is highly individual and depends, *inter alia*, upon contributions made by or on behalf of the member of the fund.

4 MEASURING SOUTH AFRICAN COMPLIANCE WITH ARTICLE 28(2) OF THE CRPD

The obligations created by article 28(2) of the CRPD are binding on South Africa. It is therefore necessary to determine whether South Africa is meeting these obligations. Each obligation (as established above) is applied in this article to the South African social security system as it applies to persons with disabilities. This application involves a review of legislation and policy applicable to social security for persons with disabilities. The ultimate goal of this analysis is to determine whether South Africa is meeting the obligations created by article 28(2) of the CRPD, and whether there are any steps that need to be taken to improve compliance with article 28(2).

4 1 The impact of section 27(2) of the Constitution on article 28 of the CRPD

According to section 27(2), "[t]he state must take reasonable legislative and other measures, within its available resources, to achieve the progressive realisation of these rights." The terms "reasonable measures", "available resources" and "progressive realisation" have specific meanings for the right of access to social security, which are discussed below.

Section 27(2) is an internal limitation on the right of access to social security, since it provides that access to social security only needs to be provided through reasonable measures with the resources available to the State, and that the right should be realised progressively. Section 27(2) effectively also acts as a limitation to the right to social protection in article 28 of the CRPD, since international law is binding only to the extent that it is not in conflict with domestic law. Since the Constitution has this internal limitation on the right of access to social security, the right to social protection in the CRPD is subject to those same limitations.

According to the Constitutional Court, when assessing measures taken to realise the right of access to social security the court is not concerned with the availability of "more desirable" measures, but rather with whether the measures taken were "reasonable".[48] The court recognises that many different measures may be considered reasonable in any set of

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44 The Road Accident Fund, which technically forms part of social insurance, does not require that a claimant be an employee or former employee. See the Road Accident Fund Act 56 of 1996.

45 Established in terms of the Pension Funds Act 24 of 1956.

46 Established in terms of the Compensation for Occupational Injuries and Diseases Act 130 of 1993.

47 Established in terms of s 4 of the Unemployment Insurance Act 63 of 2001.

48 *Government of the Republic of South Africa v Grootboom* 2001 (1) SA 46 (CC) par 41.

circumstances and, as long as the particular measures chosen can be considered reasonable in the circumstances, this requirement is met.[49] There is no established test for reasonableness, and the reasonableness of a series of measures must be considered on a case-by-case basis.

Section 27(2) provides that the right of access to social security must be progressively realised within the resources available to the State. The problem of funding social security measures is ever present, and this has been taken into consideration by the drafters of the Constitution.[50] Essentially, the right of access to social security is limited by the stipulation that the State is only compelled to provide social security benefits where it has the resources to do so.

The term "progressive realisation" has been defined by the UN Committee on Economic and Social Rights, and this definition has been met with some criticism.[51] According to the Committee on Economic and Social Rights, progressive realisation creates an obligation on a state "to move as effectively and expeditiously as possible to securing its ultimate goal". It was previously said that the right of access to social security cannot be enforced (or realised) upon demand, and this is echoed in the requirement that the right be progressively realised. According to the Constitutional Court in the *Grootboom* case, the goal of the Constitution is that the basic needs of all in our society be effectively met and the requirement of progressive realisation means that the State must take steps to achieve this goal. It means that accessibility should be progressively facilitated: legal, administrative, operational and financial hurdles should be examined and, where possible, lowered over time.[52]

The right to social security in the CRPD must therefore also be realised progressively, through reasonable measures, and within the resources available to the State.

4 2 Access to social security benefits

As discussed previously, section 27(1)(*c*) of the Constitution guarantees everyone a right of access to social security, including social assistance. This right must be progressively realised within the available resources of the State.[53] This is essentially also what is required in terms of article 28, read with article 4(2) of the CRPD.[54] In order for South Africa to be in compliance with its obligation to make social security benefits accessible to persons with disabilities, the number of persons covered by social security measures must be reasonable. The CRPD makes no qualification as to which persons with disabilities should have access to social security, but emphatically states that persons with disabilities as a group have a right to

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49 *Ibid*.

50 *Government of the Republic of South Africa v Grootboom supra* par 94.

51 Barbeton "'Progressive Realization' of Socio-Economic Rights" 1999 2(2) *ESR Review* 2.

52 *Government of the Republic of South Africa v Grootboom supra* par 45.

53 S 27(2) of the Constitution of the Republic of South Africa.

54 Article 4(2) provides that the rights in the CRPD must be progressively realised within the maximum of the available resources of States Parties, without prejudice to those obligations in the CRPD that must be implemented immediately according to international law.

social security.[55] It can therefore be inferred that the purport of article 28(2) is that all persons with disabilities should have access to some form of social security.

As discussed above, the primary social assistance available to persons with disabilities is the state-administered disability grant. In September 2022, there were 1.4 million disability grant recipients in South Africa.[56] This represents approximately 35 per cent of persons with disabilities in South Africa. It should be borne in mind that the purpose of social assistance is to provide financial support only to those persons with disabilities who cannot provide for their own maintenance needs – as such, coverage of social assistance should in theory never be 100 per cent. If 100 per cent of the persons with disabilities were receiving social assistance, this would mean that all persons with disabilities are in a position where they are dependent on social assistance for income. The more important question is whether the qualifying criteria for social assistance are unduly exclusive, therefore making assistance inaccessible to persons with disabilities.

The criteria for the disability grant are: the applicant must be at least 18 years of age;[57] the applicant must not be able to provide for their own maintenance as a result of a physical or mental disability;[58] the applicant must be resident in South Africa at the time of making the application;[59] the applicant must be a South African citizen or permanent resident;[60] and the applicant must meet the requirements of a means test.[61]

The means test has been identified as a substantial barrier to accessing social assistance. The means test effectively serves as a disincentive to work or save money, since any income will reduce the amount payable in terms of the grant.[62] While there are ongoing endeavours to provide social assistance to more persons with disabilities and to increase these benefits,[63] these endeavours will not have a substantial impact until the means test is either substantially revised or removed entirely.[64] It can therefore be argued that persons with disabilities in South Africa do not have adequate access to social assistance as a result of the excluding effect of the means test.

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55 Article 28(2) provides that "States Parties recognise the right of persons with disabilities to social security". This is an unequivocal statement, without qualification.

56 South African Government "Disability Grant" (no date) https://www.gov.za/services/social-benefits/disability-grant (accessed 2023-04-23).

57 Reg 3 of the Regulations to the SAA.

58 S 9(*b*) of the SAA.

59 S 5(1)(*b*) of the SAA.

60 S 5(1)(*c*) of the SAA provides that only South African citizens may apply for social grants. The Regulations, however, provide that permanent residents and refugees may also apply for the disability grant. See also *Khosa v Minister of Social Development, Mahlaule v Minister of Social Development* 2004 (6) SA 505 (CC) and s 27(*b*) of the Refugees Act 130 of 1998.

61 S 5(2)(*b*) of the SAA. The formula for the means test is found in the Regulations to the SAA.

62 Walker, Sinfield and Walker *Fighting Poverty, Inequality and Injustice* (2011) 145. See also Standing and Samson *A Basic Income Grant for South Africa* (2003) 21 and Ringen "Social Security, Social Reform and Social Assistance" in Pieters *Social Protection of the Next Generation* (1998) 40.

63 This is required in terms of the "progressive realisation" component of s 27(2) of the Constitution.

64 Wiid *The Right to Social Security of Persons With Disabilities in South Africa* 219.

A significant number of persons with disabilities are statutorily excluded from certain social insurance schemes,[65] since these schemes are inextricably linked to employment. Persons with disabilities who have never worked are therefore immediately excluded from social insurance benefits. Considering the high level of unemployment in South Africa, a substantial portion of the population is also barred from accessing social insurance measures.[66] This high unemployment rate is a significant barrier to accessing social insurance for persons with disabilities, who experience extremely low levels of employment across all skill levels in South Africa.[67] The average employment rate for persons with disabilities hovers around 1 per cent from top management to unskilled labour with very little variation across skill levels.[68]

Once access to social insurance is gained via employment, the membership of social insurance schemes is not guaranteed. For example, membership of occupational retirement funds in South Africa is not compulsory.[69] Membership is granted on a voluntary basis, and if an employee chooses not to join an occupational retirement fund, there will be no benefits payable to them from that fund.[70] The current lack of a national social security scheme also compounds the problem of access. Compulsory national social security schemes provide extensive coverage to persons, both in the form of social assistance and social insurance.[71] A national social security fund has been mooted in South Africa for a number of years, but very little progress towards its implementation has been made.[72]

In effect, social insurance remains inaccessible for large numbers of persons with disabilities because of its link to employment. The barriers of high unemployment, the voluntary nature of certain occupational funds, and the lack of access to a national social security fund create a situation where it cannot be said that persons with disabilities have adequate access to social insurance.

Despite the fact that social assistance is adequately accessible to persons with disabilities, the same cannot be said for social insurance. This means that elements of the social security system in South Africa are inaccessible for persons with disabilities, which conflicts with the obligations imposed on States Parties by the CRPD. In light of the barriers that restrict access to social insurance described above, it is submitted that South Africa is not

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65 For e.g., self-employed persons are excluded from COIDA and government workers are excluded from the UIF. Persons with disabilities working in these roles are therefore excluded from these social insurance schemes.

66 According to Statistics South Africa, the unemployment rate in the third quarter of 2022 was approximately 33 per cent; see Statistics South Africa *Quarterly Labour Force Survey Q3 2022* 2022 3.

67 See generally the 22nd Commission for Employment Equity *Annual Report 2021–22* 2022.

68 *Ibid*.

69 Department of Social Development *Reform of Retirement Provision* (2007) 61.

70 For e.g., s 12 of the Unemployment Insurance Act 63 of 2001 requires that an applicant for benefits be a contributor to the fund to claim such benefits.

71 National Treasury *Retirement Fund Reform: A Discussion Paper* (2004) 13.

72 Department of Social Development *Green Paper on Comprehensive Social Security and Retirement Reform* (2001) 11.

currently in compliance with the requirement of providing access to social security for persons with disabilities as required by article 28 of the CRPD.

4 3 Adequacy of social security benefits

To comply with article 28(2) of the CRPD, social security benefits paid should be adequate. For purposes of this article, adequacy relates to the extent to which the amount paid contributes towards full and equal participation in society.

The benefits provided in terms of social security are meant to assist in the achievement of full and equal participation in society.[73] In South Africa, social assistance benefits are quite low: each recipient is paid R1 990 per month.[74] The amount paid to recipients of the disability grant is considered insufficient to meet the cost of living of persons in receipt thereof, since the amount payable is considerably lower than the national minimum wage.[75] Consequently, recipients of the disability grant often find themselves living in relative poverty.[76]

Social insurance benefits are claimed by a person with a disability who was employed, and who has either lost their income entirely or has had their income reduced because of their disability.[77] Social insurance benefits are generally higher than social assistance benefits because benefits for most social insurance schemes are based on the earnings of the person before acquiring their disability.[78] Social insurance benefits can be paid on a temporary or permanent basis, depending on the nature of the disability and the future employment prospects of the person with a disability.[79] Considering that the unemployment rate is disproportionately high among persons with disabilities,[80] a temporary benefit from social insurance schemes may not meet the financial needs of the person. Furthermore, low benefits will not assist in the realisation of full and equal participation in society since the costs associated with disability will not be offset.[81] Persons with disabilities may therefore find themselves in a situation where their social insurance benefit has been exhausted and they have no recourse to

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73 Social security benefits alone are insufficient to achieve full and equal participation in society but are a major element in achieving such. See Basson 2017 *Law, Democracy and Development* 73.

74 South African Government https://www.gov.za/services/social-benefits/disability-grant.

75 The 2022 minimum wage of R23,19 equates to approximately R4 019 per month, based on an average 40-hour work week. The R23,19 was announced by the Minister of Employment and Labour in terms of s 6(5) of the National Minimum Wage Act 9 of 2018 on 8 February 2022.

76 Department of Social Development *Draft White Paper on a National Disability Rights Policy* (2014) 64.

77 Wiid *The Right to Social Security of Persons With Disabilities in South Africa* 180.

78 For e.g., sch 2 of COIDA provides that benefits for permanent disablement are capped at a maximum of 75 per cent of earnings prior to disablement.

79 For e.g., s 47 of COIDA provides for compensation in the event of temporary partial disablement and temporary total disablement, and s 49 for permanent disablement.

80 22nd Commission for Employment Equity *Annual Report 2021–22* (2022).

81 Department of Social Development *Elements of the Financial and Economic Costs of Disability to Households in South Africa* (2015).

other income, or where the benefit provided is too low to meet their maintenance needs.[82]

From the foregoing discussion, it can be concluded that South Africa is currently providing social assistance benefits to persons with disabilities that do not allow for the achievement of an adequate standard of living since the benefit provided is so low. Social insurance generally provides higher benefits that are linked to the income of the recipient. While these amounts are higher than those received in terms of social assistance, it is submitted that these benefits may still not be adequate to address the maintenance needs of the recipients, although this is difficult to establish firmly, since the benefits paid are highly individualised.

4 4 Use of social security benefits to realise other rights

According to the Committee on Economic, Social and Cultural Rights (CESCR), social security benefits should enable the recipient to "acquire at least essential health care, basic shelter and housing, water and sanitation, foodstuffs, and the most basic forms of education".[83] These are all elements of an adequate standard of living, which is inextricably linked to the right to social security. The right of access to social security is considered a chief contributor to achieving an adequate standard of living, which is guaranteed in terms of international law.[84] The social security benefits in South Africa must therefore contribute towards an adequate standard of living by enabling the recipient to access essential health care, basic shelter and housing, water and sanitation, foodstuffs and basic education.

It has already been established that the benefits provided in terms of the disability grant are very low.[85] At R1 990, the disability grant amount is just more than half of the national minimum wage amount. It can therefore be argued that the amount provided does not enable recipients to acquire the goods and services listed by the CESCR. At the very least, the amount payable is unlikely to completely cover the housing and health care costs that disability grant recipients need to meet. Social assistance for persons with disabilities is therefore not currently sufficient to realise the right to an adequate standard of living.

It is not simple to assess whether social insurance benefits are being used to realise an adequate standard of living for persons with disabilities. This is because each recipient of social insurance benefits receives a benefit that is based partially on their salary, which means benefits are highly individualised.[86] The level of social insurance benefits available to individuals may contribute greatly towards the realisation of an adequate standard of living on a case-by-case basis. However, while access to social insurance

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82 Wiid *The Right to Social Security of Persons With Disabilities in South Africa* 239.

83 United Nations Committee on Economic, Social and Cultural Rights *General Comment 19 Social Security* E/C.12/GC/19 (2008).

84 Basson 2017 *Law, Democracy and Development* 75.

85 See heading 4 3 above.

86 See heading 3 2 above.

remains limited for so many persons with disabilities owing to high unemployment, the level of benefit is essentially irrelevant. Even if the benefit received were more than enough to realise an adequate standard of living, the problem of accessibility is not solved. The fact that so few persons with disabilities have access to social security benefits make the inquiry into the ability of the recipient to use their benefits to realise other rights somewhat premature. It is thus submitted that social insurance benefits are not currently contributing towards the achievement of an adequate standard of living for persons with disabilities, since so many are excluded from social insurance schemes.

5 RECOMMENDATIONS

From the analysis conducted above, it becomes apparent that the social security measures available to persons with disabilities in South Africa do not comply with the requirements of article 28(2) of the CRPD. As a signatory State Party, South Africa is therefore in contravention of the CRPD until such time as the non-compliance with article 28(2) is remedied. This begs the question: how can this non-compliance be remedied? In the paragraphs below, suggested remedies for each of the key indicators are discussed.

5 1 Recommendations to improve accessibility

Article 28 of the CRPD requires that persons with disabilities have access to some form of social security. Social assistance is generally easily accessible for persons with disabilities who meet the qualifying criteria. However, the means test has been identified as a barrier to accessing the disability grant. While removing the means test has been mooted as a measure that would extend social assistance to more persons with disabilities by removing a problematic eligibility criterion, the issue of available resources must be borne in mind. The source of funding of social grants in South Africa is general revenue –, mainly income tax. There are currently approximately 7.5 million registered taxpayers in South Africa, while there are approximately 26 million social grant recipients. Social spending is thus already very high, especially considering the proportion of taxpayers to social grant recipients. The resources available to the State are therefore limited by the revenue generated by income tax. Considering that unemployment figures are worsening over time, the resources available to the State are concurrently decreasing. It is submitted that removing the means test as a qualifying criterion would place an undue burden on the State to fund a potentially substantial increase in disability grant recipients. In the case of social assistance, it is submitted that the removal of the means test is not reasonable in the circumstances.

With regard to social insurance, the major limiting factor in accessing social insurance schemes is the high unemployment rate in South Africa. There are two ways in which this problem can be approached – either by aiming to reduce the unemployment rate in South Africa, or by making occupational funds available to persons with disabilities irrespective of their

employment status. Both potential solutions have advantages and disadvantages.

While reducing unemployment is the ideal solution, since it would permit access to social insurance schemes that are otherwise exclusive, reduction in unemployment is not a simple exercise. There are issues to be considered relating to the available economic resources such as the funds available to create jobs, as well as the growth of the economy. To date, South Africa has not been able to implement any form of sustained job creation to alleviate the unemployment experienced. The reduction of unemployment is therefore not a practical solution to the inaccessibility of social insurance benefits.

The other option is to make social insurance schemes that have traditionally been linked with employment available to persons with disabilities who are not employees. This option does not make sense in the case of COIDA, since these benefits are predicated on injury or illness sustained in very specific conditions; providing benefits outside of these conditions would amount to a change in the nature of the funds. The same is true for many UIF benefits. In relation to retirement funds, even if membership were to be opened to all persons with disabilities, these persons may be unemployed or low-income earners, and therefore be unable to contribute towards these funds on a regular basis.

The implementation of a national social security fund that is partially contributory may address both the issue of funding benefits and that of the accessibility of benefits. There has also been movement towards the implementation of a national retirement/social security fund that will attempt to extend the coverage of social insurance to all vulnerable and previously excluded workers.[87] Membership of this fund will be mandatory and currently available discussion documents show that it will most likely allow for irregular contributions. In this way, persons with disabilities who may often be unable to work may still make some provision for their own retirement. This will improve the numbers of persons with disabilities having access to this aspect of social insurance once it is implemented.

5 2 Recommendations to improve adequacy of benefits

As discussed above, the amount paid to disability grant recipients is very low. The amount is slightly less than half the national minimum wage. How can the level of benefit paid be increased to better offset daily expenses as well as those incurred as a result of disability, while bearing in mind that the State is constrained by the limitation of available resources.

It has already been discussed that the pool of funds from which social grants is paid is finite and the long-term sustainability of current social spending is questionable. It is thus submitted that the solution to adequacy of benefits is not to dramatically increase the amount paid to disability grant recipients, but rather to aim to reduce the number of persons with disabilities who are solely reliant on social assistance for income. This involves creating

[87] National Treasury *Retirement Fund Reform: A Discussion Paper* (2004) 13.

employment for persons with disabilities. Job creation, while not an easy or simple task, alleviates the pressure on the current social grant system by simultaneously reducing the number of persons claiming benefits and increasing the number of persons who could potentially contribute to the funds available for redistribution through paying income tax.

Social insurance benefits are generally higher than social assistance benefits, because benefits for most schemes are calculated on the basis of earnings before acquiring the disability. However, considering that the unemployment rate is high among persons with disabilities, a low and temporary benefit from social insurance schemes may not meet the financial needs of the person (or their dependants). Persons with disabilities may find themselves in a situation where their social insurance benefit has been exhausted and they have no recourse to other income.

As far as the level of benefit received in terms of social insurance is concerned, the benefits tend to be more substantial than those received in terms of social assistance, since they are based on the recipient's former earnings.[88] While the benefits are not often reviewed or increased, the potential benefit that may be received is increased with an increase in the earnings of the employee. While these amounts are higher than those received in terms of social assistance, it is submitted that these benefits may still not be adequate to address the maintenance needs of the recipients, although this is difficult to establish firmly, since the benefits paid are highly individualised. It is therefore not possible to make a recommendation on improving the level of benefits paid, although the exclusive nature of social insurance in South Africa should not be forgotten.

5 3 Recommendations to improve the realisation of other rights through social security

As discussed previously, social security benefits should enable a recipient to realise other rights. Social assistance and social insurance should therefore be paid to enough persons with disabilities at a level that can make a meaningful difference to their daily lives. Considering that aspects of the current South African social assistance measures do not provide adequate coverage for persons with disabilities, since they are excluded from accessing benefits, and that the benefits provided are very low, it is submitted that social assistance alone is not sufficient to realise the right to an adequate standard of living as envisaged in the CRPD.

As is the case with assessing the adequacy of social insurance benefits, it is not simple to assess whether social insurance benefits are being used to realise an adequate standard of living for persons with disabilities. This is because each recipient of social insurance benefits receives a benefit that is based on their salary or earnings, which means benefits are highly individualised.[89] The level of social insurance benefits available may contribute greatly towards the realisation of an adequate standard of living. However, while access to social insurance remains limited for so many

[88] See heading 4 3 above.

[89] See heading 3 above.

persons, the level of benefit is irrelevant. It is submitted that social insurance benefits are not currently contributing towards the achievement of an adequate standard of living of persons with disabilities, since so many are excluded from social insurance schemes.

6 CONCLUSION

The CRPD is clear and unequivocal that persons with disabilities have the right to social security (as part of the broader right to social protection). Article 28 of the CRPD lends itself to the generation of a number of requirements that should be met by states when providing social security benefits. These requirements relate to the accessibility of benefits, the adequacy of benefits and the use of benefits to realise other rights. Each of these indicators has a scope and content that should be applied to determine whether a State Party to the CRPD is in compliance with their duty to provide social security benefits to persons with disabilities.

The application of these requirements to the social security system in South Africa reveals some concerning aspects of the current system. Social assistance in South Africa not only provides extremely low benefits, but also potentially creates a disincentive for disability grant recipients to work, through the use of certain qualifying criteria. Social insurance is exclusive and inaccessible to the large proportion of persons with disabilities who are unemployed. It is therefore clear that South Africa is currently not compliant with its social security obligations in terms of the CRPD.

Potential solutions for the shortcomings in the current social security benefits available to persons with disabilities include large-scale job creation and the introduction of a national social security fund. However, no solution is simple to implement, and any solution will require an ongoing commitment to improving the standard of living of persons with disabilities in South Africa. Such a commitment has not been evident to date, either through legislation or policy implementation. In order for South Africa to comply with the requirements established in article 28 of the CRPD, an increased prioritisation of the right to social protection for persons with disabilities must be forthcoming. Until such time, persons with disabilities remain economically marginalised and excluded from social security measures that could improve their prospects of full and equal participation in society.

INTERROGATING THE RIGHT TO BASIC EDUCATION OF UNDOCUMENTED CHILDREN IN THE CONTEXT OF THE CALL FOR THEIR EXCLUSION FROM PUBLIC SCHOOLS IN SOUTH AFRICA

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SUMMARY

The right to basic education is recognised as a fundamental human right that is guaranteed to everyone, including undocumented children under international and domestic law. However, the question needs to be asked whether this right extends to undocumented children living in South Africa when, at the start of every academic calendar, tales of children being denied enrolment in public schools owing to a lack of required identification or birth certificates dominate the media space. Apparent legal contradictions, a lack of proper understanding of extant laws protecting the right to basic education, and a lack of effective cooperation among stakeholders in the education section have continued to affect access to basic education for undocumented children in South Africa. This article reflects on the right to basic education of undocumented children in the context of the legality of the lingering call for the exclusion of undocumented children from public schools in South Africa.

1 INTRODUCTION

The significance of education to human and societal transformation has been well documented.[1] In his judgment delivered on the Limpopo textbook case in 2012, Kollapen J described education as operating on two levels: the "micro and the macro level".[2] At the macro level, education is a necessary tool for societal transformation; at the micro level, "it enables each person to

[1] United Nations (UN) Committee on Economic, Social and Cultural Rights (CESCR) *General Comment No 13: The Right to Education (Article 13) (1999)* E/C.12/1999/10. Adopted: 8/12/1999 par 1.

[2] *Section 27 v Minister of Education* [2012] ZAGPPHC 114 par 5.

live a life of dignity and participate fully in the affairs of society."[3] Education is viewed as a vital means of realising other human rights.[4] Education, according to Fafunwa, is the culmination of all the processes by which a child or young adult acquires the skills, attitudes and other types of behaviour that contribute to the betterment of the society in which they live.[5] The significance of education prompted its recognition as a fundamental human right by various international and regional human rights instruments.[6] It is on this basis that Onuora-Oguno describes the right to education as "one of the most important rights of our lifetime".[7]

It is therefore not surprising that the academic calendar begins every year with thousands of new learners registering for their schooling careers in South Africa and other parts of the world. The 2024 academic year in South Africa was no exception, and the media space was once again flooded with news of thousands of students starting their academic journey. While this moment represents a moment that is being celebrated by many, it also represents a sad reality for thousands of undocumented children residing in the country. For some, this moment represents anguish, denial, rejection and frustration, as they are denied placement in public schools either on account of their immigration status or as a result of the lack of relevant identity documents required by the national admission policy for admission into public schools. This is despite the explicit guarantee of the right to basic education to everyone by the Constitution of the Republic of South Africa, 1996 (Constitution), and by international legal instruments. It seems that legal contradictions, lack of proper understanding of extant laws protecting the right to basic education, and other conditions continue to affect access to basic education for undocumented children in South Africa. This article therefore examines the right to basic education of undocumented children in South Africa in the context of the legality of the lingering call for the exclusion of undocumented children from public schools in South Africa.

Drawing on international law, domestic and case law, the author argues that the right to basic education is a fundamental human right that is guaranteed to every child. This is irrespective of whether such child has a birth certificate, identity document and other related documents. Furthermore, the enjoyment of this right is not dependent on the immigration status of such child. To address and unpack these issues, the article is divided into four main sections. The first provides a contextual understanding of what it means to be an undocumented child in South Africa and its impact on their right to basic education. The second section of the article highlights the legal framework protecting the right to basic education, both from

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3 *Ibid*.

4 UN CESCR *General Comment No 13* par 1.

5 Fafunwa *History of Education in Nigeria* (1974) 17.

6 UN *Universal Declaration Human of Rights (UDHR)* (1948) art 26; UNGA *International Covenant on Economic Social and Cultural Rights (ICESCR)* 999 UNTS 171 (1966) Adopted: 16/12/1966 art 13; UN *Convention on the Rights of the Child (UNCRC)* 1577 UNTS 3 (1989) Adopted 20/11/1989 art 28; *African Charter on the Rights and Welfare of the Child (ACRWC)* (1990) art 11; Organisation of African Unity *African Charter on Human and Peoples' Rights (ACHPR)* (1981) Adopted: 27/06/1981 art 17.

7 Onuora-Oguno *Development and the Right to Education* (2019) vii.

international and domestic law perspectives. This section examines the legal framework in the context of determining whether the right to basic education extends to undocumented children in South Africa. This section further interrogates the court's interventions in determining whether the right to basic education extends to undocumented children in South Africa. In so doing, the article focuses on the case of the *Centre for Child Law v Minister of Basic Education*,[8] (*Phakamisa* judgment). The third section of the article looks at the measures put in place to implement the outcome of the judgment to ensure that barriers affecting the right to basic education of undocumented children are eradicated. The final section interrogates the factors that have not only impeded the implementation of the outcome of the judgment but factors that have continued to impede access to basic education of undocumented children in the country.

2 CONTEXTUALISING THE MEANING OF "UNDOCUMENTED" AND ITS IMPACT ON THE EDUCATIONAL REALITIES OF UNDOCUMENTED CHILDREN IN SOUTH AFRICA

The term "undocumented" is viewed by the United Nations International Conference on Population and Development as referring to "a person who do not fulfil the requirements established by the country of destination to enter, stay or exercise an economic activity".[9] The South African Human Rights Commission views "undocumented" as a complex umbrella concept in the South African context, driven by diverse factors that affect South Africans, migrants and stateless persons concurrently.[10] Writing in the South African context, the Commission defined undocumented learners as individuals of school-going age who desire to be enrolled at a school but do not possess the official documentation required for proof of identity or legal residency.[11] The Commission identified three categories of undocumented person: namely, (1) South African children whose births have not been registered or are unable to be registered in terms of the Births and Deaths Registration Act[12] in South Africa; (2) stateless persons; (3) migrants in an irregular situation. While the definition of "undocumented" is broad and also covers South African children whose births could not be registered in accordance with extant laws, this article focuses on the third category of undocumented persons, who are migrants in an irregular situation.

Children become undocumented in South Africa owing to several factors. The Department of Home Affairs (DHA) is saddled with the responsibility of issuing birth certificates or identity documents. However, obtaining these

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8 [2019] ZAECGHC 126.

9 UN International Conference on Population and Development, Cairo (5–13 September 1994) https://www.un.org/development/desa/pd/sites/www.un.org.development.desa.pd/files/a_conf.171_13_rev.1.pdf (accessed 2023-09-10) par 10.15.

10 South African Human Rights Commission *Position Paper: Access to a Basic Education for Undocumented Learners in South Africa* (2019).

11 *Ibid*.

12 51 of 1992.

documents from the DHA may be either near impossible or challenging for children born of parents residing in the country without the required documents.[13] Refugees and asylum seekers who fled their country for fear of maltreatment or persecution, in most cases, find it difficult to obtain assistance from their country of birth to obtain birth certificates. As a result, many such children end up being undocumented in South Africa. While it is difficult to ascertain an accurate number for undocumented children in South Africa, it is estimated there are more than one million such children in South Africa, with a significant number of them having been born in South Africa, but their births not registered for various reasons.[14]

Undocumented children are extremely vulnerable and face several impediments to accessing basic social services, including education. Registration of a child in a South African public school requires parents to produce certain documents. Paragraph 15 of the Admission Policy for Ordinary Public Schools (Admission Policy)[15] requires that parents applying for admission of their children into public schools must provide birth certificates and identity documents of the parent. The Admission Policy further provides that, in situations where parents are unable to produce a birth certificate, the child may be admitted conditionally, but could be excluded after three months if the document is not provided.[16] However, some schools either do not understand this aspect of the provision or deliberately ignore it. Consequently, undocumented children are refused admission into some public schools.

Adding to this challenge is the Immigration Act,[17] which reiterates the need for learners to have the required documents to be admitted into learning institutions. Section 39 of the Immigration Act goes so far as to prohibit learning institutions from knowingly providing training or instruction to those without the required documents, or to what is referred to as "illegal foreigners".[18] Section 42(1) of the Immigration Act makes it a punishable offence for any learning institution knowingly to provide learning or instruction to an illegal foreigner.[19]

Section 44 of the Immigration Act adds another dimension to this complexity, as it provides that persons whose status or citizenship cannot be verified, or an undocumented person, should not be prevented from receiving services or performance to which such undocumented or illegal foreigners are entitled under the Constitution or any other law. This provision seems to contradict section 39 of the Immigration Act, which prohibits learning institutions from providing services to illegal foreigners. If section 44

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13 Sibanda "The Right to Birth Registration of Foreign Children in South Africa: A Human Rights Perspective" (master's thesis, University of the Western Cape) 2020 61.

14 Broughton "Undocumented Children Win Right to Basic Education" (2019) https://www.newframe.com/undocumented-children-win-right-to-basic-education/ (accessed 2023-05-13).

15 GN 2432 in *GG* 19377 of 1998-10-19.

16 Par 15 of the Admission Policy.

17 13 of 2002.

18 S 39 of the Immigration Act.

19 S 42(1) of the Immigration Act.

is to be interpreted in the context of the right to basic education, it can be argued that basic education is a service guaranteed to everyone by section 29(1)(*a*) of the Constitution;[20] and undocumented children should consequently not be denied access to basic education on account of a lack of documentation. This aspect is further explored in the next section of this article.

However, owing to these legislative provisions, undocumented children who do not have appropriate documents for admission to public schools are either denied admission or face a high chance of having their admission application rejected. The measures put in place to exclude undocumented children from public school were revealed in a 2016 circular that was issued by the Eastern Cape Department of Education (ECDE). The ECDE took a decision and issued a circular to withhold funding to schools in respect of learners who did not have identity documents or passport numbers captured in the Education Department's Management System Database (SASAMS).[21]

This decision implied that schools would no longer receive funding for undocumented learners enrolled. This resulted in the exclusion of undocumented learners from some schools that were either unwilling or unable to shoulder the burden of providing an education to unfunded learners. Adding to this has been the harassment and intimidation that school principals have received from the DHA and other stakeholders for admitting undocumented children into their schools. It was reported that three principals were fined by the DHA for allowing undocumented learners into their schools.[22] In January 2023, the former mayor of the Central Karoo District and the president of the Patriotic Alliance, Gayton Mckenzie, once again brought the issue of undocumented children's access to basic education into sharp focus, when he called for the removal of undocumented children from South African public schools.[23]

If such a public figure can use a public platform to make such a call, it raises the question whether the right to basic education as enshrined in the South African Constitution and other international legal instruments extends to undocumented children residing in South Africa. The next section of the article responds to this question by interrogating the various legal instruments protecting the right to basic education, and examines whether this right extends to undocumented children in South Africa.

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20 S 29(1)(*a*) of the Constitution.

21 Southern African Catholic Bishops' Conference Parliamentary Liaison Office "Access to Public Schools for Undocumented Children" (February 2020) *Briefing Paper 494* 1.

22 October "Calls for Policy Certainty on Undocumented Learners" (1 March 2019) *Dullah Omar Institute* https://dullahomarinstitute.org.za/women-and-democracy/parlybeat/calls-for-policy-certainty-on-undocumented-learners (accessed 2023-05-12).

23 Venter "You're Wrong, Gayton Mckenzie: Undocumented Children Do Have the Right to Basic Education" (15 January 2023) *Daily Maverick* https://www.dailymaverick.co.za/opinionista/2023-01-15-youre-wrong-gayton-mckenzie-undocumented-children-do-have-the-right-to-basic-education/ (2023) (accessed 2023-05-10).

3 LEGAL FRAMEWORK PROTECTING THE RIGHT TO BASIC EDUCATION

Several international and regional human rights instruments recognise and affirm the right to basic education. At the international level, these include the Universal Declaration of Human Rights (UDHR),[24] the United Nations Convention on the Rights of the Child (UNCRC),[25] and the International Covenant on Economic, Social and Cultural Rights (ICESCR).[26] Article 22 of the United Nations Convention Relating to the Status of Refugees (UNCRSR)[27] also obligates member states to accord refugees the same treatment it accords its national citizens in terms of providing elementary education. All these instruments recognise the right to education as a fundamental human right, and urge States Parties to these treaties to provide free compulsory basic education to every child within their jurisdiction.

Given the significant role that education plays in society, there was a need to ensure that it was provided without any form of discrimination. This prompted the United Nations Educational, Scientific and Cultural Organisation (UNESCO) to adopt the Convention Against Discrimination in Education (CDE) in 1960. The CDE prohibits all forms of discrimination based on race, colour, sex, language, religion, political or other opinion, nationality, social origin, economic circumstances or birth.[28] Most importantly, article 4a of the CDE provides that States Parties to the Convention must undertake to make primary education free and compulsory and ensure that secondary education in its different forms is generally available and accessible to all.[29] South Africa has ratified almost all of these international law instruments, and is thus bound by their provisions to ensure that all children within its jurisdiction have access to basic education without discrimination, including undocumented children.

At the regional level, the right to education has been enshrined in a number of regional legal instruments[30] – for example, in the African Charter on Human and Peoples' Rights (ACHPR)[31] and the African Charter on the

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24 S 26(1) of the UDHR. Note also UNGA *Declaration on the Rights of the Child* (non-binding) (1959) art 7 states: "The child is entitled to receive education, which shall be free and compulsory, at least in the elementary stages."

25 Art 28(1)(*a*) of the UNCRC.

26 Art 13(2)(*a*) of the ICESCR.

27 189 UNTS 150 (1951) Adopted: 28/07/1951; EIF: 22/04/1954.

28 Art 1 of the CDE.

29 Art 4a of the CDE.

30 Art 11 of the ACRWC; OAU *Protocol to the ACHPR on the Rights of Woman in Africa* (2003) Adopted: 1/07/2003; EIF: 25/11/2005 art 2; African Union *African Youth Charter* (2006) art 13; Organization of American States *Additional Protocol to the American Convention on Human Rights in the Area of Economic, Social and Cultural Rights* (1999) art 13; Association of Southeast Asian Nations (ASEAN) *ASEAN Human Rights Declaration* (2012) art 27.

31 Art 17 of the ACHPR provides that everyone shall have the right to education.

Rights and Welfare of the Child (ACRWC).[32] South Africa has also ratified these treaties and is bound by their provisions.

Pursuant to fulfilling its international obligations under these treaties and to addressing the historical educational injustices of the past,[33] South Africa has enshrined the right to basic education in its Constitution. Section 29(*a*)(1) of the Constitution provides that everyone has the right to basic education. Similarly, section 3 of the South African Schools Act[34] provides that basic education is compulsory for every child from age 7 to age 15 or the ninth grade, whichever comes first. This begs the question whether this right extends to children residing in South Africa without proper documentation. Is it not discriminatory to deny children access to basic education on account of a lack of proper documentation? The next section of this article responds to these questions.

3 1 Does the right to basic education extend to undocumented children in South Africa?

The right to basic education as stated above is a fundamental human right that is universally applicable. Documentation is not a requirement for enjoyment of this right. This has been confirmed by international human rights treaty bodies. For example, the UN Committee on Economic, Social and Cultural Rights (CESCR) in its General Comment No 20 provides that all children within a state, including those with undocumented status, have the right to receive an education.[35] This suggests that South Africa as a party to this instrument has a duty to provide basic education to all children, including undocumented children in the country. Also, the CESCR in General Comment No 13 reaffirms this position by providing that:

> "the principle of non-discrimination extends to all persons of school age residing in the territory of a State party, including non-nationals, and irrespective of their legal status."[36]

Thus, the right to basic education should be enjoyed by everyone, and no one should be discriminated against in the enjoyment of such right, irrespective of their immigration status. In this instance, undocumented children residing in South Africa should not be denied access to basic education on account of a lack of proper documentation. Similarly, the UN Committee on the Rights of the Child (CRC) in General Comment No 6 provides for the need to ensure access to basic education for all children,

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32 Art 11 of the ACRWC also provides that everyone shall the right to an education. It further urges member states to provide free, compulsory basic education.

33 On the historical educational injustices of the past resulting from the apartheid educational policy, see Veriava *Realising the Right to Basic Education: The Role of the Court and Civil Society* (2019); also see McConnachie and Brener "Litigating the Right to Basic Education" in Brickhill (ed) *Public Interest Litigation in South Africa* (2018) 281.

34 84 of 1996.

35 CESCR *General Comment No 20: Non-Discrimination in Economic, Social and Cultural Rights (Art 2. Para 2, of the International Covenant on Economic, Social and Cultural Rights)* (2009) E/C.12/GC/20. Adopted 02/07/2009 par 30.

36 UN CESCR *General Comment No 13* par 34.

irrespective of their legal status in their country of residence.[37] The CRC reiterated that such education should be provided without discrimination. Again, South Africa as a signatory to these legal instruments is under an obligation to ensure the enjoyment of the right to basic education for all children within its jurisdiction, regardless of their documentation status.

In 2018, the CESCR, in its concluding observation on South Africa, raised concerns around the number of undocumented migrants, refugees and asylum-seeking children who are not enrolled in formal education.[38] The CESCR thus recommended that South Africa ensure that children have access to education regardless of their immigration status.[39] It is evident from an international law perspective that refusing to enrol undocumented children at public schools or calling for their removal from public schools is not legal, and is a violation of the right to basic education of the affected children. The courts in South Africa have also made a pronouncement on the question of whether undocumented children have the right to basic education in South Africa. The next section of this article examines the intervention of the court in determining whether undocumented children have the right to basic education in South Africa.

3 2 Court intervention in determining the legality of denying undocumented children admission into public schools

In the case *Centre for Child Law v Minister of Basic Education*[40] (popularly known as the *Phakamisa* judgment), the courts had the opportunity to respond to the question whether excluding undocumented children from enrolment in public schools in South Africa is legal. The case involved two distinct applications. The first was filed by the Centre for Child Law and the School Governing Body of Phakamisa High School, and concerned the legality of an Eastern Cape Department of Education (ECDE) policy decision to withdraw financing to schools with undocumented learners.

Prior to 2016, the ECDE provided funding to all learners at Eastern Cape Schools, regardless of whether such learners had identity documents. This was to ensure that all children had access to basic education and basic nutrition through the National School Feeding Programme. However, in 2016, the ECDE sent out circular informing schools of its intention to withhold funding to schools in respect of learners who did not have an identity document or passport captured on the South African Schools Administration and Management System (SASAMS).[41] The implication of this decision was that schools enrolling undocumented learners would no longer receive funding for those learners. This also meant that

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37 UN CRC *General Comment No 6: Treatment of Unaccompanied and Separated Children Outside Their Country of Origin* (2005) par 41.

38 Committee on Economic, Social and Cultural Rights concluding observations on the initial report of South Africa E/C 12/ZAF/CO/1 par 72.

39 *Ibid*.

40 *Supra* par 126.

41 *Centre for Child Law v Minister of Basic Education supra* par 5–9.

undocumented learners would be excluded from schools that did not make provision for unfunded learners.

The second aspect of the application was brought by 37 children on behalf of all children in a similar situation in South Africa. The application challenged the lawfulness of paragraphs 15 and 21 of the Department of Basic Education (DBE)'s Admission Policy as well as sections 39 and 42 of the Immigration Act, on the basis that they violate several constitutionally protected rights of undocumented children.

Paragraph 15 of the Admission Policy requires that a parent must provide a birth certificate for a child when applying for admission for their children to a public school. The paragraph further stipulates that if a parent is unable to produce a birth certificate, the child may be admitted conditionally, but still faces potential exclusion from school after three months if the document is not forthcoming.

Paragraph 21 of the Admission Policy provides that persons who are unlawfully in the country applying for admission of their children into public school must show evidence that they have applied to the Department of Home Affairs to legalise their stay in the country in terms of the Immigration Act. The Department of Basic Education and the Department of Home Affairs defended both applications vigorously, arguing that the policies and provisions challenged by the applicants were put in place to discourage people from illegally entering the country to acquire free education for their children.

In a robust judgment, the court found that paragraphs 15 and 21 of the Admission Policy for public schools were inconsistent with the Constitution and, therefore, invalid. The court observed that children could not be prevented from accessing education because it is significant to the development of children. The judgment underlines the significance of education for all children in the following manner:

> "Indeed, basic education is an important socio-economic right directed, among other things, at promoting and developing a child's personality, talents and mental and physical abilities to his or her fullest potential. Basic education also provides a foundation for a child's lifetime learning and work opportunities. To this end, access to school – an important component of the right to a basic education guaranteed to everyone by section 29(1)(*a*) of the Constitution – is a necessary condition for the achievement of this right."[42]

Consequently, the court held that there is no justifiable reason for undocumented children to be denied access to basic education on account of a lack of proper documentation.

The court also declared that the circular issued by the ECDE in 2016 was invalid and inconsistent with the South African Schools Act[43] and the Constitution.[44] The circular provided that funding to schools would be based only on learners with valid identity documents, permits or passports. The

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42 *Centre for Child Law v Minister of Basic Education supra* par 3.

43 84 of 1996.

44 *Centre for Child Law v Minister of Basic Education supra* par 135.

court noted that section 29(1)(*a*), read with section 28(2)(*a*) of the Constitution, accords everyone a right to basic education that is not subject to the condition of the provision of an identity document. The court also held that the decision of the ECDE was contrary to section 28(2)(*a*) of the Constitution, which provides that the best interests of the child are of paramount importance in every issue concerning the child.[45]

The court further held that the exclusion of undocumented children on the basis of a lack of identity document is discriminatory within the meaning contemplated in the equality clause and in section 5 of the South African Schools Act, which states:

> "A public school must admit learners and serve their educational requirements without unfairly discriminating in any way."[46]

The court also found that the decision of the ECDE infringes on the right to dignity of the affected children, as provided for by section 10 of the Constitution. Consequently, the court ordered the ECDE to admit all children who are not in possession of official birth certificates into public schools; and where a learner cannot provide a birth certificate, the school is directed to accept alternative proof of identity, such as an affidavit or sworn statements deposed to by the learner's parent or caregiver.[47]

The court also pronounced that sections 39 and 42 of the Immigration Act do not prohibit the admission of illegal foreign children into school, and do not prohibit the provision of basic education to illegal foreign children. The judgment, therefore, prohibits the ECDE from removing or excluding children from schools, including illegal foreign children already admitted, on the basis that the children do not have identity documents or passports.[48]

The outcome of this case was important in the context of access to basic education for undocumented children in South Africa. The judgment affirms that the right to basic education as provided for in the Constitution is guaranteed to all children, irrespective of the immigration status of the child or the lack of identity documentation. However, despite this robust judgment, it is surprising that in 2023, the media space is still inundated with the rejection of undocumented children into public schools owing to the lack of identity documents. This raises the question of the measures put in place to implement the judgment. What gaps exist? The next section of the article interrogates these issues.

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45 *Ibid*.

46 *Centre for Child Law v Minister of Basic Education supra* par 82–84.

47 *Centre for Child Law v Minister of Basic Education supra* par 135.

48 *Ibid*.

4 MEASURES TO IMPLEMENT THE OUTCOME OF THE JUDGMENT AND THE IMPACT OF SUCH MEASURES

Indications are that efforts have been made to ensure the implementation of the *Phakamisa* judgment, and that such efforts have achieved some levels of success. This section examines some of the efforts made to implement this judgment.

4 1 Circular 1 of 2020 by the Department of Basic Education

Following the *Phakamisa* judgment, the Department of Basic Education issued Circular No 1 of 2020, titled "Admission of Learners to Public Schools". The circular was issued to all provincial heads of department and other stakeholders. The circular not only explained the judgment of the court, but also alerted all stakeholders across the country to the fact that, while the judgment affected an issue that arose in the Eastern Cape, "it set the tone of the appetite of the Courts on the learners' right to basic education throughout the country."[49] Consequently, the Department of Basic Education in the circular, noted that the Admission Policy for Ordinary Schools will be amended in due course to reflect the recommendation of the judgment, and advises all schools across the country to follow the precedent set out in the judgment, which is to ensure that children are not denied access to basic education on the basis that they do not possess identity documents or on the basis of their immigration status.[50]

The circular strives to ensure that the court's ruling is clarified and made available to all stakeholders. This was to ensure that the impediments that have prevented undocumented children from exercising their right to a basic education were removed. However, the impact of this endeavour on securing undocumented children's access to basic education remains slow to emerge. More of this is discussed in a later section of this article.

4 2 New draft admission policy for public schools

On 10 February 2021, as part of the measures aimed at implementing the outcome of the judgment, the Department of Basic Education submitted for public comment a new draft Admission Policy for Ordinary Public Schools.[51] While the new admission policy still requires learners to produce identification documents, it states that schools may not prevent the admission of learners from schools, or exclude learners from enjoying the

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49 Minister of Basic Education "Admission of Learners to Public Schools" (11 February 2020) *Circular No 1 of 2020* par 2.1.

50 *Ibid*.

51 Department of Basic Education *Call for Comments on the Admission Policy for Ordinary Public Schools* GN 38 in *GG* 44139 of 10-02-2021 Schedule.

right to basic education, owing to a lack of documentation.[52] Although such provisions may serve as a guide for education departments and stakeholders across the country to remove barriers that impede undocumented children's access to basic education, certain aspects of the policy still leave room or gaps that could be detrimental to undocumented learners' access to basic education.

For example, the new policy includes a long list of documents that parents or guardians must provide when requesting the admission of children who are not South African nationals.[53] The former policy did not require several of these documents. Civil society organisations (CSOs) have raised concerns as to whether learners will be admitted if their parents or guardians are unable to submit these documents.[54]

The draft policy requires school officials to report situations where parents or guardians are unable to produce certain documents, or where certain information cannot be verified, to the Department of Home Affairs or the Department of Justice and Correctional Services.[55] The inference is that parents who are not legally present in the country will be afraid to send their children to school for fear of being reported to the Department of Home Affairs for failing to produce the requisite documentation, and of being deported. Such a move will have adverse impact on the right to basic education of children that do not have the required documents.

As can be seen from the preceding discussion, initiatives have been undertaken to put the court's decisions into action. As may also be seen, gaps exist in the measures put in place giving effect to the judgment. If not handled appropriately, these loopholes could restrict undocumented children's access to basic education in the country. The following section of the article investigates the challenges that have continued to obstruct undocumented children's access to basic education in the country, despite the law's clear statement that the right to basic education extends to everyone.

5 FACTORS THAT HAVE CONTINUED TO IMPEDE ACCESS TO BASIC EDUCATION FOR UNDOCUMENTED CHILDREN

The preceding discussion has demonstrated that the right to basic education applies to every child in South Africa, and the courts have affirmed that the enjoyment of this right is not contingent on the submission of a birth certificate, identity document or a child's immigration status. Despite this

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52 Par 23 of the draft Admission Policy 2021.

53 Par 20 of the draft Admission Policy 2021.

54 SECTION 27, Centre for Child Law, Children's Institute, Legal Resources Centre, Equal Education Law Centre and Lawyers for Human Rights *Joint Submission to the United Nations Committee on Economic, Social and Cultural Rights on the Occasion of the Review of the Information Received from South Africa on Follow-Up to the Concluding Observations on its Initial Report* (14 May 2021).

55 Par 21 and 22 respectively of the draft Admission Policy 2021.

position, factors such as a lack of proper awareness or understanding of the laws protecting undocumented children's right to basic education, a lack of collaboration among various stakeholders in the education sectors, and the introduction of an online admission application portal have continued to work against undocumented children's access to basic education in South Africa. The next section discusses some of these concerns.

5 1 Continued lack of awareness of the right to basic education of undocumented children

As extensively discussed in this article, the right to basic education is a fundamental human right to which everyone is entitled. Unfortunately, there appears to be a lack of basic understanding among education stakeholders in the country concerning the nature of the right to basic education, and who is entitled to it. This viewpoint was expressed in a joint report submitted to the CESCR by CSOs on the review of the information received from South Africa on follow-up to the concluding observations on its 2021 report. According to the report, schools across the country are not adequately informed about undocumented children's right to access basic education.[56]

The report further noted that several schools in the country are unaware of Circular 1 of 2020 or the *Phakamisa* judgment, which explicitly states that undocumented children have the right to basic education and should not be denied access because they lack a birth certificate or identity document.[57] Furthermore, schools that are aware of the judgment or circular believe that they apply solely to schools in the Eastern Cape.[58] Consequently, undocumented children continue to be denied access to basic education on account of a lack of proper communication and awareness on the right to basic education of undocumented children.

5 2 Weak collaboration among stakeholders

Fulfilling or realising the right to education necessitates the collaboration of various stakeholders, including the Department of Basic Education, provincial education departments, school governing bodies and the Department of Home Affairs. Unfortunately, there is a seeming lack of, or insufficient, collaboration among the multiple stakeholders, which has impacted undocumented children's access to basic education. Inadequate cooperation has made the successful implementation of the *Phakamisa* judgment problematic. This was evident in SECTION 27 Joint Submission to CESCR.[59] It was noted in the joint submission that during a training session organised for school administrators and social workers held in Mpumalanga from 23 to 25 August 2021 by Lawyers for Human Rights in collaboration with the Consortium for Refugees and Migrants in South Africa, where the

56 SECTION 27 *et al Joint Submission to CESCR* par 22 and 27.
57 *Ibid*.
58 SECTION 27 *et al Joint Submission to CESCR* par 23.
59 SECTION 27 *et al Joint Submission to CESCR* par 27.

participants revealed that they have neither received nor heard of the *Phakamisa* judgment or the accompanying circular.[60]

The fact that some school officials were still unaware two years after the judgment, of both the ruling and the circular issued following the judgment reinforces the notion that there is a lack of effective collaborative effort among various stakeholders to implement the judgment. It is hardly surprising that the judgment did not accomplish its anticipated objective, and that schools continue to refuse admission applications from undocumented children owing to a lack of requisite documentation.

The lack of collaboration is also evidenced by several reports on the problems experienced in obtaining from the DHA birth certificates and other associated documents that are required by the Admission Policy.[61] While the Admission Policy requires learners to provide identity documents or birth certificates, obtaining such documentation from the DHA has proved difficult for parents and guardians of these undocumented children.

Speaking about why children become undocumented in the country, Anjuli Maistry, a senior attorney, stated that parents and caregivers are unable to meet the strict requirements of the Births and Deaths Registration Act,[62] which include the supply of documentation that they are unable to receive from the DHA.[63] For example, unmarried fathers are not permitted to register the birth of their children without the presence of the mother, and an expensive paternity test.[64] Several children who may have qualified for asylum are unable to receive the necessary documentation owing to the DHA's well-documented problems and practices.[65] There is a need for the various stakeholders to collaborate and work together to ensure that every child, including undocumented children, has access to basic education as required by the law.

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60 *Ibid*.

61 South African Human Rights Commission *Position Paper: Access to a Basic Education for Undocumented Learners in South Africa* (September 2019). Also see Beko *The Impact of Unregistered Births of Children in South Africa and How Their Rights to Essential Services and Basic Education Are Affected* (master's dissertation, University of the Western Cape 2021); Macdonald "South Africa's Birth Registration System Challenged Over 'Unconstitutional' Requirements" (2023) *BiometricUpdate.com* https://www.biometricupdate.com/202303/south-africas-birth-registration-system-challenged-over-unconstitutional-requirements#:~:text=South%20African%20human%20rights%20organization,children%20born%20in%20the%20country (accessed 2023-05-10).

62 51 of 1992.

63 Broughton https://www.newframe.com/undocumented-children-win-right-to-basic-education/.

64 S 10(1)(*a*) of 51 of 1992.

65 Kavuro "Refugees and Asylum Seekers: Barriers to Accessing South Africa's Labour Market" 2015 *Law Democracy & Development* 258. Also see Schockaert and Venables "Behind the Scenes of South Africa's Asylum Procedure: A Qualitative Study on Long-Term Asylum-Seekers From the Democratic Republic of Congo" 2020 39 *Refugee Survey Quarterly*; Scalabrini Centre of Cape Town "The Asylum System in South Africa: 5 Problems and 5 Solutions" (2019) https://www.scalabrini.org.za/the-asylum-system-in-south-africa-5-problems-and-5-solutions/ (accessed 2023-05-09).

5 3 Online application portal for admission to public schools

Another factor that has continued to affect access to basic education for undocumented children is the use of online application portals. Gauteng,[66] the Western Cape,[67] and the Northern Cape[68] have established an online application portal for admission into public schools. Online applications require parents and guardians to submit identity documents. No provision is made for those without an identity document to bypass this requirement in the portal. The provincial governments do not provide any information on the portal on what learners without identity documents should do or what additional documents they need to provide.[69]

It was reported that, people who approach schools physically to hand in alternative documentation, such as affidavits, face hostility and threats of being reported to security officials.[70] As a result, a substantial number of children living in these provinces who do not have an identity document may be barred from attending public schools. While the online application system is already in place in the three provinces mentioned above, there are hints that other provinces will implement this as well, implying that the number of undocumented children who will be unable to attend public school will skyrocket.

The implementation of an online admission application is a novel initiative that aims to increase transparency and sanity in the admissions process. However, a more flexible approach is required to satisfy the application needs of undocumented children, as mandated by law. Until that happens, a considerable number of undocumented children will be denied admission to basic education in provinces that have implemented the online application process. A combination of these obstacles has continued to limit undocumented children's access to basic education in South Africa.

6 CONCLUSION

In the discussion above, the article has demonstrated that the call for the exclusion of undocumented children from public schools in South Africa is not consistent with extant laws, and is, as such, illegal. The right to basic education, as embodied in numerous international and domestic legal instruments, is a universal right, and can only be restricted on justified grounds. The enjoyment of this right does not require the right holder to

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66 Gauteng Provincial Government "Apply for Admission to Public Schools" (no date) https://www.gauteng.gov.za/Services/GetServices?serviceId=CPM-001592.

67 South African Government "Western Cape Education on 2024 School Admission Process" (8 March 2023) https://www.gov.za/speeches/monday-13-march-2023-2024-school-admission-process-begins-8-mar-2023-0000.

68 Province of the Northern Cape "All Systems GO for Online Admission System" (no date) http://www.northern-cape.gov.za/index.php/component/content/article?id=1610:all-systems-go-for-online-admission-system (accessed 2023-05-11).

69 SECTION27 *et al Joint Submission to CESCR* par 26.

70 SECTION27 *et al Joint Submission to CESCR* par 24.

produce or possess a birth certificate or identity documents. While South Africa, as a sovereign state, has the power to enforce its immigration laws, the right to basic education is not determined by the immigration status of the children involved; there is therefore a need to separate immigration-related issues and undocumented children's access to basic education. This position was affirmed by the court in the *Phakamisa* case, as discussed. Despite clear provision in the law protecting the right to basic education of undocumented children in the South Africa, access to basic education has remained problematic for children.

The lack of basic understanding of the nature of the right to basic education, administrative gaps, and a lack of effective collaboration among stakeholders have continued to jeopardise undocumented children's access to basic education in the country. Resolution of some of these challenges calls for concerted effort and collaboration among stakeholders. It requires that stakeholders be well informed about the nature of the right to basic education and the obligation it imposes on the State to ensure that all children, regardless of whether they have the required documents, have access to basic education. Considering the pivotal role education plays for both individuals and society in general, educating children significantly enhances their contribution to the development of the country and society at large. Conversely, denying these children access to education for lack of necessary documents will result in some of them taking to criminality and constituting a threat to the social fabric of society in the near future. In essence, a cost-benefit analysis would suggest that the benefit of granting these children access to education far outweighs the cost.

UPROOTING A CULTURE OF GENDER-BASED VIOLENCE IN SOUTH AFRICA: CRITICAL APPROACHES TO BAIL, POLICING AND AWARENESS

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SUMMARY

Gender-based violence (GBV) is a serious and systemic problem in South Africa. The government has attempted to address the problem by introducing several initiatives including sexual offences courts, and various laws aimed at protecting women and children. However, the recent reform is not sufficient. Only a limited number of bail reforms were introduced. This article proposes several additional bail reforms aimed at protecting women and children against GBV. Also, more proactive measures need to be undertaken to reduce GBV. This includes reform in the South African Police Service (SAPS) and awareness campaigns. These initiatives are important because they target GBV at its roots. First, the article provides a brief overview of the culture of GBV and the efforts of the South African government to curb it. This is followed by an analysis of how bail proceedings can be amended to have a greater impact on GBV prevention. The article then analyses proactive measures geared towards improving the role of the SAPS, and promoting awareness campaigns to combat the scourge of GBV.

1 INTRODUCTION

Siphokazi Booi, a beautiful and promising Black South African woman, lived in Paarl in 2021.[1] She, like millions of other women, wanted to enjoy her life.

[1] Bhengu "'We Will Die From Heartbreak': Family of Murdered Western Cape Woman Laments Case Delays" (7 April 2021) *News24* https://www.news24.com/news24/

Her story, sadly, does not reflect any joy. Booi, was brutally dismembered, set alight and dumped at a train station, allegedly by her boyfriend, Sithobile Qebe, who was out on bail at the time.[2] Qebe is currently standing trial for her murder. Gender-based violence (GBV), defined as any act that results in sexual, mental or physical harm or suffering to women, is rife in South Africa.[3] GBV has become a culture.[4] The Interim Steering Committee on GBV has noted: "South Africa holds the shameful distinction of being one of the most unsafe places in the world to be a woman."[5] Each day, 115 women are raped.[6] This amounts to approximately 42 000 rapes a year.[7] Equally appalling is the murder of women; three women are killed by their intimate partners per day in the country.[8]

The Constitution of the Republic of South Africa, 1996 (the Constitution) guarantees the right to human dignity,[9] and freedom and security of the person.[10] It is also an objective of local government to provide a safe environment for its citizenry.[11] GBV severely violates these rights, especially that of women and children.[12] Mokone asserts, "It is clear that laws, policies, year-long awareness campaigns and every mechanism that has been established to combat and ultimately eradicate gender-based violence are proving to be ineffective and insufficient."[13] There is a need for serious GBV

southafrica/news/we-will-die-from-heartbreak-family-of-murdered-western-cape-woman-laments-case-delays-20230407 (accessed 2023-05-20).

2 Fisher "Siphokazi Booi's Murder Case Postponed to April" (16 February 2022) *Eyewitness News* https://ewn.co.za/2022/02/16/siphokazi-booi-s-murder-case-postponed-to-april (accessed 2023-05-19).

3 See Meyiwa, Williamson, Ntabanyane and Maseti "A Twenty-Year Review of Policy Landscape for Gender-Based Violence in South Africa" 2017 15(2) *Gender and Behaviour* 8614 8614. See, generally, Brodie *Femicide in South Africa* (2020). This article focuses mainly on women. GBV also affects children and members of the LGBTIQA+ community.

4 See, generally, Buqa "Gender-Based Violence in South Africa: A Narrative Reflection" 2022 78(1) *HTS Theological Studies* 1–8; Gqola *Rape: A South African Nightmare* (2016).

5 Interim Steering Committee on GBVF *National Strategic Plan on Gender-Based Violence & Femicide* (2020) 2. See, generally, Snyman *Snyman's Criminal Law* 7ed (updated by Hoctor) (2020) 307–309.

6 Gouws "Rape is Endemic in South Africa. Why the ANC Government Keeps Missing the Mark" (9 August 2022) *The Mail & Guardian* https://mg.co.za/opinion/2022-08-09-rape-is-endemic-in-south-africa-why-the-anc-government-keeps-missing-the-mark/ (accessed 2022-10-29).

7 Gouws https://mg.co.za/opinion/2022-08-09-rape-is-endemic-in-south-africa-why-the-anc-government-keeps-missing-the-mark/.

8 United Nations Office on Drugs and Crimes "Gender-Related Killings of Women and Girls (Femicide/Feminicide)" https://www.unodc.org/documents/data-andanalysis/briefs/Femicide_brief_Nov2022.pdf (accessed 2023-05-19) 24.

9 S 10 of the Constitution.

10 S 12 of the Constitution.

11 S 152(1)(*d*) of the Constitution.

12 See *S v Robertson* [2022] ZAWCHC 104; 2023 (2) SACR 156 (WCC) par 31; *S v Khasibe* [2022] ZAKZPHC 43 par 12.

13 Mokone "The Constitutional Role of the Judiciary in Cases of Sexual GBV: An Analysis of *Tshabalala v S; Ntuli v S* 2020 (5) SA 1 (CC)" 2021 42 *Obiter* 406 419. See also, generally, Von Meullen and Van der Waldt "A Model for Gender-based Violence Awareness: The Case of Student Representative Councils in Selected South African Universities" 2022 30(1) *Administratio Publica* 34–55.

reform, which is the focus of this article.[14] The combatting of GBV crimes has only recently gathered much-needed legislative steam. Widespread protests against GBV broke out in 2019 owing to the murder of a university student, Uyinene Mrwetyana, inside a South African post office.[15] As a result, in 2022, three statutes were eventually signed into law by President Cyril Ramaphosa; these included the Criminal Law (Sexual Offences and Related Matters) Amendment Act,[16] the Criminal and Related Matters Amendment Act[17] and the Domestic Violence Amendment Act.[18]

One of the biggest changes included in these laws was that all accused charged with domestic violence crimes must now appear before a court for their bail applications, effectively removing the possibility for prosecutorial and police bail in such cases.[19] While this reform is applauded, various aspects of bail included in the Criminal Procedure Act[20] (CPA) remain insufficient to address GBV, and are analysed in this article.[21] For example, it is argued that the current bail conditions imposed on GBV accused must be more specific to protect women and children. The article also considers proactive measures to combat the culture of GBV by analysing the role of the South African Police Service (SAPS) in ensuring that GBV offences are properly reported.[22] Also, there currently exists significant distrust in the SAPS and this article looks at measures to professionalise the response of the SAPS to GBV.[23] The article also examines the lack of clear awareness measures geared towards combating GBV in South Africa, and proposes new alternatives. This article makes an important contribution to the body of

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14 Indeed, serious GBV reform has been driven by the United Nations (UN) since 2010. See UN General Assembly (UNGA) *Resolution Adopted by the General Assembly on 21 December 2010: Strengthening Crime Prevention and Criminal Justice Responses to Violence Against Women* A/RES/65/228. Goal 5.2 of the UN Sustainable Development Goals aims to "[e]liminate all forms of violence against all women and girls in the public and private spheres, including trafficking and sexual and other types of exploitation" (UN Department of Economic and Social Affairs: Sustainable Development "Goals: 5 Achieve Gender Equality and Empower All Women and Girls" (no date) https://sdgs.un.org/goals/goal5#targets_and_indicators (accessed 2023-10-28) Target 5.2).

15 See Staff Reporter "Murder Confession Arrives with a Thud – But Uyinene Mrwetyana Is Still Officially Missing" *Daily Maverick* (3 September 2019) https://www.dailymaverick.co.za/article/2019-09-03-murder-confession-arrives-with-a-thud-but-uyinene-mrwetyana-is-still-officially-missing/ (accessed 2023-10-25).

16 13 of 2021.

17 12 of 2021.

18 14 of 2021.

19 See s 3(*b*) of the Criminal and Related Matters Amendment Act 12 of 2021, which substitutes s 59A(1) of Act 51 of 1977.

20 51 of 1977.

21 Bail is regulated in Chapter 9 of the CPA. See, generally, Van der Merwe "Bail and Other Forms of Release" in Joubert, Kemp, Swanepoel, Terblanche, Van Der Merwe, Ally and Mokoena *Criminal Procedure Handbook* 13ed (2020) 206–240.

22 To examine the proactive measures put in place by SAPS, see SAPS *Annual Performance Plan 2023/2024* https://www.saps.gov.za/about/stratframework/strategic_plan/2023_2024/annual_performance_plan_2023_2024.pdf (accessed 2023-10-27). See also Nortje "Professionalising the Fight Against Police Corruption in South Africa: Towards a Proactive Anti-Corruption Regime" 2023 48 *Journal of Juridical Science* 72–95.

23 See, generally, Fry "Trust of the Police in South Africa: A Research Note" 2013 8 *International Journal of Criminal Justice Sciences* 36–46.

literature on GBV and criminal procedure by focusing specifically on how the strengthening of bail, policing and awareness measures can lead to uprooting the culture of GBV.

First, the article provides a brief overview of GBV and the efforts of the South African government to curb it. This is followed by an analysis of how bail proceedings can be amended to have a greater impact on GBV prevention. The article then analyses matters related to the reporting of serious GBV matters at police stations. Finally, proactive measures to combat GBV, including awareness campaigns, are discussed.

2 A CULTURE OF GBV

In 2020, Tshegofatso Pule, pregnant at the time, was found hanging from a tree with a gunshot wound in her chest.[24] Her estranged boyfriend, Ntuthuko Shoba, had arranged a contract killer to murder her.[25]

GBV is rampant in South Africa, and yet, it is not a new phenomenon. It was endemic during colonialism and apartheid but not categorised as such.[26] While apartheid reinforced the use of violence and inculcated the idea of manhood as "macho", most males became incapable of raising *lobola* and unable to be the breadwinners for their families.[27] As a result, many young men, especially after the rise of democracy, sought to reassert their masculinity in opposition to a system that disempowered them.[28] Many men also feel a sense of entitlement over their female partners once they have paid *lobola*.[29] This has created a culture of GBV and helps explain the massive upsurge in violence in South Africa.[30] Indeed, GBV is more prevalent in societies where there is a culture of violence, and where male superiority is treated as a norm.[31] A belief in male superiority can manifest in men feeling entitled to sex, which results in an abuse of power.[32] Women's and children's rights are generally neglected in a toxic patriarchal system.[33]

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24 *S v Shoba* [2022] ZAGPJHC 174 par 1.

25 *S v Shoba supra* par 1.

26 See, generally, Kaganas and Murray "Law and Women's Rights in South Africa: An Overview" in Murray (ed) *Gender and the New South African Legal Order* (1994) 20–28.

27 Green *Gender Violence in Africa: African Women's Responses* (1999) 70–71. See also Graaf and Heinecken "Masculinities and Gender-Based Violence in South Africa: A Study of a Masculinities-Focused Intervention Programme" 2017 34 *Development Southern Africa* 627.

28 Green *Gender Violence in Africa* 71.

29 Zinyemba and Hlongwana "Men's Conceptualization of Gender-Based Violence Directed to Women in Alexandra Township, Johannesburg, South Africa" 2022 22 *BMC Public Health* 1 2. See also Hewitt-Stubbs, Zimmer-Gembeck, Mastro and Boislard "A Longitudinal Study of Sexual Entitlement and Self-Efficacy Among Young Women and Men: Gender Differences and Associations With Age and Sexual Experience" 2016 6 *Behavioral Sciences* 1–14.

30 Green *Gender Violence in Africa* 71.

31 Sultana "Patriarchy and Women's Subordination: A Theoretical Analysis" 2010 *Arts Faculty Journal* 1 3.

32 Jewkes "Intimate Partner Violence: Causes and Prevention" 2002 359 *The Lancet* 1423 1423.

33 See, generally, Becker "Patriarchy and Inequality: Towards a Substantive Feminism" 1999 1 *University of Chicago Law Forum* 21–88.

One of the main causes of GBV is the power inequality rooted in patriarchy.[34] Feminism is adopted as a theoretical framework in this article, as feminists agree that patriarchy is the reason for the subjugation of women, as well as of men who do not conform to heteronormative standards.[35] In *Masiya*, the Constitutional Court held that "sexual violence and rape not only offends the privacy and dignity of women, but also reflects the unequal power relations between men and women in society."[36]

Rape is one of the most severe forms of GBV.[37] The Constitutional Court has also noted: "Rape is a scourge that affects women of all races, classes and sexual orientations, but we know that in South Africa rape has a pernicious effect on black women specifically."[38] Rape is an abuse of power expressed in a sexual way and characterised by the power of the offender and disempowerment for the complainant.[39] The Constitutional Court held that a reluctance to understand that rape is not just about sex, but about the abuse of power "would implicate this Court and courts around this country in the perpetuation of patriarchy and rape culture."[40] Burchell explains that "the rapist does not rape because he is sexually frustrated or deprived, any more than the alcoholic drinks because he is thirsty."[41] The Constitutional Court warned that there is an urgent need to dismantle the "rape culture" in South Africa.[42] It is submitted that "rape culture" forms parts of the bigger "GBV culture" experienced in South Africa.[43]

GBV is also a human rights violation that has severe consequences on the family unit, and on the mental and physical health of women and children.[44] Almost a third of all women who have been in a relationship have experienced physical or sexual violence by their intimate partner.[45] In 2020, the World Health Organization estimated that 12.1 in every 100 000 women

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34 Sultana 2010 *Arts Faculty Journal* 1. See also *F v Minister of Safety and Security (Institute for Security Studies & Others as Amici Curiae)* 2012 JOL 28228 (CC) par 56.

35 See, generally, Bennett "'Circles and Circles': Notes on African Feminist Debates Around Gender and Violence in the c21" 2010 14 *Feminist Africa* 21–47; Allen "Rethinking Power" 1998 *Hypatia* 21–40.

36 *Masiya v Director of Public Prosecutions Pretoria* 2007 (5) SA 30 (CC) par 28.

37 See, generally, UN Women "FAQs: Types of Violence Against Women and Girls" (no date) https://www.unwomen.org/en/what-we-do/ending-violence-against-women/faqs/types-of-violence (accessed 2023-10-28).

38 *Tshabalala v S; Ntuli v S* 2020 (5) SA 1 (CC) par 68 n38.

39 *Tshabalala v S; Ntuli v S supra* par 73.

40 *Tshabalala v S; Ntuli v S supra* par 63.

41 Burchell *Principles of Criminal Law* 5ed (2016) 611.

42 See *Tshabalala v S; Ntuli v S supra* par 75.

43 See, generally, UN Women "16 Ways You Can Stand Against Rape Culture" (18 November 2019) https://www.unwomen.org/en/news/stories/2019/11/compilation-ways-you-can-stand-against-rape-culture (accessed 2023-10-28).

44 See *S v Baloyi* 86 2000 (1) BCLR 86 (CC) par 11. See also Bencomo, Battistini and McGovern "Gender-Based Violence Is a Human Rights Violation: Are Donors Responding Adequately? What a Decade of Donor Interventions in Colombia, Kenya, and Uganda Reveals" 2022 24 *Health and Human Rights Journal* 29–45.

45 Enaifoghe, Dlelana, Durokifa and Dlamini "The Prevalence of Gender-Based Violence against Women in South Africa: A Call for Action" 2021 10(1) *African Journal of Gender, Society and Development* 121 126.

in SA are victims of femicide each year.[46] This is five times higher than the global average of 2.6 in every 100 000 women, clearly highlighting the historic and systemic nature of GBV in South Africa.[47] Also, only one in nine GBV cases is reported, mainly owing to a lack of trust in the SAPS.[48] Moreover, women fear retaliation by their abuser, as in the case of Qebe, who allegedly killed Booi because she was planning to testify against him in a previous assault case.[49] The culture of GBV in South Africa has resulted in many women being stuck between deciding to report GBV or accepting it out of fear for their lives.

3 THE GOVERNMENT'S RESPONSE TO GBV

In 2019, the Executive implemented the National Strategic Plan on GBV and Femicide 2020–2030.[50] The Strategic Plan notes: "The unacceptably high levels of gender-based violence and femicide in South Africa are a blight on our national conscience, and a betrayal of our constitutional order for which so many fought, and for which so many gave their lives."[51] It provides substantial policy on the prevention of GBV and also calls on researchers to continue exploring how we can strengthen the fight against GBV, as "there remains a poor information base, to inform a more effective response to GBV."[52] It is believed that this article will contribute to the information base and provide important recommendations that will strengthen the response to GBV in South Africa.

In 2019, the then-Chief Justice Mogoeng Mogoeng also identified the judiciary as a key role player in combating GBV.[53] He noted that South Africa will have to implement strategic plans to deal with the root causes of GBV and that stricter laws should be created.[54] In *S v Chapman*, the Supreme

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46 Nkanjeni "Women's Month: 5 Gender-Based Violence Cases That Have Made Headlines in 2022" (8 August 2022) *Times Live* https://www.timeslive.co.za/news/south-africa/2022-08-08-womens-month-5-gender-based-violence-cases-that-have-made-headlines-in-2022/ (accessed 2023-05-20).

47 Nkanjeni https://www.timeslive.co.za/news/south-africa/2022-08-08-womens-month-5-gender-based-violence-cases-that-have-made-headlines-in-2022/.

48 Thebus "GBV Cases in the Western Cape of Major Concern, With More Than 400 Recorded in a Year" (13 May 2022) *IOL* https://www.iol.co.za/capeargus/news/gbv-cases-in-the-western-cape-of-major-concern-with-more-than-400-recorded-in-a-year-734714c0-9a87-4fcf-9d4d-1599188b130c (accessed 20-05-2023).

49 Thebus https://www.iol.co.za/capeargus/news/gbv-cases-in-the-western-cape-of-major-concern-with-more-than-400-recorded-in-a-year-734714c0-9a87-4fcf-9d4d-1599188b130c.

50 Interim Steering Committee on GBV *National Strategic Plan*. See also South African Government "Overview of National Strategic Plan on Gender-Based Violence and Femicide Roll-Out Year 1: May 2020–30 April 2021" (9 August 2021) https://www.gov.za/sites/default/files/_gcis_document/202108/nsp-gbv-year-1-rollout-report-2020-2021-final-version-web.pdf (accessed 2023-11-11).

51 Interim Steering Committee on GBV *National Strategic Plan* 2.

52 Interim Steering Committee on GBV *National Strategic Plan* 32.

53 Mpanza "'We Need to Deal With the Root Causes of GBV'– Mogoeng Mogoeng" (3 October 2019) *Jacaranda FM* https://www.jacarandafm.com/news/news/we-need-deal-root-causes-gbv-mogoeng-mogoeng/ (accessed 2023-05-21).

54 Mpanza https://www.jacarandafm.com/news/news/we-need-deal-root-causes-gbv-mogoeng-mogoeng/.

Court of Appeal (SCA) held that rape is a particularly serious crime since it violates the victim's privacy, dignity and person, in a humiliating, demeaning and cruel way.[55] It further held that women have a right to be able to move about freely and enjoy the peace and quiet of their homes without fear and insecurity.[56] Various sexual courts have been established to deal specifically with GBV cases in terms of the Criminal Law (Sexual Offences and Related Matters) Amendment Act,[57] which introduced the regulation of such courts. In 2013, the Ministerial Advisory Task Team on the Adjudication of Sexual Offences Matters (MATTSO) published a report on the drastic need to establish sexual offences courts.[58] At the time of writing, 116 MATTSO courts, as they are currently called, had been established throughout the country.[59] The National GBV Strategic Plan has called for the establishment of 11 additional sexual offences courts equipped with victim support services.[60] The Department of Justice and Constitutional Development is currently in the process of converting the MATTSO courts into designated section 55A sexual offences courts.[61] These developments are promising and enable the judiciary to appoint presiding officers with experience in GBV matters; this is in addition to the National Prosecuting Authority who already has a dedicated unit that focuses on GBV crimes.[62] However, at the same time, it is argued that more can be done to ensure that the use of intermediaries and closed-circuit television facilities are widely available in sexual offences cases and, in particular, in the rural areas of the country.[63] Child witnesses and even some adults can testify in a separate room via an intermediary, upon application to the court.[64] More should be done to roll out these facilities to all areas of the country.

The legislature made significant progress by adopting three GBV laws in 2019. The Criminal Law (Sexual Offences and Related Matters) Amendment Act expanded the definition of incest, introduced the new offence of sexual intimidation, and made substantial amendments to the National Register for Sex Offenders, among other interventions.[65] The Domestic Violence Amendment Act expands on the definition of domestic abuse by including controlling behaviour, coercive behaviour, sexual harassment, related

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55 *S v Chapman* 1997 (3) SA 341 (SCA) par 3.

56 *S v Chapman supra* par 4.

57 S 55A(1) of the Criminal Law (Sexual Offences and Related Matters) Amendment Act 32 of 2007.

58 MATTSO *Report on the Re-Establishment of Sexual Offences Courts* (August 2013).

59 Department of Justice and Constitutional Development "Criminal Law. List of MATTSO Courts" (2022) https://www.justice.gov.za/vg/sxo-SOC-list.html (accessed 2023-05-21).

60 Interim Steering Committee on GBV *National Strategic Plan* 49.

61 Parliamentary Monitoring Group "Question NW924 to the Minister of Justice and Correctional Services" (25 April 2022) https://pmg.org.za/committee-question/18554/ (accessed 2023-05-21).

62 See National Prosecuting Authority "Sexual Offenses and Community Affairs: Defending Women and Children" (18 March 2022) https://www.npa.gov.za/sexual-offenses-and-community-affairs (accessed 2023-05-21).

63 See, generally, Lamprecht *The Use of Closed-Circuit Television in South African Criminal Courts* (master's thesis, University of Pretoria) 2019.

64 See s 158(2) and 170A of the CPA.

65 See generally, Criminal Law (Sexual Offences and Related Matters) Amendment Act Amendment Act 13 of 2021.

person abuse, elder abuse and spiritual abuse.[66] The Act also introduces the establishment of an integrated electronic repository for domestic violence protection orders.[67] While the Criminal and Related Matters Amendment Act made important amendments to the law relating to bail, it is argued that more can be done. Bail and its importance to the fight against GBV cannot be overemphasised.

4 THE IMPORTANCE OF BAIL REFORM

The Constitution provides that every accused has the right to be released from detention if this is in the interests of justice.[68] Bail does not exist to punish the accused, since the release of an accused is founded on their constitutional right of presumption of innocence.[69] The SCA noted in *S v Viljoen* that a bail application is not a criminal proceeding, nor should it be categorised as a dress rehearsal for the upcoming trial.[70] The release of an accused, however, becomes problematic when accused are granted bail and subsequently commit GBV offences. This has occurred in many GBV cases, including the featured case of *Qebe*, but also in the landmark Constitutional Court judgment of *Carmichele v Minister of Safety and Security*,[71] in which the accused had been released on a warning for attempted rape.[72] Shortly after his release, the accused brutally assaulted Carmichele, even after she and other concerned parties notified police and the prosecutor that the accused was stalking her.[73]

The Constitutional Court held that prosecutors have a duty to inform the presiding officer of any information relevant to the granting of bail.[74] The court also explained that South Africa has an unreserved duty under international law to prohibit all forms of GBV.[75] It referred to the Convention on the Elimination of All Forms of Discrimination Against Women, and held that GBV impairs the enjoyment by women of fundamental rights and freedoms.[76] South Africa also ratified the Maputo Protocol, which guarantees that every woman shall have the right to dignity inherent in a human being

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66 See s 2 of the Domestic Violence Amendment Act 14 of 2021, which substitutes s 1 of Act 116 of 1998.

67 See s12 of the Domestic Violence Amendment Act 14 of 2021, which inserts s 6A in Act 116 of 1998.

68 S 35(1)(*f*) of the Constitution.

69 S 35(3)(*h*) of the Constitution; *S v Acheson* 1991 (2) SA 805 (Nm); *S v Stanfield* 1997 (1) SACR 221 (C) 233g–i. See also Van der Merwe in Joubert *et al Criminal Procedure Handbook* 211; Du Toit *Commentary on the Criminal Procedure Act* (2016) 9–34.

70 *S v Viljoen* (2002) 4 All SA 10 (SCA) par 25. See also Theophilopoulos (ed) *Criminal Procedure in South Africa* (2019) 214.

71 See *Carmichele v Minister of Safety and Security (Centre for Applied Legal Studies as Amicus Curiae)* 2002 (1) SACR 79 (CC).

72 *Carmichele v Minister of Safety and Security supra* par 13.

73 *Carmichele v Minister of Safety and Security supra* par 5–24.

74 *Carmichele v Minister of Safety and Security supra* par 72.

75 *Carmichele v Minister of Safety and Security supra* par 62.

