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THE LEGAL STATUS OF TRADE UNIONS AND POTENTIAL GROUNDS ON WHICH THEY MAY INCUR LIABILITY

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SUMMARY

Employees exercise their right to freedom of association by forming or joining trade unions. It is not required that a trade union be registered to function as such. However, under the Labour Relations Act (LRA), there are a number of benefits available to registered trade unions. A registered trade union acquires the status of a body corporate with rights and duties. However, it functions through natural persons, and those who represent it may not be held liable if they act in line with the union's constitution and within their authority. This article is aimed at considering the legal status of trade unions in South Africa and in the United Kingdom (UK) respectively. It further considers different circumstances under which a trade union may incur liability, including instances where there is non-compliance with the union's constitution, a breach of contract or delict, or a discrimination claim.

1 INTRODUCTION

Employees' right to freedom of association is protected in terms of the International Labour Organization's (ILO) Conventions[1] and the Constitution of the Republic of South Africa, 1996 (Constitution). Flowing from this right, employees have the right to form or join trade unions of their choice.[2] This right is protected and has been given effect to by the Labour Relations Act[3] (LRA). The LRA defines a trade union as "[a]n association of employees whose principal purpose is to regulate relations between employees and employers, including any employers' organisations."[4]

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1 ILO *Freedom of Association and Protection of the Right to Organise Convention* C087 (1948) Adopted: 09/07/1948; EIF: 04/07/1950; and ILO *Right to Organise and Collective Bargaining Convention* C098 (1949) Adopted: 01/07/1949; EIF: 18/07/1951.

2 S 23 of the Constitution.

3 66 of 1995.

4 S 213 of the LRA.

A trade union should therefore be an association of employees aimed at regulating relations between employees and employers. According to the definition, it is not required that a trade union be registered in order to function as such. However, the LRA affords registered trade unions certain exclusive rights, including organisational rights;[5] the right to conclude collective agreements;[6] the right to become a party to a bargaining council;[7] the right to apply for the establishment of a workplace forum;[8] and the right to authorise a picket[9]. The registration of trade unions is aimed mainly at the promotion of the observance of democratic principles in the internal operation and governance of trade unions. It also serves to enforce proper financial control over trade union funds.[10]

The right to freedom of association is accorded to employees and not to trade unions. Nevertheless, employees collectively express their interests through trade unions, and trade unions are expected to act in the interests of their members.[11] Trade unions act through their representatives in order to realise the interests and wishes of their members. Unfortunately, this may at times result in trade unions incurring liability owing to their representatives' acts or conduct. This article reflects on the legal status of South African trade unions and the possible grounds on which they may be held liable. It further briefly considers the legal status of trade unions in the UK and the possible grounds on which UK trade unions may be held liable in order to determine whether there are lessons to be learned for South Africa.

2 THE LEGAL STATUS OF TRADE UNIONS AND POSSIBLE GROUNDS FOR LIABILITY IN SOUTH AFRICA

2 1 The legal status of a trade union under the LRA

The law recognises two forms of legal subject, namely, a natural person and a juristic person. A juristic person derives its personality from statutory provisions or from common law.[12] A legal subject can therefore be a human being or an entity such as a company or an organisation. Thus, a trade union (as a juristic person) is regarded as a legal subject. Legal subjects

5 S 11 of the LRA.

6 S 23(1)(*c*) of the LRA. A collective agreement is defined by s 213 of the LRA as "a written agreement concerning terms and conditions of employment or any matter of mutual interest concluded by one or more registered trade unions, on the one hand and on the other hand – one or more employers".

7 S 27 of the LRA.

8 S 78 of the LRA.

9 S 69 of the LRA.

10 Du Toit, Godfrey, Cooper, Giles, Cohen, Conradie and Steenkamp *Labour Relations Law: A Comprehensive Guide* 6ed (2015) 236.

11 Du Toit *et al Labour Relations Law* 243. See also *SA Polymer Holdings (Pty) Ltd v Llale* (1994) 15 *ILJ* 277 (LAC).

12 Van Jaarsveld and Van Eck *Principles of Labour Law* 3ed (2005) 228.

have legal capacity, which means that they can be bearers of rights and duties.[13] Chapter IV of the LRA provides for the registration of trade unions. In South Africa, the most important advantage of registering a trade union is that it becomes a body corporate with legal personality.[14] It has perpetual succession. As stated above, a trade union can only function through natural persons and must, accordingly, have natural persons to act and function on its behalf. These may include trade union representatives,[15] officials[16] and office-bearers.[17] Provided the conduct and acts of such persons fall under the trade union's constitution, they are regarded as conduct and acts of the trade union – an independent legal entity.[18] A registered trade union therefore becomes distinct from its representatives, members, office-bearers and officials.[19]

A trade union can enter into agreements and contracts in its own name. As a result, it can sue or be sued in its own name,[20] or on behalf of its members. It can acquire, hold, sell or transfer movable or immovable property.[21] The liabilities of a trade union remain those of the body corporate and members cannot be charged with its debts.[22] Membership of a trade union also does not make a member liable for the obligations or liabilities of that trade union.[23] A trade union can also act as a plaintiff or defendant in legal proceedings. However, it cannot legally do anything that is not covered in its constitution[24] because that will be regarded as *ultra vires* and therefore null and void.[25]

It must be noted that trade unions are voluntary organisations, and therefore employees may not be forced or compelled to form or join them[26] – unless under trade union security arrangements,[27] such as closed shop agreements[28] and agency shop agreements.[29] As a legal person, a trade

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13 Heaton *The South African Law of Persons* 6ed (2021) 2.

14 S 97(1) of the LRA. See also *FAWU v Wilmark (Pty) Ltd* 1998 *ILJ* 928 (CCMA); *SAMWU v Jada* 2003 *ILJ* 1344 (W).

15 S 213 of the LRA defines a trade union representative as "a member of a trade union who is elected to represent employees in the workplace".

16 S 213 of the LRA defines an "official" in relation to a trade union as "a person employed as a secretary, assistant secretary or organiser of a trade union". Officials are ordinary employees in terms of contracts of employment (see *Grundling v Beyers* 1967 (2) ASA 138 (W)).

17 S 213 of the LRA defines an "office-bearer" as "a person who holds office in a trade union … and who is not an official".

18 Van Niekerk, Christianson, McGregor, Smit and Van Eck *Law@work* 5ed (2019) 424.

19 *Mbobo v Randfontein Estate Gold Mining Co* 1992 *ILJ* 1485 (IC).

20 See also *NEWU v Sithole* [2004] 11 BLLR 1085 (LAC), where the union applied to the Labour Court for a judgment against members for arrear fees.

21 S 95(5)(*t*) of the LRA; Van Jaarsveld and Van Eck *Principles of Labour Law* 228; *AEU v Minister of Labour* 1949 (4) SA 908 (A); *NUFAWSA v PWAWU* 1984 *ILJ* 161 (W).

22 S 97(2) of the LRA.

23 S 97(2) and (3) of the LRA.

24 *AWUSA v Fedics Food Services* 1999 *ILJ* 602 (LC).

25 *Sorenson v Executive Committee Tramway & Omnibus Workers' Union (Cape)* 1974 (2) SA 545 (C); *Fraser Alexander Bulk Materials Handling (Pty) Ltd v CWIU* 1996 *ILJ* 713 (IC).

26 Grogan *Collective Labour Law* 3ed (2019) 38.

27 S 23(5) of the Constitution.

28 S 26 of the LRA.

union can prescribe requirements for admission to its membership and can decide whom to admit to membership.[30] An association cannot be registered as a trade union unless it is an association of employees and its principal purpose is to regulate relations between employees and employers. Thus, the LRA now requires a trade union to be genuine in order to be registered.[31] The Registrar must also be satisfied, before registering a trade union, that it meets the criteria set by the LRA for registration,[32] considering that a decision not to register a trade union may be taken on appeal to the Labour Court.[33]

A trade union may act in any dispute to which its member is a party, or in its own interest; or on behalf of any of its members or in the interest of any of its members.[34] Members of a trade union pay joining fees and monthly subscription fees so that the trade union may represent their interests. A trade union may not violate its members' constitutional rights, and members may not be bound by a trade union's dishonest or inappropriate conduct.[35] The relationship between a trade union and its members is similar to that of an agent and a principal; and when it performs functions in terms of its constitution, it is acting as an agent for its members.[36] Furthermore, a trade union's authority to conclude collective agreements for its members is founded in agency.[37] However, in *Blyvooruitzicht Gold Mining v Pretorius,*[38] the court stated that a trade union's right to represent its members does not flow from agency, but from "representative governance" emanating from its collective bargaining role. As with lawyers, trade union representatives may be held liable in their personal capacities if they behave unacceptably during judicial proceedings.[39]

In South Africa, a trade union is therefore a legal person that can sue or be sued in its own name. Consequently, it can be held liable in certain instances, as discussed below.

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29 S 25 of the LRA.

30 *Garment Workers Union v Keraan* 1961 (1) SA 744 (C).

31 S 95(7) of the LRA; GN R1446 in *GG* 25515 of 2003-10-10. The Registrar will examine the manner in which it was established, its composition, membership and the activities it undertakes on behalf of its members.

32 S 96 of the LRA.

33 S 111(3) of the LRA; *WUSA v Crouse NO* (2005) 26 *ILJ* 1723 (LC).

34 S 200(1) of the LRA. A trade union acting on behalf of its members becomes a party to the dispute and acquires *locus standi* to represent its members. In terms of s 162(3) of the LRA, the Labour Court may make a costs order against a party to the dispute, including any person who represented that party in proceedings before the court. In *Simelane v Letamo Estate* (2007) 28 *ILJ* 2053 (LC), the Labour Court made a costs order against the union and the employees jointly and severally. The union was obstructive during retrenchment consultations by refusing to consult pending the disclosure of financial statements that were not available at the time.

35 *Moloi v Euijen NO* [2000] 5 BLLR 552 (LAC); *Benjamin v Plessey Tellimat SA Ltd* [1998] 3 BLLR 272 (LC).

36 Grogan *Collective Labour Law* 48.

37 Grogan *Collective Labour Law* 56.

38 [2000] 7 BLLR 751 (LAC).

39 Grogan *Collective Labour Law* 55.

2 2 Trade union duties under the LRA and consequences of non-compliance

Under the LRA, it is compulsory amongst others for a registered trade union to keep proper books and records of its income, expenditure, assets and liabilities.[40] It must also prepare an annual statement of income and expenditure and a balance sheet of its assets, liabilities and financial statement for the previous year.[41] Its accounting books must be audited by an auditor according to set professional standards.[42] A trade union must preserve and keep, for at least three years, all books of account, records of subscriptions paid, financial statements, auditor's reports and minutes of meetings.[43] It must provide to the Registrar within 30 days of receipt of its auditor's report, a certified copy of that report and the financial statements.[44]

It is submitted that the above duties assist in holding trade unions accountable and responsible because, without them, trade union funds may be misused and abused by those involved. The Registrar may also cancel the registration of a trade union by removing its name from the register if satisfied that the trade union is not, or has ceased to function as, a genuine trade union,[45] or if the Registrar has issued a written notice requiring the union to comply with sections 98, 99 and 100 of the LRA within a period of 60 days of the notice and the trade union has, despite the notice, failed to comply.[46] The effect of such a deregistration is that a union stops enjoying all the rights it attained through registration.[47]

2 3 Circumstances under which a trade union may incur liability in South Africa

2 3 1 Trade union liability for non-compliance with its constitution

Trade unions have certain rights in terms of section 8 of the LRA – such as the right to determine their own constitutions and rules. This section ensures and protects the autonomy of trade unions.[48] Furthermore, section 95 of the LRA requires trade unions to have constitutions in order to be registered.[49] A union's constitution is a document that regulates the relationship between a trade union and its members; it also contains rules and procedures relevant

40 S 98(1)(*a*) of the LRA.
41 S 98(1)(*b*) of the LRA.
42 S 98(2)(*a*) of the LRA.
43 Ss 98(4) and 99(*b*) and (*c*).
44 S 100(*b*) of the LRA.
45 S 106(2A)(*a*) of the LRA; *UPUSA v Registrar of Labour Relations* (2010) 31 *ILJ* 198 (LC). See also *NEWU v Minister of Labour* (2012) 33 *ILJ* 2585 (LAC).
46 S 106(2A)(*a*) of the LRA.
47 S 106(3) of the LRA.
48 Garbers, Le Roux, Strydom, Basson, Christianson and Germishuys-Burchell (eds) *The New Essential Labour Law Handbook* 7ed (2019) 403.
49 S 95(1)(*b*) of the LRA.

to this relationship. A constitution determines the rights and obligations of a trade union and its members, and its relations with outsiders.[50] The LRA prescribes certain compulsory provisions that must form part of the constitution of every registered trade union.[51] A trade union's constitution must, among other things, state that the trade union is not an association for gain,[52] and must provide information relating to: qualifications for membership;[53] termination of membership and removal of office-bearers;[54] membership fees and other payments by members;[55] the manner in which decisions are to be taken;[56] circumstances under which office-bearers or trade union representatives may be removed from office;[57] and pre-strike ballots.[58] An employee becomes a member of a trade union after satisfying all the membership requirements prescribed by a trade union in its constitution.[59] In *Simunye Waters Forum v Registrar*,[60] the application for registration was refused by the Registrar for two reasons: first, the appellant's constitution did not meet the requirements of section 95(5)(*i*)–(*n*) of the LRA; and secondly, the Registrar did not consider the appellant to be a genuine trade union for purposes of section 95(7) of the LRA. The appellant had been established by non-standard employees from a community advice office called the Casual Workers Advice Office (CWAO). The court found that, although the appellant's structure was unique, it was a genuine trade union that did comply with the requirements prescribed in section 95 of the LRA.

A trade union's constitution should also state the industry, service or sector in which the trade union will operate and have members.[61] In *SACCAWU obo Members of King Edward VII School,*[62] the union (whose constitution authorised it to organise in tea rooms, restaurants, the catering trade, boarding houses, holiday flats and cleaning services) was denied the

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50 Van Jaarsveld and Van Eck *Principles of Labour Law* 229; *BIFSA v Minister of Labour* 1980 (4) SA 810 (W); *SASBO v Standard Bank of SA Ltd* (1994) 15 *ILJ* 332 (IC); *FAWU v Wilmark (Pty) Ltd supra*.

51 S 95 of the LRA. See also *FAWU v Buthelezi* 1998 *ILJ* 829 (LC).

52 S 95(5)(*a*) of the LRA; see also *Vidar Rubber Products (Pty) Ltd v CCMA* (1998) 19 *ILJ* 1275 (LC); *Registrar of Labour Relations v CAESAR* (2015) 36 *ILJ* 182 (LAC). This requirement serves to prevent trade unions from being used as vehicles for enriching individuals or as cover for profit-making businesses. It is therefore important to evaluate the actual financial operation of a trade union. Examples of activities showing that an organisation is for gain are: unrealistically high salaries and allowances to officials, office-bearers or employees of the union; and interest-free or low-interest loans made to officials, office-bearers or employees (see guidelines issued in terms of s 95(8) of the LRA).

53 S 95(5)(*b*) of the LRA.

54 S 95(5)(*d*) of the LRA.

55 S 95(5)(*f*) of the LRA.

56 S 95(5)(*h*) of the LRA.

57 S 95(5)(*m*) of the LRA.

58 Failure to conduct a pre-strike ballot will not affect the legality of the strike (s 67(7) of the LRA).

59 *TGWU v Multi Bus Service CC* 1995 *ILJ* 213 (IC); *Van Wyk & Taylor v Dando & Van Wyk Print (Pty) Ltd* [1997] 7 BLLR 906 (LC).

60 (2023) 44 *ILJ* 2021 (LC).

61 *Agri Operations Ltd v MacGregor NO* (2013) 34 *ILJ* 2847 (LC).

62 (2008) 29 *ILJ* 204 (CCMA).

right to organise among workers performing the services in a model C, public school.[63] In *City of Johannesburg v SAMWU*,[64] SAMWU's branch in Gauteng had split into two groups both claiming to be legitimate. The City approached the Labour Court for an order to determine the lawfully elected office-bearers. The court ruled that neither of the two groups complied with the union's constitution and therefore that all the appointments by the two groups were irregular. Trade union members rely on their unions to meet the provisions of the union's constitution in its dealings, including with regard to conducting ballots when necessary.[65] In *National Union of Metal Workers of South Africa v Lufil Packaging (Isithebe),*[66] the issue was whether a trade union could ignore its own constitution and demand organisational rights from the employer for its members, even though the members did not form part of the scope of the union's constitution, which governs eligibility for membership. The Labour Appeal Court (LAC) held that NUMSA was not entitled to organisational rights within Lufil's workplace, which operated in the paper and packaging industry, because its employees fell outside of NUMSA's registered scope (metal and related industries) and therefore that it was not sufficiently representative. The Constitutional Court (CC) found that when it came to organisational rights, until its constitution was properly amended, NUMSA was bound to the categories of membership set out in its scope and that any admission of members outside that scope was *ultra vires* and invalid.