76 See *Carmichele v Minister of Safety and Security supra* par 62. See also art 1, 2, 3, 6, 11, 12 and 16 of UNGA *Convention on the Elimination of All Forms of Discrimination Against Women* (1979) 1249 UNTS 13 Adopted: 18/12/1979; EIF: 03/09/1981.

and to the recognition and protection of her human and legal rights.[77] The court also held: "Constitutional obligations are now placed on the state to respect, protect, promote and fulfil the rights in the Bill of Rights and, in particular, the right of women to have their safety and security protected."[78] This is a stark reminder of the duty placed on the State to safeguard the rights of women and children. It is believed that the State is not fulfilling its duties and obligations in this regard, especially if one considers what happened in the *Qebe* case, and to thousands of other women in South Africa.

The presiding officer hearing a GBV bail application is also under pressure to make a decision that will serve the interests of justice, as well as the interests of the complainant and the accused.[79] The decision of the court, however, is complex as it has to strike a balance between the rights of the accused and the rights of the victims.[80] Presiding officers are guided by numerous bail factors included in the CPA.[81] Section 60(4) of the CPA provides that the granting of bail will not be in the interests of justice when certain grounds are established by the State. These include the likelihood that the accused, if released on bail, will (a) endanger the safety of the public or will commit a Schedule 1 offence,[82] (b) evade his trial,[83] (c) intimidate witnesses or destroy evidence,[84] (d) jeopardise the effectiveness of the criminal justice system,[85] and (e) undermine the public order and peace.[86] These factors were clearly evident in *Carmichele* and *Qebe*, but the State failed in its duty to protect the victims. It is submitted that there exists a problem in the analysis, application and interpretation of bail grounds in serious GBV matters.

The legislature in 2021 attempted to address this concern by instructing a court during bail proceedings, in certain offences, also to hear the views of the individual against whom the offence was committed, and whether they would feel safe if the accused were released on bail.[87] It is not clear how consistently this amendment is being applied in our courts, but this

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77 African Union *Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa* (2003) Adopted:01/07/ 2003; EIF: 25/11/ 2005. See also Mujuzi "The Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa: South Africa's Reservations and Interpretative Declarations" 2008 12(2) *Law, Democracy & Development* 41 58.

78 *Carmichele v Minister of Safety and Security supra* par 57. See also May "Submissions by the Women's Legal Centre to the United Nations Special Rapporteur on the Promotion and Protection of Freedom of Opinion and Expression" (June 2021) https://www.ohchr.org/sites/default/files/2021-11/Women-s-Legal-Centre.pdf (accessed 2023-10-25).

79 See *Majali v S* (unreported, GSJ case no 41210/2010, 19 July 2011) par 17. See also Du Toit *Commentary on the Criminal Procedure Act* 9–4.

80 See *S v Dlamini; S v Dladla; S v Joubert; S v Schietekat* 1999(2) SACR 51 (CC) par 50.

81 See s 60 of the CPA.

82 S 60(4)(*a*) of the CPA. See also *S v Mpulampula* 2007 (2) SACR 133 (E) 136i–j.

83 S 60(4)(*b*) of the CPA. See also *S v Yanta* 2000 (1) SACR 237 (Tk) 247d–e.

84 S 60(4)(*c*) of the CPA. See also *S v Louw* 2000 (2) SACR 714 (T).

85 S 60(4)(*d*) of the CPA. See also Du Toit *Commentary on the Criminal Procedure Act* 9–32.

86 S 60(4)(*e*) of the CPA. See also *S v Miselo* 2002 (1) SACR 649 (C) 653a–b.

87 See s 4(*b*) of the Criminal and Related Matters Amendment Act, amending s 60 of the CPA.

amendment is not sufficient as it stands. It is argued that the victim might not always be willing to testify against the accused, owing to the victim being financially dependent on the accused or afraid of what might happen to them when the accused is released.[88] It is proposed that the Act should also instruct the court to call to the stand additional witnesses who have been affected by the conduct of the accused. This should be made mandatory in GBV cases in order to give a voice to those who cannot speak owing to trauma caused by the accused.

Not all GBV offences are regarded in the same way by a bail court. Where an accused is charged with a Schedule 6 offence, such as premeditated murder or gang rape, the accused is required to provide exceptional circumstances to justify bail.[89] Such exceptional circumstances are not defined but may include that the accused is terminally ill or has proved that the State's case against him is weak.[90] This is the only time where there is a burden placed on the accused to adduce evidence if they want to obtain bail.[91] The authors submit that this reverse onus should be applicable to all serious GBV matters where the accused: has already confessed to the offence; was caught red-handed by the police; or has prior GBV convictions. This should be applicable to any GBV murder, GBV rape and GBV assault with intent to cause grievous bodily harm, and not only to the most serious GBV offences currently included under Schedule 6.

Bail conditions also play a crucial role in ensuring the safety and security of women and children.[92] In *S v Mathonsi*, the court prohibited the accused from contacting certain witnesses via WhatsApp, Twitter, Facebook, email, SMS and any other forms of communication.[93] In *M v S*, a father was convicted and sentenced of the attempted rape of his eight-year-old daughter.[94] The court provided a scathing report on the criminal justice system and concluded that the daughter was not protected from her father during court proceedings, which indicated a clear lack of proper bail conditions.[95] The enforcement of bail conditions is problematic in GBV cases where the offender is often closely related to the victim. It is therefore up to the court to inform the accused of the severe consequences if they were to violate these conditions. It is submitted that our courts must impose harsh consequences on GBV accused who forfeit their bail conditions. The National Strategic Plan on GBV recommends that the CPA should allow "for bail conditions to be tightened in cases of those charged with rape".[96] In

88 See, for e.g., Conner "Financial Freedom: Women, Money, and Domestic Abuse" 2014 20 *William and Mary Journal of Women and the Law* 339–397.

89 See s 60(11)(*a*) of the CPA. See also *S v Dlamini; S v Dladla; S v Joubert; S v Schietekat supra* par 77, where the Constitutional Court declared s 60(11(*a*) of the CPA constitutional. See also *Matwa v S* [2022] ZAWCHC 72 par 19.

90 Van der Merwe in Joubert *et al Criminal Procedure Handbook* 236. See also *Mafe v S* [2022] ZAWCHC 108 par 16.

91 Theophilopoulos *Criminal Procedure in South Africa* 214.

92 See s 62 of the CPA. See also Du Toit *Commentary on the Criminal Procedure Act* 9–88F.

93 *S v Mathonsi* 2016 (1) SACR 417 (GP) par 29.

94 See *M v S* 2020 (1) SACR 241 (WCC).

95 *M v S supra* par 76.

96 Interim Steering Committee on GBV *National Strategic Plan* 34.

addition, it is argued that the bail conditions issued to all GBV accused charged with serious GBV crimes should be subject to automatic review by a High Court. Such a process could be informal and take the form of an experienced judge reviewing the bail conditions. If the judge is not convinced that the conditions are appropriate, then the matter should be sent back to the bail court.

It is argued that the Department of Justice and Constitutional Development should develop professional programmes aimed at providing refresher courses to magistrates regarding the interpretation of bail proceedings in GBV cases. This could be presented by a retired presiding officer with experience in GBV matters. It is clear from the above discussion that more can be done to strengthen our bail regime in accordance with the fight against a culture of GBV.

5 THE CRITICAL ROLE OF SAPS

The State has a duty to protect women against all forms of GBV that impair their fundamental rights and freedoms.[97] It has to take reasonable and measurable steps to prevent the violation of those rights.[98] The courts, together with the SAPS, are under a duty to send a clear message to perpetrators of GBV that they are determined to protect the equality, dignity and freedom of all women.[99] In *K v Minister of Safety and Security*, the complainant was brutally gang raped by three on-duty and uniformed police officers.[100] The complainant, who asked for a lift in the early morning hours from the officers, would never have imagined that the organ responsible for shielding her from harm would violate her in such an unimaginable way. This case, decided in 2005, has left a visible scar on the image of the SAPS, especially in its fight against GBV. The SAPS is the primary body responsible for the protection of women against sexual violence and is not supposed to contribute to the problem.[101] The Constitution provides for the establishment of a single police force.[102] The SAPS is constitutionally responsible to prevent, combat and investigate crime, to protect and secure its citizens, to maintain public order and to enforce the law.[103]

In *AK v Minister of Police*, the applicant was attacked, robbed and repeatedly raped by unknown assailants.[104] The Constitutional Court held that if the police had conducted a thorough search and investigation for the applicant where they initially found her car, she would not have been

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97 *S v Chapman supra* par 4.

98 Maphosa "Tackling the 'Shadow Pandemic': The Development of a Positive Duty on Adults to Report Domestic Violence" 2002 55(1) *De Jure Law Journal* 87 94.

99 Maphosa 2002 *De Jure Law Journal* 87 98. See also *Carmichele v Minister of Safety and Security supra* par 17.

100 *K v Minister of Safety and Security* 2005 (9) BCLR 835 (CC) par 1.

101 *Carmichele v Minister of Safety and Security supra* par 30; *K v Minister of Safety and Security supra* par 18.

102 S 199 of the Constitution.

103 S 205(2) of the Constitution.

104 *AK v Minister of Police* 2023 (2) SA 321 (CC) par 1.

repeatedly raped and would not have suffered secondary trauma.[105] The court stated that the conduct of the police was wrongful and held that the applicant could claim damages from the Minister of Police.[106] The court further held that "[g]ender-based violence sustains women's subordination in society and imperils the constitutional values of human dignity, freedom, substantive equality, and the establishment of a non-sexist society."[107] The court also emphasised the obligation on the police to take effective steps to eradicate all forms of GBV.[108]

The SAPS and other stakeholders like the NPA and the Department of Health have implemented several policies over the last few decades to address GBV.[109] This has resulted in the establishment of several units dedicated to helping GBV victims. One such unit is the Thuthuzela Care Centre, which was established in 2006 and deals specifically with rape victims.[110] When reporting the offence, the complainant is taken from the police station to a Thuthuzela Care Centre (TCC) located at hospitals throughout the country.[111] This is done to provide a victim-friendly environment for the rape victim. However, the Foundation for Professional Development reported that victim friendliness is still a major concern at TCCs.[112] The report indicated that secondary victimisation occurs owing to insensitive police officers and inadequate counselling rooms and privacy at TCCs.[113]

The report also noted, "Participants mentioned that the police do not provide feedback to the victims on the progress of their cases, which makes the situation for the victim even more complicated."[114] In an attempt to address the problem, Minister of Police, Bheki Cele, announced the rolling out of GBV desks at police stations in 2022.[115] There are currently GBV

105 *AK v Minister of Police supra* par 18.

106 *AK v Minister of Police supra* par 124.

107 *AK v Minister of Police supra* par 117.

108 *Ibid*.

109 See generally Interim Steering Committee on GBV *National Strategic Plan*.

110 In addition, the Khuseleka Centres also provide assistance to GBV victims which include "trauma counselling and psychological support, healthcare, police services, legal assistance and shelter for victims of abuse." See South African Government "Plan to have GBV One-Stop Centres in All Hotspots" (28 October 2020) https://www.sanews.gov.za/south-africa/plan-have-gbv-one-stop-centres-all-hotspots (accessed 2023-05-22).

111 National Prosecuting Authority "Thuthuzela Care Centres" https://www.npa.gov.za/sites/default/files/resources/public_awareness/TCC_brochure_august_2009.pdf (accessed 2023-05-22).

112 Foundation for Professional Development *Thuthuzela Care Centre Compliance Audit and Gap Analysis 2016* (November 2016) http://shukumisa.org.za/wp-content/uploads/2018/02/PA00MQJ6-1.pdf (accessed 2023-05-22) 15.

113 Foundation for Professional Development http://shukumisa.org.za/wp-content/uploads/2018/02/PA00MQJ6-1.pdf (accessed 22-05-2023) 15.

114 Foundation for Professional Development http://shukumisa.org.za/wp-content/uploads/2018/02/PA00MQJ6-1.pdf (accessed 22-05-2023) 82.

115 Mabaso "Bheki Cele Wants Dedicated Desk to Investigate Gender-Based Violence Cases" (25 March 2022) *Eyewitness News* https://ewn.co.za/2022/03/25/bheki-cele-wants-dedicated-desk-to-investigate-gender-based-violence-cases (accessed 2023-05-22).

desks at all police stations across the country.[116] They are manned by over 80 000 police members trained in GBV-related courses.[117] The desks were established to provide coordination between the experiences of the victim and the status of the perpetrator in the criminal justice system.[118] An audit is currently underway to assess the functionality of the desks.[119] The authors commend the SAPS and other stakeholders for their commitment in professionalising the fight against GBV, but more needs to be done. It is argued that an integrated online GBV database, tracking the victim and the offender's status, should be rolled out to streamline the process and to provide the victim with immediate updates about the case.

6 UPROOTING THE CULTURE OF GENDER-BASED VIOLENCE THROUGH INCREASED AWARENESS

The GBV culture in South Africa should be continually exposed and not normalised.[120] GBV offences are often not reported owing to a desire for privacy and shame over the matter.[121] The marriage relationship is regarded as a sacred and private communion no matter what, as a male participant in a research study in Johannesburg once explained: "Issues involving two people in a marriage like in an African culture there is a saying that *indaba zabantu ababili azingenwa* [issues involving two people in romantic relationship cannot be interfered with]."[122] Another participant said, "Sometimes men do violence against women without realising that they're violating the rights of a woman."[123] These views indicate how normalised GBV has become, and that it has become a culture in South Africa.[124] It is therefore of paramount importance to make people aware that GBV is unlawful and abhorrent. It is argued that GBV awareness campaigns are popular in South Africa but are not having the desired effect as crimes against women and children remain unacceptably high.

SAPS reported that all provinces currently conduct a "365 days campaign" that runs annually and consists of community-based engagements such as *Izimbizo*, radio and television talks, door-to-door engagements, school-based agreements, crime dialogues and the distribution of information tablets at shopping centres.[125] Government created a policy framework to

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116 Ministry of Police "Police Ministry Assures SAPS Commitment to Bringing GBV Perpetrators to Book" (27 May 2022) *SAPS* https://www.saps.gov.za/newsroom/msspeechdetail.php?nid=40052 (accessed 2023-05-22).

117 Ministry of Police https://www.saps.gov.za/newsroom/msspeechdetail.php?nid=40052.

118 Minister of Police "For Oral Reply: Question 327" (31 August 2022) *Parliamentary Monitoring Group* https://static.pmg.org.za/RNO327-2022-08-31.pdf (accessed 2023-05-22).

119 Minister of Police https://static.pmg.org.za/RNO327-2022-08-31.pdf.

120 See *Tshabalala v S; Ntuli v S supra* par 75.

121 Mutinta "Gender-Based Violence Among Female Students and Implications for Health Intervention Programmes in Public Universities in Eastern Cape, South Africa" 2022 8 *Cogent Social Sciences* 3.

122 Zinyemba and Hlongwana 2022 *BMC Public Health* 7.

123 Zinyemba and Hlongwana 2022 *BMC Public Health* 8.

124 See Mutinta 2022 *Cogent Social Sciences* 3.

125 Minister of Police https://static.pmg.org.za/RNO327-2022-08-31.pdf.

address GBV in the Post-School Education and Training System (PSET).[126] The Department of Higher Education and Training also convened a GBV colloquium for all PSET institutions and stakeholders to identify national, regional and institutional initiatives to create awareness and prevent GBV in institutions.[127] The policies that have been put in place focus on the accessibility and availability of student accommodation, which is an ongoing challenge for PSET institutions.[128] Where student housing is located, the policy facilitates and limits incidents of all forms of violence, including GBV. This is a commendable step by government, even though the implementation of the policy is directed only to the higher-education sector. GBV awareness should also start in our homes and communities. Citizens should be encouraged to donate to charities that deal with GBV prevention. Religious leaders could contribute to the call for GBV prevention by running programmes at churches and mosques. It is submitted that the Department of Social Work could work on a programme to assist parents to incorporate chores within households to teach their children that men and women are equal.

GBV awareness is also part of the school curriculum from Grades 4 to 12.[129] In terms of school awareness, we suggest that schools arrange regular visits to police stations to inform senior scholars visually of the scourge of GBV. Scholars need to be taken out of their comfort zone at schools to experience what anti-GBV is in practice. Awareness in the mass media is important and impactful, but currently the use of outdoor visual awareness is lacking. The use of billboards is a relatively inexpensive way of illustrating to thousands of people on a daily basis what GBV is.[130] Billboards are a way to "serve notice" to the masses that the government and community is serious about GBV reform.[131] Soccer, rugby and cricket players should be encouraged to take the knee against GBV and a designated minute before each game could be attributed to GBV awareness. Businesses could provide slogans that relate to eliminating GBV in South Africa and link it to citizens being proudly South African. SAPS should introduce a panic button system for victims of GBV to notify SAPS when a victim requires help. An incentive scheme, such as a monetary reward or a voucher, could be implemented to encourage people to report GBV offences. It is also important to involve men in GBV prevention programmes.[132] This could include reformed GBV offenders and male police

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126 Department of Higher Education and Training *Policy Framework to Address Gender-Based Violence in the Post-School Education and Training System* (March 2020) https://www.dhet.gov.za/Social%20Inclusion/Gazette%20Z95_1221889%20Policy%20Framework%20to%20Address%20GBV%20in%20the%20PSET%20System%202020%20(1).pdf.

127 *Ibid*.

128 *Ibid*.

129 See South African Government "Western Cape Education Takes a Stand on Gender-Based Violence" (9 December 2020) https://www.gov.za/speeches/stand-against-gender-based-violence-9-dec-2020-0000 (accessed 2023-05-22).

130 See DeCicco "Crime Watch: Implementation of Statewide Crime Prevention Programs" 1977 5(3) *Criminal Justice Quarterly* 56 61.

131 See DeCicco 1977 *Criminal Justice Quarterly* 61.

132 Mashamaite and Mukhathi "Stop Gender-Based Violence and Femicide" 2020 *Police* 1 4.

officers. As a country, we have talked enough about GBV prevention; the time has come to be more proactive in our awareness campaigns.

7 CONCLUSION

This article has called for a reform of the current GBV regime. However, the road to GBV eradication is complex because we are painstakingly and slowly breaking down a violent system first inherited from apartheid and then normalised after 1994. It is submitted that a holistic effort from community forums, the SAPS, the NPA, the judiciary and others is required to combat GBV. Judges should be encouraged to practise judicial activism in GBV cases. For example, in the highly publicised *Shoba* case,[133] the judge did not even once refer to the scourge of GBV. Courts are also encouraged to pass consistent sentences in GBV matters.[134] It is recommended that the Department of Correctional Services should review their GBV rehabilitation programmes to ensure that it is creating an anti-GBV culture. It is submitted that all GBV offenders must be subjected to such a rehabilitation programme, which must include the participation of willing survivors of GBV offences. The granting of bail should be considered carefully especially where the court is of the view that the life of a complainant is under threat. Protection orders must be prioritised by our courts. SAPS members who fail to comply with their obligations in terms of assisting GBV complainants should be held accountable and liable to a reduction of their salary.

There is a dire need to be more proactive in our fight against GBV. The enacting of the National Council on Gender-Based Violence and Femicide Bill (B31–2022) must therefore be prioritised. This Council, once established, will provide strategic leadership on the elimination of gender-based violence and femicide and provide an inter-sectoral and multi-sectoral approach towards the implementation of the National Strategic Plan.[135] All these efforts will be nullified if we fail to uproot the culture of GBV.

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133 *Supra*.

134 *Maila v S* [2023] ZASCA 3 par 59.

135 S 2 of the National Council on Gender-Based Violence and Femicide Bill (B31-2022).

JUDICIAL CASE FLOW MANAGEMENT "CHECKPOINT": HOW FAR HAVE WE GONE?[1]

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SUMMARY

This article examines the introduction of judicial case flow management into South African law from a historical perspective, its initial failures, resistance and fundamental principles. It sets out the judicial attempts to regulate the management of litigious matters through the Uniform Rules of Court, particularly rule 37A, and the impact of the introduction of the era of norms and standards on case flow management. Through revelations in practice of the positive progress achieved in judicial case flow management, the central argument is that a more inquisitorial role in the case flow management system is key to ensuring access to justice.

1 INTRODUCTION

What is judicial case management?[2] Put simply, it is a system by which control over the litigation process passes from the parties and their legal representatives to judicial officers. The following excerpt captures the essence of judicial case flow management (CFM):

> "The judiciary exercises that control to promote the just determination of litigation to dispose efficiently of the business of the court, to maximise the efficient use of available judicial and administrative resources, and to facilitate the timely disposal of business at a cost affordable by the parties. In achieving these goals, case management aims to eliminate unnecessary delays in litigation. Unnecessary delay is regarded as any lapse of time beyond that reasonably required for interlocutory activities essential to the fair and just determination of the issues bona fide in contention between the parties and the preparation of the case for trial."[3]

[1] The author is grateful to Denim Kroqwana (Director: Court Operations (Eastern Cape)) for his personal institutional memory and assistance in the conception of this article, and to Sikhumbuzo Mpako (Senior Law Researcher at Makhanda High Court) for his assistance and constructive criticism in shaping this work. Any shortcomings that remain are the author's.

[2] A term that is used interchangeably with "judicial case flow management", or "judicial case management", the acronym version of which, for the sake of convenience, is "CFM".

[3] Judge Ipp "Case Management and Court–Annexed Alternative Dispute Resolution: The Hoexter Commission: New Rule 37A" 1998 *Consultus* 49 49–50.

As with everything in life, CFM exists in a context. That context plays an important role in understanding the meaning and purpose of CFM.

More than two decades after the first experimental CFM in the Cape Provincial Division (CPD), and two years since the promulgation of the current version of rule 37A of the Uniform Rules of Court (the Rules), it behoves us to: trace the history behind the introduction of CFM in South Africa; take stock of how beneficial it has been; and consider the challenges that remain in its implementation, and how these challenges may be addressed.

The promulgation of the Norms and Standards,[4] insofar as they make provision for judicial involvement in case management, attracted resistance from different corners, and for different reasons. Detractors were tempted to ask: "Why fix something that isn't broken?" In the case of members of the Bench, the concern would have related to the addition of yet another responsibility over and above the avalanche of files piled up on their desks. For others, the objection stemmed from the common law approach to litigation, and a firm belief in the fairness of the adversarial system. On this approach, CFM was incompatible with the principle that a judge is a passive, neutral arbitrator, supposedly removed from the dust of litigation. This school of thought maintained that the judge ought to leave the parties to fight on their own, without judicial interference. The criticism went further to say that judicial control in case management made the judge both player and umpire.

To the traditionalist, it is not the judiciary's concern what eventually becomes of a matter if the parties, on the hearing day, are ill prepared or manage the case poorly; that is a matter for the errant parties. This hands-off approach to the litigation process also does not concern itself with the finalisation rates of cases but considers costs orders for postponements and removal of matters from the roll as sufficient means for exercising control over the litigation process.

The aversion to CFM should have come as no surprise, for:

> "[R]eforms [are] rendered naught largely by the legal profession's dislike of, and resistance, to change ... Effecting a change of attitude in the lawyers is likely to be more difficult than changing the rules of court."[5]

According to the report and findings of the Hoexter Commission,[6]

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4 Norms and Standards for Judicial Officers issued by the Chief Justice in terms of s 8 of the Superior Courts Act 10 of 2013 read with s 165(6) of the Constitution of the Republic of South Africa, 1996 (Norms and Standards), published in GN 147 in *GG* 37390 of 2014-02-28.

5 Zuckerman "Lord Woolf's Access to Justice: Plus Ça Change …" 1996 59 *The Modern Law Review* 773 780.

6 The Hoexter Commission (the Commission) was appointed by GN R471 in *GG* 16336 of 1995-03-31 and mandated to enquire into and report upon and make recommendations regarding the rationalisation of the provincial and local divisions of the Supreme Court with more specific reference to, *inter alia*, the efficacy or otherwise of the existing court structure and the need for improved access to justice for civil litigants in the Supreme Court (South African Law Commission: Hoexter Commission Report *Inquiry into the Rationalisation of the Provincial and Local Divisions of the Supreme Court, Third and Final Report* (1997) ch 9 par 9.1.8 (the Hoexter Commission Report)).

> "The legal profession is an inward-looking one with a strangely developed herd instinct. It has always displayed an ingrained aversion to change."[7]

Yet, CFM had its genesis well before the promulgation of the Norms and Standards.

2 HISTORICAL PERSPECTIVE

In its report handed down in December 1997, the Hoexter Commission[8] found that "there was widespread support for the introduction of case management to South Africa," and that there was, without doubt, "a pressing need for reform of the way in which defended actions in South Africa are dealt with". The Commission observed that our procedural system was too slow and too expensive "because the pace of litigation [was] dictated by the parties and their legal representatives".[9]

The report and findings of the Commission also paved the way for the amendment of rule 37 by the insertion of rule 37A, which made provision for experimental case flow management in the Cape Provincial Division (CPD) (as it was then) as "the first tentative step in South Africa's arduous journey towards an effective system of case management".[10]

The amended rule, as implemented in the CPD from 1 December 1993 to 30 November 1995, embodied provisions relating to discovery and the availing of documents discovered on oath to any other party for inspection; the furnishing of further particulars for trial; the attendance of a conference before a judge in chambers to consider possible ways of curtailing the duration of the trial, with the judge accorded the power to give directions or make such orders she or he deemed appropriate in relation to such curtailment; the production of minutes by the parties pursuant to the

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7 According to Legodi JP in *Nthabiseng v Road Accident Fund* [2018] ZAGPPHC 409 par 4: "When change is imminent everyone look[s] for cover and in the process turn[s] into a resistant mode."

8 It is by no means suggested that the Hoexter Commission is the source and origin of CFM in our procedural law. The report of the Commission was informed principally by Lord Woolf *Access to Justice: Interim Report to the Lord Chancellor on the Civil Justice System in England and Wales* (1995) (Woolf Interim Report) and Lord Woolf *Access to Justice: Final Report to the Lord Chancellor on the Civil Justice System in England and Wales* (1996) (Woolf Final Report), and by developments that had taken place in international jurisdictions, especially English law.

9 Hoexter Commission Report ch 9 par 9.1.2–9.1.3. The following excerpt captures the essence of the Commission's report (par 9.1.4–9.1.5):

> "It is also beyond question that in many parts of the modern world delay in litigation has been effectively reduced by the adoption of some or other form of case management. The basic concept of case management is that the court itself, and not the parties or their lawyers, controls the pace of litigation through direct involvement in the litigation process; and the key components of case management are unremitting court supervision from the time an action becomes opposed until judgment; the determination of deadlines for compliance of the various pre-trial stages; monitoring to ensure compliance with deadlines; and strict insistence by the court on compliance with deadlines.
>
> The Commission agrees ... that it would be quite wrong for South Africa to lag behind those jurisdictions which have adopted case management systems. Indeed, South Africa simply cannot afford to do so."

10 Published in GN R1843 in *GG* 15147 of 1993-10-01. Hoexter Commission Report ch 9 par 9.1.18.

directions issued by the judge regarding, *inter alia*, facts and documents admitted by each party, and whether experts' reports were exchanged; and the summoning of the parties or their legal representatives to chambers for further consideration of whether the matters referred to in the parties' minute have been complied with.

Rule 37A(8) accorded a party the right to apply to a judge in chambers for an order against a defaulting party, dismissing the action or striking out the defence and making such order as to costs as deemed appropriate.

After the Cape rule 37A had run its course, it was substituted by another experimental rule 37A,[11] which made provision for judicial control and intervention in a more radical manner than had been the case previously, in line with well-established trends in other jurisdictions.

A synopsis of the amended rule was presented by Professor Hennie Erasmus,[12] who enumerated some of its features as having been the following:

(a) management role and responsibility of a judge in the pre-trial phase of a civil case;
(b) supervision of the time and events involved in the movement of a case through the court system from the point of initiation to disposition;
(c) intervention by a judge at various stages to give appropriate directions, in the event of the parties not adequately promoting the progression of a case; and
(d) removal from the list of cases awaiting trial and paving the way for ripe cases to proceed, in instances where the progression of a case was not satisfactory.

The addition of subrule 37A(16) was far-reaching, and is quoted in full hereunder:

> "(a) In every opposed civil action other than actions for the dissolution of marriage and actions relating to the custody of children, each party shall be required to exchange a summary of the evidence, other than expert evidence which shall be dealt with in terms of subrule (5)(g), of each witness whom such party expects to call to testify at the trial.
> (b) The purpose of delivering the summary shall be to facilitate clarification of the issues, clarification of the evidence in regard thereto and meaningful negotiations for the settlement of such issues.
> (c) The summary in respect of each witness shall–
> (i) identify the witness by name;
> (ii) summarise the substance of the evidence such witness is expected to give on each issue with sufficient particularity to serve the purpose for which the rule requires the summary to be given; and
> (iii) be verified by the signature of the witness."

[11] Published in GN R1352 in *GG* 18365 of 1997-10-10, which came into operation on 1 December 1997.

[12] Erasmus "Case Management Moves Ahead: New R 37A in Force in Cape High Court" 1998 *De Rebus* 27 27–29.

As can be gleaned from its reading, this subrule, which regulated the exchange of summaries of evidence by witnesses to be called to testify at the trial, was innovative, especially in the context of an adversarial system.[13]

The Commission acknowledged that the provisions of CPD rule 37A did not go nearly far enough to sustain the operation of an effective case management system in the High Courts. It nevertheless recommended the extension of its applicability to a division of the High Court other than the CPD, if it appeared (after due consultation between the Judge President of such division and the Chairperson of the Rules Board) that such division was ready and willing to be governed thereby. But, as is demonstrated, the availed extension bore nothing concrete.

3 THE DEMISE OF THE EXPERIMENT

According to Griesel,[14] CPD rule 37A failed as an experiment. He lamented its demise stating that administering a judicial case management system under the rule, in circumstances where there was lack of infrastructure and staffed personnel in the registrar's office, was like "having a brand-new Ferrari pulled by a team of donkeys because no engine had been fitted".[15]

Practitioners are also on record as having not cooperated in the implementation of the experimental project. They went through the motions without any serious application of mind. According to Griesel,[16] a common response from practitioners to the invitation to set out issues falling to be determined at trial was "the issues are those raised in the pleadings". Even judges, continued Griesel,[17]

> "were by no means free from blame. Instead of pulling together in order to exercise some judicial control and leading by example, there were those who were less than enthusiastic (to put it no higher) about this innovation, which

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13 On this subject, Erasmus "'Much Ado About Not So Much' – or the Excesses of the Adversarial Process" 1996 *Stellenbosch Law Review* 114 116 remarked:

> "The exchange of witness statements has become an established feature of civil litigation in Australia, England, New Zealand and the United States of America. The exchange of witness statements has also become increasingly common in international and English domestic arbitrations. The practice was introduced into England in 1986 by the addition of rule 2A to RSC Order 38. In 1992 the practice of treating witness statements as evidence in chief was sanctioned by an amendment to the rule, and the Practice Direction of the Lord Chief Justice of 24 January 1995 supplemented the rule by providing that unless otherwise ordered, 'every witness statement shall stand as the evidence in chief of the witness concerned.' In the Woolf report, the practice of requiring the exchange of witness statements is 'firmly' endorsed, and recommendations are made to discourage certain practices in this regard which gave rise to escalation of costs. It is a salutary practice which should be adopted in South Africa."

14 Judge Griesel "Cape Rule 37A: What Went Wrong?" 2001 *De Rebus* 8 8–9.

15 Compare ch 9 par 9.1.21 of the report and findings of the Commission which reads:

> "[I]t is imperative that the launch of a CM pilot project be preceded by the appointment to the court personnel of the high court concerned of an official to be designated THE CASE MANAGEMENT CONTROLLER [CM Controller]. This official will be charged with overall responsibility for administering and monitoring the CM pilot project; and at the same time, he or she will have an important function to perform at the PROGRESS CONFERENCE for which the new Rule provides."

16 Judge Griesel 2001 *De Rebus* 9.

17 *Ibid*.

> placed an additional burden on them. In the result, there was a lack of consistency in the application of the rule."

Perhaps "lack of consistency" is an understatement. Views on CFM were divergent: while Erasmus lamented the demise of CPD rule 37A, Flemming[18] viewed the introduction of the rule as superfluous.[19] Not only was he critical of the benefits achieved by case management in the South African setting, but he proffered reasons why CFM did not get the appropriate positive response from the parties, mentioning, among others, the following:

> "I have indicated that in the Witwatersrand High Court case management takes place in many shapes which are content-directed or orientated towards problem resolution; it is done without elaborate electronic control systems; there is judicial involvement only where a need for it becomes apparent. About the advantages gained, much can be added. In the final analysis though, there is a serious negative note.
>
> A basic problem is that practitioners receive no real training in pre-trial preparation. And among some senior counsel there is resistance to judicial involvement which is apparently perceived as an outside party telling eminent counsel to discuss his case rather than proceeding with the old style 'trial by ambush'. This will take time to resolve itself before younger persons replace those aging ones – unfortunately too long."

He was also of the view that rule 37 was wide enough to allow any division of the High Court to do what rule 37A spelled out, except for the consequences of non-compliance.

All this gives credence to what McQueen and Baldwin have said,[20] namely that different attitudes towards CFM were bound to result in a personality-based approach, as opposed to an institutionalised one with the potential to produce uneven long-range successes.

The final nail in the coffin came about when the experimental rule 37A was repealed on 20 April 2001.[21] With its demise, rule 37 remained in the statute book as a residual case management tool, and is dealt with in the next section of this article.

4 RESIDUAL CASE FLOW MANAGEMENT

Rule 37, whose primary objectives are to curtail the duration of a trial, narrow down issues, cut costs and facilitate settlements, has always accorded the judge a limited form of case management responsibility. Rule 37(8)(*a*) grants a judge the power to convene, at the request of a party or *mero motu*, a conference in the judge's chambers. In terms of rule 37(8)(*c*), the judge may give directions that might promote the effective conclusion of the matter, but only "with the consent of the judge and all the parties".

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18 Judge Flemming was the DJP of the Witwatersrand Local Division (WLD) (as it then was).

19 Judge Flemming "What Do We Really Want From Case Management?" 2001 *De Rebus* 9 10–11.

20 McQueen and Baldwin "Caseflow Management – The New Era" attachment in electronic mail message (12 December 2012) to Hon Dressel, President, The National Judicial College.

21 The repeal was published in regulation GN R373 in *GG* 7060 of 2001-04-30.

Much as rule 37(8) gives a judge the power to call upon the parties *mero motu* to attend a conference in chambers, its weakness as a case management tool is that it provides no process to alert judges to the need for intervention. In an adversarial system, the parties are inclined to keep their cards close to their chests. This, coupled with the fact that the directions in terms of rule 37(8)(*c*) may only be issued with the consent of the parties, renders the discretion of the judge to invoke the subrule a rare commodity. Indeed, the writer does not, in the 22 years of his practice, recall ever invoking, or being invited by a judge in chambers who invoked, the subrule. In terms of the subrule, the responsibility of a judge to take charge of the proceedings is lacking; the parties remain dominant in the process.

Judicial control that is subject to the consent of the parties is no control at all.[22] However, a supine approach towards litigation by judicial officers is not justifiable neither in terms of the fair trial requirement, nor in the context of resources.[23]

On judicial control, Lord Woolf remarked:[24]

> "Without effective control ... the adversarial process is likely to encourage an adversarial culture and to degenerate into an environment in which the litigation process is too often seen as a battlefield where no rules apply. In this environment, questions of expense, delay, compromise and fairness may have only low priority. The consequence is that expense is often excessive, disproportionate and unpredictable; and delay is frequently unreasonable."

Because of the inadequacy of rule 37, the quest for a workable judicial case flow management dispensation continued. Demonstrably, an adversarial system bereft of CFM had more demerits than merits.

At its worst, a purist adversarial system did not encourage cooperation among the parties and their legal representatives. It was not unusual to read pre-trial minutes worded, "We will take instructions and revert" or "Settlement was discussed, but not reached", in circumstances where no *bona fide* effort had been made to elicit the outstanding instructions or engage in serious settlement talks. The minutes were generated purely with a view to going through the motions and securing a trial date. The combative nature of the system was blatant. In correspondence exchanged between parties to a litigious matter, coming across words such as "Your client has no case; our instructions are to vehemently oppose any application he may resort to and seek a punitive cost order against him" was not a rare occurrence. None of these litigation tactics benefited the litigants. Settling cases at the doors of court, in instances where the parties could have resolved their differences long before the trial date, was the norm.

It comes as no surprise that Hussain, Barnard and Hughes commented on the unsustainability of the system as we knew it, as follows:[25]

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22 Judge Griesel 2001 *De Rebus* 9.

23 See *Take and Save Trading CC v Standard Bank of SA Ltd* 2004 (4) SA 1 par 3, where Harms JA remarked:

> "[A] Judge is not simply a 'silent umpire'. Fairness of court proceedings requires of the trier to be actively involved in the management of the trial, to control the proceedings, to ensure that public and private resources are not wasted."

24 Woolf *Interim Report* ch 3 par 4–5.

> "Our Courts are certainly moving in this direction through the introduction of case management. Of importance to attorneys is that there is a need to recognise that there has to be a shift in the culture of dispute resolution. There has to be a change of mind-set. Attorneys have to move away from litigation that is excessively adversarial and combative. The focus must be on resolving the dispute and remaining focused on the litigant client. It is not about the lawyers!!
>
> Litigation no longer shifts focus from the parties to their lawyers. The object is to resolve disputes rather than drive a wedge between the parties thereby incurring disproportionate costs."

In other jurisdictions, winds of change have blown and yielded positive results. Here, too, change is inevitable, to some extent, influenced by principles gleaned from those jurisdictions.

5 FUNDAMENTAL PRINCIPLES OF CFM

The following features are common to every effective case management system,[26] namely:

- embodiment of the system in the Rules;
- unfettered discretion on the managing judge to issue directives considered appropriate for the circumstances of any particular case;
- imposition of sanctions by the judge in the event of failure by a party to comply with case management directives;
- allocation of a case file to a single judge for management from pleading stage to pre-trial stage, to avoid forum shopping and inconsistences in the approach;
- certification by the party entering the matter that: all necessary parties have been joined; pleadings are closed and no amendments will be sought; discovery is complete; an advice on evidence has been obtained; if expert evidence is to be led, there has been an exchange of reports; and, most importantly, the party entering is ready to serve witness summaries;
- once the matter has been entered for trial, deeming that the other parties are ready for trial if they did not apply within a specified time for the entry to be countermanded;
- hearing of all relevant interlocutory applications by the case management judge;
- assessment by the managing judge of the length of the trial including a consideration of whether issues should be separated; and
- introduction of court-annexed alternative dispute resolution/mediation as a means to reducing the number of cases on the trial roll.

To be added to these features is a culture of avoiding postponing cases *sine die* or of removing them from the roll (without placing the parties on terms

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[25] Hussain, Barnard and Hughes "Case Management in Our Courts: A New Direction" 2016 *LEAD Guide* 1 40.

[26] Judge Ipp 1998 *Consultus* 49–50.

regarding the filing of outstanding documents) once cases have been enrolled or become subjected to case management.

6 THE NORMS AND STANDARDS ERA

The Constitution ushered in section 165(6),[27] which fortified judicial case management. The section provides:

> "The Chief Justice is the head of the judiciary and exercises responsibility over the establishment and monitoring of Norms and Standards for the exercise of the judicial functions of all courts."

Since the advent of the constitutional dispensation, and by virtue of section 173 of the Constitution, Judges President of the various divisions have had the power to promulgate directives that have the same force and effect as the Rules.[28] One can conceive of no basis on which such directives could not also deal with CFM.

At the opening of a CFM workshop held at Port Alfred in the Eastern Cape on 19 July 2012, former Chief Justice Mogoeng Mogoeng made the following remarks concerning the benefits of CFM:

> "At present, our system first provides the opportunity for the judicial officer to look at the case when it has reached the adjudication stage. This sad circumstance means that there is little room for judicial intervention while the case goes through the numerous hoops provided by our rules. The judge does not drive the matter to finality. The judge relies on the actions of the litigants themselves, or ... the actions of their legal representatives. This is a source of constant frustration.
>
> It is for this reason that modern legal systems are moving away from litigant driven case management to judicial management of case flow. The judicial officer should take over the responsibility to drive the case to resolution. In this position, the judicial officer is able to set and enforce time limits specific to the case to ensure that there are no unnecessary delays. The judge's familiarity with the development of the case gives him or her unique insight into the needs of the case and the issues in dispute. This allows the judge to promote the effective resolution of the matter which is impossible through the kitchen-sink mill system that operates at present."

Pursuant to section 165(6) of the Constitution (read with section 8(2) of the Superior Courts Act),[29] the Chief Justice issued the Norms and Standards,[30] the objective of which is stated as being, *inter alia*, to ensure the effective,

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[27] This section must be read together with s 8(2) of the Superior Courts Act 10 of 2013, which reiterates the headship of the Chief Justice, who has the power to exercise responsibility over the establishment and monitoring of Norms and Standards for the exercise of the judicial functions of all courts.

[28] *National Pride Trading 452 v Media 24 Ltd* 2010 (6) SA 587 (ECP) par 31; *Rossitter v Nedbank Ltd* [2015] ZASCA 196, cited with approval in *Bisha v Minister of Police* [2021] ZAECMHC 24.

[29] 10 of 2013.

[30] Norms and Standards for Judicial Officers issued by the Chief Justice in terms of s 8 of the Superior Courts Act 10 of 2013 read with s 165(6) of the Constitution of the Republic of South Africa, 1996 (Norms and Standards), published in GN 147 in *GG* 37390 of 2014-02-28.

efficient and expeditious adjudication and resolution of all disputes through the courts.[31]

To that end, paragraph 5.1(ii) of the Norms and Standards makes it incumbent on every judicial officer to dispose of their cases efficiently, effectively and expeditiously. Paragraph 5.2.4, in relevant part, provides:

> "(iv) Judicial Officers shall take control of the management of cases at the earliest possible opportunity.
> (v) Judicial Officers should take active and primary responsibility for the progress of cases from initiation to conclusion to ensure that cases are concluded without unnecessary delay.
> (vi) The Head of each Court shall ensure that judicial officers conduct pre-trial conferences as early and as regularly as may be required to achieve the expeditious finalization of cases.
> (vii) No matter may be enrolled for hearing unless it is certified trial ready by a Judicial Officer.
> (viii) Judicial Officers must ensure that there is compliance with all applicable time limits."

A further provision of the Norms and Standards worthy of note is paragraph 5.2.5, which deals with the finalisation of all matters before a judicial officer. It enjoins judges to finalise civil cases within one year[32] from the date of issue of summons.[33]

In line with the notion that the judiciary ought to take control of the management of cases, and that trials be finalised when judgment is delivered, paragraph 5.2.6 of the Norms and Standards is also of significance. It reads:

> "Judgments, in both civil and criminal matters, should generally not be reserved without a fixed date for handing down. Judicial Officers have a choice to reserve judgments *sine die* where the circumstances are such that the delivery of a judgment on a fixed date is not possible. Save in exceptional circumstances where it is not possible to do so, every effort shall be made to hand down judgment no later than 3 months after the last hearing."

The inclusion in the statute book of misconduct based on failure by a judicial officer to hand down judgments timeously is an important step towards giving expression to CFM. To this end, article 9(*c*)(i) of the Code of Judicial Conduct[34] ("the Code") provides that "[a] judge must manage legal proceedings in such a way as to expedite their conclusion as cost-effectively as possible," and article 10(ii) reads:

> "A judge must deliver all reserved judgments before the end of the term in which the hearing of the matter was completed, but may–
> (a) in respect of a matter that was heard within 2 weeks of the end of that term; or
> (b) where a reserved judgment is of a complex nature or for any other cogent and sound reason and with the consent of the head of the court, deliver that reserved judgment during the course of the next term."

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31 Par 2 of the Norms and Standards.

32 Nine months in the case of magistrates.

33 The Norms and Standards also make provision for the finalisation of criminal cases, but more about that will be mentioned towards the end of this discourse.

34 The Code is adopted in terms of s 12 of the Judicial Service Commission Act 9 of 1994.

In terms of article 3 of the Code, any wilful or grossly negligent breach of the Code is a ground upon which a complaint against a judge may be lodged in terms of section 14(4)(*b*) of the Judicial Service Commission Act.[35]

In *Pharmaceutical Society of South Africa v Tshabalala-Msimang; New Clicks South Africa (Pty) Limited v Tshabalala-Msimang NO*,[36] Harms JA emphasised the litigants' entitlement to enquire about the progress of their cases and, if the enquiry attracts no satisfactory response, to lodge a complaint. The judicial cloak, he continued, is not an impregnable shield providing immunity against criticism or reproach.[37]

According to the Code, the delivery of judgments is an integral part of the civil process. In any process, as the adage goes: "Better is the end of a thing than its beginning."[38] In promoting the just determination of litigation to dispose efficiently of the business of the court, the judiciary takes charge of the litigation process by, *inter alia*, ensuring that there is compliance with all applicable time limits. A case flow management system that frowns upon litigants and practitioners who do not observe the time limits stipulated by the rules, directives or orders, but winks at a delay in delivering judgments would lack credibility.

Not so long ago, the then-Judge President of the Gauteng High Court lodged a complaint with the Judicial Service Commission (JSC) against certain judges who were alleged to have reserved judgments for a period well beyond 12 months. The judges concerned were found guilty of misconduct,[39] and were each directed to issue an unconditional apology to the Judge President and the litigants involved in all the cases in relation to which the judgments had been delayed. They were reprimanded for their shortcoming. In the imposition of an appropriate sanction, consideration was given to the systematic challenges brought about by the lack of resources –

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35 9 of 1994. The section provides that one of the grounds upon which a complaint against a judge may be lodged is the wilful or grossly negligent breach of the Code, including any failure to comply with any regulation referred to in s 13(5).

36 2005 (3) SA 238 (SCA) 260H–262C.

37 The learned judge added (par 39):

> "Delays are frustrating and disillusioning and create the impression that judges are imperious. Secondly, it is judicial delay rather than complaints about it that is a threat to judicial independence because delays destroy the public confidence in the judiciary. *There rests an ethical duty on judges to give judgment or any ruling in a case promptly and without undue delay and litigants are entitled to judgment as soon as reasonably possible.* Otherwise, the most quoted legal aphorism, namely that 'justice delayed is justice denied' will become a mere platitude. Lord Carswell recently said:
>
> 'The law's delays had been the subject of complaint from litigants for many centuries, and it behoves all courts to make proper efforts to ensure that the quality of justice is not adversely affected by delay in dealing with the cases which are brought before them, whether in bringing them on for hearing or in issuing decisions when they have been heard.' (Emphasis added.)
>
> In *Goose v Wilson Sandford and Co,* the Court of Appeal censured the judge for his delay in delivering his reserved judgment and said:
>
> "Compelling parties to await judgment for an indefinitely extended period … weakened public confidence in the whole judicial process. Left unchecked it would be ultimately subversive of the rule of law.'"

38 The adage is based on the Bible verse, Ecclesiastes 7:8.

39 Not amounting to gross misconduct.

human and infrastructural – under which they were expected to discharge their judicial functions; the enormous workload that characterises the division in which they had been appointed; and intervening illness that prevented them from exercising their judicial functions.[40]

In its quest to promote the speedy delivery of judgments and transparency to all the relevant constituencies, the Office of the Chief Justice circulates a quarterly report of reserved judgments on the judiciary website,[41] with an indication of judgments reserved for longer than three months and those longer than six months. The report is prefaced with the following questions frequently posed by journalists with a view to preparing for possible media enquiries:

- What steps has the Head of Court taken to manage judges with long-outstanding judgments?
- Have any judges been reported to the JSC for reserved judgments?
- What are the reasons for the delay in delivery of specific judgments?
- Was consent sought from the Head of Court, as contemplated in article 10 of the Code?
- What measures have been put in place to ensure that there is compliance with the Norms and Standards or article 10?

It is hoped that the issuing of the report will serve as a constant reproach and reminder that justice delayed is justice denied, so that the incidence of delayed judgments will decrease.[42]

However, it is a matter of concern that the period of three months referred to in the Norms and Standards is not compatible with that mentioned in article 10(2) of the Code. The period mentioned in the Code may, in certain circumstances, prove shorter than the period in the Norms and Standards.[43] It might be that the Code is in need of amendment to bring it in line with the

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[40] *Judge President B M Ngoepe v Judge M M Mavundla* JSC (unreported) 2020-10-09 Case no JCT01/2013, where the JSC remarked:

> "It is fundamental to our democratic project that Judges must judge cases brought before them. The public is entitled to an effective judicial system that is effective and efficient in resolving disputes. The Constitution demands that there be effective judicial authority. If Judges fail on this primary duty and obligation, the entire institutional fabric will be dismantled – and this is something which our fledging constitutional project simply cannot afford. It is accordingly worth repeating the truism that 'justice delayed is justice denied.' The importance of judges executing their judicial functions with expedition can therefore not be over emphasised. The failure of Judges to execute their judicial functions timeously imperils, if not tarnishes, the reputation of the Court."

[41] The official website from which this information may be accessed is www.judiciary.org.za; see The South African Judiciary "Amended Reserved Judgments Report for the Chief Justice" (31 December 2022) www.judiciary.org.za (accessed 2023-05-08).

[42] According to the quarterly statistical report, at the beginning of term 1 of 2023, there were a total of 901 reserved judgments. 720 (80%) were reserved for less than six months and 181 (20%) for longer than six months.

[43] A case in point is *MEC for Health, Eastern Cape v Aktar Mousomi* ZAECBHC (unreported) 2023-15-06 Case no 367/2017. The appeal was heard on 20 March 2023, which fell in the last week of the first term, 2023. According to the Norms and Standards, judgment had to be delivered by 20 June 2023 – a date falling outside of the second term. In terms of the Code, absent the grant of the exemption referred to in the Code, it had to be and was in fact delivered on 15 June, which was the last day of the second term. Delivering the judgment on 20 June 2023 would have brought the case within the ambit of article 10(2) of the Code.

threshold period in the Norms and Standards. This is especially evident if one has regard to the responsibility added to the judges' workload by CFM.

The Norms and Standards inform the current system of CFM, elaborated upon next.

7 THE CURRENT CFM DISPENSATION

Despite numerous false starts and challenges, the introduction of various amendments to the Uniform Rules on 1 July 2019 confirmed that CFM under the direction of the Judges President is here to stay.[44]

The amended rule 36 extends the period for delivery of a notice by a party intending to call an expert witness to testify, and allows the parties to endeavour, as far as possible, to appoint a single joint expert relating to the same area of expertise. This goes a long way towards ensuring that notices are filed timeously, with the result that the possibility of unnecessary delays or postponements when parties intend calling expert witnesses is eliminated. Costs are also saved.

Rule 37A introduces a judicial case management system at any time after notice of intention to defend has been delivered. The Judge President of a division determines the category of defended actions to which CFM should apply by practice note or directive. Provision is made for CFM invocation before and after the close of pleadings. The registrar plays a pivotal role during the first stage by, *inter alia*, directing compliance letters to any party that fails to comply with the time limits for the filing of the pleadings or any other proceedings in terms of the Rules. After the close of pleadings, the process relies primarily on a judge to manage case flow. The rule also prescribes the requirements for a pre-trial conference to be convened by the parties to a case before a judge at various stages before the commencement of the trial. Where a case is subject to judicial case management, no trial date may be allocated unless the case has been certified trial ready by a judge.

By virtue of rule 37A(1)(*b*), judicial case management may apply "to any other proceedings in which judicial case management is determined by the Judge President, of own accord, or upon the request of a party, to be appropriate".

In terms of rule 37A(2)(*c*), CFM shall be construed and applied with due regard to the principle that, notwithstanding the provisions providing for CFM, "the primary responsibility remains with the parties and their legal representatives to prepare properly, comply with all rules of court, and act professionally in expediting the matter towards trial and adjudication". It is submitted that the subrule confers the primary responsibility on the parties without necessarily detracting from the power of a judge to manage the litigation process.

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[44] See GN R842 in *GG* 42497 of 2019-05-31, which came into operation on 1 July 2019, insofar as it substituted rule 37, inserted rule 37A, and substituted rules 36 and 30A of the Uniform Rules.

In its amended form, rule 30A extends the provisions dealing with non-compliance with the Rules, or with a request made on notice, to orders or directions made in a judicial case management process.[45] Upon a proper interpretation of the rule, there will no longer be any room for contending that a directive issued pursuant to the CFM process lacks the force of a court order.[46]

Rule 41A, directed at requiring parties to consider a non-adversarial resolution to a dispute that is already before courts was introduced.[47] In terms of rule 41A(3)(*b*):

> "A Judge, or a Case Management Judge referred to in rule 37A or the court may at any stage before judgment direct the parties to consider referral of a dispute to mediation, whereupon the parties may agree to refer the dispute to mediation."[48]

The purpose of rule 41A is to alleviate the case load on the courts and to ensure that matters are capable of being resolved without recourse to the judicial system.[49]

Rule37B[50] has introduced "administrative archiving" in an instance where none of the parties apply for the allocation of a trial date within 24 months of issue of the summons. According to the rule, if after the expiry of the period of 24 months the matter is not ready for referral by the registrar to judicial case management in terms of rule 37A, the registrar shall, after giving the parties (thirty) 30 days' written notice, and subject to subrule (2),[51] remove

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[45] Rule 30A provides:

"(1) Where a party fails to comply with these Rules or with a request made or notice given pursuant thereto, or with an order or direction made … in a judicial case management process referred to in rule 37A, any other party may notify the defaulting party that he or she intends, after the lapse of 10 days from the date of delivery of such notice, to apply for an order–

(a) that such rule, notice, request, order or direction be complied with; or

(b) that the claim or defence be struck out.

(2) Where a party fails to comply within the period of 10 days contemplated in subrule (1), application may on notice be made to the court and the court may make such order thereon as it deems fit."

[46] Compare *Skom v Minister of Police*, *in Re: Singatha v Minister of Police* [2014] ZAECBHC 6, where Roberson J held that directives issued pursuant to case flow management in terms of the Norms and Standards were not merely facilitative but had the force of an order of court; otherwise, justice would be hampered.

[47] Rule 41A was inserted by par 2 of the Schedule to the Amendment of the Rules Regulating the Conduct of the Proceedings of the Several Provincial and Local Divisions of the High Court of South Africa published in GN R107 in *GG* 43000 of 2020-02-07.

[48] Rule 41A(1) defines mediation as a voluntary process entered into by agreement between the parties to a dispute in which an impartial and independent person, the mediator, assists the parties to either resolve the dispute between them, or identify issues upon which agreement can be reached or explore areas of compromise or generate options to resolve the disputes, or clarify priorities, by facilitating discussions between the parties and assisting them in their negotiations to resolve dispute.

[49] See general discussion on rule 41A by Spilg J in *Kalagadi Manganese (Pty) Ltd v Industrial Development Corporation of South Africa Ltd* [2021] ZAGPJGHC 127.

[50] Inserted by GN R2133 *GG* 46475 of 2022-06-03, which came into operation on 8 July 2022.

[51] Subrule (2) reads:

"Any party in a case to whom notice has been given by the registrar in terms of subrule (1) and who has not taken any steps referred to in subrule (1) may apply to a judge in

the file from the administrative record of pending matters and archive the court file. The subrule, whose advent is commended, discourages parties from adopting a lackadaisical approach to litigation which often results in artificial backlogs and bad statistics of pending cases.

Rules 37 and 37A have provided a uniform template upon which CFM prescripts will be generated. Much as there are general rules in the various divisions of the High Court that may be tailored to meet the needs of a particular division, the Eastern Cape CFM dispensation is discussed next, on a broad basis.

8 THE EASTERN CAPE CFM DISPENSATION

A detailed discussion of the CFM regime applicable in the Eastern Cape is not intended; only the salient features of the applicable dispensation are discussed.

Pursuant to the amendment of the Rules of Court in 2019,[52] the Practice Directive on Judicial Case Management, Eastern Cape, was issued on 25 June 2019.[53] The directive came into operation on 1 July 2019, and replaced all previous directives relating to judicial case management. It provides that CFM, as envisaged by rule 37A, applies to all damages claims against the Road Accident Fund and to those founded on alleged medical negligence.

The directive draws a distinction between cases to which CFM must be applied in terms of subrules 37A(1)*(a)*[54] and *(b)*,[55] and those in which judicial oversight of conferences is not compulsory unless the parties have agreed to adopt the CFM regime.

Templates (Form 1(a) and Form 1(b)) were generated to facilitate compliance with rules 37A and 37, respectively. These templates embody checklists designed for use by litigants who have applied for a trial date and include questions that aid in determining the trial readiness of a matter.[56]

Once cases, either pursuant to Form 1(a) or Form 1(b), have been certified trial ready, the registrar creates a provisional roll of such cases for hearing in four weeks' time, and these are placed before a judge to conduct the roll call in court on a Friday.[57] Each of the files listed on the provisional

chambers for an extension of time within which to render the matter ready for an application to be made for the set down of the matter for trial."

52 See GN R842 in *GG* 42497 of 2019-05-31, which came into operation on 1 July 2019, insofar as it substituted rule 37, inserted rule 37A, and substituted rules 36 and 30A of the Uniform Rules.

53 See *Tyibilika v Member of the Executive Council for the Department of Health, Eastern Cape Province* [2021] ZAECBHC 38 par 5.

54 These are defended actions to which CFM applies as determined by the Judge President in a practice note or practice directive.

55 These are cases to which CFM applies as determined by the Judge President of her or his own accord or upon the request of the parties.

56 The template forms are available at the registrar's office at all the Eastern Cape High Courts.

57 Of course, this differs from court to court in the Eastern Cape. For example, in Gqeberha, at least for now, roll call is done in Chambers.

roll is accompanied by another checklist (in terms of Form 2),[58] which the judge must use to satisfy herself or himself that the files are ripe for hearing, in which event the registrar draws up a final court roll. Most importantly, and as part of ensuring trial readiness, Form 2 requires the parties to file a joint practice note addressing or containing:

(a) the position of each party with regard to the trial readiness of the matter;
(b) any outstanding matter(s), procedurally or otherwise, that may potentially prevent the matter from proceeding to trial;
(c) whether the matter is capable of settlement and should remain on the trial roll for that purpose;
(d) a clear and concise statement of any outstanding issues for determination;
(e) as contemplated in rule 37A(10)*(e)*, an identification of witnesses each party intends calling and, in broad terms, the nature of the evidence to be given by each such witness; and
(f) whether the outstanding issues are capable of determination without the hearing of oral evidence, in which event, if the parties agree that the matter be determined without hearing oral evidence, they shall be required to set out a statement of the agreed facts upon which oral argument is to be addressed.

Forms A and B, which serve to guide the registrar and the litigants when managing cases after the closure of the pleadings and upon receipt of an application for a trial date, respectively, were also introduced.

In essence, Form A steers the plaintiff towards compliance with the provisions of rule 37A and to complete the process provided for in rules 35(1) and 36(9) within 90 days from closure of pleadings, failing which the defendant may apply to have the matter subjected to active judicial case management.

Besides inviting the parties to attend a case management conference in chambers and, to that end, hold a pre-trial meeting before the conference at which the issues identified in rule 37A(10) must be considered, Form B requires the parties to deliver a detailed statement of the issues, which must identify:

(a) the issues that are not in dispute and in respect of which, by reason thereof, no evidence shall be allowed at the trial; and
(b) the issues in the case that are in dispute, describing–

    the exact nature of the disputes of facts and disputes of law and the exact contentions of each party in respect of such issues.

Form B concludes by urging the parties to particularise, in their minute, the agreement or respective positions on each of the issues identified in rule 37A(10) and, to the extent that further steps remain to be taken to render the matter ready for trial, to identify explicitly the issues and set out a timetable

[58] Form 2 is a roll call preparation checklist. In essence, it poses the same questions raised, with suitable adaptations, as in Forms 1(a) and 1(b), but, most importantly, affords the parties the opportunity to state whether any judge is disqualified from hearing the matter in terms of rule 37A(15), by reason of having previously been involved in case management.

according to which they propose, upon a mutually binding basis, that such further steps will be taken.

The pronouncement in *Economic Freedom Fighters v Manuel*[59] resulted in undefended unliquidated claims being referred to the trial court.[60] In the wake of this, Form C has been generated and constitutes a checklist for the setting-down of undefended illiquid claims on the trial roll.

The Form:

- elicits whether any order has been granted in terms of rule 33(4) and, if so, requests that a copy of the order be furnished;
- establishes whether the plaintiff intends to rely upon any documentary evidence and to provide the names of witnesses, including expert witnesses, who will be called to testify at the hearing; and
- seeks an indication regarding the estimated duration of the hearing.

Form C is helpful to practitioners when pursuing undefended illiquid claims. The Form is also an important tool in the hands of the registrar when these claims are being set down and the relevant roll is drawn.

9 CFM IN PRACTICE

The test for the value of CFM is in its application. The following examples of CFM in practice make it demonstrably clear that CFM has averted a postponement or removal of a matter from the roll in many cases, bringing matters closer to finality.

- Perusal of pleadings by a CFM judge revealed that the pleadings were excipiable, a fact that the defendant's or the plaintiff's legal representative, as the case may be, had not noted. This provided an opportunity for the matter to be removed from the roll timeously, thus paving a way for other deserving matters to be enrolled. This is important because any evidence tendered by the errant party in an instance where the pleadings are excipiable will be irrelevant[61] and thus a waste of time and other resources.

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[59] 2021 (3) SA 425 (SCA). In this matter, the court considered the process for prosecuting unliquidated claims for damages and reiterated the long-standing position that, because oral evidence is required before an award is appropriately made, motion proceedings are particularly unsuited to the prosecution of such claims.

[60] Directions Governing the Setting Down of Undefended Unliquidated Claims for Damages issued by the Judge President on 12 April 2021 (as amended on 19 July 2021); also see *Bisha v Minister of Police supra* par 23–24, where, the court, in relation to the directions, held:

> "In all the circumstances, the conclusion reached by the court is that it is inappropriate to set down applications for default judgments in motion court where the claims are based upon unlawful arrest and detention and seek the recovery of unliquidated damages. The directive is applicable to such applications.
>
> There having been no adjudication upon the merits or the quantum of any of the matters before the court, it would be appropriate to order that they simply be removed from the roll. The further conduct thereof shall be guided by the provisions set out in the directives."

[61] See *Barclays National Bank Ltd v Thompson* 1989 (1) SA 547 (A) 553G, where it was held that "the main purpose of an exception that a declaration does not disclose a cause of

- A preliminary issue of law (for example, lack of substantive jurisdiction or non-joinder) had not been raised by a party. A CFM directive was issued pointing to the shortcoming and resulted in a withdrawal of the case and a tender of costs. In the case of non-joinder, the directive resulted in timeous joinder of the necessary party before the hearing date, thus avoiding a postponement of the matter and the incurring of costs on the hearing date.
- The CFM judge picked up a shortcoming in the parties' agreement as to the incidence of the onus and the duty to begin. The judge flagged the error and thus averted a situation where the matter would have been postponed because witnesses had been lined up on the understanding that the one party, and not the other, bore the duty to adduce evidence first.
- An attorney of record had filed a notice of withdrawal and the CFM judge observed that the notice did not comply with rule 16(4). This would invariably have meant that on the hearing date, the matter would not proceed because the litigant concerned would not have been served with the notice and was thus oblivious of the hearing date. The CFM judge would then have issued a directive pointing to the shortcoming, ensuring that there was either proper service of the notice, leaving it to the litigant to instruct another attorney and avert a postponement.

In addition, the relevance and need for CFM is best illustrated through a number of case studies, the details of which are furnished below.

9 1 *AM v MEC for Health, Western Cape*[62]

This was a claim for recovery of damages brought by AM and SM, in their personal and representative capacities[63] against the Member of the Executive Committee, Health of the Western Cape (the MEC), arising from a serious brain injury sustained by J. It was alleged that the injury was caused by the negligent conduct of the medical staff, particularly Doctor Horn, who treated J at the Trauma Unit at Red Cross Memorial Hospital. The action was unsuccessful before the Western Cape High Court and ended up, with the leave of the High Court, before the Supreme Court of Appeal (SCA). The sole issue that fell to be determined was whether Doctor Horn had been negligent. A majority (four of five) judges of the SCA dismissed the appeal, exonerating the respondent from any liability towards the appellants.

Before the court *a quo,* the case hinged largely on the testimony of expert witnesses. In its conclusion, the SCA dealt with the objective of rule 36(9)*(b)* and the approach to be adopted when inferences are to be drawn from expert testimony. The court was critical of the manner in which the appellants' case had been presented, pointing out that the eventual argument, that Doctor Horn negligently diagnosed J with a minor injury, was predicated on a basis that was not pleaded; was not reflected in the expert's

action is to avoid the leading of unnecessary evidence at the trial"; also see *Opti Feeds (Pty) Ltd v Raymond Glynn Keeny t/a Raynel Ranches* [2016] ZANWHC 10.

62 2021 (3) SA 337 (SCA).

63 On behalf of their son, J.

summaries; was not debated at the pre-trial meetings between the experts; was referred to in passing during counsel's opening address; and first emerged, fully formed, in the evidence of one of the doctors on the fourth day of the trial.[64]

The litigants were criticised for not having used the provisions of rules 37 and 37A, which, if invoked, would have avoided many of these problems and enabled the trial to proceed and finish in the estimated three to four days, instead of taking 10 days spread over three months. The observation was also made that the 10 pre-trial meeting minutes, or progress certificates in relation to such meetings, showed that the "meetings" were conducted telephonically or by way of correspondence, without any engagement on the nature of the disputes between the parties or any real endeavour to classify and limit the issues. According to the court, the impression was overwhelming that these were seen as nothing more than a necessary formality in order to secure a trial date. What should have happened in an endeavour to narrow the issues, said the court, was that witness statements should have been delivered by both AM and Dr Horn as contemplated in rule 37A(10)*(e)*, in keeping with case management norms adhered to in many jurisdictions.[65] Had effective intervention been made by the court *a quo* during case flow management, the shortcomings noticed by the SCA would have been detected.

9 2 *Nthabiseng v Road Accident Fund*[66]

In this case, Judge President Legodi was concerned that the Mbombela Circuit Court of the Mpumalanga Division was seeing a trend of more cases on the weekly civil roll being settled or postponed on the trial dates because of non-compliance with pre-trial directives, arising from a general lackadaisical stance towards case management. He said:

> "It is worth mentioning that in this Division no matter is enrolled … [for] trial … unless such a matter was laid before a Judge during a pre-trial conference and a trial date was allocated or determined by the Judge during pre-trial conference. Firstly, cases are enrolled as speedily as possible. Secondly, parties are given the opportunity to set out time frames for themselves and therefore to ensure that … litigation is not allowed to move at a snail's pace.
>
> Failure by an officer of the court to comply with pre-trial directives given by court, or judge during pre-trial conference, amounts to wanting conduct, unless good and acceptable explanation is offered when an opportunity is so given."[67]

9 3 *NM obo NM v MEC for Health, Eastern Cape Provincial Government*[68]

This case is a classic example of how litigants sometimes abuse the case management process. The claim was for payment of damages brought by

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64 *Barclays National Bank Ltd v Thompson supra* par 23.

65 *Barclays National Bank Ltd v Thompson supra* par 24.

66 [2018] ZAGPPHC 409.

67 *Nthabiseng v RAF supra* par 13–14.

68 [2019] ZAECMHC 44.

the plaintiff on behalf of her minor child, who was suffering from quadriplegic cerebral palsy and developmental delay. This condition, according to the plaintiff, resulted from a breach of contract by the defendant. A special plea was raised, predicated on sections 3 and 4 of the Institution of Legal Proceedings Against Certain Organs of State Act.[69] Condonation for such non-compliance was applied for and granted without any opposition from the defendant's camp. A pre-trial conference, during which the parties agreed that the merits of the matter were ripe for hearing and that none of the parties intended amending its pleadings, was held. The same stance was adopted at case management stage, with the defendant indicating that one lay witness and six expert witnesses would be called. According to the relevant checklist, no interlocutory issues were anticipated at trial stage. Against this background, the matter was set down for trial on 26 August 2019.

Ten days before the trial date, the defendant delivered an amended plea embodying the same contentions raised in the initial special plea. The defendant insisted that the matter was not ready to proceed because the plaintiff had not dealt with the defendant's special plea insofar as it related to service of the section 3(1) notice on the relevant department in terms of section 3(1) of 40 of 2002. The matter was subjected to further case management, whereupon the parties opted for a stated case for a determination of whether the issues raised in the amended plea remained an issue between the parties.

The court (per Jolwana J) engaged in an interpretative process and found that the defendant was being disingenuous, opportunistic and extremely insensitive to the plight of the minor child who had been frustrated a number of times in having her case heard in court.

9 4 *Minister of Police v Bacela*[70]

The matter came before Lowe J as an opposed motion, supposedly in terms of rule 30A. In the view of the court, the application ought to have been brought as a rule 30 application, and was dismissed. Had the matter been placed before a CFM judge, the parties could have been directed to the relevant issues and the difficulties assessed. Although these difficulties were apparent from the papers, it seems that, as is often the case, the real considerations are only appreciated very close to the hearing.

9 5 *Bobotyana v Dyantyi*[71]

In this case, the Eastern Cape High Court held that, by virtue of paragraph 5.2.4 of the Norms and Standards, read with rule 37A(1)(*b*) and (2)(*a*), there is no logical reason why case management should not also be applied to motion proceedings.[72] In keeping with this principle, opposed motion court

69 40 of 2002.

70 [2020] ZAECBHC 19.

71 2021 (1) SA 386 (ECG).

72 Also see *Petra Nera Body Corporate v Sekgala* [2020] ZAGPJHC 195 par 6–7, where the respondent had challenged the competence of the court to hear a sequestration application

files are routinely allocated to judges for perusal before the hearing date to ensure that shortcomings that sometimes beset the progress of cases are brought to the attention of the parties and are remedied timeously, long before the hearing date.[73]

Since the implementation of case management in opposed motions, the finalisation rate of opposed motions has improved.[74] In some instances, the issuing of directives at case management stage has culminated in the settlement of opposed motions before the hearing date, which brings expression to what the former Chief Justice once said, namely:

> "Many a time, a judge realises when the matter is finally allocated to him or her for hearing that the matter could have resolved a long time before had a judge been involved in time. The flurry of settlement negotiations at the door of the courts bears testimony to the fact that not enough effort is being put in to resolve matters."[75]

9 6 *Nongezile Kozana v Nolwazi Kozana*[76]

This case illustrates the beneficial effects of case management in the context of opposed motions. The applicant sought an order in the form of a *mandament van spolie* for the return of a Toyota Hilux LDV (a motor vehicle) of which she was allegedly dispossessed by the respondent. She alleged that she had been in peaceful and undisturbed possession of the motor vehicle and that the respondent had unlawfully deprived her of such possession. The respondent, on the other hand, denied that the applicant was in possession of the motor vehicle or that she had unlawfully deprived the applicant of the motor vehicle. While the respondent admitted that she had been in possession of the motor vehicle when the application was launched, she contended that the applicant's son, who was in control of the motor vehicle at the time of the impugned dispossession, agreed to her taking possession of the motor vehicle.

The relevant case file was delivered to the writer for CFM on 1 September 2021, a week prior to the hearing date. A directive was issued on the following day, calling upon the parties to deliver supplementary written submissions, by 8 September, addressing, *inter alia*, the following:

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on the grounds, *inter alia*, that the court had referred the matter to case management under rule 37A which, it was contended, was limited to trial matters. This argument received short shrift, with Spilg J pronouncing that "[a] comparison between the wording of sub-rules [37A](1)(*a*) and [37A](1)(*b*) immediately reveals that the latter covers all other court proceedings which are not 'defended actions' … [and that] all motion proceedings, of which sequestration applications is one, therefore are covered under sub-rule [37A](1)(*b*)".

73 *Petra Nera Body Corporate v Sekgala supra* par 20.

74 See *Bobotyana v Dyantyi supra* par 23, where it was stated:

> "Prior to the implementation of case flow management, the finalisation rate of opposed motion was unsatisfactory and subject to non-compliance with the Rules by one or both parties, resulting in the matters being removed and finality delay accordingly. Sometimes, despite the Judge having read the papers and heads of arguments (often lengthy), a postponement or removal of the matter would ensue, purely because of the technical reasons that no rule 15A practice note has been delivered. This meant that on occasion by no means all of the opposed matters would then have to be set down again."

75 *Bobotyana v Dyantyi supra* par 25.

76 ZAECMHC (unreported) (undated) Case no 3504/2020.

"2. Does the value of the motor vehicle … not render it justiciable in the Magistrate's Court, as well? If so, does that factor not have a bearing on the scale of costs to be awarded in these proceedings?

3. The remedy sought in these proceedings is in the nature of a *mandament van spolie* and thus, strictly speaking, a matter that concerns the spoliator and the person in whose possession the motor vehicle was when it was allegedly seized.[77] However–

   3.1 is it not common cause that the motor vehicle belongs to the estate of the deceased; and

   3.2 if so, is the speedy resolution of this matter not dependent on the parties engaging in serious consultative talks for the surrender of the motor vehicle to the Master of the High Court or person appointed by the Master in terms of section 18(3) of the Administration of Estate Act 66 of 1965?

4. In any event–

   4.1 is there no dispute of fact that is irresoluble on the papers;

   4.2 if so, was the dispute not foreseeable; and

   4.3 if it was foreseeable, what should become of the application?

5. In the event of the application being referred for the hearing of oral evidence what, in the interim and in the light of the question posed in paragraph 4, should become of the motor vehicle?"

Three days before the hearing date, on 6 September, the directive attracted a response effectively disposing of the application. The letter, penned by both parties' attorneys, referred to settlement talks that had been held pursuant to the directive, and acknowledged that the motor vehicle belonged to the estate of the deceased and that both parties were heirs to the estate; and that continued litigation would have a negative impact on future family relations. The parties recorded that the respondent was willing to hand over the motor vehicle to the executor of the estate, and that there should be no order as to costs. On the hearing date, the settlement proposal was made an order of court. Had the concerns expressed in the directive been raised at the hearing of the application, adversarial tendencies would probably have resulted in a postponement for the taking of instructions or other point-scoring tactics detrimental to the estate of the deceased and thus the heirs.[78]

The case examples discussed above show that CFM is beneficial in a variety of ways in civil matters, but leaves the question of whether CFM could also benefit criminal proceedings.

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[77] Ordinarily, the court would have had to enquire into the act of spoliation and, upon finding that there was, restore possession of the spoliated item before any enquiry into the lawfulness of the person despoiled is conducted (see *Ngqukumba v Minister of Safety and Security* 2014 (5) SA 112 (CC) par 10–13).

[78] Which is what occurred in *Obena v Minister of Police* [2021] ZAEMHC 11 par 45, where the court remarked:

> "We are here dealing with a scramble for possession of items belonging to a deceased estate by the litigants concerned in their personal capacities. Both parties ought to have known that the items in this dispute formed part of the estate of the deceased, but they allowed their personal contest to cloud their judgment, resulting in an application that could and should have been avoided."

10 CRIMINAL PROCEEDINGS AND CFM

In considering whether CFM should be made applicable to criminal proceedings, we should remind ourselves of what was said long ago by Curlewis JA:

> "A criminal trial is not a game where one side is entitled to claim the benefit of any omission or mistake made by the other side, and a judge's position in a criminal trial is not merely that of an umpire to see that the rules of the game are observed by both sides. A judge is an administrator of justice, he is not merely a figure head, he has not only to direct and control the proceedings according to recognised rules of procedure but to see that justice is done."[79]

These remarks lend support to the invocation of CFM in criminal proceedings under the rubric of administration of justice.

Pursuant to the provisions of rule 37A(1)(*b*), CFM has also been made applicable to criminal proceedings. A prescript may need to be developed to provide guidance on how CFM is to be applied to criminal proceedings. The directive that follows, given by Tokota J, sheds light. The directive reads:

> "Whereas the above matter is pending before the East London Circuit Local Division;
>
> Whereas in terms of rule 37A(1)(b) of the Uniform Rules of Court the Judge President of the Eastern Cape Division has determined that the above proceedings be subjected to judicial case management;
>
> Whereas pursuant to such determination a case management conference was held on 22 September 2021;
>
> Whereas the following issues were identified, namely, that–
>
> (a) accused numbers 10 and 11 have launched an application for separation of trials in terms section 157 of the Criminal Procedure Act 51 of 1977 (the Act) which was served on the State on 9 September 2021;
> (b) accused number 14 has indicated that he intends launching an application for separation of trials in terms of section 157 of the Act;
> (c) it is not practically possible to commence trial proceedings during the course of this year;
> (d) the trial of the main case may last as long as the full term and the parties have agreed that the matter be set down for trial during the second term in 2022;
> (e) the issue of separation has to be dealt with prior to the commencement of the trial and the same ought to be determined before the plea proceedings;
> (f) all parties participating at this conference agree that it will be convenient to have the trial conducted at the Bhisho High Court;
> (g) the plea proceedings should be held at the East London Circuit Court, whereafter the matter shall be transferred to Bhisho for trial;
> (h) the application for separation of trials should be heard and disposed of during the 4th term, 2021;
> (i) the matter has been set down for 5 October 2021 in East London Circuit Court and on that date the matter will be postponed to a provisional date 19 January 2022;
> (j) on 19 January 2022 the matter will be postponed to a date within the first term with a view to commencing and finalising the plea proceedings; and

[79] *R v Hepworth* 1928 AD 265 277.

(k) all things being equal, the next judicial case management conference is to be held on 22 October 2021.

Now, therefore, the following directive shall issue:

1. The 14th accused is ordered to deliver his application for separation of trials, if any, by 5 October 2021.
2. The State shall deliver an affidavit in answer to affidavits already filed in support of the application for separation, including that of the 10th and 11th accused, by 19 October 2021.
3. The applicants shall deliver their replying affidavits, if so advised, by 29 October 2021.
4. The applicants shall deliver their heads of argument by 29 October 2021.
5. The State shall deliver its heads of argument by 15 November 2021.
6. The application for separation of trials shall be heard on 23 November 2021.
7. All the parties are directed to attend the next judicial case management meeting to be held at 10h00 on 22 October 2021."[80]

This directive shows the obvious benefits of the application of CFM to criminal proceedings.

11 PRACTITIONERS' PERSPECTIVE

The benefits and efficacy of any procedural dispensation cannot be discussed without factoring in the views of practitioners. That goes for judicial case management too, as is evidenced by what follows.

A colleague favoured the writer with a letter penned by both attorneys involved in a matter whose process the colleague had managed.[81] The letter makes plain that the acceptance of CFM among practitioners is gaining momentum. The material part of the letter reads:

"2. The parties address this letter to your Lordship jointly, primarily for purposes of requesting a special allocation of the consolidated matter. The parties also request a directive concerning the case management of the matter. The reasons for the request are set out hereunder:
   2.1 the papers in the consolidated application are in excess of 2000 pages;
   2.2 it is anticipated that the hearing of the matter will take 2 days;
   2.3 intervention by the Deputy Judge President in this regard is required to progress the matter; and
   2.4 a further delay will not be in the interests of either party.
3. The events leading to the consolidation of the application are indicative of the fact that the parties in this matter have benefitted from case management."

The Eastern Cape Society of Advocates has echoed the same sentiments.[82] The relevant part of the Society's letter reads:

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80 *S v Phumzile Mkolo* ZAECMHC (unreported) (undated) Case no CC40/2021.

81 *Eastern Cape Development Corporation v Price Water House Coopers* ZAECELHC (unreported) (undated) Case no 620/2020.

82 See letter dated 25 August 2021 penned by the Chairperson of the Society to the writer hereof.

> "1. It is universally accepted by practitioners in this division that the introduction of case flow management has been hugely successful and effective. It is the view of this society that it has become indispensable for the furtherance and disposal of the types of matters to which it is applied.
> 2. Case flow management promotes and ensures good and thorough preparation of matters by practitioners. In most cases when a matter enters the case flow management process, at least from the view of the plaintiff, it is ready for trial. The process thus ensures a more prompt trial readiness.
> 3. Complications previously experienced by practitioners to ensure compliance with the provisions of the rules, such as rules 35, 36 and 37 have almost completely been eliminated by the introduction of case flow management. The introduction, as part of the process, of a checklist has secured much stricter compliance with these and other rules. Compliance with the checklist as part of the process has, for instance, ensured that amendments to pleadings are timeously sought and precludes late, "tactical" amendments, which are designed solely to engineer a postponement.
> 4. Case flow management has ensured that when matters come to trial for the first time, they are in fact trial ready, and they are disposed of at the time of their first appearance on trial. The system has largely eliminated interminable postponements of matters, which were the inevitable result of practitioners not having prepared matters timeously."[83]

While applauding the introduction of case management as having contributed greatly to the smooth running of the courts and the effective disposal of matters, all of which advance the interests of justice, in the letter, the Chairperson of the Society constructively remarks:

> "5. Practitioners request that the judges administering the system do so in terms of uniform guidelines, which ensure consistency. So, for instance, where a party undertakes to revert on an issue it is suggested that a universal approach be adopted in terms of which the party undertaking to revert is required to do so within a specified period. Another example of occasional inconsistency is the refusal by some judges to declare matters trial ready in the absence of an actuarial report, whilst others are prepared to certify trial readiness on an undertaking that the report will be available by a specified date. Judges must also guard against agreements between the parties that matters are ready where they are in fact not so ready."

When afforded the opportunity to comment on the efficacy of CFM, the Wild Coast Attorneys Association assured the writer that CFM was embraced even before the insertion of the new rule 37A, but expressed concern that CFM should be implemented:

- at the commencement of the proceedings, and not only after the close thereof; and
- in a manner that resonates with other rules.

These are but some of the instances indicative of the momentum gained in the Eastern Cape Division in the implementation of CFM. It does not seem that there will be any turning back.

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[83] An accolade to the same effect was received from the chairperson of the Mthatha Society of Advocates embodied in a letter dated 6 October 2021. The letter also cries out for a return to the roll call system suspended owing to the declaration of the National State of Disaster and the Directions issued pursuant thereto.