A trade union is the custodian of its constitution, and it is incumbent on the union to ensure that it complies with its provisions. A trade union member or a person applying for membership may refer a dispute in relation to non-compliance with the union's constitution to the Labour Court.[67] In cases where a trade union concludes a collective agreement contrary to provisions of the law or of its constitution, a dispute may also be referred to the Labour Court.[68]

In South Africa, trade unions may therefore be held liable for non-compliance with their constitutions.

2 3 2 Trade union liability for claims in contract and delict

The constitution of a trade union contains rights and duties that the union and its members owe to each other. Both members and the trade union are expected to comply with these provisions. Failure by a trade union to perform or render services as stated in its constitution or any other agreement may amount to breach of contract. If a contract is breached, the

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63 See also *Democratic Union of Security Workers and Squires Foods t/a Morton's* (2008) 29 *ILJ* 2815 (CCMA), where the principle was confirmed.

64 (2017) 38 *ILJ* 1342 (LC).

65 S 95(5)(*o*) of the LRA.

66 [2020] ZACC 7.

67 S 158(1)(*e*) of the LRA.

68 S 158(1)(*e*) of the LRA; see also *George v Western Cape Education Department* [1996] 2 BLLR 166 (IC) 182–183.

innocent party has at their disposal legal remedies that include the execution of the contract or cancellation of the contract or damages.[69] The Labour Court has jurisdiction to direct the performance of any act that may remedy a wrong and give effect to the primary objects of the LRA.[70] It also has powers to review the performance or purported performance of any function provided for in the LRA, on any grounds permissible in law.[71] In *FAWU v Ngcobo*, the High Court,[72] the Supreme Court of Appeal (SCA),[73] and the Constitutional Court[74] confirmed that members may pursue a contractual claim against a trade union in cases where the member acts to their detriment based on the union's advice. In this case, two sales representatives of Nestle SA had been retrenched. Their union, FAWU, referred a dispute to the CCMA on their behalf. However, FAWU shelved the issue for two years before it referred the matter to an attorney for an opinion. The attorney advised the union that the application would not succeed. When the employees decided to take legal action against the union, FAWU denied they were its members when they were dismissed. The High Court, however, found that they were indeed members of FAWU, and that the union had failed to provide them with legal assistance as required by its constitution. It was found that if the dispute had been referred to the Labour Court, the employees' dismissals would have been proved substantively and procedurally unfair, and they would have been entitled to compensation equal to 12 months' remuneration based on a finding of procedural unfairness. As a result, FAWU was ordered to pay each of them an equivalent of that amount, plus interest. It must, however, be stated that members or officials who conclude contracts on behalf of a trade union may not sue or be sued based on the contract in their individual capacity.[75]

In addition to contractual claims, trade union members may pursue delictual claims against their trade union. A delict is an unlawful culpable act through which a person causes another party damage or injury to personality, and the prejudiced person is granted a right to damages or compensation.[76] In *SAMWU v Jada*,[77] trade union members were dismissed for engaging in an unprotected strike. They then brought a claim against the union because the union failed in its duty of care to ensure that it did not do anything that could cause them to be dismissed. The court, however, stated that there was no clear link between the trade union and the actions that led to the dismissal of its members. It must be noted that a trade union that does not intentionally mislead members into engaging in an unprotected strike is

69 Huyssteen, Lubbe, Reinecke and Du Plessis *Contract General Principles* 6ed (2019) 428.
70 S 158(1)(*a*)(iii) of the LRA.
71 S 158(1)(*g*) of the LRA.
72 *Ngcobo NO v FAWU* (2012) 33 *ILJ* 1337 (KZD).
73 *FAWU v Ngcobo NO* [2013] 7 BLLR 648 (SCA).
74 *FAWU v Ngcobo NO* [2013] 12 BLLR 1171 (CC).
75 Van Jaarsveld and Van Eck *Principles of Labour Law* 228. See also section 97(2) of the LRA.
76 Neethling, Potgieter and Visser *Law of Delict* 6ed (2010) 4.
77 *Supra*.

unlikely to be held liable in delict. Furthermore, if a delict is committed against the trade union, only the trade union can sue for damages.[78]

Despite the above, and considering that a trade union is a collective body, the principle of majoritarianism will generally apply. In *Fakude v Kwikot (Pty) Ltd*,[79] it was held that trade unions are entitled to conclude collective agreements on behalf of their members based on the principle of "majoritarianism", even though such an agreement may be to the detriment of some members. The court upheld a collective agreement that provided for members who engaged in an unprotected strike to receive final written warnings, while others would get severance packages. It was further found in *Theron v FAWU*[80] that, if a trade union takes decisions by majority vote, such decisions are not reviewable on grounds of substantive or procedural unfairness. This view is in line with the above-mentioned majoritarian principle, which is encouraged by the LRA through its various provisions.[81] An exception will, however, be made in cases where a person's constitutional right is unreasonably and unjustifiably limited, as required by section 36 of the Constitution.

It is evident from the above discussion that, in South Africa, members of trade unions may pursue contractual and delictual claims against their trade unions in cases where there is a failure by the union to perform services in accordance with the union's constitution, or where the union fails in its duty of care.

2 3 3 Trade union liability for unfair discrimination claims

The LRA states that the constitution of a trade union may not include a provision that discriminates directly or indirectly against any person on grounds of race or sex.[82] This is in line with the Constitution,[83] and the Employment Equity Act[84] (EEA), which prohibit discrimination on different grounds, including race and sex. Section 6(1) of the EEA, states that "no person" may discriminate against an employee on any of the grounds listed. The prohibition therefore applies to anyone, including trade unions. If a trade union is found to be discriminating against an employee unfairly, it may therefore incur liability.[85] Those who act on behalf of the union may also not discriminate against anyone.[86] However, the Registrar may, it seems, not consider discrimination on any ground other than race and sex when considering a trade union's application for registration.[87]

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78 *AEU v Minister of Labour supra*; *NUFAWSA v PWAWU supra*.
79 [2013] 6 BLLR 580 (LC).
80 [1998] 5 BLLR 528 (LC).
81 Ss 14, 16, 25, 26, 23(1)(*d*)(iii) of the LRA.
82 *NEWU v Ministry of Labour* (2010) 31 *ILJ* 574 (LAC).
83 S 9(4) of the Constitution.
84 55 of 1998.
85 S 10 of the EEA.
86 S 158(1)(*e*) of the LRA.
87 S 95 of the LRA. Grogan *Collective Labour Law* 344–45.

Like any other employer, a trade union may not discriminate against any person in its employment.[88] An employee who alleges discrimination against a trade union may refer a dispute to the CCMA for conciliation. If the dispute is unresolved, it may be referred to the Labour Court for adjudication.[89] Members may also seek a remedy against a trade union for alleged unfair discrimination in terms of the Promotion of Equality and Prohibition of Unfair Discrimination Act[90] (PEPUDA).

Based on the above discussion, a trade union in South Africa may be held liable if it discriminates against any person in the provisions of its constitution or where it discriminates against its employees.

2 3 4 Trade union liability for lack of authority by trade union representatives

Constitutions of trade unions should contain provisions on how disputes within the union are to be resolved.[91] Members are permitted to litigate after internal remedies have been exhausted. Where a trade union representative has acted contrary to the union's constitution, an application may be lodged in terms of section 158(1)(*e*) of the LRA, and where they have acted in bad faith, the aggrieved person may find a remedy in terms of section 158(1)(*a*)(iii) or (*g*) of the LRA. Trade union representatives are to be appointed in terms of the trade union's constitution and their conduct should fall within the scope of the trade union's constitution in order for their activities to bind the trade union.[92] It has been held that it is not an employer's duty to determine whether a trade union representative has authority to act on behalf of the trade union.[93] An employer may therefore rely on estoppel to hold a trade union bound by an agreement where the trade union wants the agreement rendered invalid because its representative exceeded their authority.[94] In terms of the principle of estoppel, if the principal has culpably represented to the third party that the agent had authority to contract on their behalf, and the third party to whom the representation was made acted to their detriment on the strength of that impression, the principal can be prohibited by law from denying the authorisation.[95] In other words, the principal is estopped from denying the authorisation and will be bound to the transaction. An action by a trade union

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88 A trade union may employ officials. S 213 of the LRA provides that an "official" "in relation to a trade union, … means a person employed as the secretary, assistant secretary or organizer of a trade union".

89 S 10 of the EEA; *Theron v FAWU supra*.

90 4 of 2000.

91 S 95(5)(*c*), (*d*), (*e*), (*m*) and (*n*) of the LRA.

92 Du Toit *et al Labour Relations Law* 247. See also *Manyele v Maizecor (Pty) Ltd* [2002] 10 BLLR 972 (LC) par 16; *Mzeku v Volkswagen SA (Pty) Ltd* [2001] 8 BLLR 857 (LAC) par 58.

93 *SASBO v Standard Bank of SA Ltd supra*.

94 *Samancor Ltd v NUMSA* [2000] 8 BLLR 956 (LC); *Coca-Cola Bottling East London v CCMA* [2003] 2 BLLR 159 (LC) par 49.

95 Sonnekus *The Law of Estoppel in South Africa* 3ed (2012) 1; Schulze, Kelbrick, Manamela, Stoop, Manamela, Hurter, Masuku and Stoop *General Principles of Commercial Law* 8ed (2015) 312.

representative that is unauthorised may, however, later be ratified by the trade union concerned.[96] In *Ramolesane v Andrew Mentis*,[97] it was found that authority could be implied if a trade union's action was to the benefit of a majority of the members concerned.

Flowing from the above discussion, trade unions in South Africa may be held liable for their representatives' actions if they acted within the scope of the union's constitution or based on estoppel.

2 3 5 Trade union liability relating to industrial action

(i) Liability under the LRA

Every worker has a right to strike as provided for in terms of the Constitution.[98] This right is regulated and given effect to by the LRA.[99] Just like any other right, the right to strike may be limited in terms of section 36 of the Constitution, as long as the limitation is reasonable and justifiable. The LRA limits the right by: providing a definition of what constitutes a strike;[100] setting procedural requirements that must be complied with for a strike to be protected;[101] and setting limitations/prohibitions in terms of its section 65. For any action to qualify as a strike and be protected under the LRA, it must meet the elements of a strike as provided for in the definition. There must therefore be a refusal to work, by employees, for the purpose of remedying a grievance or resolving a matter of mutual interest between the employer and employees.[102] Furthermore, procedurally, the issue in dispute must have been referred to a bargaining council or the CCMA for conciliation, and 30 days must have passed since the referral, or a certificate of non-resolution must have been issued, and proper notice must have been given for the commencement of a strike.[103] There must also be no prohibition in terms of section 65 of the LRA.

Section 65(2)(*b*) of the 1956 Labour Relations Act[104] contained balloting requirements for strike actions, but these were excluded from the LRA. The section entitled trade unions to call a strike only if the majority of members of

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96 *Merlin Gerin (Pty) Ltd v All Current and Drive Centre (Pty) Ltd* 1994 (1) SA 659 (C); *National Co-operative Dairies v Smith* 1996 (2) SA 719 (N). See also Kahanovitz "The Standing of Unions to Litigate on Behalf of Their Members" (1999) 20 *ILJ* 856 860. If a person purports to act on behalf of another without authority to do so, the principal will not be held liable; however, if the principal ratifies that particular transaction, the principal becomes liable. The effect of ratification by the principal is that it validates the transaction by an unauthorised person *ab initio*.

97 (1991) 12 *ILJ* 329 (LAC) 336J.

98 S 23 of the Constitution.

99 S 64 of the LRA.

100 S 213 of the LRA.

101 S 64(1) of the LRA.

102 Manamela "Matters of Mutual Interest for Purposes of a Strike: *Vanachem Vanadium Products (Pty) Ltd v National Union of Metalworkers of South Africa* [2014] 9 BLLR 923 (LC)" 2015 *Obiter* 794.

103 S 64 of the LRA.

104 28 of 1956.

a trade union in good standing in the area or particular undertaking or industry or trade in which the strike is called voted in favor of such action. Nonetheless, section 95(5) of the LRA provides that a union that applies for registration must adopt a constitution that makes provision for secret balloting before a strike can take place. The Labour Relations Amendment Act[105] provides transitional arrangements for trade unions that do not provide for secret ballots in their constitutions, allowing them to amend their constitutions to comply with section 95 of the LRA.[106] Until a trade union complies with the above, it must conduct a ballot of its members before engaging in a strike.[107] However, in terms of section 67 of the LRA, failure to comply with ballot requirements in relation to strikes will not necessarily give rise or constitute a ground of litigation that will affect the legality of the strike.

Employees have immunity against legal action for initiating or participating in a protected strike.[108] A protected strike may also not be interdicted.[109] Employees may not be dismissed based on their participation in a protected strike, unless the dismissal is based on misconduct or the operational requirements of a business.[110] Otherwise, such a dismissal will be regarded as automatically unfair under the LRA.[111] Employees may, however, be dismissed for acts of misconduct that took place during a protected strike. Inappropriate and unlawful conduct by employees will in fact attract both civil and criminal liability.[112]

Although, the right to strike is granted to individual workers by the Constitution,[113] in terms of the LRA, it can only be exercised collectively, as it must be a concerted action.[114] A number of persons must be involved and must act with a common purpose.[115] As a result, it is mainly a trade union that organises or calls employees to strike. This emanates from the trade union's right to plan and organise its lawful activities.[116] A trade union that initiates a protected strike therefore also has immunity against legal action.[117] However, such a trade union may become liable for damages that occur during a strike.[118] A trade union that organises a strike can also be held liable for losses suffered by the employer during such a strike, provided the requirements of delictual liability are met.[119]

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105 8 of 2018.

106 S 19(1)(*a*) and (*b*) of the Labour Relations Amendment Act 8 of 2018.

107 See also *Mahle BEHR SA (Pty) Ltd v NUMSA; FOSKOR (Pty) Ltd v NUMSA* (2019) 40 *ILJ* 1814 (LC).

108 S 67(2) of the LRA.

109 See also *Coin Security Group (Pty) Ltd v SANUSO* (1998) 19 *ILJ* 43 (C).

110 S 67(5) of the LRA.

111 S 187(1)(*a*) of the LRA. See also *Adams v Coin Security Group (Pty) Ltd* (1999) 20 *ILJ* 1192 (LC).

112 See Du Toit *et al Labour Relations Law* 311.

113 S 23 of the Constitution.

114 S 213 of the LRA.

115 Grogan *Collective Labour Law* 212.

116 Ss 4(2)(*a*) and 8(*b*) of the LRA.

117 S 67(6)(*b*) of the LRA.

118 S 68 of the LRA.

119 *Atlas Organic Fertilizers v Pikkewyn Ghwano* (1981) 2 SA 173 (T) 202G.

It is on record that South Africa has experienced strikes by trade union members that resulted in damage to property and loss of lives. SATAWU members, within the security industry, damaged property and about 50 people lost their lives during a strike.[120] The mineworkers' strike in Marikana resulted in damaged property and many people lost their lives, including miners, and policemen.[121] The Constitution gives everyone the right to assemble, demonstrate, picket and present petitions; however, this must be done peacefully, and participants must be unarmed.[122]

In terms of the LRA, the employer has the right to apply to the Labour Court for an interdict against a trade union and its members for initiating and participating in an unprotected strike.[123] The employer may apply for a mandatory order to direct a trade union to intervene in order to prevent violent actions by its members during a strike.[124] In case of any loss caused by an unprotected strike, the Labour Court may also order the payment of "just and equitable compensation".[125] It has been held in *Mangaung Local Municipality v SAMWU*,[126] that a trade union may be held liable in terms of section 68(1)(*b*) of the LRA to compensate the employer for any loss that is incurred owing to a strike, if the union was aware that its members engaged in an unprotected strike but failed to intervene without a good reason. Employees who participate in an unprotected strike may be dismissed for such conduct as the conduct in itself constitutes an act of misconduct.[127] A trade union must ensure that there is no violence or damage to property or acts of misconduct by its members during a strike.[128] Although not directly provided for by legislation, if a trade union fails in this duty, it may become vicariously liable for the wrongful acts of its members during a strike. In terms of the doctrine of vicarious liability, the master becomes liable for the conduct of his servant. It is a type of strict liability of one person for the delictual act of another.[129] This is one person's liability, without fault, for the delict of another.[130] In *Mondi Ltd v CEPPAWU*,[131] the employer incurred

120 *SATAWU v Garvis* (2012) 33 *ILJ* 1593 (CC).

121 President of the Republic of South Africa "Terms of Reference of the Commission of Inquiry into the Tragic Incidents at or Near the Area Commonly Known as the Marikana Mine in Rustenburg, North-West Province, South Africa" Proclamation 50 (2012) in *GG* 35680 of 2012-09-12.