12 THE WAY AHEAD

Since the advent of CFM, the landscape of South African procedural law has been enhanced in a remarkable way. In no way does this suggest that CFM is free from challenges.

Much as practitioners have embraced CFM and seem enthusiastic about its implementation, there are some who have yet to be convinced of its usefulness. One still finds checklists defining the issues for determination at trial as "merits and quantum" or "as defined in the pleadings", albeit seldom. This is a clear failure on the part of the practitioners concerned to appreciate the import of CFM. It is hoped that this attitude does not arise from a calculated subversion of judicial control by those who remain averse to the system and that it is not motivated by economic interest.

Relatively speaking, CFM is a new system for both members of the Bench and practitioners. It was never part of the syllabus at the theoretical and practical law schools from which they budded as lawyers. They were schooled in the old style, the pure adversarial system. Adjustment to embedding a more inquisitorial approach to the litigation process will require ongoing education. Much as CFM is a procedural device, the depth of the CFM participants knowledge of the relevant substantive legal principles applicable to the case being managed will determine the effectiveness of the implementation of CFM. The solution is for all lawyers, including members of the Bench, to keep abreast with developments in the legal field. In any event, a good lawyer is one who knows where to find the law.

What seems clear, however, is that with an appropriate implementation of CFM, there will be more chamber work for judges than there will be court-going cases. It remains to be seen whether, as a result, more judges will need to be appointed.

At another level, the efficacy of CFM may be negated by the different styles or approaches adopted by judges. While it is incumbent on all judges to be committed to the task, it is an open secret that some judges may be less passionate than others about conducting CFM. A duty is nonetheless cast on judges managing the flow of cases not to place reliance solely on the checklist, but to scrutinise the papers enclosed in the relevant files. CFM is not about control for the sake of control, but rather about ensuring that the real dispute, if not settled during the CFM process, is brought properly before court. Were that to take place, the finalisation rate of cases would increase. However, one must always guard against a focus on statistics[84] at the expense of the quality of the disposition.

Lessons may be learned from jurisdictions where a case is assigned to a single judge at launch stage and managed by him or her to completion stage, including the hearing of all related or incidental interlocutory applications. This practice, which commends itself as beneficial, is lacking in our system, in that at the different stages of CFM, cases move from one judge's desk to that of another. With different approaches adopted, the initial theme might be lost. The criminal review process provided for in section 304

[84] The number of cases disposed of.

of the Criminal Procedure Act[85] is worth emulating. Where possible, the judge who raises a query should be the one who eventually writes the judgment, after the magistrate, whose proceedings are under review, has proffered answers to the judge's query; the review file should not be passed on to another judge, as often happens in the CFM realm.

It is not uncommon for one party to the proceedings to drag their feet and be uncooperative with the other in signing documents, effectively delaying the matter from being declared trial ready. A device worth emulating, invoked in other jurisdictions, is the one that shifts the onus to the defaulting party by providing: "Once the matter has been entered for trial, the other parties will be deemed to be ready for trial if they do not apply within a specified time for the entry to be countermanded."[86]

Finally, in exercising control over the litigation process, judges must strike a balance between what might be perceived as overzealousness and maintaining firm control of the case management process while facilitating an active role on the part of the litigants concerned. Whereas maintaining firm control of the process is essential for the success of CFM, overzealousness runs the risk of eliciting a negative attitude and passive resistance by some practitioners.

It is well established, as a matter of constitutional principle, that litigants are entitled to reasons from a court for its orders.[87] Given that CFM is conducted in chambers (beyond public view), off the record, with no obligation to provide written reasons for the orders or directives issued, an issue that may, from time to time, rear its head is whether the orders and directives should be subject to appeal.[88] In other words, what safeguards do litigants have for protection from abuse of the authority that comes with judicial control of the litigation process? The answer may lie with what Lord Woolf has counselled, namely, that under the new approach the civil procedure rules require that judges "be trusted to exercise the wide discretion which they have fairly and justly in all the circumstances".[89] How far that trust will go is another matter.

This article has made it abundantly clear that rule 37, on its own, is not wide enough to achieve what rule 37A has achieved. Instead, it remains to be seen whether the promulgation of rule 37A has not rendered redundant the CFM dispensation bereft of judicial control enshrined in rule 37(8). Rule 37(8) may need to be repealed.

13 CONCLUSION

This contribution has offered a detailed account of the progress achieved in judicial case flow management. It is hoped that it has invalidated the maxim "why fix something that isn't broken?" Case flow management was

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85 51 of 1977.

86 Judge Ipp 1998 *Consultus* 50.

87 See *Mphahlele v First National Bank of South Africa Ltd* 1999 (2) SA 667 (CC).

88 A concern expressed by Judith Resnik in her article Resnik "Managerial Judges" 1982 96(2) *Harvard Law Review* 374 378.

89 See *Biguzzi v Rank Leisure* 1994 4 All ER 934 (CA) 941*g*.

introduced in order to correct shortcomings in the system that were prevalent at the time. Delays in the finalisation of cases, and the clogging of court rolls, often led to obstructing access to justice and costly litigation. Even if there was nothing “broken” with our procedural system, the quest to augment the efficiency of systems that are thought to be functioning well is human. Life would otherwise be static.

From a reading of the Woolf Report, it becomes clear that the author envisioned a move away from an adversarial system to a more inquisitorial one, a system that CFM promotes.

While various milestones have been attained, the journey continues. Considering the challenges and shortcomings highlighted, it might take some time before our system attains a fair balance between securing access to justice for the citizenry through judicial case flow management and the role of practitioners in advancing their clients’ case. That is the ultimate checkpoint, and one that will eventually be achieved.

TINDER SWINDLERS: SUBSTANTIVE AND PROCEDURAL MATTERS PERTAINING TO ONLINE DATING FRAUD UNDER THE COMMON LAW AND THE CYBERCRIMES ACT

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SUMMARY

The proliferation of online dating scams or fraud has presented a significant threat to users of online dating platforms globally. Scammers misrepresent themselves as would-be lovers, usually employing false identities, in order to defraud unsuspecting victims of large sums of money. Not only do romance scammers cause great financial harm to their victims, but also often leave victims with long-term psychological scars. As both the common law and the Cybercrimes Act 19 of 2020 address instances of fraud, both may potentially be employed to address the issue of online dating fraud. The State may charge an accused with both offences, but a conviction based on both would probably constitute a duplication of convictions. The offence of cyber fraud under the Cybercrimes Act may however be more onerous to prove, owing to the particular way that cyber fraud must be committed under section 8. A conviction based on the Cybercrimes Act may, however, be more attractive to the State as certain minimum sentences apply, depending on the amount defrauded, whether the accused was a law enforcement officer, whether someone was in charge of or had access to the data belonging to others, and whether the offence was committed in concert with others.

1 INTRODUCTION

In her ballad, *Think Twice*, Celine Dion once famously sang, "Don't think I can't feel that there's something wrong."[1] This line resonates well with many in the age of online dating, which has left numerous users as victims of a romance scam. In broad terms, romance scams involve fraudsters using fake profiles (or "catfishing") to seduce victims on dating websites and mobile applications (apps) such as Tinder, with the eventual goal of conning them out of a sum of money. The United States Federal Trade Commission (FTC) recently reported that it had received over 70 000 complaints of romance scams during 2022, totalling an estimated $1.3 billion

[1] Dion "Think Twice" *The Colour of My Love* (1993) (© Sony Music Entertainment).

(approximately R24 billion).[2] It confirmed that the median loss incurred by victims was approximately $4 400 (approximately R81 000).[3] The proliferation of online dating sites[4] and dating applications has therefore created a corresponding risk of fraud.[5] Although no empirical evidence of the financial implications of cyber romance scams seems to exist in South Africa, it is clear that cyber fraud in general is quite pervasive.[6]

There has been an attempt to address cybercrime broadly at the regional and national levels. An underlying theme is a call for harmonisation and coordination of legislative instruments to combat cybercrime. These instruments, which include the Southern African Development Community (SADC) Model Law on Computer Crime and Cybercrime (Model Law),[7] the African Union Convention on Cyber Security and Personal Data Protection[8] (AU Convention),[9] and the Council of Europe's Convention on Cybercrime[10] (Budapest Convention),[11] all call for the criminalisation of cyber fraud.[12]

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2 Fletcher "Romance Scammers' Favorite Lies Exposed" (9 February 2023) https://www.ftc.gov/news-events/data-visualizations/data-spotlight/2023/02/romance-scammers-favorite-lies-exposed#ft1 (accessed 2023-07-23).

3 Fletcher https://www.ftc.gov/news-events/data-visualizations/data-spotlight/2023/02/romance-scammers-favorite-lies-exposed#ft1.

4 Smith "15% of American Adults Have Used Online Dating Sites or Mobile Dating Apps" (11 February 2016) https://www.pewresearch.org/internet/2016/02/11/15-percent-of-american-adults-have-used-online-dating-sites-or-mobile-dating-apps/ (accessed 2023-07-23); Lauckner, Truszczynski, Lambert, Kottamasu, Meherally, Schipani-McLaughlin, Taylor and Hansen "'Catfishing', Cyberbullying, and Coercion: An Exploration of the Risks Associated with Dating App Use Among Rural Sexual Minority Males" 2019 23(3) *Journal of Gay & Lesbian Mental Health* 289 289.

5 See Watney "Cybercrime" in Papadopoulos and Snail (eds) *Cyber@Law: The Law of the Internet in South Africa* 4ed (2022) 463.

6 It was reported in 2021 that South Africa had the third most cybercrime victims worldwide, and that they suffered an estimated loss of R2.2 billion per year; see Interpol *African Cyberthreat Assessment Report: Interpol's Key Insight into Cybercrime in Africa* (2021) 9; Accenture "Insight into the Cyberthreat Landscape in South Africa" 2020 https://www.accenture.com/acnmedia/PDF-125/Accenture-Insight-Into-The-Threat-Landscape-Of-South-Africa-V5.pdf#zoom=50 (accessed 2023-07-23).

7 See foreword of SADC *SADC Model Law on Computer Crime and Cybercrime* (2013); see also Van der Linde "Electronic Offences" in *South African Criminal Law and Procedure Volume III: Statutory Offences* RS 32 (2022) G8–2.

8 African Union *African Union Convention on Cyber Security and Personal Data* Protection (2014). Adopted: 27/06/2014; EIF: 08/06/2023.

9 See Preamble, as well as art 28, of the AU Convention.

10 (2001) ETS 185. Adopted: 23/11/2001; EIF: 1/07/2004.

11 See Ch III of the Budapest Convention.

12 See art 12 of the Model Law; art 30(1)(a) and (b) of the AU Convention and art 8 of the Budapest Convention. South Africa is a signatory to the AU Convention (which came into force on the 8th of June 2023) but has not ratified it – see African Union "List of countries which have signed, ratified/acceded to the African Union Convention on Cyber Security and Personal Data Protection" https://au.int/sites/default/files/treaties/29560-sl-AFRICAN_UNION_CONVENTION_ON_CYBER_SECURITY_AND_PERSONAL_DATA_PROTECTION_0.pdf) (accessed 2024-06-04). South Africa is not bound by the SADC Model Law as it is merely a model law and has neither signed nor acceded to the Budapest Convention.

The South African Cybercrimes Act[13] (Cybercrimes Act) came into force on 1 December 2021. The aims of this Act (according to the Preamble) include the creation of cybercrime-related offences, the criminalisation of the disclosure of harmful data messages, and the regulation of procedural matters such as jurisdiction and mutual assistance. Section 8 of the Cybercrimes Act specifically criminalises cyber fraud. However, this new statutory offence does not repeal, replace or amend the common-law crime of fraud.

The aim of this contribution is threefold: first, it defines and explains the phenomena of online dating fraud and "catfishing"; secondly, it analyses the offence of cyber fraud and common-law fraud to evaluate whether, how and to what extent this conduct fits into the proscriptive ambit of these offences; thirdly, this contribution considers procedural matters such as the splitting of charges and the duplication of convictions, as well as competent verdicts and the sentencing of online romance fraudsters.

2 DEFINING ONLINE DATING FRAUD AND CATFISHING[14]

Online dating fraud or scams may take many forms. Scammers however most often misrepresent their intentions in entering a romantic relationship with their intended victim or target in order to defraud them.[15] Victims are often lured in through dating websites and mobile dating applications such as Tinder,[16] Grindr, Hinge and Bumble. Scams may also occur on social media websites such as Facebook and Instagram, and on messaging applications such as WhatsApp, or even via email.[17] Scammers groom potential victims over time to obtain their trust.[18] In order to foster a sense of trust, fraudsters regularly take on the personas (whether based on real persons or fabricated) of people in trusted professions or positions of

13 19 of 2020.

14 In this article, online dating fraud and catfishing are discussed together as the two concepts often overlap.

15 Whitty "The Scammers Persuasive Techniques Model: Development of a Stage Model to Explain the Online Dating Romance Scam Get Access Arrow" 2013 53(4) *British Journal of Criminology* 665 666.

16 See Staff Writer "Beware These Dating Scams Targeting South Africans This Valentine's Day – Even on Tinder" (14 February 2023) https://businesstech.co.za/news/lifestyle/664195/beware-these-dating-scams-targeting-south-africans-this-valentines-day-even-on-tinder/ (accessed 2023-07-23); Anonymous "Online Dating Scams and How to Avoid Them" (undated) https://www.kaspersky.com/resource-center/threats/beware-online-dating-scams (accessed 2023-07-23). The Tinder terms of use also explicitly prohibit its users from "[s]olicit[ing] money or other items of value from another user, whether as a gift, loan, or form of compensation" – see Tinder "Tinder Terms of Use" (2024) https://policies.tinder.com/terms/us/en/ (accessed 2024-04-19).

17 Eseadi, Ogbonna, Otu and Ede "Hello Pretty, Hello Handsome!: Exploring the Menace of Online Dating and Romance Scam in Africa" in Chan and Adjorlolo (eds) *Crime, Mental Health and the Criminal Justice System in Africa* (2021) 66.

18 Anonymous https://www.kaspersky.com/resource-center/threats/beware-online-dating-scams; Whitty "Is There a Scam for Everyone? Psychologically Profiling Cyberscam Victims" 2020 26 *European Journal on Criminal Policy and Research* 399 402.

authority, such as military personnel or aid workers.[19] The communication between the victim and the scammer is "frequent and intense" to hasten the grooming process.[20] These perfidious lovers often declare their love or feelings relatively early in the romance to manipulate their victims.[21] Unfortunately, their romantic promises and declarations of love are only fantasies sketched to lure their potential victims as the scammer intends eventually to defraud the victim.

The scammer initially asks for an insignificant amount of money or small gifts but these requests significantly increase in value as the "relationship" develops.[22] Often, the scammer develops a "personal emergency" that suddenly necessitates the need for sums of money, often in the form of a loan.[23] This may include paying legal fees, aeroplane tickets and hospital bills.[24] A good example is the so-called "Tinder Swindler", Simon Hayut, who went by the pseudonym Simon Leviev, and pretended to be the son of diamond magnate Lev Leviev.[25] He would seduce women on Tinder and assert (mainly on WhatsApp) that his enemies were after him, requiring him to go into hiding. He would then claim that he could not access his bank accounts and ask the women to advance him a sum of money that he promised to repay.[26] As he had (mis)represented himself as the son of a mogul, the victims had no issue in providing him with the money. He, however, went out of his way to evade repayment.[27]

A South African victim alleged that her so-called boyfriend had requested money from her but promised to repay her as soon as he received monies owed to him.[28] The alleged fraudster employed emotional blackmail techniques when she refused to transfer the funds, asserting that she did not love him, despite his being willing to marry her and purchase a house for her.[29] She alleges that she was defrauded of R500 000 over a period of nine months, leaving her penniless.[30] It later emerged that her online partner was not the person depicted in the images he shared with her and was

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19 Eseadi *et al* in Chan and Adjorlolo (eds) *Criminal Justice* 66; Koon and Yoong "Preying on Lonely Hearts: A Systematic Deconstruction of an Internet Romance Scammer's Online Lover Persona" 2013 23(1) *Journal of Modern Languages* 28 30.

20 Whitty and Buchanan "The Online Dating Romance Scam: The Psychological Impact on Victims – Both Financial and Non-Financial" 2016 16(2) *Criminology & Criminal Justice* 176 177.

21 *Ibid*.

22 Whitty 2013 *British Journal of Criminology* 666; Whitty and Buchanan 2016 *Criminology & Criminal Justice* 177; Eseadi *et al* in Chan and Adjorlolo (eds) *Criminal Justice* 67.

23 Eseadi *et al* in Chan and Adjorlolo (eds) *Criminal Justice* 67.

24 Whitty 2020 *European Journal on Criminal Policy and Research* 403.

25 DiLillo "Who Is the Tinder Swindler?" (14 February 2022) https://www.netflix.com/tudum/articles/who-is-tinder-swindler-real-shimon-hayut (accessed 2023-07-23).

26 *Ibid*.

27 *Ibid*.

28 Carte Blanche "Online Love Scams" (13 February 2020) https://youtu.be/Rl3FLdxjgO0 (accessed 2023-07-23).

29 *Ibid*.

30 *Ibid*.

contracted by a syndicate to scam her.[31] It is not uncommon for romance scammers to operate in vast fraud networks or organised syndicates.[32]

Victims of online dating fraud or scams appear to be predominantly women over 50.[33] Over and above the monetary losses that victims may suffer, they also suffer a broad spectrum of emotional harm such as self-doubt, shock, a loss of social status, embarrassment, anxiety and stress, and the ordeal can also lead to post-traumatic stress disorder.[34] Victims also feel ostracised by colleagues, friends and family.[35] They are often doubly traumatised owing to the loss not only of the scammed funds but also the (sham) relationship.[36] Interestingly, a study conducted in 2016 showed that participants experienced more trauma from the dissolution of the relationship than the (often substantial) loss of money.[37]

A romance scam ends only when the victim discovers the true intentions of the scammer and discontinues their financial support of the scammer,[38] or when the scammer reaches a predetermined financial goal.[39]

As mentioned above, the South African victim was scammed by someone who misrepresented himself by using images of another person. This is known as "catfishing". This term was popularised by the documentarian Nev Schulman, following his own catfishing experience.[40] It turned out that not only was the woman depicted in the images shared by his online paramour not her, but she was also married.[41] She used publicly available images of a model who, of course, did not know or authorise the use of her likeness.[42] The phrase originates from the husband of the fraudster, Angela Wesselman-Pierce, who recounted how cod fishermen would add catfish to their cod hauls to keep the "cod active and alert until arrival". The implication

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31 *Ibid*.

32 Rege "What's Love Got to Do With It? Exploring Online Dating Scams and Identity Fraud" 2009 3(2) *International Journal of Cyber Criminology* 494 501–502; Whitty and Buchanan 2016 *Criminology & Criminal Justice* 177. See also *Otubu v Director of Public Prosecutions, Western Cape* 2022 (2) SACR 311 (WCC) par 7, where the bail applicants in that case were wanted in the United States for online romance scams. The appellant was part of a syndicate known as the Black Axe.

33 Peachey "Women 'Victims in 63% of Romance Scams'" (10 February 2019) https://www.bbc.com/news/business-47176539 (accessed 2023-07-23); Carte Blanche https://youtube/Rl3FLdxjgO0.

34 Whitty and Buchanan 2016 *Criminology & Criminal Justice* 178 180; Lauckner *et al* 2019 *Journal of Gay & Lesbian Mental Health* 291.

35 Whitty and Buchanan 2016 *Criminology & Criminal Justice* 181; Carte Blanche https://youtu.be/Rl3FLdxjgO0.

36 Whitty and Buchanan 2016 *Criminology & Criminal Justice* 182.

37 Whitty and Buchanan 2016 *Criminology & Criminal Justice* 189–190.

38 Whitty 2013 *British Journal of Criminology* 666.

39 Rege 2009 *International Journal of Cyber Criminology* 502.

40 See IMDb "Catfish" (2010) https://www.imdb.com/title/tt1584016/ (accessed 2023-07-23).

41 Kaufman "The Woman Behind 'Catfish's' Mystery" (5 October 2010) https://www.latimes.com/archives/la-xpm-2010-oct-05-la-et-catfish-lady-20101005-story.html (accessed 2023-07-23).

42 Santi "'Catfishing': A Comparative Analysis of U.S. v. Canadian Catfishing Laws & Their Limitations" 2019 44 *Southern Illinois University Law Journal* 75 76. Also see Ndyulo "Protecting the Right to Identity Against Catfishing: What's the Catch?" 2023 44 *Obiter* 308 308–330.

is that catfish, such as his wife, keep the lives of others exciting.[43] This (perhaps distasteful) metaphor has now evolved to be understood as denoting "a person who sets up a false personal profile on a social networking site for fraudulent or deceptive purposes".[44] The catfish uses the images of third parties to trick the target into believing that they (the catfish) are the persons depicted in the images.[45] The catfish usually selects images of attractive people, including models and athletes.[46] Catfish often create elaborate online identities in order to manipulate their targets into entering into relationships with them.[47] Catfishing and online dating scams often also overlap, as romance fraudsters are most likely to use fake profiles (in other words, not their own photos or social media accounts) to seduce their victims.[48] The profiles are typically accompanied by flattering text descriptions of their personality, including their personal interests, life story, and values.[49] However, not all catfish are romance scammers, as their motivations for employing false profiles may be unrelated to any financial gain. Some people may use a catfish persona owing to loneliness, and believe that using a more attractive persona may make them more popular, while others are dissatisfied with their physical appearance and struggle with their self-esteem.[50] Others have also used it as a way to freely explore their sexuality and gender identity.[51]

With the recent rise in lifelike images generated by artificial intelligence (AI), also known as "deepfakes",[52] there is now even less need to appropriate *existing* images to create (fake) online personas. AI is employed "to produce new identities and duplicate existing ones, to create a video, sound recording, or photograph of a scene that did not take place".[53] Not only can images or videos be created out of whole cloth, but the likeness of real persons can be superimposed onto the body of another.[54]

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43 Merriam-Webster "Catfish" (undated) https://www.merriam-webster.com/dictionary/catfish (accessed 2023-07-23).

44 Merriam-Webster https://www.merriam-webster.com/dictionary/catfish. Also see Cambridge Dictionary "Catfish" (undated) https://dictionary.cambridge.org/dictionary/english/catfish (accessed 2023-07-23).

45 Whitty 2013 *British Journal of Criminology* 666.

46 Coluccia, Pozza, Ferretti, Carabellese, Masti and Gualtieri "Online Romance Scams: Relational Dynamics and Psychological Characteristics of the Victims and Scammers. A Scoping Review" 2020 16 *Clinical Practice & Epidemiology in Mental Health* 24 25; Smith, Smith and Blazka "Follow Me, What's the Harm: Considerations of Catfishing and Utilizing Fake Online Personas on Social Media" 2017 27 *Journal of Legal Aspects Sport* 32 35–36.

47 Cohen "Angling for Justice: Using Federal Law to Reel in Catfishing" 2019 2 *The Journal of Law and Technology at Texas* 51 54.

48 Carte Blanche https://youtu.be/Rl3FLdxjgO0.

49 Coluccia *et al* 2020 *Clinical Practice & Epidemiology in Mental Health* 25.

50 Santi 2019 *Southern Illinois University Law Journal* 81–82.

51 Santi 2019 *Southern Illinois University Law Journal* 82.

52 Deepfake is a portmanteau word consisting of "deep learning" and fake. Deep learning, according to Mashinini, is a process which "enables computers to learn independently how to perform human tasks, using increased computing power"; see Mashinini "The Impact of Deepfakes on the Right to Identity: A South African Perspective" 2020 32(3) *SA Merc LJ* 407 408–409.

53 Mashinini 2020 *SA Merc LJ* 408.

54 Mashinini 2020 *SA Merc LJ* 411.

In light of the above, the next section sets out the offence of fraud, both under the common law and the Cybercrimes Act, to evaluate whether and to what extent online dating fraud and/or catfishing fall under the scope of the offence.

3 BROAD OVERVIEW OF THE CRIME OF FRAUD

Fraud is criminalised both under the common law and the Cybercrimes Act. The elements of the common-law crime require there to be a misrepresentation, prejudice (or even potential prejudice), as well as unlawfulness and intent.[55] Section 8 of the Cybercrimes Act reads as follows:

> "Any person who unlawfully and with the intention to defraud makes a misrepresentation
> (*a*) by means of data or a computer program; or
> (*b*) through any interference with data or a computer program as contemplated in section 5(2) (*a*), (*b*) or (*e*) or interference with a computer data storage medium or a computer system as contemplated in section 6(2)(*a*),
> which causes actual or potential prejudice to another person, is guilty of the offence of cyber fraud."

The terms "data", "computer program", "computer data storage medium" and "computer system" are all defined under Chapter 1 of the Cybercrimes Act. "Data" means "electronic representations of information in any form", while "computer program" means "data representing instructions or statements that, when executed in a computer system, causes the computer system to perform a function". "Computer data storage medium", in turn, means:

> "any device from which data or a computer program is capable of being reproduced or on which data or a computer program is capable of being stored, by a computer system, irrespective of whether the device is physically attached to or connected with a computer system."

A "computer system" means

> "(*a*) one computer; or
> (*b*) two or more interconnected or related computers, which allow these interconnected or related computers to
> (i) exchange data or any other function with each other; or
> (ii) exchange data or any other function with another computer or a computer system."

The offence under the Cybercrimes Act is therefore "virtually identical" to the common-law offence of fraud.[56] The only substantive difference is that the offence of cyber fraud requires the accused to have committed the crime through specific means, namely "by means of data or a computer program […] or through any interference with data or a computer program".

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[55] Hoctor *Snyman's Criminal Law* 7ed (2020) 461.

[56] Van der Linde *Criminal Law and Procedure* G8–11.

4 CONSIDERING ONLINE ROMANCE FRAUD AND CATFISHING AS INSTANCES OF THE COMMON-LAW CRIME OF CYBER FRAUD

As the common-law crime of fraud and cyber fraud are "virtually identical" save for the fact that the latter must be committed through specific means (and carry certain prescribed sentences), the ensuing section discusses the elements of the two crimes simultaneously. Where any substantive differences exist, such differences are highlighted.

4 1 Misrepresentation

The *actus reus* of both crimes is a misrepresentation. This misrepresentation must amount to a "perversion or distortion of the truth".[57] Fraud can occur broadly through spoken or written words or by conduct and may be explicit or implied.[58] There are two sets of misrepresentation that occur during the course of a dating scam. First, an online dating scammer distorts the truth by misrepresenting their feelings for the victim, when the victim is merely a target for financial gain. The second, interrelated misrepresentation concerns the scammer's intention to pay back the money or "make good" with the victim during the relationship. These representations are the ones that will form the core of the fraud investigation and prosecution. As outlined above, fraudsters often create false emergencies to create a sense of urgency to manipulate their target further. This usually goes hand in hand with an undertaking to repay (or make good with) the victim at a later stage.

Under the Cybercrimes Act, the misrepresentation may only take place by means of data or a computer program, or through interference with data or a computer program, or interference with a computer data storage medium or a computer storage system. As "data" is defined as "electronic representations of information in any form", messages sent via either the Internet or any type of mobile application such as Tinder will certainly fall within the ambit of the offence under section 8 of the Cybercrimes Act.

4 2 Prejudice

The misrepresentation must cause actual or potential prejudice to the victim. It is, therefore, not necessary for the harm actually to manifest. Consequently, it is not required to prove that the victim was in fact misled by the misrepresentations.[59] Hoctor describes the term "potential prejudice" as one with multiple possible meanings. It may denote, objectively viewed, at least a risk of prejudice or even the likelihood thereof.[60] This objective view

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57 Hoctor *Snyman's Criminal Law* 462; Milton *South African Criminal Law and Procedure Volume II: Common-Law Crimes* 3ed (1996) 705.

58 Burchell *Principles of Criminal Law* 5ed (2016) 745–746; Hoctor *Snyman's Criminal Law* 462.

59 Hoctor *Snyman's Criminal Law* 466.

60 *Ibid*.

or test also means that the potential prejudice must be reasonable and not too remote.[61] A likelihood of prejudice does not denote a probability that the prejudice will occur but rather only a possibility.[62] Furthermore, it is irrelevant if the target of the fraud knew that assertions made by the accused were false.[63]

The scam may unravel for a multitude of reasons. This may include the victim not being able to find the resources to pay the scammer, or the victim (or someone else) discovering the true intentions of the scammer.[64] Even if a scam unravels before it runs its course, the prejudice element of the crime will be met if the State establishes that there was potential prejudice.

Under the common law, the prejudice may be proprietary or non-proprietary.[65] There is no reference to the type of proprietary prejudice required under section 8 of the Cybercrimes Act. There is also no reason to believe that this form of prejudice has been codified into the Cybercrimes Act, as the legislature has been clear that both actual and potential harm are proscribed, although it is silent on the type of proprietary prejudice. Two regional instruments, however, are clear on the matter. Article 12 of the SADC Model Law is quite prescriptive; it specifically requires that there be "a loss of property" for the victim, and an "economic benefit" for the culprit,[66] while article 8 of the Budapest Convention similarly requires "an economic benefit" for the culprit. Neither of these instruments binds South African courts, but courts may consider them to cure any uncertainty regarding non-proprietary prejudice.

The potential exclusion of non-proprietary prejudice under section 8 of the Cybercrimes Act does not detract from the fact that instances of online dating fraud invariably involve a financial objective by the fraudster.

4 3 Intent

Fraud is committed with the intention of defrauding the victim, and the accused must be aware that their representations are false.[67] In such an instance, the fraud would be committed with intent, specifically *dolus directus*. However, *dolus eventualis* will also satisfy the intent requirement, as it is sufficient for the State to prove that the accused foresaw the possibility that their representations may be false, but recklessly went on to make them nevertheless.[68] Online romance scammers are likely to commit

61 *Ibid*.
62 *Ibid*.
63 Kemp (ed) *Criminal Law in South Africa* 4ed (2023) 471; Hoctor *Snyman's Criminal Law* 465.
64 Whitty and Buchanan 2016 *Criminology & Criminal Justice* 179.
65 Hoctor *Snyman's Criminal Law* 466; Burchell *Principles* 749–750.
66 Neither of these terms is defined under the Model Law; they should be given their ordinary meanings.
67 Kemp (ed) *Criminal Law* 470; Hoctor *Snyman's Criminal Law* 467.
68 *Ex Parte Lebowa Development Corporation Ltd* [1989] 4 All SA 492 (T); Kemp (ed) *Criminal Law* 470; Hoctor *Snyman's Criminal Law* 467.

fraud or cyber fraud with *dolus directus* as they intend from the outset to defraud the victim.

4 4 Unlawfulness

If there is no ground of justification to excuse the conduct of the accused, the misrepresentations will be considered unlawful. However, coercion or compulsion[69] or obedience to superior orders may exclude the element of unlawfulness.[70] Burchell asserts that false declarations of love to obtain "sexual favours" fall under a type of conduct where there has been "tacit acceptance" and will not be subject to prosecution.[71] False declarations of love are at the heart of romance scams, but the prejudice may be differentiated from Burchell's assertion. The benefit sought by a romance scammer is proprietary, while the benefit in Burchell's example is sexual. Romance scammers, in fact, rarely meet their victims. A notable exception is the Tinder Swindler, Simon Hayut.

4 5 Causation

It has been submitted that causation is a superfluous element of the common-law crime of fraud. Burchell and Kemp do not even discuss it as an element of the crime. Hoctor agrees that the element is superfluous, as prejudice has received such a broad interpretation by the courts that it has been rendered meaningless and superfluous.[72] Milton asserted that it was "logically redundant" to require causation in cases involving potential fraud.[73]

Section 8 of the Cybercrimes Act states that the accused must make "a misrepresentation … which causes actual or potential prejudice to another person". It is submitted that courts are unlikely to require the State to prove causation; although the definitions of the common-law crime of fraud, stated by the three authors above, all still employ the word "causes",[74] they nevertheless regard it as superfluous or do not discuss it all.

It would, in any event, usually be simple for the prosecution to prove, under section 8 of the Cybercrimes Act, that the misrepresentations by the scammer led to financial prejudice.

4 6 Evaluation

It is clear that the characteristics of an online dating scam fall within the ambit of either the common-law crime of fraud, or the cyber fraud offence under the Cybercrimes Act. Two (albeit minute) questions remain: whether the Cybercrimes Act covers non-proprietary prejudice; and whether

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69 Kemp (ed) *Criminal Law* 470; Hoctor *Snyman's Criminal Law* 467.
70 Hoctor *Snyman's Criminal Law* 467.
71 Burchell *Principles* 745.
72 Hoctor *Snyman's* Criminal Law 467.
73 Milton *Criminal Law* 719.
74 Burchell *Principles* 742; Hoctor *Snyman's Criminal Law* 461; Kemp (ed) *Criminal Law* 468.

causation is an essential element under the same. It is submitted that the answer to both of these questions is probably "no".

5 PROCEDURAL MATTERS

5 1 Splitting of charges and duplication of convictions

As *dominus litus*, the State may charge the accused with all offences arising from a specific factual matrix.[75] This is known as the splitting of charges and is a permissible prosecutorial practice under the Criminal Procedure Act[76] (CPA). This, however, does not entitle the court to convict an accused of all charges against them.[77] The duplication of convictions is unlawful. In *S v Whitehead*,[78] Combrinck JA held that "it is a fundamental principle of our law that an accused should not be convicted and sentenced in respect of two crimes when he or she has committed only one offence", and this protection is enshrined under section 35(3) of the Constitution.[79] An accused may therefore be charged with common-law fraud and cyber fraud in the same charge sheet or indictment, in the alternative, but a court is unlikely to convict an accused of both offences.

Courts have developed two broad tests to determine when a conviction on two separate charges constitutes an unlawful duplication of convictions. The "evidence test" requires a court to consider whether the evidence required to prove one offence also proves another.[80] The "intent test" evaluates whether a series of criminal actions are carried out with a single intent.[81] It would constitute an unlawful duplication of convictions where an accused is charged with committing various acts arising from a "continuous criminal transaction".[82] These tests are nevertheless not decisive or exhaustive and must always be considered with a healthy dose of common sense.[83] As the common-law and statutory offences are "virtually identical" save for the latter requiring that the crime be committed in a specific manner, a conviction on both offences is likely to constitute an impermissible duplication of offences.

However, it is cognisable that a certain series of interactions could give rise to a set of charges under the Cybercrimes Act and the common law. This is particularly where the representations were made both online as well as in person. Whether a prosecutor would laboriously charge and prosecute

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75 S 83 of the CPA.

76 51 of 1977.

77 S 336 of the CPA

78 2008 (1) SACR 431 (SCA).

79 The Constitution of the Republic of South Africa, 1996. See also, *S v Whitehead* supra par 10.

80 *S v Whitehead supra* 39.

81 *S v Whitehead supra* par 42

82 *S v Davids* 1998 (2) SACR 313 (C) 316; Van der Linde "Managing and Participating in a Criminal Enterprise Under POCA: Duplication of Convictions? A Discussion of the Conflict Between *S v Prinsloo* and *S v Tiry*" 2022 139(3) *South African Law Journal* 526 530.

83 *S v Grobler* 1966 (1) SA 501 (A) 523; *Whitehead supra* par 35.

someone under the common law and the Cybercrimes Act is dubious, especially because the broadly defined offence under the common law is wide enough to encompass all instances of the offence under the Cybercrimes Act. However, there are certain procedural advantages to prosecuting someone under the Cybercrimes Act, as minimum sentences would apply in certain scenarios. These scenarios are canvassed below. The most apposite route to follow is charging an accused under the Cybercrimes Act, and charging them with common-law fraud in the alternative. If a prosecutor fails to do so, a court will also be able to convict the accused of a myriad other offences owing to the operation of competent verdicts.

5 2 Competent verdicts

Where the State fails to prove an offence beyond reasonable doubt, and yet, on the evidence, establishes a (usually lesser) offence with which the accused was not charged, a court may convict the accused of the offence where such an offence is a competent verdict to the charged offence.[84] The offence now established on the facts must not have been either a charge or an alternative charge in the charge sheet or indictment.[85] Competent verdicts are only permissible if authorised by statute,[86] and are contained mainly under Chapter 26 of the CPA. There are two broad provisions relating to attempt[87] and accessories after the fact[88] that enable courts to convict accused persons of these offences if established by the evidence, and where the prosecution has failed to prove the substantive offence beyond a reasonable doubt. Chapter 26 also contains a range of specific offences on which courts are empowered to impose competent verdicts, including convicting someone of culpable homicide instead of murder or attempted murder.[89] Offences not explicitly mentioned in Chapter 26 of the CPA may still be considered competent verdicts under section 270 if another offence containing "the essential elements of that offence is included in the offence so charged". As there are no competent verdicts listed for the common-law crime of fraud under Chapter 26 of the CPA, could section 270 of the CPA be invoked to convict an accused of the crime of cyber fraud?[90] The statutory offence requires cyber fraud to be committed through specific means, including "by means of data or a computer program" or through "interference with data or a computer program". Unless the instance of common-law fraud was already "cyber" in nature, it is unlikely that these essential elements would have formed part of the common-law charge. In such an event, it may have been more appropriate to charge the accused with cyber fraud in the first place.

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84 Joubert (ed) *Criminal Procedure Handbook* 13ed (2020) 389.

85 As envisaged under s 83 of the CPA; see Joubert *Handbook* 389.

86 Theophilopoulos (ed) *Criminal Procedure in South Africa* (2020) 350; Joubert *Handbook* 389.

87 S 256 of the CPA.

88 S 257 of the CPA.

89 S 258 of the CPA.

90 See Van der Merwe "Competent Verdict" in Du Toit and Van der Merwe *Commentary on the Criminal Procedure Act* vol 3 (RS 68, 2022) 26–26.

The Cybercrimes Act also contains a comprehensive list of competent verdicts under section 18 of the Act. The unlawful interception of data,[91] unlawfully accessing data,[92] using or possessing hardware or software tools for specific purposes,[93] and acquiring or possessing a password, access code or similar device or data to commit cyber fraud[94] or cyber extortion[95] are competent verdicts on a charge of cyber fraud. An accused may also be convicted of the common-law crime of fraud or attempted fraud,[96] common-law forgery, uttering or an attempt to commit those crimes,[97] or common-law theft or attempted theft.[98]

A court may also convict an accused of an attempt[99] or conspiracy[100] to commit cyber fraud. An accused may also be convicted of aiding, abetting, inducing, inciting, instigating, instructing, commanding or procuring another person to commit cyber fraud.[101] Such an accused will be liable to receive the same punishment as applies to the substantive offence.[102] It is usual practice not to subject the accused to the same punishment for incitement or conspiracy as for committing the substantive offence.[103]

Where the State charges an accused only with the statutory offence under section 8, and does not charge them with common-law fraud in the alternative, such an accused may be convicted of common-law fraud as the aforementioned offence is a competent verdict to cyber fraud. A scenario where an accused is charged with common-law fraud, but is not convicted, and yet is found guilty of cyber fraud in terms of section 270 of the CPA is unlikely.

5 3 Sentencing

The Cybercrimes Act does not prescribe a sentence for “ordinary” instances of cyber fraud that do not fall within the ambit of the minimum sentences. A court is then required to impose a sentence as envisaged under section 276

91 S 18(6)(*a*), read with s 2(1) of the Cybercrimes Act.
92 S 18(6)(*a*), read with s 2(2) of the Cybercrimes Act.
93 S 18(6)(*b*), read with ss 4(1), 5(1) and 6(1) of the Cybercrimes Act.
94 S 18(6)(*c*), read with ss 7(1), 7(2) and 8 of the Cybercrimes Act.
95 S 18(6)(*d*), read with s 9(1) and (2) of the Cybercrimes Act.
96 S 18(6)(*e*) of the Cybercrimes Act.
97 S 18(6)(*f*) of the Cybercrimes Act.
98 S 18(6)(*g*) of the Cybercrimes Act.
99 S 17(*a*) of the Cybercrimes Act.
100 S 17(*b*) of the Cybercrimes Act.
101 S 17(*c*) of the Cybercrimes Act.
102 S 17 of the Cybercrimes Act.
103 Burchell *Principles* 539; Hoctor *Snyman's Criminal Law* 263. This was also confirmed by the Constitutional Court in *Economic Freedom Fighters v Minister of Justice and Correctional Services* 2021 (2) SA 1 (CC) (*EFF*), as judicial officers still maintain their discretion to impose the most appropriate sentence in the circumstances; see *EFF supra* par 27, citing *S v Toms; S v Bruce* 1990 (2) SA 802 (A) 813. Courts also retain their ordinary sentencing discretion whereby the offence, offender and the interests of society are considered when considering an appropriate sentence; see *S v Zinn* 1969 (2) SA 537 (A) 540.

of the CPA.[104] The minimum sentences under the Cybercrimes Act would apply where cyber fraud was committed by the accused or "with the collusion or assistance" of another, and that person or persons

> "who as part of their duties, functions or lawful authority were in charge of, in control of, or had access to data, a computer program, a computer data storage medium or a computer system belonging to another person in respect of which the offence in question was committed."[105]

If the cyber fraud has been committed under those circumstances, a court must impose a sentence of direct imprisonment "unless substantial and compelling circumstances justify" imposing a sentence other than direct imprisonment (with or without a fine).[106] This sentence may also not be suspended.[107]

The Criminal Law Amendment Act[108] (CLAA) also creates certain minimum sentences for cyber fraud.[109] Instances where minimum sentences fall into four broad categories relating to the status of the offender:

1. The fraudulent acts involved amounts exceeding R500 000.
2. The defrauded amount exceeded R100 000 *and* the offence was committed in furtherance or execution "of a common purpose or conspiracy".[110]
3. The fraudulent acts exceeded R100 000 *and* the offence was committed under certain specific circumstances. This is where someone acts alone, receives assistance or colludes with others. Secondly, the accused must have "as part of his or her duties, functions or lawful authority [been] in charge of, in control of, or had access to data, a computer program, a computer data storage medium or a computer system of another person".

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104 S 19(4) of the Cybercrimes Act. S 276 of the CPA applies if a sentence is not prescribed in terms of other legislation. S 276(1) reads as follows:

> "Subject to the provisions of this Act and any other law and of the common law, the following sentences may be passed upon a person convicted of an offence, namely
>
> (*a*) .....
>
> (*b*) imprisonment, including imprisonment for life or imprisonment for an indefinite period as referred to in section 286B (1);
>
> (*c*) periodical imprisonment;
>
> (*d*) declaration as an habitual criminal;
>
> (*e*) committal to any institution established by law;
>
> (*f*) a fine;
>
> (*h*) correctional supervision;
>
> (*i*) imprisonment from which such a person may be placed under correctional supervision in the discretion of the Commissioner or a parole board."

105 S 16(6) of the Cybercrimes Act.

106 S 16(6)(*a*) of the Cybercrimes Act.

107 S 16(6)(*b*) of the Cybercrimes Act, read with s 297(4) of the CPA. The latter provision permits a court to suspend any prescribed minimum punishment for periods not exceeding five years and impose any condition as described under s 297(1)(*a*)(i) of the CPA.

108 105 of 1997.

109 Under s 51(2)(a)(*i*), read with Part II of Schedule 2 of the CLAA.

110 Part II of Schedule 2 of the CLAA.

4. The last category involves fraudulent acts by law enforcement officers.[111] They fall within the ambit of the provisions if the fraudulent act or acts relate to amounts exceeding R10 000 or, while a police officer, they acted in concert with others as described in 2 or was in charge of the systems listed in 3.

First-time offenders under any of these categories will face imprisonment of at least 15 years,[112] while second-time offenders will face a minimum of 20 years.[113] Persons who are third-time (and subsequent) offenders face a minimum of 25 years' imprisonment.[114] Just as with the prescribed sentences under the Cybercrimes Act, a court may only deviate from the imposition of the minimum sentence if "substantial and compelling circumstances exist" to justify imposing a lesser sentence.[115]

The threshold for the applicability of the minimum sentence regime is much lower for law enforcement officers. This is so because a single act of cyber fraud by a law enforcement officer involving an amount of R10 000 would invoke the provisions, as opposed to amounts of R100 000 and R500 000 respectively when persons who are not law enforcement officers are involved.

The minimum sentences appear harsher than courts would impose for common-law fraud and, reviewing a number of cases, sentences rarely involved a term of imprisonment of 15 years[116] or more.[117]

6 CONCLUSION

Online fraud, especially online romance fraud, is becoming an increasingly serious threat. Clearly, the common-law crime of fraud, as well as the

111 The term "law enforcement officer" is described under the CLAA as including members of the National Intelligence Agency or the South African Secret Service (under s 3 of the Intelligence Services Act 65 of 2002) and correctional officials working for the Department of Correctional Services or authorised persons in terms of the Correctional Services Act 111 of 1998.

112 S 51(2)(i) read with Part II of Schedule 2 of the CLAA.

113 S 51(2)(ii) read with Part II of Schedule 2 of the CLAA.

114 S 51(2)(iii) read with Part II of Schedule 2 of the CLAA.

115 S 51(3)(*a*) of the CLAA. A comprehensive discussion of "substantial and compelling circumstances" falls beyond the scope of this contribution. The *locus classicus* regarding the imposition of minimum sentences under the CLAA, an deviations therefrom, is *S v Malgas* 2001 (1) SACR 469 (SCA). The Supreme Court of Appeal (SCA) there set out a step-by-step approach as to the deviation from the minimum sentence and the meaning of "substantial and compelling circumstances". The Constitutional Court in *S v Dodo* 2001 (3) SA 382 (CC) later affirmed this approach. There is no reason to believe that the term "substantial and compelling circumstances" under the Cybercrimes Act should be ascribed a different meaning from that under the CLAA. Therefore, it is submitted that CLAA jurisprudence on the matter may be transposed to matters under the Cybercrimes Act.

116 See *S v Rautenbach* 2015 JDR 0228 (GP) (involving fraud of R1 339 560), *S v Boshoff* 2013 JDR 2181 (ECG) (involving fraud of R35 000) and *S v Ntozini* 2020 JDR 1983 (ECG) (involving fraud of R19 722 000 and the hacking of the Nelson Mandela Metropolitan Municipality by a syndicate).

117 See *S v Hattingh* 2014 JDR 0491 (FB), where the accused was sentenced to 20 years' imprisonment (involving fraud of R52 000 000).

offence under section 8 of the Cybercrimes Act, adequately proscribes the typical *modus operandi* of a romance scammer. A prosecutor is entitled to charge a suspect with either of these offences, or charge them in the alternative. The decision on how to formulate the charges will depend on a constellation of considerations, but sentencing is a significant one, as the accused will face minimum sentences under a set of circumstances described under the CLAA. Courts are unlikely to be entitled to convict an accused of both offences, as that would constitute an unlawful duplication of offences owing to the substantive similarity of the two offences. In any event, a court is entitled to convict an accused of common-law fraud if *cyber* fraud is not proven, or even conspiracy, incitement, or aiding and abetting cyber fraud.

One can, however, question the existence of an independent offence of cyber fraud as it does not *add* to the scope of the common-law offence. In fact, it limits the scope of the offence. The true utility of the offence under section 8 is the fact that the accused faces harsher punishment. However, this could have been achieved through amendments to the CLAA. The minimum sentences are, in any case, contained under the CLAA. Nevertheless, if an independent offence serves the exclusive function of bringing attention to the proliferation of cyber fraud and the fact that it is a punishable offence, that is itself a commendable goal. This awareness is important not only for victims who might be unaware that romance scams are illegal but also for police officers who might consider such scams a mere risk of being an Internet user and not a crime.

(IN)EQUALITY IN PROPERTY OWNERSHIP: THE RHETORIC OF HOMELESSNESS*

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SUMMARY

Given South Africa's shameful apartheid past, equality before the law should seep through every stratum of its society. Arguably, equality should be more of a consideration in areas where apartheid caused significant damage, such as in property relations. Yet, this is far from being the case. In this article, the authors contend that legal protection of certain categories of property is based on who the property owners are and on the value of the asset. This argument is based on a case study of the legal protection afforded to homeless people's ownership of property.

Property relations in capitalist "post"-apartheid South Africa operate and exist within a hierarchy of property interests, resulting in more protection being afforded to certain forms of property interests and less (and sometimes no) protection given to other forms of property interests. Thus, certain forms of property ("formal property"), such as immovable property, enjoy more protection than "informal property", such as the makeshift homes of homeless people. This dichotomy is most evident in South Africa in light of the housing crisis. While the State focuses on preserving the free market, safeguarding rights over formal property, and minimising the existence of "nuisance" in urban areas, homeless people remain the most destitute people in the country. Hence, it is contended that property law does not protect homeless people and their belongings as informal property owners.

Two chief arguments are made in this regard. First, it is asserted that there is an ordering of property rights protection in a capitalist society and a correlating hierarchy of property interests. Although informal property is property deserving of legal protection, it is generally deprived of such protection because it is perceived as less valuable. This article focuses primarily on homeless people's belongings (informal property), which, it is emphasised constitutes "property" as envisaged under section 25(1) of the Constitution, and extends to the materials that shelter homeless people. Thus, law enforcement agencies' appropriation of homeless people's belongings constitutes an arbitrary deprivation of property. The authors posit that the tendency to prioritise "formal" property over "informal" property is arbitrary and unconstitutional.

A second contention is that this difference in treatment of, and protection afforded to, informal property constitutes discrimination on the ground of poverty, which falls foul of the equality clause under section 9(3) of the Constitution, and of the

Promotion of Equality and Prevention of Unfair Discrimination Act (PEPUDA). The argument is made that the difference in treatment between legal protection afforded to certain property owners as opposed to others constitutes indirect unfair discrimination.

1 INTRODUCTION

> "Everyone is equal before the law and has the right to equal protection and benefit of the law."

This is the guarantee afforded by section 9(1) of the Constitution of the Republic of South Africa, 1996 (Constitution). Equality before the law is so fundamental that it was identified by early constitutional-law theorist Dicey as one of the three fundamental principles of the rule of law.[1] Equality before the law is the most basic protection that the rule of law seeks to afford its constituencies. It is independent of fickle external factors, such as socio-economic conditions, and, on the spectrum of equality, is arguably the most easily achievable standard, since it entails no positive duty or extra resources from the State. As such, it ought to constitute the bare minimum of any constitutional democracy. Despite South Africa's global ranking as the world's most unequal country,[2] equality before the law ought to be achievable.

Equality before the law should seep through every stratum of South African society, given South Africa's shameful past. Some would argue that equality should be more of a consideration in areas where apartheid law caused significant damage, such as in property relations. Yet, this is far from being the case. In this article, it is argued that legal protection of certain categories of property is based instead on who the property owners are and on the asset's value. The article considers the legal protection afforded to homeless people's private ownership of property. Approximately 200 000 people are living on the streets in South Africa.[3] Many homeless people use cardboard boxes, wooden pallets, and plastic sheets to build makeshift structures for shelter. Usually erected in urban areas, these structures have been met with resistance. Law enforcement (such as the South African Police Service) and other community members (shop owners and private security guards)[4] have demolished these structures. They argue that such

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* This article was presented at the Modern Studies in Property Law Conference held at St Johns College, University of Oxford on 29–31 March 2022.

1 Dicey *Introduction to the Study of the Law of the Constitution* (1885) 120.

2 International Center for Transitional Justice (ICTJ) "Country in the World: Report" (3 October 2022) https://www.ictj.org/node/35024#:~:text=South%20Africa%20is%20the%20most,World%20Bank%20report%20has%20said (accessed 2023-07-05).

3 Lesegie "Homelessness in SA: Surviving Another Cold Season in the Streets" (16 April 2023) *City Press* https://www.news24.com/citypress/news/photos-homelessness-in-sa-surviving-another-cold-season-in-the-streets-20230416 (accessed 2023-09-17).

4 Ntseku "Probe into CCID's 'Assault' of Homeless Man in the CBD" (7 June 2021) *IOL* https://www.iol.co.za/capeargus/news/probe-into-ccids-assault-of-homeless-man-in-the-cbd-3aa9e6c3-7939-4a90-bd2e-52afcae31bb6 (accessed 2023-09-17); Bradpiece "'David versus Goliath': Being homeless in the City of Cape Town" (4 June 2021) *Aljazeera*

actions are justified because homeless people "dirty" their communities and that they should not erect these structures.[5]

Property relations in capitalist "post"-apartheid South Africa operate and exist within a hierarchy of property interests, resulting in more protection being afforded to certain forms of property interests and less (and sometimes no) protection for others.[6] Thus, certain forms of property – what the authors call "formal property", such as immovable property – enjoy more protection than "informal property", such as the makeshift homes of homeless people. This dichotomy is most evident in South Africa in light of the housing crisis.[7] While the State focuses on preserving the free market, safeguarding the property rights of particular forms of property interests (formal property), and minimising the existence of "nuisance" in urban areas,[8] homeless people remain the most destitute people in the country.[9] It is contended that property law does not protect homeless people and their belongings as informal property owners.

https://www.aljazeera.com/features/2021/6/4/david-versus-goliath-the-story-of-being-homeless-in-south-africa (accessed 2023-09-17).

5 This can be regarded as a perceived right to self-help enjoyed by these property owners. The authors acknowledge that there is no actual right to self-help under South African law, hence the inclusion of the word "perceived". However, the common-law remedy of *mandament van spolie*, which if all legal requirements are met (peaceful and undisturbed possession of the property at the time of spoliation, and the spoliator's deprivation of possession was wrongful), allows the lawful possessor to regain possession of the property, and is often seen as a means of self-help. However, this article is concerned not with the remedy of self-help in the context of evictions, but rather with the different protections afforded to distinct types of property. See *Yeko v Qana* 1973 4 SA 735 (A) 739G; *Ness v Greef* 1985 4 SA 641 (C) 647D; Van der Walt and Pienaar *Introduction to the Law of Property* (2016) 228; Van Schalkwyk and Van der Spuy *General Principles of the Law of Things* (2012) 76; *Mbangi v Dobsonville City Council* 1991 (2) SA 330 (W); *Kgosana v Otto* 1991 (2) SA 113 (W); *Deana v Minister of Environmental Affairs and Tourism* 2002 JOL 9962 (Tk). It should be noted that, in the context of unlawful occupation, there is much debate around whether the unlawful occupiers can rely on this common-law remedy to regain possession of the unlawfully occupied land, and whether the landowner consequently has a defence of "counter-spoliation" to eject the unlawful occupiers. For more, see Scott "The Precarious Position of a Landowner vis-à-vis Unlawful Occupiers" 2018 *TSAR* 158–176; and in response, Muller and Marais "Reconsidering Counter-Spoliation as a Common-Law Remedy in the Eviction Context in View of the Single System-of-Law Principle" 2020 *TSAR* 103–124.

6 This does not seek to ignore the major shift in property paradigm noted in *Port Elizabeth Municipality v Various Occupiers* 2005 (1) SA 217 (CC).

7 Marutlulle "A Critical Analysis of Housing Inadequacy in South Africa and Its Ramifications" 2021 9 *Africa's Public Service Delivery and Performance Revi*ew 372; Viljoen "A Systemically Correct Approach in State Evictions" 2020 31 *Stellenbosch Law Review* 201; Roux "Pro-Poor Court, Anti-Court Outcomes: Explaining the Performance of the South African Land Claims Court" 2004 20 *SAJHR* 511; and Kumar and Shika "South Africa's Housing Crisis: A New Breed of Honest Politicians Is Needed to Unlock the Land" (21 June 2021) *Daily Maverick* https://www.dailymaverick.co.za/opinionista/2021-06-21-south-africas-housing-crisis-a-new-breed-of-honest-politicians-is-needed-to-unlock-the-land/ (accessed 2023-09-17).

8 Van der Walt *The Law of Neighbours* (2010) 9–14.

9 Wilson "Planning for Inclusion in South Africa: The State's Duty to Prevent Homelessness and the Potential of 'Meaningful Engagement'" 2011 22 *Urban Forum* 262.

Two chief arguments are made in this regard, using as a case study the Unlawful Occupation By-Law promulgated by the City of Cape Town, which allows the City to impound homeless people's belongings.[10] First, relying on Pistor,[11] it is asserted that there is an ordering of property rights protection in a capitalist society, and a correlating hierarchy of property interests. It is argued that this is because ownership over specific, valuable property interests results in higher-value economic returns. Although informal property is property deserving of legal protection, it is generally deprived of such protection because it is perceived as less valuable, and cannot be exchanged for capital. This article focuses primarily on homeless people's belongings (informal property), which, it is contended, constitutes "property" as envisaged under section 25(1) of the Constitution.[12] It is argued that "property" under section 25(1) cannot merely refer to certain forms of property, but also extends to the materials that shelter homeless people.[13] It is consequently maintained that law enforcement agencies' appropriation of homeless people's belongings constitutes an arbitrary deprivation of property, as referred to in section 25(1). The authors posit that the tendency to prioritise "formal" property over "informal" property is arbitrary and unconstitutional.

A second contention is that this difference in treatment of, and protection afforded to, informal property constitutes discrimination on the basis of poverty, which falls foul of the equality clause under section 9(3) of the Constitution and of the Promotion of Equality and Prevention of Unfair Discrimination Act[14] (PEPUDA), legislation enacted in terms of section 9(4) of the Constitution.[15] Section 9(3) of the Constitution states:

> "The State may not unfairly discriminate directly or indirectly against anyone on one or more grounds, including race, gender, sex, pregnancy, marital status, ethnic or social origin, colour, sexual orientation, age, disability, religion, conscience, belief, culture, language and birth."

While poverty is not a listed ground of discrimination under section 9(3), PEPUDA prohibits indirect and direct unfair discrimination in terms of

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10 City of Cape Town "Unlawful Occupation By-Law 2021" https://resource.capetown.gov.za/documentcentre/Documents/Bylaws%20and%20policies/Unlawful_Occupation_By-law.pdf (accessed 2023-07-05). S 9(2)(*b*) and 9(4) give the City of Cape Town the power to impound the belonging of homeless people.

11 Pistor *The Code of Capital: How the Law Creates Wealth and Inequality* (2019).

12 On a close reading of *Ngomane v City of Johannesburg Metropolitan Municipality* 2020 (1) SA 52 (SCA), the Supreme Court of Appeal does not clearly decide whether homeless people's belongings are property and deserving of protecting under s 25 of the Constitution. For a critical analysis of this judgment see, Boggenpoel "Revisiting the *Tswelopele*-Remedy: A Critical Analysis of *Ngomane v City of Johannesburg Metropolitan Municipality*" 2020 137 *SALJ* 424.

13 Roark "Homelessness at the Cathedral" 2016 80 *Missouri Law Review* 53.

14 Act 4 of 2000 (PEPUDA).

15 S 9(4) states:

"No person may unfairly discriminate directly or indirectly against anyone on one or more grounds in terms of subsection (3). National legislation must be enacted to prevent or prohibit unfair discrimination."

grounds listed in the Act, as well as unlisted grounds.[16] Relying on the case of *Social Justice Coalition v Minister of Police*[17] (*SJC* case), where the High Court recognised poverty as a ground of indirect discrimination under PEPUDA for the first time, the authors make the argument that the difference in treatment between legal protection afforded to certain property owners as opposed to others constitutes indirect unfair discrimination.

2 HOMELESSNESS IN THE PROPERTY PARADIGM

Although homelessness is a worldwide phenomenon,[18] it has no universal definition, as it may vary from country to country.[19] Homelessness is often seen as not having a home, but the term is complex.[20] For instance, in an Australian study, Hanson-Easey *et al* define homelessness as living in accommodation that is below the minimum standard or as lacking secure tenure.[21] In contrast, the Canadian Observatory on Homelessness described homelessness as a situation where an individual, family or community is without safe, stable, permanent, appropriate housing or the immediate prospect, means and ability to acquire it.[22] Homelessness can be defined by patterns of time that persons spend without, or outside of, conventional shelters or housing. It can be episodic, permanent or temporary.[23] With that in mind, our conceptualisation of homelessness encompasses individuals or families who reside (live and sleep) on streets and in overnight shelters for any period owing to a lack of economic means to secure a place they can call home.[24] Homelessness generally results in an individual being exposed to harsh conditions that endanger their health and leave them open to

16 See s 1 of PEPUDA, which defines "prohibited grounds".

17 2019 (4) SA 82 (WCC).

18 Olufemi "Street Homelessness in Johannesburg Inner-City: A Preliminary Survey" 1998 10 *Environment and Urbanization* 223 223.

19 Obioha "Addressing Homelessness Through Public Works Programmes in South Africa" 2019 *Expert Group Meeting on the Priority Theme: Affordable Housing and Social Protection Systems for All to Address Homelessness* 1 1.

20 Predictably, the definitions of homelessness seem to evolve around the definition of a home, which is just as contentious as the term "homelessness". For more, see Daya and Wilkins "The Body, the Shelter, and the Shebeen: An Affective Geography of Homelessness in South Africa" 2013 20 *Cultural Geographies* 357; Dovey "Home and Homelessness" in Altman and Werner (eds) *Home Environments* (1985) 33–64; and Somerville "Homelessness and the Meaning of Home: Rooflessness or Rootlessness?" 1992 16 *International Journal of Urban and Regional Research* 529–539.

21 Hanson-Easey, Every, Tehan and Krackowizer "Climate Change, Housing and Homelessness: Report on the Homelessness and Climate Change Forum" (2016). For more on the habitability of the home, see Muller and Viljoen *Property in Housing* (2021) 316–330.

22 Canadian Observatory on Homelessness "What is Homelessness?" https://www.homelesshub.ca/about-homelessness/homelessness-101/what-homelessness (accessed 2023-07-05).

23 Rule-Groenewald, Timol, Khalemo and Desmond "More Than Just a Roof: Unpacking Homelessness" 2015 13 *HSRC* 3–4.

24 Therefore, this framing excludes people who voluntarily decide to not have a home or a house, despite having the economic means to have a home.

exploitation.[25] Confronted by such conditions, homeless people often have to protect themselves from the elements through make-shift structures. While these are not made of materials of high economic value, they are valuable to the property owners, as can be seen from the following statement by a dispossessed homeless person:

> "Our belongings are meagre and our homes may appear ramshackle, but this is all we have, and this is what affords us the only bit of dignity which we enjoy."[26]

Indeed, property is ubiquitous.[27] Yet, despite the omnipresent nature of property and its importance as a social institution, there is marginal agreement on the core of what constitutes property. It is nonetheless essential to determine whether homeless people's belongings are "property" in the strict sense. Some property scholars eschew a rigid definition of property.[28] Harris notes that there is no true definition of property, and what might constitute property in one jurisdiction might not be considered property in another.[29] Generally, ownership entails numerous entitlements, such as the right to have or possess the thing in question,[30] the right to exclude others from the thing, and the right to deal with the thing in whatever way one pleases.[31] Despite the debates concerning the nature of property,[32] there is a common and prevailing conception of property that characterises it as innately exclusionary. Under this conception, as Van der Walt remarks, property acts as a fence that protects and safeguards owners against external threats, and the exclusionary nature of property triggers a legion of legally conclusive results.[33]

The formalist approach to property, delineated above, is the dominant conception of property in South Africa, and places ownership at the centre of

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25 Richter, Burns and Botha "Research Planning for Global Poverty and Homelessness Policy and Services: A Case Study of a Joint Canadian-South African Initiative" 2012 1 *Journal of Social Science Research* 85.

26 This statement was lifted verbatim from the founding affidavit of one of the homeless applicants in *Ngomane*.

27 Harris *Property and Justice* (1996) 4 and 6.

28 Van der Walt "The Modest Systemic Status of Property Rights" 2015 1 *Journal of Law, Property and Society* 16 16.

29 *Ibid*.

30 According to *Maasdorp's Institutes of South African Law*, "the term thing (*res*) is applied in law to everything which can be the object of a right, that is, everything with respect to which one person may be entitled to a right and another person subject to a duty." Things can be either corporeal or incorporeal. For more, see Maasdorp *Maasdorp's Institutes of South African Law Vol 2* (1948) 1.

31 Humbach "Property as Prophesy: Legal Realism and the Indeterminacy of Ownership" 2017 49 *Case Western Reserve Journal of International Law* 211 211.

32 Schlatter *Private Property: The History of an Idea* (1951); Cohen "Dialogue on Private Property" 1954 9 *Rutgers Law Review* 357; Waldron *The Right to Private Property* (1988); Munzer *A Theory of Property* (1990); and Christman *The Myth of Property* (1994); and Penner *The Idea of Property in Law* (1997).

33 Van der Walt "Property and Marginality" in Alexander and Peñalver (eds) *Property and Community* (2009) 82; Dhliwayo *A Constitutional Analysis of Access Rights That Limit Landowners' Right to Exclude* (doctoral thesis, Stellenbosch University) 2015.

property.[34] Thus, ownership is generally regarded as the most comprehensive right that one can have over property within the limits of the law and, therefore, the most superior right in property. Under this formalist approach to property, what has been termed "informal property" is property in the strict sense, regardless of its economic value, and is worthy of constitutional protection. A ten-storey mansion is no more "property" than is a wooden pallet or plastic sheet.[35] Accordingly, the entitlements of ownership apply to property owners, regardless of the economic value of the property. For instance, the entitlement to vindicate is integral to ownership, and flows logically from the right to exclude.[36] The right to exclude an intruder from one's property, within the confines of the law, is vital to ownership and property. Attached to this right is the correlative duty it imposes on the rest of the world not deliberately or carelessly to interfere with the owner's property; in other words, this is the entitlement to resist any unlawful invasion (*ius negandi*).[37] Douglas and McFarlane contend that the distinctiveness of property lies in its conferral of a right on the property owner to exclude non-owners.[38] Thus, from the homeless people's status as property owners flows their corresponding right to exclude non-owners, including the State, from their property.

It is apparent from the ensuing discussion about the Unlawful Occupation By-Law, and reported incidents of the seizure of homeless people's property, that property owners are treated differently within property law itself. Owners who own property of higher economic value (formal property) are treated more favourably and enjoy more significant legal protection than those with property of low or no economic value (informal property). This is at the core of the argument developed below. It is argued that the right to private ownership of property is perceived as much more valuable when the right is over property of some economic value. For instance, the right to ownership is particularly strong when the property is a house affixed on land, but it

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[34] For critiques on this approach to property, see Kolabhai "Private Property as Public Unhealth: A Critical-Systemic Paradigm in Times of Crises" in Boggenpoel, Van der Sijde, Tlale and Mahomedy (eds) *Property and Pandemics: Property Law Responses to COVID-19* (2021) 302; Van der Walt "Tradition on Trial: A Critical Analysis of the Civil-Law Tradition in South African Property Law" 1995 11 *SAJHR* 169; Van der Walt "Dancing With Codes – Protecting, Developing and Deconstructing Property Rights in a Constitutional State" 2001 118 *SALJ* 258; and Bhandar "Fault-Lines in the Settler-Colony: On the Margins of Settled Law" in Muller, Brits, Slade and Van Wyk (eds) *Transformative Property Law: Festschrift in Honour of AJ Van der Walt* (2018) 295.

[35] As the Ninth Circuit held in *Lavan v City of L.A.*, 693 F.3d 1022, 1032 (9th Cir. 2012) (quoting *Clement v. City of Glendale*, 518 F.3d 1090, 1093 (9th Cir. 2008)):

"'The government may not take property like a thief in the night; rather, it must announce its intentions and give the property owner a chance to argue against the taking.'... *This simple rule holds regardless of whether the property in question is an Escalade or an EDAR, a Cadillac or a cart*." (emphasis added)

[36] The right to exclude, in this article, should be read as "the right to exclude within the confines of the law". This article acknowledges that the right to exclude is not absolute and that limits are regularly ascribed to this entitlement of property ownership.

[37] Dhliwayo and Muller "General Principles of Ownership" in Muller (ed) *General Principles of South African Property Law* (2014) 64.

[38] Douglas and McFarlane "Defining Property Rights" in Penner and Smith (eds) *Philosophical Foundations of Property Law* (2013) 223–232.

tends to be weaker when it is an empty cardboard box. To illustrate this point, the authors focus on the tension between property owners who own houses affixed on land, or buildings from which they operate their commercial business, and homeless people whose belongings may be less valuable because they are perceived not to be fixtures or buildings in the (more) formal sense.

3 THE HIERARCHY OF PROPERTY RIGHTS AND INTERESTS

> "How assets are selected to be legally coded as capital, by whom, and for whose benefit are questions that cut to the core of capital and the political economy of capitalism."[39]

Law, including property rights, represents many different things to many people. To the indefatigable Marxist, the law is an instrument to exercise power. To the cynical rational choice theorist, however, law can be both an expression of, or a constraint on, power.[40] The authors do not wish to demonstrate which school of thought either of them belongs to, save to highlight the blind spot to which, Pistor argues, both camps fall prey – that "in [the law's] absence, the legal privileges capital enjoys would not be respected by others."[41] The protection afforded by the law to capital, and by virtue of this to capital owners, can be observed in all scenarios. The protection of the law has been inextricably linked to social and political status over centuries. For instance, under colonialism, white people had more rights than their Black counterparts, more privileges, and, of course, higher social and political status.[42] Likewise, under feudalism, the nobility enjoyed far more rights than peasants, and these rights often related to property. These systems were put into place and reinforced by law but driven by market forces in the form of commerce.[43]

Property law is crucial in capitalist societies for the alchemy of converting abundant resources, such as land, into scarce resources or assets that can be alienated, transferred, and exploited for economic gain. Pistor contends that this alchemy has been one of the critical motivations for the progression of private law generally and property law specifically.[44] Economists posit that private property is fundamental to economic development.[45] Given that

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39 Pistor *The Code of Capital* 32.

40 *Ibid*.

41 *Ibid*.

42 Whiteness has also been seen to be property and capital in and of itself, hence the inordinate legal protection for white people as opposed to Black people. For more on this, Harris "Whiteness as Property" 1993 106 *Harvard Law Review* 1707–1791.

43 Weber *General Economic History* (1981) 277 and Weber *Economy and Society* (2013) 880.

44 Pistor *The Code of Capital* 101 and Pistor "Liberal Property Law vs. Capitalism" (27 January 2021) https://lpeproject.org/blog/liberal-property-law-vs-capitalism/ (accessed 2023-09-17).

45 There is considerable debate on what constitutes private property. There is further contestation on the justification of private property. See Ostrom "Private and Common Property Rights" in *Encyclopedia of Law and Economics, Vol. II: Civil Law and Economics* (2000); Epstein "Possession as the Root of Title" 1979 13 *Georgia Law Review* 1221; Epstein *Takings* (1985); Rose *Property and Persuasion* (1994); Hardin "The Tragedy of the

individuals have to compete for the use and enjoyment of scarce resources, it becomes necessary to develop rules and principles to resolve conflicts in the event of a dispute.[46] As a result of the instrumentality of property in a capitalist society, these rules and principles are ultimately directed at achieving specific values, such as certainty, efficiency, and autonomy. One may plausibly resist our claim and argue that law, including property law, can be separated from the economy, and has its own internal logic[47] that is abstract and divorced from political ideologies, the economy, and the social world. One might even cite McFarlane's claim:

> "Law, unlike life, must have a structure. Life is messy and throws up impossible problems. Law has to be clear and give us workable solutions. To do its job, law cannot merely replicate reality: it must ... construct something artificial ... [and this] artifice ... can have a clarity and coherence rarely seen in the mess of the real world."[48]

However, such a response would ignore the fact that law, notably property law, has ideological underpinnings. It takes for granted that property has a propensity to inflict injustice,[49] regardless of its "clarity" and "coherence". A recent example of this is apartheid. Under apartheid, property followed an abstract, syllogistic logic predicated on an immutable, hierarchical rights arrangement.[50] Ownership reigned supreme at the top of the hierarchy. This meant that a property owner had the right to exclude from their property, and evict, any person who had no right to be on the land. The right to exclude was enforced using racial and class lines, which led to the brutal dispossession of Black people *en masse*.[51]

In its simplest form, property law is a means through which asset holders find protection for their assets. This article does not seek to elaborate on the class of people the law protects,[52] but, instead, focuses on the property interests that the law protects; to demonstrate the latter, it is fundamental to address the link between the two. The more economic value a thing has, the more it is protected by law. This is so for two reasons: first, because the law was crafted to preserve capital; and secondly, because the owners of the thing have the means to secure adequate legal representation to vindicate

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Commons" 1968 162 *Science* 1243; Ellickson, Rose and Smith *Perspectives on Property Law* (1995); Dukeminier and Krier *Property* (1993); and Harris *Property and Justice*.

46 Cheung "Common Property Rights" in Eatwell, Milgate, Newman (eds) *The World of Economics* (1991) 83.

47 Raz *Ethics in the Public Domain: Essays in the Morality of Law and Politics* (1995) 195–210.

48 McFarlane *The Structure of Property Law* (2008) 5.

49 Davy "'Dehumanized Housing' and the Ideology of Property as a Social Function" 2019 19 *Planning Theory* 28 44.

50 Van der Walt *Property and Constitution* (2012) 114; Van der Walt "Exclusivity of Ownership, Security of Tenure, and Eviction Orders: A Model to Evaluate South African Land Reform Legislation" 2002 2 *Journal of South African Law* 254; and Van der Walt "The South African Law of Ownership: A Historical and Philosophical Perspective" 1992 25 *De Jure* 446 447.

51 Van der Walt *Property and Constitution* (2012) 114; Van der Walt *Journal of South African Law* 254; and Van der Walt 1992 *De Jure* 447.

52 For a powerful article on the import of property on "propertied parties" and "unpropertied parties", see O'Mahony "Property Outsiders and the Hidden Politics of Doctrinalism" 2014 67 *Current Legal Problems* 409–445.

their rights. In Kolabhai's words, "property law thus cannot be said to be the will of the people, as much as it is the will of powerful non-State actors that have historically had determinative control over the State and its laws."[53] As is seen later, the law is more likely to heavily regulate non-owners' intrusion on land than to create specific legislation on whether one may occupy a homeless person's tent. The law's fondness for asset holders also affects how property rights are dealt with. Much as the law favours the thing with the highest economic value, it also favours the individual who holds the right to said thing. As a result, homeless people are not a class of people whose property rights are protected by the law, as is seen next.

4 CAN THE TAKING OF THE PROPERTY OF HOMELESS PERSONS BE JUSTIFIED?

> "Law is the cloth from which capital is cut; it gives holders of capital assets the right to exclusive use and to the future returns on their assets; it allows capital to rule not by force, but by law."[54]

Although homeless people have rights guaranteed by the Constitution, they do not seem to experience equal protection of the law, at least not by law enforcement agencies.[55] At the very least, they are entitled to property rights over the little that they have. What they own sustains them and protects them against the elements. There is no question that what they have constitutes property. However, they are treated as if they do not have property, and the law does not protect them. There lies the rub. They are perceived as a nuisance, drug addicts, and criminals instead of property owners.[56] This is evident from the recent by-law enacted by the City of Cape Town. Section 9(2)(*b*) of the Unlawful Occupation By-Law states that the City may seize homeless people's property if they believe an unlawful occupation is imminent.[57] In pursuing the alleged regulation of public spaces,

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53 Kolabhai in Boggenpoel *et al* (eds) *Property and Pandemics* 305.

54 Pistor *The Code of Capital* 209.

55 See for instance, Shoba "The Reality of Living on the Street in SA" (10 October 2021) *Daily Maverick* https://www.dailymaverick.co.za/article/2021-10-10-the-reality-of-living-on-the-street-in-sa/ (accessed 2023-09-17); Gooikin "City's Approach to Homeless People Is Not Working" (1 June 2021) *Daily Maverick* https://www.dailymaverick.co.za/article/2021-06-01-city-of-cape-towns-approach-to-homeless-people-is-not-working/ (accessed 2023-09-17); Mlauzi "Here's How SA Can Tackle Homelessness" (12 October 2018) https://saiia.org.za/research/heres-how-sa-can-tackle-homelessness/ (accessed 2023-03-04); Bajaber "Homeless vs. Homelessness in Cape Town" (28 November 2016) https://agorajournal.squarespace.com/blog/2016/11/27/homelessness-vs-houselessness-in-cape-town (accessed 2023-09-17); *City of Cape Town v South African Human Rights Commission* [2021] ZASCA 182; and Bradpiece https://www.aljazeera.com/features/2021/6/4/david-versus-goliath-the-story-of-being-homeless-in-south-africa.

56 See Pophaim "Homelessness Victimization in South Africa and Its Potential Inclusion in Hate Crime and Hate Speech Bill" 2021 34 *South African Journal of Criminal Justice* 259–280.

57 S 9(2)(*b*) of the Unlawful Occupation By-Law states:
"(2) If the intending occupier refuses or fails to comply with an instruction given under subsection (1)(*b*), the authorised official may–
(*b*) dismantle the structure of the person who intends to occupy the land and *impound* the building materials and possessions if the structure is–

there seems to be marginal care for homeless persons' right not to be arbitrarily deprived of their property under section 25 of the Constitution.

Section 25(1) does not apply only to a specific class of right-holders; the provision uses the term "no one".[58] Furthermore, the provision does not apply only to a category of property interests or a certain economic value of a thing. Nevertheless, a study conducted by the Human Sciences Research Council on homelessness found that 68 per cent of persons living on the streets reported one of their main challenges to be victimisation and harassment by police.[59] The definition of violence included "*personal property confiscation*, inappropriate arrests, and violently dislocating them outside the environments where they often access services".[60] Section 25(1) applies as much to a billionaire's right not to be arbitrarily deprived of their tenth holiday home as to a homeless person's right not to be arbitrarily deprived of their tent. This much was recognised in *Ngomane v City of Johannesburg Metropolitan Municipality*,[61] where the Supreme Court of Appeal recognised the seizure of the homeless people's belongings to be an arbitrary deprivation of property. Informal property is property, regardless of its economic value. Applying the methodology in *First National Bank of SA Ltd t/a Wesbank v Commissioner, South African Revenue Service; First National Bank of SA Ltd t/a Wesbank v Minister of Finance*[62] (*FNB*) to the deprivation occasioned by section 9(2)(*b*) and (4) of the Unlawful Occupation By-Law, it is argued that the deprivation is arbitrary and unconstitutional.

In *FNB*, the court held that "any interference with the use, enjoyment and exploitation of private property involves some deprivation in respect of that person."[63] This decision rendered the test for deprivation very wide and was quickly narrowed by the Constitutional Court only a few years later in *Mkontwana v Nelson Mandela Metropolitan Municipality*.[64] In that decision, the court held: "at the very least, substantial interference or limitation that goes beyond the normal restrictions on property use or enjoyment found in an open and democratic society would amount to deprivation."[65] Following this approach, the interference with the property use or enjoyment would

(i) on land under the City's control;
(ii) on a public thoroughfare; or
(iii) not yet capable of constituting a home on any other land."

58 See for instance, Van der Walt *Constitutional Property Law* (2011) on the beneficiaries of s 25.

59 Timol and Groenewald "Ikhaya Lami: Understanding Homelessness in Durban" (2016) *Human Sciences Research Council* https://repository.hsrc.ac.za/bitstream/handle/20.500.11910/10039/9353.pdf?sequence=1&isAllowed=y (accessed 2023-06-20) 26.

60 *Ibid*.

61 *Ngomane supra* par 21.

62 2002 (4) SA 768 (CC).

63 *FNB supra* par 57.

64 *Mkontwana v Nelson Mandela Metropolitan Municipality; Bisset v Buffalo City Municipality; Transfer Rights Action Campaign v Member of the Executive Council for Local Government and Housing, Gauteng* 2005 (1) SA 530 (CC).

65 *Mkontwana supra* par 32.

need to be significant enough to have a "legally relevant impact" on some of the ownership entitlements.[66]

Section 25(1) states that "no one may be deprived of property except in terms of law of general application, and no law may permit arbitrary deprivation of property." Whether one adopts the *FNB* or *Mkontwana* formulation of deprivation under section 25(1), it is clear that the seizure of belongings constitutes deprivation. This is because the court held that interference with property use or enjoyment would need to be significant enough to have a "legally relevant impact" on some of the ownership entitlements. In this case, the seizure of the belongings of homeless people falls within the scope of deprivation.

Once deprivation has been established, the next step is to consider whether the municipal by-law constitutes "law of general application" under section 25(1).[67] The court has adopted a broad understanding of "law", including original and delegated legislation, common law and customary law.[68] That a municipal by-law constitutes law is evident. According to section 156(2) of the Constitution, municipalities have the power to legislate and administer by-laws "for the effective administration of the matters which it has the right to administer". In our case, the matters concerned would be control of public nuisances, local amenities, municipal roads, and public spaces, which fall under Schedule 5 of the Constitution, and which municipalities have the right to administer. Municipalities may legislate as they deem fit as long as the by-laws do not fall foul of the Constitution or national or provincial legislation.[69] However, in the case of section 25(1) of the Constitution, the by-law ought to be of general application – meaning it ought not to target specific persons. While on the face of it, the by-law applies to everyone who intends to occupy land and is thus contingent only on this intention, Waldron notes that "laws that in their effect are targeted at

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66 Slade "Constitutional Property Law" in Muller, Brits, Boggenpoel, Dhliwayo, Erlank, Marais and Slade (eds) *General Principles of South African Property Law* (2019) 63. These two conceptions of how significant the interference needs to be to constitute deprivation have caused many debates among property law scholars in South Africa, but unfortunately they fall outside of the scope of this article. For more see, Van der Walt "Retreating From the *FNB* Arbitrariness Test Already? *Mkontwana v Nelson Mandela Metropolitan Municipality; Bissett v Buffalo City Municipality; Transfer Rights Action Campaign v MEC for Local Government & Housing, Gauteng*" 2005 122 *SALJ* 75 79–80.

67 It is commonly understood that the requirements to be met for the existence of a law of general application for expropriation purposes are vastly different from the broader understanding of the requirements in the constitutional context. According to Van der Walt, this is because "there is no common law authority for expropriation in South African law." However, given that this article only considers deprivation and not expropriation, since there is no explicit statutory authority to expropriate, this distinction is not discussed further. For more, see Van der Walt *Constitutional Property Law* (2011) 453. See also Van der Walt *Property and the Constitution* (2012) 27; and Slade "The 'Law of General Application' Requirement in Expropriation Law and the Impact of the Expropriation Bill of 2015" 2017 50(2) *De Jure* 2017 346–362.

68 Woolman and Botha "Limitations" in Woolman and Bishop (eds) *Constitutional Law of South Africa Vol II* (2006) ch 34–7; *S v Thebus* 2003 (6) SA 505 (CC) par 64–65; Van der Walt *Constitutional Property Law* (2011) 453; Van der Walt *Property and the Constitution* (2012) 27; and Slade 2017 *De Jure* 346–362.

69 S 156(3) of the Constitution.

a particular group, such as the homeless, may not be hidden behind the banner of general application".[70] The by-law seems, in theory, to apply to everyone, but in practice, its effects are only felt by those who have insecure tenure in land and seek to occupy land for shelter, such as homeless persons.

Even if a law of general application authorises the deprivation, it constitutes an infringement if it is arbitrary. The factors to be considered under the test for arbitrariness are set out in *FNB*.[71] Generally, this test would involve evaluating the relationship between the means of the deprivation and the purpose of the deprivation. Regard must also be had to the person whose property is being interfered with and the purpose of the deprivation. In this case, the purpose of depriving homeless people of their belongings seems to be an attempt to discourage them from unlawfully occupying land. Given that the purpose is a legitimate governmental purpose and is connected to the deprivation, the deprivation is not considered arbitrary. If the deprivation was arbitrary and not under a law of general application, it would be an infringement of the property owners' right not to be arbitrarily deprived of property under section 25(1).

Based on *FNB*,[72] infringement can only be rescued if it is proved to be a justifiable limitation under section 36(1) of the Constitution. In the South African constitutional property-law landscape, there is a contentious debate about whether any infringement of section 25(1) can be justified by section 36(1), as the analysis required by the latter constitutes a higher threshold than section 25(1)'s internal limitation.[73] The Constitutional Court held in *National Credit Regulator v Opperman*:[74] "Many of the factors employed under the arbitrariness test [as set out in *FNB*] to determine the sufficiency of reasons yield the same conclusion when considering whether a limitation is reasonable and justifiable under section 36." For instance, in the arbitrariness test illustrated above, the importance and purpose of the limitation, its nature and extent, and the relationship between the limitation and its purpose, which are all considerations under section 36, have already been assessed. The only addition that section 36(1) brings to section 25(1) is the proportionality test. The latter requires one to question whether there are less restrictive means to achieve the purpose of the impugned law.

Homeless people should be allowed to move their property elsewhere should they be found to have unlawfully occupied land. There should also be many more shelters available, and adequate access to housing should be provided to prevent unlawful occupation. The Unlawful Occupation By-Law dismally fails the proportionality test as its intended purpose of public regulation of land ought not to outweigh a right protected under the Bill of Rights, namely section 25(1) of the Constitution. Such lack of respect for the

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70 Waldron "Homelessness and the Issue of Freedom" 1991 39 *UCLA Law Review* 312 and Killander "Criminalising Homelessness and Survival Strategies Through Municipal By-Laws: Colonial Legacy and Constitutionality" 2019 35(1) *SAJHR* 88.

71 *Supra* par 100.

72 *FNB supra* par 46 and 110.

73 Van der Walt *Constitutional Property Law* 76–78.

74 2013 (2) SA 1 (CC) par 75.

ownership rights of homeless persons also ignores the fact that property owners are responsible for preventing interference with their property interests, *ius negandi*, by adequately protecting it, as mentioned before. Destroying such property is certainly not in line with their section 25(1) right not to be arbitrarily deprived of their property. Impoundment cannot be the first means that municipalities and law enforcement seek to adopt – at least, not in a society that prizes private ownership so highly. Thus, sections 9(2)(*b*) and (4) of the by-law are disproportionate and fail to withstand constitutional scrutiny. This different treatment between owners of formal and informal property clearly shows that there is differentiation based on poverty. Whether this differentiation amounts to unfair discrimination is explored next.

5 THE INEQUALITY IN HOMELESSNESS

> "Decoding capital and uncovering the legal code that underpins it regardless of its outward appearance reveals that not all assets are equal; the ones with the superior legal coding tend to be 'more equal' than others."[75]

Section 1 of PEPUDA defines discrimination as any law, *inter alia*, that "imposes burdens, obligations or disadvantage on; or withholds benefits, opportunities or advantages from, any person on one or more of the prohibited grounds". Although the phrasing of the Unlawful Occupation By-Law is neutral, the act of impounding the belongings of "intending" occupiers indirectly disadvantages homeless people by withholding the protection of section 25(1) to their property on the ground of their poverty, and exposing them to the risk of harsh conditions with no shelter. Indirect discrimination occurs when the conduct, practice or, in this case, application of legislation seems innocuous and neutral but results in differential treatment, the impact of which is discriminatory.[76] If the discrimination is not based on a listed ground, as with the ground of poverty, it can still be presumed unfair if, as per section 1 of PEPUDA, the discrimination

> "(i) causes or perpetuates systemic disadvantage;
> (ii) undermines human dignity; or
> (iii) adversely affects the equal enjoyment of a person's rights and freedoms in a serious manner that is comparable to discrimination on a ground in paragraph (*a*)."[77]

Thus, if one of the above requirements is met for the discriminatory ground of poverty, the discrimination will be presumed unfair unless the respondent disproves the discrimination. Section 34(1) of PEPUDA provides a directive principle for the Equality Review Committee to consider including, *inter alia*, socio-economic status as a discriminatory ground. Section 1 defines socio-economic status as including "a social or economic condition or perceived

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75 Pistor *The Code of Capital* 5.

76 Currie and De Waal *Bill of Rights Handbook* (2013) 238 and Van der Linde "Poverty as a Ground of Indirect Discrimination in the Allocation of Police Resources – A Discussion of *Social Justice Coalition v Minister of Police* 2019 4 SA 82 (WCC)" 2020 23 *PELJ* 4.

77 With paragraph (*a*) referring to the listed grounds in PEPUDA.

condition of a person who is *disadvantaged by poverty*, low employment status or lack of or low-level educational qualifications" (emphasis added). Basson argues that the lack of "special consideration" of this directive principle by the Minister of Justice and Constitutional Development and the Equality Review Committee[78] has resulted in a lack of clarity over the legal status of poverty as a prohibited ground of discrimination under PEPUDA.[79]

Despite this legislative negligence, poverty has received attention as a ground of discrimination, even before the *SJC* case, especially under the framework of intersectionality.[80] This can be seen in the case of *Mahlangu v Minister of Labour*. [81] There, the Constitutional Court considered a constitutional challenge to section 1(xix) of the Compensation for Occupational Injuries and Diseases Act, [82] which expressly excluded domestic workers from accessing social security assistance in case of injury, disability or death in the workplace. [83] When considering who would be targeted by such an exclusion, the majority of the court found that the work was performed by "*poor* Black women", [84] and that racist and gendered assumptions led to a loss of dignity suffered by domestic workers. Importantly, the court also clearly associated such injury with the socio-economic status of the Black women concerned. Thus, there is precedent in the *SJC* case and, in some instances, *Mahlangu,* for poverty to be considered as a ground of discrimination under PEPUDA.

Poverty ought to be a recognised ground of indirect discrimination. On that basis, the authors asseverate that the difference in treatment between formal and informal property owners amounts to unfair and indirect discrimination on the grounds of poverty and race. In the *SJC* case, the applicants extensively proved all three requirements of section 1 of PEPUDA to the court's satisfaction.[85] Relying on *Soobramoney v Minister of Health (KwaZulu-Natal)*,[86] they argued that South Africa's historical context led to the inevitable conclusion that poverty is systemic in the country. As for poverty's impact on human dignity, the applicants relied on the case of *Minister of Health v New Clicks South Africa (Pty) Ltd*, [87] where the

78 S 34(1)(*a*)–(*b*).

79 Basson "Poverty Discrimination Under the Promotion of Equality and Prevention of Unfair Discrimination Act: A Transformative Substantive Equality Approach" 2023 *SAJHR* 2.

80 Intersectionality, was defined by Crenshaw, as acknowledging "[t]he interconnected nature of social categorizations such as race, class, and gender, [that create] overlapping and interdependent systems of discrimination or disadvantage." For more on intersectionality and the Constitutional Court's endorsement thereof, see Jeewa and Bhima "Discriminatory Language: A Remnant of Colonial Oppression" 2021 11(1) *Constitutional Court Review* 9–13.

81 2021 (2) SA 54 (CC).

82 130 of 1993 (COIDA).

83 COIDA did so by excluding domestic workers from the definition of an 'employee'. For more, read Atrey "Beyond Discrimination: *Mahlangu* and the Use of Intersectionality as a General Theory of Constitutional Interpretation" 2021 21 2 *International Journal of Discrimination and the Law* 2021.

84 *Mahlangu supra* par 110.

85 *SJC* case par 64–65.

86 1996 (1) SA 765 (CC) par 8.

87 2006 (2) SA 311 (CC) par 64.

Constitutional Court linked the State's obligation to root out poverty to the ability of people to enjoy their rights. This was confirmed by the Constitutional Court in *Khosa v Minister of Social Development*,[88] where the court found that certain material conditions were necessary for recognising a person's dignity. More poignantly, in this case, the authors are reminded of the applicants' submissions in *Ngomane* where they refer to "[t]he only bit of dignity which [they] enjoy,"[89] referring to the fact that their material conditions as poor people already affect their dignity considerably. For the final requirement, the applicants in the *SJC* case also referred to *Khosa*, [90] where a link was made between poverty and citizenship. Relating the last requirement to our case, homeless people's poverty has led to an infringement of their right not to be arbitrarily deprived of property. In *Ngomane*, the SCA also identifies a breach of homeless people's rights to dignity and privacy.

It is contended that the differentiation in treatment of people who own formal and informal property amounts to discrimination on the ground of poverty, which meets all the requirements under section 1 of PEPUDA, and can be presumed to be unfair discrimination. People with shelter and tenure security will not run the risk of unlawfully occupying land or being considered an "intending occupier". It is clear from the language of the by-law that the City of Cape Town has broad discretion in determining who is capable of holding the intention to occupy land unlawfully. Such assessment by law enforcement officials is likely to require consideration of who fits the stereotype of an unlawful occupier, requiring even more "stereotyping, humiliation, denigration, and violence of and towards impoverished people".[91]

6 CONCLUSION

> "Vesting some with legal entitlements while denying similar treatment to others, and stripping certain protections from some assets and grafting them onto others are actions that make or destroy wealth."[92]

It is often the rallying cry of traditional property theorists that property rights ought to be protected at all costs. However, the raging caveat seems to be that whether one's property rights deserve any protection depends on one's socio-economic conditions, and on said property's economic value. In this article, the authors have relied on the Unlawful Occupation By-Law enacted by the City of Cape Town to show that the level of legal protection afforded to property can differ depending on whether one owns formal or informal property. It has been argued that informal property is not afforded the same legal protection despite such being envisaged under section 25(1) of the

88 2004 (6) 505 (CC) par 74.

89 *Ngomane supra* par 24.

90 *Khosa supra* par 74. For more, see Albertyn and Goldblatt "Equality" in Woolman *et al* (eds) *Constitutional Law of South Africa* (2013) 35–63.

91 Basson 2023 *SAJHR* 2 and Fredman "Substantive Equality Revisited" 2016 3 *International Journal of Constitutional Law* 712 731–732.

92 Pistor *The Code of Capital* 46.

Constitution, owing to the fact that the owners are homeless people, and the property itself is seen to lack economic value. Consequently, it is argued that the by-law is unconstitutional, not only because it infringes section 25(1) of the Constitution, but also because it indirectly discriminates against homeless people on the basis of poverty, an unlisted ground of discrimination under PEPUDA.

THE (IN)EFFECTIVENESS OF REQUIRING PRIOR EXHAUSTION OF LOCAL REMEDIES IN INVESTMENT ARBITRATION

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SUMMARY

The international investment-law regime continues to be mired in a legitimacy crisis that has given rise to important multilateral reform efforts through the United Nations Commission on International Trade Law. A key reform proposal is centred on the introduction of an exhaustion-of-local-remedies requirement. This article critically evaluates the exhaustion-of-local-remedies rule in the context of international investment law, and challenges its interpretation where such clauses already exist in contemporary investment law. The article concludes that investment tribunals have subverted these clauses in various ways, and considers the legal challenges states would need to address to best prevent the subversion of these clauses by investment tribunals in future.

1 INTRODUCTION

International investment law is currently mired in an unprecedented legitimacy crisis that has given rise to important multilateral reform efforts.[1] The United Nations Commission on International Trade Law (UNCITRAL) specifically established Working Group III to spearhead multilateral discussions on procedural reforms to the system of investor-state dispute settlement (ISDS).[2] One reform proposal is the introduction of a rule requiring the exhaustion of local remedies before a dispute could be

[1] Langford "Special Issue: UNCITRAL and Investment Arbitration Reform: Matching Concerns and Solutions" 2020 21 *The Journal of World Investment & Trade* 167 168.

[2] Langford 2020 *The Journal of World Investment & Trade* 170.

submitted to international arbitration.[3] This would align ISDS with other areas of international law, such as international human rights law, where the prior exhaustion of local remedies is usually required.

Recent treaty practice has also seen states increasingly resort to the inclusion of clauses requiring exhaustion of local remedies or prior recourse to local courts. These clauses are usually time bound, and most reform proposals in fact seem to encourage the use of time-bound prior-recourse-to-local-courts requirements.

In principle, this contribution considers these proposals to be admirable. However, in instances where these clauses have been included in treaties, investment tribunals have found several ways around these clauses.[4] This article considers the rationale for the exhaustion-of-local-remedies rule before analysing three ways in which investment tribunals have subverted such clauses. The methods used to subvert an explicit exhaustion-of-local-remedies rule include: (i) an expansive interpretation of the object and purpose of an investment treaty; (ii) the application of a most-favoured-nation (MFN) clause; and (iii) the use of a so-called futility exception. This article critically analyses these three methods used to subvert exhaustion-of-domestic-remedies clauses and their implications for the reform proposals.

2 THE EXHAUSTION-OF-LOCAL-REMEDIES RULE

The exhaustion-of-local-remedies rule is a well-established rule of customary international law.[5] In the *Interhandel* case, the International Court of Justice (ICJ) explained that the purpose of this rule was to allow the state in whose territory the alleged internationally wrongful act occurred an opportunity to remedy the violation "within the framework of its own domestic legal system".[6]

While the exhaustion of local remedies is a principle of customary international law, it does not generally apply where individuals have been granted direct access to international courts or tribunals.[7] In the human-rights context, the requirement for the exhaustion of local remedies does not arise from customary international law, but rather from the provisions of the various human-rights treaties.[8] Therefore, it is not surprising that investment

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3 UNCITRAL Fifty Second Session 8–26 July 2019 *Report of Working Group III (Investor-State Dispute Settlement Reform) on the Work of its Thirty-Seventh Session* (1–5 April 2019) A/CN.9/970 par 30.

4 See, e.g., *Abaclat (formerly Giovanna a Beccara) v Argentine Republic*, ICSID Case No ARB/07/5 Decision on Jurisdiction and Admissibility (4 August 2011) par 580 (*Abaclat* case).

5 *Interhandel (Switzerland v United States of America)* ICJ Judgment: Preliminary Objections (21 March 1959) (*Interhandel* case) par 27.

6 *Ibid*.

7 Dimerkol and Willcocks "Exhaustion of Local Remedies" *Jus Mundi* (undated) https://jusmundi.com/en/document/wiki/en-exhaustion-of-local-remedies? (accessed 2022-06-16).

8 See UNGA *International Covenant on Civil and Political Rights* 999 UNTS 17 (1966). Adopted: 16/12/1966; EIF: 23/03/1976 art 41(1)(c); Organisation of African Unity *African*

tribunals have generally rejected jurisdictional challenges based on a failure to exhaust domestic remedies in the absence of such a requirement in the applicable treaty.[9] The tribunal in *EDF International SA v Argentine Republic*[10] (*EDF* case) explained that article 26 of the ICSID Convention showcases a clear intention not to require the exhaustion of local remedies.[11]

The tribunal noted that article 26 demonstrates that ICSID arbitration is "to the exclusion of any other remedy" unless otherwise stated.[12] It is therefore not open to states to argue that an implied provision requiring the exhaustion of remedies prior to arbitration exists where they chose not to include one in the applicable treaty consenting to arbitration.[13] The *EDF* tribunal emphasised that holding otherwise would contradict the plain meaning of article 26, and invite states to mandate the exhaustion of local remedies without giving investors expecting a clear path to arbitration fair warning of such a stipulation.[14]

This approach has also been applied in non-ICSID arbitrations, where investment tribunals have interpreted the consent to arbitration as a tacit waiver of the rule requiring the exhaustion of local remedies.[15] Therefore, international investment tribunals usually only require the prior exhaustion of local remedies where the exhaustion of such remedies is required for a breach to be complete, such as in a denial-of-justice claim,[16] or where the treaty (expressly) requires such exhaustion of local remedies.

In the UNCITRAL discussions, some states have argued that requiring the exhaustion of local remedies may grant states the opportunity to improve their own domestic legal institutions. South Africa has argued that the ISDS system takes away international pressure upon states to improve their domestic legal system, government mechanisms and practices by allowing large investors to bypass these systems.[17] The South African submissions also argue that the interpretation of domestic law by international tribunals may in some instances be problematic, particularly where arbitrators interpret domestic law "from a commercial rather than public policy

Charter on Human and Peoples' Rights CAB/LEG/67/3 rev 5, 21 ILM 58 (1982). Adopted: 27/06/1981; EIF: 21/10/1986 art 55.

9 *Gavrilovic v Republic of Croatia*, ICSID Case No ARB/12/39 Award (26 July 2018) (*Gavrilovic* case) par 889.

10 ICSID Case No ARB/03/23 Award (11 June 2012).

11 *EDF* case *supra* par 1126.

12 *EDF* case *supra* par 1126.

13 *EDF* case *supra* par 1127.

14 *EDF* case *supra* par 1127.

15 *RosInvestCo UK Ltd v Russia* SCC Case No Abr V 079/2005 Award on Jurisdiction (5 October 2007) par 153; *Bank Melli Iran and Bank Saderat Iran v Kingdom of Bahrain* PCA Case No 2017–25 Final Award (09 November 2021) par 517.

16 *Big Sky Energy Corporation v Republic of Kazakhstan* ICSID Case No ARB/17/22 Award (24 November 2021) par 451; *Manchester Securities Corporation v Republic of Poland* PCA Case No 2015–18 Award (07 December 2018) par 483; *Philip Morris Brand Sàrl (Switzerland) v Oriental Republic of Uruguay* ICSID Case No ARB/10/7 Award (8 July 2016) par 499.

17 UNCITRAL *Possible Reform of Investor-State Dispute Settlement (ISDS): Submission From the Government of South Africa* (17 July 2019) A/CN.9/WG.III/WP.176 par 44.

perspective".[18] The prior exhaustion of local remedies would also allow local courts to pronounce upon these issues of domestic law, and, in general, an international tribunal ought then to defer to the domestic court's interpretation of domestic law.[19]

South Africa's submission in this respect is not without merit as controversy over the correct interpretation of domestic law has a precedent in international investment law. In the case of *Perenco v Ecuador*,[20] Ecuador brought a counterclaim against Perenco over pollution caused by its subsidiaries. This counterclaim was adjudged in terms of Ecuadorian domestic law, and in interpreting the domestic law, the tribunal found that the strict-liability regime in Ecuador does not apply retrospectively. Ecuador disagreed with this interpretation and argued on annulment that the tribunal had "so grossly misapplied Ecuadorian law that it should be considered that it did not apply Ecuadorian law at all".[21] The annulment committee noted that, even if Ecuador's interpretation were correct, it would not allow the annulment committee to set aside the award. It found that the tribunal was merely required to identify the proper law and endeavour to apply it.[22] Not even a gross misapplication or misinterpretation of domestic law would render an award annullable.[23] Therefore, states have a clear interest in seeking the inclusion of such a rule, albeit that the status of this rule as a jurisdictional or admissibility issue is uncertain, as is discussed in the section that follows.

3 EXHAUSTION OF LOCAL REMEDIES: AN ADMISSIBILITY OR JURISDICTIONAL ISSUE

There have been substantial inconsistencies by tribunals in determining whether prior-recourse-to-local-remedies clauses are jurisdictional in nature, or whether they speak to an admissibility issue.[24] In the field of investment law, it has been said that while jurisdiction refers to the tribunal's ability to hear a case, admissibility is a characteristic of the dispute that has been presented to the tribunal, which may result in its rejection even if it falls within the tribunal's jurisdiction – for example, if local remedies have not been exhausted when necessary.[25] In terms of customary international law, the exhaustion of local remedies is ordinarily regarded as an admissibility issue rather than a jurisdictional issue as such. Notwithstanding this general position, Abi-Saad has noted that where the requirement of exhaustion of

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18 *Submission from the Government of South* Africa par 45.

19 *Ibid*.

20 *Perenco Ecuador Limited v Republic of Ecuador* ICSID Case No ARB/08/6 Decision on Annulment (28 May 2021) (*Perenco Ecuador* case).

21 *Perenco Ecuador* case *supra* par 584.

22 *Perenco Ecuador* case *supra* par 587.

23 *Perenco Ecuador* case *supra* par 96.

24 *Kılıç İnşaat İthalat İhracat Sanayi ve Ticaret Anonim Şirketi v Turkmenistan* ICSID Case No ARB/10/1 Award (2 July 2013); *İçkale İnşaat Limited Şirketi v Turkmenistan* ICSID Case No ARB/10/24 Award (8 March 2016).

25 *Mathias Kruck, Frank Schumm, Joachim Kruck, Jürgen Reiss v Kingdom of Spain* ICSID Case No ARB/15/23 Decision on Jurisdiction and Admissibility (19 April 2021) par 192.

local remedies is stipulated as "conditions in the jurisdictional title", they become limits to jurisdiction as well.[26] He notes that, in bilateral investment treaties (BITs), prior-recourse-to-local-remedies clauses and exhaustion-of-local-remedies clauses are usually stipulated as conditions to the state's consent to arbitration.[27] Therefore, exhaustion-of-local-remedies clauses in investment arbitration should usually be treated as a jurisdictional issue rather than an admissibility issue.

While Abi-Saad's reasoning is appealing, and in the authors' view correct, the issue remains unsettled in arbitral practice. Despite this uncertainty over the correct interpretation, the consequences of interpreting a failure to exhaust local remedies as an admissibility issue rather than a jurisdictional requirement is not always immediately apparent. The Singapore Court of Appeal noted:

> "The conceptual distinction between jurisdiction and admissibility is not merely an exercise in linguistic hygiene pursuant to a pedantic hair-splitting endeavour. This distinction has significant practical import in investment treaty arbitration because a decision of the tribunal in respect of jurisdiction is reviewable by the supervisory courts at the seat of the arbitration (for non-ICSID arbitrations) or before an ICSID ad hoc committee pursuant to Art 52 of the ICSID Convention (for ICSID arbitrations), whereas a decision of the tribunal on admissibility is not reviewable."[28]

This finding has also been supported by some other ICSID tribunals,[29] but does not enjoy universal support.[30] The tribunal in *Urbaser* questions the correctness of such broad general statements, as a decision on admissibility can be reviewed before an annulment committee where it is alleged "that the tribunal had 'manifestly exceeded its powers'".[31] The tribunal finds that this possibility to review issues on admissibility on these grounds renders "the distinction wrong in theory and useless in practice".

Notwithstanding the views expressed by the *Urbaser* tribunal, a practical distinction between admissibility and jurisdiction arises from the fact that admissibility issues are more likely to be addressed with the merits.[32] Therefore, in bifurcated proceedings, an interpretation of the exhaustion-of-local-remedies requirement as an admissibility issue could prolong the proceedings, particularly where the tribunal is likely to find the case

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26 *Murphy Exploration & Production Company International v The Republic of Ecuador (II)*, PCA Case No 2012–16 Separate Opinion of Georges Abi-Saab (Partial Award on Jurisdiction) (13 November 2013) (*Murphy* case) par 20.

27 *Murphy* case *supra* par 21.

28 *Swissbourgh Diamond Mines (Pty) Limited v Kingdom of Lesotho* PCA Case No 2013–29 Judgment of the Singapore Court of Appeal (27 November 2018).

29 *Supervision y Control SA v Republic of Costa Rica* ICSID Case No ARB/12/4 Award (18 Jan 2017) par 270.

30 *Urbaser SA and Consorcio de Aguas Bilbao Biskaia, Bilbao Biskaia Ur Partzuergoa v Argentina Republic* ICSID Case No ARB/07/26 Decision on Jurisdiction (19 Dec 2012) (*Urbaser* case) par 117.

31 *Urbaser* case *supra* par 117.

32 *Urbaser* case *supra* par 270.

inadmissible in either event.[33] However, Reinisch notes that while a tribunal is compelled to dismiss a claim over which it does not have jurisdiction, it has discretion in relation to claims that are potentially inadmissible.[34] Therefore, in instances where a tribunal regards exhaustion of local remedies as an admissibility issue, it may still find in favour of a claimant, notwithstanding a failure to have prior recourse to local remedies.

The supposed distinction between jurisdiction and admissibility has also contributed to some tribunals interpreting a prior-recourse-to-local-courts clause as requiring a balancing of interest rather than a strict prerequisite to the exercise of jurisdiction.[35] It is accordingly clear that treating the exhaustion-of-local-remedies requirement as an admissibility issue rather than a jurisdictional issue has profound practical implications. In their reform efforts, states should ideally expressly indicate that the exhaustion of local remedies is a condition to their consent to arbitration, where this is their intention. In the section that follows, this article considers the subversion of the exhaustion-of-local-remedies clause through interpreting the object and purpose of the treaty, which interpretation also arises as a consequence of treating such issues as admissibility issues rather than jurisdictional ones.

4 SUBVERTING THE EXHAUSTION-OF-LOCAL-REMEDIES RULE THROUGH AN EXPANSIVE INTERPRETATION OF THE OBJECT AND PURPOSE OF THE TREATY

It is an accepted principle of treaty interpretation that clauses in a treaty must be accorded their ordinary meaning in line with the object and purpose of the agreement.[36] However, in investment-treaty arbitration, this seemingly benign principle has given rise to substantial controversy. Some scholars argue that tribunals have been quick to resort to the object and purpose of the treaty to grant investors overly extensive protection. These concerns have also extended to the interpretation of prior-recourse-to-local-litigation clauses. For example, in *Abaclat*, the parties had conflicting views regarding the consequences of non-compliance with the prior-recourse-to-local-courts requirement.[37] The tribunal stated that the claimant's non-compliance with the 18-month-litigation requirement is in itself not sufficient to preclude the claimant from resorting to arbitration.[38] Rather, it is whether non-fulfilment of

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33 See for example, *Chevron Corporation (USA) and Texaco Petroleum Corporation (USA) v Republic of Ecuador II* PCA Case No 2009–23 Third Interim Award on Jurisdiction and Admissibility (27 February 2012) where admissibility issues stood aside to be heard along with the merits in bifurcated proceedings.

34 Reinisch "Jurisdiction and Admissibility in International Investment law" in Gattini, Tanzi and Fontanelli (eds) *General Principles of Law and International Investment Arbitration* (2018) 130.

35 *Abaclat* case *supra*; the balancing of interest approach is discussed in more detail under heading 4 of this article.

36 Art 31 of the United Nations *Vienna Convention on the Law of Treaties* (1969) 1155 UNTS 331. Adopted: 23/05/1969; EIF 27/01/1980.

37 *Abaclat* case *supra*.

38 *Abaclat* case *supra* par 580.

the requirement can be considered incompatible with the object and purposes of the treaty. The tribunal suggested that this would require a careful consideration of the "interests at stake".[39] In adopting this weighing-of-interest approach, which is allegedly permitted when interpreting a treaty in light of its object and purpose, the interests of the state in being afforded an opportunity to resolve the dispute through its own legal framework must be weighed against the claimant's interests in accessing "an efficient dispute resolution mechanism".[40]

The *Abaclat* tribunal concluded that where it appears that the opportunity afforded to a state would have been merely theoretical or could not have resulted in a resolution of the dispute within 18 months, it would be "unfair" to demand that the investor pursue such matter in the local courts.[41] According to the tribunal, this disregard of the prior-recourse-to-local-courts rule would not result in any "real harm" to the state, but would supposedly deprive the investor of an essential path to dispute resolution.[42] It is not clear on what basis the tribunal concluded that the investor would supposedly have been deprived of an important path to dispute resolution, as the treaty does not contain any fork-in-the-road clause. The investor would have been free to approach an international arbitral tribunal after having litigated before domestic courts for a period of 18 months.

The *Abaclat* decision has faced substantial criticism. In *Urbaser*, the tribunal concluded that *Abaclat*'s legal reasoning, or rather lack thereof, is incorrect. The tribunal emphasised that neither the purpose, nor the object, nor the policy underlying this 18-month rule gives rise to a weighing-of-interests standard.[43] The *Urbaser* tribunal also stated that such a test, or standard cannot merely be imposed as an amendment to the treaty language by election of a tribunal.[44] Quoting the tribunal in *ICS v Argentina*, it cautioned, "judicially-crafted exceptions must find support in more than a tribunal's personal policy analysis of the provisions at issue."[45] Therefore, if there is to be any weighing of interests, such interests must be weighed in line with the provisions as negotiated and agreed upon by the states. Mere resort to the object and purpose of the treaty does not accordingly provide an adequate basis for the creation of a so-called balancing-of-interests test.

A similar nonsensical approach was followed by the tribunal in *Hochtief*, where the tribunal decided that they could elect to exempt the investor from compliance with the 18-month local-litigation provision, as it viewed this provision as redundant, considering that it brings no benefit to the investor.[46] In *Urbaser,* the tribunal stated that such an interpretation would not coincide with the prevailing understanding of investment-treaty law, as such a

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39 *Abaclat* case *supra* par 581.
40 *Abaclat* case *supra* par 582.
41 *Abaclat* case *supra* par 583.
42 *Ibid*.
43 *Urbaser* case *supra* par 146.
44 *Urbaser* case *supra* par 147.
45 *Ibid.*
46 *Hochtief AG v Argentine Republic* ICSID Case No ARB/07/31 Decision on Jurisdiction (24 October 2011) par 87.

provision should attend to both parties' concerns.[47] The *Urbaser* tribunal noted that while it may be true that investment treaties aim to promote international investments, they are also aimed at providing "a reasonable and negotiated balance between prospective investor's interests and those of the states".[48] One cannot accordingly bypass an exhaustion-of-local-remedies or prior-recourse-to-local-courts clause merely because it does not benefit the investor.

5 SUBVERTING THE EXHAUSTION-OF-LOCAL-REMEDIES RULE THROUGH THE MFN CLAUSE

While the precise formulation of MFN clauses may differ somewhat, these clauses generally require a state to afford the other contracting party or its nationals no less favourable treatment than that which it accords to any third state.[49] In international investment law, it is generally accepted that investors can rely on an MFN clause to effectively import more favourable substantive clauses from other treaties.[50] However, the extent to which an MFN clause permits an investor to rely on a more favourable dispute resolution clause has been more controversial, with some tribunals allowing this[51] and others rejecting it.[52]

The first case in which a tribunal permitted an investor to rely on a more favourable dispute resolution clause in another treaty was the case of *Maffezini v Spain*.[53] Article X of the Spain-Argentina BIT required the investor to have prior recourse to local courts but subject to the condition that the dispute may be referred to international arbitration if the dispute remains unresolved after 18 months. It was uncontested that Mr Maffezini had not submitted any dispute to the local courts and instead sought to rely upon the MFN clause to import a dispute-resolution clause into the then Chile-Spain BIT where no such prior recourse to local courts was required.[54]

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47 *Urbaser* case *supra* par 141*; CMS Gas Transmission Company v The Argentine Republic* ICSID Case No ARB/01/8 Award (12 May 2005) par 360.

48 *Urbaser* case *supra* par 141.

49 Claxton "The Standard of Most Favoured Nation Treatment in Investor State Dispute Settlement Practice" in Chaisse, Choukroune and Jusoh (eds) *Handbook of International Investment Law and Policy* (2021) 271.

50 *Vladimir Berschader and Moïse Berschader v Russia* Case No 080/2004, Award (21 April 2006).

51 *Itisaluna Iraq LLC, Munir Sukhtian International Investment LLC, VTEL Holdings Ltd, VTEL Middle East and Africa Limited v Republic of Iraq* ICSID Case No ARB/17/10 Award (3 April 2020) par 195; *Camuzzi International SA v Argentine Republic (II)*, ICSID Case No ARB/03/7 Decision on Jurisdiction (10 June 2005) par 34; *Emilio Agustín Maffezini v The Kingdom of Spain* ICSID Case No ARB/97/7 Decision of the Tribunal on Objections to Jurisdiction (25 Jan 2000) (*Maffezini* case).

52 *Plama Consortium Limited v Republic of Bulgaria* ICSID Case No ARB/03/24 Decision on Jurisdiction (8 Feb 2005) par 184 (*Plama* case); *Salini Costruttori SpA and Italstrade SpA v Hashemite Kingdom of Jordan* ICSID Case No ARB/02/13 Decision on Jurisdiction (29 Nov 2004) par 116–118; *ICS Inspection and Control Services Limited v The Argentine Republic (I)* PCA Case No 2010–09 Award on Jurisdiction (10 Feb 2012) par 309 (*ICS* case).

53 *Supra.*

54 *Maffezini* case *supra* par 21.

In the absence of a sufficiently broad MFN clause, provisions in a treaty with a third state would be *res inter alios acta* concerning Mr Maffezini.[55] However, if the subject matter to which the clause applies is covered by the basic treaty, it follows that matters treated more favourably in the third-party treaty would entitle the beneficiary of the basic treaty to this more favourable treatment by operation of the MFN clause.

According to the tribunal in *Maffezini*, where there is an MFN clause present, a matter would only be *res inter alios acta* where "a matter [is] not dealt with in the basic treaty".[56] The tribunal noted that the base treaty indicates that the MFN clause applies to "all matters subject to this Agreement".[57] As the dispute-resolution clause formed part of the agreement, the tribunal found that there was nothing prohibiting the claimant from relying on the more favourable treatment in the Chile-Spain BIT.[58] The only limitation in this respect arises from public-policy considerations.[59] The tribunal gave examples of some of these public-policy considerations, which it considers may bar reliance on the MFN clause including a requirement of the exhaustion of local remedies.[60] However, it appears that in the view of the tribunal these policy considerations would only apply to actual exhaustion of local remedies and not to a time-bound prior-recourse-to-local-courts requirement.

In contrast, the tribunal in *Plama v Bulgaria*,[61] while agreeing with the *Maffezini* tribunal that an MFN clause may sometimes apply to dispute-resolution provisions, found that there is a general presumption that the MFN clause in the base treaty does not permit one to import dispute-settlement provisions set out in another treaty unless there is "no doubt that the Contracting parties intended to incorporate them".[62] The tribunal in *Plama* cautioned that the findings in *Maffezini* ought not to be treated as general principles guiding future tribunals.[63] It saw the *Maffezini* decision as having arisen from a "curious requirement" that appeared nonsensical.[64] Where no such "curious requirement" is present, a tribunal ought not to resort too readily to the MFN clause in matters concerning dispute resolution. The tribunal remarked:

> "It is one thing to add to the treatment provided in one treaty more favorable treatment provided elsewhere. It is quite another thing to replace a procedure specifically negotiated by parties with an entirely different mechanism."

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55 *Maffezini* case *supra* par 45.
56 *Ibid*.
57 *Maffezini* case *supra* par 53.
58 *Maffezini* case *supra* par 56.
59 *Ibid.*
60 *Maffezini* case *supra* par 63.
61 *Supra*.
62 *Plama* case *supra* par 223.
63 *Plama* case *supra* par 224.
64 *Ibid*.

In a dissenting opinion in *Impregilo v Argentina (I)*,[65] arbitrator Stern agreed with the *Plama* tribunal in principle. However, she warned that it could perhaps have been better reasoned, as it is difficult to see why dispute settlement clauses should be excluded merely because they are "specifically negotiated".[66] After all, is it not presumed that all provisions in the treaty are specifically negotiated.

She also rejected the approach in *Maffezini*, and quoted a statement by Douglas wherein he explained that the MFN clause had never before been used to import more favourable dispute-resolution provisions.[67] Douglas argued that the MFN clause has a provenance stretching back hundreds of years, and yet never before had it been used to import more favourable dispute-resolution provisions.[68] Arbitrator Stern noted that the *Maffezini* tribunal and its followers have completely misinterpreted the *Ambatielos*[69] case. She pointed out that these tribunals often overlook a critical aspect of that case, namely that the MFN clause had not been used to alter the conditions of access to a procedure but was merely used to afford the Greek nationals the "substantive protection of an administration of justice".[70]

Paparinskis also notes that while the broad use of the term "administration of justice" might to the modern eye seem to "extend to procedural rights of international dispute settlement", that term ought to be viewed in line with the case and legal arguments that was before court at the time.[71] He agrees with arbitrator Stern that the *Ambatielos* case and award extends no further than the substantive rules of denial of justice.[72] Therefore, it would appear that the *Ambatielos* case is not directly apposite to the question of the extent to which the MFN clause can apply to dispute-resolution provisions. Paparinskis accordingly argues that the ordinary meaning of "treatment" would traditionally not extend to procedures for the resolution of disputes, but the parties may naturally depart from this where they intended to do so.

In some post-*Plama* cases, there has been a clearer attempt properly to articulate the general presumption against an MFN clause being applicable to dispute resolution beyond the so-called specifically negotiated argument. In *Daimler v Argentina*,[73] the tribunal noted that while the BIT in that case clearly entitles an investor to receive compensation for violations of the MFN clause, this question arises separately from whether or not the tribunal has the jurisdiction to rule on the MFN-based claim. The tribunal explained:

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65 *Impregilo SpA v Argentine Republic (I)* ICSID Case No ARB/07/17 Award Concerning and Dissenting Opinion of Professor Brigitte Stern (21 June 2011) (*Impregilo* case).

66 *Impregilo case supra* par 23 (*Impregilo* case).

67 *Impregilo* case *supra* par 6.

68 *Ibid.*

69 *Ambatielos, Greece v the United Kingdom*, Judgment, 1952 ICJ 28 (July 1).

70 *Impregilo* case *supra* par 34.

71 Paparinskis "MFN Clauses and International Dispute Settlement: Moving Beyond Maffezini and Plama?" 2011 *ICSID Review* 14 28.

72 Paparinskis 2011 *ICSID Review* 27–28.

73 *Daimler Financial Services AG v Argentine Republic* ICSID Case No ARB/05/1 Award (22 August 2012) (*Daimler* case).

> "[S]ince the Claimant has not yet satisfied the necessary condition precedent to Argentina's consent to international arbitration, its MFN arguments are not yet properly before the Tribunal. The Tribunal is therefore presently without jurisdiction to rule on any MFN-based claims unless the MFN clauses themselves supply the Tribunal with the necessary jurisdiction."[74]

The tribunal held that the MFN clause could therefore only be used to bypass a prior-recourse-to-local-courts requirement if it is clear from the treaty that the parties intended for the conditions precedent to accessing international arbitration to be altered by virtue of the MFN clause.[75]

In the recent award of *Kimberly-Clark v Venezuela,*[76] the tribunal noted that its conclusion (that "the MFN clause cannot serve the purpose of importing consent to arbitration when non[e] exists under the basic treaty") has been enjoying greater support in more recent awards.[77] The tribunal emphasised that an MFN clause does not actually automatically incorporate the provisions of other treaties into the base treaty. Therefore, as with any other substantive provision, a tribunal only has the power to determine if there was a breach of the MFN clause if it has jurisdiction to do so.[78] This contribution agrees with this interpretation, which also accords with the centuries-old understanding of how the MFN clause generally operates. The reliance by tribunals on treaty practice seemingly supporting the opposite conclusion is frankly misplaced. State practice is generally not relevant to the question of treaty interpretation, and is quite useless concerning the MFN clause, considering that there is no customary international law standard on MFN. Where states deliberately depart from the general rules within a specific treaty, that is of course their prerogative, but should have no influence whatsoever on the interpretation of other treaties where this has not been done.

6 SUBVERTING THE EXHAUSTION OF LOCAL-REMEDIES RULE THROUGH THE "FUTILITY" EXCEPTION

The futility exception is recognised under customary international law. The exception was initially developed in the context of diplomatic protection and not *per se* in systems where individuals were granted procedural status.[79] A

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74 *Daimler* case *supra* par 199–200.

75 *Daimler* case *supra* par 204.

76 *Kimberly-Clark Dutch Holdings, BV, Kimberly-Clark SLU, and Kimberly-Clark BVBA v Bolivarian Republic of Venezuela* ICSID Case No ARB(AF)/18/3 Award (5 November 2021) (*Kimberly-Clark* case).

77 *Kimberly-Clark* case supra par 186; *ST-AD GmbH v Republic of Bulgaria* PCA Case No 2011–06 Award on Jurisdiction (18 July 2013) Exh RL-0035 par 398; *Hochtief* case *supra* par 79; *Enrique Heemsen and Jorge Heemsen v Bolivarian Republic of Venezuela* PCA Case No 2017–18 Award (29 October 2019) Exh RL-0009 par 408; *Venezuela US, SRL (Barbados) v Bolivarian Republic of Venezuela* PCA Case No 2013–34 Interim Award on Jurisdiction (on the Respondent's Objection to Jurisdiction *Ratione Voluntatis*) (26 July 2016) Exh. CS-0019 par 105. See also, *Kiliç* case *supra* par 7.8.6–7.9.1.

78 *Kimberly-Clark* case *supra* par 167.

79 *Gavrilovic* case *supra* par 889.

primary purpose of the futility exception under customary international law is also to prevent states from allowing "the matter to drag on unconscionably".[80] For the futility exception to be applicable, it does not need to be included specifically in the BIT. BITs have an article on "applicable law" that states that applicable rules and principles of law regulate the BIT. Thus, unless specifically excluded, the futility exception can be applicable through customary international law.

In investment law, there are two main types of exhaustion-of-local-remedies clause, either time bound or not. Exhaustion-of-local-remedies clauses that are not time bound can easily give rise to the futility exception, as it may lead to claimants not having effective recourse available because of a delay in a country's judicial system. However, in the case of a time-bound clause, such as in *Urbaser v Argentina*[81] (where it specifically stated if a dispute has been submitted to the local courts and remains unresolved after 18 months, it can be submitted to international arbitration), it is more difficult to make use of the futility exception. In such instances, there is generally no need to apply the futility exception, as the clause is time bound. The claimant would be able to submit a claim to international arbitration if it has attempted to exhaust local remedies and has not been able to obtain redress, for example within 18 months, depending on the specific clause. Accordingly, a matter cannot drag on indefinitely. Tribunals have, however, applied the futility exception in relation to time-bound clauses. If a party alleges that it would be futile to submit a case to the local courts, they must provide evidence to that effect.

However, some tribunals have interpreted the time-bound provisions to require the state, effectively, to prove that it would be possible to resolve an investor-state dispute within this time period.[82] The tribunal in *Urbaser v Argentina* held that the exhaustion-of-local-remedies clause "can only impose a duty on an investor to the extent that the Host State can meet its obligation of making available a competent court capable of meeting the target of rendering a decision on the substance within 18 months".[83] It makes this finding notwithstanding its explanation that the clause does not impose an obligation on the domestic courts to resolve this dispute within this time period. According to the tribunal, the principle of *effet utile* demands this interpretation, as the exhaustion-of-local-remedies requirement would be deprived of its meaning if there is no likelihood of the dispute being resolved within 18 months.[84]

While at first this reasoning may seem to make sense intuitively, it is problematic for several reasons. If it were to be applied more generally, similar clauses in other BITs would virtually immediately be rendered redundant. If, for example, we consider the People's Republic of China-Belgium BIT, which provides that prior recourse is limited to three months, it

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80 Mollengarden "The Utility of Futility: Local Remedies Rules in International Investment Law" 2019 58 *Virginia Journal of International Law* 403 420.

81 *Supra*.

82 *Urbaser* case *supra* par 192.

83 *Urbaser* case *supra* par 193.

84 *Ibid*.

seems impossible that any dispute would ever be resolved within such a short space of time. A 2013 study by the Organisation for Economic Co-operation and Development (OECD) found that the average time to resolve a commercial dispute within Belgium is around 505 days.[85] Therefore, if the tribunal in *Urbaser* were correct, and the obligation is conditional on the state demonstrating that it should at least be theoretically possible to resolve an investor-state dispute at first instance within the stipulated time period, Chinese investors could never be required to have prior recourse to Belgian courts.

Similarly, the Swiss-Egypt BIT provides that disputes must be submitted to the local courts before they may be submitted to international arbitration. This provision is subject to a stipulation that, if the dispute had not been resolved in the local courts within six months, the matter may then be referred to international arbitration. As with the Belgian courts, it is highly unlikely that the Swiss courts would be able to resolve an investor-state dispute within six months. The same OECD study indicates that Swiss courts take, on average, 390 days to resolve a commercial dispute at first instance,[86] while, in Egypt, sources indicate that such disputes often take in excess of a thousand days,[87] well beyond the 6-month time period. This BIT was concluded in 2010 – not long before the completion of the OECD study – making it clear that, at the time the BIT was concluded, there was no reasonable possibility of a dispute being resolved within six months. Therefore, an interpretation that only requires an investor to have prior recourse to local courts if the dispute is reasonably likely to be resolved within six months would deprive this clause of any meaning and render it *void ab initio*.

It is a well-established principle of treaty interpretation that an interpretation rendering a clause redundant must be avoided.[88] The principle of contemporaneity can perhaps act as a counterbalance to these seemingly conflicting interpretations of the principle of effectiveness. If it is clear that, at the time of the conclusion of a treaty, a dispute would not have been capable of resolution within the time-bound period, the mere fact that a dispute is unlikely to be resolved within that time period would not be sufficient to excuse a claimant's failure to attempt prior recourse to domestic courts. This interpretation would avoid a situation where clauses are effectively rendered *void ab initio*.[89]

Nevertheless, it would be prudent for states contemplating time-bound exhaustion-of-local-remedies clauses to consider the prescribed time

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85 OECD *What Makes Civil Justice Effective?* (2013) 11.

86 *Ibid*.

87 Mcmullen "The Development of Egyptian Alternative Dispute Resolution" (6 September 2013) https://mediate.com/the-development-of-egyptian-alternative-dispute-resolution/ (accessed 2023-01-23).

88 *(1) Mr Idris Yamantürk (2) Mr Tevfik Yamantürk (3) Mr Müsfik Hamdi Yamantürk (4) Güriş İnşaat ve Mühendislik Anonim Şirketi (Güris Construction and Engineering Inc) v Syrian Arab Republic* ICC Case No 21845/ZF/AYZ Final Award Partial Dissenting Opinion of Nassib G Ziade (31 August 2020).

89 *ICS* case *supra* par 317.

carefully. It is difficult to see the purpose of establishing a particularly short time period such as three months. These short time periods risk turning the clause into a mere waiting period. However, while the purpose of a shorter time-bound exhaustion-of-local-remedies clause might be more difficult to ascertain, this does not in itself mean that such clauses serve no purpose. Paparinskis correctly notes that possible benefits of the clause are to provide a state with greater clarity on the merits of the case, which may improve the chances for successful negotiations.[90]

7 CONCLUSION

In this article, it has become apparent that the introduction of an exhaustion-of-local-remedies requirement seems increasingly likely as part of the multilateral reform efforts underway through UNCITRAL Working Group III. However, most states appear to prefer a time-bound clause, and it seems more likely that this option will be followed than a strict exhaustion-of-local-remedies clause. In their efforts to reform the investment-law system, states need to remain cognisant of the existing interpretation of such time-bound clauses, and the methods used by arbitral tribunals and investors to subvert these clauses.

States should ideally express a clear view on the nature of the exhaustion-of-local-remedies clause – that is, whether it should be treated as affecting the jurisdiction of the tribunal or as an admissibility issue. From this article, it should be clear that where an exhaustion-of-local-remedies clause is stipulated as a condition to a state's consent to arbitration, it ought to be treated as a jurisdictional issue rather than an admissibility issue.[91] Notwithstanding this position, it is equally clear that tribunals have not always followed this approach.

The implication of treating such clauses as an admissibility issue rather than a jurisdictional issue also has profound practical implications. As showcased in this article, treating the exhaustion-of-local-remedies requirement as an admissibility issue may confer much broader discretion upon a tribunal to excuse non-compliance than states had intended at the time of concluding the treaty. It also gives rise to the problematic balancing-of-interest approach, where tribunals effectively rewrite treaties to offer investors more favourable treatment.[92]

In their reform efforts, states also need to pay adequate attention to the formulation of any MFN clauses. This article has clearly showcased the dangers of a broad MFN clause being used to subvert the exhaustion-of-local-remedies clause.[93] Despite this danger, the authors maintain the view that the ordinary meaning of "treatment" would not extend to procedures for the resolution of disputes. In so doing, this article does not lose sight of the fact that some states seek to include provisions for dispute resolution within

[90] Paparinskis 2011 *ICSID Review* 54.
[91] See heading 3 above.
[92] See heading 4 above.
[93] See heading 5 above.

the meaning of "treatment".[94] Although such an extension of the term "treatment" to dispute-resolution procedures is the prerogative of those states, it is irrelevant to the interpretation of other treaties where states did not have a similar intention to expand the ordinary meaning of "treatment" to include provisions for dispute settlements. This interpretation accords best with the centuries-old understanding of the MFN clause, as correctly pointed out by Paparinskis.

This article has also critiqued the interpretation of the futility exception by some tribunals.[95] In particular, it is argued that the interpretation requiring a state to prove that it would theoretically be possible to resolve an investor-state dispute within the minimum time period during which parties must litigate before domestic courts risks rendering many time-bound prior-recourse-to-local-remedies clauses effectively *void ab initio*. As showcased in this article, few (if any) courts would be able to resolve an investor-state dispute within the short time periods often stipulated in such treaties.[96] This interpretation should be rejected for this reason alone, as a treaty must be interpreted in such a manner that it contains no nugatory provisions.[97] Nevertheless, states should use the multilateral reform efforts to clarify the purpose of such prior-recourse-to-local-remedies clauses and the extent to which it actually demands possible resolution of the dispute within the stipulated time period.

94 See for example, Albania-United Kingdom BIT art 3(3).
95 *Urbaser* case *supra.*
96 See heading 6 above.
97 *Güris* case *supra.*

REGULATION OF THE LEGAL PRACTITIONERS' FIDELITY FUND INVESTMENTS IN NAMIBIA

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SUMMARY

In the Namibian context, the Legal Practitioners' Fidelity Fund is created by statute, and is administered by a board of control known as the Legal Practitioners' Fidelity Fund Board of Control.[1] In terms of the law, the Board of Control (the Board) has the mandate to invest moneys of the fund from time to time if, in the opinion of the Board, such funds are not immediately required for other purposes.[2] Market failures are continuously experienced globally, and may lead to failed investments. This reality requires investors to take proper steps to ensure that their investments are sound. The soundness of an investment rests in the possibility of increasing investment returns and reducing possible risk of investment failure. The Legal Practitioners Act does not provide any steps to follow to guard against the failure of fidelity fund investments. The Act also fails to indicate the extent to which the Board or any other person may be held accountable for failed investments. The Rules of the Law Society of Namibia are equally silent on this matter. This article seeks to investigate the extent to which the Board may be held liable for any failed investments. The article also attempts to establish various steps that should be followed by the Board to prevent or avoid the failure of fidelity fund investments.

1 INTRODUCTION

The legal profession is a noble profession, and is guided by principles, rules, regulations and laws. In the Namibian context, the Legal Practitioners Act (LPA)[3] is the principal legislation setting out a framework to guide legal practitioners' conduct. Furthermore, the Rules of the Law Society of Namibia amplify the provisions of the Act on the operation of legal practitioners' trust and business accounts, as well as on issues relating to the Fidelity Fund. In terms of the law, all legal practitioners in private practice are required to have a fidelity fund certificate and to contribute to the Fidelity Fund.[4] All legal professionals are subject to certain legal requirements. The provisions of the LPA and the Rules of the Law Society of Namibia must all be carefully

1 S 55 of the Legal Practitioners Act 15 of 1995 (LPA).
2 S 64(2) of the LPA.
3 15 of 1995.
4 S 20 of the LPA.

followed by a legal practitioner, especially when it comes to client funds that are entrusted to their care and control.[5] Failure to follow the provisions of the statute and the Rules of the Law Society may expose a legal practitioner to legal consequences. A legal practitioner who contravenes or fails to comply with any of the provisions of section 25(1) or section 26(1), (2)(*b*), (3) or (4) is guilty of an offence and liable on conviction to a fine not exceeding N$200 000 or to imprisonment for a period not exceeding 10 years or to both such fine and such imprisonment.

Trust funds are not included in a legal practitioner's assets.[6] The lack of risk and the confidence it fosters are what make trust funds what they are. The improper administration of trust funds is wholly unacceptable; it not only violates the law's criteria for handling trust funds, but also calls into question the idea that money held in a trust account by a lawyer acting on behalf of a client is absolutely secure.[7]

In terms of the governing legislation, the Fidelity Fund Control Board (whose primary role is to administer the money of the Fidelity Fund) has the power from time to time to invest moneys of the fund that are not immediately required for the purposes mentioned in the Act.[8] The crux of this article is to examine the powers and the liability of the Fidelity Fund Control Board and the consequences of a failed investment. It is noteworthy that this article concerns aspects of both finance and law as it pertains to the issues under discussion.

This article thus seeks to provide a critical review of the Board's function and liability. In doing so, the article provides some definitions of the key terms used in the article; discusses the powers of the Board, investment risk, liability for failed investments, consequences for the lack of accountability and investment steps; and makes concluding remarks.

2 DEFINITIONS

Although written from a legal perspective, the article covers aspects of finance and economics. For a proper understanding of the concepts and analysis contained in the article, it is essential to provide a few definitions of the concepts that are used throughout the article.

2 1 Fidelity fund

There is no concise legislative definition of a fidelity fund – at least from the legal profession's point of view. However, elements in section 54 of the Act may be used to create a definition. Section 54 of the Act sets out the purpose of the Act, stating:

> "Subject to the provisions of this Act, the fund shall be applied for the purpose of reimbursing persons who may suffer pecuniary loss as a result of – (a) theft

5 See *South African Legal Practice Council v Joynt* [2021] ZAGPPHC 471.
6 *Ibid*.
7 *Ibid*.
8 S 64(2) of the LPA.

> committed by a legal practitioner or a candidate legal practitioner attached to, or a person employed by such a legal practitioner, of any money or other property entrusted by or on behalf of such persons to the legal practitioner or to such a candidate legal practitioner or a person employed in the course of the legal practitioner's practice or while acting as executor or administrator in the estate of a deceased person or as a trustee in an insolvent estate or in any other similar capacity."[9]

Using the above definition, we can thus define a fidelity fund as [the] funds used as an insurance to compensate a [legal practitioner's] client for any financial loss they have suffered as a result of the conduct of the legal practitioner, candidate legal practitioner or an employee of such legal practitioner in the handling of the funds entrusted to the legal practitioner. Such conduct may relate, but not be limited, to fraud, theft and/or embezzlement. In the South African case of *Industrial and Commercial Factors (Pty) Ltd v Attorneys Fidelity Fund Board of Control*,[10] the court set out the requirements that need to be met to succeed on a claim of theft of trust money entrusted to a legal practitioner's practice. First, the applicant must prove that they suffered a pecuniary loss. Secondly, the pecuniary loss must be as a result of theft by the practising attorney to whom the money was entrusted. Thirdly, the money must be entrusted by the applicant or on their behalf to the attorney, and finally, the money must be entrusted in the ordinary course of their practice. Trust money is to be dealt with in an agreed or legally allowed manner. In the case of *Leysath v Legal Practitioners Fidelity Fund Board of Control*,[11] the court cited with approval the words of Nicholas J, where he stated:

> "'[T]o entrust' comprises two elements: (a) to place in the possession of something, (b) subject to a trust. As to the latter element, this connotes that the person entrusted is bound to deal with the property or money concerned for the benefit of others."[12]

If money is entrusted to another person for the purposes of using such money in an agreed or legally allowed manner, such money should be

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9 See also Vercuil "The KwaZulu-Natal Reform Audit Support System (RASS) Pilot Project" 2005 446 *De Rebus* 22. In the South African case of *King v The Attorneys Fidelity Fund Board of Control* 2010 (4) SA 185 (SCA), the Supreme Court of Appeal reiterated the purpose of the fidelity fund and stated that "the fund shall be applied for the purpose of reimbursing persons who may suffer pecuniary loss as a result of– (a) theft committed by a practising practitioner, his candidate attorney or his employee, of any money or other property entrusted by or on behalf of such persons to him or to his candidate attorney or employee in the course of his practice or while acting as executor or administrator in the estate of a deceased person or as a trustee in an insolvent estate or in any other similar capacity".

10 [1996] ZASCA 84; 1997 (1) SA 136 (A). In the case of *Yeats NO v Attorneys Fidelity Fund Board of Control* [2003] ZAWCHC 90, the plaintiffs' claim failed for the reason that they could not prove that the money was entrusted to the attorney in the course of his practice as an attorney. Alternatively, if it had been so entrusted, the attorney was instructed to invest the money on behalf of the trust (of which the plaintiffs were trustees) in an account contemplated in s 78(2A) of the Act.

11 [2021] ZAGPPHC 7.

12 *Provident Fund for the Clothing Industry v Attorneys, Notaries and Conveyancers Fidelity Guarantee Fund* 1981 (3) SA 539 (W) 543E–F.

protected at all costs and misuse of any such funds must call for consequences. The safeguarding of trust money encourages clients and members of the general public to have confidence in the services provided by legal practitioners, so that they may without hesitation entrust their funds to legal practitioners should the need arise.

The idea of a fund to safeguard the public from the loss of money entrusted to attorneys is not a novel one, nor is it limited to lawyers. The majority of professions hold client money in trust function with so-called fidelity funds; estate agents are an excellent example.

2 2 Financial markets

In general, there is no specific location or site to denote a financial market. The centres and arrangements that make it possible to purchase and sell financial assets, claims and services are referred to as financial markets.[13] Thus, when we speak about financial markets, we are referring to stock exchanges and commodity exchanges.[14] In general, there is no specific location or site to denote a financial market. Therefore, the term "financial market" generically refers to any setting where securities are traded.[15]

In our economic system, financial markets play a critical role in facilitating seamless, uninterrupted global trade while minimising price shocks.[16] Open and regulated financial markets offer a means for businesses to raise sizeable amounts of capital. The stock and bond markets play a role in this process. Through access to commodities, foreign exchange futures and other derivative markets, markets also enable firms to mitigate risk.[17]

Financial market activity directly influences investments and how businesses act.

2 3 Financial risk management

The approach used to address market uncertainty is known as financial risk management.[18] The process of detecting investment risk and selecting the most effective response to that risk is known as risk management.[19] A risk management strategy aims to limit prospective losses to an acceptable

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13 Gordon and Natajaran *Financial Markets* (2010) 10.

14 Market Business News (MBN) "What Is a Financial Market? Definition and Examples" (undated) https://marketbusinessnews.com/financial-glossary/financial-market/ (accessed 2022-10-12).

15 Hayne "Financial Markets: Role in the Economy, Importance, Types, and Examples" (24 October 2023) https://www.investopedia.com/terms/f/financial-market.asp (accessed 2022-10-12).

16 Weller "What Is the Role of Financial Markets?" (6 February 2024) https://www.forex.com/en/market-analysis/latest-research/what-is-the-role-of-financial-markets/ (accessed 2022-10-12).

17 *Ibid*.

18 Horcher *Essentials of Financial Risk Management* (2011) 15.

19 Hartill "What Is Financial Risk Management?" (11 November 2021) http://www.thebalancemoney.com/what-is-financial-risk-management-5189898 (accessed 2022-11-19).

range based on one's risk tolerance.[20] It entails determining management plans that are in line with organisational priorities and policies, and assessing the financial risks that an organisation faces. An organisation may gain a competitive edge by proactively managing financial risk. In addition, it ensures that the management, operational staff, stakeholders, and the board of directors concur on critical risk-related problems.[21]

2 4 Market failure

According to Samuelson and Nordhaus, a market failure is defined as "an imperfection in a price system that prevents an efficient allocation of resources".[22] Therefore, addressing market failure entails making markets operate more effectively or efficiently in terms of the decisions made regarding the allocation of resources and the creation of goods and services.[23]

2 5 Legal practitioner

A legal practitioner is a person who is admitted to the legal profession and as such has "licence" to practise law in the lower and superior courts. In the Namibian context, there are certain statutory requirements that a person must fulfil to be able to practise law. These requirements are outlined in the LPA. The Act classifies these requirements into two categories: academic and professional qualifications. In order to meet the academic qualification, a person must hold a law degree from the University of Namibia or an equivalent qualification in law from a university or a comparable educational institution situated outside Namibia that has been prescribed by the Minister in terms of the law.[24] In addition to the academic qualification, a person must satisfactorily undergo practical legal training; and must pass the Legal Practitioners' Qualifying Examination (also referred to as the Board Examination). There is often confusion between a legal practitioner and a lawyer. A lawyer is someone who has studied the law, whereas a legal practitioner, in addition to studying the law, has undergone professional training and has subsequently qualified for admission to the practice of law.

Only persons who are admitted as legal practitioners and who own and manage a law firm are required by law to pay money to the Law Society Fidelity Fund. In other words, practising legal practitioners who receive and hold trust money are required to pay over funds to the Fidelity Fund. One of the circumstances in which a legal practitioner may have to pay over money to the Fidelity Fund is when they have earned interest on an investment

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20 *Ibid*.

21 *Ibid*.

22 Samuelson and Nordhaus *Economics* (1985) 25.

23 Cunningham *Understanding Market Failures in an Economic Development Context* (2011) 13.

24 S 5 of the LPA.

made on behalf of a client.[25] It is this money that the Fidelity Fund Control Board administers and invests in accordance with the provisions of the law.

3 THE POWERS OF THE LEGAL PRACTITIONERS' FIDELITY FUND CONTROL BOARD

The Law Society of Namibia (LSN)'s Chairperson of Council and three other lawyers appointed by Council make up the Board of Control of the Legal Practitioners' Fidelity Fund. Of these lawyers, at least two must not be members of the Council and at least two must have been in private practice for at least five years. Since the Law Society Council appoints three lawyers and of these two should not be council members, the correct interpretation means that one of the lawyers appointed by council could be a member of council. The Council may also designate an alternate member to take the chairperson's place when that individual is unavailable or unable to serve on the Board of Control.[26] Although the rationale for the eligibility requirements is not clear, one can assume that the functions of the Board require someone with experience to deal with complex issues facing the Board – hence a need for a person with private practice experience (that is, five years' experience) and a person who serves on Council. The Council of the Law Society is equivalent to the board of a company, and normally comprises persons with expertise to deal with complex matters. However, as far as requirements for Board membership are concerned, the law fails dismally to require investment and financial literacy. Trained legal practitioners who possess some form of financial and or investment knowledge could be of benefit to the Board in discharging its functions adequately. This is because such persons not only understand the workings of the law, but have a sound understanding of financial markets, finance and investments. Accordingly, there is a need to revisit the eligibility requirements for appointment to the Board.

The Fidelity Fund is administered by the Legal Practitioners' Fidelity Fund Board of Control.[27] This board is vested with the powers to invest, from time to time, moneys of the fund that are not immediately required for the purposes set out in the Act.[28]

Apart from mentioning that the money shall be deposited into the Legal Practitioners' Fidelity Fund Account and authorising the Board to invest money not immediately required, the Act is silent on all other administrative issues regarding such investments. This is similar to the South African position.[29] The investment process does not simply involve taking money

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25 S 26(2) of the LPA.

26 The Board of Control of the Legal Practitioners' Fidelity Fund https://lawsocietynamibia.org/1224/ (accessed 2022-11-12).

27 S 55(1) of the LPA.

28 S 64(2) of the LPA.

29 S 58(2) of the LPA merely indicates that the Board has the power to invest moneys deposited in the bank account of the Fidelity Fund that is not immediately required for any of the purposes mentioned in the Act. No guidelines are provided as to how the Board must go about investing the funds.

and putting it away in some account with the aim of getting good returns at the end of the investment period. The investment process is a complex matter comprising various aspects such as determining investment objectives, developing an investment plan, evaluating and selecting investment alternatives, constructing a portfolio, and evaluating and revisiting the portfolio. Understanding these aspects and ensuring that they are followed first requires someone with sound knowledge regarding investments. Secondly, there is a need for detailed guidelines on the investment process to ensure that the invested funds yield desired results.

In a system of corporate governance, a board of directors is responsible for supervising a corporation's operations, including its management, as a large number of dispersed stockholders cannot efficiently carry out that function on their own.[30] Ordinarily, the directors of any given company have several common-law duties – namely, the duty of care and loyalty, the duty of disclosure and the duty to act in good faith.[31]

Broadly speaking, the members of the Legal Practitioners' Fidelity Fund Control Board are bound by the common-law duties of directors and are therefore required to uphold these duties. This is despite the fact that the Act fails to make express mention of these duties.

Similar to the Namibian position, the South African Legal Practice Act 28 of 2014 establishes the Legal Practitioners' Fidelity Fund Board to manage and administer its fidelity fund.[32] The South African Act further sets out the composition of the Board stating that the Board is to comprise five legal practitioners, one of whom must be an advocate referred to in section 34(2)(*b*), elected in accordance with a procedure determined in the rules by the Council in consultation with the Board.[33] The Board must, furthermore, comprise two persons designated by the Council whose names, by virtue of their qualifications, expertise and experience in the field of finance, are submitted by the Independent Regulatory Board of Auditors or its successor.[34] Lastly, the Board must consist of two fit and proper persons designated by the Minister.[35]

The South African approach (as reflected above) is the more desirable one in ensuring that the Board discharges its duties efficiently. The Board composition in South Africa, unlike in Namibia, requires persons with some form of expertise and experience in the field of finance, in addition to persons with expertise in law. This approach is desirable, as persons with

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30 Amakobe "Duties of Company Directors" (2015) http://www.researchgate.net/publication/286918957_Duties_of_Company_Directors (accessed 2022-11-15).

31 *Ibid*.

32 S 60(1) of the South African Act.

33 S 62(*a*) of the South African Act. Furthermore, Rule 46 of the South African Legal Practice Council Rules succinctly sets out the approach to be followed in appointing legal practitioners to the Board. Among other rules, it is required that legal practitioners be in good standing with reference to their principal place of business and that legal practitioner(s) must be nominated by practising legal practitioners. This approach is appropriate, as it sets a clear process to be followed in appointing legal practitioners to the Board; secondly, it promotes transparency.

34 S 62(*b*) of the South African Act.

35 S 62(*c*) of the South African Act.

expertise in finance are more likely to possess sound knowledge in financial investments. The South African legislative position on the Legal Practitioners' Fidelity Fund Board composition reflects the importance of having both financial and legal expertise on the Board. This can be achieved in one of two ways. The first involves appointing persons with both legal and financial expertise. It is possible to have a trained lawyer who, because of their educational background or work experience, has been exposed to issues of finance and investment. Such lawyers should thus be considered for appointment to the Legal Practitioners' Fidelity Fund Board. Alternatively, the appointments should include two different categories of person – that is, lawyers, and those with financial expertise, as contemplated in the South African legislation. It is imperative that both disciplines and expertise – namely, law and finance – are represented on the Fidelity Fund Board, regardless of the approach followed in appointing the members to such a board. The South African legislature has taken an approach to limit the risks of possible losses in fidelity fund investments, as both legal and financial aspects receive attention when dealing with the investments.

4 RISKS ASSOCIATED WITH FINANCIAL INVESTMENTS

Numerous financial operations, including sales and purchases, investments and loans, and several other company activities, are accompanied by financial risk.[36] This may result from business transactions, new initiatives, mergers and acquisitions, debt financing, the cost of energy, or the acts of management, stakeholders, rivals, foreign governments, or the environment.[37]

Market risk is the risk that an investor experiences of a possible decline in the market value of a financial product that results from variables that have an impact on the entire market and are not specific to one type of economic good.

Interest rate risk is the risk that arises for bond owners from fluctuating interest rates. In other words, interest rate risk is related to the returns that the investor will receive from the investment. Higher interest rates could mean a better return for the investor, whereas a lower interest rate could mean that the investor will not make good returns from the investment.

Business activities can be significantly disrupted by changes in government or regulation, social unrest, war, terrorism, unemployment, natural disasters, or governments taking over publicly traded companies and nationalising them. Such events can hamper the ability of companies to make a profit and pay dividends. This is referred to as socio-political risk.

Credit risks are business risks related to the inability of borrowers to meet or honour their obligations to pay the principal amount of a debt and interest thereon when they become due and payable. The purpose of any

36 Horcher *Essentials of Financial Risk Management* 25.

37 *Ibid*.

investment is to receive good returns. No investor wants to run the risk of poor investment returns. However, if care is not taken, credit risk may become a reality.

Credit risk arises when the borrower in a loan contract makes a mistake or postpones paying back the obligation in full or in part.[38] Inability or unwillingness of a borrower to make repurchases (that is, to return credit provided to them) could result in losses on outstanding credit, and is referred to as credit risk.[39] Thus, credit risk is defined as the likelihood that a legally binding contract may be rendered worthless (or at least significantly diminished in value) owing to the counterparty defaulting and going out of business.[40] The risk that committed cash flows from securities and loans held by financial institutions may not be fully paid is what this means. Thus, default by debt issuers and counterparties in derivatives transactions gives rise to credit risk.[41]

Credit risk is the possibility of financial loss owing to a party's failure to fulfil its contractual obligations, and which results in financial loss for the creditor's shareholders.[42] These responsibilities are a result of a company's lending, trading, and investing activities, as well as the payment and settlement of its own securities trading and foreign account.[43] There may be instances where a counterparty breaches an agreement and fails timeously or fully to refund the principal debt and interest that is due. Most balance sheet assets and off-balance sheet transactions series contain credit risk.[44] Credit risk for derivatives comprises default risk, guarantor risk, and counterparty risk. It is important to assess credit risk. The measurement of credit risk is done in order to estimate prospective losses from credit operations. Since the quantity of losses is never known with confidence, an estimate is required.[45]

Economic risk emanates from national or global economic events, such as economic booms and downturns, which can affect the overall financial market irrespective of the type of investment. Economic risks can thus be classified into two broad categories – namely, business risks and institutional risks.[46] Commercial risks, also known as business risks, are dangers resulting from various market developments that could have an impact on a project while it is in operation.[47] Examples of these risks include changes in the cost of goods and producer prices, fluctuations in demand, and

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38 Zamore and Alon "Credit Risk Research: Review and Agenda" 2018 54(4) *Emerging Markets Finance and Trade* 812.

39 IMF Financial Operations "Financial Risk Management" (30 November 2014) https://www.imf.org/external/pubs/ft/finop/2014/pdf/ch6.pdf (accessed 2022-11-18).

40 *Ibid*.

41 *Ibid*.

42 Spuchľáková, Valaškováb and Adamkoc "The Credit Risk and Its Measurement, Hedging and Monitoring" 2015 24 *Procedia Economics and Finance* 676.

43 *Ibid*.

44 *Ibid*.

45 *Ibid*.

46 Latona, Fronea and Constantinescua "Financial and Economic Risks to Public Projects" 2014 8 *Procedia Economics and Finance* 205.

47 *Ibid*.

technological failures and performance.[48] The risk of financial or personal loss for a business resulting from non-market factors such as macroeconomic and social policies (fiscal, monetary, trade, investment, industry, income, employment, and development), as well as the institutional-legal frameworks of those policies, can be referred to as institutional risk.[49]

There are certain elements of risk management, and, generally speaking, if these elements are not properly adopted into an organisation and meticulously adhered to, it will be impossible to monitor and limit any type of risk. One such element is good corporate governance. The success of an organisation's risk management depends on its corporate governance.[50] Corporate governance facilitates an organisation's overall behaviour.[51] No matter how effective the risk management, an organisation cannot succeed without sufficient sound corporate governance; risks will otherwise slip through the gaps.[52] Therefore, it is crucial to strengthen governance gradually over time. Another equally important element of risk management is risk culture. Culture is something that passes down from one generation to the next without being overtly transmitted or recorded.[53] In a risk culture, the entire organisation is not only risk-focused but also business-focused.[54] Values, beliefs, knowledge, attitudes and an understanding of risk all play a role in risk culture.[55] This helps to reduce unpleasant surprises and raise shareholder value. Personal risk perception is the primary component of risk culture, which is then followed by ethical behaviour, and good corporate culture.[56]

It is difficult to invest in financial markets. Beginners in stock investing lack knowledge and experience, and the majority of them lose money after making direct investments in the stock market.[57] This is frequently where investing through an investment trust offers advantages. The advantages of investing in mutual funds are numerous. The fact that mutual funds offer a variety of schemes means that there is something for everyone, which is the main and most important benefit of mutual funds. Fund managers are knowledgeable about the securities market and are familiar with equities investments.[58] When retail investors try to invest in stocks themselves, many see their capital swept away. This occurs frequently because the market is unpredictable, and it requires extensive knowledge to choose stocks,

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48 *Ibid*.

49 *Ibid*.

50 Kumar "Essential Elements of Risk Management" (1 February 2022) https://corp-story.com/essential-elements-of-risk-management/ (accessed 2022-12-19).

51 *Ibid*.

52 *Ibid*.

53 *Ibid*.

54 *Ibid*.

55 *Ibid*.

56 *Ibid*.

57 Rakibe *Benefits of Investing on Mutual Fund* International Interdisciplinary Conference on the Role of Economy and Ecology on Sustainable Development, Phondaghat, Dist-Sindhudurg, Maharashtra, India, (2020) 490.

58 *Ibid*.

monitor them, and determine when to exit a deal.[59] It therefore goes without saying that whoever is appointed and is responsible for dealing with fidelity fund investments must have a sound knowledge and understanding regarding investments and taking investment decisions. Any lack of sound understanding may result in failed investments.

5 LIABILITY FOR FAILED INVESTMENTS

Certain pieces of legislation in the Namibian context prescribe penalties and/or liability for negligent conduct. Those that stand and act in a fiduciary capacity may thus be held accountable for their actions, especially where these result in financial losses.

The Companies Act,[60] for example, sets out circumstances under which a director may be held liable. Section 92 of the said Act is one such example: directors may held liable, jointly and severally, if in violation of section 90 they permit the company to purchase any share issued by it, to return to the company any cash so paid and not otherwise recovered by the business.[61] Another example is found in section 430 of the same Act, which provides for directors' liability for fraudulent business conduct. Section 430(1) in particular provides that a court, whether in a winding-up, judicial management, or otherwise, upon application from the Master, the liquidator, the judicial manager, any creditor, member, or contributory of the company, may declare any person who was knowingly a party to the carrying on of any business of the company recklessly or with intent to defraud creditors of the company or creditors of any other person, or for any fraudulent purpose, to be personally responsible for all or any of the debts or other liabilities of the company. In section 430(2), the Act gives the court the power to make the liability declared under section 430(1) a charge on any debt due by the company to a director who acted improperly. Finally, under section 430(4), the court has the power to impose a fine of N$8 000 on any director who commits an offence in carrying on the business in such improper manner, and such a fine may be payable in addition to imprisonment. In terms of section 256, in legal proceedings against a director for acting negligently, a court may relieve the director from liability, if it is found that they acted honestly and reasonably in the circumstances, regardless of the outcome of their actions.

The Trust Monies Protection Act[62] sets out the liability for any trustee who fails to comply with the provisions of the said Act. A trustee is someone who has the power to deal with the funds of another. Put differently, a trustee is entrusted to deal with funds for the benefit of another. It is therefore crucial

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59 *Ibid*.

60 28 of 2004.

61 S 90 of the Namibian Companies Act provides that a company is prohibited from paying anything, regardless of the form, to purchase any of the company's shares if there are good reasons to believe that (a) the company is unable to pay its debts as they become due in the normal course of business, or would be unable to do so after the payment; or (b) the company's consolidated assets, correctly valued, would be less after the payment than its consolidated liabilities.

62 34 of 1934.

that a trustee should act in a proper manner and should incur liability where they act in an improper manner, especially where such conduct may result in a loss of money and where negligence is proved.

The aforementioned two statutes are examples of how liability can be imposed on persons who stand in a fiduciary capacity and who administer affairs on behalf of others. However, the LPA, and the Rules of the Law Society of Namibia, are silent on any possible liability for members of the Board in dealing with fidelity fund investments. In other words, the LPA does not make provision for holding any person or body accountable for a failed investment. As far as imposing liability is concerned, the Namibian position is not very different from the South African approach. The (South African) Legal Practice Act and the Rules for the Attorneys' Profession of South Africa also do not expressly contain any provisions relating to the liability of the Board for failed investments. The legislative framework of both jurisdictions refers only to the auditing function that needs to be performed.[63] This auditing function requires the drawing up of financial statements such as the balance sheet to indicate the status quo regarding the funds of the Board. However, no reference is made to what happens when investments fail or if there is any negligence committed by the Board in handling the investment of the funds. Does this mean that members of the Board can never be held liable for failed investments? If they can never be held liable, , will the funds be dealt with properly? There is a clear need to relook at the law and provide mechanisms in the Act or the Rules with regard to liability for failed investments owing to negligent conduct of Board members.

It is not enough for the LPA to authorise the investment of fidelity fund moneys without prescribing the manner in which the funds are to be invested. Such prescription would ensure that board members follow proper steps in investing the funds, eliminate negligent conduct and limit the possibilities of failed investments.

6 CONSEQUENCES FOR LACK OF LIABILITY

There are various consequences for lack of liability. The first is to encourage carelessness or negligent conduct. If the law fails to set out consequences or liability for the negligent conduct of Board members, such persons or bodies may not exercise reasonable care and diligence when administering the fidelity fund. People are prone to act in a proper manner only when they know that they may run the risk of being held accountable for any negligent conduct, and when there is an express law prescribing liability.

Secondly, lack of liability may result in poor investment decisions. Unless the responsible persons or bodies understand that they act in a fiduciary capacity, they will constantly make poor investment decisions. A cautious person is more likely to avoid making bad investment decisions, and one can only be cautious if there is a likelihood of the imposition of liability for failure to act cautiously.

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63 S 65 of the LPA and s 75 of the Legal Practice Act.

Thirdly, a lack of liability may result in failed investments. The final result of a lack of liability is failed investment. A seemingly innocent negligent act may have negative consequences on one's investments. Thus, there is a chain starting with carelessness or negligent conduct, followed by bad investment decisions, and ending with failed investments.

7 THE WAY FORWARD

The following steps must be followed in aiming to limit possible investment failure of fidelity fund investments:

1. Clarify that members of the Legal Practitioners' Fidelity Fund act in a fiduciary capacity and should act in the best interests of the Fund when performing any related duties (as in the Companies Act).
2. Set out the procedure to be followed for investing money from the fund. This must be done either through a legislative amendment and/or amending the Rules of the Law Society of Namibia. A set procedure will provide proper guidance with regard to handling fidelity fund investments. This will limit the possibility of failed investments.
3. Clearly define consequences for fidelity fund investment failures. Currently, neither the LPA nor the Rules of the Law Society set out any consequences for failed investments or negligence in dealing with fidelity fund investments. Thus, there is a need to amend the law and or the Rules to make provision for possible liability for Board members for negligent and/or careless conduct in dealing with fidelity fund investments. Only when there are prescribed consequences for negligent dealings will those vested with the power to make fidelity fund investments act in a responsible and proper manner.
4. Amend legislation and/or the rules to ensure that requirements for eligibility for serving on the Legal Practitioners' Fidelity Fund Board of Control are clearly spelled out. One such requirement must be a sound background in finance and the operation of financial markets law. South Africa's approach is worth emulating. It is crucial that members of the Board have a sound understanding of financial risk management. This will limit the risk of failed investments and ensure that the fidelity fund investments yield favourable results.
5. Ensure that amendments to the existing law (the Act and the Rules) are in line with company law and financial markets law to safeguard investments and ensure that careless dealings are punishable in terms of the law.

8 CONCLUSION

It is not debatable that Namibian legislation (the LPA) makes provision for investments by the Fidelity Fund. The provisions of this Act were properly canvassed, and it was found that the law does not set out any procedure to be followed for making fidelity fund investments. It was also found that the

legislation does not provide for members of the Board to be held liable for failed investments.

A thorough understanding of potential opportunities is necessary for an investor to make a successful investment selection, and hasty decisions should not be made. A poor investment choice could potentially result in a fund's collapse.[64] To optimise the appraisal of opportunities, the fundamental concepts behind investment decisions should be understood. When evaluating an investment, the indicators should be picked taking into consideration the project's unique characteristics and the decision-maker's knowledge.[65] Understanding investment language and dealing with funds in an honest and meticulous manner is more likely to guarantee good investment returns. Thus, whoever is serving as a member of the Board must have a good understanding of the principles of investments, and the law must expressly set out liability for careless or otherwise negligent conduct that may lead to failed investments.

64 Virlicsa "Investment Decision Making and Risk" 2013 6 *Procedia Economics and Finance* 170.

65 *Ibid*.

CHERISHING CUSTOMARY LAW: THE DISPARITY BETWEEN LEGISLATIVE AND JUDICIAL INTERPRETATION OF CUSTOMARY MARRIAGES IN SOUTH AFRICA

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SUMMARY

The constitutional recognition of customary law in South Africa has opened a new conduit for the development of customary law. With the courts taking the lead in addressing customary law disputes, the interpretation of customary law has come with setbacks. This article argues that the development and reform strides made by the judicial and legislative institutions appear of modest benefit to the people they strive to protect, advance and regulate, especially during interpretation and reform. The article seeks to confront the judicial interpretation of customary law based on the recent High Court case of *Sengadi v Tsambo.* The court had to consider an application for four types of relief. The court deviated from the factual nature of customary law in relation to a spouse's burial rights when it concluded that a valid customary marriage and all the validity requirements outlined under the Recognition of Customary Marriages Act had been met. Indicating the factuality of customary law when it relates to marriage and its link to burial rights, "that a male descendant of the household belongs to his paternal family, his place and existence being one with his paternal roots. His right to belong to his paternal family is absolute and customary." The above ignored, yet crucial cultural practice informs the interpretation of customary law under the constitutional guise. The Constitution affirms the right to practise and observe one's culture. In *Sengadi v Tsambo*, to determine the burial rights of a spouse, the court employed a narrow and strict interpretation instead of interpreting the cultural practice of bridal integration against a holistic customary background. The article advocates for courts to adopt purposive interpretational approaches in reforming customary law. It emphasises for the consideration of the interpretational rules and theoretical frameworks proposed by legal scholars to reflect the factual nature of customary law. As the positivist approach to customary law

undermines the pluralistic nature of the South African legal system. The article pioneers for the recognition of living customary law as holistic, and an integral normative system of indigenous people of South Africa, while taking into account the history and context of this legal system.