122 S 17 of the Constitution.

123 S 68(1)(*a*) of the LRA.

124 Manamela and Budeli "Employees' Right to Strike and Violence in South Africa" 2013 46(3) *CILSA* 325.

125 S 68(1)(*b*) of the LRA. See also Cohen, Rycroft and Whitcher *Trade Unions and the Law in South Africa* (2009) 84.

126 [2003] 3 BLLR 268 (LC).

127 S 68(5) of the LRA.

128 Cohen *et al Trade Unions and the Law* 81.

129 Manamela and Budeli 2013 *CILSA* 333.

130 Manamela "Vicarious Liability: Paying for the Sins of Others" *SAMerc LJ* 2004 16(1) 125; Neethling *et al The Law of Delict* 365.

131 (2005) 26 *ILJ* 1458. Also, in *Eskom Ltd v National Union of Mineworkers* (2001) 22 *ILJ* 618 (W*)*, the union was sued for more than R6 million in damages caused by union members who were part of a demonstration organised by the union, and who ran amok and vandalised the premises. Eskom claimed that the union was vicariously liable for the damages.

damages of R673 000 after striking employees switched off the employer's machinery. Subsequently, the employer claimed the amount from the trade union. The court stated that for the union to be held vicariously liable for its members' actions, it must be proved that it acted with common purpose by authorising the employees' behavior. Ultimately, the union could not be held vicariously liable because there was insufficient evidence to identify the employees responsible for switching off the machine. In *In2Food (Pty) Ltd v FAWU,*[132] the court stated that the time had passed for trade unions to wash their hands of responsibility for their members' acts of violence during strikes. The union was fined R500 000 for failing to control its members during the strike.

(ii) Liability under the Regulation of Gatherings Act

Section 11(1) of the Regulation of Gatherings Act,[133] (RGA) provides that if any riot damage occurs as a result of a gathering or demonstration, an organisation or convener responsible for such gathering or demonstration is jointly and severally liable together with any other person who unlawfully caused or contributed to the damage. However, section 11(2) of the RGA states that an organisation or person may defend such a claim by proving that they did not permit the act that caused the damage, that the act did not fall within the scope of the objectives of the gathering or demonstration, and that reasonable steps were taken to prevent the act in question.

Provisions of the RGA came into the picture in *SATAWU v Garvis*,[134] where there was a protest organised by SATAWU. The protest resulted in damage to property and death of some people. The respondents claimed damages from SATAWU in the High Court in terms of section 11 of the RGA. Denying liability, SATAWU challenged the constitutionality of section 11(2)(*b*) of the RGA, arguing that it was inconsistent with the constitutional right to assemble, demonstrate and picket. After the court found against SATAWU, the union appealed to the SCA, where the appeal was dismissed. The union appealed further to the Constitutional Court, which held that section 11 of the RGA was rational and that the constitutional right to assemble and demonstrate is constitutionally protected and guaranteed as long as it is exercised peacefully. The Constitutional Court found that because the decision to assemble resides with the organisation, it should be responsible for any reasonably foreseeable damage arising from such assembly because the purpose of section 11(2) of the RGA is to protect the safety and property of the public from foreseeable damage. The appeal was therefore dismissed.

From the above discussion, it is evident that trade unions in South Africa may be held liable in situations where damage occurs as a result of a strike organised by the trade union.

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132 (2013) 34 *ILJ* 2589 (LC).
133 205 of 1993.
134 *Supra*.

3 THE LEGAL STATUS OF TRADE UNIONS AND POSSIBLE GROUNDS FOR LIABILITY IN THE UNITED KINGDOM

3 1 The legal status of trade unions under the Trade Union and Labour Relations (Consolidation) Act, 1992 (TULRCA)

In the UK, trade unions are regulated under the TULRCA. The TULRCA defines a trade union as:

> an organisation–
>
> (a) Which consists wholly or mainly of workers of one or more descriptions and whose principal purposes include the regulation of relations between workers of that description or those descriptions and employers or employers' associations; or
>
> (b) Which consists wholly or mainly of–
>
> (i) Constituent or affiliated organisations which fulfil the conditions in paragraph (a) (or themselves consist wholly or mainly of constituent or affiliated organisations which fulfil those conditions), or
>
> (ii) Representatives of such constituent or affiliated organisations, and whose principal purposes include the regulation of relations between workers and employers or between workers and employers' associations, or the regulation of relations between its constituent or affiliated organisations.[135]

It is important to note from the above definition that the purpose of a trade union in the UK is more or less the same as the one for trade unions in South Africa, except that it refers to workers[136] instead of employees and that it relates mainly to the regulation of relations between workers and employers.[137] On registration (listing) by the Certification Officer, a trade union in the UK is also issued with a certificate.[138] However, if the Certification Officer is of the view that an organisation whose name has been entered in the list of trade unions is in fact not a trade union, they may remove its name from the list.[139] One of the advantages of listing is that a trade union can apply for a certificate of independence. Members of a trade union with such a certificate are entitled not to suffer a detriment or be dismissed on the grounds of trade union membership.[140] In *Squibb UK Staff*

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135 S 1 of the TULRCA.

136 In terms of s 295(1) of the TULRCA, "employee" means "an individual who has entered into or works under (or, where the employment has ceased, worked under) a contract of employment", whereas in terms of s 296(1) of the TULRCA, "worker" means "an individual who works, or normally works or seeks to work – (a) under a contract of employment, or (b) under any other contract whereby he undertakes to do or perform personally any work or services for another party to the contract who is not a professional client of his, or (c) in employment under or for the purposes of a government department".

137 Manamela *The Social Responsibility of South African Trade Unions* (2015) 146.

138 S 2(5) of the TULRCA.

139 S 4(1) of the TULRCA.

140 See s 146(1) of the TULRCA.

Association v Certification Officer,[141] a certificate of independence was denied based on fears of vulnerability to employer interference.[142] The Certification Officer may also withdraw the certificate of independence if they are of the view that the union is no longer independent.[143]

Unlike in South Africa, a trade union in the UK is not really regarded as a body corporate. However, it can conclude contracts, and sue and be sued in its own name – whether in proceedings relating to property or based on contract or tort or any other cause of action, or for an offence alleged to have been committed by the union or on its behalf.[144] A trade union can only be treated as a body corporate to the extent authorised by provisions of the TULRCA.[145] Trade unions may not be registered under the Companies Act of 1985 or under the Friendly Societies Act of 1974 or the Industrial and Provident Societies Act of 1965.[146] In the UK, trade unions held a quasi-legal personality between 1901 and 1971, but this was removed by section 10 of the TULRCA. In *Electrical, Electronic Telecommunications and Plumbing Union v Times Newspapers,*[147] it was stated that a trade union does not have legal personality, and therefore could not sue for libel in respect of its reputation based on the provisions of section 10 of the TULRCA.

The property of a trade union is vested with trustees in a trust. However, a judgment or order brought against a trade union is enforceable by way of execution against property held in trust to the same extent and in the same manner as if the trade union were a body corporate.[148] Notably, it is unlawful for the property of a trade union to be used towards the payment of an individual's penalty imposed for an offence or for securing such payment.[149]

Although in the UK a trade union is not regarded as a body corporate, as it is in South Africa, it can conclude contracts, and can sue and be sued in its own name.

3 2 Trade union duties under the TULRCA and consequences of non-compliance

Similar to trade unions in South Africa, a UK trade union is required to keep proper accounting records regarding its transactions, assets and liabilities. It must also establish and maintain a satisfactory system of control of its accounting records, cash holdings and all receipts and remittances.[150] These

[141] [1978] *Industrial Cases Reports* (ICR) 115.

[142] See also *Government Communications Staff Federation v Certification Officer* [1993] ICR 163.

[143] An independent trade union is "a trade union which is not under the domination or control of an employer or group of employers or of one or more employers' associations and is not liable to interference by an employer or any such group or association".

[144] S 10(1) of the TULRCA.

[145] S 10(2) of the TULRCA.

[146] S 10(3) of the TULRCA.

[147] [1980] *All England Reports* (All ER) 1097.

[148] S 12(2) of the TULRCA.

[149] S 15 of the TULRCA.

[150] S 28 of the TULRCA.

must reflect a true and fair view of the state of the affairs of the union.[151] A trade union must also provide the Certification Officer with a return relating to its affairs. This must among other matters contain revenue accounts showing the income and expenditure of the trade union for the reporting period, and a balance sheet providing a true reflection of the affairs of the trade union. There must also be a copy of a report made by the auditor of the trade union on those accounts.[152]

If a trade union fails to perform the above duties, it commits an offence. Such offence is deemed also to have been committed by every officer of the trade union who is bound by the rules of the union to discharge on its behalf the duty, breach of which constitutes an offence, or if there is no such officer, every member of the general committee of management of the union.[153]

3 3 Circumstances under which a trade union may incur liability in the UK

3 3 1 Trade union liability for non-compliance with its constitution

An application for the registration of a trade union should among other things be accompanied by the organisation's rules (constitution).[154] In *Frost v Clarke & Smith Manufacturing Co Limited*,[155] it was held that a body of workers that claims to be a trade union in order to claim sole bargaining rights under the Industrial Relations Act of 1971 was not an organisation since it had no name, no constitution, and no rules, held no meetings and kept no minutes. The constitution constitutes a contract between the union and its members and it is important that both parties should adhere to it.[156] Membership of a trade union entitles members to certain rights contained in its constitution and they can claim damages if the union does not fulfill its role.[157] For example, a trade union that fails to provide legal advice as promised in its rules may be sued for loss incurred from such a breach.[158] It was stated in *Friend v Institution of Professional Managers and Specialists*[159] that the union can execute its duty to use ordinary care and skill by lodging a possible claim through a firm of solicitors.[160]

In terms of section 109 of the TULRCA, a trade union member who claims that there has been a breach of other rules of the union may apply to the Certification Officer for a declaration. Those rules include the appointment or

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151 S 28(2) of the TULRCA.
152 S 33 of the TULRCA.
153 S 45(2) of the TULRCA.
154 S 3(2) of the TULRCA.
155 [1973] Industrial Relations Law Reports (IRLR) 216.
156 Selwyn *Selwyn's Law of Employment* 15ed (2008) 558.
157 Selwyn *Selwyn's Law of Employment* 560.
158 *Ibid*.
159 [1999] IRLR 173.
160 Selwyn *Selwyn's Law of Employment* 560.

election of a person to, or the removal of a person from, any office, and the balloting of members on any issue other than industrial action.

As in South Africa, a UK trade union may be held liable for failure to comply with its constitution.

3 3 2 Trade union liability for claims in contract and delict

Section 20 of the TULRCA concerns proceedings that are brought against a trade union based on an act that induces a person to break a contract, or that interferes or induces another person to interfere with its performance, or that threatens that a contract will be broken. In order to determine whether the union is liable in respect of the act, that act is taken to have been done by the union, on condition it has been authorised or endorsed by that trade union.[161] This is the case if, for example, the act was by any person empowered by the rules of the union to do, authorise or endorse acts like the one in question, or by the principal executive committee or the president or general secretary or any other committee or official[162] of the union. It was however, held in *Buckley v National Union of General and Municipal Workers*,[163] that no breach of contract arises where a member cannot show that their case had judicious prospects of success. The TULRCA specifically states the amounts that may be awarded against the union by way of damages during proceedings in tort.[164] Each employee who has suffered damage may sue the union for a maximum sum depending on the size of the union. Interest may also be added to the award.[165]

If a trade union fails to apply for a protective award in appropriate circumstances or negligently delays the presentation of a claim to a tribunal such that it becomes out of time, the aggrieved member will have a right of action against the union for damages.[166] Section 14 of the Trade Union and Labour Relations Act 1974 (TULRA) granted total legal immunity to trade unions in respect of various actions in tort. The immunity was, however, repealed by the Employment Act 1982, which provides for a remedy against the striking employees' trade union in tort.[167] A trade union is liable in tort if the protection of section 219 of the TULRCA is not available to it.[168] A union

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161 S 20(1) of the TULRCA.

162 In terms of s 119 of the TULRCA, an official is "an officer of the union or of a branch or section of the union or a person elected or appointed in accordance with the rules of the union to be a representative of its members or of some of them and includes a person so elected or appointed who is an employee of the same employer as the members. An officer includes any member of the governing body of the union and any trustee of any fund applicable for the purposes of the union".

163 [1967] 3 All ER 767.

164 S 22 of the TULRCA. The Liability of Trade Unions in Proceedings in Tort (Increase of limits on damages) Order 2022 increased the limits on the amounts that may be awarded against a trade union.

165 *Boxfoldia Ltd v National Graphical Association* [1988] IRLR 383.

166 Selwyn *Selwyn's Law of Employment* 560.

167 S 15 of the Employment Act of 1982.

168 This section offers protection from certain tort liabilities.

that imposes upon its members a levy that is *ultra vires* can be restrained from doing so through an injunction.[169]

The above discussion has demonstrated that, similar to South Africa, trade unions in the UK may be held liable for their members' contractual and delictual claims.

3 3 3 Trade union liability for unfair discrimination claims

The European Court of Human Rights held in *ASLEF v United Kingdom*[170] that, just as a worker is free to join or not join a union, a trade union is also free to choose its members. In terms of section 174 of the TULRCA, a trade union may prescribe requirements for membership, but these may not be exercised in an arbitrary and unreasonable manner.[171] In terms of section 12 of the Sex Discrimination Act of 1975, a trade union cannot discriminate against a woman in relation to membership or discriminate against her in the way it affords her access to any benefits, facilities or other services.[172] There can also be no discrimination on the basis of race in terms of section 12 of the Race Relations Act, 1976.

As in South Africa, trade unions in the UK may therefore not unfairly discriminate against employees based on sex and race.

3 3 4 Trade union liability for lack of authority by trade union representatives claims

In the UK, trade union officials are expected to act within the ambit of the union rules. In *Weakley v Amalgamated Union of Engineering Workers*,[173] the president of the union exercised a casting vote on a motion based on the fact that the committee was divided. An injunction was granted restraining the union from acting on the motion because the president was not allowed to exercise a casting vote. If a shop steward has authority to act on behalf of the union, the union may be responsible for their actions, unless it has a defence.[174] The union will, for example, not be held liable if the act was repudiated by the principal executive committee or president or general secretary as soon as reasonably practicable.[175]

In *White v Kuzych*,[176] it was stated that a trade union member who seeks a determination or conciliation of a dispute under the union rules should first pursue their case through the union's internal disputes procedure before seeking recourse to the courts. Nevertheless, the union member has a right

169 *Hopkins v National Union of Seamen* [1985] ICR 268.
170 [2007] ECHR 184.
171 *Nagle v Feilden* [1966] 2 Law Reports, Queen's Bench Division (QB) 633.
172 Selwyn *Selwyn's Law of Employment* 557.
173 (1975) 125 *New Law Journal* (NLJ) 621.
174 *Heaton's Transport (St Helens) Ltd v Transport and General Workers' Union* [1997] AC 15.
175 S 21 of the TULRCA.
176 [1951] AC 585.

to apply to court any time after six months from the date when the union first received their application regarding the matter.

In *Heaton's Transport (St Helens) Ltd v Transport and General Workers Union,*[177] the trade union argued that it was not liable for its shop stewards' actions – neither the unfair industrial practices for which it was found liable nor for being in contempt of restraining orders made. It was found that in accordance with the rules and practice of the trade union, shop stewards had implied authority to act in the interests of members they represented, to defend and improve their rates of pay and working conditions, which could be done by negotiation or by industrial action at the relevant workplace. However, they were not authorised to do any act outside of the trade union rules or policy. In this case, Lord Wilberforce stated as follows:

> "To be effective in law a withdrawal or curtailment of any existing actual authority of an agent must be communicated by the principal to the agent in terms which the agent would necessarily understand forbidding him to do that which he had previously been authorized to do on the principal's behalf."[178]

As in South Africa, trade unions in the UK may be held liable for authorised acts of officials and shop stewards.

3 4 Trade union liability relating to industrial action

Whereas employees in South Africa have the right to strike, in the UK they do not have a positive right to organise or take part in industrial action; instead, they have a freedom to strike.[179] Industrial action is defined under the TULRCA as "a strike or other industrial action by persons employed under contracts of employment".[180] The freedom to strike is obtained on condition that the act is done in contemplation or furtherance of a trade dispute.[181] In terms of the TULRCA, a "trade dispute" must relate to terms and conditions of employment or the physical conditions under which workers are required to work; engagement or non-engagement, or termination or suspension of employment or duties of employment; allocation of work; and matters of discipline.[182]

If a union calls for industrial action in violation of balloting provisions of the TULRCA, or for a reason not allowed by the TULRCA, it can be sued and will not have immunity in terms of section 219. A trade union member who claims that members are likely to have been induced by the union to take part or to continue to take part in industrial action that is not supported by a ballot may apply to court for an order.[183] The court has power to grant an

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177 *Supra.*

178 *Supra* 68.

179 Morris and Archer *Trade Unions, Employers and the Law* 2ed (1993) 207; Manamela *The Social Responsibility of South African Trade Unions* 162.