1 INTRODUCTION

The Constitution of the Republic of South Africa, 1996 (Constitution) prides itself on the recognition of indigenous languages and the right of choice of religion and culture.[1] Section 31 of the Constitution recognises the existence of culture and its practices. It is commendable that the drafters of the Constitution saw it imperative to recognise the culture and the customary practices of the marginalised ethnic South African, whose cultures were overlooked during the colonial struggle and the apartheid era.[2]. Despite the positive constitutional advancements in customary law, there remain several concerns regarding its interpretation and application by the judiciary. This tension arises from the clash between the Constitution and customary law, which often cannot be fully reconciled, leading to dissension.[3] The judicial interpretation of living customary law tends to favour a positivist approach, emphasising legislation over normative stances based on people's daily experiences. In essence, while customary law has evolved and adapted to current circumstances, challenges persist in harmonising it with constitutional principles. The courts grapple with striking a balance between tradition and modernity, seeking to ensure justice and fairness for all.[4] The judiciary's disposition to apply common-law principles and remedies during customary law disputes creates the impression that this is the standard approach to solve customary law disputes;[5] however, such remedies never address the normative position of living customary law.[6] The main argument in the article asserts that the judiciary overlooks the nature and deep-rooted meaning of customary practices when interpreting customary law. Based on the above points, it is evident that parties approached the court and claimed that they have subscribed to customary law and its practices, when in fact they have only managed to perform partial customary ceremonies pursuant to a valid conclusion of a customary marriage.[7] Parties fail to distinguish between a practice of convenience and actual living customary law, as observed by the relevant tribe(s). The customary law normative systems and

1 The right to language and to belong to a linguistic community is protected and recognised under ss 6 and 30; and culture, religion and belief systems are protected and recognised under ss 15 and 31 of the Constitution.

2 See s 39(3) of the Constitution.

3 Ozoemena "Living Customary Law: A Truly Transformative Tool" 2014 Constitutional Court Review 6 152.

4 See the decision of *Bhe v Khayelitsha Magistrate* 2005 (1) SA 580 (CC), where the court replaced the rule of male primogeniture with a common-law statute – the Intestate Succession Act 81 of 1987.

5 This was the stance in *MM v MN* (29241/09) [2010] ZAGPPHC 24 (24 March 2010) where the courts claimed that the first respondent to remedy her current void marriage by claiming damages from the deceased estate of the spouse who deceived her into a marriage without complying with the s 7(6) of the Recognition of Customary Marriages Act 120 of 1998.

6 See the decision of *Bhe v Khayelitsha Magistrate supra*.

7 *Maisela v Kgolane* NO 2000 (2) SA 370 (T) par 1–8.

practices are caught between an appreciation and observance of customary practices, and piecemeal application of customary practices pursuant to the conclusion of a customary marriage.[8] Many parties approaching the courts have performed partial customary ceremonies and rites, and thereafter live in a common household as though they are living as husband and wife.[9] This state of affairs has been observed in the recent case of *Sengadi v Tsambo*.[10] The judgment affects not only the parties' rights and status in terms of a customary marriage, but also distorts the process, which goes beyond marriage and affects also the familial rights of the parties. In the above matter, the court overlooked the nature and observance of the marriage ceremonies. Furthermore, the court interpreted and reasoned that customary practices have evolved;[11] and that such practices have succumbed to the effects of globalisation, a change in lifestyles, and individuals changing how they observe and subscribe to customary law.[12] In those terms, there is no strict line that differentiates customary marriage ceremonies that have been fully observed in full from incomplete ceremonies in which parties have waived the inherent right to observe these ceremonies.

Despite legislative attempts to codify customary law or tend to its legal protection and recognition,[13] the legislature and courts, as discussed above, have not captured the essence of customary law. This article seeks to investigate the current interpretation and application of customary law in the guise of customary practices concerning the celebration and conclusion of a valid customary marriage. The current legislative stance on customary marriages, as regulated by the Recognition of Customary Marriages Act (RCMA)[14] and its amendments, manages to offer guidance on the valid conclusion of a customary marriage.[15] However, courts are still inclined to overlook customary practices during the legal interpretation of customary law. As highlighted under section 3(1)(*b*) of the RCMA, "customary marriages must be entered into, negotiated, and celebrated according to customary law". There are several crucial, necessary and required rituals to be observed during the traditional celebration of customary marriages, but the courts have in many cases overlooked these to offer a resolution to discontented parties.[16] The judicial approach creates disharmony and distorts the nature of customary law practices.[17] The article focuses attention

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8 See s 3(1) of the Recognition of Customary Marriages Act 120 of 1998.

9 This has been evident in major cases such as *Bhe v Khayelitsha Magistrate supra*; *Sengadi v Tsambo* 2019 (4) SA 50 (GJ); *Mabuza v Mbatha* 2003 (4) SA 218 (C).

10 *Supra*.

11 *Mabuza v Mbatha supra* par 13.

12 *Ibid*.

13 See the Recognition of Customary Marriages Act 120 of 1998.

14 120 of 1998.

15 S 3(1) of the RCMA.

16 See *Moropane v Southon* [2014] JOL 32177 (SCA); *Maisela v Kgolane* NO *supra*; *Mabuza v Mbatha supra* and *Bhe v Khayelitsha Magistrate supra* as reference.

17 According to s 1 of the RCMA, customary law is defined as, "custom and usages traditionally observed among the indigenous African peoples of South Africa and which forms part of their culture". Note that this translates to Black South Africans. This is elucidated in s 1 of the Law of Evidence Amendment Act 45 of 1988, which explicitly states that "'indigenous law' means the law or custom as applied by the Black clans in the Republic". Note that this stance may be discriminatory in light of the current South African dispensation and the fact that the Constitution recognises a plural normative legal order.

and academic interpretation on the *Sengadi v Tsambo* and *Tsambo v Sengadi* case insofar as what the customary law repercussions are for those who still subscribe to customary law.[18] In addition, the article looks into the pragmatic customary practices and ceremonies that are required, and which must be fulfilled and observed during the marital procession, and which embed the correct reflection of the nature and form of customary law. Concluding remarks and recommendations are made.

2 CASE ANALYSIS

2 1 Facts of the case

In the matter of *Sengadi v Tsambo,*[19] the court had to consider several legal aspects concerning customary practices relating to the parties' marriage and burial rites. The applicant contended that she was the customary wife of the deceased, and brought an urgent application to court seeking four types of relief against the respondent, who was the father of the deceased.[20] The deceased in question was known as HHP or Jabba, formally named, Jabulani Tsambo. The applicant sought a declaration from the court that she was the customary wife of the deceased, and an interdict prohibiting the respondent from burying the deceased at his paternal home; as well as a declaration to allow her to bury the deceased at their matrimonial home, and a spoliation order against the respondent to return access and use of the matrimonial home and effects.[21] The applicant claimed that she married the deceased according to customary rites and that their customary marriage was valid regardless of whether *lobola* was tendered in full. She claimed that the handing over of the bride celebration was conducted, that the final ritual of killing the beast was observed, and that they adhered to section 3(1)(*b*) of the RCMA.[22] The applicant contended that the customary celebration had been observed after the conclusion of the *lobola* negotiations (also known as bride wealth), in which the husband's family tendered two-thirds of the payment as per negotiations.[23] To this effect, the RCMA does not prescribe that *lobola* is a strict or a validity requirement for a valid conclusion of a marriage. In the case of *Moropane v Southon*,[24] it was held that full payment of *lobolo* is a strict requirement for the valid conclusion of a customary marriage. However, this was overturned in the case of *Bhe v Khayelitsha Magistrate*.[25]

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18 See both proceeding judgments, *Sengadi v Tsambo* 2019 (4) SA 50 (GJ) *and Tsambo v Sengadi* [2020] ZASCA 46.

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

20 *Sengadi v Tsambo supra* par 1.

21 *Ibid*.

22 *Sengadi v Tsambo supra* par 4–16.

23 *Sengadi v Tsambo supra* par 5.

24 *Supra* par 41–42.

25 *Supra*. Originally, *lobola* was a payment in consideration of marriage. However, traditionally, *lobolo* is a payment to acknowledge the integration of two families when asking the hand in marriage of a daughter from another family. *Lobola* harbours more significant meaning and its ethos is discussed below. *Bhe and Others v Khayelitsha Magistrate and* Others 2005 (1) SA 580 (CC).

Although the Tsambo family failed to observe the initial step of concluding the negotiation procedures, they tendered to celebrate and welcome the applicant into the matrimonial household and family.[26] They observed the celebration of welcoming the bride regardless, and this led to the contention that the deceased and the applicant entered into a valid customary marriage, even if only a portion of the matrimonial rituals and procedures had been observed, and others were overlooked. The contention raised by the applicant, that she was the customary wife of the deceased, was strengthened by the conduct of the Tsambo family in allowing her and the deceased to reside or cohabitate in the matrimonial home bought by the deceased.[27] The deceased and the applicant faced matrimonial issues, mainly owing to the deceased's infidelity and drug abuse, which led the applicant to leave the matrimonial home.[28] The tumultuous issues faced by the deceased, coupled with untreated depression, led the deceased to commit suicide.

During the funeral arrangements, the applicant returned to the matrimonial home, but the deceased's father denied her entry.[29] The respondent refused to accept the applicant as the customary wife of the deceased, and claimed that customary rites and rituals were not strictly and customarily observed, and thus she could not be accepted as Tsambo's bride.[30]

2 2 Decision of the court *a quo*

According to the RCMA, a valid customary marriage needs to meet the requirements provisioned under section 3 of the Act, which states:

> "For a customary marriage entered into after the commencement of this Act to be valid – (*a*) the prospective spouses must both be above the age of 18 years; and must both consent to be married to each other under customary law; and (*b*) the marriage must be negotiated and entered into or celebrated by customary law."

The High Court accepted that the initial intention by the Tsambo family was to accept the applicant as married to the deceased, and ascertained this fact in the partial celebration. It is clear that the court wanted to provide relief to the applicant, but the court ignored the symbolic feature and link between marriage and burial rites. Although the court focused on the aspect of the

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26 *Sengadi v Tsambo supra* par 6–9.

27 *Sengadi v Tsambo supra* par 9.

28 *Sengadi v Tsambo supra* par 10–11. Note that under the common-law lens, this will be viewed as wilful abandonment of the matrimonial home, and this would serve as a ground for divorce on the basis of the irretrievable breakdown of the marriage. S 4(2)(*a*) of the Divorce Act 70 of 1979 states that, subject to the provisions of subsection (1), and without excluding any facts or circumstances which may be indicative of the irretrievable break-down of a marriage, the court may accept evidence – (a) that the parties have not lived together as husband and wife for a continuous period of at least one year immediately prior to the date of the institution of the divorce action. Also, in respect to customary practices and beliefs, a wilful abandonment of the matrimonial home is a ground for a customary divorce. The above practice holds that a wife who abandons the matrimonial household is regarded to have consented to a customary divorce. Therefore, the spouse may approach the court and adduce evidence to that effect for the court to order a decree of divorce.

29 *Sengadi v Tsambo supra* par 12.

30 *Sengadi v Tsambo supra* par 14–16.

validity of the customary marriage, the matter of burial rites should have been addressed in tandem. The aspects pertaining to burial rights are linked not to the marriage but to the status that exists under customary law, which is "the right to belong to one's paternal family even after death".[31] In relation to section 3(1)(*b*) of the RCMA, the court elected to interpret the customary law of bridal integration using a liberal and idealistic approach. There is no denying that not all customary law and practices are made official through codification, since there are no uniform standards in customary law owing to the flexibility of the legal system.[32] The court's interpretative approach sought to dwell only on the aspect of marriage although the reason for the dispute related to burial rites, albeit informed by the observance of matrimonial ceremonies related to the valid conclusion of a customary marriage. The court proceeded to make a close analysis of the respondent's contention that the ceremony of bridal integration was not observed. Known in Tswana culture as "*go goroswa*", this is an official and sacrosanct customary practice that cannot be taken out of the equation through the negligence or unwillingness of the parties involved. Since the court chose to interpret the practice liberally, not much could be contested. The court asserted:

> "Customary law is living law because its practices, customs and usages have evolved over the centuries. The handing over custom as practised in the pre-colonial era has also evolved and adapted to the changed socio-economic and cultural norms practised in modern times."[33]

The court gave socio-economic justification for the family's ignorance of the initial requirement to observe bridal integration practice. Casting customs away for convenience and removing the due process is ignorant and synthesised as pleasure seeking. The initial manner in which the respondent's family carried themselves was in response to a "need for convenience", but means omitting long-observed traditions and customary practices inherent to a matrimonial ceremony. It is well noted that African customary practice embraces a consonant belief system. The interrelationship between culture and spirit is entwined in its nature and form. Every customary practice is imbued with what Asian communities call yin and yang (connecting opposite sides of darkness and light in order to obtain a balance); the harmony of observing cultural practices brings about spiritual harmony and existence. Simply removing a practice because it is time-consuming or aligns with the current *bourgeois* lifestyle that deems it to have evolved disturbs the harmony of the cultural practice. The court stood firm and further held:

> "The existential reality that customary law is dynamic and adaptive finds resonance … the notion that physical (virilocal) handing over of the bride to the bridegroom's family being the be-all and end-all of customary marriages is

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31 This custom is elucidated below. Also, see deposed affidavits by the Fanti family regarding oral evidence of the living customary law they practice under Xhosa tribe. *Fanti v Boto* 2008 (5) SA 405 (C) par 2–5.

32 Bennett "Customary Criminal Law in the South African Legal System" in Fenrich, Galizzi and Higgins (ed) *The Future of African Customary Law* (2012) 376.

33 *Sengadi v Tsambo supra* par 20.

> not correct, because the handing over of the [bride] can also take a symbolic or uxorilocal form."[34]

The court's stance and reasoning seek to cast out any customary practice that seems not to fit in with modern ideals or that does not make literal sense. This mentality and legal interpretation forgo the essential element of customary interpretation and the fundamental customary practices that are observed, and that should be observed to maintain the cultural form and nature of customary law, especially when it comes to customary practices informed by a spiritual connection. To maintain its reasoning, the court relaxed the customary practice of bridal integration, using a flexible approach to the requirement in section 3(1)(*b*) of the RCMA regarding observing cultural ceremonies, and found that according to the modern requirement, the parties could be declared validly married.[35] The court confirmed its decision that:

> "[t]he customary law custom of handing over the bride to the bridegroom's family as an essential pre-requisite for the lawful validation and the lawful existence of a customary law marriage declared to be not a lawful requirement for the existence of a customary law marriage when section 3(1) of the Recognition Act have been complied with."[36]

The court's *ratio decidendi* undervalues the long-standing and purposeful customary practice of "*go goroswa*" as a prerequisite for the valid conclusion of a customary marriage. The court's pragmatic approach to interpreting customary law, in condemning the necessary practice of *go goroswa*, falls short of the required intentional, holistic, and purposeful interpretation of the customary practices as observed. Furthermore, the court elucidated its purview of the initial practice of *go goroswa* by stating:

> "The customary law custom of handing over the bride is self-evidently discriminatory on the ground of gender and equality as between the prospective wife and the prospective husband. Because only women, after consenting to enter a customary law marriage are subject to this unequal treatment by the custom of handing over which overrides the statutory requirements of section 3(1) of the Recognition Act as the essential requirements for a valid customary marriage."[37]

This belief that handing over the bride is gender prescriptive because it seeks to undermine women when they need to be handed over is misguided and misdirected. Handing over the bride is a prerequisite that must be fulfilled owing to the nature and the embedded meaning of customary marriage. It signifies the acceptance of both physical and spiritual integration of the wife into the husband's family.[38] The judge crystallised his position on bridal integration by stating:

> "In my considered view the requirement of handing over the bride to bridegroom's family does not pass Constitutional muster as it is not in

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34 *Sengadi v Tsambo supra* par 22.

35 *Sengadi v Tsambo supra* par 36–38.

36 *Sengadi v Tsambo supra* par 42.

37 *Sengadi v Tsambo supra* par 36.

38 See *Fanti v Boto* 2008 (5) SA 405 (C) judgment on this; and *Mabuza v Mbatha* 2003 (4) SA 218 (C) par 223.

> accordance with the Bill of Rights and it does not promote the spirit, purport and objects of equality and dignity clauses in the Constitution because this handing over custom as a determinative prerequisite for the existence of a customary law marriage unfairly and unjustly discriminates against the gender of the applicant as a woman and denies her constitutional right of equality and dignity."[39]

The abandonment of a longstanding and obligatory tradition in favour of modern convenience within the institution of marriage also undermines the constitutionally protected right to freely practice and observe one's cultural heritage.[40] The court's interpretation of customary marriage, while narrow and individualised, stands in contrast to the prevailing view among the advocates of customary law, who recognise these practices as communal, traditional, and imbued with spiritual significance.[41]

2 3 Ambiguity in interpretation: the Supreme Court of Appeal (SCA)

The respondent appealed to the Supreme Court of Appeal (SCA) to declare the customary marriage between the applicant and the deceased invalid for not complying with section 3(1)(*b*) of the RCMA. The SCA confirmed the High Court's decision. On the question of the validity of the marriage between the deceased and the applicant, there should have been reference to experts' evidence to confirm the normative stance regarding customary law in terms of marriage and burial rights. The court *a quo* allowed the respondent to bury the deceased solely based on economic convenience and the fact that preparations were already underway at the deceased's hometown of Mahikeng.[42] However, and according to the nature of customary law as discussed, a deceased male has to be buried near his family household. This custom is still observed by indigenous communities of South Africa.[43] Given the court's departure from looking at the purpose, nature and form of customary marriages, the court's interpretation fell short of ascertaining this important aspect when interpreting living customary law, which is described as the law that is applied and practised by the indigenous communities of South Africa.[44] It is to be noted further that the interpretation clause provides both narrow and broad powers to the judiciary.[45] Before the above statement is alluded to, the interpretation clause as provisioned under section 39 of the Constitution states that when any court or legal forum interprets the rights under the Bill of Rights in the Constitution they must promote the values that underlie an open and democratic society based on

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39 *Sengadi v Tsambo supra* par 37.

40 S 31 of the Constitution of the Republic of South Africa, 1996.

41 *Bhe v Khayelitsha Magistrate* 2005 (1) SA 580 (CC) par 45.

42 *Sengadi v Tsambo supra* par 40–41.

43 *Finlay v Kutoane* 1993 (4) SA 675 (W) 679I–680A.

44 See argument made by Himonga "The Living Customary Law in African Legal Systems: Where to Now?" in Fenrich, Galizz and Higgins (ed) *The Future of African Customary Law* 31–57.

45 The court has narrow powers based on interpreting customary law under the constitutional guise, and broader power to take cognisance of living customary law when it interprets customary law or any other law.

human dignity, equality and freedom;[46] and when interpreting any legislation, and when developing the common law or customary law, every court, tribunal, or forum must promote the spirit, purport and objects of the Bill of Rights.[47] This shows that the Constitution gives due recognition to customary law and it further guides the judiciary to interpret customary law in light of the constitutional provisions that seek to protect vulnerable and marginalised individuals, being women and children. However, the pursuit of substantive equality within the Constitution, particularly in the context of customary law disputes, has been distorted, resulting in the emergence of a "customary monster" that disproportionately marginalises women and children.[48] Section 39(3) of the Constitution states:

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

The expansive authority vested in section 39 grants the courts considerable discretion to adapt customary law, thereby facilitating its assimilation and evolution within the existing legal framework.[49] The judiciary may take cognisance of the existence of unofficial and official legal systems, being indicative of the appreciation of deep legal pluralism, which speaks to living customary law.[50] The constitutional viewpoint recognising non-state law normative systems is indicative of the progressive nature of our constitutional dispensation. Insistence on binding customary law to the Constitution and the Bill of Rights tends to move away from a holistic approach to interpreting customary law, and creates a distorted view of customary law. It suggests the only view is the Eurocentric position in which the Constitution is fully entrenched. During the drafting of the South African Constitution, the basis of the principles and values adopted and embedded were sourced from Western laws and principles.[51] This obscures the view of customary law as a specific and purposeful law to which many indigenous communities subscribe. The nature of customary law is described by Ndulo as follows:

> "The law before colonialization in most African states was essentially customary in character, having its bases in the practices and customs of the people. The great majority of people conducted their personal activities in accordance with and subject to customary law. 'African customary law' does not indicate that there is a single uniform set of customs prevailing in any given country."[52]

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46 Ss 39(1) of the Constitution.

47 Ss 39(2) of the Constitution.

48 See *Bhe v Khayelitsha Magistrate supra*.

49 *Ibid*.

50 Rautenbach and Bekker *Introduction to Legal Pluralism in South Africa* (2014) ch 1.

51 The major source during the drafting of the Constitution of the Republic of South Africa was the Netherlands Constitution. See Discussion Document "Drafting of the Constitution: Topics, Detail, Language" (1995) https://www.justice.gov.za/legislation/constitution/history/LEGAL/CP108055.PDF (accessed 2021-09-24).

52 Ndulo "African Customary Law, Customs, and Women's Rights" 2011 *Cornell Law Faculty Publications* Paper 187 http://scholarship.law.cornell.edu/facpub/187 (accessed 2021-09-19) 88.

The courts are allowed to develop customary law, and are imbued with such powers, subject to the Constitution and the law, which they must apply without fear, favour, or prejudice.[53] This is historically significant because, during the apartheid regime, courts did not have the powers to develop non-state law even when fairness would dictate otherwise.[54] Nevertheless, the Constitution of South Africa in its Preamble acknowledges:

> "As the people of South Africa, we recognise the injustices of our past and believe that South Africa belongs to all who live in it, united in our diversity. Human dignity, the achievement of equality and the advancement of human rights and freedoms form part of the founding provisions of our Constitution."[55]

Significantly, this places on the courts the burden of ascertaining living customary law, as it is still an important source of law in South Africa, and is still observed by indigenous communities across the country. According to the practice of *go goroswa,* the two families have to agree on formalities and the date on which the bride will be "handed over" to the bridegroom's family.[56] Upon arrival of the bride and the conclusion of the ceremonial processions, a lamb or goat is slaughtered, and its bile is used to cleanse the couple.[57] This customary observance signifies the union of the couple and the joining of the two families.[58] The ritual is followed by a celebration during which the slaughtered lamb or goat is consumed.[59] This is a precondition for the valid conclusion of a customary marriage, but the court nevertheless overlooked this important ceremonial procession. Furthermore, it could be alluded that the above evidence presented in court *a quo* further ascertains living customary law as required under s 1(1) of the Law of Evidence Amendment Act.[60] It is argued the court's interpretation is illogical; it adopted a constitutional interpretation to suit the modern lifestyle and not customary practice as observed by the relevant indigenous clan. The SCA took an elaborate stance to diminish the normative nature of customary law in relation specifically to customary marriages. The court maintained:

> "[b]ased on the evidence, tendered by the applicant and her witnesses, it is symptomatic of the fact that the aunts tendered to dress her up in a traditional attire and welcome her into the Tsambo family was not an anticipation of a valid customary marriage and mere elucidations."[61]

The court was inclined to recognise the aunts' sentiments as pointing to a valid conclusion of customary marriage, and thus a tacit waiver of the

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53 S 165 of the Constitution.

54 Rautenbach "Deep Legal Pluralism in South Africa: Judicial Accommodation of Non-State Law in South Africa" 2010 60 *Journal of Legal Pluralism and Unofficial Law* 152.

55 Preamble of the Constitution.

56 *Sengadi v Tsambo supra* par 10.

57 *Ibid*.

58 *Ibid.*

59 *Tsambo v Sengadi supra* par 26.

60 45 of 1988. Which states that any court may take judicial notice of the law of a foreign state and of indigenous law in so far as such law can be ascertained readily and with sufficient certainty: Provided that indigenous law shall not be opposed to the principles of public policy and natural justice: Provided further that it shall not be lawful for any court to declare that the custom of *lobola* or *bogadi* or other similar custom is repugnant to such principles.

61 *Tsambo v Sengadi supra* par 25. (sic) authors emphasis.

required formalities and ceremonial prescriptions of *go goroswa*.[62] The court's stance was affirmed by the earlier case of *Mbungela v Mkabi*,[63] where the court succinctly held:

> "The importance of the observance of traditional customs and usages that constitute and define the provenance of African culture cannot be understated. Neither can the value of the custom of bridal transfer be denied. But it must also be recognised that an inflexible rule that there is no valid customary marriage if just this one ritual has not been observed, even if the other requirements of section 3(1) of the Act, especially spousal consent, have been met, in circumstances such as the present ones, could yield untenable results."[64]

The court's final stance seems to justify the parties' actions as a valid customary practice as observed by the community and which has evolved.[65] However, allowing parties, at their convenience, to elect to forgo a necessary and required cultural practice based deviates greatly from the normative nature of custom. By definition, "custom" refers to what people practise communally and in uniformity; it is the actual observance of practices that form part of the identity of each group, community, or clan.[66] While customary law prescribes what one ought to do, custom regulates what people do.[67] Custom pursuant to customary practices does not emphasise on the individuality or personal choices of the members of the community or tribe, but the court seemed to prefer a Eurocentric approach to customary law by emphasising on self-reliant people which is out of touch and hypocritical toward customary law and its innate values, including communities who still hold their customs close.

3 TRADITIONAL INTERPRETATION

The conclusion drawn by the High Court and the SCA raises an important issue that needs to be considered regarding the interpretation of customary law. In customary law, it is imperative to view customs holistically in light of fairness, observance and appreciation of the relevant practices which are not uniform and differ from tribe to tribe.[68] Regarding the interpretation of customary practices pursuant to the conclusion of a valid customary marriage, courts can only make decisions based on the facts because the RCMA does not specify the requirements for the celebration of a customary marriage.[69] In this way, the legislature purposefully embraces a living customary law. In tandem, the requirement relating to a ceremonial celebration is fulfilled when customary law celebrations are generally in

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62 *Ibid.*

63 2020 (1) SA 41 (SCA).

64 *Mbungela v Mkabi supra* par 27.

65 *Ibid.*

66 Juma "From 'Repugnancy' to 'Bill of Rights': African Customary Law in Lesotho and South Africa" 2007 1 *Speculum Juris* 92.

67 See Posner "A Theory of Primitive Society, With Special Reference to Primitive Law" 1980 *Journal of Law & Economics* 1–5.

68 *MM v MN* 2013 (4) SA 415 (CC) par 48–51.

69 *Ngwenyama v Mayelane* 2012 (4) SA 527 (SCA), and emphasised in *Tsambo v Sengadi supra* par 15.

accordance with the customs applicable in those particular circumstances.[70] However, once the three requirements have been fulfilled, a customary marriage, whether monogamous or polygamous, comes into existence.[71] It is an embedded law and customary practice that places significant appreciation on communal integration and relationships in indigenous communities of South Africa. The indigenous people of South Africa hold close to the values of communion and exclude the notion that "a man is an island".[72] The structure of individualism and exclusivity does not exist under the customary guise. The belief that a man belongs to his family even in matrimonial communion is an embedded feature that cannot be replaced with modern and Western notions and ideas.[73] The initial rule of handing a bride over is both symbolic and spiritual; it is embedded in the prescripts relating to a family unit created through affinity, and exists to ensure that couples do not deal with issues such as death aside from the family unit, which is defined by the paternal connection of male descent. Therefore, one cannot enter into a customary marriage without consideration of the custom that exists in respect of marriage, and which is sustained through mutual consent and acceptance of the wives into the husband's family, and is connected though marital spirituality to the husband's paternal side.[74] The meaning that is attached to this significant practice, even when distorted and abandoned by selected modern observers in order to speed up marital processes, is what needs legislative consideration and a novel judicial perspective. Handing over of the bride is part of a matrimonial procession, in which is also held firm the notion that a married male descendant belongs to his paternal household. This is not related to gender discrimination or male primogeniture as the High Court in *Sengadi v Tsambo* interpreted it to be.[75] The concept under consideration acknowledges the dynamic and shifting roles of a husband, particularly in the spiritual dimension of his being. That means he moves from being an unmarried man to a husband and thus affirms himself as the protector and guide in matters affecting his family.[76] According to traditional and customary practices, the husband does not change his paternal surname (or maternal name, depending on whether his parents are married or not), and as such, the male descendant will remain

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70 Ss 3(1)(*b*) of the RCMA.

71 Highlighted in *Tsambo v Sengadi supra* par 15.

72 Discussed in Himonga in Fenrich et al *The Future of African Customary Law* 45.

73 In the context of this article the West means a conceptual space, and it is trite to note that decolonial scholar refers to the West as conceptual space marked by colonial-imperial logics and predations. See Himonga, Nhlapo, Badejogbin, Luwaya, Hutchison, Maithufi, Weeks, Mofokeng, Ndima and Osman *African Customary Law in South Africa: Post-Apartheid and Living Law Perspectives* 2ed (2023) 10.

74 Mtuze *Hidden Presences in the Spirituality of the amaXhosa of the Eastern Cape and the Impact of Christianity on Them* (published master's thesis, Rhodes University) 2000 20.

75 In *Bhe v Khayelitsha Magistrate supra*, the court affirmed that the "[male primogeniture] … general rule is that only a male who is related to the deceased qualifies as intestate heir. Women do not participate in the intestate succession of deceased estates. In a monogamous family, the eldest son of the family head is his heir. If the deceased is not survived by any male descendants, his father succeeds him. If his father also does not survive him, an heir is sought among the father's male descendants related to him through the male line."

76 See Himonga *et al African Customary Law in South Africa: Post-Apartheid and Living Law Perspectives* 281–285 on the discussion of this changed status *quo*.

within his paternal household even after marriage.[77] In contrast, a female descendant is considered to belong to her husband's paternal household.[78] In African customary law, there is a notion and belief that a female descendant does not hold her paternal or birth surname long,[79] under the assumption that female descendants are bound to be married; owing to the nature of marital status, she is physically and traditionally handed over to her husband's paternal household. (Note that maternal descendants or descendants of unmarried mothers are excluded in the above phrasing, as the rules, practices and processes above only apply when one is married). Such interpretations require a purposeful and holistic consideration of customary practices which enlightens and commends living customary law and affording it its constitutional status.[80] The nature and form of customary law emanate from raw and validified practices that transcend human form and knowledge.[81] There is an element of pseudo-religious and spiritual existence in every ritual and ceremony, and this is evident in all customary practices.[82] Indigenous people of South Africa have over thousands of years closely held onto their belief in an ancestral system.[83] This was so before the introduction of the Bible during colonisation.[84] Currently, most African indigenous communities hold to their belief in a three-tier system that is based on "God", followed by "ancestry" and then "man".[85] Every ceremony celebrated – whether the birth of a child; their progression in life; their entry into marriage; or even after death – their existence of within their immediate context never ceases, and is linked to their spiritual belief. Therefore, when the court in *Sengadi v Tsambo* was faced with the two important and spiritually connected rites of the parties (one of marriage, and one of death, which led to the question of burial rites by the disputing parties), the court failed to honour these beliefs even when confronted with evidence from the relevant witnesses.[86] It is paramount to emphasise that the practice of the handing-over of the bride/*go goroswa* has nothing to do with discrimination.[87] It is based on the wife leaving her home and establishing a new family unit and being integrated within her husband's family. The court in the *Sengadi v Tsambo* case sought to establish that, and pursuant to the marriage between the applicant and the deceased, the applicant (wife) was entitled to bury the deceased.[88] The court in *Sengadi* deviates from the nature and accuracy of customary practices concerning marriage. The courts placed an individualistic filter on a normative system, which goes beyond custom

77 *Ibid*.
78 Mentioned and affirmed in *Moropane v Southon* [2014] ZASCA 76 par 40.
79 Also noted in *Sengadi v Tsambo supra*.
80 Customary law is afforded the same status as common law. See s 39(2) and (3) of the Constitution.
81 Bradley *The Celtic Way* (1993) 5.
82 Mtuze *Hidden Presences in the Spirituality of the amaXhosa* 20.
83 Tamanaha "Legal Pluralism Across the Global South: Colonial Origins and Contemporary Consequences" 2021 *Journal of Legal Pluralism* 185.
84 Mtuze *Hidden Presences in the Spirituality of the amaXhosa* 22.
85 *Ibid*.
86 *Sengadi v Tsambo supra* par 3, 11, 12, and 40–42.
87 *Sengadi v Tsambo supra* par 40.
88 Said with conviction in *Tsambo v Sengadi supra* par 41.

however, treads on its spirituality. The concept of *ubuntu,*[89] and its interpretation, seeks to confirm the communal and close-knit connection of everyone to his or her *familiar* household. The court insisted that the principle of *ubuntu* in light of its emphasis on human dignity must be upheld to protect and ensure that rights under the Bill of Rights were not infringed upon owing to customary law practices that seek to exclude and marginalise women.[90] The robust approach undertaken by the court in *Sengadi* seems to overlook and undermine the nature and form of customary law in its essence and context. Furthermore, the supposed "practical common-sense approach" adopted by the courts deviates profoundly from how living customary law is applied by communities.[91] Depending on isolated practices and ceremonies relating to the marriage itself may as well be a new culture and not the one to be associated with the Tswana people, who may still argue that celebrations must be adhered to especially if they have imbued rituals.[92] It can be observed that parties are using financial incapability to justify random practices as customary law, and this is considered a far stretch from customary law. These sentiments were shared by the respondent in *Mabena v Letsoalo,*[93] concerning the observance of customary law in relation to marriages:

> "Their marriage was performed according to Pedi custom. However, she also said: 'My people and I, we do not engage in these customary traditions. We did it as it pleased my mother. It is how we do it at home, it is how we do it according to our custom'. When it was put to her in cross-examination that they did in several respects not properly follow the Pedi customs, she replied: 'Well, customs differ, it depends on an individual, how does he or she want to do it'."[94]

It can be adduced from such an approach that customary marriage is concluded by implication, even if the physical handing over of the bride does not happen. If that is the case, why then still classify this as being subject to customary law? Should it not rather be personal/private law? At their own convenience, parties elect to perform some rituals while waiving others. Parties do not understand, nor want to understand, the nature and form of customary law and its implication for their spirituality, and the courts are in support of such demeanour. To view customary law in light of individual circumstances, and to pedantically accept them as actual customs, eradicates the normative stance of customary law. Personal circumstance cannot be afforded the same status as culture. Pseudo-customary practices impact the development of customary law in its entirety.

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89 The principle expresses "[the] communality and the interdependence of the members of the community, a respect of life and human dignity, humaneness, social justice and fairness, and an emphasis on the reconciliation rather than confrontation". In *State v Makwanyane* 1995 (3) SA 391 (CC) par 223–225 237, 250, 263, 300, 308 and 309.

90 *Sengadi v Tsambo supra* par 42.

91 *Sengadi v Tsambo supra* par 41.

92 See evidence presented by Robert Tsambo in *Sengadi v Tsambo supra* par 13–6.

93 [1998] JOL 3523 (T).

94 *Mabena v Letsoalo supra* 4.

4 COURTS' EUROCENTRIC AND CENTRALIST INTERPRETATION OF CUSTOMARY LAW

Academic authors have always discussed the status of customary law under the constitutional dispensation, especially living customary law, which is uncodified and unofficial. Without a legislative remedy and a clear interpretative guide, it is left open to misconception and misunderstanding.[95] Customary law as law was historically marginalised, distorted and considered uncivil.[96] For as long as customary law has existed, the positivistic views consistently undertaken during customary law litigation has influenced most of the interpreters and developers of customary law in recent cases.[97] However, the law that could be readily ascertained was, over time, codified through rigorous legislative enactments and court's interpretation always formed a biased and misinterpreted perception. The perception was taught and was part of the educational background of every legal practitioner and graduate.[98] This has undermined the recognition of the existence of normative orders within a single state-law order – in South Africa, a constitutional order. Rautenbach affirms the assertions above that

> "[t]he judiciary, in particular the Constitutional Court, has been less passive in affording individuals belonging to religious or cultural groups protection where needed. The relevant cases deal mostly with legal pluralism issues in the context of human rights law and read like a jurisprudential chronicle reflecting the changing values of a diverse society on the move."[99]

Rautenbach tends to assert that the judiciary merely recognises the existence of customary law and religious law when suited and she confirms the aspect of accepting and acknowledging the deep legal pluralism of South Africa.[100] While not denying that courts are allowed to interpret unofficial law to offer a legal solution to parties in dispute, a misconceived or injudicious application and interpretation may not serve the initial purpose of a specific customary practice. It is therefore submitted that flexibility and consistency of the law during its development and interpretation must be balanced against the values underpinned by the Constitution.[101] This should not eradicate the nature of a particular practice even in the perception of constitutional advancement. The interpreters and developers of customary law must have an intentional, purposeful, and contextual approach to living customary law, especially if courts are faced with evolved practices.

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95 These arguments are adduced by socio-legal theory. They conclude, based on the idea that law can be found in tangible sources, that it is scientifically or logically verifiable. They reject morality and ethics as a source of law. They further argue that law is and should be the law of the State, uniform for all persons, exclusive of all other law, administered by a single set of institutions. See Rautenbach 2010 *Journal of Legal Pluralism and Unofficial Law* ch 1.

96 See Himonga and Nhlapo (eds) *African Customary Law in South Africa: Post Apartheid and Living Law Perspective* (2015) ch 1.

97 See the trend from major reported cases such as *Bhe v Khayelitsha Magistrate supra*; *Sengadi v Tsambo supra*; *Mabuza v Mbatha supra*; *Mabena v Letsoalo supra*.

98 Zgaga "Between Global Inequalities and World Ethics: Personal Reflections on Internationalisation of Higher Education Over the Past Seventy Years" in Van't Land *The Promise of Higher Education Essays in Honour of 70 Years of IAU* (2021) 50–51.

99 Rautenbach 2010 *Journal of Legal Pluralism and Unofficial Law* 147.

100 *Ibid*.

101 *Mayelane v Ngwenyama* 2013 (4) SA 415 (CC) par 24.

5 INTENTIONAL, PURPOSEFUL INTERPRETATION OF CUSTOMARY LAW

Requiring courts to have a purposeful and intentional approach is a daunting task, however, genuineness within the interpretational context could form a new approach within customary law. This approach eliminates malice or distortion, which is the view reiterated in the matter of *Nortje v Attorney-General*, the court adduced that

> "[i]t is no doubt correct to say that the constraints imposed by the traditional rules of interpreting statutes result in too restrictive and 'legalistic' an approach to legislation of this kind and will frustrate both contemporary and future Courts' efforts to accommodate changing social dynamics over the years."[102]

It has been suggested that disputes about customary marriages, contrary to what is enacted in legislation, should be determined under customary law.[103] Parties to a dispute concerning the observance of marital ceremonies in *lieu* of a valid conclusion of a customary marriage where it relates to the observance of customary practices need to be interpreted according to the actual practices of the related tribe.[104] Customary law requires that parties who are bound by it should celebrate it and live according to its tenets, especially if such practices are still uniform within the actual tribe, however, contrary practices may be agreed to be altered by mutual consent. A casual waiver of practices that should be observed, owing to the nature and grassroots connection to spirituality, should not be taken lightly by any legal forum or institution. It is adduced in *Mayelane v Ngwenyama*[105] that customary law is

> "a system of law prevailing in a community with its own norms and values, that was handed from generation to generation".[106]

The court further emphasised "understanding customary law in its own perspective and not in a Western or common-law lens, after all they are systems of law that are parallel to each other one is not above the other".[107] The court further developed an interpretative approach to understanding customary law during its application and interpretation that employs caution, patience, and respect.[108] It should be noted that living customary law or practices must conform to constitutional norms, principles, values and laid-down provisions. However, such an approach should not seek unreasonably or unconsciously to downplay or disregard the intricacies of customary law and its importance to those who subscribe to it. It has been suggested by Van der Westhuizen J, in the matter of *Shilubana v Nwamitwa*,[109] that

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102 See the discussion of *Nortje v Attorney-General* 1995 (2) SA 460 (C) 471.
103 *Mbungela v Mkabi supra* par 17.
104 *Mayelane v Ngwenyama supra* par 24.
105 *Ibid*.
106 *Mayelane v Ngwenyama supra* par 24.
107 *Mayelane v Ngwenyama supra* par 43.
108 *Mayelane v Ngwenyama supra* par 44.
109 2009 (2) SA 66 (CC) par 44–49.

> "[a] process of ascertaining customary law norms requires an analysis of several and imperative factors, namely, 'a consideration of the traditions of the community concerned; the right of communities that observe systems of customary law to develop their law; the need for flexibility and development must be balanced against the value of legal certainty, respect for vested rights and the protection of constitutional rights; and while the development of customary law by the courts is distinct from its development by a customary community, the courts, when engaged with the adjudication of a customary-law matter, must remain mindful of their obligations under section 39(2) of the Constitution to promote the spirit, purport and objects of the Bill of Rights, and not in piecemeal or singular viewpoint, but in a holistic and interactive viewpoint and investigation."[110]

The court in *Mayelane v Ngwenyama* adduced the sentiments that,

> "[t]o afford customary law its place as the primary source of law under the constitutional dispensation requires the observance of the following factors, which are imperative and necessary to guide the legislature and the judiciary: to interpret customary law within its own source and tenets and not within the western view of the law and the normative system; to still subject it to the constitutional test and the values underpinned in the Constitution; to acknowledge that customary law is a system of law that is adept within its community, and it has its own values and norms, that are practised from generation to generation and continuously evolves and develops to meet the changing needs of the community not individuals."[111]

The inherent flexibility of customary law allows for communities to embark on consensus-seeking and on prevention and resolution, in family and clan meetings, of disputes and disagreements; and the above-highlighted aspects provide a setting that contributes to the unity of family structures and the fostering of cooperation, a sense of responsibility and belonging in its members, and the nurturing of healthy communitarian traditions like *ubuntu*.[112] These clear-cut sentiments come from the very judiciary that often allows for deviation from the nature and form of customary law. What is required is to ensure that each consideration and interpretation approach is adopted and dispensed with to guard against means to downplay or ignore customary practices. If living customary law and its practices are approached with caution, respect, and patience, this will allow customary law to evolve according to its nature, and not be tainted by the cynical tales of individual parties. To follow through, parties who waive customary practices for convenience should be recognised as life cohabitating partners and the law of life partnership will apply incessantly to their relationships. Many pseudo-customary marriages accept partial payment of *lobola* or neglect of observing required celebrations or ceremonies, and then parties cohabitate under the assumption that they are husband and wife. This ridicules inherent cultural practices that are observed by tribes who respects and still wants to observe ceremonies as they ought to be. This status *quo* is believed to bring spiritual harmony to marriage and family relationships and creates legal certainty. Within judicial context and the fact that the court's are supposed to take judicial notice of customary practices informed from customary law the intention of the parties to conclude the marriage can be established or

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110 *Ibid*.

111 *Alexkor Ltd v Richtersveld Community* 2004 (5) SA 460 (CC) par 53–4.

112 *Mayelane v Ngwenyama supra* par 24.

determined, which was the case in the *Sengadi* court case. However, a one-size-fits-all approach does not work owing to the diverse and flexible nature of customary marriages, and this fact should also be taken under judicial notice when the court's hear customary law matters.

6 CONCLUSION

Although section 39 of the Constitution introduces interpreters and developers of customary law to a new approach to interpretation, especially concerning human rights issues, this does not necessarily mean that orthodox methods should always be deviated from; a conscientious approach to interpreting and developing customary law according to its nature and form can also involve a re-evaluation of these methods.[113] The judicial recommendations sound good on paper, but they should not merely be made parenthetically. Neglecting laws because they tend to be complex in their nature due to their diverse practices as informed from their respective should not be a resorted by the judiciary and the legislature.[114] In respect, these factors should not deter lawmakers and interpreters of customary law they should be a proactive approach that is undertaken so that customary law serve communities as it should within the constitutional backdrop. Means should be employed to ensure that the sanctity of customary practices as informed by customary law are nurtured and correctly viewed from their communal perspective, thus embracing the nature and form of customary law as the law observed by communities who still believe in its existence, respect its practices, constitutionally observe it, and embrace its normative existence.

[113] Rautenbach 2010 *Journal of Legal Pluralism and Unofficial Law* 147.

[114] See the approach discussed in *S v Makwanyane* 1995 (3) SA 391 (CC) par 156.

NOTES / AANTEKENINGE

DOES SECTION 9(2) OF THE DIVORCE ACT 70 OF 1979 PROVIDE ADEQUATE PROTECTION FOR AN ILL SPOUSE?

1 Introduction

In simple terms, section 9 of the Divorce Act (70 of 1979) provides for forfeiture of patrimonial benefits (forfeiture) in divorce proceedings if the ground for the divorce is the irretrievable breakdown of a marriage. It was important for the legislature to specify that forfeiture may only be made where the ground for a divorce is the irretrievable breakdown of the marriage (s 3(*a*) read with s 4(1)), because the latter is not the only ground for a divorce in South African law. A marriage may also be dissolved by a decree of divorce on the grounds of mental illness or continuous unconsciousness (s 3(*b*) read with s 5). Section 9(2) further clarifies the legal position by providing that forfeiture may not be ordered against the defendant where the grounds for a divorce are mental illness or continuous unconsciousness. Obviously, the purpose behind section 9(2) is to provide protection for the mentally ill or unconscious spouse in divorce proceedings. However, the protection provided is lacking in two respects. First, as is shown below, mental illness and continuous unconsciousness, as grounds for a divorce, do not cover all defendants who suffer from mental illness or continuous unconsciousness. Defendants who are mentally ill or unconscious, but fall outside the ambit of section 5, are not protected by section 9(2). Consequently, a forfeiture order becomes possible against them. Secondly, as is shown below through case law, it appears possible to prosecute a divorce against a mentally ill or a continually unconscious spouse under section 4(1) – that is, on the basis of an irretrievable breakdown of the marriage. In this case, a forfeiture is possible and the protection in section 9(2) is circumvented.

In light of the above, the adequacy of the protection in section 9(2) is questioned. This note discusses the adequacy of the protection in section 9(2). It also seeks to recommend ways in which the defect in this provision may be remedied. The grounds for a divorce in South Africa are discussed and mental illness and continuous unconsciousness are contextualised within the broader divorce jurisprudence. Thereafter follows a more focused discussion on mental illness and continuous unconsciousness as grounds for a divorce, as provided for in section 5. These discussions also reflect on the arguments by other academics, including arguments that section 5 should be expunged from the Divorce Act. Forfeiture is discussed

briefly. In conclusion, the question whether section 9(2) provides adequate protection is considered together with the author's recommendations.

2 Grounds for a divorce in South Africa

Section 3 of the Divorce Act provides that a marriage may be dissolved by a decree of divorce only on the grounds of the irretrievable breakdown of a marriage (s 3(*a*)); mental illness (s 3(*b*)); and continuous unconsciousness (s 3(*c*)). Based on these, it is clear that the common-law fault-based divorce system, where the granting of a divorce decree was dependent on the defendant's guilt in that he or she committed adultery or malicious desertion (Hahlo "A Hundred Years of Marriage Law in South Africa" 1959 *Acta Juridica* 47 55), is no longer applicable. While this move has largely been welcomed, it has also been pointed out that the introduction of the no-fault divorce system has seen a rise in divorce rates (Schafer "Amendments to the Divorce Act: A Question of Priorities" 1984 *THRHR* 299 307). It has been argued that facilitating this high divorce rate undermines the need to protect marriage as an institution.

Because this note is on mental illness and continuous unconsciousness, these are dealt with in more detail below. Only the irretrievable breakdown of a marriage is discussed in this part of the note. The Divorce Act does not define the meaning of irretrievable breakdown of a marriage. Instead, determination of whether a marriage has irretrievably broken down was left within the discretion of the courts. Nevertheless, section 4(1) provides:

> "A court may grant a decree of divorce on the ground of the irretrievable breakdown of a marriage if it is satisfied that the marriage relationship between the parties to the marriage has reached such a state of disintegration that there is no reasonable prospect of the restoration of a normal marriage relationship between them."

A simple reading of this provision makes it clear that it is not enough that the marriage relationship has broken down between the parties. In addition to the breakdown, what is required is that there must be no reasonable prospect that the marriage may still be restored into a normal marriage relationship between the parties to a marriage (Barnard "An Evaluation of the Divorce Act 70 of 1979" 1983 *Acta Juridica* 39 44). A normal marriage relationship is a relative term. Should the court consider what is normal in the eyes of the society or what is normal between the parties? In some marriages, the parties may be drunkards who attack each other, both physically and verbally, when under the influence of alcohol. While this may certainly be normal between the parties, it is frowned upon by society. It is submitted that courts have not adopted societal views on what constitutes a normal marriage relationship. Neither have they settled only on what is normal between the parties. Instead, courts have treated each case based on its own facts, bearing in mind that what may be normal for one marriage, may not necessarily be normal for another marriage (Barnard 1983 *Acta Juridica* 45). However, a normal marriage relationship has been associated with *consortium omnis vitae* (Van Heerden, Skelton and Du Toit *Family Law in South Africa* 2ed (2021) 137), and it includes companionship, love, affection, comfort, mutual services and sexual intercourse (Barnard 1983

Acta Juridica 45). Barnard opined that once consortium has ceased to exist, the marriage may have irretrievably broken down (Barnard 1983 *Acta Juridica* 45). Barnard's view is supported.

In light of the above, the court in *Naidoo v Naidoo* (1985 (1) SA 366 (T)) held that the test whether a marriage has irretrievably broken down comprises both a subjective enquiry into the breakdown of the marriage; and an objective enquiry into whether the breakdown is irretrievable (*Naidoo v Naidoo supra* 367C). The subjective component enquires into the attitudes of the parties towards the marriage relationship. The fact that at least one of the parties wants a divorce satisfies the subjective enquiry. It has been pointed out that the cooperation of both parties is necessary for a marriage to succeed (Van Heerden, Skelton and Du Toit *Family Law in South Africa* 138). However, this is not enough. The court must also conduct an objective enquiry into the history of the marriage relationship between the parties to determine if the breakdown is irretrievable (*Schwartz v Schwartz* 1984 (4) SA 467 (A) par 24).

During the early stages of the Divorce Act, there was uncertainty about whether a court had a discretion as to whether to order a decree of divorce once it was shown that the marriage had irretrievably broken down. This uncertainty was instigated by the use of the word "may" in section 4(1). In *Smit v Smit* (1982 (4) SA 34 (O)), the court considered itself to possess this discretion. However, in *Schwartz v Schwartz* (*supra*), the Appellate Division, as it was, put an end to this uncertainty. It held that the effect of section 4(1) was to confer upon the court powers that it did not have. It further held that once it is shown that a marriage relationship between parties has irretrievably broken down, it becomes the duty of the court to order a decree of divorce (par 18). With this said, section 4(3) of the Act is also worth mentioning. This provision confers a discretion on the court to postpone divorce proceedings, but only if it appears before it that there is a reasonable possibility that the parties may become reconciled through marriage counselling, treatment or reflection. However, should the marriage counselling fail, the court will have no discretion but to decree a divorce.

It is worth highlighting that section 4(3) does not confer upon the court a wide discretion to refuse a divorce decree; it confers the power to exercise a narrow discretion under specific circumstances. Courts cannot just exercise their discretion in terms of section 4(3) without care. This discretion must be exercised judiciously, and only when there is a reasonable possibility that the parties may become reconciled through marriage counselling, treatment or reflection. It follows that if there is no such reasonable possibility, an order in terms of section 4(3) may not be made. Perhaps one of the greatest challenges to this provision is the meaning of marriage counselling, treatment or reflection. It is trite that marriage counselling may come from different sources – for instance, from churches, families, elders and experienced people, as well as professionals. The question is whether, the legislature (in s 4(3)) intended professional counselling or the former. If the former was also intended, section 4(3) may never be invoked, given that in almost every divorce case, one form of counselling or treatment is almost always attempted before initiating divorce proceedings. Indeed, a survey of

divorce cases shows that an order in terms of section 4(3) is seldom made (see the Southern African Legal Information Institute website on saflii.org).

Another example of the narrow discretion conferred upon the court appears in section 5A. This provision empowers the court to refuse a divorce if it appears during divorce proceedings that despite a divorce in a circular court, by reason of religious barrier or prescripts, one or both of the spouses will not be free to remarry unless the religious barrier to remarriage is removed. The court may refuse to order a civil divorce unless it is satisfied that the party whose responsibility it is to facilitate the religious divorce has taken all reasonable steps to remove the religious barriers. Alternatively, if the court does not order a decree of divorce, it may make any order that it finds just. A few things are worth highlighting with respect to section 5A. First, this provision was only added as an amendment to the Divorce Act in 1996 (Divorce Amendment Act 95 of 1996). Secondly, it applies only in cases of dual religious marriages (Abduroaf "An Analysis of s 5A of the Divorce Act 70 of 1979 and Its Application to Marriages Concluded in Terms of Islamic Law" 2023 *De Jure* 1 5). Thirdly, the powers of the court are invoked only if one or both of the parties will not be able to remarry because of a religious barrier or prescript. Finally, the court has a narrow discretion whether to refuse a divorce decree or to make any order that it finds just.

3 Mental illness and continuous unconsciousness as grounds for a divorce

Section 5 of the Divorce Act elaborates on mental illness and continuous unconsciousness as grounds for a divorce. These grounds have been labelled as the "supervening impossibility of the marriage" (Zaal "Divorcing the Afflicted: The Case Against Section 5 of the Divorce Act" 1983 *SALJ* 114 116). Mental illness is dealt with separately in section 5(1), whereas continuous unconsciousness is dealt with in section 5(2). These provisions are set out below, and are then the subject of a unified critical discussion.

3 1 Mental illness

Section 5(1)(*a*) and (*b*) of the Divorce Act provides that a court may grant a decree of divorce on the ground of mental illness if it is satisfied that the defendant, in terms of the Mental Health Care Act (17 of 2002): (i) has been admitted as a mentally ill patient pursuant to a reception order; (ii) is being detained as a state patient at an institution or other place, or (iii) is being detained as a mentally ill convicted prisoner at an institution, and has not been unconditionally discharged for a period of at least two years immediately prior to the institution of the divorce proceedings. There must also be evidence from at least two psychiatrists, one of whom must have been appointed by the court, that the defendant is mentally ill and that there is no reasonable prospect they will be cured of the mental illness.

Mental illness as a ground for a divorce is not novel to the Divorce Act. Prior to this Act, there were doubts whether mental illness was ever a common-law ground for a divorce. The doubts were understandable in a divorce system that was premised on fault. Owing to this uncertainty, if a

person wanted to divorce a mentally ill spouse, they had to try and find the fault in order to qualify for a divorce (Zaal "Some Medico-Legal Aspects of Divorce in South Africa" 1985 *CILSA* 237 238). The uncertainty about whether mental illness ever constituted a ground for a divorce was lifted when the Divorce Laws Amendment Act (32 of 1935) was passed. This Act added as grounds for divorce incurable mental illness of no less than seven years (s 1(1)(*a*)) and the imprisonment of a spouse for no less than five years after being declared a habitual criminal (s 1(1)(*b*)). Admitting mental illness as a ground for a divorce assumed that such illness destroys the marriage relationship between husband and wife, thereby necessitating a permanent separation (Turpin "Desertion and Insanity" 1958 *SALJ* 438). Although this assumption is questionable in a world where some marriages can withstand many challenges, admitting mental illness as a ground for a divorce was welcomed at the time because it saved spouses who wanted to divorce their mentally ill spouses from branding the mental illness as fault.

For the sake of completeness, it is important to highlight that the Divorce Act repealed the whole of the Divorce Laws Amendment Act. While mental illness was obviously retained as a ground for a divorce, the same is not the case with imprisonment. Accordingly, imprisonment is not a ground for a divorce *per se*. A party seeking a divorce on the ground that the defendant is imprisoned will have to couch the case in such a way that the irretrievable breakdown of the marriage is established, as required by section 4(1).

3 2 Continuous unconsciousness

Section 5(2) empowers the courts to decree a divorce if the defendant is, by reason of a physical disorder, in a state of continuous unconsciousness. The court must be satisfied of two things. First, the defendant must have been unconscious for a period of six months immediately prior to the institution of divorce proceedings. Secondly, after hearing evidence of two medical practitioners, one of whom must be a neurologist or neurosurgeon appointed by the court, the court must be satisfied that there are no reasonable prospects of the defendant gaining consciousness.

3 3 Protection of the interests of the mentally ill and the continually unconscious spouse in divorce proceedings

Section 5 provides some measures to protect the interests of the defendant where mental illness and continuous unconsciousness are grounds for a divorce. The court is empowered to appoint a legal practitioner to represent the defendant and to order the plaintiff to pay for the costs of the representation (s 5(3)). The court is also empowered to make the order it deems fit regarding the provision of security in respect of any patrimonial interest that the defendant may have in the divorce (s 5(4)). As already alluded to above, section 9(2) also provides that a forfeiture order may not be ordered if the ground for divorce is mental illness or continuous unconsciousness.

3 4 Discussion of the grounds

When compared with the 1935 enactment, section 5(1), though still stringent (Zaal 1983 *SALJ* 115), has relaxed the requirements for mental illness as a ground for a divorce. The minimum waiting period is now only two years, whereas it was seven years under the 1935 enactment. Whereas the 1935 enactment required incurable insanity, the current Act simply requires that there must be no reasonable prospect that the mental illness will be cured. There are additional challenges with section 5(1). The Act does not say what will constitute reasonable prospects of the mental illness being cured. Will a divorce action fail simply because somebody with similar illness has been cured before using certain methods? In this day and age, the meaning of "cure" may be debatable. For instance, in the South African context there is medical plurality in the form of religious, traditional and Western medicines. Religion may insist that a certain mental illness is curable, whereas physicians may say otherwise. A *curator* representing a mentally ill defendant may argue that the defendant may still be cured should they undergo religious healing. Be that as it may, the wording of section 5(1) seems to tilt in favour of Western medicines. The requirement of psychiatrists supports this assertion. What about religious leaders and traditional healers?

On the other hand, continuous unconsciousness as a ground for a divorce is novel to the Divorce Act. What is required in terms of section 5(2) is that the continuous consciousness must be caused by a physical disorder. However, the legislature does not define the term "physical disorder". The following questions arise in this respect: Is it not possible for a mental disorder to lead to a physical disorder? Is the converse true as well? Is it possible for a physical disorder to lead to mental illness? Zaal points out that the term "physical disorder" is used to distinguish between divorces for physical and mental illnesses. This author is critical of this approach as the distinction between a physical and mental illness is not always clear-cut, and a divorce action may therefore be dismissed on a technicality if pleaded on a wrong ground (Zaal 1985 *CILSA* 239). It is also clear that both mental illness and continuous unconsciousness are premised on time periods. It has been pointed out that these time periods were established through evidence delivered before the South African Law Commission. Thus, after the passage of these time periods, there can be certainty that the mental illness or the continuous unconsciousness is incurable (Barnard 1983 *Acta Juridica* 41).

The existence of mental illness and continuous unconsciousness as separate grounds for a divorce have been questioned. It has been stated that the legislature intended to distinguish between the grant of a divorce on the grounds of irretrievable breakdown and mental illness or continuous unconsciousness (Schafer 1984 *THRHR* 301). It has also been pointed out that these grounds constituted special circumstances for which special rules were necessary (Heaton and Kruger *South African Family Law* 4ed (2015) 122). Zaal disagreed with this approach. The author stressed the need for the legislature to avoid classifications that might encourage further stigmatisation of vulnerable groups such as the mentally ill (Zaal 1983 *SALJ* 117).

There are arguments that section 5 allows the dissolution of a marriage that has not broken down irretrievably. Section 5 simply requires that when its requirements are met, the court must grant a divorce decree regardless of whether the marriage is viable or not (Zaal 1983 *SALJ* 117). The unqualified presumption that mental illness destroys the marriage relationship between husband and wife has been retained. This is clearly problematic because the fact that a spouse is mentally ill does not mean that the marriage has broken down irretrievably. Zaal argues that the legislative classification that encourages the placing of mentally ill spouses in special institutions may in fact contribute to the breakdown of the marriage (Zaal 1983 *SALJ* 117).

While the aim of section 5 is also to protect vulnerable spouses in divorce proceedings (Robinson, Human, Boshoff and Smith *Introduction to South African Family Law* 3ed (2008) 197), the anomaly is that it does not protect all spouses who are mentally ill or unconscious (Zaal 1983 *SALJ* 119). These include a spouse who has been mentally ill for less than two years, a spouse who has been unconscious for less than six months, a mentally ill spouse who voluntarily surrenders to treatment at an institution, and a patient in a private mental institution (Zaal 1983 *SALJ* 120). In addition, section 5(1) does not apply to spouses who are not undergoing compulsory incarceration in a state mental institution (Zaal 1983 *SALJ* 119); it does not apply if the mentally ill spouse has not been institutionalised (Midgley "The Divorce Act: Reconsideration Necessary" 1982 *SALJ* 22 24), and if a patient is detained outside of South Africa (Turpin 1958 *SALJ* 439 and Midgley 1982 *SALJ* 24). Zaal argues that the insistence on compulsory treatment undermines modern medicine's increasing reliance on voluntary and community-based treatment (1985 *CILSA* 238). If the category of patient does not fall within the ambit of section 5, the divorce will have to proceed under section 4(1) – the irretrievable breakdown of a marriage. In this situation, the mental illness and continuous unconsciousness will, instead, substantiate the irretrievable breakdown of a marriage (Midgley 1982 *SALJ* 22).

3 5 Does section 4(1) permit a divorce order against a mentally ill or continually unconscious defendant on the ground of irretrievable breakdown of a marriage?

The main question of this note is whether section 4(1) may still be invoked even where the requirements under section 5 are met. In other words, does a party to divorce proceedings in which the defendant is mentally ill or unconscious have a choice between using section 5 and section 4(1)?

In *Dickinson v Dickinson* (1981 (3) SA 856 (W)), the plaintiff brought divorce proceedings against the defendant in terms of section 4(1) on the ground that the marriage relationship between them had irretrievably broken down; alternatively, in terms of section 5(1), on the ground of the defendant's mental illness (*Dickinson v Dickinson supra* 859D–E). At the time that the divorce proceedings were instituted, the defendant had been in an institution in terms of a reception order for approximately two years. However, her mental illness had not been proved. Although the court had initially ordered

the appointment of a *curator ad litem* and psychiatrist for the benefit of the defendant, the plaintiff was subsequently unable to afford the costs of these services. As a result, proof regarding the defendant's mental illness could not be solicited (*Dickinson v Dickinson supra* 860G). It goes without saying that the plaintiff could also not afford a second psychiatrist as required by section 5(1) (*Dickinson v Dickinson supra* 860B). For this reason, section 5(1) was abandoned in favour of section 4(1).

The court had first to assess if it was possible to proceed in terms of section 4(1). Coetzee J found that section 4(1) did permit the divorce. He held that the requirement under this provision is the objective fact regarding the irretrievable breakdown of a marriage and that there was no requirement of guilt of any kind (*Dickinson v Dickinson supra* 860E). Coetzee J then accepted that the marriage relationship between the parties had irretrievably broken down (*Dickinson v Dickinson supra* 860F). However, he could not order a decree of divorce in terms of section 4(1) because the matter had proceeded in terms of section 5(1), and the summons had been served on the *curator ad litem.* Furthermore, because section 5(1) had been abandoned, the court held:

> "Before the court is convinced of the mental illness of a person, it is impossible to appoint a curator with any power to act contractually on behalf of such a person … He has no powers whatsoever to represent her on any other basis and in any case he has no powers to enter into any contracts on her behalf." (*Dickinson v Dickinson supra* 861A–C)

Accordingly, the plaintiff had to effect proper service on the defendant (*Dickinson v Dickinson supra* 861E–F).

Since *Dickinson v Dickinson*, it has been accepted that where the defendant is mentally ill or unconscious, the plaintiff has a choice between section 4(1) and section 5. Some authors have even argued that section 4(1) (the irretrievable breakdown of a marriage) should be the only ground for a divorce. In this light, what then is the purpose of section 5 in the Divorce Act? This question was considered in *Krige v Smit* (1981 (4) SA 409 (C)), where the court held that where the requirements in section 5 exist, the question of the irretrievable breakdown of the marriage relationship becomes irrelevant (*Krige v Smit supra* 415H). It is only in the absence of the requirements in section 5 that the court may proceed in terms of section 4(1). In *Krige v Smit*, the defendant had been in a semi-conscious state as a result of a brain haemorrhage (*Krige v Smit supra* 411E). However, the defendant did regain consciousness, albeit with permanent incapacity (*Krige v Smit supra* 416C). The proceedings then continued under section 4(1), and it was proved that the marriage had irretrievably broken down and the plaintiff had already entered into a relationship with another man and wanted to remarry (*Krige v Smit supra* 416E). The court granted the decree of divorce (*Krige v Smit supra* 416H).

4 Forfeiture of patrimonial benefits – section 9 of Divorce Act

Section 9 of the Divorce Act is a relic of the fault principle (Hahlo "When Is a Benefit Not a Benefit" 1984 *SALJ* 456 457). The original aim of forfeiture of

patrimonial benefits was to punish the guilty spouse by making sure that they did not derive any patrimonial benefit from a marriage that they had wrecked (Hahlo *The South African Law of Husband and Wife* 2ed (1963) 418). This aim is partially retained by section 9. While fault is no longer considered in the grounds of a divorce, it plays a major role in determining the economic consequences of a divorce. It may be argued that forfeiture had a gendered application insofar as it prescribed economic sanctions against the guilty spouse. In the past, women were unable to secure employment and build an estate. Since it is women who benefitted from marriages the most, the corollary is that they felt the impact of forfeiture the most. This was compounded by the common-law rule that a person could not forfeit what they brought into the marriage (Evans *Law of Divorce in South Africa* (1920) 125). Most women did not benefit from this rule in any way because they seldom generated wealth that they could bring into the marriage. It comes as no surprise that the rule that a spouse cannot forfeit what they brought into the marriage has been criticised (Heaton "Striving for Substantive Gender Equality in Family Law: Selected Issues" 2005 *SAJHR* 547 557).

Section 9(1) reads:

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

Forfeiture has been discussed in significant details by other academics (Hahlo *The South African Law of Husband and Wife* 5ed (1985) 372–382 and Marumoagae "The Regime of Forfeiture of Patrimonial Benefits in South Africa and a Critical Analysis of the Concept of Unduly Benefited" 2014 *De Jure* 85). Against this background, this note does not delve into repetitive discussions, save where necessary.

The abstract above sets out a few rules regarding forfeiture. The first is that a forfeiture order may be made when a decree of divorce is granted on grounds of the irretrievable breakdown of a marriage. Secondly, a benefit may only be forfeited if it is a patrimonial benefit. It is submitted that a patrimonial benefit is one that a person derives by virtue of the marriage. This excludes those assets that a party brought into the marriage. The third rule is that a court has a narrow discretion on whether to order whole or partial forfeiture. It has been observed that courts are reluctant to order whole forfeiture in the absence of wrongdoing. Complete forfeiture is a likely order if the defendant is the wrongful party and has made a meagre contribution (see *Singh v Singh* 1983 (1) 781 (C) 784).

The fourth rule is that a forfeiture order may only be made if the defendant will be unduly benefitted. The legislature does not define "unduly benefitted". A study of court judgments also shows that courts have not divulged much about this concept. It is submitted that an undue benefit is one that a person derives in the absence of any legal or moral entitlement. In *Wijker v Wijker*

([1993] 4 All SA 857 (AD)), the court held that what must first be determined is whether a party will in fact benefit (*Wijker v Wijker supra* par 19). Once it is established that a party will benefit, the second and final step is to determine whether the benefit is undue (*Wijker v Wijker supra* par 19). The latter step necessitates a value judgment considering the duration of the marriage, the circumstances that gave rise to the breakdown of the marriage and any substantial misconduct on the part of either of the parties.

5 Does section 9(2) of the Divorce Act provide adequate protection?

The impact of section 9(2) is that forfeiture, as discussed above, cannot be ordered if the ground for the divorce is anything other than the irretrievable breakdown of the marriage. Essentially, section 9(2) shields the mentally ill or unconscious spouse (who falls within the ambit of section 5(1) and (2)) from the impact of a forfeiture order only if the mental illness or continuous unconsciousness is a ground for the divorce. Since forfeiture is a relic of the fault principle, the obvious assumption in section 9(2) is that spouses who are mentally ill or unconscious cannot be punished for what is beyond their control. This legislative measure is well in place but for the deficiencies with the interpretation and application of section 5(1) and (2), which have been discussed above. The deficiencies are further compounded by the fact that even if the requirements in section 5 exist, the plaintiff has a choice whether to prosecute a divorce under section 4(1) or section 5 as enunciated in *Dickinson* (*supra*) and *Krige* (*supra*), and can thereby circumvent the impact of the protective provision in section 9(2) (Schafer 1984 *THRHR* 302).

If a plaintiff decides to prosecute a divorce under section 5, the protection in section 9(2) is full scale and straightforward. However, if they decide to prosecute the divorce under section 4(1), nothing in section 9(2) prevents the court from ordering forfeiture. This conclusion is based on a literal interpretation of this provision. Various suggestions have been made. Zaal called for the complete removal of section 5 as it fails to cater for certain categories of person, as pointed out above (in which case section 9(2) will become redundant). The author calls for a better replacement for this provision, one that will consider the real family circumstances in each divorce case; if it emerges that any party to a divorce is seriously ill or mentally challenged, a curator should be appointed (Zaal 1983 *SALJ* 125). Midgley also calls for the same removal on the ground that section 5 is ineffective as it may be circumvented (Midgley 1982 *SALJ* 25). Hahlo labels section 9(2) as a “dead letter”. However, he is of the view that courts are unlikely to order forfeiture against a mentally ill or unconscious defendant (Hahlo *Law of Husband and Wife* 5ed (1985) 373 n 111).

Since it is clear that section 9(2) does not provide adequate protection, what steps may be taken to ensure that qualifying defendants are protected in divorce proceedings? It is submitted that the immediate solution is the one suggested by Hahlo (Hahlo *Law of Husband and Wife* 373 n 111): that courts should not order forfeiture if the defendant is either mentally ill or unconscious as envisaged in section 5(1) and (2) respectively. However, the problem with this approach is that section 5(1) and (2) is already defective

insofar as it does not cover all defendants. In addition, nothing in section 9 supports it. In this light, some courts may ignore Hahlo's suggestion and proceed to order forfeiture where section 4(1) has been relied on.

Perhaps the best solution is an overhaul of section 5 that covers even those defendants currently excluded from the ambit of section 5. Insistence on the time periods should be dropped. There should be emphasis on the defendant's current state – that is, the fact that they are currently mentally ill or unconscious. Any speculation regarding the prospects of recovery should play little to no role. The duration of the mental illness and unconsciousness should also play little to no role. The overhaul of section 5 must also draw a distinction between those cases where the events substantiating forfeiture and the irretrievable breakdown of the marriage occurred prior to the mental illness or unconsciousness, and those where the mental illness or unconsciousness is relied upon for a divorce. It should not be enough for courts to refuse forfeiture solely because the defendant happens to fall within the ambit of section 5. The overhaul should allow forfeiture, especially in cases where mental illness or unconsciousness is self-inflicted just to frustrate the defendant.

6 Conclusion

This note has shown that section 9(2) of the Divorce Act, as it currently stands, does not afford adequate protection to mentally ill or unconscious defendants against a forfeiture of patrimonial benefits order. It has shown that the plaintiff may circumvent the impact of this protective provision by prosecuting the divorce under the provisions of section 4(1), in which case a forfeiture order becomes competent. This note has discussed the ground in section 4(1) – the irretrievable breakdown of a marriage. Mental illness and continuous unconsciousness, as grounds for a divorce as envisaged in section 5, have also been discussed in great detail. The defects in section 5 have also been highlighted.

This note proposes an overhaul of section 5, and by extension, section 9(2). This overhaul should accommodate all cases of mental illness and continuous unconsciousness with little to no regard to the duration of the condition and any speculation regarding the prospects of recovery. Furthermore, the overhaul should allow forfeiture in cases where the events justifying forfeiture and the irretrievable breakdown of the marriage occurred before the mental illness or unconsciousness. Forfeiture should also be allowed in cases where the mental illness and unconsciousness is self-inflicted in order to frustrate the plaintiff's case.

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CASES / VONNISSE

CLARIFYING THE LAW OF COMPLICITY

S v Mbuyisa
[2023] ZAKZPHC 132; 2023 JDR 4950 (KZP)

1 Introduction

The single perpetrator is the paradigmatic offender. Apart from very limited exceptions, all the elements of criminal liability, including both *actus reus* and *mens rea*, apply to the perpetrator, and a conviction cannot ensue unless the presence of each element is established, and the blameworthiness of the accused is duly considered to be proved beyond reasonable doubt. The problems posed by complicity (more commonly described as participation in South African law) emerge where more than one person is involved in criminal conduct, and yet, the rules governing criminal liability in respect of groups of two or more offenders do not admit of collective responsibility, but depend on the individual contribution of the participant to the criminal enterprise, and the application of the elements of liability to such contribution.

The question of the operation of the rules governing co-perpetrator liability and common purpose has frequently arisen in the courts and in academic writing on criminal law. These issues once again arose for consideration in the recent case of *S v Mbuyisa* ([2023] ZAKZPHC 132; 2023 JDR 4950 (KZP)), which is discussed below.

2 Judgment

2 1 Findings

The *Mbuyisa* case (*supra*) concerned an appeal against convictions of robbery with aggravated circumstances in the Pongola Regional Court. The first part of the judgment dealt with the problem of the trial record not being complete, and consequently whether the existing incomplete record was "adequate for a just consideration of the issues … raised in this appeal" (par 8). After due consideration, the court concluded that the record was indeed adequate for this purpose (par 22) and, having set out the appropriate approach of an appeal court to a trial court's findings – essentially that a court of appeal will not overturn a trial court's factual findings unless they are shown to be wrong (par 23–27) – the court proceeded to examine the

findings of the trial court. Upon assessing the evidence before it, the court on appeal upheld the correctness of the convictions of all four appellants. In respect of the first appellant, his positive identification by the complainant and his employee, and his arrest very shortly after the robbery, was determinative (par 42, 49). The fourth appellant contested his identification, which the State erroneously conceded to be invalid (par 80), but, based on its evaluation of the evidence, the appeal court confirmed the correctness of the finding of guilt by the trial court (par 77–85). The second and third appellants were similarly unsuccessful in their contention that they were wrongly convicted in the face of their decision not to testify, despite the extensive direct and circumstantial evidence against them (par 50–60). The argument on behalf of the second and third appellants was that there was insufficient evidence to link them to the crime. The court on appeal pointed out that there was no finding made by the trial court convicting the second and third appellants on the basis of common purpose (par 43), and that in fact their conviction was on the basis of co-perpetrator liability (par 56). The appeals of the four appellants were therefore all dismissed (par 90).

Notably, the State conceded the appeal of the second and third appellants on the basis that they were not aware of the reliance on common purpose (par 61). The appeal court was at pains to point out that the basis of the conviction of the appellants was merely their respective roles as perpetrators, and that "the doctrine of common purpose played no role in the decision of the trial court" (par 61). The analysis that follows assesses this issue.

2 2 Court's reasoning regarding the common purpose doctrine

As noted above, the court in *Mbuyisa* had no difficulty in dismissing the claims of the appellants that there was insufficient evidence to justify their convictions beyond reasonable doubt. The findings of the trial court were affirmed. However, the court was required to deal with the concession by the State on the merits of the appeal of the second and third appellants, on the basis that they had not been advised of the State's reliance on the doctrine, as evidenced by a failure to mention the doctrine in the charge sheet (par 63). Both the State and counsel for the appellants took the view that since the second and third appellants were not the "main perpetrators" and were not involved "with the wielding of weapons and the removal of items from the complainant's possession …, this necessarily means that they could only be convicted in our law on the basis of the doctrine of common purpose" (par 62).

As previously mentioned, the court did not agree with the approach of counsel in this case, and stated that common purpose was not the basis of any argument in the trial court, and was not even mentioned in the judgment of the trial court, where the court convicted the appellants as perpetrators (par 64). The court referred (par 65) to the case of *S v Hlongwane* (2014 (2) SACR 397 (GP)) for the following *dictum*:

> "The starting point is that a person can commit an offence directly or vicariously through another and that where two or more persons agree to commit a specific crime, such as robbery, it is irrelevant what task each was assigned for its execution. Each is a co-perpetrator because he or she had agreed to commit the crime and either intended that force would be applied in order to rob or foresaw that possibility. Furthermore their agreement can be established through circumstantial evidence alone." (*Hlongwane supra* par 41)

The court pointed out (citing Snyman (Hoctor *Snyman's Criminal Law* 7ed (2020) 222–223 par 66–67)) that the legal principles governing co-perpetrator liability are well established, and that where a number of persons commit a crime, and all comply with the requirements for perpetrator liability, they are simply to be regarded as co-perpetrators. The court further cited *R v Parry* (1924 AD 401) in support of the fact that each accused acting together with another may be convicted on the basis of his own acts and mental state (par 68), before referring (*Mbuyisa supra* par 69–70) to the cases of *S v Williams* (1980 (1) SA 60 (A) 63A–B), *S v Khoza* (1982 (3) SA 1019 (A) 1031B–F) and *S v Kimberley* (2004 (2) SACR 38 (E) par 10) in order to illustrate the distinction between perpetrator, co-perpetrator and accomplice.

Finally, the court (*Mbuyisa supra* par 71–73) referred to Kruger (*Hiemstra's Criminal Procedure* (Service Issue 16 February 2023) 22–29, 22–30) to explain why it regards the State's concession as flawed. Quoting from this source, the court approved the discussion in this source as "logical" and "correct" when it stated that the common purpose doctrine is frequently applied where it is "unnecessary and inappropriate" (echoing the earlier comment in this source that the doctrine is "sometimes unnecessarily invoked"), which leads to confusion in both the legal principles and in the evaluation of the evidence by the person who is required to establish the facts (*Mbuyisa supra* par 71). The following words from *Hiemstra's Criminal Procedure* are highlighted by the court in this regard (*Mbuyisa supra* par 71): "The doctrine postulates as point of departure the absence of an agreement to commit the offence alleged", prior to citing the following passage:

> "Common purpose thinking is irrelevant where an agreement to commit the offence has been proved by means of direct or circumstantial evidence or both. Botha JA's discussion in *S v Mgedezi and Others* 1989 (1) SA 687 (A) at 705I of the prerequisites for liability based on the doctrine is expressly based on the premise: 'In the absence of a prior agreement ...' Holmes JA in *S v Ngobozi* takes as point of departure the absence of an agreement to murder. To invoke, as is sometimes done, common purpose in the case of a hired assassin is wrong in principle and calculated to confuse the *judex facti*. In such cases the parties are simply co-perpetrators, with the person hired as direct actor, and the person who hires as vicarious actor." (*Mbuyisa supra* par 72)

The court proceeded to point out the presence in the facts of this case of both circumstantial and direct evidence of a prior agreement to rob the complainant (*Mbuyisa supra* par 72), before citing a further example from *Hiemstra's Criminal Procedure* (22–30), which in the view of the court "makes the point even clearer":

> "[F]ive robbers, all members of a gang, commit a bank robbery in the central business district in broad daylight. A sits waiting in the getaway car around the

> corner; B is the sentry across the road; C enters the bank with a suitcase in which to load the spoils; and D and E, both armed with AK47s, walk into the bank and open fire as they enter and fatally wound several bystanders. All five are guilty of murder, not as a result of a forced application of the doctrine but simply as co-perpetrators. Against each one the inference would be irresistible that he agreed that shots would be fired (by himself or one of the others), with the intent to kill bystanders or, at best for him, that he foresaw the real risk of such death and was indifferent thereto. Each of the members of the gang had the direct intent to apply deadly force in order to rob as to the murders there was thus, at the very least, intention by foresight of possibility (legal intention). Each fulfilled his agreed role in the execution of such intent. Each is thus a co-perpetrator in the commission of the murder, albeit vicariously in the case of those who did not directly participate in the shootings but nevertheless participated fully in the crime. *In such case invocation of the doctrine of common purpose is superfluous.* The correct result would be reached by a simple application of the principles of the law of participation on the given facts." (*Mbuyisa supra* par 73, emphasis added by the court)

3 Discussion

3 1 Development of terminology

While the notion of co-perpetrator liability has always constituted a part of the rules of criminal liability in South African law, it has assumed different forms as the rules of participation have developed. In describing the law of participation in Gardiner and Lansdown's work on criminal law, the discussion was, in all editions from 1917 to 1957, consistently placed under the heading "Principals and accessories before the fact", and the opening words remained the same:

> "In English law a person who actually commits, or takes part in the actual commission of, a felony is a principal in the first degree, and a person who aids and abets the commission is a principal in the second degree … South African law knows no such distinction: all persons who aid or abet in the commission of a crime are socii criminis, companions or partners in guilt, and are indictable and punishable as principals." (Gardiner and Lansdown *South African Criminal and Procedure Volume I: General Principles and Procedure* (1917) 81–82)

Although the term "principal in the first degree" was only mentioned in a few early judgments (see, e.g., *R v Abrams* (1880–1882) 1 SC 393 397–398), it seems clear that the co-perpetrator, who would be regarded as a joint principal in the first degree in English law (Kenny *Outlines of Criminal Law* (1902) 85), would fall within the broad notion of a *socius criminis* in South African law. This is exemplified by the Appellate Division decision in *R v Parry* (*supra* 401), where the court held (404, per Innes CJ) that "[b]y our law one who knowingly assists in the commission of a crime is a *socius criminis* and may be charged as if he were the actual perpetrator of the deed". The court in *Parry* elaborated that "[i]t is the existence of criminal intent in each of those who jointly commit a crime which entails on each a criminal responsibility" (406).

The imprecision associated with the application of the term *socius criminis* in the courts was lamented by De Wet, who notes that this "muddled terminology" ("verwarde terminologie") incorporated both the co-perpetrator

and the accomplice (De Wet *De Wet & Swanepoel Strafreg* 4ed (1985) 198). Burchell and Hunt seek to distinguish between an "actual perpetrator" and the *socius criminis* in the first edition of *South African Criminal Law and Procedure* (*Vol I: General Principles of Criminal Law* (1970) 350), but this distinction is not aided by the attempt to link the categories to the English law equivalents, which are foreign to South African legal practice. The necessary clarification of terminology ultimately occurred in the Appellate Division, when the court authoritatively distinguished between perpetrator, co-perpetrator and accomplice liability:

> "'n Medepligtige se aanspreeklikheid is aksessories van aard sodat daar geen sprake van 'n medepligtige kan wees sonder 'n dader of mededaders wat die misdaad pleeg nie. 'n Dader voldoen aan al die vereistes van die betrokke misdaadomskrywing. Waar mededaders saam die misdaad pleeg, voldoen elke mededader aan al die vereistes van die betrokke misdaadomskrywing." (*S v Williams supra* 63A–B)
>
> (Translation (Burchell *Cases and Materials on Criminal Law* 4ed (2016) 644): "An accomplice's liability is accessory in nature, so that there can be no question of an accomplice without a perpetrator or co-perpetrators who commit the crime. A perpetrator complies with all the requirements of the definition of the relevant offence. Where co-perpetrators commit the crime in concert, each co-perpetrator complies with all the requirements of the definition of the relevant offence.") (When this *dictum* is cited in the *Mbuyisa* case at par 69, the court provides its own translation.)

Ever since the *Williams* case, the nature of what a "co-perpetrator" entails has been settled in the law, and the concept has been applied in a number of cases (see, e.g., *S v Frederiksen* 2018 (1) SACR 29 (FB) and *S v Tilayi* 2021 (2) SACR 350 (ECM)). Indeed, the *Mbuyisa* judgment further endorses the application of this form of liability, and there is nothing to suggest that the court is incorrect in doing so, given the court's careful analysis of the facts of the case.

3 2 Conceptual concerns

3 2 1 The nature of common purpose liability

It is however submitted that the court's reliance on *Hiemstra's Criminal Procedure* in making its analysis of the common purpose doctrine requires closer scrutiny. (This analysis was introduced into this work under the authorship of Kriegler in *Hiemstra Suid-Afrikaanse Strafproses* 5ed (1993), and has been followed in this work ever since.) First, the statement that the point of departure of the doctrine is the "absence of agreement to commit the offence alleged" is difficult to reconcile with the otherwise uniformly accepted nature of common purpose liability in South African law (as expressed by the Constitutional Court in *S v Tshabalala* (2020 (2) SACR 38 (CC)):

> "The liability requirements of a joint criminal enterprise fall into two categories. The first arises where there is a prior agreement, express or implied, to commit a common offence. In the second category, no such prior agreement exists or is proved. In the latter instance the liability arises from an active association and participation in a common criminal design with the requisite blameworthy state of mind." (par 48)

In adopting the approach propounded by *Hiemstra's Criminal Procedure*, the *Mbuyisa* court is dismissing the possibility that the common purpose doctrine can be based on prior agreement, clearly undermining the historical development of the common purpose doctrine, which initially only took the form of prior agreement (for further discussion, see Hoctor "The Genesis of the Common Purpose Doctrine in South Africa" 2023 26 *Potchefstroom Electronic Law Journal* DOI http://dx.doi.org/10.17159/1727-3781/2023/v26i0a16385 1–29).

Moreover, the court is required to deny the existence of the body of authoritative judicial precedent that has formed the basis of the increasing resort to the common purpose doctrine since the Constitutional Court declared the doctrine to be constitutional in the landmark case of *S v Thebus* (2003 (2) SACR 319 (CC)). In the *Thebus* case, Moseneke J, writing on behalf of the court, summed up the basis of common purpose liability as follows:

> "The liability requirements of a joint criminal enterprise fall into two categories. The first arises where there is a prior agreement, express or implied, to commit a common offence. In the second category, no such prior agreement exists or is proved. The liability arises from an active association and participation in a common criminal design with the requisite blameworthy state of mind." (par 19)

This *dictum* was cited with approval in the judgment of Zondo DCJ (as he then was) in the Constitutional Court case of *S v Jacobs* (2019 (1) SACR 623 (CC) par 128 and 150). In addition, it has been followed, *inter alia*, in *S v Gedezi* (2010 (2) SACR 363 (WCC) par 49) and *S v Tilayi* (*supra* par 19). (For further discussion of the forms of common purpose, see Hoctor "Distinguishing the Forms of Common Purpose Liability – *S v Govender* 2023 (2) SACR 137 (SCA)" 2023 *Obiter* 913). More significantly perhaps, this understanding of the nature of common purpose liability has been fully accepted into the application of the doctrine in the Constitutional Court (see the recent judgment of Mathopo AJ (with which all the other judges concurred) in *S v Tshabalala* (*supra* par 48) (cited above), which repeated the words of Moseneke J in *Thebus* (*supra* par 19), without the need for attribution) and in the Supreme Court of Appeal (see, for example, the recent case of *S v Pooe* 2021 (2) SACR 115 (SCA) par 57).

In the passage cited by the court in *Mbuyisa* (*supra* par 65) from *Hlongwane* (*supra* par 41), which addressed the question whether the doctrine of common purpose applied in *Hlongwane*, that court also agreed that common purpose can come about through a prior agreement: "[W]here two or more persons *agree* to commit a specific crime … [liability follows] because he or she *had agreed* to commit the crime …" (my emphasis). Furthermore, in seeking to explain that the common purpose doctrine is unnecessarily invoked, *Hiemstra's Criminal Procedure* uses the example proffered in *S v Ngobozi* (1972 (3) SA 476 (A) 478D–E) to illustrate the operation of the doctrine, in terms of which each participant acting with a common purpose to assault can be held liable for murder on the basis of *dolus eventualis*:

> "Suppose A and B, each carrying a knife, form an unlawful common purpose, in the execution whereof each is to play a contributory part, to assault C by

> stabbing him. In the ensuing scuffle, first A gets in the first and only stabbing-blow; and as a result C falls dead. Each is guilty of murder if he subjectively foresaw the possibility of the execution of their unlawful common purpose causing the death of C, but nevertheless persisted therein, reckless whether the possibility became fact." (*Hiemstra's Criminal Procedure* 22–29)

It is, ironically, clear that the example contemplates common purpose liability being based on a prior agreement.

The *Mbuyisa* court (*supra* par 72) clarifies and supports its position, distinguishing prior agreement from common purpose liability by further reference to *Hiemstra's Criminal Procedure* (22–29 and 22–30; full passage cited above under heading 2 2), which dismisses common purpose as "irrelevant" where an agreement to commit the offence has been proved. In this regard, reference is made to the cases of *Mgedezi* (*supra*) and *Ngobozi* (*supra*). While the court in *Mgedezi* does use the words "[i]n the absence of proof of a prior agreement" (705I) prior to setting out the authoritative requirements for active association common purpose (705I–706C), this merely serves to distinguish the application of this form of common purpose liability from the other form of common purpose liability, namely prior-agreement common purpose. There is no question of this phrase excluding prior agreement as a basis for common purpose liability; instead, it merely indicates that prior agreement was not relevant to the particular factual complex in *Mgedezi*. As for the reference to *Ngobozi*, the court accepted that at the time of the initial blow there was no (prior agreement) common purpose between the appellant and his companion (to assault the deceased) (478G), and further that no common purpose was formed between them thereafter, at the time of the fatal attack on the deceased (478G–479B). In this case, the appellant and his companion were not even held to be co-perpetrators in respect of the murder of the deceased, with the appellant being convicted of assault with intent to do grievous bodily harm, and his companion being convicted of murder. The analysis in *Hiemstra's Criminal Procedure* proceeds to state that the invocation of common purpose in the case of a hired assassin is "wrong in principle", and is calculated to confuse the *judex facti* (trier of facts), as in this case there is simply co-perpetrator liability. However, there is no reason in principle not to charge and convict a person hiring an assassin to kill another on the basis of (prior agreement) common purpose. This is precisely what occurred in the recent cases of *S v Panayiotou* (2017 JDR 1739 (ECP)) and *S v Soni* (2021 (2) SACR 241 (SCA)).

The *Mbuyisa* court (*supra* par 73) concludes its reliance on *Hiemstra's Criminal Procedure* (22–30) to point out the superfluity or irrelevance of the common purpose doctrine in circumstances where each participant in a criminal enterprise had fulfilled his agreed role by referring to the example of the bank robbery (see full passage cited above under heading 2 2). In the example, it is reasoned that in respect of a fatal shooting during the course of a bank robbery, all the members of the gang of robbers "are guilty of murder, not as a result of a forced application of the doctrine [of common purpose] but simply as co-perpetrators". After explaining further that each of the robbers would have direct intent to apply deadly force in order to rob, it is concluded that the correct result "would be reached by a simple application

of the principles of the law of participation" on the facts of the case. Further support for this approach may be gleaned from the *dictum* cited (*Mbuyisa supra* par 65) from the *Hlongwane* judgment (*supra* par 41; see full passage above under heading 2 2).

What is one to make of the approach of the court in *Mbuyisa* and in *Hlongwane*, which coincides with the approach adopted in *Hiemstra's Criminal Procedure*? As discussed earlier, it is clear that the doctrine of common purpose can indeed be founded on prior agreement, as well as on active association. That this is the correct legal position has found wide and authoritative support in the courts, as well as being the academic consensus. Is it then not true that co-perpetrator liability can be employed to establish criminal liability where the participants in a criminal enterprise, formed by prior agreement, intentionally commit unlawful conduct? In this regard, Snyman's words are clear, and unassailably correct: "If a number of people commit a crime and they all comply with the requirements for perpetrators … they are all simply co-perpetrators" (Hoctor *Snyman's Criminal Law* 222). Does the characterisation of the common purpose doctrine as unnecessary in the context of prior agreement (as strongly contended for by *Hiemstra's Criminal Procedure*, upon which the courts in *Hlongwane* and *Mbuyisa* rely) not then undermine the usefulness and apparent ubiquitous use of this doctrine in cases of more than one person acting together to commit a crime?

By no means: while the court in *Mbuyisa* correctly determined that the appellants were soundly convicted, on the basis of each of them fulfilling all the requirements for robbery, this does not detract from the fact that the appellants *could* have been convicted on the basis of the common purpose doctrine. The common purpose doctrine provides invaluable assistance to the State in cases where a group of two or more accused are involved in the commission of a crime, and where it is therefore often difficult to determine that the individual conduct of each of the group satisfied the requirement of causation. The operation of the doctrine provides that where two or more people share a common purpose to commit a crime, and act together in order to achieve such purpose, the conduct of each of them in the execution of that common purpose is imputed to each of the others in the common purpose (Hoctor *Snyman's Criminal Law* 225; Burchell *Principles of Criminal Law* 5ed (2016) 477). The difficulties of proof of a causal link between the individual accused's conduct and the harmful result are thus circumvented. These difficulties are cogently summarised in *S v Mzwempi* (2011 (2) SACR 237 (ECM)):

> "In many cases involving a consequence crime and committed by a group of people – such as, for instance, murder – it is often very difficult, if not impossible, to determine which offender caused the death. If a victim is beaten to death by four offenders, all hitting him with knobkieries, it is often impossible to determine which of the offenders delivered the fatal blow – causing the death. In cases of this nature the element of causation is not proved beyond reasonable doubt, and all four offenders must be acquitted. This was the injustice and mischief sought to be overcome by the introduction of the common purpose doctrine." (par 45)

The Constitutional Court in *S v Tshabalala* (*supra*) adopted this reasoning, echoing the balance of the justification for the common purpose doctrine set out in *Mzwempi* (*supra* par 46), as follows:

> "The object and purpose of the doctrine are to overcome an otherwise unjust result which offends the legal convictions of the community, by removing the element of causation from criminal liability and replacing it, in appropriate circumstances, with imputing the deed (*actus reus*) which caused the death (or other crime) to all the co-perpetrators." (*Tshabalala supra* par 56)

3 2 2 Common purpose or co-perpetrator

While the explanation of the rationale of the common purpose doctrine is very lucidly expressed, unfortunately the Constitutional Court in *Tshabalala* follows the *Mzwempi* judgment into a conceptual difficulty – a difficulty that was perpetuated in *Hlongwane* and the *Mbuyazi* judgment under discussion.

The difficulty in question simply relates to the fact that by definition co-perpetrator liability, being a form of perpetrator liability, requires that *all* the necessary elements of liability be established in order for the accused to be convicted of the crime in question (Burchell *Principles of Criminal Law* 475; *S v Williams supra* 63A–B). Where all such elements can be proved, there is no need to consider common purpose liability, as the following passage indicates (echoing the statement from *Hiemstra's Criminal Procedure* cited in par 72 of *Mbuyisa*):

> "The Court *a quo*, applying the guidelines itemised in *S v Mgedezi and Others* … convicted appellant No 4 on the basis of the doctrine of common purpose. But of course if appellant No 4 was the man in brown, as he must be found to have been, the doctrine of common purpose is irrelevant. If appellant No 4 was the man in brown he was a co-perpetrator who passed the gun to appellant No 5 when he was being held by the deceased to enable appellant No 5 to shoot the deceased. Appellant No 4's actions contributed causally to the death of the deceased." (*S v Majosi* 1991 (2) SACR (A) 540A–B)

The fact that common purpose is not required for the purposes of liability where co-perpetrator liability can be established does not however exclude it from being applied. The common purpose doctrine, by definition, relieves the State of the proof of the element of causation for each individual accused acting in a group to commit a crime. It follows then that a participant in a common purpose cannot be a co-perpetrator, as in order to be a co-perpetrator, the accused would be required to fulfil *all* the necessary elements of criminal liability. Unfortunately, both *Mzwempi* (*supra* par 46) and *Tshabalala* (*supra* par 56) refer to participants in a common purpose as "co-perpetrators"; so does the *Hlongwane* case (*supra* par 43), one of the authorities on which the *Mbuyisa* decision relies (par 64) as providing "a good illustration of the law [relating to participation] on the facts"; and so too do a handful of other High Court judgments, and at least one Supreme Court of Appeal judgment (*S v Leshilo* 2020 JDR 1882 (SCA) par 15).

Is this inaccurate use of terminology worthy of concern? It is submitted that there is indeed cause for concern, because while co-perpetrator liability closely resembles common purpose liability, there are important distinctions that need to be drawn between these concepts. Co-perpetrator liability

arises where a number of persons have co-operated in the commission of a crime, and each, in so doing, has satisfied the definitional elements of liability for the crime. In contrast, the common purpose doctrine does not require proof of causation. As pointed out by Nienaber JA in *S v Majosi* (*supra* 540B), the liability of the co-perpetrator is *direct* in nature, whereas the liability of the participant in the common purpose is *imputed* (my emphasis; *Mzwempi supra* par 51–53). (Is it any wonder that wherever possible in cases where more than one offender commits unlawful conduct, the State employs the common purpose doctrine to achieve a conviction?) Where it is not possible to prove that each participant personally performed every act required for liability for the offence, in appropriate circumstances the proved conduct of another member of the group may be imputed or attributed to the accused so as to render him liable in his own right – in other words, as a perpetrator. However, it bears emphasising that the common purpose doctrine forms a special category of perpetration, in terms of which a person may be deemed to be a perpetrator by reason of their mere involvement with a person or persons who actually perpetrate a crime. In *Thebus* (*supra*), Moseneke J explained the common purpose doctrine as "a set of rules of the common law that regulates the attribution of criminal liability to a person who undertakes jointly with another person or persons the commission of a crime" (par 18). Evidently, the "attribution" or deeming of common purpose liability is a different enterprise from the proof of co-perpetrator liability in terms of the accepted categories of perpetrator liability. Co-perpetrator liability and common purpose liability are recognised as qualitatively different and distinct concepts – both in the courts (see, e.g., *S v Khoza supra* 1038F–G; *S v Kimberley* 2005 (2) SACR 663 (SCA) par 12; *S v Thebus supra* par 40), and among the writers (Burchell *Principles of Criminal Law* 475ff; Hoctor *Snyman's Criminal Law* 219ff; Kemp, Walker, Palmer, Baqwa, Gevers, Leslie and Steynberg *Criminal Law of South Africa* 4ed (2022) 280ff; Visser and Maré *Visser & Vorster's General Principles of Criminal Law Through the Cases* 3ed (1990) 675ff), each of which subject common purpose liability to a separate discussion from perpetrator liability *simpliciter*.

The drawing of this distinction reflects the fundamental theoretical and practical dichotomy to be noted between co-perpetrator and common purpose liability. Strictly speaking, the rules relating to the co-perpetrator have nothing to do with those relating to complicity or participation. The liability of the co-perpetrator is assessed in terms of their own conduct and state of mind, as is that of the single perpetrator. What others do around the co-perpetrator does not affect the co-perpetrator's culpability. In sharp contrast, the liability of a participant in a common purpose is by definition dependent on someone else. In order for common purpose liability to ensue, the unlawful act, with a causal link to the harmful result, must be committed by someone in the group, who need not be the particular accused. Moreover, the common purpose doctrine requires someone to agree with another to commit the crime in question, or someone to actively associate with someone else's acts, demonstrating the intention to commit the crime in question. It is axiomatic that the application of the common purpose doctrine requires the presence of a number of persons acting together, and an

interdependent and mutual reliance between such persons on each other in committing the crime. Responsibility for the conduct of each of the participants in the common purpose is ascribed to all others, and this mutual act-attribution serves to establish liability in terms of the doctrine. By contrast, the co-perpetrator's liability is not dependent on the liability of their co-perpetrator – as, for example, the case of *Parry* (*supra*) confirms.

Moreover, although there may be no difference in the result (conviction) achieved by establishing either co-perpetrator liability or common purpose liability, it may well be adjudicated by the court that there is a difference in the respective levels of blameworthiness, particularly where the common purpose liability is based on active association. Thus, in this respect, drawing the distinction in this context is of significant probative and practical importance.

It is therefore contended that to refer to a participant in a common purpose as a "co-perpetrator" conflates significantly distinct concepts of criminal liability; this practice in the sources listed, including the *Mbuyisa* judgment, is unfortunate and does not assist the vital process of establishing legal clarity, particularly in the area of participation, where there has been much uncertainty over the years. Corbett JA in *Khoza* (1031B–C) reflects on the law of participation: "]I]mprecise and undefined use of legal terms can lead to misunderstanding and confusion of thought, especially in [this] juristic field." Similarly, De Wet bemoans instances where the courts have not consistently upheld the correct principles, and where cases of co-perpetratorship are sometimes presented as if they are cases where one actor is actually a sort of participant in the other's crime ("gevalle van mededaderskap soms voorgestel asof hulle gevalle is waar die een dader eintlik 'n sort deelnemer is aan die ander se misdaad" – *De Wet & Swanepoel Strafreg* 4ed (1985) 192).

3 2 3 Vicarious liability

There is a further concern in the passage cited by the *Mbuyisa* court (*supra* par 72); in the terminology employed in relation to the hired-assassin example (*Hiemstra's Criminal Procedure* (22–29 and 22–30; full passage cited above under heading 2 2)), as between the co-perpetrators, the person hired is described as a "direct actor" and the person who hires him as a "vicarious actor". There is no difficulty with the term "direct actor". Snyman distinguishes between a direct and indirect perpetrator (which he describes as "merely convenient terms") by explaining that an indirect perpetrator is "somebody who commits a crime through the instrumentality of another", while the other party, who actually carries out the unlawful conduct is the direct perpetrator (Hoctor *Snyman's Criminal Law* 223). However, the use of the term "vicarious actor" is problematic. *Mbuyisa* (*supra* par 65) is not the first place in which this term comes up. The passage cited earlier from the *Hlongwane* case (*supra* par 41) explains that a person can commit an offence "directly or *vicariously* through another" (my emphasis). Later in the *Hlongwane* judgment (*supra*), the court states:

> "It is evident on the facts that the appellant readily meets the requirements of a co-perpetrator to the crime of robbery since an agreement that they together would rob the two women can be inferred. Moreover he at all times continued to associate with his co-perpetrator when the knife was drawn and after, rendering him at the very least *vicariously liable*." (par 44, my emphasis)

The term is also employed (*Mbuyisa* supra par 73) in the example of the bank robbery from *Hiemstra's Criminal Procedure* (22–30; see full passage above under heading 2 2), where reference is made to co-perpetrator liability for murder for those in the criminal enterprise who "did not directly participate in the shootings but nevertheless participated fully in the crime" as being vicarious in nature.

The difficulty with the use of this term is simply that no general principle of vicarious liability is recognised in criminal law (Burchell *Principles of Criminal Law* 449). Vicarious liability is possible only in relation to statutory offences, and then only where the legislature specifically creates such liability in particular legislation (Hoctor *Snyman's Criminal Law* 212). Employing the term "vicarious" in the context of perpetrator liability for murder (as in the above-mentioned examples in *Hiemstra's Criminal Procedure*) or robbery (as in *Hlongwane*) is therefore inaccurate and confusing.

4 Concluding remarks

After these critical observations, it bears iteration that the result in *Mbuyisa* providing for co-perpetrator liability for the four appellants is sound. It is submitted that justice was served in this case. However, as indicated above, the reasoning that the court adopted from *Hiemstra's Criminal Procedure* regarding the concepts relating to criminal complicity is subject to challenge on two fronts.

As indicated, the argument that the common purpose doctrine is essentially limited to where the accused actively associates themselves with the conduct of another is not at all consistent with the current legal position in South African law, as the jurisprudence of both the courts and other writers agree. The difficulty with the approach adopted in *Hiemstra's Criminal Procedure* is demonstrated by the concluding part of the argument that appears in the work after the passage cited in the case (see above). Here it is contended as follows:

> "On close examination it appears that the only real place for the doctrine of common purpose is in cases in which a specific agreement is not proved, and the causal link between the acts of a particular accused and the result of a consequence crime cannot be established. With respect, the example of Holmes JA in *Ngobozi* can, with a slight adaptation, make the point clearer. Say each of A and B (without an agreement to murder) inflicts one stab wound on C. At the post-mortem examination it is found that there was one fatal and one superficial stab wound to the body. Nobody knows which wound was inflicted by which assailant. In such a case the doctrine can be usefully applied. Its application makes it irrelevant which attacker is causally connected to the bringing about of C's death." (*Hiemstra's Criminal Procedure* 22–30)

Unfortunately for the purposes of this example, the argument proceeds to the *Tshabalala* case, of which it is said that it was held that "[s]imilarly … in cases of group rape … [t]he accused can be convicted on the basis of common purpose, and it is not necessary to prove that each accused raped the victim" (*Hiemstra's Criminal Procedure* 22–30). However, the form of common purpose that was applied in the *Tshabalala* case was prior-agreement common purpose, as is evident from the following extract from the court's reasoning:

> "It is trite that a prior agreement may not necessarily be express, but may be inferred from surrounding circumstances … After a careful analysis of the facts, the High Court found that the applicants were part of the group that moved from one plot to another as per their arranged sequence. The High Court further found that the group members must have been aware or associated themselves with the criminal enterprise. They must have hatched a plan before then, that they would invade different households. Included in that plan or understanding was the rapes of the complainants." (*Tshabalala supra* par 49–50)

It may be further noted, in respect of the example based on the adjusted *Ngobozi* facts that, rather than common purpose being "usefully applied" to obtain a murder conviction, the posited absence of intent to murder would simply exclude the possibility of either A or B being convicted of the crime of murder. Neither is it correct to say that the application of common purpose "to certain sets of fact is often problematic (especially when large amorphous groups are involved)" (*Hiemstra's Criminal Procedure* 22–29). This is the very situation that the common purpose doctrine seeks to remedy, as the rationale for the doctrine (discussed above in *Mzwempi* and *Tshabalala*) indicates. But it bears emphasising that each participant in a common purpose must meet all the requirements for liability contained in the doctrine, whether the applicable form of common purpose liability is prior agreement or active association.

The second issue arising out of the argument (and sources relied on) in the *Mbuyisa* judgment is the conflation of co-perpetrator and common purpose liability. As explained above, these are distinct concepts. While both arise in the context of two or more actors being involved in the commission of a crime, co-perpetrator liability deals with direct-perpetrator liability, as opposed to common purpose liability, which deals with liability by means of imputation. While co-perpetrator liability (which as argued should never be expressed in terms of vicarious liability) is founded upon the actor meeting all the requirements for liability, common purpose liability is based on the imputation of the conduct of the participants in the common purpose, each to every other, along with the requisite elements of the particular form of common purpose liability in issue. It follows that to use the term "co-perpetrator" in the context of the application of the common purpose doctrine is misleading, and unhelpful.

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ESORFRANKI PIPELINES (PTY) LTD v MOPANI DISTRICT MUNICIPALITY [2022] ZACC 41

1 Introduction

The Constitutional Court, in the recent case of *Esorfranki Pipelines (Pty) Ltd v Mopani District Municipality* ([2022] ZACC 41), had to decide whether a tenderer, whose tender failed as a result of the intentional misconduct of the State, could claim from the State damages in delict for loss of profits (par 1).

The High Court and the Supreme Court of Appeal both applied the *res iudicata* rule, holding that the matter had already been raised. In both instances, the courts also found that wrongfulness and causation had not been proved.

In addition to finding that the applicant had not proven wrongfulness, the Constitutional Court held that the delictual claim had to fail and, "[t]he appropriate avenue for a claim for compensation for loss sustained as a result of a breach of the precepts of administrative justice is [the Promotion of Administrative Justice Act (3 of 2000) (PAJA)]" (par 27). The court, per Theron J, thus invoked the principle of subsidiarity (see discussion below) as the reason that the applicant was precluded from claiming damages in terms of the law of delict.

This note addresses the correctness of the Constitutional Court judgment, with regard, *inter alia*, to the finding of lack of wrongfulness and the application of the principle of subsidiarity. The application of the *res iudicata* rule and the application of the tests for factual and legal causation, as addressed by the High Court and the Supreme Court of Appeal, are also examined.

2 Case discussion

2 1 Background

Pursuant to a debilitating drought in Giyani, a national disaster was declared in terms of the Disaster Management Act (57 of 2002). National Government then decided that water should be sourced from a dam and for this purpose, a welded-steel bulk-water pipeline would be constructed to alleviate the effects of the drought.

During August 2010, the Mopani District Municipality (the respondent) invited tenders for the construction of the water pipeline. Esorfranki Pipelines (Pty) Ltd (the applicant) submitted a tender, but its tender was unsuccessful. Instead, the tender was awarded to a joint venture, consisting of two entities. The applicant instituted an urgent application to interdict the implementation

of the tender, pending a review. The applicant's contention was that the joint venture did not comply with the mandatory minimum requirements for the tender and that its tender should therefore have been disqualified.

A similar application had also been instituted by another unsuccessful tenderer. Both it and the applicant claimed that the joint venture had not met the required requirements specified in the tender. Furthermore, they alleged that the decision to award the tender to the joint venture "was vitiated by bad faith and corruption" (par 6).

The High Court set aside the tender and directed that the tender be re-adjudicated in terms of the Preferential Procurement Policy Framework Act (5 of 2000). The tender bids were adjudicated afresh, and the joint venture was again awarded the tender.

The applicant again brought an urgent application to interdict the process, pending a review. The applicant alleged that the tender award was unlawful, and that during the tender process, the joint venture had made various fraudulent representations to secure the tender. The High Court, per Fabricius J, granted an interdict to restrain the implementation of the award. The respondent and the joint venture applied for leave to appeal. Furthermore, they refused to give an undertaking that operations would be suspended pending a determination of their application for leave to appeal. The applicant applied to the court in terms of the Uniform Rules of Court for the interim order to continue to operate, and this relief was granted. Leave to appeal against the interim order was refused.

The respondent and the joint venture applied to the Supreme Court of Appeal to have the interdict set aside. The applicant, in the meantime, brought an application in terms of the Uniform Rules of Court for the interim relief to remain operative. The Supreme Court of Appeal, and subsequently the Constitutional Court, dismissed the respondent's application for leave to appeal.

The applicant, in the review proceedings, applied for the tender to be set aside. It furthermore wanted itself substituted as the successful tenderer. Finding that the joint venture's tender application was wholly irregular (par 12) and that the respondent's "failure to detect these manifest irregularities supported the conclusion that its decision 'to appoint the joint venture was vitiated by bias, bad faith and ulterior purpose'" (par 12, quoted from *Esorfranki Pipelines (Pty) Ltd v Mopani District Municipality* 2012 JDR 1560 (GNP) par 75), Fabricius J set aside the awarding of the tender, and the respondent was ordered to ensure that all work that had already been done, had been completed according to specification. The court, furthermore, held that it was not certain whether substituting the applicant as the successful tenderer would achieve the purpose of ensuring that destitute communities would be supplied with water.

The applicant appealed to the Supreme Court of Appeal, which held that the High Court had erred in permitting the continuation of the contract between the respondent and the joint venture (*Esorfranki Pipelines (Pty) Ltd v Mopani District Municipality* [2014] ZASCA 21; 2014 JDR 0613 (SCA) par 22). It declared the contract void and then ordered the respondent to approach the Department of Water Affairs to take steps to ensure that the

remaining work would be completed. The Department called for tenders and the applicant was again unsuccessful. The applicant launched proceedings to have the tender set aside but abandoned these proceedings.

2 2 Litigation history: delictual claim

(i) High Court

The applicant approached the court to claim delictual damages for loss of profits from both the municipality (respondent) and the joint venture (*Esorfranki Pipelines v Mopani District Municipality* [2018] ZAGPPHC 224 par 1–2). The applicant alleged that it had suffered damage because the tender had been awarded to the joint venture, and not to it (par 2). From the pleadings, it appeared that it was common cause that the tender process had been "vitiated by bias, bad faith and ulterior purpose" (par 17).

The High Court per Makgoka J held that the applicant was not entitled to claim delictual damages (par 2). It found that the matter was *res iudicata* because it had already been decided when both the High Court and the Supreme Court of Appeal had refused to substitute the applicant as the successful tenderer (par 21 and 22).

Makgoka J held, moreover, that while the applicant had proved factual causation (par 23), it had failed to prove legal causation because the re-advertised tender constituted a *novus actus interveniens* (par 25). The applicant had, therefore, not established that the unlawfully awarded tender was the cause of its loss.

The court found that "legal policy does not favour delictual liability to arise against the municipality" and held that the applicant's claim had to fail (par 27).

(ii) Supreme Court of Appeal

The applicant appealed to the Supreme Court of Appeal (*Esorfranki Pipelines (Pty) Ltd v Mopani District Municipality* 2022 (2) SA 355 (SCA)). The appeal was dismissed, the court finding that the applicant had failed to prove wrongfulness and causation. Insofar as wrongfulness was concerned, Nicholls JA held that the applicant had a public remedy at its disposal; this involved setting aside the tender, which then became void *ab initio* (par 98). This meant that there was no tender in terms of which the applicant had lost the opportunity to bid and profit (par 98).The applicant had, furthermore, been invited to participate in the re-advertised tender process (par 98).

Nicholls JA explained that in terms of public policy it would not be tolerable for a company to retain a claim in a tender process that is unlawful, but at the same time then fail in the legal tender process following on the first (par 99). This would furthermore entail "'a double charge upon the State, and a double entitlement on the part of Esorfranki to profit'" (par 99). Wrongfulness had, therefore, not been established.

Regarding causation, the Supreme Court of Appeal, per Nicholls JA, found that neither factual nor legal causation had been established (par 110

and 120). Insofar as factual causation was concerned, Nicholls JA held that the applicant had failed to prove that its tender would have been accepted if the tender had not been awarded to the joint venture (par 105). The appeal court, like the High Court, found that the re-advertised tender constituted a *novus actus interveniens*, and thus legal causation had also not been established (par 114–115).

Mbatha JA, who wrote the concurring judgment, held that the appeal had to fail, specifically on the basis that the claim was *res iudicata* and also since legal causation had not been established (par 122). Insofar as the principle of *res iudicata* was concerned, Mbatha JA held that in both the review proceedings and the delictual claim, the applicant relied on the allegation that the respondent had acted fraudulently (par 127). The two claims were thus based on the same cause of action (par 127). According to Mbatha JA, this would mean that the respondent would have to defend the same claims based on the same facts that had been made previously and been "conclusively determined" in previous proceedings (par 128).

Legal causation had, furthermore, not been established because the re-advertised tender constituted a *novus actus interveniens* (par 131). Mbatha JA noted that the test for legal causation entailed whether the wrongful act was "sufficiently closely or directly related to the loss" for delictual liability to arise (par 132). In order to ascertain whether legal causation had been established, regard has to be had to public policy (par 132). There is a plethora of cases involving administrative-law breaches in which public policy excludes delictual liability being imposed (par 132).

Goosen AJA in his dissenting judgment held that the appeal should have been upheld. He held that there was no reason "in law or public policy" for the intentional and dishonest conduct on the part of the municipality not to give rise to delictual liability. He furthermore held that the setting-aside of the tender does not mean that wrongfulness could not be proved. Goosen AJA, moreover, found that both factual and legal causation had been established (par 45–52).

Insofar as *res iudicata* was concerned, he noted that while the parties were the same, the cause of action and the relief sought were not the same as that which had been sought before the review court (par 31). The first cause of action, according to Goosen, was the exercise of a court's review jurisdiction, whereas the second cause of action dealt with a claim for delictual damages for loss of profit (par 31).

2 3 Constitutional Court

Apart from referring to the lower courts' application of the *res iudicata* principle, the Constitutional Court, per Theron J, did not address the matter. The court, furthermore, did not deal with causation. Instead, after having found that wrongfulness had not been established, it ultimately decided the matter on the basis of the principle of subsidiarity, and the fact that the applicant had to use PAJA to claim redress.

(i) Jurisdiction and leave to appeal

Theron J held that the matter raised a constitutional issue because the court was called upon to decide whether delictual liability could attach to an intentional infringement of sections 33 and 217 of the Constitution of the Republic of South Africa, 1996 (the Constitution) (dealing with just administrative action and procurement respectively) (par 26). In addition, the question of whether an administrative action affected by intentional misconduct could give rise to delictual liability had been left open by Moseneke J in *Steenkamp NO v Provincial Tender Board of the Eastern Cape* (2007 (3) SA 121 (CC) par 26; see discussion on merits under heading 2 3 (ii) below).

Given the general public importance of the matter, as well as the fact that the application had a reasonable prospect of success, Theron J granted leave to appeal (par 28).

(ii) Merits

(1) Wrongfulness

As mentioned above, Theron J did not address the issue of causation. Instead, she focused only on wrongfulness, which she found had not been established by the applicant (par 58).

Theron J reiterated the legal position that conduct must be both culpable and wrongful. She quoted the well-known *dictum* from *Le Roux v Dey (Freedom of Expression Institute and Restorative Justice Centre as Amicus Curiae)* 2011 (3) SA 274 (CC)), where the question as to whether conduct is wrongful is answered as follows:

> "[It] ultimately depends on a judicial determination of whether – assuming all the other elements of delictual liability to be present – it would be reasonable to impose liability on a defendant for the damages flowing from specific conduct; and ... that the judicial determination of that reasonableness would in turn depend on considerations of public and legal policy in accordance with constitutional norms." (par 122, quoted at par 28 of *Esorfranki*)

Theron J then noted that, while culpable conduct that causes harm to someone is *prima facie* wrongful, in the case of pure economic loss, the position is different. In this instance, conduct is not *prima facie* wrongful, and wrongfulness has to be established (par 29; see also Neethling and Potgieter *Law of Delict* 8ed (2020) 60; headings 3 2 and 3 3 below and sources cited there).

She went further by saying that in the case of a breach of a constitutional or statutory duty, delictual liability will not necessarily ensue (par 30). However, delictual liability may arise in two instances: first, when the breach of a provision imposes a duty to pay damages for loss that may be caused by that breach; secondly, where the statutory provision, "taken together with all relevant facts and salient constitutional norms, mandates the conclusion that a common law duty, actionable in delict, exists" (par 30). (In the latter instance, the court referenced *MEC, Western Cape Department of Social*

Development v BE obo JE 2021 (1) SA 75 (SCA) par 11; see also Neethling and Potgieter *Law of Delict* 90.)

Theron J then explained that these two enquiries overlap.

> "If, on a proper construction, a statutory or constitutional provision provides that a litigant is not entitled to recover damages for its breach, then a common law claim for damages will also not arise, because to allow for a damages claim would subvert the statutory or constitutional scheme." (par 31)

Referring to *Steenkamp* (par 22, quoted at par 31 of *Esorfranki*), Theron J held:

> "The proper construction of the applicable provision is thus relevant to both enquiries and requires a consideration of–
>
> 'whether there are alternative remedies such as an interdict, review or appeal; whether the object of the statutory scheme is mainly to protect individuals or advance public good; whether the statutory power conferred grants the public functionary a discretion in decision-making; whether an imposition of liability for damages is likely to have a 'chilling effect' on performance of administrative or statutory function; whether the party bearing the loss is the author of its misfortune; whether the harm that ensued was foreseeable.'"

In addition to the factors mentioned in *Steenkamp*, Theron J added accountability to the list of instances where a constitutional provision is in issue, for example where there is a duty on the State to protect the rights in the Bill of Rights and there is a breach of such rights (par 32). Accountability provides "a necessary and powerful, but not sufficient reason to recognise that conduct is wrongful in delict" (par 32). With reference to *Minister of Safety and Security v Van Duivenboden* (2002 (6) SA 431 (SCA) par 21, cited at par 31 of *Esorfranki*), she noted that the norm of accountability need not always translate constitutional duties into private-law duties that can be enforced by means of an action for damages, as, in some instances, other remedies will be available to hold the State accountable (par 21).

In certain cases, according to Theron J, the norm of accountability will not give rise to a private-law duty. This will be the case where there are "countervailing constitutional principles, and/or considerations of policy, which mitigate against the imposition of such a duty" (par 33). Furthermore, where there is a breach of a constitutional provision that is in conflict with the state's duty to protect rights in the Bill of Rights (as in the present case), these policy considerations have to be assessed in terms of whether the remedy constitutes "appropriate relief" as provided for in section 38 of the Constitution (par 33).

Theron J continued by noting that the case concerned pure economic loss. The applicant averred that the respondent caused it to suffer loss by its intentional breach of section 217(1) of the Constitution, which provides:

> "When an organ of state in the national, provincial or local sphere of government, or any other institution identified in national legislation, contracts for goods or services, it must do so in accordance with a system which is fair, equitable, transparent, competitive and cost-effective."

Theron J raised the question of whether the wording of section 217(1) militated against a finding on whether the respondent's conduct was

actionable in delict (par 34). She stated that upon a proper construction of section 217, the section is silent as to whether an intentional breach of the section is actionable in delict: "The relevant question is whether the imposition of liability for private harm is an incident of the constitutional provisions" (par 39).

Theron J then referred to *Steenkamp*, where the court answered a question that was related to the *Esorfranki* case, namely whether the "negligent but honest bungling of a tender" that results in pure economic loss was actionable (par 40). In *Steenkamp*, it was held that incorrect or negligent but honest decisions were not actionable in delict, but the court did not address the matter of whether intentional breach of the State's duties would give rise to delictual liability (par 55). The decision in *Steenkamp* was consistent with the decision in *Olitzki Property Holdings v State Tender Board* (2001 (3) SA 1247 (SCA)). After *Steenkamp*, the Supreme Court of Appeal in *Minister of Finance v Gore NO* (2007 (1) SA 111 (SCA)) found that the State was vicariously liable for fraudulent misconduct on the part of its officials in a tender process that resulted in pure economic loss.

Theron J went on to discuss the principle of subsidiarity (see below) and came to the conclusion that, because wrongfulness had not been established, the claim had to fail (par 58).

(2) Subsidiarity

At the time *Steenkamp* was heard, PAJA was not yet in force, but it came into force before the judgment was delivered. Theron J referred to a concurring judgment by Sachs J, in which the following was stated:

> "The existence of this constitutionally based public-law remedy renders it unnecessary and inappropriate to hybridise and stretch the common-law delict of injury beyond its traditional limits in this area. Just compensation today can be achieved where necessary by means of PAJA." (*Steenkamp* par 101, quoted at par 44 of *Esorfranki*)

Theron J, in finding that the applicant should have relied on PAJA, rather than on the law of delict, referred to the principle of subsidiarity:

> "This principle provides that where legislation is enacted in order to comprehensively give effect to a constitutional right, a litigant cannot bypass the relevant legislation and rely directly on the Constitution or on the common law, without challenging the constitutional validity of that legislation. The principle has two foundational justifications: to mitigate against the development of 'two parallel systems of law', one judge-made and the other crafted by Parliament, and to ensure 'comity between the arms of government' by maintaining "a cooperative partnership between the various institutions and arms tasked with fulfilling constitutional rights." (par 45)

Theron J recognised that PAJA was now in force and that the *dictum* of Sachs J was useful. To find that the respondent is liable in delict would offend the principle of subsidiarity (par 46). PAJA makes provision for, *inter alia*, the granting of a court order that is just and equitable (par 46 and 47). When called upon to decide upon a remedy,

> "a court must seek, as far as possible, to fully vindicate the breach of administrative justice by carefully balancing the interests of the public with those of the reviewing party and other affected parties." (par 48)
>
> "If private interests are vindicated in terms of the law of delict then, in assessing appropriate relief under PAJA, a court would either be required to discount these interests from the balance (despite the clear contrary injunction which emerges from section 8), or risk the situation in which an individual's interests are, in effect, double counted, since they are able to obtain redress both in terms of PAJA and in delict." (par 49)

Theron J accordingly held that both the principle of subsidiarity and the scheme of section 8 of PAJA meant that economic loss sustained as a result of an infringement of section 217 of the Constitution, irrespective of whether the breach was intentional, could not be recovered in terms of the law of delict. She referred specifically to section 8(1)(*c*)(ii)(*bb*) of PAJA, which makes provision for directing the administrator or any other party to the proceedings to pay compensation in exceptional cases.

She concluded by saying that it was not permissible from a constitutional perspective, and also not necessary, to allow the applicant's claim in delict (par 57). The appropriate remedy in this case was a claim for compensation based on loss sustained as a result of the breach of the principles of administrative justice, and thus recourse should be had to PAJA (par 57).

3 Discussion

The purpose of this section is to examine the reasons raised in all three *Esorfranki* cases to deny a claim for delictual damages and to show that the reasons were based on incorrect applications of the relevant legal principles.

3 1 Res iudicata

As mentioned above, the Constitutional Court did not address the matter of *res iudicata*, but it featured in the reasoning of both the High Court and the Supreme Court of Appeal.

The High Court held that the claim for damages was *res iudicata*, as a claim based on the same cause of action had already been heard by both the High Court and the Supreme Court of Appeal in the matter where Esorfranki claimed it should have been the successful bidder (par 22 High Court judgment).

In the Supreme Court of Appeal, Mbatha JA, in his concurring judgment, also held that the matter was *res iudicata* (par 126). The defence, according to Mbatha JA, was based on the public-policy notion that there should be an end to litigation and also that a defendant should not be sued twice based on the same cause (par 124).

In deciding that the matter was not *res iudicata*, Goosen AJA explained the principle as follows:

> "A plea of *res judicata* requires the party who relies thereupon to establish each of the three elements upon which the exception is based, namely that *the same cause of action* between the same parties has been litigated to

> finality i.e. the same relief has been sought or granted." (par 30 SCA) (own emphasis)

The defence of *res iudicata* is closely aligned with the so-called "once and for all" rule. In order for the rule to apply, it has to be shown that the subsequent action is based on the same cause of action as the previous action (Peté, Hulme, Du Plessis, R Palmer, Sibanda, T Palmer *Civil Procedure: A Practical Guide* (2016) 3ed par 3.3.1(c)(iii)(c)). A case is *res iudicata* if a court has given final judgment in a matter based on the same cause of action and involving the same parties (Peté *et al Civil Procedure* par 2.3.1(c)(iii)(c)).

The "once and for all" rule can be defined as follows:

> "In claims for compensation or satisfaction arising out of a delict, breach of contract or other cause, the plaintiff must claim damages once for all damage already sustained or expected in the future in so far as it is based on a single cause of action." (Potgieter, Steynberg and Floyd *Law of Damages* 3ed (2013) 153; see also *Evins v Shield Insurance Co Ltd* 1980 (2) SA 814 (A) 835B–C; Loubser and Midgley *Law of Delict in South Africa* 492–495; Neethling and Potgieter *Law of Delict* 270)

For the purposes of this rule, it is important to know what is meant by a "cause of action". Applying the *facta probanda* approach, the court in *Evins v Shield Insurance* (*supra*) defined a cause of action as:

> "every fact which it would be necessary for the plaintiff to prove, if traversed, in order to support his right to judgment of the Court. It does not comprise every piece of evidence which is necessary to prove each fact, but every fact which is necessary to be proved." (838E–F, referring to *McKenzie v Farmers' Co-operative Meat Industries* Ltd 1922 AD 16 23)

The question that has to be answered here is whether the initial claim is based on the same *facta probanda* as the claim for pure economic loss. The cause of action in the first case related to the tender not being awarded to Esorfranki, while the second was a delictual claim for pure economic loss, the *facta probanda* of which would include the elements of delict. The two claims are definitely not based on the same *facta probanda*, and therefore constitute different causes of action. It is, therefore, clear that the findings in this regard of both Nicholls JA and Goosen AJA were correct and that the claim for delictual damages was not *res iudicata*.

3 2 Wrongfulness

In *Country Cloud Trading CC v MEC, Department of Infrastructure Development, Gauteng* (2015 (1) SA 1 (CC)), Khampepe J described the test for wrongfulness as functioning

> "to determine whether the infliction of culpably caused harm demands the imposition of liability or, conversely, whether 'the social, economic and others costs are just too high to justify the use of the law of delict for the resolution of the particular issue'. *Wrongfulness typically acts as a brake on liability, particularly in areas of the law of delict where it is undesirable or overly burdensome to impose liability.*" (par 20) (own emphasis)

Khampepe J went further, noting, with reference to *Loureiro v Imvula Quality Protection (Pty) Ltd* (2014 (3) SA 394 (CC)), that wrongfulness is based on the duty not to cause harm … *and questions the reasonableness of imposing liability*." (par 21) (own emphasis)

In the case of pure economic loss and omissions, harm-causing conduct is not *prima facie* wrongful; wrongfulness lies in the breach of a legal duty (*Country Cloud Trading v MEC, Department of Infrastructure Development, Gauteng supra* par 22; see also *Minister of Finance v Gore supra* par 82; Neethling and Potgieter *Law of Delict* 350). Khampepe J in *Country Cloud* formulated it as follows:

> "Our law of delict protects rights, and, in cases of non-physical invasion, the infringement of rights may not be as clearly apparent as in direct physical infringement. There is no general right not to be caused pure economic loss." (par 22)

She noted the problem of limitless liability, which could arise should all instances of pure economic loss be compensated (*Country Cloud Trading v MEC, Department of Infrastructure Development, Gauteng supra* par 24). Unless wrongfulness is positively established, there can be no liability (*Country Cloud Trading v MEC, Department of Infrastructure Development, Gauteng supra* par 23).

Theron J found that the respondent was not liable, *inter alia* because wrongfulness had not been proved (par 58).

She first recognised that "the intensity of the respondent's fault is ... relevant to the wrongfulness enquiry" (par 42), and continued by saying:

> "What is clear, however, is that the respondent's unconscionable conduct harmed the rights and interests of the residents it was duty bound to protect, egregiously violated the applicant's right to just administrative action, and prejudiced the country generally, by squandering taxpayer money." (par 42)

Despite finding that the applicant had not proved wrongfulness, she referred the matter to the Special Investigation Unit (par 58). In addition, she ordered the respondent to pay all costs, repeating again, the fact that the conduct was reprehensible (par 59).

Recognising the (intentional) conduct as reprehensible and unconscionable implies that it was wrongful. Neethling and Potgieter state the following with regard to wrongfulness:

> "In essence, wrongfulness lies in the infringement of a legally protected interest (or an interest worthy of protection) in a legally reprehensible way …
>
> The determination of wrongfulness in principle entails a dual investigation. In the first place, one must determine whether a legally recognised interest has been infringed, ie, whether such interest has in fact been encroached upon. In other words, the act must have caused a harmful result. In the second place, if it is clear that a legally protected interest has been prejudiced, legal norms must be used to determine whether such prejudice occurred in a legally reprehensible manner." (Neethling and Potgieter *Law of Delict* 35–36)

What is not clear from the facts of the case is whether Esorfranki proved the nature and scope of their harm. In the absence of a harmful consequence, wrongfulness cannot be established (Neethling and Potgieter *Law of Delict*

36–37). This would be a better basis for establishing absence of wrongfulness.

3 3 Causation

While both the High Court and the Supreme Court of Appeal held that causation had not been established, Theron J in the Constitutional Court did not address the issue of causation.

The High Court held that factual causation had been proved, but that legal causation had not been established. The issues of factual causation and *res iudicata* were conflated by the High Court. Under the heading of *res iudicata*, the court applied the "but for" test:

> "Such a declaration must, perforce, be preceded by a finding that, *but for the municipality's conduct*, Esorfranki would have been the successful bidder. *But Esorfranki has already failed in that respect – not once, but twice.* Both in the review application in this court and on appeal to the Supreme Court of Appeal, Esorfranki expressly and pertinently sought that order." (par 21 High Court) (own emphasis)

> "Neither of the two courts acceded to its request. Despite negative findings by both courts against the municipality, they were not sufficient to move either of the courts to declare Esorfranki the successful bidder. It was submitted on behalf of the municipality that as a result, this issue (whether Esorfranki was the successful bidder) is res judicata between the parties and cannot be revisited*. I agree, and that should be the end of the matter, as this court is bound by the conclusions arrived at ultimately by the Supreme Court of Appeal*." **(**par 22 High Court) (own emphasis)

The High Court thus seemed to find that factual causation had not been established (par 21), but then stated that "[t]here is no question that in the present case, factual causation has been established by Esorfranki" (par 23).

The Supreme Court of Appeal, per Nicholls J, found that neither factual nor legal causation had been proved. Mbatha J, in his concurring judgment, held that factual causation had been proved but agreed with Nicholls J and the High Court that the re-advertised tender constituted a *novus actus interveniens.* Goosen AJA, in his dissenting judgment, held that causation had been established (par 45–52. See heading 2 2 (ii) above).

Neethling and Potgieter (215) write, "The causing of damage through conduct, or, in other words, a causal nexus between conduct and damage, is required for a delict." Causation involves two enquiries, namely both factual and legal causation (*Lee v Minister of Correctional Services* 2013 (2) SA 144 (CC) par 38; *Fourway Haulage SA (Pty) Ltd v SA National Roads Agency Ltd* 2009 (2) SA 150 (SCA) 163–164; *International Shipping Co (Pty) Ltd v Bentley* 1990 (1) SA 680 (A) 700–702. See also Neethling and Potgieter *Law of Delict* 215).

It is trite that the test used for factual causation is the so-called *conditio sine qua non*, or "but for" test (*Lee v Minister of Correctional Services supra* par 40; *International Shipping Co (Pty) Ltd v Bentley supra*). It was described in *International Shipping Co (Pty) Ltd v Bentley* (*supra*) as involving

> "the mental elimination of the wrongful conduct and the substitution of a hypothetical course of lawful conduct and the posing of the question as to whether upon such an hypothesis plaintiff's loss would have ensued or not. If it would in any event have ensued, then the wrongful conduct was not a cause of the plaintiff's loss; [otherwise] it would not so have ensued. If the wrongful act is shown in this way not to be a *causa sine qua non* of the loss suffered, then no legal liability can arise." (700F–H)

The question, therefore, is first whether the conduct of the respondent was a *causa sine qua non* for the financial loss suffered by the applicant, and secondly, whether legal causation had been established, or whether the re-advertised tender constituted a *novus actus interveniens.*

The High Court, as well as the two minority judgments of the Supreme Court of Appeal (per Mbatha JA and Goosen AJA) were correct in holding that factual causation had been established. Applying the *conditio sine qua non* test, it is clear that, but for the conduct of the respondent, the applicant would not have suffered harm.

Insofar as legal causation is concerned, Neethling and Potgieter describe the test (with reference *inter alia* to *S v Mokgethi* 1990 (1) SA 32 (A) 40–41; *International Shipping Co (Pty) Ltd v Bentley supra* 700–701) as follows:

> "The basic question is whether there is a close enough relationship between the wrongdoer's conduct and its consequence for such consequence to be imputed to the wrongdoer in view of policy considerations based on reasonableness, fairness and justice. However, the existing criteria for legal causation (such as direct consequences and reasonable foreseeability) may play a subsidiary role in determining legal causation within the framework of this elastic approach." (Neethling and Potgieter *Law of Delict* 234)

These existing criteria include whether or not something was a *novus actus interveniens* (new intervening cause), which has been described as follows:

> "A novus actus interveniens (new intervening cause) is an independent event which, after the wrongdoer's act has been concluded, either caused or contributed to the consequence concerned."(Neethling and Potgieter *Law of Delict* 250)

The authors provide the following example: A administers a dose of slow-working poison to her husband whereafter the husband is shot dead by B; there is no [causal] connection between A's deed and her husband's death. B's act is then a *novus actus interveniens* (Neethling and Potgieter *Law of Delict* 250 fn 236).

From the above, it is clear that the *novus actus interveniens* achieves the result initially intended with the "first act". This criterion also has to be viewed against the elastic criterion for legal causation, which takes into consideration "policy considerations based on reasonableness, fairness and justice" (Neethling and Potgieter *Law of Delict* 234). In the present case, the "second cause" did not contribute or cause the financial loss and in fact had nothing to do with it. It is, therefore, submitted that the re-advertised tender was not a *novus actus interveniens*. Furthermore, "policy considerations based on reasonableness, fairness and justice" should not regard the relationship between conduct and the damage as too remote to impute liability, particularly since the conduct in question was fraudulent.

3 4 Remedies for pure economic loss in the case of unsuccessful tender bids

(i) Delictual damages

Bleazard, Budlender and Finn note that in two Supreme Court of Appeal cases – *Transnet v Sechaba Photoscan (Pty) Ltd* (2005 (1) SA 299 (SCA)) and *Minister of Finance v Gore NO* (*supra*) – the court awarded delictual damages where the tender process was vitiated by fraud ("Remedies" in Quinot, Anthony, Bleazard, Budlender, Cachalia, Corder, Finn, Kidd, Madonsela, Maree, Murcott, Salakuzana and Webber *Administrative Justice in South Africa* 2ed (2021) 293; see also Hoexter and Penfold *Administrative Law in South Africa* 3ed (2021) 708). In those cases, the courts did not require the parties to rely only on PAJA.

In *Steenkamp NO v Provincial Tender Board of the Eastern Cape* (*supra*), the Constitutional Court, per Moseneke DCJ, held that delictual liability should not be imposed where the tender board had acted negligently:

> "A potential delictual claim by every successful tenderer whose award is upset by a court order would cast a long shadow over the decisions of tender boards. Tender boards would have to face review proceedings brought by aggrieved unsuccessful tenders. And should the tender be set aside it would then have to contend with the prospect of another bout of claims for damages by the initially successful tenderer. In my view this spiral of litigation is likely to delay, if not to weaken the effectiveness of or grind to a stop the tender process." (par 55.)

Moseneke DCJ further held that it would be detrimental to the public. He noted the constraint on the public purse and the fact that the State would not be able to compensate disappointed tenderers and still procure the same goods or service (*Steenkamp* par 55. He noted that "if an administrative or statutory decision is made in bad faith, under corrupt circumstances of outside the legitimate scope of the empowering provision, different policy considerations may well apply" (par 55.). It would appear from this *dictum* that Moseneke J recognised the possibility of damages where a tender process has been tainted by fraud.

(ii) PAJA

PAJA makes provision for a number of remedies, including, in terms of section 8(1)(*c*)(*ii*)(*bb*), compensation to be paid by the administrator. This compensation is payable only in exceptional circumstances. What is meant by "exceptional circumstances" is, according to Bleazard *et al*, not entirely clear, as the courts have hesitated to define what this entails, preferring instead to decide this on a case-by-case basis (Quinot *et al Administrative Justice in South Africa* 294).

Bleazard *et al* remark that compensation in terms of section 8 of PAJA is a public-law remedy (in Quinot *et al Administrative Justice in South Africa* 291). This has to be distinguished from private-law damages (Bleazard *et al* in Quinot *et al Administrative Justice in South Africa* 291). Referring to *Steenkamp*, the authors note:

> "the considerations that it attracts differ from those that inform whether a breach of an administrative duty can give rise to private-law delictual damages. Nevertheless, in applying section 8(1)(*c*)(ii)(*bb*), the courts have had regard to the practical and policy concerns that have informed the courts' approach to delictual damages for irregular administrative action. (Bleazard *et al* in Quinot *et al Administrative Justice in South Africa* 291)

Section 10A of PAJA provides as follows:

> "No person is criminally or civilly liable for anything done in good faith in the exercise or performance or purported exercise or performance of any power or duty in terms of this Act or the rules made under section 7(3)."

This seems to imply that civil (or criminal) liability may ensue where an administrative act was *not* performed in good faith. This would further imply that delictual damages may be available where the administrative act (in this case the awarding of a tender) was vitiated by fraud (Hoexter and Penfold *Administrative Law* 708, 709; *LAWSA II Administrative Justice* par 74).

Hoexter and Penfold write:

> "Delictual liability, at least for pure economic loss, is unlikely to be visited on a negligent administrator. The same, however, cannot be said of an administrator who is corrupt or dishonest or acts in bad faith. As Cameron JA put it in a procurement case, *Minister of Finance v Gore NO,* 'the cost to the public of exempting a fraudulent perpetrator from liability for fraud would be too high." (708)

From the above, it appears that section 10A of PAJA does not exclude delictual liability in the case of fraudulent administrative acts. The mere fact that PAJA provides for compensation does not, therefore, mean that delictual damages are not available in the case of fraudulent administrative acts.

3 5 The principle of subsidiarity

As can be seen from the discussion above, the principle of subsidiarity was not used in the lower courts' judgments to exclude delictual liability, and was raised for the first time by Theron J in the Constitutional Court. While she did refer to the fact that wrongfulness had not been proved, that was not the reason that the delictual claim ultimately failed; instead, it failed because of Theron J's application of the principle of subsidiarity.

Subsidiarity featured prominently in the recent case of *Eskom Holdings SOC Ltd v Vaal River Development Association (Pty) Ltd* ([2022] ZACC 44). In that instance, Madlanga J described the principle as follows:

> "The principle of subsidiarity, repeatedly recognised by this Court, has a number of applications. One application of the principle is that a litigant cannot directly invoke a constitutional right when legislation has been enacted to give effect to that right. The litigant must either challenge the constitutionality of the legislation so enacted or rely upon the legislation to make its case." (par 149)

He also quoted (*Eskom* par 234) from Cameron J's minority judgment in the case of *My Vote Counts NPC v Speaker of the National Assembly* (2016 (1) SA 132 (CC) (*My Vote Counts I)* (the majority did not address this issue):

> "[A] litigant cannot directly invoke the Constitution to extract a right he or she seeks to enforce without first relying on, or attacking the constitutionality of, legislation enacted to give effect to that right. ... *Once legislation to fulfil a constitutional right exists, the Constitution's embodiment of that right is no longer the prime mechanism for its enforcement.* The legislation is primary. The right in the Constitution plays only a subsidiary or supporting role." (*My Vote Counts I* par 46) (own emphasis)

In *SAHRC obo Jewish Board of Deputies v Masuku* ([2022] ZACC 5 par 102–108), the Constitutional Court similarly noted that the principle entails that where legislation has been enacted to give effect to a constitutional right, the Constitution cannot be invoked directly to give effect to that right. In *Thubakgale v Ekurhuleni Metropolitan Municipality* ([2021] ZACC 45), Jafta J reiterated the principle, holding that the parties, instead of claiming constitutional damages, should have claimed damages in terms of the relevant legislation (in that case, the Housing Act) (par 178).

In the case law quoted above, the principle was applied where claimants relied directly on the Constitution under circumstances where legislation had been passed to give effect to give to a constitutional right, or where there was a remedy in terms of the common law. In terms of the principle, the aggrieved party has to institute a claim in terms of the legislation or the common law. Other than Sachs J's concurring judgment in *Steenkamp*, where subsidiarity is not mentioned by name, there is no prior example of the principle being used to exclude delictual liability.

In *Jayiya v MEC for Welfare, Eastern Cape* (2004 (2) SA 611 (SCA)), the court applied the principle of subsidiarity to PAJA. In this case, the appellant had claimed constitutional damages for the infringement of her right to lawful administrative action in terms of section 33(1) of the Constitution. The court held that the PAJA remedies should be used; only where these did not provide "appropriate relief" could a claim be brought under the Constitution. While the principle of subsidiarity was not mentioned by name, the court, per Conradie, noted as follows:

> "[T]he Promotion of Administrative Justice Act was passed by Parliament to give effect to the constitutional guarantee of just administrative action. The appellant should accordingly have sought her remedy in this Act. '*Constitutional damages*' in the sense discussed in *Fose v Minister of Safety and Security* 1997 (3) SA 786 (CC) at 826 para [69] *might be awarded as appropriate relief where no statutory remedies have been given or no adequate common law remedies exist***.** Where the lawgiver has legislated statutory mechanisms for securing constitutional rights, and provided, of course, that they are constitutionally unobjectionable, they must be used. The Promotion of Administrative Justice Act does not provide for the kind of relief afforded to the appellant in paras 2(c) and 3 of the order. Instead, it provides in sec 8(1)(c)(ii)(bb) that a court may in proceedings for judicial review, exceptionally, direct an administrator to pay compensation." (*Jayiya* par 9) (own emphasis)

In the *Jayiya* case, the principle was used with reference to PAJA, but to exclude a claim for constitutional damages, not to exclude a delictual claim.

The principle of subsidiarity should, therefore, not have been used in *Esorfranki* to exclude a claim for delictual damages.

4 Conclusion

It has been shown that the applicant's claim should not have failed on the basis of *res iudicata* or of lack of wrongfulness and causation.

It is submitted that Theron J erred in two respects: first, in finding that wrongfulness had not been proved; and secondly, holding that in terms of the principle of subsidiarity there was no delictual claim.

Theron J referred three times to the fact that the respondent's conduct was "reprehensible", and from this an inference of wrongfulness can be drawn.

Theron J applied the principle of subsidiarity to exclude delictual liability where a tender had failed as a result of the intentional misconduct of the State. Past cases have primarily applied the principle of subsidiarity to exclude a claim under the Constitution – for example, for constitutional damages, where a common-law (delictual) claim was available. The principle has also been invoked numerous times where legislation has been passed in terms of the Constitution; specifically, it has been used to prevent direct access to the Constitution where legislation has been passed in terms of the Constitution to protect rights entrenched in the Bill of Rights.

PAJA, furthermore, does not exclude a common-law remedy where conduct has been fraudulent – only where it has been "done in good faith". Since civil liability is not excluded where an administrative act is not performed "in good faith", this surely means that delictual claims should be available for pure economic loss where the conduct is fraudulent and where the defendant has a legal duty not to cause pure economic loss.

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THE COMPANIES ACT 71 OF 2008 DOES NOT OUST THE COMMON-LAW DERIVATIVE ACTION FOR CLOSE CORPORATIONS

Naidoo v The Dube Tradeport Corporation [2022] ZASCA 14

1 Introduction

The Companies Act 71 of 2008 (2008 Act) abolished the common-law derivative action for companies; section 165 of the 2008 Act replaced it with the statutory derivative action (Griggs "The Statutory Derivative Action: Lessons That May Be Learnt From the Past!" 2002 *University of Western Sydney Law Review* par 1.2; Coetzee "A Comparative Analysis of the Derivative Litigation Proceedings Under the Companies Act 61 of 1973 and the Companies Act 71 of 2008" 2010 *Acta Juridica* 298). The question that remained was what impact this would have on common-law rights for close corporations that had been incorporated before the commencement of the 2008 Act but which have not converted to companies under that Act. The Supreme Court of Appeal (SCA) judgment in *Naidoo v The Dube Tradeport Corporation* ([2022] ZASCA 1) provides much-needed clarity on the status of the common-law derivative action for close corporations. The case also provides guidance on how a court will assess whether knowledge of information can be imputed to a third party in their dealings with a close corporation.

2 Facts

This case was an appeal from the KwaZulu-Natal Division of the High Court, Durban (High Court), which had upheld the exception of the first respondent, the Dube Tradeport Corporation (Dube Tradeport), to the appellants' particulars of claim (par 1). In the action, the first appellant, Mr Sagadava Naidoo (Sagadava) and the second appellant, Odora Trading CC (Odora), a close corporation, sued the first defendant, Mr Sivaraj Naidoo (Sivaraj) and Dube Tradeport to set aside the sale of certain farms that had belonged to Odora and had been sold to Dube Tradeport under the controlling mind of Sivaraj (par 1).

Sivaraj was the sole registered member of Odora, and therefore held the entire member's interest in the close corporation. However, in the particulars of claim it was alleged that Sagadava was in fact the beneficial owner of the member's interest in Odora, and that Sivaraj held the member's interest on behalf of Sagadava as his nominee (par 2). This claim was made pursuant

to certain previous oral agreements between Sagadava and Sivaraj. It was alleged that Sivaraj had no right to sell the property to Dube Tradeport without Sagadava's consent. It was on this ground that Sagadava had instituted a derivative action on behalf of Odora, and a personal action in his own name to set aside the sale of the properties (par 2).

These properties were the sole assets of Odora and were sold pursuant to a written purchase agreement between Odora and Dube Tradeport (par 3). Odora had purchased the properties in December 2001. On 20 January 2001, Sagadava and Sivaraj had concluded an oral agreement in terms of which certain assets in Sagadava's possession would be divided between the two brothers on a 50/50 basis (2001 agreement). The ultimate agreement was that the assets would be registered in the personal names of Sagadava and Sivaraj. However, the latter repudiated the 2001 agreement and refused to sign any record of it. In response, Sagadava refused to accept Sivaraj's repudiation and elected to hold him to the agreement (par 4).

In the alternative to the 2001 agreement, it was pleaded that Sagadava and Sivaraj had concluded an agreement in 1998, in terms of which Sivaraj would hold certain assets on behalf of Sagadava as his nominee (1998 agreement). When Odora purchased the properties in 2001, they became part of the 1998 agreement. On 13 January 2014, Sagadava instituted an action in the High Court against Sivaraj, seeking transfer and delivery to him of his (Sagadava's) member's interest in Odora. Sivaraj defended the action, also claiming to act on behalf of Odora (par 4–5).

An exception to the particulars of claim was filed by Dube Tradeport, predicated on the contention that, since Sagadava was not a member of Odora, he could not bring an action on its behalf, and that, in any event, section 54 of the Close Corporations Act 69 of 1984 (Close Corporations Act) protected Dube Tradeport. Section 54 of the Close Corporations Act provides that a member of a close corporation is an agent of the close corporation in dealings with a third party, and has the power to bind the close corporation, except where a third party knows or ought to know of the member's lack of authority to transact on behalf of the close corporation (par 7).

3 Proceedings in the High Court

The High Court found that the common-law derivative action is available in respect of close corporations. However, the court concluded that since Sagadava was not a registered member of Odora, he was not entitled, in terms of that law, to institute an action on its behalf or in its name (par 8). According to the court, neither section 49 nor section 50 of the Close Corporations Act granted Sagadava the right to institute an action in the name of Odora. In any event, concluded the High Court, as Sagadava had relied on the common-law derivative action to advance the suit of Odora, he could not rely on section 50.

The High Court also considered section 54 of the Close Corporations Act. The court held that the provisions of the Close Corporations Act precluded the action by both Sagadava and Odora against Dube Tradeport, as the

latter had transacted with Sivaraj, the sole member of Odora, and who, as its agent, had the power to bind it. The court held that Dube Tradeport was protected against the negative effects of the *ultra vires* doctrine and the doctrine of constructive notice (par 9). The court accordingly held that the appellants' pleaded case did not set out a cause of action against Dube Tradeport, and it upheld the exception with costs (par 10).

4 Issue

The SCA had to consider three issues. The first was the *locus standi* of both Sagadava and Odora, which depended on Sagadava's claim that he was the "beneficial owner" of the member's interest in Odora. The second issue was whether the common-law derivative action, upon which Sagadava relied, is available in respect of close corporations, and if so, whether Sagadava was entitled to bring such action on behalf of Odora. The third was whether section 54 of the Close Corporations Act protected Dube Tradeport. Both the second and third issues arose only if the first issue was answered in the affirmative (par 14).

5 Judgment

On the first issue, Makgoka JA concluded (Mocumie, Mothle, Mabindla-Boqwana JJA and Weiner AJA concurring) that this being an exception stage, the factual averments by Sagadava must be accepted as correct, unless they were manifestly false and untenable, which was not apparent from the pleadings (par 35). Makgoka JA held that, for the purposes of the exception, Sagadava's *locus standi* had been established. With regard to the common-law derivative action for close corporations, the court considered the effect of abolishing the common-law derivative action by section 165(1) of the 2008 Act, and concluded that this did not affect close corporations that had not converted to companies. Thus, the common-law derivative action was still available to such close corporations. With regard to section 54 of the Close Corporations Act, the SCA found that Dube Tradeport had known of the dispute between Sagadava and Sivaraj concerning the membership of Odora and the properties. The court held that there was sufficient indication, at least at the exception stage, that the imputed knowledge should be attributed to Dube Tradeport in terms of section 54(2), and as a result, Dube Tradeport did not enjoy the protection of section 54 of the Close Corporations Act (par 34). Accordingly, the SCA set aside the order of the High Court, and upheld the appeal with costs (par 37).

6 Discussion

6 1 The origin and nature of the common-law derivative action

Judges have long been reluctant to interfere with the internal affairs of a company and similar associations; they have usually abdicated their

jurisdiction in favour of the obvious alternative authority – the majority of the members (shareholders). The long-standing view has been that it is not the business of a court to manage the affairs of a company – that is a task for shareholders and directors (*Shuttleworth v Cox Bros & Co* [1927] 2 K.B 9 23; see also Sykes "The Continuing Paradox: A Critique of Minority Shareholder and Derivative Claims Under the Companies Act 2006" 2010 *Civil Justice Quarterly* 205 209). This was the view adopted in *Sammel v President Brand Gold Mining Co Ltd* (1969 (3) SA 629 (A)), where the court held that the concept of corporate democracy connotes that where there is disagreement among the members, or between the members and directors, the will of the majority members must ultimately prevail (see *Sammel v President Brand Gold Mining Co Ltd supra* 678; see also *Karoo Valley Farms Bpk v Klein Karoo Kooperasie Bpk* 1998 (4) SA 226 (C) 235; Gibson *South African Mercantile and Company Law* 8ed (2005) 368–369). The general rule is that the courts are reluctant to interfere with the internal management of a company (*Carlen v Drury* (1812) 1 V 7 B 154; 35 ER 61 62; *Yende v Orlando Coal Distributors (Pty) Ltd* 1961 (3) SA 314 (W) 316; *Maynard v Office Appliances (SA) (Pty) Ltd* 1927 WLD 290; *Levin v Felt and Tweeds Ltd* 1951 (2) SA 401 (A) 414–415). This rule stems from the principle in *Salomon v Salomon & Co Ltd* ([1897] AC 22 (HL)) that an incorporated company must be treated like any other independent person. It is the bearer of its own rights and liabilities.

The origin of what is now known in English law as the rule in *Foss v Harbottle* ((1843) 2 Hare 461, 491; 67 ER 189) (*Foss v Harbottle*) can be traced to some early nineteenth-century decisions on the law of partnership. In *Foss v Harbottle* (see also Beuthin and Luiz *Beuthin's Basic Company Law* 3ed (2003) 153–156; see generally Cassim (ed) *Contemporary Company Law* (2011) 678–300). Sir James Wigram VC stated that, in respect of wrongs done to a company, "the corporation should sue in its own name and in its corporate character, or in the name of someone whom the law has appointed to be its representative" (Wedderburn "The Rule in *Foss v Harbottle*" 1957 *Cambridge Law Journal* 194 and 1958 *Cambridge Law Journal* 93: these articles are primarily concerned with the modern rule and the exceptions to it, but also provide an introduction to the history of the rule).

The exception to the rule in *Foss v Harbottle* (*supra*) is available where what has been done amounts to fraud and the wrongdoers are themselves in control of the company. According to Wedderburn, the exceptions to the rule in *Foss v Harbottle* (*supra*) are not exceptions at all (Wedderburn "Shareholders' Rights and the Rule in Foss v Harbottle" 1957 *Cambridge Law Journal* 203). They are situations in which there is no chance of confirmation by the majority, and are therefore situations where the rule in *Foss v Harbottle* does not apply (par 11).

Exceptions to the rule in *Foss v Harbottle* (*supra*) have been established even though there has not always been agreement upon their exact nature. The exceptions to the rule listed by Jenkins LJ in *Edwards v Halliwell* ([1950] 2 All ER 1064) are where:

1. *Ultra vires or illegal acts have been committed*: The act of the company is *ultra vires* where the act complained of is wholly *ultra vires* to the

company or association. *Ultra vires* means "beyond the scope of (its) powers" (Hiemstra and Gonin (eds) *Trilingual Legal Dictionary* 3ed (2003) 300). In cases where the act or acts in question are *ultra vires* or illegal, the majority shareholders cannot ratify the act and specifically in the case of illegal acts, such will be prohibited under law. In such a case of an *ultra vires* or illegal act performed by the majority, a shareholder has a right of action, for an interdict or injunction to restrain the act in question. This action may be brought on his own behalf, or in his representative capacity acting on behalf of other shareholders (Wedderburn *Cambridge Law Journal* 203).

2. *The company fails to achieve a special resolution*: The company fails to achieve a special resolution where the matter is one that could validly be agreed to or sanctioned not by a simple majority of the members but only by some special majority. The rule is ousted in this situation. In *Edwards v Halliwell* (*supra*), Jenkins LJ held that anything that, according to the articles, should be done by a special majority fell outside the rule in *Foss v Harbottle* (*Edwards v Halliwell supra* n 6 1067). If this was not the case, a company, where its directors had breached its own regulations by acting without a special resolution, could assert that it alone was the proper plaintiff in any further action. The effect would be to allow a company acting in breach of its articles to do *de facto* by ordinary resolution that which was required by the articles to be done by special resolution (Wedderburn 1957 *Cambridge Law Journal* 194).
3. *A member's rights are infringed*: A member's rights are infringed where the personal and individual rights of membership of the plaintiff have been invaded (*Residues Treatment & Trading Co Ltd v Southern Resources Ltd* (1988) 6 ACLC 1160). In *Edwards v Halliwell* (*supra*), the court said that each member had a personal right to prevent irregular alterations. In *Pender v Lushington* ((1877) 6 ChD 70), the court stated that the right of a shareholder to vote according to the articles was enforced. This is true whether a shareholder votes with the majority or minority; a shareholder is entitled to have their vote recorded and thus also has an individual right to sue (*Edwards v Halliwell supra* 1064, 1066). The cases go further and have recognised not only a member's contractual rights under the articles of association (*Borland's Trustee v Steel Bros, Ltd* (1901) 1 Ch 279; *Bigswood v Henderson's Transvaal Estates, Ltd* (1908) 1 Ch 743), and the right to enforce shareholder rights (*Beattie v Beattie* [1938] Ch 708 721–722), but also personal rights: a) to transfer shares and to vote (*Pender v Lushington* (1877) 6 ChD 70; *Moffat v Farquhar* (1877) 7 ChD 591; *Marks v Financial News* (1919) 35 TLR 681); b) to protect preferential rights and class interests, such as the right to have shares offered to them; c) to enforce a declared dividend to be distributed according to the articles (*Moodie v Shepherd (Bookbinders) Ltd* [1949] 2 All ER 1044 (HL); *Burdett v Standard Exploration Co* (1899) 16 TLR 112); and d) to prevent directors from holding positions in breach of the articles. Similarly, a shareholder has a personal right to prevent alterations of the articles that would constitute a fraud on the minority (*Greenhalgh v Arderne*

Cinemas supra [1945] 2 All ER 719; *Brown v British Abrasive Wheel* (1919) 1 Ch 290).

4. *A fraud on the minority has been committed*: The majority of members perpetrate a fraud on the minority (*Cook v Deeks* (1916) 1 AC 554 (PC)). The two elements in the concept of fraud on a minority were established in the leading decision of *Burland v Earle* ((1902) AC (PC) 83). In this case, the respondents (as shareholders) sued to compel the directors to declare a dividend, and to obtain an account from B (a director) of a profit made by him out of the purchase and resale to the company of certain materials. The Privy Council rejected both claims. The question that the court considered was the right of minority shareholders to sue when the alleged wrongdoers were in control of the company. Lord Davey, in *Burland v Earle* (*supra*), maintained that an exception would be made to the principle that the company is a proper plaintiff where "the persons against whom the relief is sought themselves hold and control the majority of shares in the company and will not permit an action to be brought in the name of the company" (*Burland v Earle supra* 93). This element became known as wrongdoer control.
5. *The wrongdoer is in control*: The question that often arises is what exactly is meant by control. The test for control was stated in the case of *Pavlides v Jansen* ((1956) Ch 565). According to the court, the test requires that the wrongdoers own at least 51 per cent of the shares in the company. This test has been criticised for being too narrow, because in some instances a shareholder could have *de facto* control of the company without holding a majority of shares in that company (Ngalwana "Majority Rule and Minority Protection in South African Company Law: A Reddish Herring" 1996 113 *South African Law Journal* 527–528). A more flexible approach was adopted in earlier cases. In *Russel v Wakefield Waterworks* ((1875) LR 20 Eq 474), the court stated that the rule in *Foss v Harbottle* (*supra*) is not a universal rule but a rule that is subject to exceptions, and these exceptions are dependent on the necessity of the case and of the court doing justice (*Russel v Wakefield Waterworks supra* 480).

The common-law exceptions to the rule in *Foss v Harbottle* (*supra*) have been consistently applied in South African law, and it is accepted that they form part of our law (see *Lewis Group Ltd v Woollam* [2017] 1 All SA 192 (WCC); 2017 (2) SA 547 (C) par 30, where reference is made to *Wimbledon Lodge (Pty) Ltd v Gore NO* 2003 (5) SA 315 (SCA); [2003] 2 All SA 179 (SCA); *Trinity Asset Management (Pty) Ltd v Investec Bank Ltd* 2009 (4) SA 89 (SCA); *Letseng Diamonds Ltd v JCI Ltd* 2009 (4) SA 58 (SCA); *Cassim v Voyager Property Management* 2011 (6) SA 544 (SCA); *Communicare v Khan* 2013 (4) SA 482 (SCA); *Gihwala v Grancy Property Ltd* [2016] ZASCA 35; [2016] 2 All SA 649 (SCA); and *Itzikowitz v Absa Bank Ltd* 2016 (4) SA 432 (SCA)).

Section 165 of the 2008 Act abolished the rule in *Foss v Harbottle* that a person other than the company can bring legal proceedings on behalf of the company; it replaces the rule with statutory provisions that are contained in section 165 of the 2008 Act. This approach is similar to the provisions in

Canadian company law that revoked the common-law derivative action with the introduction of the statutory derivative action (Griggs 2002 *University of Western Sydney Law Review* par 1.2; Coetzee 2010 *Acta Juridica* 298).

6 2 Sections 49 and 50 of the Close Corporations Act

Dube Tradeport argued that because the common-law derivative action was abolished in section 165(1) of the 2008 Act and replaced with a statutory derivative action, there was no common-law derivative action applicable to close corporations (par 12). Dube Tradeport contended further that the appellants were prevented from bringing the action by sections 49 and 50 of the Close Corporations Act. According to Dube Tradeport, since Sagadava was not a member of Odora, he was excluded from pursuing any legal proceedings on behalf of Odora. It was also contended that it was incompetent for Odora to bring an action itself or to be assisted by a non-member like Sagadava (par 13).

Sections 49 and 50 of the Close Corporations Act are expressly limited to proceedings instituted by registered members of a close corporation designated in the founding statement. Section 49(1) of the Close Corporations Act provides:

> "Any member of a corporation who alleges that any particular act or omission of the corporation or one or more other members is unfairly prejudicial, unjust or inequitable to him or her, or to some members including him or her, or that the affairs of the corporation are being conducted in a manner unfairly prejudicial, unjust or inequitable to him or her, or to some members including him or her, may make an application to a Court for an order under this section."

Section 50 gives a member the right to institute proceedings against fellow members on behalf of the corporation where, among other things, a member or a former member of a corporation is liable to the corporation for: a) a breach of a duty arising from his or her fiduciary relationship to the corporation in terms of section 42; or b) negligence in terms of section 43 (par 12).

According to Makgoka JA, on a simple and sensible reading of the allegations, the essence is clear that it was not Odora itself that was suing, but Sagadava suing on its behalf, and in his own name. Thus, Sagadava was suing in two capacities, namely in his personal capacity as a victim of an alleged fraud perpetrated against him by Sivaraj, and in his representative capacity on behalf of Odora (par 16). According to the established principles of derivative action, Odora ought not to be cited as a plaintiff. However, the fact that it was cited does not detract from the fact that Sagadava purported to sue on behalf of Odora. This is expressly averred. Despite imperfections, the essence of Sagadava's *locus standi* was clear (par 16). Makgoka JA was of the view that an over-technical approach should be avoided because it destroyed the usefulness of the exception procedure, which is to weed out cases without legal merit. On the face of it, Sagadava's case could not be classified in the category of those "without legal merit" (par 16; see also *Telematrix (Pty) Ltd v Advertising Standards*

Authority SA [2005] ZASCA 73; 2006 (1) SA 461 (SCA); [2006] 1 All SA 6 (SCA) par 3).