180 S 62(6) of the TULRCA.

181 Perrins *Trade Union Law* (1985) 293.

182 Ss 218 and 244 of the TULRCA.

183 S 62(1) of the TULRCA.

injunction[184] or interdict, and may require the union to take steps as the court considers appropriate for ensuring that there is no further inducement of persons to take part or to continue to take part in the industrial action. An award of £130 000 was awarded in *Willerby Holiday Homes Ltd v Union of Construction, Allied Trades and Technicians*,[185] where the union called a strike notwithstanding that the pre-ballot notice did not comply with sections 22, 227(1) and 234 of the TULRCA. It must be noted that South Africa does not have a similar provision.

It was confirmed in *Simmons v Hoover Ltd*[186] that if notice of strike action is not given, the strike is treated as a breach of contract by the courts. In the UK, there are two torts: the tort of interference with a contract, trade or business as stated in *Lumley v Gye*;[187] and the tort of causing loss by unlawful means.[188] The first is a tort of secondary or accessory liability, where a third party is the wrongdoer who was persuaded or induced to breach their contract with the claimant and the defendant incurs accessory liability as having induced the breach. The latter tort is a tort of primary liability informed by the defendant's unlawful act.[189]

In the UK, section 20 of the TULRCA provides for vicarious liability of a trade union for its officials, but this only applies to liability for torts, including breach of contract, intimidation and conspiracy. The union will be liable if the act was authorised from the beginning or was endorsed at a later stage by, among others, the principal executive committee acting within set rules, or any other person empowered by the rules to authorise such acts.

Where a trade union official calls employees to strike, it is the employee who is breaking the contract but, as previously stated, the union could be held liable for inducing a breach of contract. Also, where a union calls a secondary boycott, it is regarded as inducing a breach of a commercial contract.[190] An action by a trade union to induce a person to take part in industrial action is prevented from being actionable in tort by section 219 of the TULRCA, unless the union takes such steps as are reasonably necessary to ensure that the employer receives relevant notice of the industrial action within the appropriate period. Employees who are dismissed for participation in an unofficial industrial action will have no claim of unfair dismissal.[191]

As in South Africa, there are circumstances in the UK under which a trade union may be held liable in relation to industrial action by its members.

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184 *Solihull Metropolitan Borough Council v National Union of Teachers* [1985] IRLR 211.

185 [2003] *England and Wales High Court* (EWHC) 2608 (QB).

186 [1977] ICR 61 76.

187 [1853] 2 E & B 216.

188 Bowers, Duggan, Reade and Apps *The Law of Industrial Action and Trade Union Recognition* 3ed (2019) 18–19.

189 *OBG Limited v Allan* [2008] 1 AC 1.

190 Selwyn *Selwyn's Law of Employment* 577.

191 S 223 of the TULRCA.

4 EVALUATION AND CONCLUSION

Internationally, trade unions are recognised as important collective bargaining agents and representatives of employees' interests. Whereas in South Africa a trade union is considered a body corporate, in the UK it is not, and it does not have legal personality.[192] Nonetheless, in both countries, trade unions have rights and duties in the same way that any legal person does. They can enter into contracts, and they can sue or be sued in their own names.[193] Generally, trade unions have legal or statutory duties to meet; should they fail to meet these, they may face certain consequences, such as deregistration.[194] Furthermore, in the UK, failure by a trade union to perform those duties amounts to an offence. Such offence is also deemed to have been committed by every officer of the trade union who is bound by the rules of the union to discharge on its behalf the duty, breach of which constitutes an offence, or if there is no such officer, every member of the general committee of management of the union.[195] It is evident from the discussion that, in both countries, the constitutions of trade unions are important for trade unions' proper functioning, and therefore that trade unions may be held liable for breaching their provisions.[196] Moreover, in both countries, trade unions may be held liable under the law of contract or the law of delict,[197] unless in instances where a trade union has immunity – for example, under section 219 of the TULRCA in the UK. Unlike in South Africa, under the TULRCA, amounts for which employees or trade union members may sue a trade union for suffered damage are specified.[198]

In both countries, although a trade union acts through natural persons, it is distinct from them, and generally its representatives cannot be held liable for authorised acts or for acting within the prescribed limits of the union's constitution.[199] Notwithstanding that trade unions in both countries have the right to prescribe who may become a member,[200] unfair discrimination based on sex and race is prohibited.[201] In both countries, trade unions are also expected to act conscientiously with regard to industrial action as they may be held liable in certain instances. In both countries, there is a provision for pre-strike balloting, but in the UK, if a pre-strike ballot is required before industrial action, trade unions must ensure that such ballot is conducted in order to avoid being sued. An order may also be issued by the court against such action.[202] By contrast, in South Africa, failure to comply with ballot requirements in relation to strikes will not necessarily give rise to or

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192 In *Electrical, Electronic Telecommunications and Plumbing Union v Times Newspapers supra*.

193 *NEWU v Sithole supra*; s 10(1) of the TULRCA.

194 S 106(2A) of the LRA.

195 S 45(2) of the TULRCA.

196 S 158(1)(*e*) of the LRA; Selwyn *Selwyn's Law of Employment* 560.

197 *FAWU v Ngcobo supra*; *SAMWU v Jada supra*.

198 S 22 of the TULRCA.

199 *Weakley v Amalgamated Union of Engineering Workers supra*.

200 *ASLEF v United Kingdom supra*.

201 S 6(1) of the EEA.

202 *Willerby Holiday Homes Ltd v Union of Construction, Allied Trades and Technicians supra*.

constitute a ground to contest the legality of the strike.[203] Trade unions are also expected to ensure that their members conduct themselves well during industrial action.[204] In the UK, if a trade union official calls employees to strike, even though it is an employee who breaches his or her contract of employment, a trade union could be held liable for inducing such a breach.[205] Before claiming damages against a trade union, members must, however (where internal procedures are prescribed), exhaust them first, before approaching courts.[206]

The discussion has demonstrated that although trade unions are free to determine their constitutions and rules, and to plan and organise their administration and lawful activities,[207] as organisations they must act appropriately because they might be held liable on a variety of grounds. Trade unions must ensure that they or their representatives comply with their statutory duties and provisions of their constitutions in order to avoid likely claims in contract and delict. They should also ensure that their representatives act with authority, avoid claims of unfair discrimination, and become responsible and accountable when it comes to industrial action.

South Africa can learn from the UK position, where the TULRCA requires more accountability from trade unions and their representatives. In order to increase accountability for trade unions in South Africa, the LRA should (like the TULRCA) provide for specific offences for which a trade union could be found liable, and also possible fines that could be issued against trade unions in cases of non-compliance.[208] This would encourage trade unions and their representatives to act appropriately and responsibly in their functioning. It would furthermore promote the observance of the law and better governance in trade unions. It is submitted that this would not limit, or not unduly limit, their rights to determine their constitutions and rules, and to plan and organise their administration and lawful activities as provided for in terms of the Constitution[209] and the LRA.[210] Nevertheless, whatever form of limitation which may arise owing to the above should be reasonable and justifiable as required by the Constitution.[211]

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203 S 67(7) of the LRA.

204 S 68 of the LRA; *Mangaung Local Municipality v SAMWU supra*.

205 Selwyn *Selwyn's Law of Employment* 577.

206 Du Toit *et al Labour Relations Law* 236; *White v Kuzych supra*.

207 S 8(*a*) of the LRA.

208 S 22 of the TULRCA. The Liability of Trade Unions in Proceedings in Tort (Increase of limits on damages) Order 2022 increased the limits on the amounts that may be awarded against a trade union.

209 S 23(4) of the Constitution.

210 S 8(*a*) of the LRA.

211 S 36(1) of the Constitution.

IMAGE-BASED SEXUAL ABUSE AND THE REQUIREMENT OF MOTIVE UNDER THE FILMS AND PUBLICATIONS AMENDMENT ACT: A CRITICAL ASSESSMENT*

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SUMMARY

Section 18F(1) of the Films and Publications Amendment Act (FAPAA) prohibits the commission of image-based sexual abuse (IBSA). This contribution critically assesses the requirement "with the intention of causing that individual harm" contained in section 18F(1)(*b*) of the FAPAA. It is demonstrated that the requirement "with the intention of causing that individual harm" cannot be understood as indicating intention in the legal sense (that is, *dolus*). Rather, section 18F(1)(*b*) refers to motive, or the reason for the perpetrator's conduct. Section 18F(1)(*b*) should thus more accurately read (to avoid confusion with *dolus*) "with the 'motive' of causing that individual harm". In the determination of criminal liability, motive has been repeatedly affirmed as irrelevant. The author supports this conclusion. In addition, the underlying reasons motivating the perpetration of IBSA vary substantially. Thus, requiring proof of motive in this respect is ill considered.

However, motive is relevant to the process of sentencing. Some motives for the perpetration of IBSA may be considered by the sentencing court as "aggravating", and, accordingly, attract a harsher sentence. Section 56A(2)(*a*) of the Criminal Law (Sexual Offences and Related Matters) Amendment Act indicates several motives (for the commission of sexual offences) that might be considered "aggravating". These include where a sexual offence is committed with the motive "to gain financially, or receive any favour, benefit, reward, compensation or any other advantage". Many of these motives are witnessable in cases of IBSA, and being a sexual offence that should be located in the Criminal Law (Sexual Offences and Related Matters) Amendment Act, should (in terms of section 56A(2)(*a*)) be considered "aggravating". It is also shown that other aggravating motives listed in 56A(2)(*a*), such as to receive any "benefit" or "reward", may apply when IBSA is committed for purposes of revenge.

* This article has been adapted from the author's PhD thesis – Supervisor: Associate Professor Emile Zitzke.

1 INTRODUCTION

"Revenge porn", more comprehensively defined as image-based sexual abuse,[1] is quickly becoming a global menace.[2] In response to the threat of image-based sexual abuse (IBSA), many jurisdictions have recently enacted laws[3] criminalising the "non-consensual creation and/or distribution of private sexual images".[4] Fortunately, the South African legislature has timeously responded to this threat with the promulgation of two new laws: section 16 of the Cybercrimes Act[5] and section 18F of the Films and Publications Amendment Act (FAPAA).[6] While the inefficiency of having two pieces of legislation responding to the same issue is acknowledged, this contribution is focused on assessing the requirement of motive in section 18F(1)(*b*) of the FAPAA.[7] The author begins by analysing the requirement in section 18F(1)(*b*) of the FAPAA "with the intention of causing that individual harm" and asks whether the use of the word "intention" can be understood to denote intention in the legal sense (that is, *dolus*). Next is a discussion of the irrelevance of motive as it pertains to the establishment of criminal liability, both internationally and in the South African context. Lastly, the article considers the value of motive (outside of the establishment of criminal liability) as it pertains to sentencing. The author asks whether the varying motivations for the commission of IBSA could be considered "aggravating" for the purposes of sentencing.

2 A CRITIQUE OF THE REQUIREMENT "WITH THE INTENTION OF CAUSING THAT INDIVIDUAL HARM" IN SECTION 18F(1)(*b*) OF THE FAPAA

Mens rea, or fault, is a requirement for all crimes and must be established in the form of either intention or negligence.[8] Intention, or *dolus*, is defined by Snyman as the "will to commit the act … set out in the definitional elements of the crime, in the knowledge of the circumstances rendering such act … unlawful".[9] There are three principal types of *dolus*:[10] *Dolus directus*; *dolus*

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1 McGlynn and Rackley "Image-Based Sexual Abuse" 2017 37(3) *Oxford Journal of Legal Studies* 1 2–5.

2 Henry, McGlynn, Flynn, Johnson, Powell and Scott *Image-Based Sexual Abuse: A Study on the Causes and Consequences of Non-Consensual Nude or Sexual Imagery* (2021) 1–2; Souza "'FOR HIS EYES ONLY': Why Federal Legislation Is Needed to Combat Revenge Porn" 2016 23(2) *UCLA Journal of Gender and Law* 101 103–105.

3 Henry *et al Image-Based Sexual Abuse* 135; Phippen and Brennan *Sexting and Revenge Pornography: Legislative and Social Dimensions of a Modern Digital Phenomenon* (2021) 20–21, 85.

4 McGlynn and Rackley 2017 *Oxford Journal of Legal Studies* 3.

5 The Cybercrimes Act 19 of 2020 came into operation on 1 December 2021.

6 The Films and Publications Amendment Act 11 of 2019 (FAPAA) came into operation on 1 March 2022. Also see Papadopoulos and Snail *Cyberlaw@ZA* (2022) 423.

7 Martin "Mixing Old and New Wisdom for the Protection of Image-Based Sexual Abuse Victims" 2022 35(3*) South African Journal of Criminal Justice* 307 312.

8 See Burchell *Principles of Criminal Law* 5ed (2016) 341.

9 Snyman *Criminal Law* 7ed (2020) 159.

10 Burchell *Principles of Criminal Law* 349.

indirectus; and *dolus eventualis* — the last of which is the least arduous type of *dolus* to establish.[11] Deliberately bringing about or willing a particular outcome (required for proof of *dolus directus*) comes closest to the ordinary meaning of "actual intention" but is more difficult to prove.[12] The adoption and recognition of the concept of *dolus eventualis* into South African law[13] entails that not only deliberate conduct but also subjectively foreseen conduct be sufficient to satisfy the requirement of fault in the form of *dolus*.[14] Intention, in the form of *dolus eventualis*, is defined by Burchell as follows:

> "*Dolus eventualis* exists where the accused foresees the possibility that the unlawful consequence might occur … or the unlawful circumstance might exist and he or she accepts this possibility into the bargain (i.e., is reckless as regards to this possibility)."[15]

Since its inception into South African law, the concept of *dolus eventualis* has met with significant approval,[16] finally emerging as the "most important form of intention in practice in South African criminal law".[17] Thus, this contribution focuses solely on *dolus eventualis* for proof of fault in the form of *dolus*.

Motive is different from intention.[18] Motive is the *reason* that a perpetrator deliberately brings about a certain outcome.[19] For example, by reason of hoping to inherit money from his father's estate, X deliberately or wilfully kills his father. This example illustrates the difference between the concepts of motive and *dolus*. "Hoping to inherit money" is the motivation or motive for the killing of X's father. The act of deliberately or wilfully bringing about his father's death is *dolus*. Though distinct, the concepts of motive and *dolus* are confused in some legal responses to IBSA.

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11 *Dolus directus* necessarily entails more than proof of subjective foresight of the unlawful result ensuing, since the perpetrator must purposefully direct their will to the causing of the unlawful consequence. This level of deliberateness does not need to be established for *dolus eventualis.* Proof of *dolus eventualis* only requires foresight of a possibility – a possibility that does not, arguably, need to be qualified by degree. See Hoctor "The Degree of Foresight in Dolus Eventualis" 2013 26(2) *South African Journal of Criminal Justice* 131 and Snyman *Criminal Law* 162–164. For similar reasons, *dolus indirectus* is more difficult to prove, since *dolus indirectus* requires that the unlawful consequence be foreseen as "virtually" or "substantially" certain. See Burchell *Principles of Criminal Law* 350.

12 Burchell *Principles of Criminal Law* 356.

13 See Hoctor "The Concept of Dolus Eventualis in South African Law: An Historical Perspective" 2008 14(2) *Fundamina* 14 for a detailed unfolding of the acceptance of the concept of *dolus eventualis* into South African law.

14 Burchell *Principles of Criminal Law* 348 355–356. *Dolus eventualis* has met with significant approval since 1945.

15 Burchell *Principles of Criminal Law* 357. Also see *S v Sigwahla* 1967 (4) SA 566 (A).

16 See Burchell *Principles of Criminal Law* 356, where Burchell notes the Constitutional Court judgments of *Coetzee* 1997 (3) SA 527 (CC) par 162 and *Thebus* 2003 (6) SA 505 (CC) par 50.

17 See Hoctor 2008 *Fundamina* 14. Also see Hoctor 2013 *South African Journal of Criminal Justice* 131.

18 Cook "Act Intention and Motive in the Criminal Law" 1916–1917 26(8) *Yale Law Journal* 645 658–659.

19 Chiu "The Challenge of Motive in the Criminal Law" 2005 8(2*) Buffalo Criminal Law Review* 653 664. Also see Burchell *Principles of Criminal Law* 353.

Some legislative responses to IBSA require, as a basis for liability, that the offence be committed intentionally.[20] Less commonly, legislative responses also require that a perpetrator must have intended to cause a victim harm in order for liability to ensue.[21] This is the case with the FAPAA, which requires that the prohibited conduct of section 18F(1) be committed "with the intention of causing that individual harm".[22] Contributing to the uncertainty of what should be accepted in South African law, the Cybercrimes Act contains no such requirement.[23] Section 18F(1) of the FAPAA reads:

> "No person may expose, through any medium, including the internet and social media, a private sexual photograph or film if the disclosure is made–
> (*a*) without the consent of the individual or individuals who appear in the photograph or film; *and*
> (*b*) *with the intention of causing that individual harm*."[24]

In respect of section 18F(1), an offence is committed not when or if the victim is harmed but at the precise moment when the "private sexual photograph or film"[25] is exposed with the intention (on behalf of the perpetrator) to cause harm. "With the intention to harm"[26] is describing the motivation for the crime – to cause harm. This is the reason for the perpetrator's conduct or motive[27] and, as is argued, cannot be taken to constitute intention in the legal sense – that is *dolus*.