Sagadava alleged that he was in fact the sole member, alternatively, a 50 per cent member of Odora, and that there was an oral agreement between him and Sivaraj that the latter would hold the membership of Odora on his behalf as his nominee. The High Court had not accepted Sagadava's claims to membership of Odora (par 17). According to Makgoka JA, however, the factual averments by Sagadava should have been accepted as correct, unless they were manifestly false (see *Natal Fresh Produce Growers' Association v Agroserve (Pty) Ltd* 1990 (4) SA 749 (N) 754J–755B; *Voget v Kleynhans* 2003 (2) SA 148 (C) par 9; *Trinity Asset Management (Pty) Ltd v Investec Bank Limited* [2008] ZASCA 158; 2009 (4) SA 89 (SCA); [2009] 2 All SA 449 (SCA) par 55), which was, according to the judge, not apparent from the pleadings. The High Court should not have gone beyond the allegations. At the trial, the allegations might well turn out to be false, but, for the purposes of the exception, their truthfulness should have been accepted. Makgoka JA stated that the High Court's reasoning also suffered an internal contradiction (par 18). The High Court had said that even if it accepted that Sagadava was the sole, or a 50 per cent member of Odora, he was "a stranger to Odora", who could not institute an action on its behalf. It defies logic that as a member, even a sole member, Sagadava could, in the same breath, be "a stranger" to it. It follows that for the purposes of the exception, facts regarding Sagadava's membership of Odora, and therefore his *locus standi* to bring a derivative action on its behalf, had been established and should therefore have been accepted by the High Court (par 18).

Prior to the 2008 Act coming into effect, a common-law derivative action was recognised for companies, and by extension, for close corporations (see *TWK Agriculture Ltd v NCT Forestry Co-Operative Ltd* 2006 (6) SA 20 (N)). In *TWK Agriculture Ltd v NCT Forestry Co-Operative Ltd* (*supra*), it was decided that the common-law principles of minority protection in companies are applicable to co-operatives, and that, accordingly, a common-law derivative action is available to a member of a co-operative. Sections 266 to 268 of the repealed Companies Act 61 of 1973 offered members the right to initiate legal proceedings, or to cause legal proceedings to be initiated on behalf of the company when, acting through its directors, the company failed to initiate such proceedings. In respect of close corporations, sections 49 and 50 of the Close Corporations Act provide members with similar rights. These statutory rights, according to Makgoka JA, have always been parallel, and complimentary to, the common-law rights of shareholders of companies and members of close corporations to pursue derivative actions on behalf of their respective corporate entities. They were never meant to oust those common-law rights (par 20).

The 2008 Act, however, abolished the common-law right of derivative action in section 165, and substituted it with a statutory right. This, according to Makgoka JA, has not affected the common-law rights in respect of close corporations that were incorporated prior to the commencement of the 2008 Act but which have not converted to companies pursuant to that Act (par 21). In terms of Schedule 3 Part A paragraph 3 of the 2008 Act, close

corporations will continue to exist indefinitely until they are deregistered or dissolved under the current Close Corporations Act, or converted to a company as envisaged in paragraph 1(1) of Schedule 2 of the Act. The current Close Corporations Act (with slight amendments) and the 2008 Act will exist concurrently, and close corporations will be required to comply with the provisions of both Acts (par 21).

Makgoka JA was of the view that it would be misplaced and incorrect for a comparison to be drawn by the respondent between sections 49 and 50 of the Close Corporations Act, and section 165 of the 2008 Act. Not only is the abolition of common-law derivative actions expressly stated in section 165(1) of the 2008 Act, but section 165(*d*) also provides for a third party right, which is not found in sections 49 and 50 of the Close Corporations Act (par 21). The situation remains therefore that the common-law rights of members of close corporations, including the rights of an unregistered owner of a member's interest to bring a derivative action, are still available (par 21). Sagadava did not purport to rely on section 49 or 50, but pursued his common-law rights as the actual and factual, albeit unregistered, member of Odora.

6 3 Section 54 of the Close Corporations Act and the doctrine of constructive notice

Section 54 of the Close Corporations Act provides:

> "(1) Subject to the provisions of this section, any member of a corporation shall in relation to a person who is not a member and is dealing with the corporation, be an agent of the corporation.
> (2) Any act of a member shall bind a corporation whether or not such act is performed for the carrying on of the business of the corporation unless the member so acting has in fact no power to act for the corporation in the particular matter and the person with whom the member deals has, or ought reasonably to have, knowledge of the fact that the member has no such power."

The purpose of this section is to protect third parties who have *bona fide* transacted with a member of a close corporation, against the negative effects of the *ultra vires* doctrine and the doctrine of constructive notice. It was submitted on behalf of Dube Tradeport that it was protected under this section as it transacted with a member of Odora (Sivaraj), who, on the basis of section 54, was an agent of Odora and had the authority to bind it. In addition, he was the sole registered member (par 24).

According to Makgoka JA, equal attention must be given to the caveat in subsection (2)(*b*) of section 54. Where the third party knows, or ought reasonably to know, that the member he or she is dealing with has no power to act for the close corporation, such third party does not enjoy the protection afforded by the section (par 25). In the present case, in their particulars of claim, the appellants alluded to the dispute between Sagadava and Sivaraj in respect of the membership of Odora and the ownership of the properties. They pointed out that Sagadava had, pursuant to that dispute, instituted an action for, among others, an order directing Sivaraj to transfer and deliver to

him, Odora's member's interest, which action was pending. The appellants went on, according to Makgoka JA, to make extensive allegations of fraud, unlawfulness and misrepresentations against Sivaraj in relation to Odora and, in particular, the sale of the properties to Dube Tradeport (par 25).

The appellants alleged that Dube Tradeport was aware of the dispute between Sagadava and Sivaraj, and the pending action in respect thereof; accordingly, it knew or ought to have known of Sagadava's claimed rights; and was therefore not a *bona fide* possessor who was unaware of Sagadava's prior claims (par 26). In essence, the appellants alleged that Sivaraj had no power to sell the properties on behalf of Odora because he was a 50 per cent member of Odora, or alternatively a mere nominee of Sagadava, and that Dube Tradeport knew it, or in the circumstances, ought to have known it (par 26).

Makgoka JA stated that Dube Tradeport was aware of the dispute between Sagadava and Sivaraj (as was evident from the escape clause written into the agreement of sale for the properties), and accordingly knew or ought to have known that Sivaraj may lack the necessary authority to conclude the sales agreement on behalf of Odora without the consent of Sagadava (par 26). Dube Tradeport could therefore not claim to be a *bona fide* possessor who was unaware of Sagadava's claims. Makgoka JA stated further that Dube Tradeport did not have to know the truthfulness of these claims, but it was sufficient that it subjectively foresaw the possibility of the truthfulness, and nonetheless proceeded with the impugned sale agreement (par 26). According to the court, Dube Tradeport's position is similar to a purchaser described thus in *Dhayanunth v Narain* 1983 (1) SA 565 (N) 565:

> "[A purchaser who] has been apprised, prior to purchasing the property, of the existence of some right in the property vested in a third party in such a way as to make it incumbent upon him to enquire, before purchasing the property, precisely what that right comprised. If he does not do so, he cannot be heard … to say that he did not know the precise nature of the third party's right. The imperfection of his knowledge is attributable to his own act in wilfully shutting his eyes and failing to see what was perfectly obvious." (par 31)

The High Court accepted that Dube Tradeport was aware of the dispute between Sagadava and Sivaraj over the membership of Odora and the properties when it concluded the impugned purchase agreement with Odora. The High Court accepted that the "escape clause" was inserted with this in mind. However, the High Court concluded that this was not enough for Dube Tradeport to lose the protection afforded in section 54 "because of the lack of knowledge of [Dube Tradeport] as to the truth of the membership ownership" (par 27).

Makgoka JA disagreed with the reasoning of the High Court. According to Makgoka JA, section 54 has two requirements pertaining to the knowledge of a third party of a member of a close corporation's lack of authority: actual or imputed knowledge (par 28). These requirements are in the alternative. The appellants relied on the latter. Whether a third party knew or ought to have known of the member's lack of power to act for the corporation is a factual question, the truthfulness of which can only be determined at the trial (par 28). Makgoka JA stated that as the High Court was not sitting in the trial

of the main action, it was not in a position to determine probabilities or cast doubt on the facts alleged in the particulars of claim. This was for the simple reason that it had only one version before it, namely that of the appellants. The High Court had to accept that version, unless it was patently false, which was not the case here (par 28).

According to Makgoka JA, Dube Tradeport had known of the dispute between Sagadava and Sivaraj concerning the membership of Odora and the properties, and it was sufficient, at least at the exception stage, that the imputed knowledge in terms of section 54(2) should be attributed to it. As a result, it did not enjoy the protection of section 54 of the Close Corporations Act (par 28–34).

7 Conclusion

The judgment in *Naidoo v The Dube Tradeport Corporation* indicated that before the promulgation of the 2008 Act, the common-law derivative action was recognised in relation to companies and extended to close corporations. For this reason, the statutory rights have always been parallel and complementary to the common-law rights of companies, shareholders and members of close corporations to pursue derivative actions on behalf of their respective companies and close corporations. The statutory rights and principles were never meant to totally disregard the common-law rights of close corporations. The SCA in *Naidoo v The Dube Tradeport Corporation* (*supra*) provides the certainty needed, as it indicates that the common-law rights in respect of close corporations incorporated before the commencement of the 2008 Act but not converted to companies under that Act have not been affected. This ensures that the common-law rights of members of close corporations, including an unregistered owner of a member's interest, to bring a derivative action remain intact.

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RESCUING THE BUSINESS RESCUE PROCESS: A CRITICAL REFLECTION ON THE AUTHORITY TO APPOINT A SUBSTITUTE BUSINESS RESCUE PRACTITIONER THROUGH THE LENS OF

Shiva Uranium Limited v Mahomed Mahier Tayob 2022 (3) SA 432 (CC)

1 Introduction

The South Africa Companies Act 71 of 2008 (the Act), introduced, *inter alia*, business rescue as a vital, innovative instrument for maintaining and sustaining corporate life by saving financially distressed companies (Cassim "Business Rescue Proceedings" in FHI Cassim, MF Cassim, R Cassim, Jooste, Shev and Yeats *Contemporary Company Law* 2ed (2012) 861). Business rescue is a legal mechanism that facilitates the rehabilitation of companies facing economic distress so that they can contribute to the national economy, thereby ensuring company profitability, preservation of employment, and other significant social goals (Naidoo, Patel and Padia "Business Rescue Practices in South Africa: An Explorative View" 2018 11(1) *Journal of Economic and Financial Sciences* 1–9). In this matrix, business rescue practitioners play an important role in the successful execution of business rescue proceedings (s 138(1) of the Act). Notably, the Act lays down criteria for a person to qualify as a business rescue practitioner. It states that to qualify as a business rescue practitioner, a person must be a member in good standing of a legal, accounting or business management profession accredited by the Companies and Intellectual Property Commission (CIPC) and be licensed as such by the CIPC. It is desirable that there should be clarity on the interpretation of statutory provisions governing the appointment of business rescue practitioners (Pretorius "Tasks and Activities of the Business Rescue Practitioner: A Strategy as Practice Approach" 2013 17(3) *Southern African Business Review* 1–26). The power to appoint a substitute business rescue practitioner was expounded in *Shiva Uranium Pty Ltd* (*In Business Rescue*) *v Mahomed Mahier Tayob* (2022 (3) SA 432 (CC)) (*Shiva v Tayob*). The court grappled with the question of who is vested with the authority to appoint a business rescue practitioner in circumstances where the court-appointed business rescue practitioner has either resigned, become incapacitated or died (see *Shiva v Tayob supra* par 1).

This case note provides a critical analysis of the *Shiva* decision by exploring the rationale of the court's decision, its soundness, and assessing whether it is a correct reading of sections 128(1)(*b*), 129(3) and 130(6)(*a*) of

the Act. The central argument advanced by the article is that, unlike the court *a quo*, the Constitutional Court in *Shiva* had an opportunity to flesh out the rules and principles that govern the appointment of a substitute business rescue practitioner. The court was not only required to ascertain the formulation of section 129(3) of the Act *vis-à-vis*, the appointment of the business rescue practitioner, but also to ascertain ancillary, yet important questions, such as who can be appointed as a business rescue practitioner. This case note posits that the interpretation of controversial sections 128(1)(*b*), 129(3), and 130(1)(*b*) of the Act should be made in light of contemporary trends in India, which allow the appointment of juristic persons as business rescue practitioners to ensure continuity of business rescue proceedings (s 128 of the Act).

The structure of this case note is as follows. The first part lays the foundation for a discussion of the *Shiva* case by providing a succinct intertwined discussion on the significance of business rescue and the appointment of the rescue practitioner in general. Such an approach is important for the purposes of establishing the instrumentality of the business rescue. The second part of the case note introduces the factual matrix of the *Shiva* case*.* Thereafter, it explores the decisions of the Companies Tribunal and the High Court in *Shiva*. The case note then proceeds to distil the decisions of both the Supreme Court of Appeal (SCA) and the Constitutional Court in *Shiva*. Finally, the case note provides a critical analysis of the Constitutional Court's findings in *Shiva*, identifying the lacuna in the court's judgment and offering a pathway for refining and developing the corporate rules that govern the appointment of a substitute business rescue practitioner in accordance with the applicable provisions of the Act.

2 The necessity and ramifications of appointing a business rescue practitioner in business rescue proceedings

A business rescue practitioner is a person(s) appointed in terms of Chapter 6 of the Act to manage a company that has been placed in business rescue (s 138 of the Act provides the qualifications and conditions for appointment as a business rescue practitioner). The main duties of a business rescue practitioner are temporarily to supervise and manage the company's affairs (s 140 of the Act states that, "[d]uring a company's business rescue proceedings, the practitioner, in addition to any other powers and duties set out in this Chapter … has full management control of the company in substitution for its board and pre-existing management"). Section 128 of the Act provides that a company that has been placed on the pathway of the business rescue process will enjoy a temporary moratorium from the claims of creditors against the company or in respect of other property in its possession (s 128(1)(*b*) read with s 133 of the Act). During this interval, subject to the approval by each creditor, the business rescue practitioner is required to develop, implement, and operationalise the business rescue plan (s 150 of the Act). A business rescue plan has the potential to rescue the company from its financial problems by restricting its liabilities, equity, debts and business affairs (s 128(1)(*b*)(iii); Rosslyn-Smith and De Abreu "Informing the Vote: The Business Rescue vs Liquidation Decision" 2021 25 *Southern*

African Business Review 22). Notwithstanding the corporate benefits of business rescue, including the stay of creditors' rights, when a company is placed in business rescue there is no guarantee that the rescue process will be successful (Rosslyn-Smith and De Abreu 2021 *Southern African Business Review* 22). According to the 2022 statistical overview provided by the CIPC, since the inception of business rescue in 2011, approximately 4 370 companies have entered business rescue, with 1 649 active business rescue proceedings and 546 companies under business rescue that have ended in liquidation (CIPC "Status of Business Rescue in South Africa" (30 June 2022) https://www.lssa.org.za/wp-content/uploads/2022/10/Status-of-Business-Rescue-in-South-Africa-Report_June-2022.pdf (accessed 2023-05-04).

3 The factual matrix of the *Shiva* case

The facts of the case are as follows. On 20 February 2018, Shiva's board of directors decided to place the company in business rescue under section 129 of the Act (*Shiva v Tayob supra* par 3). Section 129 of the Act provides that a company's board of directors may decide to commence business rescue proceedings voluntarily and may place the company under supervision if there are good reasons to believe that the company is experiencing financial distress, and there appears to be a reasonable prospect of rescuing the company (s 129(1) of the Act). This section allows a company to be placed in business rescue without applying to court, and this approach is time- and cost-effective (Kubheka "The Requirements of Business Rescue Proceedings in South Africa: A Critical Analysis of 'Reasonable Prospect' in Light of Business Rescue Proceedings in Terms of the Companies Act 71 of 2008" (unpublished Master of Laws thesis, University of KwaZulu Natal) 2020 26). Commentators have pointed out that the purpose of section 129 is to persuade directors of financially struggling companies to seek assistance at an early stage rather than delaying their actions until it is too late to do so (Cassim *et al Contemporary Company Law* 866; see also Levenstein "An Appraisal of the New South African Business Rescue Procedure" (unpublished doctoral thesis, University of Pretoria) 2015 307; Pretorius and Du Preez "Constraints on Decision Making Regarding Post-Commencement Finance in Business Rescue" 2013 6(1) *The Southern African Journal of Entrepreneurship and Small Business Management* 168–191; Ramnanun, Rajaram and Nyatanga "Business Rescue Legislation: Rehabilitating or Debilitating Business Rescue Success During Covid-19" 2022 7(4) *African Journal of Business and Economic Research* 101–121). After resolving to commence business rescue, the board must appoint a business rescue practitioner. In *Shiva,* the board nominated Messrs Klopper and Knoop as business rescue practitioners. However, a month after their appointment, the Industrial Development Corporation (IDC) – an affected party – filed an application to replace Messrs Klopper and Knoop as business rescue practitioners with Mr Murray in terms of section 130(1)(*b*) read with section 130(6)(*b*) (s 130(6) of the Act states that, "[i]f, after considering an application in terms of subsection (1)(*b*), the court makes an order setting aside the appointment of a practitioner …".) Section 130 allows an affected person to petition the court to nullify a practitioner's appointment based on a lack of certain competences – in

particular if the practitioner does not meet the requirements of section 138, is not independent of the company, or falls short of the necessary skills in light of the company's circumstances (s 130(1) of the Act). The Act ensures that the practitioner may be removed from office only by means of a court order (for a detailed discussion on the removal of a business rescue practitioner, see Wilson and Harten "How to Break Up With Your Business Rescue Practitioner" 2019 19(8) *Without Prejudice* 26–27; Cassim *et al Contemporary Company Law* 891). In *Shiva*, the day before the application was to be heard, Messrs Klopper and Knoop resigned from their positions as business rescue practitioners. When the case was brought before the High Court, the parties submitted a draft order that acknowledged the resignations of Messrs Klopper and Knoop and the appointment of Mr Murray as the new business rescue practitioner. The order also requested the CIPC to appoint an additional business rescue practitioner, and it duly appointed Mr Monyela as an additional business rescue practitioner for Shiva. Three months after his appointment, Mr Murray resigned as one of Shiva's business rescue practitioners. Nonetheless, before Mr Murray resigned, he and Mr Monyela passed a resolution to designate Mr Damons as his replacement. However, Shiva's board of directors opposed Mr Damons's appointment and decided to replace Mr Murray with Messrs Tayob and Januarie (see *Shiva v Tayob supra* par 11). Importantly, after taking the necessary steps, these competing appointments were submitted to the CIPC for determination (*Shiva v Tayob supra* par 11).

3 1 The pronouncement of the Companies Tribunal in Shiva

In *Shiva*, Mr Monyela, ostensibly in his own name and on behalf of *Shiva*, filed a lawsuit with the Tribunal to compel the CIPC to accept the appointment of Mr Damons and to remove that of Messrs Tayob and Januarie. The Companies Tribunal (established in terms of section 193 of the Act) has, *inter alia*, the function of resolving disputes as contemplated in Part C of Chapter 7 of the Act. In his lodgment, Mr Monyela contended that the IDC has the authority to appoint a business rescue practitioner in terms of section 139(3) of the Act (*Shiva v Tayob supra* par 12*)*. He further argued that Mr Damons was appointed on behalf of the IDC as the major creditor. The Companies Tribunal accepted Mr Monyela's submission and ruled in his favour. Nonetheless, in response, Messrs Tayob and Januarie filed an application with the High Court seeking an interdict to prevent the CIPC from enforcing the Tribunal's judgment, and a declaration of invalidity of the decision of the Companies Tribunal (*Shiva v Tayob supra* par 12). Notwithstanding the ruling by the Companies Tribunal, ordinarily, it is accepted that the Companies Tribunal does not have explicit jurisdiction to hear matters arising from Chapter 6 of the Act, including those pertaining to business rescue (*Shiva v Tayob supra* par 12). However, arguably, considering that the presiding officer of the Tribunal has expertise in business, economics and finance, Boraine *et al* propose that the jurisdiction of the Companies Tribunal should be extended to include matters arising from business rescue proceedings (Boraine, Delport, Scott and Labuschagne "Seminar on Legislative Shortcomings in Implementing the

Tribunal's Mandate" (27 April 2023) *Companies Tribunal* https://www.companiestribunal.org.za/seminar-on-legislative-shortcomings-in-implementing-the-tribunals-mandate-2/ (accessed 27-04-27) session 3). Such a development should be embraced because it serves multiple objectives, including decongesting the courts by providing a competent platform other than the courts for resolving disputes on business rescue (Boraine, Delport, Scott and Labuschagne https://www.companies tribunal.org.za/seminar-on-legislative-shortcomings-in-implementing-the-tribunals-mandate-2/ session 3).

3 2 The High Court decision

The three-fold issues for determination before the High Court were as follows. First, which business rescue practitioner appointment was valid (*Shiva v Tayob supra* par 14)? Secondly, did the board of directors have the authority to appoint a replacement business rescue practitioner without the approval of the existing business rescue practitioner (*Shiva v Tayob supra* par 14)? Thirdly, is a junior business rescue practitioner eligible for overseeing the rescue of a large company notwithstanding the provisions of regulation 127(3) of the 2011 Companies Regulations (GN R351 in *GG* 34239 of 26-04-2011; *Shiva v Tayob supra* par 14)? (Reg 127(3) states: "A junior practitioner (*a*) may be appointed as the practitioner for any particular small company; but (*b*) may not be appointed as the practitioner for any medium or large company, or for a state-owned company unless as an assistant to senior practitioner.") The High Court ruled that the appointment of Messrs Tayob and Januarie as business rescue practitioners was not valid because the board of directors did not obtain the approval of the existing business rescue practitioner (Mr Monyela) in terms of section 137(2) read with section 137(4) of the Act (*Shiva v Tayob supra* par 15 and 16; s 137(2)(*a*) of the Act states: "During a company's business rescue proceedings, each director of the company must continue to exercise the functions of director, subject to the authority of the practitioner.") The court held further that Mr Monyela could continue discharging his duties as a business rescue practitioner for *Shiva* only if the board of directors appointed an additional senior business rescue practitioner (*Tayob v Shiva Uranium (Pty) Ltd* [2020] ZASCA 162).

The main shortcoming of the High Court's decision is that the court did not distinguish between the business rescue practitioner's powers to manage the business, and the director's fiduciary duties during the business rescue process. It can be strongly argued that section 129 of the Act, which authorises the board of directors to place a financially distressed company in business rescue, is congruent with section 66(1) of the Act, which imposes a duty on the board of directors to manage the company's business (see also Cassim *et al Contemporary Company Law* 866). Such a duty is not abandoned or relegated by the director but continues to subsist and must be actively fulfilled during business rescue. This is because the directors are best equipped to know whether the company is in financial distress, and they are also properly positioned to appoint the best business rescue practitioner suited to facilitate the restructuring of the company. More importantly, the board of directors is not obligated to consult with the shareholders in

resolving to place a company in business rescue, or to appoint a business rescue practitioner (Cassim *et al Contemporary Company Law* 866). Considering that shareholders have interests in the survival of the company and are not consulted, this strongly suggests that the board does not need the practitioner's approval to appoint a replacement business rescue practitioner. The latter view is clearly captured by the Supreme Court of Appeal.

3 3 Deciphering the defects in the Supreme Court of Appeal's conservative interpretation of the provisions of the Act

The business rescue practitioners appointed by Shiva, Messrs Tayob and Januarie, appealed against the decision of the High Court to the Supreme Court of Appeal (SCA). The SCA held that the board of directors does not need the approval of the business rescue practitioner to appoint or replace a business rescue practitioner (*Tayob v Shiva Uranium (Pty) Ltd supra* par 25). The court reasoned that the powers and duties conferred on the business rescue practitioner in section 140(1) only relate to the company's management in the sense of overseeing the day-to-day operational management of the company (*Tayob v Shiva Uranium (Pty) Ltd supra* par 25). Therefore, when directors perform duties outside the scope of "management", they do not need the practitioner's approval (*Tayob v Shiva Uranium (Pty) Ltd supra* par 25). Most importantly, a decision taken by directors to replace a business rescue practitioner, as provided for in section 139(3), is an act of corporate governance falling outside the ambit of the practitioner's "management" of the company (*Tayob v Shiva Uranium (Pty) Ltd supra* par 25). Therefore, the appointment of Messrs Tayob and Januarie as business rescue practitioners by Shiva's board of directors was valid. Aggrieved by the SCA ruling, Mr Monyela appealed to the Constitutional Court.

3 4 The decision of the Constitutional Court

Although the SCA concluded that the board of directors had the authority to appoint a new business rescue practitioner, Mr Monyela maintained that such power belonged to the independent creditors with the majority of voting interests who had participated in the procedures that led to the appointment of the court-appointed business rescue practitioner. The Constitutional Court held that the answer depended on a proper interpretation of section 139(3) of the Act, which states:

> "The company, or the creditor who nominated the practitioner, as the case may be, must appoint a new practitioner if a practitioner dies, resigns or is removed from office, subject to the right of an affected person to bring a fresh application in terms of section 130(1)(*b*) to set aside that new appointment."

The court ruled that the formulation of section 139(3) applied to two different scenarios: one in which a company is placed in business rescue by a board resolution in accordance with section 129, and the other in which a company is placed under compulsory business rescue by a court in terms of section

131 (*Shiva v Tayob supra* par 37). In the former scenario, when the business rescue practitioner resigns, the board of directors has the right and responsibility to appoint another business rescue practitioner. However, in the latter, the affected person who nominated the business rescue practitioner may nominate a substitute. The court elucidated that the reference in section 139(3) to the "creditor" who nominated the practitioner is infelicitous since the "affected person" envisioned by section 131(5) might not be a creditor (*Shiva v Tayob supra* par 38). The court further held that the legislature clumsily drafted section 139(3) of the Act with the presumption that the person who would file a petition for compulsory business rescue would be a creditor (*Shiva v Tayob supra* par 38). If the word "creditor" in section 139(3) is not read as meaning "affected person", or if the words "or other affected person" are not read into the section immediately after "creditor", there would be no provision for the appointment of a substitute where the person who applied for compulsory business rescue was an affected person in a capacity other than creditor (*Shiva v Tayob supra* par 38). The court concluded that the word "creditor" also included any person who falls under the category of affected persons.

The court held that when a practitioner chosen by the court in terms of section 130(6)(*a*) resigns, the question is where to accommodate the power to appoint a substitute. In this scenario, one is dealing with a voluntary business rescue (*Shiva v Tayob supra* par 38). The board is rightly positioned to choose a replacement. However, in this case, the individual who resigned was not the practitioner designated by the company but rather a practitioner appointed by the court under section 130(6)(*a*) following a successful challenge to the company's appointment (*Shiva v Tayob supra* par 39). The court held that, in such a scenario, the power remained with the board to appoint a substitute business rescue practitioner, and reasoned that a purposive interpretation of section 139(3) would revive the company's right of appointment if the court-appointed substitute resigned (*Shiva v Tayob supra* par 30 and par 53).

Further, section 7(*k*) of the Act provides that one of the purposes of the Act is to "provide for the efficient rescue and recovery of financially distressed companies, in a manner that balances the rights and interests of all relevant stakeholders" (see also *Shiva v Tayob supra* par 51–53). The court concluded that given the importance of completing corporate rescue proceedings quickly and successfully, a court should prefer an interpretation that supports rather than hinders this purpose (*Shiva v Tayob supra* par 56). If section 139(3) is interpreted as the SCA did, the appointment of a substitute practitioner will be simple and quick. There will be no ambiguity as to who has the authority to make the appointment (*Shiva v Tayob supra* par 56). The company or the affected person who brought the business rescue application will make the alternative appointment, depending on whether the business rescue is voluntary or compulsory. In the case of voluntary business rescue, the rights and interests of stakeholders are balanced: the company keeps its right of appointment, while section 139(3) of the Act specifically preserves creditors' rights to bring a new challenge under section 130(1)(*b*), if grounds for such a challenge exist (*Shiva v Tayob supra* par 56). Thus, when Mr Murray resigned, it was not incumbent upon the practitioner to appoint a substitute practitioner; instead, the right to nominate

his successor vested in Shiva's board of directors. Hence, the appointment of Messrs Tayob and Januarie was legitimate and valid.

It is argued that the SCA and the Constitutional Court reached the correct decision based on the following substantive viewpoints. The board of directors enjoys the first right to appoint a business rescue practitioner because it has an intricate understanding of the needs of the company and is better situated to decide on the appointment of a rescue practitioner. This resonated with the doctrine of the debtor in possession, which maintains that although the debtor may be replaced by the business rescue practitioner, the management of the business remains in the hands of the board of directors. The doctrine of the debtor in possession was adopted by South Africa from Australia and England and its precepts remain an authoritative guide and template of acceptable international best practice on the business rescue function.

Aside from the soundness of the decisions of the two courts, it was incumbent upon the Constitutional Court also to interpret the significance of section 129 read with section 66(1) of the Act. Section 66 of the Act provides that the business and affairs of a company must be managed by or under the direction of its board, which has the authority to exercise all of the powers and perform any of the functions of the company. Therefore, as pointed out earlier, the decision to place a company in business rescue is in fulfilment of the directors' duty to manage the business of the company. It is submitted that the directors are not absolved of actively continuing to fulfil their fiduciary duties during the business rescue process, and they do not simply relinquish all their powers to the business rescue practitioner (see Jordaan and Nkaiseng "Directors Be Warned: There is Not Absolution in Rescue" (11 May 2022) *Business Rescue, Restructuring and Insolvency Newsletter* https://www.cliffedekkerhofmeyr.com/en/news/publications/2022/Sector/Business/business-rescue-restructuring-and-insolvency-newsletter-11-may-directors-be-warned-there-is-not-absolution-in-rescue.html (accessed 2023-04-02) 1–9). The legal relationship between directors and a company can be described as "co-governance" based on "cooperative governance" principles, in terms of which directors' fiduciary duties owed to the company are retained (*De Bruyn v Steinhoff International Holdings NV [*2020] ZAGPJHC 145 para 138). This vital relationship is not terminated during business rescue or when the business rescue practitioner assumes control of the company. Thus, when a business rescue practitioner resigns, the board of directors has a statutory duty to appoint a new business rescue practitioner.

4 Going beyond the *Shiva* ruling: A comparative analysis and proposal to cure the legislative defects concerning the authority to appoint a substitute practitioner

Although the above discussion, predicated on the *Shiva* ruling, has brought some illumination on the authority to appoint a substitute business practitioner through juridical interpretation of sections 128 7(*k*), 130(6) and 139(3) of the Act, the court(s) lost an important opportunity to pronounce on

the important aspects concerning the meaning of a business practitioner, as well as determining whether the court has power to delegate the CIPC to appoint a business rescue practitioner (*De Bruyn v Steinhoff International Holdings NV supra* par 138). The discussion below provides a succinct exploration of these two important aspects of business rescue. It argues that there is a need to go beyond the decision of the *Shiva* ruling by revisiting the concept of a business rescue, and the delegative power of the courts in the business rescue process.

4 1 Revisiting the meaning of a business rescue practitioner

The Act envisions in terms of section 128(1)(*d*) of the Act, an appointment of two or more people as business rescue practitioners. Nonetheless, Delport argues that although the definition allows for the appointment of more than one business rescue practitioner to manage the rescue of a company, none of the other provisions of Chapter 6 of the Act appears to address this possibility (Delport *Henochsberg on the Companies Act* 2008 (2016) 451). For instance, none of the provisions dealing with remuneration of the business rescue practitioner makes provision for the division of fees where more than one practitioner has been appointed, or for a mechanism that must be applied should a dispute between practitioners arise. Furthermore, the Act does not specify what should happen if one of the practitioners dies or resigns.

In section 1 of the Act, the word "person" includes a legal person, and this implies that a juristic person could be appointed as a business rescue practitioner. However, in light of the Act's other provisions, that inference may not be valid. This is also in contrast to the Insolvency Act 24 of 1936, and Chapter XIV of the Companies Act 61 of 1973, where only a natural person may be appointed as a trustee or liquidator (see s 1 of the Insolvency Act; s 372 of the 1973 Companies Act). It is not clear whether this is an anomaly or whether it was intentional. It is suggested that the legislature should consider amending the definition of business rescue practitioner to include a juristic person. One potential rationale for limiting the appointment of business rescue practitioners exclusively to individuals could be the parallel concern with the accountability of corporate entities for criminal behaviour, which is the basis for disqualifying juristic persons from serving as directors (see Mpofu, Nwafor and Selala "Exploring the Role of the Business Rescue Practitioner in Rescuing a Financially Distressed Company" 2018 14(2) *Corporate Board: Role, Duties and Composition* 20–26). Historically, the judiciary has embraced the stance that companies cannot be held criminally accountable for the actions of their directors. This conclusion was drawn from the difficulty with ascribing moral culpability or guilt to a legal entity. However, within the legal sphere, there is a contemporary perspective that prioritises adaptability and places significance on the practical responsibilities of an individual inside a firm, attributing their actions to the company as a whole (see *Meridian Global Funds Asia Ltd v Securities Commission* [1995] 2 AC 500; *El Ajou v Dollar Land Holdings Plc* [1994] 2 All ER 685 CA; *Canadian Dredge and Duck Co v The Queen* (1985) 1 SCR 662, 19 DLR 4th 314 (Ont. SCC); *The Rhone v The Peter A.B.*

Widener (1993)1 SCR 497, 101 DLR 4th 188 (SCC). For a detailed discussion of these cases and principles, see Nfawor "Examining the Concept of *De Facto* Director in Corporate Governance" 2016 12(2) *Corporate Board: Role, Duties and Composition* 12–21). Nevertheless, it appears that the South African corporation law jurisprudence has not fully integrated this judicial resolution, as juristic entities are still ineligible to serve as directors. Therefore, it is not permissible to designate juristic entities as business rescue practitioners in South Africa. However, the differentiation in the eligibility for holding office based on the distinction between juristic and natural people is no longer defensible within the context of contemporary company law. The issue of corporate liability has been extensively addressed in judicial rulings, establishing a clear legal framework. From a pragmatic standpoint, corporations generally possess superior capabilities for managing business operations compared to individuals (according to s 155(1) of the Companies Act 2006, the United Kingdom allows for the appointment of a corporate director on a company's board, provided that there is at least one director who is a natural person). Individuals have significant challenges in matching the reach of corporate entities that possess abundant qualified personnel and financial resources.

In terms of section 5(2) of the South African Companies Act, a court interpreting or applying this Act may consider foreign company law. For this reason, the authors posit that South Africa should consider drawing some lessons from the United Nations Commission on International Trade Law (UNCITRAL) Legislative Guide parts one and two of 2005 (UNCITRAL) and from the Indian legislature. According to the UNCITRAL Legislative Guide, in some states, a legal person may also be eligible for appointment, though this is contingent upon meeting certain requirements, such as ensuring that the individuals who will carry out the work on behalf of the legal person have the appropriate qualifications, and ensuring that the legal person itself is subject to regulation (UNCITRAL Legislative Guide 2005: 177 par 44. The term "insolvency representative" is used in the Guide to refer to the person fulfilling the range of functions that may be performed in a broad sense without distinguishing between those different functions in different types of proceeding). The UNCITRAL Legislative Guide provides an authoritative and persuasive set of good practices on, *inter alia*, who can be competently appointed as a business rescue practitioner, and should inform the South African approach to the subject matter.

One of the jurisdictions that allows the appointment of a juristic person as an insolvency representative is India under the Insolvency and Bankruptcy Code of 2016. The Preamble to the Indian Insolvency and Bankruptcy Code states that the purpose of the Code is "to consolidate and amend the laws relating to reorganisation and insolvency resolution of corporate persons, partnership firms and individuals in a time bound manner for maximisation of value of assets". Chapter II of the Code provides for the "corporate insolvency resolution process*"* that is akin to Chapter 6 business rescue proceedings in South Africa. The resolution process is administered by a "resolution professional", who holds the same status as a business rescue practitioner. A "resolution professional" means "an insolvency professional appointed to conduct the corporate insolvency resolution process and includes an interim resolution professional" (s 5(27) of the 2016 Insolvency

and Bankruptcy Code). The phrase "insolvency professional" means a "person enrolled under section 206 with an insolvency professional agency as its member and registered with the Board as an insolvency professional" (s 3(19) of the Insolvency and Bankruptcy Code); whereas the term "person" includes– (a) an individual; (c) a company; (d) a trust; (e) a partnership; (f) a limited liability partnership; and (g) any other entity established under a statute, and includes a person resident outside India (s 3(23) of the Insolvency and Bankruptcy Code). Under Indian law, a company that offers business rescue services can be appointed as a resolution professional (equivalent to a business rescue practitioner in South Africa).

There are two main foreseeable advantages to appointing a juristic person as a business rescue practitioner. First, when an individual resigns or dies, appointing another business rescue practitioner may not be necessary since the firm may just appoint other individuals with the same expertise without needing to approach the court. The rescue process may continue without unnecessary interruptions. In *Shiva*, the resignation of Murray and the appointment of Mr Damons could have been dealt with as an internal matter not affecting creditors or the board of directors. This would avert unnecessary debate on who the business rescue practitioner is, and more time and resources could be invested in rescuing the business. Secondly, a juristic person has the capacity to provide expertise in all the areas of a business, including accounting, law and financing. In other words, a firm specialising in business rescue may provide more expertise and resources than individuals.

4 2 Reconsidering the delegative power of the court in the appointment of a substitute business rescue practitioner

As previously discussed, the primary debate in *Shiva* concerned the authority to appoint a replacement business rescue practitioner where the court-appointed business rescue practitioner has resigned (*Shiva v Tayob supra* par 1). The Act authorises the board of directors and the court to appoint a business rescue practitioner. If the company initiates business rescue proceedings under section 129, the board of directors must appoint a business rescue practitioner within five working days of submitting the initiating decision with the CIPC (s 129(3)(*b*) of the Act). The stipulation of time frames for the appointment of the practitioner and the filing of the required notice reflect the lawmaker's wish that the business rescue process should not be unreasonably extended. (In fact, failure to comply with the five-day requirement renders a business rescue resolution by the company null and void; see also *Madodza Pty Ltd (in business rescue) v ABSA Bank Ltd* [2012] ZAGPPHC 165 par 24–26). In *Shiva*, the dispute over a business rescue practitioner's appointment started in March 2018, and was concluded in November 2021 (*Shiva v Tayob supra* par 4). It took more than 30 months to finalise the appointment issue, although the primary purpose of business rescue proceedings is not the appointment of a business rescue practitioner (s 132(3) of the Act). Rather, business rescue is intended to resuscitate the company and is estimated to last for three months. Hence, the decision of

the court is welcome because it puts to rest a complicated issue that might trouble other companies in the future.

Shiva also raises an important issue regarding the power of the court to delegate the CIPC to appoint a business rescue practitioner (*Shiva v Tayob supra* par 7). The CIPC was established in terms of Chapter 8 Part A of the Act, and one of its functions during business rescue is to provide licences for business rescue practitioners (s 187(2)(*b*) of the Act; the CIPC is responsible for monitoring whether nominated individuals comply with the requirements of a business rescue practitioner stipulated in section 138 of the Act). In *Shiva*, the creditors objected to the appointment of Messrs Knoop and Klopper as business rescue practitioners, but, before the matter was heard, they resigned. Instead, the practitioners submitted a draft order indicating their resignation and appointment of an additional business rescue practitioner by the CIPC. Ranchod J accepted the draft order and delegated the CIPC to appoint an additional business rescue practitioner. The Constitutional Court held that it is doubtful the court has the power to delegate its powers of appointment to the CIPC (*Shiva v Tayob supra* par 7). It is submitted that there is nothing in the Act authorising the court to transfer its power to appoint an additional or alternative business rescue practitioner to the CIPC. Section 130(6) of the Act is clear: if an affected party applies to set aside a resolution appointing a business rescue practitioner, the court has the authority to make an order to set aside the appointment of a practitioner. Suppose the court decides to set aside a resolution appointing a business rescue practitioner. In that case, it must also appoint an alternate practitioner who meets the requirements of section 138, and who is recommended or acceptable to the holders of a majority of the independent creditors' voting interests represented in the court hearing (s 130 of the Act).

However, it is posited that the court has the option to delegate that function to the CIPC, where parties consent to the appointment of the CIPC as a separate independent institute that appoints a business rescue practitioner. In fact, the UNCITRAL Legislative Guide states that some countries have a separate office or institution responsible for the general regulation of all insolvency representatives, including business rescue practitioners, and it has the authority to appoint an insolvency representative upon receiving a court order (UNCITRAL Legislative Guide 2005: 177 par 46). The main benefit of this approach lies in the fact that the independent appointing authority can select from a pool of qualified professionals who are familiar with the specifics of the case at hand. This includes the nature of the debtor's business, the market in which the debtor operates, and any specialised knowledge needed to comprehend the debtor's affairs (UNCITRAL Legislative Guide 2005: 177 par 46). It should be borne in mind that central to business rescue proceedings is the desire to resuscitate a company in financial distress within a short period of time and on a minimal budget. Endowing the CIPC with powers to appoint a substitute business rescue practitioner would resonate with the overall objective of expediting the rehabilitation of financially distressed companies.

5 Concluding remarks

This case note has demonstrated that the *Shiva* judgment can be celebrated for reducing potential litigation on the issue of appointing a substitute business rescue practitioner. It has shown that section 139(3) of the Act should be interpreted restrictively as requiring the company, or the affected person who lodged the application for business rescue, to make the alternative appointment, depending on whether the business rescue is voluntary or compulsory. In voluntary business rescue proceedings, the rights and interests of stakeholders should be balanced by upholding the company's right of appointment, while section 139(3) of the Act specifically preserves creditors' right to bring a new challenge under section 130(1)(*b*) if grounds for such a challenge exist. This means the Constitutional Court was correct in reasoning that, when Mr Murray resigned, it was not incumbent upon the practitioner to appoint a substitute practitioner. Instead, the right to nominate his successor vested in Shiva's board of directors. Hence, the appointment of Messrs Tayob and Januarie was legitimate and valid. Furthermore, the case note has strongly argued that to rescue the business rescue process effectively, there is a need for the legislature to amend sections 128(1)(*d*), 129 and 130(6) of the Act to enable the appointment of juristic persons that provide business rescue services, and also to allow the courts to delegate their power to appoint a business rescue practitioner to the CIPC in accordance with the Indian approach and international best practice derived from the UNCITRAL Legislative Guide. The argument is that the CIPC is better placed in terms of expertise to make a decision on who can be appointed as a business rescue practitioner. These developments will expedite and improve the process concerning the appointment of a business rescue practitioner, and obviate the challenges that continue to militate against the effectiveness of the current business rescue system.

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CAN THE DEATH PENALTY STILL BE CONSIDERED A "CRUEL, INHUMANE AND DEGRADING PUNISHMENT" IN THE FACE OF SOUTH AFRICAN PRISON CONDITIONS?

1 Introduction

The use of the death penalty as a form of punishment can be traced back to the earliest human civilisations. South Africa was no stranger to this punishment, and it was only abolished here in 1995. South Africa accepted this form of punishment through its colonisation by the English (Knowles "The Abolition of the Death Penalty in the United Kingdom: How It Happened and Why It Still Matters" *The Death Penalty Project* (2015) 61). The Union of South Africa made use of hangings throughout the 1900s; an average of 4 000 executions were implemented over an 80-year period (Cronje (ed) "Capital Punishment in South Africa: Was Abolition the Right Decision? Is There a Case for South Africa to Reintroduce the Death Penalty?" *South African Institute for Race Relations* 2016 1. In 1989, President FW de Klerk placed a moratorium on the physical implementation of executions during the negotiations of the Convention for a Democratic South Africa (Cronje *South African Institute for Race Relations* 1). The Constitution of the Republic of South Africa Act 200 of 1993 (Interim Constitution) was adopted during these negotiations; while it contained a comprehensive bill of rights, it did not address the use of capital punishment.

The fate of the death penalty was left to the courts to address in 1995 in the landmark case of *S v Makwanyane and Mchunu* ((1995) 6 BCLR 665). Chaskalson J stated that section 277(1)(*a*) of the Criminal Procedure Act (51 of 1977) was unconstitutional with reference to the following rights: section 9 (life); section 10 (dignity) and section 8(1) (equality before the law) (*S v Makwanyane supra* par 26; the Interim Constitution). He stated that the reasoning for this decision was that the imposition of the death penalty amounted to a cruel, inhumane or degrading punishment inconsistent with the right to life and human dignity. Moreover, this punishment cannot be reversed in the case of error or enforced in a manner that is not arbitrary (*S v Makwanyane supra* par 145–146). However, in the 28 years since this decision was made, South Africa has experienced an escalation in violent and sexual crimes, including murder, robbery with aggravating circumstances, rape and kidnapping. With this in mind, South Africans are left to question whether our courts should be implementing more serious sentences for these crimes and whether the decision made by Chaskalson J was correct.

This note focuses specifically on the understanding of the term "cruel, inhumane and degrading punishment", and examines the present conditions of life imprisonment in a South African prison in order to determine whether the death penalty can still be considered a non-viable punishment (based on the interpretation of this term).

2 The death penalty and the meaning of the term "cruel, inhumane and degrading punishment" when imposing a legal sanction

In order to understand why life imprisonment in the conditions of a South African prison may be considered "torture" or "cruel, inhumane or degrading", the origins of the terms and their definitions must be understood.

In terms of the Constitution of the Republic of South Africa, 1996 (Constitution), all persons have the right to freedom and security of persons, which includes the right not to be tortured and not to be treated or punished in a cruel, inhumane or degrading way (s 12(1)(*d*) and (*e*) of the Constitution). Section 35(2)(*e*) of the Constitution states that every prisoner has the constitutional right to conditions of detention that are consistent with human dignity (s 12(1)(*d*) and (*e*) of the Constitution). Furthermore in 2013, the Prevention of Combating and Torture of Persons Act (13 of 2013) was established. The long title to the Act states that it was enacted to give effect to the United Nations Convention Against Torture and Other Cruel, Inhumane and Degrading Treatment or Punishment; to create the offence of torture and others associated therewith; and to prevent and combat the torture of persons within or outside the borders of South Africa. It is therefore apparent that South Africa considers torture, and any act or treatment associated therewith, as a punishable crime.

In terms of international law, there exists an express covenant within which the use and limitations of the use of death penalty are expressed. This is the International Covenant on Civil and Political Rights (ICCPR) (UNGA 999 UNTS 17 (1966). Adopted: 16/12/1966; EIF: 23/03/1976). Article 6 of this covenant states that every person has the right to life, of which they cannot be arbitrarily deprived; the sentence of death can only be imposed for the most serious crimes committed by adult, non-pregnant offenders; the death sentence cannot be retroactively applied; and offenders who receive such a sentence must be given an opportunity to seek pardon. Article 7 states that the use of torture, cruel, inhumane or degrading treatment or punishment is prohibited. Therefore, the use of the death penalty as a legal sanction must comply strictly with these provisions; an offender must receive a fair trial, and only receive the death penalty for a serious and legally recognised crime, with the opportunity for appeal or pardon. This covenant failed to define what is regarded as torture or cruel, inhumane or degrading treatment.

The Convention against Torture and Other Cruel, Inhumane or Degrading Treatment or Punishment (CAT) (UNGA 1465 UNTS 85 (1984). Adopted: 10/12/1984; EIF: 26/06/1987) at article 1.1 states that torture is

> "any act by which severe pain or suffering whether physical or mental, is intentionally inflicted on a person by, or with the instigation or consent of a public official or a person acting in an official capacity so as to intimidate, punish or obtain information from the person (among other motives)."

Article 1.1 of the CAT also states that torture does not include pain or suffering that is integral or related to a legal sanction. The CAT, however, fails to provide a comprehensive definition of what "cruel, inhumane or degrading punishment" is, merely stating that acts that do not reach the severity of, or fall short of, the intentions of torture are prohibited (art 16.1).

Express provisions about "cruel, inhumane or degrading punishment" can also be found in article 3 of the European Convention on Human Rights (Council of Europe *European Convention for the Protection of Human Rights and Fundamental Freedoms, as amended by Protocols Nos. 11 and 14* ETS 5 (1950) (Adopted: 4/11/1950; EIF: 03/09/1953; Amendments EIF: 01/06/2010) ,and article 5 of the African Charter on Human and Peoples' Rights created by the Organisation of African Unity (OAU) (Banjul Charter) ((27 June 1981) CAB/LEG/67/3 rev 5, 21 ILM 58 (1982). Adopted: 27/06/1981; EIF: 21/10/1986).

In his judgment, (*S v Makwanyane supra* par 26), Chaskalson J expressed the view that death should be considered a cruel punishment because of the legal processes involved with its application as well as the uncertainty that can result from these processes. Inhumanity can be found in its execution which denies a person their humanity. Lastly, according to Chaskalson J, the death penalty is a degrading punishment because it strips a person of their human dignity and treats them rather as an object that, owing to the disruption of social codes, should be eliminated by the State. As such, the court came to the conclusion that the death penalty is a cruel, inhumane and degrading punishment – as these words are understood through the application of the Constitution, and not necessarily through the ordinary meaning of the words.

In opposition, this note is of the opinion that the arguments made by Ernest van den Haag are relevant. Van den Haag argues that to refer to the punishment of a crime as degrading is unfounded (Van den Haag "The Ultimate Punishment: A Defense" 1986 99 *Harvard Law Review* 1662 1668). The degradation of the human life of an offender began the moment the offender voluntarily chose to commit crime and assume all the risks associated therewith (Van den Haag 1986 *Harvard Law Review* 1662 1668). Owing to the fact that the offender could have avoided punishment by refraining from committing crime, the punishment imposed for the criminal act cannot be regarded as degrading. Execution, specifically in *Makwanyane*, was referred to as contrary to the right to dignity. However, execution affirms a convicted person's mortality by affirming their rationality and responsibility for taking the actions they committed (Van den Haag 1986 *Harvard Law Review* 1668–1669). Death, inherently, is a common fate among all human beings (Van den Haag 1986 *Harvard Law Review* 1668–1669); it cannot be considered inhumane because death is inherently a human process. Considering this "inhumanity", it is often argued that capital punishment is "uncivilised". Death as a form of punishment has been used by almost every emerging civilisation and as such is fundamentally civilised

(Van den Haag 1986 *Harvard Law Review* 1669). The alternative to death – life imprisonment – contravenes more human rights than does the death penalty, and deprives the prisoner of freedom, safety, bodily integrity and autonomy (Van den Haag 1986 *Harvard Law Review* 1669). Using the very definition of the words used to prohibit and aggravate the use of the death sentence, Van den Haag mitigates its use as a form of punishment.

When the United Nations Human Rights Committee (UNHRC) was asked to make a comment on the definition of the term as it is used in the ICCPR, they stated that they did not consider it necessary to assemble a comprehensive list of which acts constitute cruel, inhumane or degrading treatment or punishment, or to establish precise distinctions between the different kinds of punishment or treatment (par 4 of HRC *CCPR General Comment 20: Article 7 (Prohibition of Torture or Other Cruel, Inhuman or Degrading Treatment or Punishment).4* (1992). Adopted 10/03/1992). The UNHRC stated that in order to determine what is cruel, inhumane and degrading, the circumstances and facts of each individual case would need to be considered; these include the duration of the treatment, the manner of the treatment, its physical or mental effects, and the sex, age and relative health of the person (*Vuolanne v Finland* 96 ILR 649 par 657). Therefore, the understanding of what constitutes "cruel, inhumane and degrading treatment or punishment" cannot be determined from the ICCPR or the UNHRC itself but should rather be considered through practical application in case law.

2 1 International case law

2 1 1 *Denmark et al v Greece*

The applicant governments in this case (Denmark, Norway and Sweden) had made the application owing to the Royal Decree of 21 April 1967, in which a state of siege had been declared in Greece and in which certain parts of the Greek Constitution had been suspended (*Denmark et al v Greece* The European Commission of Human Rights (31 May 1968) par A1). The European Commission of Human Rights (European Commission) stated that inhumane treatment is that which "causes severe suffering, mental or physical, which in the particular situation is unjustifiable" ("*Denmark et al v Greece*: Report of 5 November 1969" *Yearbook of the European Convention on Human Rights XII* (1969) par 186). The European Commission also defined torture as "an aggravated form of inhumane treatment" (*Denmark et al v Greece Yearbook of the European Convention on Human Rights XII* par 186).

2 1 2 *The Republic of Ireland v The United Kingdom*

The court in this case was required to determine whether the interrogation techniques used by the United Kingdom in Northern Ireland between 1971 and 1975 were acts that amounted to torture, inhumane or degrading treatment (Webb *Republic of Ireland v United Kingdom* (1979–1980) 2 EHRR 25*, European Court of Human Rights* (2020)). In the European Court

of Human Rights, the difference between torture and inhumane treatment was considered. The court stated that torture attaches "a special stigma to deliberate inhumane treatment causing very serious and cruel suffering" (Webb *The Republic of Ireland v The United Kingdom* (1979–1980) 2 EHRR 25 80 par 167). The court also determined that "degrading" conduct is that which induced fear in its victims, including feelings of agony and subservience leading to humiliation and degradation of their being (Webb *The Republic of Ireland v The United Kingdom* (1979–1980) 2 EHRR 25 80 par 167).

2 1 3 *Tyrer v United Kingdom*

The applicant in this case, Mr Tyrer, at age 15, pleaded guilty before the Isle of Man local juvenile court to unlawful assault with the intent to do actual bodily harm to another pupil in his school (*Tyrer v United Kingdom* (1979–80) 2 EHRR 1 9 par 9). The assault that occurred was allegedly motivated by the fact that the victim reported the applicant, with three other boys, for bringing beer into the school (*Tyrer v United Kingdom supra* par 9). Owing to the victim's reporting this, the boys had all been caned (*Tyrer v United Kingdom supra* par 9). The applicant was also sentenced to three strokes of the rod on the same day in accordance with the legislation (*Tyrer v United Kingdom supra* par 9). The applicant appealed against this sentence, but this was dismissed, and a medical practitioner examined and ensured that the applicant was fit to receive the punishment (*Tyrer v United Kingdom supra* par 9). The applicant was birched that afternoon when he was asked to lower both his trousers and underwear and to bend over a table (*Tyrer v United Kingdom supra* par 10). The applicant was held down by two police officers. The first stroke of the birch caused it to splinter (*Tyrer v United Kingdom supra* par 10). After the third stroke, the applicant's father lunged at the police officer (*Tyrer v United Kingdom supra* par 10). The applicant raised the concern that the punishment was required to be administered over one's clothing regardless of age (*Tyrer v the United Kingdom supra* par 12). The European Court on Human Rights in this case had to distinguish between inhumane and degrading punishment. The court held that in order to be considered an inhumane punishment, suffering had to reach a certain level of severity (*Tyrer v United Kingdom supra* par 29). The court stated that although the applicant's sentence did not amount to the level of suffering required, it did amount to a degrading punishment (*Tyrer v United Kingdom supra* par 29).

2 2 National case law

2 2 1 *S v Williams*

In this case, the applicants were a group of juveniles who had all been sentenced by different magistrates to receive a sentence of strokes with a light cane, commonly referred to as "corporal punishment" (*S v Williams* (1995) 7 BCLR 86 1 (CC) par 1). The applicants appealed this sentence on the grounds that it was undignified and unconstitutional to continue to

administer such a punishment. The court was left to consider whether this punishment was "cruel, inhumane and degrading" or "severely humiliating" (*S v Williams supra* par 11). The court stated that whether something is "cruel, inhumane and degrading punishment or treatment" is dependent on an assessment of what the society acknowledges to be decent and in line with human dignity (*S v Williams supra* par 35). In order to determine where a punishment can be defined as cruel, inhumane or degrading, the court must assess it with due consideration of the values that underpin the Constitution (*S v Williams supra* par 37). As such, the court determined that any punishment administered must respect human dignity and be consistent with the Constitution (*S v Williams supra* par 38).

2 2 2 *Stransham-Ford v The Minister of Justice and Correctional Services*

In this case, the applicant applied to have physician-assisted suicide (euthanasia) administered to him. The applicant was diagnosed with terminal, stage-4 cancer and was informed that he only had a few weeks left to live (*Stransham-Ford v Minister of Justice* (2015) 6 BCLR 737 (GP) par 3). The applicant brought an urgent application to the court in order to obtain permission to have a medical practitioner end his life, or for a medical practitioner to provide him with lethal agents to enable him to end his own life: as such, the medical practitioner would not be held accountable for such an act (*Stransham-Ford v Minister of Justice supra* par 4). The applicant had, many a time, been rushed to hospital for extreme pain as a result of his cancer (*Stransham-Ford v Minister of Justice supra* par 6). The applicant argued that palliative care did not satisfy his needs and was against his right to die in a dignified manner (*Stransham-Ford v Minister of Justice supra* par 6). The applicant's quality of life had severely deteriorated, and even the medication administered to him to help with the symptoms was contributing to such deterioration (*Stransham-Ford v Minister of Justice supra* par 7). The applicant could no longer do normal human daily activities without assistance and was fully aware that as the cancer progressed this would become worse; as such he would be made to suffer to his death (*Stransham-Ford v Minister of Justice supra* par 9). The court was made to consider the right to dignity, the right not to be made to endure torture, and the right not to be treated in a cruel, inhumane and degrading manner. The applicant based his argument on the grounds of sections 2(1)(*e*), 5(1) and 8(1)(*d*) of the Animals Protection Act (71 of 1962), which obliged an owner of an animal to destroy it if it be seriously injured or diseased or in such a condition that prolonging its life would be cruel and result in unnecessary suffering, and that such mercy and dignity in death should be afforded to him (*Stransham-Ford v Minister of Justice supra* par 16). The applicant also referred to the case of *Carter v Canada* (Attorney-General) (2015 SCC5), in which the court stated that people who are terminally ill should not be condemned to a life of eternal suffering (*Stransham-Ford v Minister of Justice supra* par 18). Without the option of physician-assisted suicide, such a person is left with the choice either to take their own life, which could be violent, dangerous or possibly unsuccessful, or to have to allow their illness to degrade them to such an extent that they eventually die owing to natural

causes after a long time of suffering (*Stransham-Ford v Minister of Justice supra* par 18). Essentially, the court came to the conclusion that it is both degrading and undignified to leave a person in a state of suffering for extended periods of time.

2 2 3 *Llewellyn Smith v The Minister of Justice and Correctional Services*

This case, was brought by a group of applicants who claimed that, while serving their sentence in Leeuwkop Maximum Correction Centre in Gauteng, they endured torture and cruel treatment at the hands of the correctional officers (Redress "Llewellyn Smith v The Minister of Justice and Correctional Services, South Africa (third party intervention)" (2020) https://redress.org/casework/llewellyn-smith-v-the-minister-of-justice-and-correctional-services-south-africa-third-party-intervention/ (accessed 2023-05-19)). The applicants alleged that they were beaten with batons, shocked with electric shock shields, attacked by dogs and made to squat in painful positions for prolonged periods of time (Redress https://redress.org/casework/llewellyn-smith-v-the-minister-of-justice-and-correctional-services-south-africa-third-party-intervention/). The applicants claimed that their right not to be tortured and their right not to be treated or punished in a manner that is cruel, inhumane or degrading was violated (Redress https://redress.org/casework/llewellyn-smith-v-the-minister-of-justice-and-correctional-services-south-africa-third-party-intervention/).

It was suspected that the court would address the interpretation of the terms "cruel, inhumane and degrading punishment and treatment" and "torture". The court instead addressed the prohibition of such treatment nationally and internally and classified segregation for extended periods and denial of access to adequate medical care as such (Smith & Others v Minister of Correctional Services (21639/2015) [2015] ZAGPJHC 1127).

3 Prison conditions in South Africa

In the case of *R v Swanepoel* ((1945) AD 444), it was determined that the purposes of punishment are deterrence, retribution, rehabilitation and prevention. As such, the punishment of imprisonment should serve these purposes without encroaching upon the fundamental rights of an offender. It is the duty of the Department of Correctional Services to ensure that the rights and needs of the offender are met.

South African prison conditions are, at the best of times, poor and degrading. South African inmates experience extreme overcrowding and inhumane living conditions, including poor ventilation, lack of sanitation facilities, no privacy, a shortage of adequate beds, poor health and mental care facilities, lack of sufficient supervision and inadequate rehabilitation facilities and opportunities (Wasserman "Prison Violence in South Africa: Context, Prevention and Response" (2023) https://www.saferspaces.org.za/understand/entry/prison-violence-in-south-africa-context-prevention-and-response#:~:text=Inmates%20and%20remand%20detainees%20

experience,oversight%3B%20and%20poor%20healthcare%20provision (accessed 2022-11-21)). Owing to overcrowding and a culture of toxic masculinity among prisoners, prisons have the highest frequency of sexual violence and sexual disease transmission (*R v Swanepoel supra*). The most frequently transmitted diseases are human immunodeficiency virus (HIV) and tuberculosis (TB), infection rates being higher than those of the general population (Wasserman https://www.saferspaces.org.za/understand/entry/prison-violence-in-south-africa-context-prevention-and-response#:~:text=Inmates%20and%20remand%20detainees%20experience,oversight%3B%20and%20poor%20healthcare%20provision). Essentially, prisons and sentences of imprisonment should only impact on the right to freedom (s 12 of the Constitution). However, the present conditions in South African prisons violate many more human rights. Through the violation of these rights, South African prisons fail to meet the minimum standards for imprisonment established in national and international law and standards (Wasserman https://www.saferspaces.org.za/understand/entry/prison-violence-in-south-africa-context-prevention-and-response#:~:text=Inmates%20and%20remand%20detainees%20experience,oversight%3B%20and%20poor%20healthcare%20provision).

Sexual violence is highly prevalent in South African prisons among inmates. This sexual violence can be attributed to overcrowding, a culture of toxic masculinity within male prisons, and a shortage of staff to watch over inmates (Wasserman https://www.saferspaces.org.za/understand/entry/prison-violence-in-south-africa-context-prevention-and-response#:~:text=Inmates%20and%20remand %20detainees%20experience,oversight%3B%20and%20poor%20 healthcare%20provision). The perpetuation of gender constructs within male prisons influences men to use rape and sexual violence as a way of expressing male dominance and establishing a hierarchical structure among all-male inmates (Wasserman https://www.saferspaces.org.za/understand/entry/prison-violence-in-south-africa-context-prevention-and-response#:~:text=Inmates%20and%20remand%20detainees%20experience,oversight%3B%20and%20poor%20healthcare%20provision). Hlongwane posits that weaker, younger and first-time offenders are often forced to assume the role assigned to women in the outside world (Hlongwane *Life Imprisonment in Penological Perspective* (doctoral thesis, University of South Africa) 1998 117). The psychological and physical impact of sexual violence upon these men has a serious negative impact upon rehabilitation (Hlongwane *Life Imprisonment in Penological Perspective* 117). The men who commit rape, as well as the men who experience rape and other violent sexual offences, are prone to perpetuate this behaviour upon release or parole (Wasserman https://www.saferspaces.org.za/understand/entry/prison-violence-in-south-africa-context-prevention-and-response#:~:text=Inmates%20and%20remand%20detainees%20experience,oversight%3B%20and%20poor%20healthcare%20provision). Victimised offenders or witnesses thereto are unlikely to report the acts or volunteer information out of fear for their lives (Hlongwane *Life Imprisonment in Penelogical Perspective* 118). Thus, keeping persons in prison for extended periods of time forces them to endure the inhumanity, suffering and degradation of being raped or sexually

violated by their fellow inmates, and this increases the prevalence of reoffending upon release.

Rehabilitation, although not expressly a right of an offender, is an important goal of the Department of Correctional Services (DCS). The resources and opportunity to provide this to inmates is severely lacking. Omar states that rehabilitation is not aimed at curing an offender but is rather an attempt to restore the relationship between society and the offender to ensure successful reintegration with society and prevent reoffending (Omar "A Prisoner's Right? The Legal Case for Rehabilitation" 2011 37 *SA Crime Quarterly* 19 20). Terblanche argues that imprisonment has proved to have almost zero success in achieving rehabilitation (Terblanche *A Guide to Sentencing in South Africa* (2016) 180). In order for rehabilitation to be successful there must exist a sufficient amount of funds, education, infrastructure and professionals to ensure such a result (Terblanche *A Guide to Sentencing* 181). It is common knowledge that South Africa does not possess the finances, facilities and professionals to rehabilitate every type of offender. Terblanche argues that rehabilitation will only be effective in cases where an offender commits a crime as a result of a well-known and understood condition; the treatment of such a condition is well-practised; the success rate of such treatment is high and it is known that if the offender is not rehabilitated for this condition there is a high chance of recidivism, regardless of the length of their sentence (Terblanche *A Guide to Sentencing* 182). Thus, where these conditions do not exist, incarceration is likely to make the offender a greater danger to society upon release.

There also exist specific conditions that cannot be treated, or for which treatment is very rarely successful – such as that for paedophiles (*S v De Klerk* (2010) 2 SACR 40 (KZP) par 8). Finally, there is no definitive research to show that rehabilitation programmes reduce reoffending rates or that it is substantially successful (Omar 2011 *SA Crime Quarterly* 21). Taking all of the above into consideration, the DCS's failure to rehabilitate offenders, while it exposes them to inhumane conditions during long prison sentences and then releases such offenders into society, is likely to be more harmful to society and offenders alike.

In the case of *S v Makwanyane* (*supra* par 26), it was stated that when considering the abolition of the death penalty, it was important to consider the courts' role as the protector of the outcast and the marginalised. In the case of *Van Biljon v Minister of Correctional Services* ((1997) 4 SA 441 (C)), the court stated that the DCS bears a higher duty of care towards inmates and remand detainees because it has placed them in incarceration. As such, the DCS is required to fulfil all the detained persons' rights and ensure that they are not arbitrarily deprived of them. By instituting the death penalty, the DCS would bear less of a duty in respect of the incarcerated than they currently do. Capital punishment, although infringing on the right to life (s 11) (the Constitution), would only impede on one human right of the inmate rather than the multiple that are currently, and continue to be, violated on a daily basis in prisons.

4 Conclusion

The decision that sealed the fate of the use of the death penalty as a form of punishment in South Africa, *Makwanyane*, stated that it is a cruel, inhumane and degrading form of punishment. The debate on what is to be considered "cruel, inhumane and degrading" is complex, and can only truly be determined on a case-by-case basis. However, there is an understanding, within both foreign and national law, that living in conditions that contravene human rights, or that require a person to live in an undignified manner or condition, is considered cruel, inhumane and degrading treatment or punishment.

South African prisons continue to infringe on human rights on a daily basis. Imprisonment should only encroach upon the right to freedom, while providing substantially for the other basic human rights to which a prisoner is entitled in terms of section 35 of the Constitution. It is the responsibility of the Department of Correctional Services to fulfil these rights because they are responsible for incarcerating offenders. However, at present, South African prisons are overpopulated, which has led to the undernourishment of prisoners, a lack of beds, bedding, clothing and adequate hygiene facilities. Overcrowding, especially in male prisons, has also resulted in the imposition of hierarchical heteronormative structures that are determined by and imposed through rape and other forms of sexual violence. The frequency of sexual violence in prisons has led to a high frequency of transmission of diseases such as human immunodeficiency virus and tuberculosis. As a result, the Department of Correctional Services encroaches upon more than just a prisoner's basic human right to freedom.

In the words of Lee Anderson, the deputy Chairman of the Conservative Party in the United Kingdom: "Nobody has ever committed a crime after being executed. A one hundred percent success rate" (Heale "Lee Anderson: 'Capital Punishment? 100% Effective'" (11 February 2023) *The Spectator*). Although this statement was considered farcical, the death penalty does achieve all purposes of punishment that the court in *R v Swanepoel* stated it should achieve – barring rehabilitation, for which our current prison system cannot cater consistently and successfully.

With this in mind, and considering the above exposition of what is considered "cruel, inhumane and degrading", it can be concluded that the state of South African imprisonment (particularly for those serving life sentences) can be considered as a punishment that amounts to such. The death penalty, although it encroaches upon the right to life, does not require the offender to endure conditions that do not meet the basic standards required for a dignified human existence.

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SHOULD A COMPANY'S DIGNITY BE PROTECTED UNDER SECTION 10 OF THE CONSTITUTION? THE QUESTION IN

Reddell v Mineral Sands Resources (Pty) Limited [2022] ZACC 38

1 Introduction

In *Reddell v Mineral Sands Resources (Pty) Ltd* ([2022] ZACC 38) (*Reddell*), the Constitutional Court considered whether section 10 of the Constitution of the Republic of South Africa, 1996 (the Constitution), as read with section 8(4), should be interpreted to protect the dignity of juristic persons (in this case, mining companies). The majority and minority judgments arrived at conflicting decisions on the point. Unterhalter AJ, for the minority, held that juristic persons should be protected under section 10, while Majiedt J, for the majority, held otherwise. The majority also developed the common law of defamation to limit the circumstances in which a juristic person may succeed in a claim for general damages for non-patrimonial loss.

The authors make two claims. First, it is argued that the minority judgment correctly interpreted the nature and purpose of section 10 (the guarantee of human dignity) when read with section 8(4) of the Constitution, which provides that juristic persons are entitled to bear the rights in the Bill of Rights as required by the nature of the right and the nature of the juristic person in issue. It is asserted that the two sections can be interpreted to entitle companies to rely on section 10 of the Constitution to protect their right to dignity, encompassing their good name and reputation. Secondly, it is argued that the majority's development of the common law of defamation – to create a special exception for cases where a juristic person sues for general damages – was unnecessary, and has created legal uncertainty.

The case note proceeds as follows. First, the authors introduce the facts of the case, and then explore the *ratione decidendi* of both judgments. Secondly, the note addresses the ambit and scope of human dignity as a constitutional right, followed by the applicable principles governing constitutional interpretation, including the role of the heading of a statutory provision. This is followed by a discussion of the law of defamation concerning whether a juristic person can claim damages for an infringement to its reputation under the *actio iniuriarum*. The legal position prior to the judgment in *Reddell* is compared to that which now applies. Finally, the decision is evaluated with reference both to the reasoning used by the majority and minority respectively and the significance of the outcome of the case for our law.

A detailed discussion of the constitutionality of awarding general damages to corporations for defamation on the basis that such claims unjustifiably limit

section 16 of the Constitution (the right to freedom of expression) falls outside the scope of this case note.

2 Facts

The mining companies in the *Reddell* case, including Mineral Sands (Pty) Ltd, instituted a defamation suit against a group of environmentalists, including Reddell (the activists). The claim was based on the activists' widespread criticism of the mining companies' operations, which they alleged harmed the environment, a matter that was hotly contested. The mining companies sought damages for defamation and a public apology.

In defence, the activists raised a special plea – namely that a trading corporation had no remedy for defamation without alleging and proving that the defamatory statement concerned was false, and that the false statement was made wilfully, causing the company to suffer patrimonial loss (par 13). This defence was eventually narrowed down, with the activists conceding that a trading company is entitled to sue for defamation and to claim relief other than general damages, including patrimonial damages, a declaratory order and an apology (par 33). The activists contended, however, that the common law of defamation should be developed to prevent a trading company from claiming and receiving general damages for defamation on the basis that such a claim restricts the right to freedom of expression (par 33). The premise of the defence was that a trading corporation is not a natural person, cannot be a bearer of the constitutional right to human dignity, and thus cannot claim non-patrimonial damages for defamation.

The court had to decide whether trading corporations could have their dignity protected under section 10 of the Constitution, and whether the proper interpretation of section 8(4) extended section 10 to corporations. However, it is important to note that the majority refused to distinguish between trading and non-trading companies in its judgment, emphasising that its decision applies to all corporate entities, regardless of whether such entity is incorporated, trading or operating as a business. The principles apply equally to non-profit organisations and political parties (par 98).

3 Judgment

3 1 Majority judgment

The majority judgment, per Majiedt J, considered whether a corporation can be the bearer of the right to human dignity. The majority emphasised that there are numerous facets to human dignity that are not applicable to a corporation. These include the development of a person's humanness and unique talent, the deep personal understanding of ourselves, individual worth in a material and social context, and *uBuntu*, which is the core foundation of the right to dignity (par 58; also, Ackermann *Human Dignity Lodestar for Equality in South Africa* (2012) 97). To avoid diminishing what it means to be a person, there must be a clear distinction between the concept of personhood, which is exclusive to humans, and that of corporate identity (par 81). While humans form corporations, they do so to enjoy the benefit of a legal *persona* that is separate from the identity of natural persons.

Majiedt J held further that, for the provisions in the Bill of Rights to be understood contextually and purposively, the history of the provisions and the reasons for the Bill of Rights' enactment must be taken into account. In this respect, Majiedt J stressed that the crux of the right to human dignity is humancentric. The Bill of Rights was adopted as a means to cure the fact that in the past human beings were treated as unworthy of respect and concern. Thus, he held:

> "The right to dignity was not to ensure that companies are treated as entities worthy of respect, companies do not have intrinsic self-worth." (par 60)

Regarding the rights of juristic persons, Majiedt J added that a company's right to be treated equally is protected by section 9, but certainly not by section 10 of the Constitution. Section 10 is headed "Human dignity"; and, understood purposively, the right is intended to protect human beings. Thus, the right to human dignity cannot be borne by a juristic person. The fact that a corporation can enjoy some rights in the Bill of Rights does not lead to the extension of the protection in section 10 to a juristic person. The contrary is true; there are other rights that are not enjoyable by a juristic person – section 8(4) of the Constitution makes this clear (*Ex Parte Chairperson of the Constitutional Assembly: In Re Certificate of the Constitution of the Republic of South Africa* [1996] ZACC 26; 1996 (4) SA 744 (CC); 1996 (10) BCLR 1253 (CC) par 57).

In relation to the development of the common law of defamation, the majority considered whether a corporation could claim damages for an infringement to reputation as a component of the constitutional right to human dignity (par 62 and 81). The majority held that the right to human dignity only protects a human being's reputational interests (par 62–63). The fact that a company has an interest that is protected by a certain constitutional right does not mean that it enjoys that right. Plus, the right to human dignity should not be conflated with the common-law right to reputation, which all corporations may enforce.

The majority concluded that a company does not have an *unqualified* claim for general damages for harm to its reputation or good name (own emphasis). The reason is that a company does not have "hurt feelings" for which a claim for damages would provide solace. Thus, it cannot rely on the constitutional right to dignity to justify a claim for general damages for harm caused to its good name. However, a company does have a common-law right to a reputation, which, if infringed, could undermine its goodwill. To protect these interests, a company may claim patrimonial loss (if its goodwill is infringed) and general damages (if its reputation is undermined), but the common law should be developed so that the latter claim is not absolute. In cases of public discourse involving debates in the public interest, the impact on freedom of expression must be considered by the trial court, which will have a discretion to award general damages (par 150). A public-interest rider of this sort ensures that the right to freedom of expression is not unjustifiably infringed (par 132). The development of the common law in this manner, said the majority, will not prejudice companies because their reputational interest is sufficiently protected under the common law of delict, even though such interest does not enjoy the protection of a constitutional guarantee.

3 2 Minority judgment

The minority judgment, delivered by Unterhalter AJ, decided otherwise. It held:

> "The injunction of section 8(4) of the Constitution is that a juristic person is entitled to the rights in the Bill of Rights." (par 156)

The minority held that weight must be given to section 8(4) of the Constitution when interpreting section 10. Notwithstanding section 10's heading ("Human dignity"), its ambit is not confined to a narrow conception of dignity, and it should not be limited to self-worth. The question of who enjoys the right is answered by the text of section 10, which provides that "everyone" is entitled to bear the right. In addition, it is a standard rule of constitutional interpretation that rights must be interpreted generously (par 156). It is also indisputable that a juristic person enjoys the right to a reputation under the common law.

The constitutional right to dignity is multi-faceted and includes a right to a reputation (par 157). Trading companies have a reputation to uphold and should be entitled to rely on the constitutional right to dignity to protect their reputation. Such an interpretation is supported by section 8(4), which provides that a juristic person is entitled to the rights in the Bill of Rights to the extent required by the nature of the rights and the nature of that juristic person, which is supported by the wording of section 10, extending the right to everyone.

Unterhalter AJ acknowledged the textual obstacle posed by the heading of section 10 – "Human dignity" (par 158). He also agreed that the wording of the heading seems to indicate that only natural persons are bearers of the right, excluding juristic persons. He held, however, that the consequence of this approach would be to cast section 10 as an exception to the application of section 8(4). Such result is untenable; dignity embraces reputation, and a trading corporation has a reputation to protect. It is thus unreasonable to withhold the entitlement of a juristic person to have its dignity protected under section 10. Unterhalter AJ acknowledged that it has been held that juristic persons do not have a right to human dignity (*Investigating Directorate: Serious Economic Offences v Hyundai Motor Distributors (Pty) Ltd*: *In re Hyundai Motor Distributors (Pty) Ltd v Smit NO* [2000] ZACC 12; 2001 (1) SA 545 (CC); 2000 (10) BCLR 1079 (CC) par 18, and also, *Tulip Diamonds FZE v Minister of Justice and Constitutional Development* [2013] ZACC 19; 2013 (2) SACR 443 (CC); 2013 (10) BCLR 1180 (CC) par 35), but found that this approach cannot be accepted at face value; the position is far more nuanced. Even though a trading company cannot claim damages for hurt feelings, it should be entitled to rely on the right to human dignity to protect its reputation, which is a core aspect of dignity in any event, and if infringed, causes harm (par 169).

4 The right to human dignity

The inherent right to human dignity afforded by section 10 of the Constitution is the cornerstone of the South African Constitution. Human dignity is both a right and a value, and serves as the foundation for the birth of the

constitutional dispensation (ss 1(*a*) and 7(1) of the Constitution, and *Freedom of Religion South Africa v Minister of Justice and Constitutional Development* [2019] ZACC 34; 2020 (1) SA 1 (CC); 2019 (11) BCLR 1321 (CC) par 45).

The inherent right to human dignity is at the heart of individual rights in a free and democratic society (*President of the Republic of South Africa v Hugo* [1997] ZACC 4; 1997 (4) SA 1 (CC); 1997 (6) BCLR 708 (CC), which referred to *Egan v Canada* (1995) 29 CRR (2d) 79 106). The significance of this right is derived from the fact that in South Africa, during apartheid, people were stripped of their dignity, respect and selfhood (*S v Makwanyane* [1995] ZACC 3; 1995 (3) SA 391 (CC); 1995 (6) BCLR 665 (CC)). The South African constitutional dispensation accordingly rejects our shameful past. It seeks the achievement of equality for all persons in South Africa by recognising and promoting human rights and freedoms, and by promoting human dignity, which is fundamental to the Constitution (*Thomas v Minister of Home Affairs* [2000] ZACC 8; 2000 (3) SA 936 (CC); 2000 (8) BCLR 837 (CC) par 35).

Section 10 provides that everyone's right to human dignity must be respected and protected. The content of the right is both complex and broad, and protects a wide variety of interests, including self-worth, reputation, a good name, being worthy of respect, identity, empowerment, freedom, collective group-based dignity, the right to be different, and the right to enjoy the material conditions of well-being – such as water, housing and so on (see generally *President of the Republic of South Africa v Hugo* 1997 (4) SA 1 (CC); *National Coalition for Gay and Lesbian Equality v Minister of Justice* 1999 (1) SA 6 (CC) par 28; *Dawood v Minister of Home Affairs* 2000 (3) SA 936 (CC) par 53 and *Daniels v Scribante* 2017 (4) SA 341 (CC)). When read with sections 7 and 8 of the Constitution, it is submitted that both natural and juristic persons can bear the right.

5 The principles of constitutional interpretation

The question of whether section 10 of the Bill of Rights can be interpreted to protect the dignity of juristic persons is now addressed. Section 39(1)(*a*) of the Constitution is the starting point. It provides that an interpretation of the Bill of Rights, which includes both sections 8(4) and 10, must promote the values that underpin an "open and democratic society, based on human dignity, equality and freedom – the founding values of the Bill of Rights. This provision is peremptory, but sections 39(1)(*b*) and (*c*) are also important. The interpreter must consider international law and may consider relevant foreign law when interpreting the meaning and ambit of rights. The Bill of Rights also does not deny the existence of any other rights that are recognised or conferred by common law, provided that they are consistent with the Bill of Rights (s 39(3)).

When interpreting provisions in the Bill of Rights, the basic rule is that the Constitution is at the forefront of the interpretative process, with the constitutional values serving as guiding principles (ss 1 and 2 of the Constitution). A valued-based interpretation promotes a normative construction of the Bill of Rights and ensures the fullest protection of the

rights guaranteed (*S v Zuma* [1995] ZACC 1; 1995 (2) SA 642 (CC) par 15–17).

A number of other principles underpin constitutional interpretation. First, rights must be interpreted generously or liberally so that each right is fully protected (*Ramakatsa v Magashule* [2012] ZACC 31; 2013 (2) BCLR 202 (CC) par 70). Secondly, while a strict and mechanical adherence to the text in the Constitution is not necessary, the text of each provision must be considered and cannot be ignored (*Shabalala v The Attorney General of Transvaal* 1996 (1) SA 725 (CC) par 27). Thirdly, as with the interpretation of all other legislation, a contextual and purposive approach to interpretation is required (*Minister of Health v New Clicks South Africa (Pty) Ltd (Treatment Action Campaign as Amici Curiae)* 2006 (2) SA 311 (CC); 2006 (1) BCLR 1 (CC) par 232). The context includes the circumstances that gave rise to the adoption of the Constitution. Fourthly, each right must be interpreted to give effect to the interest it was intended to protect (*S v Zuma* par 15). Fifthly, interpretation is a holistic process; the Bill of Rights must be interpreted as an entire document, not in a piecemeal fashion. A harmonious reading of rights must be promoted (*New Nation Movement NPC v President of the Republic of South Africa* [2020] ZACC 11; 2020 (6) SA 257 (CC); 2020 (8) BCLR 950 (CC) par 18 and 63). Finally, where two provisions in the Constitution deal with the same subject, the one being general and the other specific, the latter should prevail (*Doctors for Life International v Speaker of the National Assembly* [2006] ZACC 11; 2006 (6) SA 416 (CC); 2006 (12) BCLR 1399 (CC) par 49).