If the present use of the word "intention" in section 18F(1)(*b*) is made to denote *dolus*, it would produce illogical results. For example, the first leg of *dolus eventualis* (foresight of a possibility)[28] would amount to foresight of the possibility of the motivation of harm, not foresight of the possibility of an unlawful circumstance or result, (since section 18F(1)(*b*) does not require that the victim actually be harmed). In terms of the second leg of *dolus eventualis* (the volitional component), the perpetrator would need to proceed recklessly, or take into the bargain[29] the foreseen motivation of the crime (to cause the individual harm), and not the unlawful circumstance or result. In

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20 For e.g., The State of California, Senate Bill No. 1255, ch 863 s 647(4)(*a*) requires that revenge porn be committed intentionally. In New South Wales, s 91Q(1) of the Crimes Act 1900 No 40 requires that "a person … intentionally distributes an intimate image of another person".

21 In England and Wales, s 33(1) of the Criminal Justice and Courts Act 2015 makes it "an offence for a person to disclose a private sexual photograph or film if the disclosure is made" (at (b)) "with the intention of causing that individual distress". In Malta, s 208E of the Maltese Criminal Code prohibits the disclosure of a "private sexual photograph or film" that is done "with an intent to cause distress, emotional harm or harm of any nature".

22 S 18F(1)(*b*) of the FAPAA.

23 S 16(1) of the Cybercrimes Act reads: Any person ("A") who unlawfully and intentionally discloses, by means of an electronic communications service, a data message of an intimate image of a person ("B"), without the consent of B, is guilty of an offence.

24 Italicised for emphasis.

25 S 18F(1) of the FAPAA.

26 S 18F(1)(*b*) of the FAPAA.

27 "Motive", as defined in the Mirriam-Webster online dictionary, is "something (such as a need or desire) that causes a person to act".

28 Snyman *Criminal Law* 162–164 and *S v Sigwahla supra* 435.

29 Snyman *Criminal Law* 164–167. Also see *S v Humphreys* 2013 (2) SA 1 (SCA) 17.

light of this illogicality, section 18F(1)(*b*) clearly signals motive. Motive is sometimes conflated with *dolus*.[30] Burchell explains, "motive is thus the explanation for a person's conduct" and "is something separate and distinct from intention".[31] Being something separate and distinct from intention, the reading of section 18F(1)(*b*) should more accurately read (in an effort to avoid confusion with *dolus*) "no person may expose, through any medium, including the internet and social media, a private sexual photograph or film if the disclosure is made with the motive to cause the person harm".[32] Thus, for clarity, when referring to the requirements of section 18F(1)(*b*), the word "motive" will be used as the correct substitute for the word "intention" – thus, "with the 'motive' of causing that individual harm".

In the determination of criminal liability, proof of motive has been determined to be irrelevant.[33] This is the general rule. There are, however, exceptions.[34] In American law, certain offences require proof of motive – witnessable in the framing of some hate crimes.[35] South Africa is on track to follow similarly with the proposed Prevention and Combatting of Hate Crimes and Hate Speech Act.[36] Some commentators propound that motive is necessary as a requirement for liability for the proof of certain crimes (such as hate crimes).[37] Other commentators argue that the requirement of motive for these crimes should be removed in order to alleviate the prosecutorial burden of having to prove motive, which is acknowledged as a difficult undertaking.[38] Crimes that require motive are an exception to the general rule[39] – which is that motive is irrelevant to the determination of criminal liability.

Criminal-law writers in South Africa have asserted their position on whether motive should constitute a requirement for criminal liability. Snyman writes that in the determination of intention, "the motive behind the act is immaterial".[40] Burchell, despite indicating the relevance of motive to the unlawfulness of conduct, asserts that "a person's motives, whether good or

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30 Snyman *Criminal Law* 169.

31 Burchell *Principles of Criminal Law* 353. Also see Rosenberg "The Continued Relevance of the Irrelevance-of-Motive Maxim" 2008 57(4) *Duke Law Journal* 1143 1146–1158.

32 Adaption of s 18F(1)(*b*) of the FAPAA.

33 Burchell *Principles of Criminal Law* 353–355. Also see Kaufman "Motive, Intention, and Morality in the Criminal Law" 2003 28(2) *Criminal Justice Review* 317 333–334.

34 Robinson "Hate Crimes: Crimes of Motive, Character, or Group Terror?" 1993 *Annual Survey of American Law* 605 606–607.

35 For e.g., see Title I of the Civil Rights Act of 1968, enacted 18 U.S.C. § 245(b)(2) Federally protected activities and Morsch "The Problem of Motive in Hate Crimes: The Argument Against Presumptions of Racial Motivation" 1991 82(3*) Journal of Criminal Law and Criminology* 659 660–661.

36 Prevention and Combatting of Hate Crimes and Hate Speech Bill B 9–2018.

37 Naidoo "Reconsidering Motive's Irrelevance and Secondary Role in Criminal Law" 2017 2 *Journal of South African Law/Tydskrif vir die Suid-Afrikaanse Reg* 337 349–350; Rosenberg 2008 *Duke Law Journal* 1145.

38 Morsch 1991 *Journal of Criminal Law and Criminology* 664. In some cases, this may deter prosecutors from charging offenders with hate crimes that require proof of motive. See Morsch 1991 *Journal of Criminal Law and Criminology* 872.

39 Naidoo 2017 *Journal of South African Law/Tydskrif vir die Suid-Afrikaanse Reg* 337–338.

40 Snyman *Criminal Law* 169.

bad, are irrelevant to criminal intent".[41] Therefore, if tried in a South African courtroom, Robin Hood, despite his altruistic motivation to benefit the poor by stealing from the rich, would still satisfy the requirements for incurring liability for theft.[42] This is true for most criminal-law systems.[43] American legal scholar and academic Professor Jerome Hall writes that "hardly any part of penal law is more definitely settled than that motive is irrelevant".[44] This assertion is premised on the postulation that an individual's reasons for committing a crime, lest the reasons not be immediately plain, hinder the course of justice.[45] Thus, motive has no bearing on the establishment of criminal liability, and will at most, be influential during the process of sentencing, which is addressed later.[46] Overall, including motive as a requirement for the determination of criminal liability, as submitted by section 18F(1)(*b*), is superfluous and must be precluded.

Even if a motive to harm is argued to be rightfully imbedded in the text (as is the case with some exceptional crimes, such as hate crimes), requiring proof of "the 'motive' of causing that individual harm" is an overly stringent threshold that may be difficult to establish, since a motivation to harm is not a feature in many cases of IBSA.

The recent preference for more inclusive terms, such as "image-based sexual abuse" (as opposed to "revenge porn") has been justified on the basis that not every "non-consensual creation and/or distribution of private sexual images" is motivated by revenge.[47] Motivations may include financial gain, entertainment, notoriety or acting "for a laugh" or "prank" among other things.[48] Where IBSA is committed for these reasons, it may be difficult to draw the inference of motivation to cause harm.[49] For example, among the interview findings in "Image-based Sexual Abuse: A Study on the Causes and Consequences of Non-Consensual Nude or Sexual Imagery", one victim, reflecting on her own IBSA experience, states that "I think [they did it] because they thought it was funny and they don't think about things from other people's perspectives, and probably don't think about the long term consequences of things either".[50] Similarly, one participant in a study, whose

41 Burchell *Principles of Criminal Law* 353–355.

42 The crime of theft requires proof of *dolus*. In Burchell *Principles of Criminal Law* 689, "[t]heft consists in an unlawful appropriation with intent to steal of a thing capable of being stolen." As discussed later, Robin Hood's motive would be likely to impact the sentence he is handed down.

43 Burchell *Principles of Criminal Law* 353; Naidoo 2017 *Journal of South African Law/Tydskrif vir die Suid-Afrikaanse Reg* 344.

44 Hall *General Principles of Criminal Law* 2ed (1960) 88.

45 Burchell *Principles of Criminal Law* 354.

46 Snyman *Criminal Law* 169.

47 Henry *et al Image-Based Sexual Abuse* 67 and 71. There are convincing reasons to replace the term "revenge porn" with the term "image-based sexual abuse". See McGlynn and Rackley 2017 *Oxford Journal of Legal Studies* 2–6.

48 McGlynn and Rackley 2017 *Oxford Journal of Legal Studies* 5; Franks "Drafting an Effective 'Revenge Porn' Law: A Guide for Legislators" 2015 SSRN 1 2; and Henry *et al Image-Based Sexual Abuse* 79.

49 See Phippen and Brennan *Sexting and Revenge Pornography* 77, where the authors note the challenges of proving a motive to harm.

50 Henry *et al Image-Based Sexual Abuse* 81.

intimate images were shared by her partner to a group of his friends, remarked that "it was never really revenge. Showing his friends, he just wanted to brag and be like, 'look this … is who I'm getting to sleep with' to his mates".[51] In these cases of IBSA, the motivation to cause harm may be a difficult inference to draw. Moreover, it may be equally difficult to draw such an inference in circumstances where an accused makes use of deepfake technology[52] to paste the face of a victim onto the body of a pornographic image. Sending such an image to another person is likely to cause the victim significant harm[53] despite the accused potentially interpreting the incident as a joke. An accused might contend "the 'motive' to cause that individual harm" is absent, since the pornographic portion of the image was fictitious and not in reality the victim. Thus, the accused would not be prosecutable in terms of section 18F(1). On these same facts, even in cases where the accused did harbour the motive to cause harm, ascertaining the accused's subjective motive, and proving it beyond reasonable doubt (as would be required in a criminal prosecution) would be a burdensome obstacle for the prosecution.

The motivation of monetary gain may also be difficult to equate with "motivation to cause harm".[54] Before it was shut down by law enforcement, the infamous revenge porn hosting site "IsAnyBodyUp" was generating an estimated 10 000 US dollars in advertising revenue monthly from over 30 million page views.[55] Many similar instances are primarily motivated by financial gain.[56] Site operator for revenge porn site "IsAnyBodyDown", Craig Brittan, revealed that he was earning 3 000 US dollars per month in advertising revenue, avowing that "we don't want anyone shamed or hurt. We just want the pictures there for entertainment purposes and business."[57]

Additional difficulties – if "the 'motive' to cause that individual harm" remains a requirement under the FAPAA – may also arise when IBSA is perpetrated within the confines of an instant-messaging or email group that

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51 Henry *et al Image-Based Sexual Abuse* 83.

52 Mashinini "The Impact of Deepfakes on the Right to Identity: A South African Perspective" 2020 32 *South African Mercantile Law Journal* 407 408; Citron *The Fight for Privacy* (2022) 37. Also see Papadopoulos and Snail *Cyberlaw@ZA* 424, where it is stated that "deep-fake technology uses real images and videos and edits them to make it appear as if someone had said or done something completely differently to what actually happened."

53 Harris "Deepfakes: False Pornography Is Here and the Law Cannot Protect You" 2019 17 *Duke Law & Technology Review* 99 106.

54 See Henry *et al Image-Based Sexual Abuse* 84, where a victim, who was victimised by a sextortion scam, states that "[i]t wasn't a revenge thing. It was just a simple money thing. They wanted money. They clearly found what they thought was a good gig and scam."

55 Mullen "New Lawsuit Against 'Revenge Porn' Site Also Targets GoDaddy" (22 January 2013) https://arstechnica.com/tech-policy/2013/01/new-lawsuit-against-revenge-porn-site-also-targets-godaddy/ (accessed 2022-04-14).

56 See Phippen and Brennan *Sexting and Revenge Pornography* 58.

57 Peterson "'It's Only Entertainment:' Creator of 'Revenge Porn' Site Shrugs Off Potential Lawsuits and Says His Number One Goal Is Making Money" (5 February 2013) https://www.dailymail.co.uk/news/article-2273963/I-entertainment-Creator-revenge-porn-site-shrugs-potential-lawsuits-says-number-goal-making-money.html (accessed 2022-04-14). Revenge porn site owners may also offer a corresponding take-down service, also motivated by profit, where victims would be required to pay a fee to have their intimate images removed. See Phippen and Brennan *Sexting and Revenge Pornography* 58.

purposefully excludes those subjects depicted in the images. Since the intimate images (which are likely to cause the victim harm) were never intended to be discovered by the victim, "the 'motive' to cause that individual harm" cannot be inferred.

Lastly, in light of these arguments, the difficulty in proving motive might wholly deter prosecutors[58] from charging offenders under section 18F(1) of the FAPAA, as they are likely to deem the provision too cumbersome to employ. Prosecutors are more likely to charge offenders under section 16 of the Cybercrimes Act (which, while still requiring *dolus*, does not require proof of motive) or with the common-law crime of *crimen injuria*[59] or defamation.[60]

Overall, since varying motives exist for the exposure of a victim's intimate images, and since motive is not required for criminal liability, the requirement that the exposure of a victim's "private sexual photograph or film" be made "with the 'motive' of causing that individual harm" should be severed from section 18F(1) of the FAPAA. For further confirmation of this pronouncement, Citron and Franks (in their critique of the requirement to prove motive in IBSA laws) assert that "whether the person making the disclosure is motivated by a desire to harm a particular person, as opposed to a desire to entertain or generate profit, should be irrelevant".[61] Whether section 18F(1)(*b*) is kept or severed (since the motive of harm in section 18F(1)(*b*) is guised as *dolus*), we have or will be left with a statutory offence void of any indication of fault.[62] To remedy this undesirable state of affairs, one could, hesitantly, posit that the inclusion of the words "with the intention of causing that individual harm" indicates that the legislature envisaged a blameworthy state of mind commensurate with *dolus*. This has been done before in respect of other ambiguous statutes.[63] Alternatively, but not ideally, it can be presumed that the formulators of section 18F(1)(*b*) envisioned the prerequisite of fault, since it is preferable that fault, as a requirement for

58 Morsch 1991 *Journal of Criminal Law and Criminology* 872.

59 See Snyman *Criminal Law* 407, where *crimen injuria* is defined as "the unlawful, intentional and serious violation of the dignity or privacy of another."

60 As stipulated in section 34(1) of the Judicial Matters Amendment Act 15 of 2023, the crime of defamation is abolished in South Africa. Section 34(2) of the same act, however, clarifies that the repeal "does not affect civil liability in terms of the common law based on defamation". Thus, in South Africa, defamation in terms of the law of delict remains viable. Defamation law has been effectively used in IBSA cases. See Citron and Franks 2014 *Wake Forest Law Review* 357–358 and Pangaro "Hell Hath No Fury: Why First Amendment Scrutiny Has Led to Ineffective Revenge Porn Laws, and How to Change the Analytical Argument to Overcome This Issue" 2015 88(1) *Temple Law Review* 185 192. However, these authors are critical of the financial implications of civil defamation.

61 Citron and Franks 2014 *Wake Forest Law Review* 387. Furthermore, the authors note that motive, as is the case in South Africa, is not a constitutional requirement. The authors stress that motive, as a constitutional requirement, would "create an unprincipled and indefensible hierarchy of perpetrators".

62 There can be no criminal liability without establishing fault. Fault may either be established as *dolus* (intention) or *culpa* (negligence). See Burchell *Principles of Criminal Law* 341.

63 For e.g., Burchell notes that South African courts have interpreted words such as "'maliciously', 'knowingly', 'corruptly', 'fraudulently' and so on" as indicating *mens rea*. See Burchell *Principles of Criminal Law* 397.

liability, should feature in South African statutory offences.[64] Nevertheless, to avoid the application of strict liability and promote legal certainty, it is preferable to have laws that clearly indicate fault requirements.[65]

3 THE ROLE OF MOTIVE IN SENTENCING

While motive is not a requirement for criminal liability, it should not be sidelined as irrelevant.[66] Some writers argue for better recognition of motive and the important role that it plays in sentencing.[67] In South Africa, the role of motive is already recognised in this regard. South Africa's approach to sentencing rests on three overarching considerations as set out in *S v Zinn*[68] – collectively referred to as the "Triad in Zinn".[69] In seeking an appropriate sentence, the sentencing court must consider: (1) the crime; (2) the offender; and (3) the interests of society.[70] These factors should be carefully balanced to achieve an equitable result.[71]

In respect of motive, "the offender" factor is relevant. This may include the personal circumstances of the offender, and, as Snyman writes, "the personal reasons which drove [the offender] to crime".[72] The more sinister the reason for the crime, the harsher the punishment.[73] Furthermore, the motive for committing a crime may be regarded as either an aggravating or mitigating factor during sentencing, and, thus, serve an important role in arriving at a fair punishment.

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64 See Burchell *Principles of Criminal Law* 396–397, where Burchell quotes the words of Botha JA from *S v Arnstein* 1964 (1) SA 361 (A) 365B–D, where it is stated that "[t]he general rule is that *actus non facit reum nisi mens sit rea*, [the act is not wrongful unless the mind is guilty (see Burchell *Principles of Criminal Law* 341)] and that in construing statutory prohibitions or injunctions, the Legislature is presumed, in the absence of clear and convincing indications to the contrary, not to have intended innocent violations thereof to be punishable."

65 See Burchell *Principles of Criminal Law* 443. This is also a fundamental tenet of the principle of legality, which is a requirement for criminal liability. In respect of the *ius certum* principle, laws must be formulated with clear requirements in order for society to know what is expected of them.

66 Xie "Utterly at Odds: Criminal Intention, Motive, and the Rule of Law" 2014 *Oxford University Undergraduate Law Journal* 80 86–88.

67 See Hessick "Motive's Role in Criminal Punishment" 2006 80(89) *Southern California Law Review* 89 90–91, 101–104, where Hessick argues for motive to play a more prominent role in sentencing for the assurance of appropriate moral condemnation and proportionate punishments.

68 1969 (2) SA 537 (A).

69 Snyman *Criminal Law* 16 and *S v Zinn supra* 540.

70 Emerging more recently in case law is the consideration of victim impact, which has been recognised as a fourth consideration; see *S v Matyityi* 2011 (1) SACR 40 (SCA). All factors, as emphasised in *S v Smith* 2017 (1) SACR 520 (WCC) 107, should be imbued with the principle of mercy.

71 Snyman *Criminal Law* 17.

72 *Ibid*.

73 Theophilopoulos *Criminal Procedure* (2019) 363–365.

Varying motives for the commission of sexual offences are listed as aggravating factors in section 56A(2) of the Criminal Law (Sexual Offences and Related Matters) Amendment Act[74] (Sexual Offences Act):

> "If a person is convicted of any offence under this Act, the court that imposes the sentence shall consider as an aggravating factor the fact that the person–
> *(a)* Committed the offence with the intent[75] to gain financially, or to receive any favour, benefit, reward, compensation or any other advantage; or
> *(b)* Gained financially, or received any favour, benefit, reward, compensation, or any other advantage."

Some have argued for IBSA to be treated as a sexual offence – and consequently, that its regulation not be located in the FAPAA or Cybercrimes Act, but in the Sexual Offences Act.[76] The authors of the term "image-based sexual abuse" argue that the "non-consensual creation and/or distribution of private sexual images" be treated as a sexual offence.[77] The term admirably redirects focus from the perpetrator's motive of revenge to the victim impact of the crime: sexual abuse.[78] Should the crime of IBSA rightfully be regulated in the Sexual Offences Act, the motives listed in section 56A(2)(*a*) would be applicable to IBSA. The motive "to gain financially" or to receive "compensation" would thus, in light of arguments already made, be considered aggravating factors for purposes of sentencing.[79] Other motives commonly witnessed in IBSA cases, such as to entertain or for notoriety, could (depending on the facts of the case) be considered as an "advantage" also in terms of section 56A(2)(*a*).[80] However, it is important to note that the varying motives of section 56A(2)(*a*) are subject to the sentencing court's discretion and are not to be automatically considered "aggravating".[81]

The possible spectrum of the varying motives in section 56A(2)(*a*), such as "to receive any … benefit [or] reward", is potentially wide-ranging. Thus, it is possible to appropriately classify other motives under "to receive any … benefit [or] reward" without stretching the meaning of the words.[82] The motive "to receive any … benefit [or] reward" could be inclusive of the

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74 32 of 2007.

75 While the word "intent" is used in this section, its use (for the same reasons already mentioned) cannot be understood as constituting *dolus* or intention in the legal sense.

76 See Digital Law Company submission in Parliamentary Monitoring Group "Cybercrimes and Cybersecurity Bill: Public Hearings Day 1" (13 September 2017) https://pmg.org.za/committee-meeting/25008/ (accessed 2023-03-17) ; Martin 2022 *South African Journal of Criminal Justice* 313; Phippen and Brennan *Sexting and Revenge Pornography* 110.

77 McGlynn and Rackley 2017 *Oxford Journal of Legal Studies* 3–4.

78 *Ibid.*

79 S 56A(2)(*a*)(*a*) of the Sexual Offences Act.

80 Considering the definition of "advantage" (defined by the Mirriam-Webster online dictionary as "a factor or circumstance of benefit to its possessor") the term can be interpreted widely. Whether the "advantage" obtained by the perpetrator be considered "aggravating" will be governed by judicial discretion.

81 Theophilopoulos *Criminal Procedure* 363–365.

82 The principle of legality, specifically in terms of the *ius strictum* principle, requires that the sentencing court not unnaturally stretch the meaning of particular words in a statute to the detriment of the accused. See Snyman *Criminal Law* 37–39.

traditional reason for the commission of IBSA – that is, revenge[83] – and the "benefit" or "reward" of revenge could be considered psychological.

The reason that individuals exact revenge on others has been explained as a type of "emotional catharsis"; according to psychoanalytic theory, this a process of releasing intense emotions such as anger or frustration in order to feel better or more in control of a situation.[84] The reason that revenge might be construed as appealing (despite the high potential for personal cost) is explained by Dutch psychologist Dr Nico Henri Frijda:[85] "Revenge precisely achieves in the individual's emotion what a social or societal analysis of vengeance indicates might be its purpose: power equalization."[86] Through revenge, the avenger, psychologically, attempts to restore their self-esteem.[87] Frijda's "comparative suffering hypothesis" proposes that when a wrong is committed, an imbalance between the eventual avenger and victim arises.[88] Revenge is used, in the mind of the avenger, as a means to correct this imbalance. Neuroscience supports this hypothesis.[89] Seeing the victim of your revenge suffer for what they have done to you is enough to invoke satisfaction.[90] Revenge will be satisfied when the avenger supposes the amount of suffering inflicted upon the victim to be equal to their own.[91] The "comparative suffering hypothesis" is evident in cases of IBSA that are motivated by revenge.[92] Taken from a study conducted in Zimbabwe, one victim's encounter with IBSA is relevant:[93]

> "I was 16 years old at that time and I felt like I wanted a boyfriend. I met this guy and I was happy that someone showed interest in me and we started hanging out. Within a few weeks, he was asking for my nude pictures. I asked if he would send them to anyone and he said no. Even though I knew that it

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83 Henry *et al Image-Based Sexual Abuse* 1–2.

84 Liao and Wang "Development of a Scale Measuring Emotional Catharsis Through Illness Narratives" 2021 18(16): 8267 *International Journal of Environmental Research and Public Health* 1 1–2; Jaffe "The Complicated Psychology of Revenge" 2011 *Observer* 1 2–3.

85 Mesquita "The Legacy of Nico H. Frijda (1927–2015)" 2016 30(4) *Cognition and Emotion* 603 606.

86 Frijda "The Lex Talionis: On Vengeance" in Van Goozen, Van de Poll and Sergeant (eds) *Emotions: Essays on Emotion Theory* (1994) 275.

87 Mesquita 2016 *Cognition and Emotion* 606.

88 Gollwitzer and Denzler "What Makes Revenge Satisfactory: Seeing the Offender Suffer or Delivering a Message?" 2009 *Journal of Experimental Social Psychology* 1 3.

89 When an individual is provoked, an imbalance in the brain arises, which, according to Chester and DeWall, may motivate an individual "to seek out sources of hedonic reward to regain affective homeostasis" or, in other words, to restore a state of balance. This is achieved through retaliation or aggression. See Chester and DeWall "The Pleasure of Revenge: Retaliatory Aggression Arises From a Neural Imbalance Toward Reward" 2016 11(7) *Social Cognitive and Affective Neuroscience* 1173 1179.

90 Gollwitzer and Denzler 2009 *Journal of Experimental Social Psychology* 2.

91 Barnoux and Gannon "A New Conceptual Framework for Revenge Firesetting" 2013 *Psychology, Crime & Law* 1 3.

92 See Mafa, Kang'ethe and Chikadzi "'Revenge Porn' and Women Empowerment Issues: Implications for Human Rights and Social Work Practice in Zimbabwe" 2020 5 *Journal of Human Rights and Social Work* 118 123. In the same study, one cultural and religious expert observes that "Zimbabwe as an African country to a larger extent still upholds a patriarchal belief system. So a man who is rejected or dumped by a woman may be enraged and want to get back at her, or should I say to fix her … it's an ego thing".

93 Mafa *et al* 2020 *Journal of Human Rights and Social Work* 122.

> was wrong, I did it anyway to make him happy, just my breasts and face. That did not satisfy him and he asked for pictures of my private part. I kept making excuses because I honestly did not want to. As the pressure was getting too much I told him I did not want to be with him anymore and that sort of pissed him off. All hell broke loose. He started sending me messages like 'hee [sic] who do you think you are … what is so special about your private part you slut … I always get what I want and no girl rejects me like that and gets away with it …' After 3 days, he posted nude pictures of me on Facebook and to everyone at my school."

In the account above, the avenger (in light of the "comparative suffering hypothesis" and with reference to section 56A(2)(*a*)) is rewarded and/or benefited with the satisfaction of knowing that the victim is suffering for their actions and has been put into a position where they can feel the same pain that was caused to the avenger by refusing to accede to the demands made. The avenger is rewarded and/or benefited for other psychological reasons explained by the "comparative suffering hypothesis", including "power equalization"; to feel better or more in control of a situation; and restoration of self-esteem. This conclusion is further supported by neuroscience. Chester and DeWall, in their study on the science behind retaliation, "propose that provoked people respond aggressively because doing so is hedonically rewarding".[94] When an individual is provoked, retaliatory aggression from that individual is a rewarding experience.[95]

The aggravating nature of the motive of revenge (in respect of IBSA) is evident in the Australian case of *Wilson v Ferguson*.[96] The plaintiff and the defendant, upon entering into a romantic relationship, had shared intimate images with each other on condition that the images would not be shared with anybody else.[97] Less than 10 months later, the relationship between the defendant and the plaintiff began to deteriorate. Soon after the termination of the relationship, the defendant vengefully posted 16 intimate images and two videos of the plaintiff (one of which showed the plaintiff masturbating) onto the Facebook page of the defendant.[98] Some of the intimate images were taken without the plaintiff's knowledge and consent. A note was also posted to the plaintiff's Facebook page indicating the defendant's motivation for his actions: "Let this b a fkn lesson. I will shit on anyone that tries to fk me ova. That is all!"[99] Following this note, several other messages (further affirming the vengeful motive of the defendant) were also sent to the plaintiff on the same day.

1. At 5:20 pm: "All in fb so fk u n the fkd up shit u represent. Hahaa."[100]
2. At 5:21 pm: "Fkn photos will b out for everyone to see when I get back you slappa. Cant wait to watch u fold as a human being. Piece if shit u r."[101]

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94 Chester and DeWall 2016 *Social Cognitive and Affective Neuroscience* 1173.
95 Chester and DeWall 2016 *Social Cognitive and Affective Neuroscience* 1178.
96 [2015] WASC (Western Australia Supreme Court) 15.
97 *Wilson v Ferguson supra* 22–23.
98 *Wilson v Ferguson supra* 27–29.
99 *Wilson v Ferguson supra* 27.
100 *Wilson v Ferguson supra* 30.
101 *Wilson v Ferguson supra* 30.

3. At 6.08 pm: "There's 2 vids so hopefully the lesson us learnt."[102]

The Supreme Court of Western Australia inferred, in light of the timing and content of the above Facebook posts and messages, that the defendant's reason for committing IBSA was that "he was angry at her decision to terminate their relationship and because he wanted to cause her extreme embarrassment and distress".[103] In pursuit of an equitable order, Justice Mitchell stressed:

> "[T]he compensation award should take account of the fact that the impact of the disclosure on the plaintiff was aggravated by the fact that the release of the images was an act of retribution by the defendant, and intended to cause harm to the plaintiff."[104]

Thus, an examination of the defendant's motive in *Wilson v Ferguson* was important in arriving at a just and equitable sentencing decision.

4 CONCLUSION

Burchell writes: "[T]he reason for ignoring motive in the matter of determining criminal liability is that individual motives are too complex and obscure to provide a reliable basis for determining liability for punishment."[105] Considering the multifaceted motivations for the commission of IBSA, the irrelevance of proof of motive is particularly cogent. Furthermore, requiring proof of motive is an overly stringent requirement, which, in many cases of IBSA, will be overly burdensome for prosecutors. It is therefore submitted that the requirement "with the intention of causing that individual harm" should be severed from section 18F(1) of the FAPAA.

An examination of motive, however, is useful during the process of sentencing. Sinister motivations for the commission of IBSA, such as "to gain financially, or to receive any favour, benefit, reward, compensation or any other advantage" should be considered aggravating by the sentencing court.[106] The "comparative suffering hypothesis" and developments in neuroscience explain how the motive of revenge does constitute a "reward" or "benefit",[107] and thus, could find application under section 56A(2)(*a*) of the Sexual Offencs Act. Alternatively, sentencing courts may (as in the case of *Wilson v Ferguson*) recognise the motive of revenge as an aggravating factor, irrespective of sentencing guidelines. Sentencing guidelines, indicating aggravating factors (such as in section 56A(2)(*a*) of the Sexual Offences Act) can be followed without the requirement "with the intention of causing that individual harm" imbedded in the statutory text.

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102 *Wilson v Ferguson supra* 31.

103 *Wilson v Ferguson supra* 31. The court also notes (at 58) that "[a]ny disclosure of the images to third parties would be likely to cause immense embarrassment and distress to a person in the plaintiff's position. The defendant appreciated this and was in fact motivated by the embarrassment and distress which publication of the photographs would cause to the plaintiff."

104 *Wilson v Ferguson supra* 85.

105 Burchell *Principles of Criminal Law* 354.

106 S 56A(2)(*a*) of the Sexual Offences Act.

107 S 56A(2)(*a*)of the Sexual Offences Act.

It is hoped that the issues highlighted in this article and the solutions provided will be considered in the ongoing quest for robust and capable laws, and in the context of a worldwide call for effective IBSA laws,[108] that South Africa's response to IBSA will help pioneer the way.

[108] See Phippen and Brennan *Sexting and Revenge Pornography* 109–110; Mania "The Legal Implications and Remedies Concerning Revenge Porn and Fake Porn: A Common Law Perspective' 2020 24(1) *Sexuality and Culture* 2079 2091–2092.

JUSTIFYING THE INTEGRATION OF CLINICAL LEGAL EDUCATION WITH PROCEDURAL-LAW MODULES TO DEVELOP PRACTICAL SKILLS IN LAW STUDENTS

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SUMMARY

This article focuses on the integration of Clinical Legal Education (CLE) with the conventional teaching methodologies traditionally employed for teaching procedural law modules, i.e., civil procedure, criminal procedure and the law of evidence at university level. The aim of this integration is to teach law students professional practical skills as a means to promote effective and efficient interpersonal relations with clients, including attorney-client consultations. This article addresses the concerns of many legal practitioners that law graduates need to improve their practical skills before entering legal practice. The legal education system at university level is often blamed for this inadequacy. It has been argued that universities have the responsibility to develop those students lacking practical skills to prepare them for practice. In this article, it is argued that an integrated teaching and learning approach, as far as CLE and procedural-law modules are concerned, should involve more than just the mere transmission of the theory of procedural law and the principles of substantive law to students. It should go further and involve students practising such theory to achieve the desired effect or goal of excellence in legal practice. The Legal Practice Act is supportive of this argument. In addition, the concept of transformative constitutionalism is invoked to strengthen the argument that there is a constitutional

imperative on law teachers to conduct teaching and learning in a transformative manner. By teaching students only or mainly by way of lectures based on theoretical presentations, law schools are not doing students justice in preparing them for legal practice. It is consequently argued that blending CLE with the teaching and learning of procedural-law modules would combine the teaching of theory with practice, which is foundational in preparing law students for their entry into the profession. This means that students would be taught so as to make them more skilled and ready to enter the working world after graduation. Besides possessing a sound theoretical basis required for practice, law graduates entering the profession would also then have some experience in legal practice; both legs of such an education serve the way in which the law should be applied practically.

1 INTRODUCTION

This article focuses on the integration or blending of Clinical Legal Education (CLE) with the conventional teaching methodologies traditionally employed for teaching procedural law modules, i.e., civil procedure, criminal procedure and the law of evidence, as well as all other law modules, at university level. CLE, in rudimentary form, may be defined as the use of the clinical methodology to teach law students procedural-law skills by making use of simulations, or real-life situations, to illustrate how legal practitioners would in practice approach a legal issue under investigation. The aim is to teach law students professional practical skills to promote effective and efficient interpersonal relations with clients, including attorney-client consultations. Such an approach includes reference to professional ethics and improves students' capacity to combine the facts of cases with the substantive law and procedure. Clinical pedagogy of the lived experiences can be shared with students in classrooms; and at those universities that have the benefit of institutionalised law clinics, students can practise law under the mentorship and coaching of an experienced legal practitioner.[1] Such clinics, at the same time, provide access to justice to the poor and vulnerable.