The *Reddell* majority used the principle that the Bill of Rights must be interpreted purposively and contextually to find that section 10 only protects *human* dignity (own emphasis), holding that the reason human dignity was included in the Bill of Rights was to ensure that human beings in South Africa would always be treated as worthy of respect and concern (par 70). In their view, the limitation of the right in this manner accords with its heading and textualism, and does not amount to mere formalism (par 61). The minority, however, expressed doubt as to whether section 10 should be interpreted so narrowly. The minority added that the heading of section 10 – "Human dignity" – should not be definitive of the provision's scope. Instead, section 8(4) should also apply (par 158). As both the majority and the minority focused on the value of section 10's heading, an understanding of the purpose of statutory headings is required to consider whether section 10 was correctly interpreted by the majority.

5 1 The value of a heading

In its interpretation of the scope of section 10, the *Reddell* court had to deal with the text of section 10(1) and its heading. Section 10 is titled "Human dignity", the literal meaning of which excludes juristic persons. In *Turffontein Estates Ltd v Mining Commissioner Johannesburg* (1917 AD 419 431), the court held that the value attached to headings will depend on the circumstances of each case. The meaning of a title of a statute and its heading are not definitive of what a statute and its provisions are about, but are explanations of the context in which the statute was enacted and the nature of its provisions. Also, in *Jaga v Dönges* (1950 (4) SA 653 (A) 664B),

Schreiner J held that when interpreting a statute, the context of the statute and the words being interpreted should be considered together. Schreiner JA's views were echoed in *Natal Municipality Pension Fund v Endumeni Municipality* (2012 (4) SA 593 (SCA) par 17–26).

While it is an accepted tool of construction that a statute's title and the heading of a provision in a statute are valuable interpretative guidelines, especially when it comes to determining the purpose of the legislation or a legislative provision, the accepted position is that headings are not definitive of the meaning of the statute or provision. A court merely has regard to the heading to help determine the meaning of the provision (*Hugo* par 12; *S v Jordan* [2002] ZACC 22; 2002 (6) SA 642 (CC) par 49).

Headings must also be interpreted in the context of the legislation as a whole. Their literal meaning should not prevail. The ultimate aim is to determine the meaning of the provision in light of the Constitution's values and the other rules already referred to. Interpreting a statute narrowly may also be problematic because the courts are not agents of the legislature, and the Constitution does not provide that the courts be such organs; nor do the courts have a duty to find what the legislature intended. That would be acceptable under a system of parliamentary sovereignty, but given the Constitution's supremacy, it is against public policy. The courts' duty is to promote the spirit, purport and object of the Bill of Rights and the Constitution (*Prince v Cape Law Society* 2002 (2) SA 794 (CC) par 155; Perumalsamy "The Life and Times of Textualism in South Africa" 2019 22 *PER/PELJ* 1 17).

5 2 Other relevant interpretational tools

There are other rules of statutory interpretation to consider when deciding whether a corporate entity can be a bearer of the right to human dignity. Two rules are mentioned here.

The first is that legislation should be read to give effect to the rule that "the law is always speaking". This rule ensures that statutes are given a current, updated meaning. It also permits the Constitution to be interpreted in a way that reflects new developments and the current values of society, although the sanctity of the rule of law is also important (*Fourie v Minister of Home Affairs* 2005 (3) SA 429 (SCA) par 136–137). Nonetheless, the Constitution must be interpreted to allow for growth and to give effect to the values it endorses, not only for now, but also for the future (*Khala v the Minister of Safety and Security* 1994 (4) SA 218 (W) 122D–E; *Qozoleni v Minister of Law and Order* 1994 (3) SA 625 (E)). This interpretational approach, it is submitted, underscores the need to protect a corporation's reputation as part of the right to dignity, especially given the valuable economic role that corporations play in the country. This point, while recognised by the *Reddell* majority, did not convince it to treat corporations as bearers of the right to dignity.

The second rule is that a contextual interpretation of a statute requires that regard be had to existing law; consistency between the Constitution, legislation and the common law must be achieved, with the Constitution guiding the process of interpretation and development (*Shaik v Minister of*

Justice and Constitutional Development [2003] ZACC 24; 2004 (3) SA 599 (CC); 2004 (4) BCLR 333 (CC) par 18). This rule promotes legal certainty and gives credence to the rule of law (*Abahlali Basemjondolo Movement SA v Premier of the Province of Kwa-Zulu Natal* [2009] ZACC 31; 2009 JDR 1027 (CC); 2010 (2) BCLR 99 (CC) par 120). When interpreting the ambit of the right to human dignity, it is thus necessary to consider the extent to which the common law of defamation recognises that the reputation of a juristic person is encompassed within the concept of *dignitas* and is worthy of protection. It is to this aspect that the authors now turn.

6 Defamation of a corporation under the common law

Defamation is the wrongful, intentional publication, concerning another person, that has the impact of undermining their status, good name or reputation. The law of defamation is based on the *actio iniuriarum*, a remedy giving a right to claim damages to a person whose personality rights have been impaired by another. The action was not designed to compensate for patrimonial loss; instead, it was created to give personal satisfaction when a personality right is impaired (*Dikoko v Mokhatla* [2006] ZACC 10; 2006 (6) SA 235 (CC); 2007 (1) BCLR 1 (CC) par 90). Personality rights include both reputation and self-worth.

It has long been accepted that a corporation (whether trading or not) may sue for defamation for the infringement of its reputation, good name or *fama* if the defamatory statement will injure its business reputation, or affect the trade or business that it carries on, or cause it "financial loss, irrespective of whether such loss has actually occurred" (Neethling and Potgieter "Defamation of a Corporation: Aquilian Action for Patrimonial (Special) Damages and Actio Iniuriarum for Non-Patrimonial (General) Damages: Media 24 Ltd v SA Taxi Securitisation and Amici Curiae 2011 5 SA 329 (SCA)" 2012 75 *Journal of Contemporary Roman-Dutch Law* 304).

In *Reddell*, both the majority and minority agreed that the reputation of the mining companies was protected under the common law of delict. Thus, they were entitled to bring an action under the *actio iniuriarum*, claiming damages vindicating their reputation. The issue, however, was whether companies were entitled to claim general damages for defamation. Such a claim was permitted by the Supreme Court of Appeal (SCA) in *Media 24 Ltd v SA Taxi Securitisation (Pty) Ltd* [2011] ZASCA 117; 2011 (5) SA 329 (SCA) (*SA Taxi*)), but the activists claimed that this decision was incorrectly decided because it equated the dignity of a trading company with the dignity of a human person (par 14). Their case was that a claim for general damages in these circumstances would undermine the right to freedom of expression; and the companies could not in any event rely on the constitutional right to dignity to trump the activists' right to freedom of expression. For these reasons, they asked that the common law be developed to prevent trading companies from claiming general damages for defamation.

To contextualise the way in which the common law of defamation has been developed by the decision in *Reddell*, the principles established in *SA Taxi* are introduced, followed by a description of the way in which *Reddell* has changed the law.

6 1 The decision in SA Taxi

The respondent (the plaintiff in the court a quo), a finance company, gave financial assistance to purchasers and lessees of taxis. It sued the publisher, editor and a reporter of *City Press* for defamation based on an article they published asserting *inter alia* that the respondent cheated on taxi operators. The respondent claimed general damages of R250 000, plus special damages for lost profits for R20 million suffered as a result of the defamation.

The appellants (the defendants in the court a quo) pleaded that the respondent, as a juristic person, should not be entitled to claim either general damages (for personality infringement) or special damages (for patrimonial loss) in terms of the law of defamation. Their argument was that a corporation does not have personality rights or feelings of hurt or shame. The *actio iniuriarum* for defamation, which has always been reserved for the protection of personality rights, giving a *solatium* for wounded feelings, should be reserved for such loss (par 36). Although the appellants accepted that an injury to a corporation's reputation diminishes its goodwill, causing loss of profit or patrimonial loss, their argument was that these losses should be claimed using the *actio legis Aquiliae* only (specifically, the claim for injurious falsehoods).

In assessing whether a corporation may claim general damages under the law of defamation, the majority (per Brand JA) reviewed previous case law on the point, focusing on *Dhlomo NO v Natal Newspapers* (1989 (1) SA 945 (A) *Dhlomo*) and *Caxton Ltd v Reeva Forman (Pty) Ltd* 1990 (3) SA) 547 (A) *Caxton*). The majority held that the *ratio decidendi* in these cases was that all corporations, both trading and non-trading, have a right to their good name and reputation, which is protected by the usual remedies under our law of defamation, including a claim for damages (par 37–41). The *SA Taxi* majority added that the reasons advanced by the appellants in support of their plea had already been considered and correctly dismissed in *Dhlomo*, and that the court was bound by its own precedent. In any event, the modern-day *actio iniuriarum* had become more nuanced (par 38). On the one hand, a human person need not prove hurt feelings in the true sense of the word to claim non-patrimonial damages because a person's external dignity can be harmed without suffering any personal distress (see, e.g., *Boka Enterprises (Pvt) Ltd v Manatse* 1990 (3) SA 626 (ZHC) 631J–632A). On the other hand, a juristic plaintiff can have an interest in its external dignity, even though it may not have suffered a financial loss (par 39).

The *SA Taxi* majority also rejected the argument that a corporation does not have a constitutional right to a reputation, finding that section 8(4) of the Constitution specifically extends rights to juristic persons (par 48). Such rights include personality rights, which can overlap with constitutionally protected rights, including the right to privacy. In this respect, the majority referred to the Constitutional Court's decision in *Investigating Director: Serious Economic Offences v Hyundai Motor Distributors (Pty) Ltd: In re Hyundai Motor Distributors (Pty) Ltd v Smit* (2001 (1) SA 545 (CC)), where the court held that corporations have a right to privacy, which is protected both by the common law and the Constitution. Moreover, the right to dignity is wide and has numerous components (par 45). A correct reading of

sections 8(4), 10 and 39(3) of the Constitution thus permits a finding that a corporation, whether trading or not, is entitled to enjoy the protection of the constitutional right to dignity.

6 2 The position after Reddell

The *Reddell* majority held that the SCA's majority judgment in *SA Taxi* was incorrect. It gave the following reasons.

First, the wording of section 8(4) makes it clear that juristic persons can enjoy the protection of the rights in the Bill of Rights in qualified or limited circumstances – depending on the nature of the right and the nature of the juristic person in issue. Human dignity is a uniquely personal right, and the many facets of human dignity cannot all apply to corporations. A juristic person's right to a reputation is a personality right, but is not part of the constitutional right to human dignity (par 81).

Secondly, the *SA Tax*i court was incorrect when it held that the constitutional right to dignity is broader than the common-law concept of dignity, and that the former encapsulates a wider range of interests than the latter (par 82). This approach, which equated the right to dignity with the right to privacy, citing the decision in *Hyundai*, was conceptually flawed. The Constitutional Court in *Hyundai* in fact held that while juristic persons may have a constitutional right to dignity, they do not have a similar right to dignity and, in any event, corporations possess neither a wide nor a narrow sense of dignity (par 83–85).

Thirdly, the rights-balancing exercising between freedom of expression and dignity conducted in *SA Taxi* was misplaced, because in defamation cases involving trading corporations as plaintiff, there can be no reliance on the right to dignity (par 86).

Thus, in sum, according to the *Reddell* majority, it is not our law that a corporation has a defamation claim based on its constitutional right to dignity. A corporation merely has a common-law right to its good name and reputation, which can be enforced through the common law of delict. So, in a defamation case where a corporation is the plaintiff and the defendant relies on the right to freedom of expression to answer the plaintiff's claim, a court should not engage in a rights-balancing exercise to resolve the dispute between the parties. This finding, however, does not mean that a corporation can never sue for general damages for defamation. It may do so, but not if the defendant's statement is published as part of a debate of public importance, as occurred on the facts in *Reddell* (par 105). Where the statement is published in the course of "public discourse on issues of legitimate public interest", then general damages for a corporation should not be considered (par 114).

The result is that the *dictum* in *SA Taxi* – namely that a corporation has a constitutional right to human dignity – is no longer part of our law. Moreover, while a corporation has a common-law right to protect its reputation if harmed through the publication of a defamatory statement, it will not be permitted to claim general damages for defamation in all cases. Where the publication is of public importance and forms part of public discourse, the claim will be qualified, and the trial court will have a discretion to exclude an

award of general damages. This qualification is required because an award of general damages to a defamed corporation limits the right to freedom of expression guaranteed by section 16 of the Constitution, and cannot be justified under section 36.

7 Evaluation

Both the majority and minority in *Reddell* agreed that juristic persons have a common-law right to a reputation. They also agreed that the harm caused to a corporation's reputation by a defamatory statement may undermine both the corporation's goodwill, causing financial loss, and its reputation, causing non-patrimonial loss. A corporation may therefore rely on the *actio iniuriarum* to protect its reputation.

The majority and minority disagreed, however, about whether companies can bear the constitutional right to dignity to protect their reputation. They also disagreed on the need to develop the common law of defamation to limit a juristic person's claim for general damages. In the authors' view, the minority judgment offers a more balanced and less intrusive approach to rights protection than does the majority judgment, and also creates synergy between the common law and the Constitution. The authors' position is based on four main premises.

First, it is argued that when interpreting the ambit of the constitutional right to human dignity and, in turn, whether a juristic person is entitled to bear the right, all the principles of constitutional interpretation addressed here should have been considered. In particular, it is argued that while section 10 is headed "Human dignity", the heading of a provision is not the determining factor of its scope. Other important interpretational principles include that section 10's wording extends the right to "everyone", that rights should be interpreted generously, and that section 8(4) permits juristic persons to bear the rights in the Bill of Rights to the extent required by the nature of the right. It is acknowledged that a core component of the right to human dignity is "humancentric", but this does not mean that juristic persons should be completely excluded from the ambit of protection. Section 8(4)'s qualification that a juristic person can bear a right *to the extent required* by a particular right indicates that a juristic person is entitled to bear aspects of a particular right – in this case, the right to a reputation forming part of the right to dignity. The relationship between a juristic person and the right to equality in section 9 illustrates the point. Corporate entities can rely on sections 9(1), (3) and (4) to claim equal protection of the law and the right not to be discriminated against, but they are certainly not entitled to the right in section 9(2), namely the benefit of affirmative action measures. The wording of section 9(2) makes this clear. The right is limited to persons disadvantaged by unfair discrimination. In short, the *Reddell* majority's approach was too restrictive. The minority was correct not to be restrained by the literal meaning of the heading to section 10. It properly treated the heading as explanatory of the content of the right as opposed to a determining interpretative factor. The scope of the right had to be interpreted according to the context as a whole.

The authors' second claim is that constitutional interpretation requires that there be a harmonious reading of provisions in the Constitution. The

Constitution should not be interpreted in a piecemeal fashion. Section 8(4) does not specifically exclude a juristic person from being a bearer of any of the rights in the Bill of Rights. In fact, it permits such application. Section 10 applies to everyone. Read together, and given that a specific provision (in this case, section 8(4)) should prevail over a more general one (the right to human dignity borne by everyone), it is argued that a company should be entitled to rely on the constitutional right to human dignity to protect its reputation and good name. This argument is supported by the principle that South Africa has one system of law (*Pharmaceutical Manufacturers Association of South Africa: In re Ex Parte President of the Republic of South Africa* [2000] ZACC 1; 2000 (2) SA 674 (CC) par 44). This rule means that the Constitution is the supreme law, with all law being informed by its normative content, and that there should be consistency between the Constitution, the common law and legislation. Given that the common law protects a company's right to a reputation and that reputation forms part of the right to dignity, a constitutionally compliant interpretation of section 10 permits a company to rely on the right to dignity to find a claim protecting its reputation.

The authors' third argument is that the Constitution is a living document and should be interpreted to reflect current, updated values. In the authors' view, the majority's narrow interpretation of section 10, which excludes corporations from its ambit and restricts its application to humans only, undermines the importance of businesses and corporate entities in the current legal and economic framework. The minority was thus correct to emphasise the need to interpret the Constitution to provide protection against harm caused by defamatory statements to corporate reputational harm (par 175).

Finally, it is maintained that the majority's development of the common law of defamation – to restrict a juristic person's right to claim general damages in cases where the speech is of public importance and/or requires public debate – was neither necessary nor required. The already extant balancing of rights for all defamation cases (*Khumalo v Holomisa* [2002] ZACC 12; 2002 (5) SA 401 (CC)) is sufficient to ensure that the right to freedom of expression is not subsumed by the right to dignity. The authors also agree with the minority that it is irrational to distinguish between a corporate entity's claim to general damages versus a claim to patrimonial damages to protect freedom of expression. It is by no means apparent that an award of general damages would undermine freedom of expression more restrictively than would a claim for patrimonial damages.

The new rule is also likely to create legal uncertainty. While the authors understand the majority to have given courts a discretion to award general damages to a juristic person for reputational damage caused by speech in the public interest, it is unclear whether the new rule applies absolutely or is discretionary. The confusion is caused by assertions in the majority judgment to the effect that in cases involving public discourse in the public interest "general damages *may not be considered*" (par 114; own emphasis). This wording creates a blanket exclusion. Yet, later on in the judgment the rule is clarified to explain that if the defamatory statement does not fall within the new qualification, the extent of the general damages would need to be determined "on a fact-based approach from case to case" (par 114). Here,

discretionary language is used. The same approach is repeated in the majority's conclusion (par 150). In addition to these unfortunate contradictions, the reality is that the law of defamation does not require a new public-discourse exception. The public interest is always relevant when determining whether a statement in issue is defamatory and, if so, whether a plaintiff may claim general damages. More problematically, the addition of a public-discourse exception leans toward the free-speech approach adopted in the United States (US), where laws limiting speech in the public discourse are permitted only in very narrow circumstances. In the authors' view, the danger of the public-discourse qualification created in *Reddell* is that it disregards the Constitutional Court's caution in *S v Mamabolo (E TV & others Intervening)* (2001 (3) SA 409 (CC) par 40–43) that courts should be wary of using US free-speech jurisprudence to develop the South African law of freedom of expression as the two constitutional dispensations are completely different.

8 Conclusion

The purpose of this case note has been twofold. The authors have compared the majority and minority judgments in *Reddell* (*supra*) and have analysed the different approaches to the interpretation of section 10, as read with section 8(4) of the Constitution, and to the development of the common law of defamation.

While both judgments envision the importance of protecting a juristic person's reputation, the majority held that a juristic person is not entitled to rely on the right to dignity under the Constitution. In the authors' view, this approach undermines section 8(4) of the Constitution and the wide ambit of the right to human dignity. It also fails to recognise that the heading of a statutory provision should not define the content of that provision and should merely serve an explanatory purpose.

Both judgments also accepted that a juristic person may rely on the common law of defamation to protect its reputation. However, such a claim is no longer unqualified. Where the defamatory speech forms part of public discourse on a matter involving the legitimate public interest, a court has a discretion to exclude an award of general damages. The authors' case is that this approach undermines the already careful balance our courts have forged between the competing rights in defamation cases, and is likely to cause confusion rather than promote freedom of expression.

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SALARY DEDUCTIONS: CAN EMPLOYERS RESORT TO "SELF-HELP"?

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SUMMARY

In the context of an employment relationship, an employee may cause the employer to incur loss or damages. In such an event, an employer would be entitled, with the employee's consent, to recover the loss or damage caused by the employee by deducting the corresponding amount from the employee's remuneration. It is also common for employers to enter into loan agreements with employees, in terms of which employees are required to repay a loan in instalments by way of deductions from their remuneration. These situations do not, in practice, tend to be controversial.

The controversy, however, tends to lie in respect of instances where an employer pays an employee additional money to which the employee is not contractually entitled. This may occur as a result of an administrative payroll error. In other instances, the employee may receive additional remuneration in respect of hours or days not worked. The latter instance may also be attributed to an administrative error resulting in erroneous overpayment, depending on the circumstances. The employer, upon realising such an administrative error, may want to recover the additional remuneration paid to the employee.

However, an employer may be faced with an employee who contends that they are not to blame for the administrative error, or that they are entitled to the remuneration, and that, as a result, the employer may not proceed to deduct amounts from future remuneration without their consent. This impasse raises questions regarding the employer's ability to resort to "self-help" by proceeding to effect deductions from the employee's remuneration without the employee's consent. It further raises questions regarding whether the employer may rely on the common-law doctrine of set-off in effecting deductions. This article considers whether the employer is empowered to effect deductions from the employee's remuneration without the employee's consent and, if so, whether the employer is required to follow a process in making the deductions.

1 INTRODUCTION

The employment relationship is centred on reciprocal obligations. The main contractual obligation of an employee is to place their personal service at the disposal of the employer and render efficient service.[1] The employee is expected to perform specified work and is entitled, in return, to be paid remuneration by the employer. Specified work and remuneration are also regarded as essential elements of the contract of employment.[2]

There are, however, several situations that may result in an employer paying an employee more than the amount to which the employee is contractually entitled. An employee could, for example, be paid an additional amount through an erroneous payroll error, or the employer could remunerate an employee for hours or days not worked. The latter typically arises in situations relating to an employee allegedly being on authorised leave or participating in strike action (whether protected or unprotected) and subsequently being remunerated, despite their absence from the workplace.

In practice, employers often encounter situations where there has been an overpayment made to an employee. The employee often refuses to grant the employer authorisation to deduct the overpaid amount from their remuneration. The question that arises in the event of such a refusal is whether an employer may resort to "self-help" and proceed to deduct the overpaid amount from an employee's remuneration without the employee's consent.

2 THE AMBIT OF SECTION 34 OF THE BCEA

2 1 The enabling provisions for deductions

2 1 1 Deductions from remuneration

Section 34(1) of the Basic Conditions of Employment Act[3] (BCEA) regulates deductions from an employee's remuneration. The section provides:

> "(1) An employer may not make any deduction from an employee's remuneration unless–
>
> (a) subject to subsection (2), the employee in writing agrees to the deduction in respect of a debt specified in the agreement; or
>
> (b) the deduction is required or permitted in terms of a law, collective agreement, court order or arbitration award."

Section 1 of the BCEA defines the term "remuneration" as "any payment in money or in kind, or both in money and in kind, made or owing to any person in return for that person working for any other person, including the State". Section 35(5) provides that the Minister of Employment and Labour may

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1 *Smit v Workman's Compensation Commissioner* 1979 (1) SA 51 (A). See also *Mpanza v Minister of Justice and Constitutional Development and Correctional Services* (2017) 38 *ILJ* 1675 (LC) par 30.

2 *Jack v Director-General Department of Environmental Affairs* [2003] 1 BLLR 28 (LC).

3 75 of 1997.

determine whether a particular category of payment, whether in money or in kind, forms part of an employee's remuneration for the purposes of any calculation made in terms of the BCEA.

In *SATU (obo Van As) v Kohler Flexible Packaging (Cape) (a division of Kohler Packaging Ltd)*,[4] the Labour Appeal Court (LAC) held that section 35(5) does not expand on the definition of "remuneration", as contained in section 1 of the BCEA. If anything, it curtails the definition.

In *Rank Sharp v Kleinman*,[5] the Labour Court held that an amount to be paid as severance pay by the employer to the employee in terms of a settlement agreement was not "remuneration" as defined in section 1 and envisaged in section 34 because it was "over and above the remuneration owing to the employee 'in return for that person working for' the [employer]".[6]

Accordingly, the definition of "remuneration" means that any deduction from an employee's remuneration may only be made in respect of a payment made to an employee for purposes of the employee rendering their services.

Section 34(1) expressly provides that any deduction may be made from an employee's remuneration where (i) the employee agrees to the deduction in writing, or (ii) the deduction is required or permitted in terms of a law, collective agreement, court order or arbitration award.

Accordingly, where an employee agrees to the deduction, the provision requires the employee's consent to be in writing and in accordance with a debt specified in the agreement. This postulates a position where the employee acknowledges their indebtedness, and requires the agreement to stipulate the debt in respect of which the employee's liability towards the employer has arisen. This section does not provide for a situation where there is no agreement between the parties. This is intended to curb employers from resorting to "self-help" and deducting amounts from an employee's remuneration where there is no debt due and payable by the employee to the employer.

Where the amount to be deducted is required or permitted in terms of a law, collective agreement, court order or arbitration award, the employer evidently does not require the employee's consent in order to deduct such amount from the employee's remuneration. This typically applies to the deduction of payments such as statutory deductions permitted in terms of legislation – for example, tax deductions or the employee's unemployment insurance contributions. It also applies to garnishee orders.

2 1 2 Deductions from bonus payments

In the context of an employment relationship, an employee may be entitled to receive various types of payment, including a bonus payment. The bonus payment may either be a contractual entitlement or a discretionary payment, depending on the contractual provisions. The question that arises is whether an employer is entitled to deduct any amount from an employee's bonus

4 [2002] 7 BLLR 605 (LAC) par 18.
5 (2012) 33 *ILJ* 2932 (LC).
6 *Rank Sharp v Kleinman supra* par 28.

payment, relying on section 34 of the BCEA. The key aspect in determining this issue is, therefore, whether the particular bonus payment constitutes remuneration for purposes of the BCEA.

In *Quantum Foods (Pty) Ltd v Commissioner H Jacobs NO*,[7] the LAC held, albeit in the context of the interpretation of what constitutes "wages" in terms of the National Minimum Wage Act,[8] that a bonus payment that is paid to an employee as a result of a binding contract does not constitute a gratuitous payment and thus forms part of an employee's wages.[9]

It is arguable that an employer is not entitled to effect deductions in terms of section 34 of the BCEA in respect of bonus payments that are, in the strict sense, gratuitous payments and not remuneration. This is because section 34 only caters for deductions from remuneration. In *Schoeman v Samsung Electronics (Pty) Ltd,*[10] the Labour Court sought to draw a distinction between a "benefit" and remuneration. In that matter, the Labour Court discussed the meaning of the word "benefit" and concluded: "[A] benefit is something extra, apart from remuneration."[11] Accordingly, where a bonus payment constitutes a benefit and not remuneration, the employer cannot effect deductions from the employee's bonus payment under section 34.

In *Solidarity v Gijima Holdings*,[12] the LAC confirmed that section 34 does not apply to a dispute about the deduction of a retention bonus from an employee's termination payments.

Based on the above authorities and the wording of the BCEA, it is evident that the BCEA only makes provision for deductions from an employee's remuneration, and not from other amounts that are payable to the employee. Accordingly, any deduction from any other amount due to the employee that does not constitute remuneration, as defined, is not subject to the requirements of section 34 of the BCEA.

2 1 3 Deductions from pension benefits

The deduction of any amounts from an employee's pension fund does not fall within the purview of section 34 of the BCEA. The deduction of pension fund contributions from an employee's remuneration is, however, regulated in terms of section 34A of the BCEA. Section 34A of the BCEA provides expressly that an employer that deducts from an employee's remuneration any amount for payment to a benefit fund[13] must pay the amount to the benefit fund within seven days of the deduction being made. This section,

7 [2023] JOL 61409 (LAC).
8 9 of 2018.
9 *Quantum Foods (Pty) Ltd v Commissioner H Jacobs NO supra* par 25.
10 [1997] 10 BLLR 1364 (LC).
11 *Schoeman v Samsung Electronics (Pty) Ltd supra*.
12 (2019) 40 *ILJ* 1216 (LAC) par 20.
13 S 34A(1) of the BCEA provides that for purposes of the section, a benefit fund is a pension, provident, retirement, medical aid or similar fund.

however, does not affect any obligation on an employer, in terms of the rules of the benefit fund, to make any payment within a shorter period.[14]

The deduction of any amount from an employee's pension fund is specifically regulated in terms of the Pension Funds Act (PFA),[15] and not the BCEA. In this regard, section 37A(1) of the PFA provides that no pension benefit provided for by a registered pension fund may, among other things, be reduced, transferred or otherwise ceded, or be liable to be attached or subjected to any form of execution under a court order or judgment.

The wording of section 37A(1) of the PFA has the effect that an employer cannot unilaterally deduct any amount from an employee's pension fund. In any event, it would be practically impossible for an employer to do so given that the employer does not hold the employee's pension benefit.

The proviso to section 37A(1) of the PFA is encapsulated in section 37D(1). In particular, section 37D(1)(*b*)(ii) provides that the relevant pension fund may deduct any amount due to an employer from its member's fund as compensation in respect of any "damage caused to the employer by reason of any theft, dishonesty, fraud or misconduct". This, however, requires: (i) the employee to have admitted liability to the employer in writing; or (ii) a judgment to have been obtained against the employee in any court. The latter situation may arise in the context of the employer instituting a civil claim for damages and obtaining relief in the form of a court order against an employee.

The object of 37D(1)(*b*)(ii) is to protect the employer's right to pursue the recovery of money misappropriated by its employees.[16] The power to withhold and deduct an amount from an employee's pension benefit, pursuant to determination of the employee's liability, therefore, lies with the registered pension or provident fund and not the employer.

2 2 The limitations expressly provided

Turning to permissible deductions, section 34(2) of the BCEA provides express limitations in respect of the instances when an employer is empowered to make deductions in terms of section 34(1) of the BCEA. In this regard, section 34(2) provides:

> "(2) A deduction in terms of subsection (1)(a) may be made to reimburse an employer for loss or damage only if–
>
> (a) the loss or damage occurred in the course of employment and was due to the fault of the employee;
>
> (b) the employer has followed a fair procedure and has given the employee a reasonable opportunity to show why the deductions should not be made;
>
> (c) the total amount of the debt does not exceed the actual amount of the loss or damage; and

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14 S 34A(4) of the BCEA.

15 24 of 1956.

16 *Highveld Steel and Vanadium Corporation Ltd v Oosthuizen* (2009) 30 *ILJ* 1533 (SCA) par 16. See also *Twigg v Orion Money Purchase Pension Fund* (1) [2001] 12 BPLR 2870 (PFA) par 21; *Charlton v Tongaat-Hulett Pension Fund* [2006] 2 BPLR 94 (D) 97I–98B.

> (d) the total deductions from the employee's remuneration in terms of this subsection do not exceed one-quarter of the employee's remuneration in money."

In order for an employer to be entitled to make a deduction from an employee's remuneration, the deduction needs to (i) comply with the requirements of section 34(1), and (ii) be effected in a manner that complies with all of the substantive requirements falling under section 34(2).

In addition, regulation 4.6.2 of the General Administrative Regulations, promulgated in terms of the BCEA provides:

> "A deduction in respect of damage or loss caused by the employee may only be made with agreement and after the employer has followed a fair procedure."[17]

The General Administrative Regulations merely amplify the requirements stipulated in the BCEA; requirements to have a written agreement and to follow a fair procedure are already stipulated in section 34(2)(*b*) of the BCEA. Significantly, an employer cannot comply only with section 34(1) and not comply with section 34(2). Both sections need to be complied with to achieve compliance with the BCEA. Therefore, section 34(2) serves the function of a proviso for deductions effected in terms of section 34(1).

Section 34(3) provides that a deduction in terms of section 34(1)(*a*) in respect of any goods purchased by the employee must specify the nature and quantity of the goods. This is in relation to instances where an employee has purchased goods from an employer and the parties have expressly agreed in writing that the employer may deduct the amount in respect of such goods from the employee's remuneration.

Section 34(4) further provides that where an employer deducts an amount from an employee's remuneration in terms of section 34(1) for payment to another person, the employer must pay the amount to the person in accordance with the time period and other requirements specified in the agreement, law, court order or arbitration award. This provision merely regulates the enforcement of the time period and other stipulated requirements when an employer is required to pay any amount that an employee is liable to pay to another person.

The above provisions are not particularly contentious in circumstances where (i) an employee has provided their express agreement in writing to the deduction, or (ii) the deduction is required or permitted in terms of a law, collective agreement, court order or arbitration award. However, there has been some controversy as to whether the common-law doctrine of set-off comes into effect by operation of law in respect of deductions in circumstances where the common law constitutes "a law" as contemplated by section 34(1)(*b*) of the BCEA. This aspect is considered in detail below.

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[17] GN R1438 in *GG* 19453 of 1998-11-13 as amended by GN R174 in *GG* 43026 of 2020-02-17. See also *Padayachee v Interpak Books (Pty) Ltd* (2014) 35 *ILJ* 1991 (LC) par 13.

3 DEDUCTIONS WITHOUT AN EMPLOYEE'S CONSENT

In practice, where the employer has made an overpayment, employees often refuse to provide their consent to deductions from their remuneration. Such instances include where the employer has made overpayments resulting from an administrative error in calculating the employee's remuneration, or where an employer has paid an employee for service not rendered. The employee is likely to contend that they are not to blame for the overpayment and that the employer is not entitled to deduct any amount from their remuneration, without their consent, in an effort to recover the amount paid.

The relevant provision in such instances is section 34(5) of the BCEA, which provides:

> "(5) An employer may not require or permit an employee to–
> (a) repay any remuneration except for overpayments previously made by the employer resulting from an error in calculating the employee's remuneration; or
> (b) acknowledge receipt of an amount greater than the remuneration actually received."

The provision encapsulated in section 34(5)(*a*) applies where an employer has made overpayments to an employee. The courts have, on occasion, had to consider the application of section 34, and specifically section 34(5)(*a*) within different contexts. The relevant decisions are considered below.

3 1 Recovering remuneration from erroneous overpayments

The recovery of remuneration for overpayments made by an employer as a result of an administrative error in calculating an employee's remuneration is specifically regulated in terms of section 34(5)(*a*). The contentious issue is whether this provision entitles an employer to deduct overpaid amounts without an employee's consent.

Section 34(5) does not appear to be intrinsically linked to the requirements stipulated in section 34(1). In particular, it cannot be argued that, based on the express wording, section 34(5)(*a*) specifically requires the employer to obtain the employee's agreement in writing prior to the deduction being made from the employee's remuneration.

It is submitted that the intention of the drafters of the BCEA was deliberately to distinguish between different types of deduction permissible under the BCEA. It would be an absurd interpretation to hold that section 34(5)(*a*) requires an employee's consent where section 34(1)(*a*) is the section that makes specific provision for the requirement to obtain an employee's consent prior to effecting deductions. To the extent that the legislature intended to require the employer to obtain the employee's consent, such an intention would be apparent from the wording of the provision. It is further trite that legislation should be interpreted in a manner

that does not result in incongruity or absurdity.[18] An interpretation that leads to the conclusion that section 34(5)(*a*) requires an employer to obtain the employee's consent would not accord with the intention of the legislature.

Whitcher AJ (as she then was) also observed this point and, in *Padayachee v Interpak Books (Pty) Ltd,*[19] held:

> "It is noteworthy that the drafters of section 34 chose to identify and deal separately with a number of different types of deductions. This must mean that the purpose of the provision is to regulate these deductions.
>
> It thus follows that any inquiry into section 34 should commence by identifying the nature and purpose of the deduction in dispute and then ascertain whether the section requires employers to regulate such deductions in a particular manner."[20]

It is evident that the intention of the legislature was to differentiate between deductions to be made in terms of section 34(5) and those in terms of section 34(1), read with section 34(2). Based on the wording of section 34 in its entirety, the wording of section 34(5) appears to be a stand-alone subsection. It specifically caters for the recovery of overpayments made to an employee, whereas section 34(1), read with section 34(2), caters for the recovery of loss of damages and the repayment of debts.

In *Cenge v MEC, Department of Health, Eastern Cape*,[21] the Labour Court appears to have accepted the notion that there are different provisions in terms of which an employer is entitled to make deductions. In this regard, the Labour Court held:

> "In terms of section 34 it is clear that the only basis on which the employer would be entitled to make the deductions would be under the provisions of subsections 34(1)(*a*) or (*b*) or [34(5)(*a*)]."[22]

Although the Labour Court appears to have appreciated the distinct provisions permitting deductions, the decision did not determine the issue regarding whether section 34(5)(*a*) specifically requires consent. This was in circumstances where, based on the facts, the skills allowance that had been paid to the employees did not constitute an overpayment and therefore section 34(5)(*a*) did not apply.[23]

In *Sibeko v CCMA*,[24] the Labour Court had to determine whether the employer was entitled to deduct erroneous payments made to the employee. In this matter, the employee had been paid an amount in excess of that provided in terms of his contract of employment. The employer notified the employee in writing that he had been paid the excess amount in error and that the amount paid in error would be deducted from his salary. The employee was also requested to furnish reasons, at a later stage, as to why he felt that he was entitled to the higher amount. The employee declined

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18 *Liesching v S* 2017 (4) BCLR 454 (CC).

19 *Supra*.

20 *Padayachee v Interpak Books (Pty) Ltd supra* par 27–28.

21 (2012) 33 *ILJ* 1443 (LC).

22 *Cenge v MEC, Department of Health, Eastern Cape supra* par 7.

23 *Cenge v MEC, Department of Health, Eastern Cape supra* par 10.

24 [2001] JOL 8001 (LC).

and, instead, demanded an explanation from the employer to advance reasons why he should not be paid the higher amount.

The Labour Court held:

> "It is indeed so, that in terms of the Basic Conditions of Employment Act, an employer may not deduct amounts from the salary or remuneration of an employee without the employee's consent. Where an employee was however overpaid in error, the employer is entitled to adjust the income so as to reflect what was agreed upon between the parties in the contract of employment, without the employee's consent."[25]

The Labour Court further noted that the employee sought relief to the effect that the employer be interdicted from "interfering" with his salary. The Labour Court found this to have been a very wide form of relief, which would also mean that the employer would never be entitled to adjust the employee's salary.[26] The Labour Court dismissed the employee's application on the basis that the employee failed to make out a case that entitled him to urgent relief.[27]

The extract quoted from the *Sibeko* decision requires careful consideration. Revelas J appears only to have confirmed that an employer is entitled, without the employee's consent, to "adjust" the employee's future remuneration to reflect the remuneration agreed upon between the parties.[28] Although the *Sibeko* decision has been quoted with approval in subsequent decisions, it is important to highlight that this decision does not expressly postulate the position that an employer is entitled to deduct an amount from the employee's remuneration to which an employee is contractually entitled. The interpretation is that the employer is merely entitled to adjust the employee's remuneration so as to prevent the employee from receiving additional remuneration to which they are not contractually entitled.

In *Sekhute v Ekhuruleni Housing Company SOC*,[29] the Labour Court confirmed the distinction between deductions made in terms of section 34(1) and section 34(5) respectively. In this regard, the Labour Court held:

> "The first thing to note is that, all the subsections except for [section] 34(5) are concerned with deductions made in terms of section 34(1). Section 34(1) identifies two classes of deductions which may be made. The first (s 34(1)(a)) is a deduction which may be made for an acknowledged debt and which specifically requires the employee to authorise the deduction in writing. The second (s 34(1)(b)) is a deduction which does not require the employee to authorise the deduction personally in writing before it can be made. This second type of deduction may be mandated by other legal instruments such as a law, Court order or collective agreement. It is noteworthy, that this second type of deduction does not presume the existence of an acknowledged debt."[30]

The *Sekhute* decision confirms that deductions made in terms of section 34(5) are not akin to deductions made in terms of section 34(1).

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25 *Sibeko v CCMA supra* par 6.
26 *Sibeko v CCMA supra* par 7.
27 *Sibeko v CCMA supra* par 8.
28 *Sibeko v CCMA supra* par 6.
29 [2017] ZALCJHB 318.
30 *Sekhute v Ekhuruleni Housing Company SOC supra* par 12.

Deductions in terms of section 34(1) either require the employee's consent in writing or that the deductions are permissible in terms of a law, collective agreement, court order or arbitration award. There is, however, no express requirement to obtain an employee's consent in respect of deductions that fall within the ambit of section 34(5).

To further illustrate this point, Lagrange J held as follows in *Sekhute*:

> "At the very least, I believe s 34(5) was clearly intended to authorise a particular type of deduction for amounts due to an employer not arising from debts of the kind contemplated by s 34(1) and even if s 34(5) must be read as subject to s 34(1), the s 34(5) is a provision of 'a law' contemplated in s 34(1)(b) which permits recovery without consent. At common law, the obligation of an employee to refund an employer for an overpayment made in error in essence would appear to be an obligation that could found an action based on the condictio indebiti. It would serve little purpose if section s 34(5) was included to simply reaffirm the existence of a common law right to recover the payments made in error. The more plausible interpretation of the provision is that the legislature intended it to specifically authorise deductions for overpayments of remuneration."[31]

It is submitted that the Labour Court's purposive interpretation of section 34(5) is correct. It is well in accordance with the established canons of interpretation, and, in particular, the imperative of contextual reading of words and phrases as enunciated in *Natal Joint Municipal Pension Fund v Endumeni Municipality*.[32]

An important rule of interpretation is to establish the purpose of the relevant provision and to give effect to it. The purpose is either explicitly stated or can be determined logically and from the full text and context of the provision.[33] Adopting this approach, it should be accepted that section 34(5) was not enacted for purposes of reaffirming an employer's existing rights to recover erroneous payments under the common law. If that were the case, the legislature would have included wording in the provision to the effect that an employer is entitled to recover overpayments through judicial process, as would be required in the case where an employer seeks to recover overpayments under the common law.

It is submitted that the purpose of section 34(1) is to limit the specific instances where an employer may effect deductions. This prevents an employer from potentially resorting to "self-help" in respect of an employee's remuneration without first obtaining the employee's consent. The purpose of section 34(5), based on its wording alone, does not expressly require consent. To the extent that it is argued that consent is required to effect deductions under section 34(5), the *Sekhute* decision confirms that section 34(5) constitutes "a law" as contemplated in section 34(1)(*b*). The latter does not require an employer to obtain an employee's consent prior to effecting deductions.

It is noteworthy to mention that, in *Sekuthe*, some of the employees in the main application had launched an application for leave to appeal against the

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31 *Sekhute v Ekhuruleni Housing Company SOC supra* par 15.

32 (2012) (4) SA 593 (SCA) par 18.

33 *Padayachee v Interpak Books (Pty) Ltd supra* par 19.

decision on the basis that, among other things, the Labour Court had erred in interpreting section 34(1)(*b*) and (5)(*a*) of the BCEA.[34] In deciding the application for leave to appeal, Lagrange J appreciated that although the employees had not advanced any contrary authority for the interpretation of these provisions, there had been no LAC decision dealing with the proper interpretation of the provisions at the time. Therefore, the correct interpretation was of some importance to both employers and employees.[35] The application for leave to appeal was, therefore, granted on this narrow legal issue alone. However, the employees did not persist with the appeal.

In *Valasce v Wireless Payment Systems CC*,[36] the employee launched an urgent application seeking an order to direct the employer to repay her an amount that had allegedly been unlawfully deducted from her final remuneration. The employee further sought an order interdicting and restraining her employer from making any deductions from her remuneration payable at the end of her notice period.

The employer contended that the employee's salary varied from month to month, depending on the commission earned for a particular month. The employer further contended that the employee had been provided with a vehicle and was, therefore, not entitled to payment of a car allowance. However, because of an administrative error, the employee had received a car allowance.

The basis of the employee's urgent application was founded upon section 34 of the BCEA.[37] However, the Labour Court dismissed the application on the basis that the employee failed to show the existence of urgency.

Despite dismissing the application based on a lack of urgency, the Labour Court entertained the question of whether the deductions were unlawful. In determining the lawfulness of the deductions, the Labour Court held as follows:

> "In support of her case that her right had been interfered with the Applicant relied on the provisions of section 34(1) of the Basic Conditions of Employment Act. That section prohibits an employer from making any deductions from an employee's remuneration unless, the employee agrees in writing. It is indeed correct that as a general rule the Basic Condition[s of] Employment Act prohibits deductions from employees' salaries without their prior consent. However, deductions without consent are permitted where it is permitted by the law, collective bargaining agreement and a court order or arbitration award. In these instances all [t]hat the employer needs to do is to advi[s]e the employee of the error in payment and the deduction made or to be made." See *Papier and others v Minister of Safety and Security* (2004) 25 ILJ 2229 (LC)
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> In *Sibeko v CCMA* (2001) JOL 8001 (LC) [ ] R[e]velas J in dealing with the issue of the deductions said:

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[34] *Sekhute v Ekhuruleni Housing Company SOC*; *In re: Sebola v Ekhuruleni Housing Company SOC* [2018] ZALCJHB 8.

[35] *Sekhute v Ekhuruleni Housing Company SOC*; *In re: Sebola v Ekhuruleni Housing Company SOC* [2018] ZALCJHB 8 par 8.

[36] (2010) 31 *ILJ* 381 (LC) par 21; quoted with approval in *Sekhute v Ekhuruleni Housing Company SOC* [2017] ZALCJHB 318.

[37] *Valasce v Wireless Payment Systems CC supra* par 9.

> "It is indeed so, that in terms of the Basic Conditions of Employment Act, an employer may not deduct amounts from the salary or remuneration of an employee without the employee's consent. Where an employee was however overpaid in error, the employer is entitled to adjust the income so as to reflect what was agreed upon between the parties in the contract of employment, without the employee's consent."
>
> The e-mail which the applicant addressed to the respondent on 1st June 2009 does not support the version of the Applicant that the Respondent was not entitled to deduct the over payment which was made to her erroneously. The administrative error arose when the Applicant was granted a company vehicle. At that point the car allowance which was paid to the Applicant should have been discontinued."[38]

The Labour Court dismissed the employee's urgent application after having found that no special circumstances existed to grant the urgent relief sought.[39] In the *Valasce* decision, the Labour Court effectively concluded that the car allowance payments were made erroneously to the employee.

The Labour Court further appears to have placed reliance on the *Sibeko* decision, although the latter decision does not expressly stand as authority that deductions may be effected without the employee's consent. As illustrated above, the *Sibeko* decision merely confirms that the employer may "adjust" the employee's remuneration to reflect what has been agreed upon between the parties. The facts in *Valasce* did not concern "adjusting" the employee's remuneration. Instead, it concerned the employer seeking to recover payments already erroneously made in respect of a car allowance. The process of recovering such payments would not have involved "adjusting" the employee's final remuneration (since the employer was serving notice) but would have necessitated a deduction from her final remuneration.

Despite this, for the reasons reflected in *Sekuthe* above, it is accepted that an employer is entitled, in terms of section 34(5)(*a*), to effect deductions for erroneous overpayments from an employee's remuneration, without the employee's consent.

3 2 Recovering remuneration for services not rendered

The circumstances that lead to overpayment of remuneration are not limited to administrative glitches resulting from an employer's payroll system. An employer may, for example, remunerate an employee in respect of hours not worked. In this regard, an employer may assume that the employee tendered their services on a particular day, only for the employer to establish later that the employee ought not to have been remunerated for those particular hours or days not worked. There is some debate as to whether circumstances of this nature constitute an error in calculating the employee's remuneration as contemplated in section 34(5)(*a*) of the BCEA.

Specifically, the question is whether an employer is entitled to deduct

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38 *Valasce v Wireless Payment Systems CC supra* par 21–23.

39 *Valasce v Wireless Payment Systems CC supra* par 25.

remuneration already paid where the employee has not rendered the services, and whether the employer requires the employee's consent to effect the deduction from their remuneration. This is dealt with below.

3 2 1 Recovering remuneration paid in respect of unauthorised leave of absence: Public Service Act and BCEA considerations

In *SA Medical Association on behalf of Boffard v Charlotte Maxeke Johannesburg Academic Hospital*,[40] the employee had taken various types of leave. During the period of his absence, he was paid his remuneration. Without any notice to the employee, deductions were made from the employee's remuneration in various different months. It was argued that the deductions were made because the leave taken by the employee was not in compliance with the leave procedure.

The employee was employed in the public service and the question for determination was whether an employer in the public service is entitled to deduct monies from an employee's remuneration where it alleges that the employee has been on unauthorised leave. If so, what procedures should be followed to effect such deductions. It was, however, common cause that the deductions were not preceded by any opportunity for the employee to make representations and also that the deductions were not consensual between the parties.

In distilling the applicable legal principles, the Labour Court had to determine whether the Department of Health had the authority to effect the deductions, regardless of the issue of consent.[41] Having considered the principles pertaining to the supremacy of the Constitution and the rule of law, the Labour Court held that it is clear that any decisions taken by the Department of Health, as a repository of public power, must comply with the principle of legality.[42]

In addition, the Labour Court held that, in this case, the power of the Department of Health to deduct monies from state employees or civil servants to reverse situations of wrongly paid remuneration, is specifically governed by legislation in the form of section 38 of the Public Service Act, 1994.[43] In this regard, section 38(2) of the Public Service Act provides:

> "If an officer or employee contemplated in sub-section (1) has in respect of his or her salary, including any portion of any allowance or other remuneration or any other benefit calculated on his or her basic salary or scale of salary or awarded to him or her by reason of his or her basic salary– …
>
> (b) *been overpaid* or received any such other benefit not due to him or her–
>
> (i) an amount equal to the amount of the overpayment shall be recovered from him or her by way of the deduction from his or her salary of such instalments as the head of department, with the

40 (2014) 35 *ILJ* 1998 (LC).

41 *SAMA obo Boffard v Charlotte Maxeke Johannesburg Academic Hospital supra* par 28.

42 *SAMA obo Boffard v Charlotte Maxeke Johannesburg Academic Hospital supra* par 32.

43 *Ibid*.

> approval of the Treasury, may determine if he or she is in the service of the State, or, if he or she is not in so service, by way of deduction from any monies owing to him or her by the State, or by way of legal proceedings, or partly in the former manner and partly in the latter manner."[44]

The difference between the wording of the BCEA and the Public Service Act is noteworthy. The BCEA caters for deductions where there has been an error in calculating the employee's remuneration, whereas the Public Service Act makes provision for deductions where remuneration has been "wrongly granted". The difference in wording is significant in that the Public Service Act provides a wider ambit within which to effect deductions. Ngcukaitobi AJ similarly recognised the latter point and described section 38(2) as permitting a deduction where an employee has been wrongly paid.[45] Thus, the wrongful conduct in this matter arose pursuant to the payment of the employee in circumstances where payment ought not to have been made (owing to the employee allegedly being on authorised leave) as opposed to an error in calculating an employee's remuneration, as envisaged in the BCEA.

In determining whether the Department of Health had complied with section 38(2) of the Public Service Act, the Labour Court found that the Department of Health had effected the deductions without the approval of National Treasury and, therefore, in the absence of authority, the deductions were declared unlawful.[46]

Interestingly, the enquiry did not end with determining whether there had been compliance with section 38 of the Public Service Act. In this regard, Ngcukaitobi AJ held that the fact that the State has authority to make deductions from an employee's remuneration to reverse wrongly paid remuneration does not necessarily render such deductions lawful.[47] Any authority to make deductions provided by section 38 of the Public Service Act is subject to the procedural constraints provided in section 34 of the BCEA.[48] This finding is not controversial in circumstances where State employees, although falling within the purview of the Public Service Act, nevertheless remain employees for purposes of the BCEA. With the exception of members of the State Security Agency, the BCEA does not specifically exclude public service employees from its application,[49]

Ngcukaitobi AJ considered the Labour Court's previous decisions in *Sibeko* and *Valasce*. In this regard, he held:

> "It is apparent from these decisions that the view taken by the Labour Court is that an overpayment as a result of an administrative error does not constitute remuneration as defined in terms of the BCEA. Since it is outside the parameters of the BCEA, an employer is not required to obtain the consent of

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44 In a later decision, the Constitutional Court declared this provision unconstitutional. This decision is discussed below (see *Public Servants Association obo Ubogu v Head of the Department of Health* (2018) 39 *ILJ* 337 (CC)).

45 *SAMA obo Boffard v Charlotte Maxeke Johannesburg Academic Hospital supra* par 33.

46 *SAMA obo Boffard v Charlotte Maxeke Johannesburg Academic Hospital supra* par 34.

47 *SAMA obo Boffard v Charlotte Maxeke Johannesburg Academic Hospital supra* par 35.

48 *Ibid*.

49 S 3 of the BCEA.

> an employee before effecting the deductions as required by s 34(1) of the BCEA."[50]

The above extract from the *Boffard* decision confirms that the employer does not require the employee's consent to deduct an overpayment, as contemplated in the BCEA, if an overpayment is not remuneration (because it is not in exchange for services rendered). However, this fails to recognise that the issue is not whether the amount sought to be deducted constitutes remuneration. Rather, the central issue concerns the fact that the amount is sought to be deducted from the employee's remuneration. The nature of the amount sought to be deducted (ie whether it constitutes remuneration) is not relevant to the enquiry.

In the *Boffard* decision, the deductions were effected from remuneration, which the employer contended was not due since the employee was on unauthorised leave. The deductions, therefore, fell within the ambit of "remuneration" as defined in section 1 of the BCEA. It is for this reason that the Labour Court found that the deductions were unlawful based on a lack of compliance with section 38 of the Public Service Act, read with section 34 of the BCEA.[51] This was compounded by the fact that the employer had not pleaded that the monies were overpayments made as a result of erroneous remuneration.

As an aside, Ngcukaitobi AJ pointed out that the Labour Court's previous decisions in *Sibeko* and *Valasce* did not decide the issue regarding whether an employee is entitled to a fair hearing before an employer recovers an overpayment.[52] In this regard, Ngcukaitobi AJ held that, in his view, it may well be implicit from the structure of the BCEA as a whole that all instances involving demands for repayment of money already paid to an employee should at least be preceded by a fair hearing.[53] Although this remark was made obiter*,* the reasoning is supported.

The Labour Court's decision in *Boffard*, however, needs to be reconsidered in relation to a later decision that the Constitutional Court handed down regarding the unconstitutionality of section 38(2)(*b*)(i) of the Public Service Act.

3 2 2 Recovering wrongly paid remuneration by the State: the unconstitutionality of section 38(2)(b)(i) of the Public Service Act

In *Public Servants Association obo Ubogu v Head of the Department of Health,*[54] the Constitutional Court had to determine the constitutionality of section 38(2)(*b*)(i) of the Public Service Act insofar as it permitted the State, in its capacity as the employer, to recover monies wrongly paid to its employees from the employees' remuneration in the absence of any due

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50 *SAMA obo Boffard v Charlotte Maxeke Johannesburg Academic Hospital supra* par 39.

51 *SAMA obo Boffard v Charlotte Maxeke Johannesburg Academic Hospital supra* par 44.

52 *SAMA obo Boffard v Charlotte Maxeke Johannesburg Academic Hospital supra* par 40.

53 *Ibid*.

54 *Supra*.

process or agreement between the parties. This determination brought into sharp focus the issues regarding "self-help" and the common-law principle of set-off.[55]

In this matter, the employee was employed by the Department of Health. Therefore, she was subject to the provisions of the Public Service Act. The employee was previously employed as the CEO of a hospital and was subsequently transferred to a different position, being that of Clinical Manager: Allied. This position was classified as Grade 11, while the higher graded position of Clinical Manager: Medical was a Grade 12 position. The employee received remuneration at the rate applicable to the post of Clinical Manager: Medical (Grade 12).

The Department of Health informed the employee that, in the process of her redeployment, she had erroneously been "translated" into the Grade 12 position, as opposed to the Grade 11 position. She was thus advised that she owed the Department of Health an amount of R794 014.33. The Department of Health proceeded unilaterally to deduct a sum from the employee's remuneration to compensate for a part of the overpayment. The employee was opposed to this and maintained that the Department of Health had no right to help itself to part of her salary. The Public Service Association (PSA), on the employee's behalf, launched urgent proceedings in the Labour Court for relief.

In the Labour Court, the PSA challenged the lawfulness of the deductions on the basis that, among other reasons, (i) there was no overpayment and (ii) section 38(2)(*b*)(i) of the Public Service Act, in terms of which the deductions had been made, was unconstitutional.

The PSA specifically contended that section 38(2)(*b*)(i) of the Public Service Act entitled the State to remain passive for extensive periods and, thereafter, recover amounts in respect of which the claims would otherwise have prescribed and that the Department should, instead, be directed to institute legal proceedings against the employee to allow her to challenge the basis of the deductions. This is in circumstances where sections 3(3) and 38(1)(*c*)(i) of the Public Finance Management Act,[56] read together with the National Treasury Regulations, required the Department of Health to institute legal proceedings where any unauthorised, irregular, fruitless and wasteful expenditure was found.

The Labour Court considered whether the deductions made in terms of section 38(2)(*b*)(i) of the Public Service Act amounted to untrammeled "self-help", as prohibited by section 1(*c*) of the Constitution.[57] In this regard, the Labour Court held that it was unclear why section 38(2)(*b*)(i) of the Public Service Act did not, in the same manner as section 31(1) (relating to "unauthorised remuneration") make provision for the recovery of overpaid remuneration through consent or legal proceedings.[58] The Labour Court analysed the principle of the rule of law and its components, including the

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55 *Public Servants Association obo Ubogu v Head of the Department of Health supra* par 1.

56 1 of 1999.

57 S 1(*c*) of the Constitution provides that the Republic is one sovereign, democratic state founded on values that include "[s]upremacy of the constitution and the rule of law".

58 *Public Servants Association obo Ubogu v Head of the Department of Health supra* par 15.

principle of legality as encapsulated in *Lesapo v North West Agricultural Bank*.[59] This involved a consideration of whether deductions made in terms of section 38(2)(*b*)(i) amounted to "self-help", as prohibited by the principle of legality in terms of section 1(*c*) of the Constitution.[60]

The Labour Court concluded that the deductions in terms of section 38(2)(*b*)(i) violated the spirit, purport and objects of the Bill of Rights and amounted to untrammeled "self-help".[61] The Labour Court, therefore, declared section 38(2)(*b*)(i) of the Public Service Act unconstitutional.[62]

The PSA lodged a confirmation application to the Constitutional Court in terms of section 172(2)(*d*) of the Constitution. The purpose of the application was to confirm the order of constitutional invalidity.

In the Constitutional Court, the PSA contended that section 38(2)(*b*)(i) sanctions "self-help" in that it permits deductions where the State is the sole arbiter concerning any dispute on allegedly wrongly granted remuneration, as well as on the appropriate means to recover the indebtedness. In addition, the State is the self-appointed executioner. The Department of Health contended that, insofar as the allegation that section 38(2)(*b*)(i) offends the principle of legality is concerned, actions taken in the context of the employment relationship between the State, as employer, and its employees falls within the sphere of private law and cannot be qualified as administrative action.[63] It was contended that the principle of legality only applies to the sphere of public law and not private law.

The Department of Health, therefore, contended that section 38(2)(*b*)(i) is consistent with the Constitution and that the confirmation application, therefore, fell to be dismissed.

The Constitutional Court considered the effect of section 38(2)(*b*)(i) on limiting the right to judicial redress in terms of section 34 of the Constitution, which provides everyone with the right "to have any dispute that can be resolved by the application of law decided in a fair public hearing before a court".

The Constitutional Court held that the effect of section 38(2)(*b*)(i) is to impose strict liability on an employee, in that deductions may be made without the employee concerned making representations about her liability and even her ability to pay the deductions (in terms of instalments).[64] The impugned provision provided the State with unrestrained power to determine, unilaterally, the instalments without an agreement with the employee.[65]

The Constitutional Court noted that, although section 38(2)(*b*)(i) is a statutory mechanism to ensure recovery of monies wrongly paid to an

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59 1999 (12) BCLR 1420.

60 *PSA obo Ubogu v Head of the Department of Health supra* par 53.

61 *PSA obo Ubogu v Head of the Department of Health supra* par 16 and 53.

62 *PSA obo Ubogu v Head of the Department of Health supra* par 54.

63 See also *Chirwa v Transnet Ltd* 2008 (3) BCLR 251 (CC) and *Gcaba v Minister for Safety and Security* 2010 (1) BCLR 35 (CC).

64 *PSA obo Ubogu v Head of the Department of Health supra* par 65.

65 *Ibid*.

employee out of the State's coffers, the provision gives the State free rein to deduct whatever amounts have been allegedly wrongly paid.[66] As a result, the Constitutional Court held that section 38(2)(*b*)(i) allows the State to undermine judicial process, which requires that disputes be resolved by law as envisaged in section 34 of the Constitution.[67]

The Constitutional Court similarly found that deductions in terms of section 38(2)(*b*)(i) constituted unfettered "self-help" – the taking of the law by the State into its own hands and enabling it to become the judge in its own cause – in violation of section 1(*c*) of the Constitution.[68] As a result, the Constitutional Court held that section 38(2)(*b*)(i) does not pass constitutional muster.[69]

As at the date of publication of this article, section 38(2)(*b*)(i) of the Public Service Act had not been amended. The effect is that any deductions from the remuneration of employees employed in the public service are to be effected in accordance with the prescripts of the BCEA.

3 2 3 Recovering erroneous remuneration paid in respect of unauthorised leave of absence in terms of section 34(5) of the BCEA

In *Stein v Minister of Education and Training*,[70] the Labour Court had to determine whether the employer's conduct in effecting deductions from the employee's remuneration was unlawful in circumstances where the employee was regarded as absent from work.

In this matter, the employer had requested the employee to submit completed leave application forms in respect of the days he was allegedly not at work. The employee failed to submit the leave forms, arguing instead that he was not on leave but working outside the office on matters assigned to him. When the leave forms were not forthcoming, the human resources manager applied for approval to declare the days in respect of which the employee was absent as unpaid leave.

It is not clear from the decision in respect of which legislative provision that approval was sought, since, at the date of the *Stein* decision, the requirement for an employer in the public service to obtain approval from National Treasury was encapsulated under section 38(2) of the Public Service Act, which was declared unconstitutional in *Ubogu*. However, this is not material.

The approval was nevertheless granted and in due course, the Department of Higher Education and Training (as employer) deducted certain amounts for the days that the employee did not work.

The employee approached the Labour Court for an order declaring that the deductions were unlawful because he did not consent to them being

66 *PSA obo Ubogu v Head of the Department of Health supra* par 64.
67 *PSA obo Ubogu v Head of the Department of Health supra* par 67.
68 *PSA obo Ubogu v Head of the Department of Health supra* par 65.
69 *PSA obo Ubogu v Head of the Department of Health supra* par 68.
70 [2021] ZALCJHB 420.

made against his remuneration as required by section 34 of the BCEA, and nor were they permitted by a law, court order or collective bargaining agreement. He further sought a consequential order that the deductions already made be reversed.

In reaching its decision, the Labour Court noted that the employer had notified the employee that the days on which the employee was absent would be treated as unpaid leave.[71] The Labour Court found that the deductions for the days in respect of which the employee was not at work constituted recoupment of a payment made in circumstances where the payment ought not to have been made. Thus, the employer was recovering an amount in respect of an overpayment previously made.[72] In reaching its finding, the Labour Court relied on the *Sibeko* decision, in terms of which it was held that where an employee was overpaid *"in error"*, the employer is entitled, without the employee's consent, to "adjust" the income so as to reflect what was agreed upon between the parties.[73]

However, it does not appear, it is submitted, that the facts in *Stein,* carefully considered, necessitated reliance on the *Sibeko* decision. The *Sibeko* decision contemplated a scenario where an employee has been overpaid in terms of the contractually agreed amount, and therefore that the employer is, in such circumstances, entitled to "adjust" future remuneration to reflect the remuneration to which the employee is contractually entitled. Narrowly considered, the same principle cannot be said to apply where an employer seeks to recover remuneration paid for unauthorised leave of absence.

In the *Stein* decision, the Labour Court considered the *Padayachee* decision in which it was held that the purpose of the deductions in dispute ought to be considered. Against this background and having regard to the fact that the contract of employment only entitles an employee to remuneration in return for services rendered, it is arguable that an employer should be entitled, without obtaining the employee's consent, to deduct amounts paid where the employee has not rendered services. However, the employer should nevertheless follow a fair process in doing so.

The Labour Court reasoned that an employee is required to be at work and render service to the employer in exchange for payment.[74] In this regard, the Labour Court held that where an employee absents themselves and fails to submit the leave form in accordance with the employer's policy, the employer is entitled to withhold payment, and in instances where the employer has already effected payment, the employer should be allowed to recover it without the employee's consent.[75]

Notably, the Labour Court circled its reasoning back to section 34(5) of the BCEA, being the empowering provision, stating that the payment made to the employee, in respect of the days on which he was absent, constituted an "overpayment", and was susceptible to recovery under the provisions of

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71 *Stein v Minister of Education and Training supra* par 10.

72 *Ibid.*

73 *Stein v Minister of Education and Training supra* par 11.

74 *Stein v Minister of Education and Training supra* par 13.

75 *Stein v Minister of Education and Training supra* par 14.

section 34(5), in that the payment was made when it was not due, meaning that the payment was made in error.[76]

3 2 4 Recovering erroneous remuneration paid to striking employees

In *North-West Provincial Legislature v National Education Health and Allied Workers Union obo 158 Members*,[77] the LAC had to determine an appeal from the Labour Court, which had interdicted and restrained the employer from deducting any remuneration from employees until it had complied with section 34 of the BCEA.

In this matter, the employees had engaged in an unprotected strike. The employer issued a communiqué to the employees informing them that, given the unprotected industrial action, the principle of "no work, no pay" would apply to those employees who did not attend work. Despite the communiqués issued, all the striking employees received their remuneration, apparently because the employer failed to halt its payroll run in respect of the striking employees. Following this, the employer advised the employees that it would deduct the remuneration paid to them from their remuneration over a number of months. After negotiations failed between the parties, the employer proceeded to inform the employees that it would deduct three working days' remuneration each month.

In response, the National Education, Health and Allied Workers' Union (NEHAWU) approached the Labour Court on an urgent basis in terms of section 77(3) of the BCEA. NEHAWU asked the Labour Court to restrain the employer from effecting the deductions from the employees' remuneration on the basis of their alleged participation in the unprotected strike. NEHAWU further sought an order declaring that the deductions were made in contravention of the BCEA and were, therefore, unlawful.

The Labour Court considered section 34(1) of the BCEA and held that since no written agreement had been concluded with the employees and no law permitted the deduction, the employer was not permitted to effect any deduction from the employees' remuneration.[78] The Labour Court found further that there was no conflict between section 67(3) of the Labour Relations Act[79] (LRA),[80] which provides for "no work, no pay" during a

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76 *Ibid*.

77 (2023) 44 *ILJ* 1919 (LAC).

78 *North-West Provincial Legislature v NEHAWU obo 158 Members supra* par 5.

79 66 of 1995.

80 S 67 of the LRA states:

"(1) In this Chapter, "protected strike" means a strike that complies with the provisions of this Chapter and "protected lock-out" means a lock-out that complies with the provisions of this Chapter.

(2) A person does not commit a delict or a breach of contract by taking part in–

(a) a protected strike or a protected lock-out; or

(b) any conduct in contemplation or in furtherance of a protected strike or a protected lock-out.

(3) Despite subsection (2), an employer is not obliged to remunerate an employee for services that the employee does not render during a protected strike or a protected lock-out, however–

protected strike, and section 34 of the BCEA.[81] Consequently, it found that the deductions made, or those intended to be made, were unlawful. The employer was interdicted from effecting the deductions until it had complied with section 34 of the BCEA.[82]

On appeal in the LAC, the employer contended that (i) section 34 of the BCEA did not apply where the principle of "no work, no pay" finds application and (ii) the "no work, no pay" principle constituted "a law" as contemplated in section 34(1)(*b*), with the result that there had been compliance with section 34; therefore, the recovery of unearned remuneration did not amount to "self-help", with set-off applicable. These contentions were all disputed.

Insofar as the "no work, no pay" principle was concerned, the employer argued that that it was entitled to effect the deductions since section 34 did not apply to the deductions made – on the basis that "no work, no pay" falls under the LRA, which deals with collective bargaining, and not the BCEA. This is an interesting point. This argument is, however, untenable in circumstances where, in this matter, the employer had already made the payments and, therefore, any deductions from already paid remuneration falls within the purview of the BCEA, irrespective of whether the deductions derive from the application of the "no work, no pay" principle.

The LAC rightfully dismissed the employer's "no work, no pay" argument on the basis of its being unmeritorious.[83] This is because there is a clear distinction between an entitlement not to make payment of remuneration under certain circumstances, such as those that prevail in a strike, and the entitlement to make deductions under the circumstances specified in section 34 of the BCEA.

The LAC noted that, despite the employer not being obliged to remunerate the employees for services they did not render during the unprotected strike, it did so, and thereafter sought unilaterally to deduct such remuneration, without agreement or order obtained through an adjudicative or judicial process.[84]

In addition, the LAC held that it was not common cause on what days or over what period all employees were on strike. Therefore, to allow deductions to be made unilaterally by the employer, without any agreement or impartial adjudication on the issue, would be patently unfair, unjust and in violation of the express limitations of section 34 of the BCEA.[85] It was further noted that it has been made clear by the Constitutional Court in *Lesapo* that

(a) if the employee's remuneration includes payment in kind in respect of accommodation, the provision of food and other basic amenities of life, the employer, at the request of the employee, must not discontinue the payment in kind during the strike or lock-out; and

(b) after the end of the strike or lock-out, the employer may recover the monetary value of the payment in kind made at the request of the employee during the strike or lock-out from the employee by way of civil proceedings instituted in the Labour Court."

81 *North-West Provincial Legislature v NEHAWU obo 158 Members supra* par 5.

82 *Ibid*.

83 *North-West Provincial Legislature v NEHAWU obo 158 Members supra* par 14.

84 *North-West Provincial Legislature v NEHAWU obo 158 Members supra* par 12.

85 *North-West Provincial Legislature v NEHAWU obo 158 Members supra* par 17.

the rule against "self-help" is necessary for the protection of the individual against an adversary's arbitrary and subjective decisions and conduct. It serves as a guarantee against partiality and consequent injustice that may arise.[86] The employer's appeal was, therefore, dismissed.

Interestingly, in this matter, the employer founded its justification for the deductions on the "no work, no pay" principle. It is submitted that this principle only applies at the time that the employer is determining what remuneration is payable to the employee (thus not constituting a deduction) and not as an underlying basis for unilateral deductions at a later stage, when remuneration has already been paid to the employee.

In addition, it is noteworthy that the payment of the remuneration was due to the employer's failure to halt its payroll run in respect of the striking employees. It is possible that the employer anticipated that mounting its defence in terms of section 34(5) of the BCEA would not have been sustainable – that the failure to halt payroll could possibly not be argued to constitute an error in calculating an employee's remuneration as contemplated in section 34(5) of the BCEA.

4 THE COMMON-LAW DOCTRINE OF SET-OFF

In the simplest terms, the common-law doctrine of set-off allows one debt to be cancelled by another. It applies in instances where debts are mutually owing between two parties so that each party is simultaneously the debtor and creditor of the other party.[87]

In *Harris v Tancred*,[88] Rosenow J observed that the "origin of the principle appears rather to have been a common-sense method of self-help".[89] The Appellate Division, as the Supreme Court of Appeal was then known, in *Schierhout v Union Government (Minister of Justice*),[90] held the following with regard to the application of the doctrine:

> "When two parties are mutually indebted to each other, both debts being liquidated and fully due, then the doctrine of compensation comes into operation. The one debt extinguishes the other *pro tanto* [only to the extent of the debt] as effectually as if payment had been made."[91]

Based on the Appellate Division's description of the doctrine of set-off, the following requirements must be met for the doctrine to apply: (i) there must be reciprocal debts between the parties; (ii) the debts must be of the same kind; (iii) the debts must be liquidated; and (iv) both debts must be due and payable.

In the case of deductions from an employee's remuneration, it can easily be contended that scenarios involving deductions may not always be

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86 *Lesapo v North West Agricultural Bank supra* par 18.

87 *National Credit Regulator v Standard Bank of South Africa Limited* GP (unreported) 2019-06-27 Case No 44415/16.

88 1960 (1) SA 839 (C).

89 *Harris v Tancred supra* 843H.

90 1926 AD 286.

91 *Schierhout v Union Government (Minister of Justice) supra* 289.

comparable to circumstances that give rise to the application of the doctrine of set-off, in that the deductions do not come into effect by operation of law, but rather, pursuant to an employer's unilateral determination to effect the deductions.

In the *Ubogu* decision, it was contended that section 38(2)(*b*)(i) of the Public Service Act permitted deductions by way of set-off under the common law. The Constitutional Court held that the doctrine of set-off did not operate as a matter of law in the matter. This is because there were no mutual debts between the employer and employee. Therefore the parties could not be said to be mutually indebted to each other.[92] As a result, the Constitutional Court confirmed that the set-off doctrine could not be invoked to defeat an employee's claim to their remuneration.[93] Notably, Nkabinde ADCJ (as she then was) remarked in *Ubogu* that this should not be understood to suggest that there could never be instances in which the doctrine of set-off, especially where there are mutual debts in existence, may be invoked.[94]

It may nevertheless, depending on the facts, certainly be arguable that the alleged debt (overpayment to an employee) is due and payable. However, this does not, in and of itself, give rise to the application of the common-law doctrine of set-off.

In *North-West Provincial Legislature*, the LAC confirmed the principle emanating from *Ubogu* and held that the doctrine of set-off does not operate *ex lege* (as a matter of law), and where there are no mutual debts, but rather an unresolved dispute about deductions from an employee's remuneration, it cannot be applied.[95]

Turning to whether section 34(5) of the BCEA permits the application of the doctrine of set-off, the Labour Court in *Padayachee* held:

> "The respondent's contention that set-off constitutes a rule of the common law and that a rule of the common law is 'a law' as contemplated in section 34(1)(b) is accepted on the basis that the phrases 'a law of general application' and 'notwithstanding anything contained in any other law' have been held to refer to statute and the common law.
>
> However, the respondent's contention that, in the absence of an agreement with the employee, an employer may rely on section 34(1)(b) and ignore sections 34(1)(a) and [34(2)] to make a deduction from an employee's remuneration in respect of damage or loss caused by the employee is rejected for the reasons set out below."[96]

The *Padayachee* decision confirms the applicability of the doctrine of set-off in terms of section 34(1)(*b*) of the BCEA in that it constitutes "a law" as contemplated by that provision. However, it is submitted that this finding does not give employers carte blanche to effect deductions by relying on the doctrine of set-off. In order for the doctrine to apply, the employer needs also

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92 *PSA obo Ubogu v Head of the Department of Health supra* par 71.

93 *PSA obo Ubogu v Head of the Department of Health supra* par 72.

94 *Ibid.*

95 *North-West Provincial Legislature v NEHAWU obo 158 Members supra* par 21.

96 *Padayachee v Interpak Books (Pty) Ltd supra* par 25–26.

to ensure that legal requirements of set-off are met. In *Padayachee*, the Labour Court held further:

> "It is also clear that sections 34(1)(a) and 34(2) also require the damages to be liquidated through the process of a hearing and a written agreement which sets out the specific amount owed and due. The provision thus requires the existence of a liquid document."[97]

Having regard to the above, the doctrine may not always be applicable in circumstances where there are no mutual debts between the parties. A mutual debt typically exists where an employer has suffered quantifiable loss or damages arising in the course of employment, through the employee's fault. The loss or damages need to be quantified. To permit otherwise would entitle the employer to determine arbitrarily the amount due to the employee in respect of which set-off is sought to be applied.

It is further noted that the employer needs to follow a fair procedure in the quantification process, and provide the employee with a reasonable opportunity to show why the deduction should not be made. This is in accordance with section 34(2)(*b*) of the BCEA – in the fuller context of section 34(2), which provides:

> "A deduction in terms of subsection (1)(a) may be made to reimburse an employer for loss or damage only if–
>
> (a) the loss or damage occurred in the course of employment and was due to the fault of the employee;…"

An additional requirement is that the amount in respect of which set-off is sought to be applied should be reflected in a written agreement. This is in accordance with section 34(1) of the BCEA. Practically, the written agreement follows the process in terms of which the quantification of the amount due and payable is determined.

The *Padayachee* decision is not entirely at odds with the Constitutional Court's decision in *Ubogu*. This is because the Constitutional Court accepted that there may be instances when the doctrine of set-off may apply. Such situations include where there is a mutual debt between the parties.

The concept of a "mutual debt" also requires some consideration. Does a mutual debt only exist in situations where an employer has suffered quantifiable loss or damages or does it extend to situations where the employer has made an overpayment to an employee? In both *Ubogu* and *North-West Provincial Legislature*, the factual matrix involved overpayments to an employee. In both cases, it was, however, found that the doctrine of set-off did not apply. The reasoning in *Ubogu* was that there was no mutual debt between the parties.[98] The reasoning in *North-West Provincial Legislature* was that there was an unresolved dispute about deductions made from employees' remuneration for work that was not performed during a strike – meaning that the employees' debts had not been determined.[99]

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97 *Padayachee v Interpak Books (Pty) Ltd supra* par 32.

98 *PSA obo Ubogu v Head of the Department of Health supra* par 71.

99 *North-West Provincial Legislature v NEHAWU obo 158 Members supra* par 21.

In the *Padayachee* decision, by contrast, the factual matrix involved the employer having suffered loss or damages as a result of the employee's fault, and thus it was found that the doctrine of set-off applied.

It can certainly be contended that where an employer has made overpayments to which an employee was not entitled, such overpayments constitute a debt that the employee owes the employer. Such amounts would, in ordinary circumstances, be easily ascertainable. An employer would similarly be indebted to remunerate the employee for services rendered, thus establishing mutual debts between the parties. As a result, there is no reason, on the face it, to conclude in such circumstances that there would be no mutual debts between the parties.

In *Gqithekhaya v Amathole District Municipality*,[100] the High Court held:

> "The provisions of subsection (5) do not in itself grant the employer a remedy or right to apply set off (even in a scenario where there has been an error in calculating the employees' remuneration). The section merely in my view confirms the category of deductions that an employee cannot be expected to challenge on the basis that she/she had no entitlement to in the first place due to it constituting an obvious overpayment or arithmetic miscalculation."[101]

The High Court, however, similarly did not discount the possibility of the doctrine of set-off being applicable under certain circumstances. In this regard, it was suggested that the doctrine would only apply where the employee has admitted the debt and payment terms, or if a judgment debt already exists as provided for in terms of section 34(1) of the BCEA, because only then can parties be mutually indebted to each other. The High Court also noted the Constitutional Court's observation in *Ubogu* that the doctrine of set-off cannot be invoked to defeat an employee's claim to their salary.[102]

5 CONCLUSION

The deduction of any amount from an employee's remuneration without consent remains a contentious issue that may be subject to challenge based on unlawfulness. It is trite that the Labour Court has exclusive jurisdiction in respect of all matters arising out of the BCEA.[103] Accordingly, the Labour Court is empowered to determine any challenge regarding the lawfulness of any deductions from an employee's remuneration.

There will be no controversy in respect of deductions that are effected in accordance with an agreement between the parties. However, where an employer has erroneously made overpayments to an employee, it is submitted that the employer is not required to obtain the employee's consent prior to making the deduction. The employer may proceed to effect deductions in accordance with section 34(5) of the BCEA. The employer would be entitled to do so under this provision. However, the employer

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100 (2023) 44 *ILJ* 627 (ECL).

101 *Gqithekhaya v Amathole District Municipality supra par 54*

102 *Gqithekhaya v Amathole District Municipality supra* par 62.

103 S 77(1) of the BCEA. See also *Amalungelo Workers' Union v Philip Morris South Africa (Pty) Limited* (2020) 41 *ILJ* 863 (CC) par 20.

would first need to satisfy itself that the amount sought to be deducted constitutes an overpayment resulting from an error in calculating the employee's remuneration. This section cannot be relied upon for purposes of recovering loss or damage incurred owing to the employee's fault or for the repayment of debts.

Although section 34(5) is the enabling provision and thus does not expressly require the employee's consent, it is submitted that the provision should not be interpreted as allowing employers unfettered "self-help" and carte blanche to deduct whatever amount they deem appropriate, and without following any due process. It is important for an employer to allow an employee to make representations as to why the deductions should not be effected and their ability to pay the instalments sought to be deducted. The notion of a fair procedure is implicit in all employment legislation.

Notably, unlike deductions effected in terms of an agreement under section 34(1), read with section 34(2), the provisions of section 34(5) do not expressly require an employer to follow a fair procedure. Despite this, employers should, at the very least, advise employees in writing, prior to effecting deductions under section 34(5), and follow a fair procedure in doing so.

To date, our courts have not been called upon to pronounce on the constitutional validity of section 34(5) of the BCEA. However, the Constitutional Court in *Ubogu* nevertheless remarked on section 34(5) in the course of determining the unconstitutionality of section 38(2)(*b*)(i) of the Public Service Act. The Constitutional Court stated:

> "There can be no doubt that the recovery of monies overpaid by the state engages multi-faceted interests. Section 34(1) of the BCEA may be a point of reference when the defect in the impugned legislation is remedied. This section prohibits an employer from making deductions from an employee's remuneration unless by agreement or unless the deduction is required or permitted in terms of a law or collective agreement or court order or arbitration award. It bears mentioning that section 34(5) read with section 34(1) of the BCEA does not authorise arbitrary deductions. Therefore, the appropriate forum for balancing different interests is Parliament and it will be open to it to consider, among other things, the impact of section 34 of the BCEA and the potential inequality between public service employees and those falling outside the public service who have been overpaid."[104]

Although this remark appears to be obiter in the *Ubogu* decision, employers should nevertheless be circumspect and avoid arbitrarily relying on section 34(5) when the facts do not give rise to its application. Where the facts do give rise to its application, employers should follow a fair procedure.

Regarding the principle of fair procedure, the Constitutional Court in *De Lange v Smuts NO*[105] held:

> "When contemplating the essential purpose of the protection afforded through the notion of procedural fairness, my sight is arrested by this fact: at heart, fair procedure is designed to prevent arbitrariness in the outcome of the decision. The time-honoured principles that no-one shall be the judge in his or her own

[104] *PSA obo Ubogu v Head of the Department of Health supra* par 78.

[105] 1998 (7) BCLR 779.

> matter and that the other side should be heard, aim toward eliminating the proscribed arbitrariness in a way that gives content to the rule of law."[106]

Although section 34(5) is the enabling provision, it does not appear that the legislature found it necessary to require an employer to follow a fair process when it effects deductions in terms of the provision. The reasoning is probably that where there has been an erroneous overpayment, such a case should not be contentious in circumstances where the employee would not have been entitled to an overpayment. An additional consideration is that the overpayment is likely to be easily ascertainable and should not give rise to a dispute. This was similarly noted in *Gqithekhaya*. However, it is submitted that the legislature should consider amending section 34(5) to provide more clarity on the parameters of the application of the provision and the procedure, if any, required to be followed in respect thereof.

[106] *De Lange v Smuts NO supra* par 131.

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