In light of the aforementioned, the following question may be posed: why should this integration of CLE be considered at all?

Law graduates need to improve their practical skills before entering the legal profession. Legal practice requires this. These two statements have been uttered countless times by various stakeholders in legal practice.[2] In

[1] Du Plessis "Designing an Appropriate and Assessable Curriculum for Clinical Legal Education" 2016 49(1) *De Jure* 1 5–6; Welgemoed "Die Balans Tussen Kliniese Regsopleiding en Regstoegang Per Se – 'n Delicate Spankoord" 2016 2 *Litnet Akademies* 753 758; Welgemoed *Integration of Clinical Legal Education With Procedural Law Modules* (doctoral thesis, Nelson Mandela University) 2013 289.

[2] In this regard, see Vukowich "Comment: The Lack of Practical Training in Law Schools: Criticisms, Causes and Programs for Change" 1971 23 *Case Western Reserve Law Review* 140 140; Redding "The Counterintuitive Costs and Benefits of Clinical Legal Education" 2016 55 *Wisconsin Law Review Forward* 55 55; Holmquist "Challenging Carnegie" 2012 61(3) *Journal of Legal Education* 353 353, as well as Du Plessis 2016 *De Jure* 1 1; Greenbaum "Re-Visioning Legal Education in South Africa: Harmonizing the Aspirations of Transformative Constitutionalism With the Challenges of our Educational Legacy" (undated) https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2575289 (accessed 2024-02-02) 10; Biggs and Hurter "Rethinking Legal Skills Education in an LLB Curriculum" 2014 39(1) *Journal for Juridical Science* 1 2, 3; and Engler "The MacCrate Report Turns 10: Assessing Its Impact and Identifying Gaps We Should Seek to Narrow" 2001 8 *Clinical Law Review*

this regard, the judiciary, members from legal practice and even some law teachers have complained that law students, after graduation, lack the necessary practical knowledge, skill and ingenuity expected of a practising attorney.[3] Keeping in mind that law graduates follow various career paths, it is not clear to what extent the LLB degree prepares them for their careers.[4] Many legal practitioners are of the opinion that law graduates, who, after graduating from university, join law firms for a period of practical vocational training, lack the essential practical and theoretical knowledge necessary to make a good start in practice.[5] It appears that the legal profession would prefer to receive ready-made legal practitioners immediately after their graduation from university.[6] This appears to be an international trend. In 2011, the New York Times published an article about how ill-equipped many new legal practitioners appear to be.[7] Graduates also appear to display low levels of literacy, research and numeracy skills.[8] It is the authors' experience

109 115. This is not only a concern as far as the legal profession is concerned, but also in other fields and professions; see Griesel and Parker "Graduate Attributes: A Baseline Study on South African Graduates From the Perspective of Employers" 2009 *Higher Education South Africa & The South African Qualifications Authority* 1 in this regard.

3 Vukowich 1971 *Case Western Reserve Law Review* 140; Snyman-Van Deventer and Swanepoel "The Need for a Legal-Writing Course in the South African LLB Curriculum" 2012 33(1) *Obiter* 121 121; Manyathi "South African LLB Degree Under Investigation" 2010 (April) *De Rebus* 8 8; Chamorro-Premuzic and Frankiewicz "Does Higher Education Still Prepare People for Jobs?" (7 January 2019, revised 14 January 2019) https://hbr.org/2019/01/does-higher-education-still-prepare-people-for-jobs (accessed 2020-02-13); SASSETA Research Department "SASSETA Research Report: Assessment of Learning Conditions of Candidate Attorneys During a Transformation Attempt" (March 2019) https://www.sasseta.org.za/download/91/candidate-attorneys-study/7474/candidate-attorneys-study-research-report-final-revised-25-03-2019-1-1.pdf (accessed 2020-01-14) 30–31. Sasseta specifically commented on the "very sloppy" work and initiative of some candidate attorneys. In this regard, it must be kept in mind that most candidate attorneys have just come from university law school training and this complaint may reflect on the training received while at university.

4 Manyathi 2010 *De Rebus* 8.

5 Dednam "Knowledge, Skills and Values: Balancing Legal Education at a Transforming Law Faculty in South Africa" 2012 26(5) *South African Journal of Higher Education* 926 929; Gravett "Pericles Should Learn to Fix a Leaky Pipe – Why Trial Advocacy Should Become Part of the LLB Curriculum (Part 2) 2018 (21) *Potchefstroom Electronic Law Journal* 1 2, 26; Chaskalson "Responsibility for Practical Legal Training" 1985 (March) *De Rebus* 116 116; Vukowich 1971 *Case Western Reserve Law Review* 140; Swanepoel, Karels and Bezuidenhout "Integrating Theory and Practice in the LLB Curriculum: Some Reflections" 2008 (Special Issue) *Journal for Juridical Science* 99 100. These stakeholders also include magistrates and judges, advocates at the bar, as well as legal educators. Also see Kruse "Legal Education and Professional Skills: Myths and Misconceptions About Theory and Practice" 2013 45 *McGeorge Law Review* 7 8 and Boshoff "Professional Legal Education in Australia: Emphasis on Interests Rather Than Rights" 1997 (January) *De Rebus* 27 27 in this regard, as well as Modiri "The Crises in Legal Education" 2014 46(3) *Acta Academica* 1 2, where the perspective of the stakeholders of the 2013 LLB Summit is indicated.

6 Dednam 2012 *South African Journal of Higher Education* 926; Bowman and Brodoff "Cracking Student Silos: Linking Legal Writing and Clinical Learning Through Transference" 2019 25 *Clinical Law Review* 272.

7 Stetz "Best Schools for Practical Training" (undated) https://bluetoad.com/publication/?i=482098&article_id=3038646&view=articleBrowser&ver=html5#{%22issue_id%22:482098,%22view%22:%22articleBrowser%22,%22article_id%22:%223038646%22} (accessed 2019-06-24).

8 Biggs *et al* 2014 *Journal for Juridical Science* 1; Campbell "The Role of Law Faculties and Law Academics: Academic Education or Qualification for Practice?" 2014 1 *Stellenbosch Law Review* 15 17.

that graduates also display an inability to apply reasoning and logical skills to integrate factual scenarios with the law, a skill that is absolutely essential in legal practice. Furthermore, there also seem to be pockets of a concerning lack of intuitive ethics present among some graduates. The legal education system at university level is said to be to blame for this.[9] It is argued, by some critics, that universities have the responsibility to develop those lacking skills in the students admitted for tertiary studies.[10] The aim of this article can be summarised as follows: that an integrated teaching-and-learning approach, as far as CLE and all law modules, including procedural-law modules are concerned, is required. This teaching-and-learning approach should involve more than just the mere transmission of procedural-law theory and substantive-law principles. It should go further and involve students practising such theory so as to achieve the desired effect or goal of excellence in legal practice. It is submitted that the profession would prefer ready-made legal practitioners straight out of university in order to be able to use such "practitioners" effectively the moment they are employed as candidate legal practitioners (CLPs), enabling law firms to start earning fees immediately from for example, court appearances, without the need to train graduates extensively in court etiquette and procedures.

2 THE NEED FOR AN INTEGRATED APPROACH

The concept of "integration" refers to the action of combining two or more things in an effective manner.[11] The integration of CLE with procedural-law modules must thus have a desired effect, which requires some explanation. It must be kept in mind that the law should be viewed from a holistic perspective and not merely piecemeal. This perception becomes relevant in legal practice when assisting members of the public in solving their legal problems. Here, clients' cases must be viewed from a holistic perspective. It includes all their social and human circumstances.[12] It is suggested that a holistic perspective should also be applied when teaching law. Students should therefore not be taught to view different areas and aspects of the law

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9 Vukowich 1971 *Case Western Reserve Law Review* 140. According to Reed, complaints about the lack of practical knowledge, skill and ingenuity of law graduates started when legal education had primarily been taken over from law offices by universities. Also see Holmquist *Journal of Legal Education* 353 and Schultz "Teaching 'Lawyering' to First-Year Law Students: An Experiment in Constructing Legal Competence" 1996 52(5) *Washington and Lee Law Review* 1643 1644 in this regard.

10 Snyman-Van Deventer and Van Niekerk "The University of the Free State Faculty of Law Write/Site Intervention – Supporting Broader Access With the Skills for Success" 2018 43(1) *Journal for Juridical Science* 39 42; Akojee and Nkhomo "Access and Quality in South African Higher Education: The Twin Challenges of Transformation" 2007 21(3) *South African Journal for Higher Education* 385 396.

11 Cambridge Dictionary "Integration" (2021) https://dictionary.cambridge.org/dictionary/english/integration (accessed 2023-06-21).

12 See Welgemoed *Integration of Clinical Legal Education With Procedural Law Modules* 2013 205–218 in this regard. In short, the involvement of human and social elements refers to an interpretation of the application of legal principles and procedure by keeping in mind the personal circumstances and social stance of persons in their individual capacity, as well as in society as a whole. Legal practitioners must determine what their clients really want by taking into account their personal circumstances and preferences, as well as what social justice would dictate for the situations in which they find themselves.

in compartments or "silos", but rather to view the law as a holistic structure.[13] This becomes very relevant when dealing with rather practical modules like the procedural-law modules. Although a firm theoretical knowledge is always necessary, the practical nature of procedural-law modules should not be left out of consideration in designing a curriculum and syllabus. Broussard and Gross opine that students must be able to see the contextual connection between substantive law and the practice of law.[14] Singh, on the other hand, states that it is of the utmost importance to produce lawyers who possess a social vision, especially in a developing country.[15] Changes in society, including modernisation, require alteration and improvements in legal education, as well as the expansion of the scope of legal education.[16] The advent of the Fourth Industrial Revolution, with the concomitant modernisation of the legal profession to include electronic and digital means in daily work performance, constitutes an example of modernisation. An example of a relevant change in society is the fact that, every year more law graduates are looking for work. The economic circumstances in the world now require people to make a living as soon as possible to care for themselves as well as for their families. The implication is that law graduates need to be sufficiently equipped for legal practice when entering the legal profession. This means that legal education should not be limited to a study of theory and legislation, but should include a study of various legal procedures.[17] Legal education must have breadth.[18] It would therefore be beneficial to integrate or combine the procedural-law modules in a teaching methodology that can achieve this. Not only would this provide a firm theoretical foundation to students, but it would also serve to instil practical skills as far as legal procedure and analysis of evidence are concerned. It is submitted that CLE is such a teaching methodology in that it incorporates both theoretical and practical methods of imparting knowledge and skills to students.

The aforementioned integration can also be explained in a more theoretical and foundational manner. An integrated approach to teaching and learning gives rise to more active learning by law students. Although experience is a firm foundation for learning, it does not automatically lead to learning.[19] Theory also plays an important role in learning and must therefore be integrated with experience to achieve effective learning.[20] Active learning therefore includes tasking students with instructional activities. After completing such tasks, they reflect on what they have done

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13 See Bowman *et al* 2019 *Clinical Law Review* 269 271 in this regard. There must be opportunities in the curriculum where students can draw the various areas of the law together in order to become familiar with how the law functions as a holistic structure.

14 Broussard and Gross "Integrating Legal Research Skills Into Commercial Law" in Friedland and Hess (eds) *Teaching the Law School Curriculum* (2016) 362.

15 Singh "Importance of Legal Education" (18 March 2020) https://www.ipemgzb.ac.in/ (accessed 2021-05-05).

16 *Ibid*.

17 *Ibid*.

18 *Ibid*.

19 Wrenn and Wrenn "Enhancing Learning by Integrating Theory and Practice" 2009 21(2) *International Journal of Teaching and Learning in Higher Education* 258 259.

20 *Ibid*.

and self-evaluate their efforts.[21] This serves as an important instrument for the law teacher to identify any challenges and to assist students in their development.

The following question can be asked: is there a need for this integrated teaching methodology? Owing to the legal profession having such a major stake in legal education, the profession depends on the educational system to provide the profession with skilled practitioners who have the required knowledge and experience.[22] Governments in many countries, including Australia and the United Kingdom, have taken measures to facilitate a connection between higher education and the workplace.[23] Both government and the workplace in South Africa are exerting pressure on higher education to produce graduates who possess the capabilities, attributes and dispositions to perform work in a successful manner.[24] As far as the legal profession is concerned, graduates who enter the profession with the required skills and experience are able to provide better-quality legal services to the poor and vulnerable who access legal aid. The reason for this pressure is that current capabilities, attributes and dispositions appear to be unsuitable for the needs and expectations of employers.[25] Teaching-and-learning experiences must therefore develop and adapt in order to meet the demands of employers and the legal profession.[26]

The former Chief Justice of South Africa, Justice Mogoeng Mogoeng, identified another contributing factor, namely the transition from basic education to higher education.[27] It has been suggested that the school system is failing and cannot equip students with the skills and concepts to deal with all the demands of tertiary education.[28] Universities are therefore facing the reality of admitting students who are products of an inadequate

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21 *Ibid*.

22 Smith *The Legal Education – Legal Practice Relationship: A Critical Evaluation* (Master's thesis, Sheffield Hallam University) January 2015 15.

23 Griesel and Parker 2009 *Higher Education South Africa & The South African Qualifications Authority* 1 1, 4.

24 Griesel *et al* 2009 *Higher Education South Africa & The South African Qualifications Authority* 1.

25 Griesel *et al* 2009 *Higher Education South Africa & The South African Qualifications Authority* 1. Also see Broussard *et al* in Friedland et al (eds) *Teaching the Law School Curriculum* 362 in this regard.

26 Smith *The Legal Education* 18.

27 Die Vryburger "Law Degree Graduates Cannot Write, Read, Do Sums or Reason" (30 March 2018) https://southafricatoday.net/south-africa-news/law-degree-graduates-can-not-write-read-do-sums-or-reason/?fbclid=IwAR0qO_cyU-ElaPRXqenoL6Q9-0My3HNOMBV-yG696ELFxEdLgoOt-lot (accessed 2019-01-07); Biggs *et al* 2014 *Journal for Juridical Science* 2; Snyman-Van Deventer *et al* 2018 *Journal for Juridical Science* 39; Campbell 2014 *Stellenbosch Law Review* 31. The shortcomings in the national schooling system contribute to the unpreparedness of graduates for practice.

28 Snyman-Van Deventer *et al* 2018 *Journal for Juridical Science* 42; Swanepoel *et al* 2008 *Journal for Juridical Science* 100; Dednam 2012 *South African Journal of Higher Education* 934; McQuoid-Mason "The Four-Year LLB Programme and the Expectations of Law Students at the University of KwaZulu-Natal and Nelson Mandela Metropolitan University: Some Preliminary Results From a Survey" 2006 27(1) *Obiter* 166 167; Zitske "Stop the Illusory Nonsense! Teaching Transformative Delict" 2014 46(3) *Acta Academica* 52 53–54.

school system.[29] For this reason, universities bear the responsibility of adapting institutional measures in order to prepare such students for the "rigours of higher education". A mitigating factor for the students being underprepared is that it is owing to "no fault of their own".[30] The Chief Executive Officer of the Law Society of South Africa, as it then was,[31] indicated that in most cases, students lack the required literacy and/or numeracy skills. This lack of skills poses an obstacle for them to complete the undergraduate LLB degree in just four years.[32]

Many practising legal practitioners are of the opinion that law schools at universities should prepare students better for legal practice in that students are not experienced in routine tasks such as drafting wills, administration of deceased estates and court procedures.[33] Some of these practitioners assist in training graduates for practice when employing them at their law firms.

It has been suggested that students themselves, as well as young lawyers, are to some extent in agreement that universities should prepare them better to enter legal practice.[34] Modules, like civil procedure, criminal procedure and the law of evidence, as well as skills and values, like trial advocacy, research, problem-solving, legal writing, handling ethical issues, consultation skills, litigation and counselling skills, are all of a practical nature. It thus makes sense that many students believe that they should, insofar as the practical application of the law is concerned, be better prepared for legal practice upon their exit from university.[35]

According to Quinot and Greenbaum, an integrated approach to teaching law in South Africa is required.[36] They suggest that teaching law in a holistic way is preferable to adopting a piecemeal approach by way of distinct branches, fields and skills.[37] Such an approach acknowledges that the law is a complex discipline.[38] They also acknowledge that teaching law can be equally complex.[39] Supplementary to that, a more practical approach is suggested in this article to education – in particular, involving procedural-law

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29 Dednam 2012 *South African Journal of Higher Education* 934. Also see Quinot and Greenbaum "The Contours of a Pedagogy of Law in South Africa" 2015 1 *Stellenbosch Law Review* 29 33 in this regard.

30 Akojee *et al* 2007 *South African Journal for Higher Education* 396.

31 The Law Society of South Africa now carries the title of The Legal Practice Council.

32 Du Plessis 2016 *De Jure* 1; Greenbaum https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2575289 10; Biggs *et al* 2014 *Journal for Juridical Science* 1; Snyman-Van Deventer *et al* 2018 *Journal for Juridical Science* 41; Van der Merwe "Profession Can Make Important Contribution to Investigation into Effectiveness of LLBs" 2010 (April) *De Rebus* 4 4.

33 Vukowich 1971 *Case Western Reserve Law Review* 140. Also see Gravett 2018 *Potchefstroom Electronic Law Journal* 1 and Beaton "When Will Legal Education Catch the Wave?" (2 October 2018) https://www.collaw.edu.au/news/2018/10/02/when-will-legal-education-catch-the-wave in this regard.

34 Gravett 2018 *Potchefstroom Electronic Law Journal* 2.

35 In this regard, see Adewumi and Bamgbose "Attitude of Students to Clinical Legal Education: A Case Study of Faculty of Law, University of Ibadan" 2016 3(1) *Asian Journal of Legal Education* 106 112.

36 Quinot *et al* 2015 *Stellenbosch Law Review* 38.

37 *Ibid.*

38 *Ibid.*

39 *Ibid.*

modules. Practical work, in this regard, refers to tasks in which students observe and/or handle actual clients and their cases themselves. Alternatively, they observe a teacher demonstrating various tasks.[40] In this way, they acquire practical skills. Such an approach provides motivation to students and stimulates their interest and enjoyment of the specific work. It is submitted that law schools should provide students with a proper foundation of legal knowledge and skills so that they may be better prepared for legal practice upon their exit from university. A sound foundation of practical learning enhances their continued training by their supervising principals. It also teaches them the essential skills needed to apply the law to solve various legal problems encountered in practice.

Most graduates generally have a firm understanding of substantive legal principles applicable to various legal disciplines. However, they lack the necessary practical skills and experience to apply such knowledge practically.[41] This lack of problem-solving skills has been acknowledged by a variety of stakeholders[42] and bears the risk of prejudice to clients in legal practice.[43] Students are, it seems, not prepared for legal practice when they exit universities after graduation.[44] It has been identified as a major shortcoming in the LLB curriculum that no provision is made for adequate exposure by students to practical legal experience during their time spent at university.[45] Warren Burger CJ, the former Chief Justice in the Supreme Court in the United States of America, correctly remarked in this regard: "Shortcomings of today's law graduate lies not in a decent knowledge of the law, but that he has little, if any, training in dealing with facts or people – the stuff of which cases are really made."[46] The public also demands that legal practitioners be skilled in solving legal problems; if universities are not training students for this, they are neglecting their duties.[47] It has been suggested that skills training, as well as those presenting such training, deserve attention and recognition by law schools. There has, however, been a measure of resistance to the suggested changes from academia. According to Geraghty,[48]

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40 Nänny "Practical Teaching Experience 'Best Way to Learn'" (27 October 2016) https://www.sun.ac.za/english/Lists/news/DispForm.aspx?ID=4429 (accessed 2024-02-02).

41 Vukowich 1971 *Case Western Reserve Law Review* 141; Holmquist 2012 *Journal of Legal Education* 360.

42 Domanski 2011 *Fundamina* 46; McQuoid-Mason "Can't Get No Satisfaction: The Law and Its Customers: Are Universities and Law Schools Producing Lawyers Qualified to Satisfy the Needs of the Public?" 2003 28(2) *Journal for Juridical Science* 199 200.

43 Domanski 2011 *Fundamina* 47.

44 Hansjee and Kader *The Survivor's Guide for Candidate Attorneys* (2013) 1; Sullivan, Colby, Wegner, Bond and Shulman *Educating Lawyers – Preparation for the Profession of Law: Summary* (2007) 8.

45 Holness "Improving Access to Justice Through Compulsory Student Work at University Law Clinics" 2013 (16)4 *Potchefstroom Electronic Law Journal* 328 333.

46 Kruse 2013 *McGeorge Law Review* 16. Also see Sullivan *et al Educating Lawyers* 6 in this regard, where it is stated that this omission is one of the major limitations of legal education as we currently know it.

47 McQuoid-Mason 2003 *Journal for Juridical Science* 200.

48 Geraghty "Teaching Trial Advocacy in the 90s and Beyond" 2012 66 *Notre Dame Law Review* 687 693.

> "[a]cademia was critical of this rush to relevance, although it could not deny that students and the legal profession would benefit from curricula which improved lawyer skills. The debate between legal academia and those who advocated skills training focused on when and where such training should take place, who should be responsible for it, and what the status of the skills teachers should be within law school faculties. Law schools resisted giving 'skills training' curricula and its teachers status equal to 'traditional' curricula and faculty."

The opposite view has also emerged in that some academics have supported practitioners and students who advocate for a change towards practical training.[49] In this regard, the LLB Summit is of significance. The summit was held by the South African Law Deans Association, the Legal and Education Development branch of the (then) Law Society of South Africa and the General Council of the Bar on 29 May 2013.[50] The purpose of the summit was to focus on problems surrounding the LLB curriculum, quality assurance, new models for legal education and community service.[51] At the summit, it was made clear that law schools should assume responsibility for the calibre of future professionals that they produce through their education and training.[52] The Carnegie Foundation for the Advancement of Teaching, very expressively views the role of the law school as follows:[53]

> "Law school provides the single experience that virtually all legal professionals share. It is the place and time where expert knowledge and judgment are communicated from advanced practitioner to beginner. It is where the profession puts its defining values and exemplars on display, and future practitioners can begin both to assume and critically examine their future identities."

The question can now be asked: do law schools presently fulfil this role? It is submitted that the role is fulfilled in part only. It is further submitted that the synchronisation of the interests of law educators with the needs of legal practitioners, as well as with that of the public, is a challenge.[54] Civil professionalism, or the legal profession's pledge to serve the public, must be kept in mind when educating future lawyers.[55] Another challenge presently is that there are more and diverse career opportunities available to students than there were a few years ago.[56] This means that more law teachers from various fields of specialisation are required to present practical programmes and courses to law students.[57] Nevertheless, it appears, from statistics

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49 See Vukowich 1971 *Case Western Reserve Law Review* 140 in this regard, where it is stated that educators themselves are criticising the lack of practical knowledge and skills of law graduates. Also see Snyman-Van Deventer *et al* 2012 *Obiter* 123 in this regard.

50 Whittle "Legal Education in a Crisis? Law Deans and Legal Profession to Discuss Refinement of LLB-Degree" (4 February 2013) https://blogs.sun.ac.za/legalwriting/2013/02/04/legal-education-in-crisis/ (accessed 2024-02-02).

51 *Ibid.*

52 Dicker "The 2013 LLB Summit" (August 2013) https://www.gcbsa.co.za/law-journals/2013/august/2013-august-vol026-no2-pp15-20.pdf (accessed 2024-02-02) 15.

53 Sullivan *et al Educating Lawyers* 3.

54 Sullivan *et al Educating Lawyers* 4.

55 *Ibid*.

56 Vukowich 1971 *Case Western Reserve Law Review* 146.

57 *Ibid.*

provided by the Law Society of South Africa, that legal practice is popular as a career choice.[58] Law teachers should thus ensure that law students are adequately prepared for their future careers in legal practice. Moreover, teachers also have to fulfil their duty towards the legal profession and equip themselves with the necessary flexibility to cope with unknown future changes.[59] In short, changes in regulation, technology and what clients want, require changes in legal education. In this regard, Smith states that new forms of legal business are developing, as well as new ways of how to go about executing work, with a concomitant shift of attitudes by members of the profession.[60]

It was further emphasised at the aforementioned LLB Summit that legal education plays a significant part of the problem that the legal profession is not fulfilling its proper role in society.[61] The main duty of universities is to provide students with the essential, substantive theoretical knowledge they will need when entering practice.[62]

The notion of an approach in which theory and experience are blended, was also discussed at a conference hosted by the Law Society of South Africa, in collaboration with Monash South Africa, on 1 and 2 March 2018 in Johannesburg.[63] In this regard, it was pointed out that the role of academic institutions should be to produce graduates with the necessary base-level skills, or graduates who possess the core competencies that are required within the legal profession, namely the following:[64]

a) critical thinking and analysis;
b) drafting and writing; and
c) sound business sense.

Following this discussion, the question as to how academic institutions can produce such graduates was asked.[65] The following suggestions were tabled:[66]

a) employing university law clinics to assist;
b) the introduction of experiential learning to all LLB courses;

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58 Law Society of South Africa "Statistics for the Attorneys' Profession" (January 2022) https://www.lssa.org.za/about-us/about-the-attorneys-profession/statistics-for-the-attorneys-profession/ (accessed 2024-02-02).

59 Hall and Kerrigan "Clinic and the Wider Law Curriculum" 2011 *International Journal of Clinical Legal Education* 25 29.

60 Smith *The Legal Education* 27.

61 Whitear-Nel and Freedman "A Historical Review of the Development of the Post-Apartheid South African LLB Degree – With Particular Reference to Legal Ethics" 2015 21(2) *Fundamina* 234 237.

62 See Vukowich 1971 *Case Western Reserve Law Review* 143 in this regard, where it is stated that, at university level, it is easier to teach knowledge than it is to develop skills. Also see Vukowich 1971 *Case Western Reserve Law Review* 148–149 in this regard.

63 Ramotsho "Uniformed PVT Discussed at Legal Education Conference" April 2018 *De Rebus* 6 6. The theme of the conference was "From a Disjointed to an Integrated Legal Profession: The Design of the Appropriate and Relevant Practical Vocational Training for Legal Practitioners."

64 *Ibid.*

65 *Ibid.*

66 *Ibid.*

c) finding synergies between academic institutions and the LEAD (Legal Education and Development) division of the LSSA; and

d) focusing on section 29 of the Legal Practice Act (LPA),[67] which provides for community service by candidate legal practitioners.

Professional and practical training, and most importantly, experiential learning, are prominently mentioned. Experiential learning is an important component of CLE and is elaborated on elsewhere in this article.[68] In law schools, it appears that there is a divide between doctrinal teachings and professional training.[69] The Carnegie Report has indicated that universities allow students to be detached theoretical observers with regard to legal issues, whereas they should be actively and practically engaged in such issues.[70] It appears that universities, more specifically law schools, are accentuating the teaching of theory above practical, professional and ethical legal training, the very qualities that legal practice requires from those who enter the profession.[71] This is ironic, since the four-year LLB degree recognises the need for an integrated approach to legal education in the sense that theory should not be separated from practice, unlike the traditional approach to teaching law.[72]

The challenges experienced in South Africa were similarly investigated in the United Kingdom. The first report of the Advisory Committee on Legal Education and Conduct (ACLEC) compiled in the United Kingdom in 1996 states, in this regard: "The rigid demarcation between the 'academic' and 'vocational' stages needs to disappear; what is required is a new partnership between the universities and the professional bodies at all stages of legal education and training."[73] During such education and training, skills training is to be paramount. The ACLEC managed to bring academics and legal practitioners together.[74] To them, the meaning of "skill" had to be investigated to ensure that law teachers, clinicians and other trainers approached such education and training with the correct goals in mind. A skill has been defined by them as "[e]xpertness, practiced ability, facility in an action or in doing or to do something".[75] It therefore denotes action,

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67 28 of 2014.

68 See heading 3 3 3 below.

69 Grimes "The ACLEC Report: Meeting Legal Education Needs in the 21st Century?" https://classic.austlii.edu.au/au/journals/LegEdRev/1996/12.html (accessed 2024-02-02). The Lord Chancellor's Advisory Committee on Legal Education and Conduct, or ACLEC, compiled a report in 1996, which, *inter alia*, identified the need for intellectual rigour, core and contextual knowledge, legal values, ethical standards, as well as analytical, conceptual and communication skills in law degree curricula. Also see Chaskalson 1985 *De Rebus* 116 in this regard. Also see Greaves "Learning Leadership Is in Your Hands: Toward a Scholarship of Teaching in Practical Legal Training" 2012 *Journal of the Australasian Law Teachers Association* 1 4 in this regard.

70 Morgan "The Changing Face of Legal Education: Its Impact on What It Means to Be a Lawyer" 2011 *GW Law Faculty Publications & Other Works* 1 20.

71 See Gravett 2018 *Potchefstroom Electronic Law Journal* 2 in this regard.

72 McQuoid-Mason 2006 *Obiter* 167.

73 ACLEC's First Report on Legal Education and Training, April 1996, par 2.2; Hall *et al* 2011 *International Journal of Clinical Legal Education* 26.

74 Smith *The Legal Education* 65.

75 Wade "Legal Skills Training: Some Thoughts on Terminology and Ongoing Challenges" 1994 5(2) *Legal Education Review* 173 173.

practice and competence.[76] In order to learn skills, students have to do certain things on a repetitive basis until a certain level of objective competence is achieved.[77] A skill should have the following attributes:[78]

a) it must be goal-directed, i.e., it must be directed towards a particular result;
b) it must be learnt, i.e., gradually built up by way of practice rather than acquired in a reflexive or instinctive manner;
c) it usually involves certain micro-skills, i.e., a particular skill consists of various elements. An example in this regard is the skill of listening, which includes showing attention and interest non-verbally, providing acknowledgments, restating certain statements that have been uttered by the speaker, showing feelings in order to demonstrate empathy with what the speaker said; and
d) when the skill has been accomplished, a shift to intuitive levels of response takes place for the elements of the micro-skill. With regards to the listening skill, for example, when this skill has been mastered, the listener automatically incorporates all the mentioned elements into his or her action without concentrating or focusing on it. The separate elements therefore become mechanical or artificial.

O'Regan J, a former South African Constitutional Court judge, emphasised the importance of skills training, stating that the provision of competent legal education to students is the primary responsibility of law schools.[79] According to Judge O'Regan, skills, and not content, form the foundation of a competent legal practitioner.[80] Skills training must therefore be a core component of legal education and not merely something that is presented as a by-product of legal education.[81] Swanepoel, Karels and Bezuidenhout also investigated this issue. They found that there should not be a choice between content or skills, but a development of ways to integrate the two concepts.[82] They further state that the way in which law students are prepared for entry into the legal profession should be regularly reviewed.[83]

The pressing needs of the economy in South Africa have given rise to a skills revolution. This notion was explained as follows by former Deputy President of South Africa, Mlambo-Ngcuka:[84]

> "The phenomenon of unemployed graduates, who are without abilities to self-employ and self-determine, after spending three to four years of post-secondary education is an indication to all of us of the challenge in our education at a tertiary level … the curriculum developers are not paying enough attention to issues of relevance and ensuring that we all pay attention

76 *Ibid.*
77 *Ibid.*
78 Wade 1994 *Legal Education Review* 173–174.
79 Du Plessis "Access to Justice Outside the Conventional Mould: Creating a Model for Alternative Clinical Legal Training" 2007 32(1) *Journal for Juridical Science* 44 47.
80 *Ibid.*
81 *Ibid.*
82 Swanepoel *et al* 2008 *Journal for Juridical Science* 99 100.
83 *Ibid.*
84 Griesel *et al* 2009 *Higher Education South Africa & The South African Qualifications Authority* 2.

> to the skills and competencies learners require when they come out of higher education … we need a skills revolution in the curriculum of tertiary education."

However, Griesel and Parker state that a degree of realism needs to be sustained from both higher education and the employer regarding the extent to which higher education can bridge the gap between higher education and entry into the workplace.[85] The learned authors are correct and, in this regard, should be supported. It is not the aim of this article to suggest that higher education – more specifically law schools – should teach students everything that they need to know for success in the workplace as from their first day at the office. It is, however, submitted that law schools can equip students with adequate professional and practical skills to allow them to perform basic tasks when entering legal practice, more specifically tasks with regard to civil proceedings, criminal proceedings and the interpretation of evidence. It is then the public and professional duty of the candidate legal practitioner's principal and/or employer to develop the employee further – through mentorship and coaching, supported by in-house training and external legal training offered by LEAD or other service providers.

3 A SOUND BASIS FOR INTEGRATING CLINICAL LEGAL EDUCATION IN TEACHING PROCEDURAL LAW

3 1 The importance of practical experience

It is trite knowledge that, in practice, the application of all legal principles is accomplished by way of specific legal procedures. It has already been pointed out that various stakeholders in legal practice require improvement in the calibre of law graduate who enters legal practice.[86] Erasmus states: that a "[p]ractical mechanism that may have the effect of improving the competency and calibre of … legal representatives … would be to put proper mechanisms in place to ensure quality legal representation".[87] Although he primarily refers to defence attorneys and state prosecutors, it is submitted that the statement is equally applicable to legal practitioners who specialise in civil litigation. However, Erasmus does not state which mechanisms should be employed. It is submitted that legal education at tertiary level is a good place to start. In this regard, law schools employ primarily the Socratic and case-dialogue teaching methodologies in all years of academic study.[88]

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85 Griesel *et al* 2009 *Higher Education South Africa & The South African Qualifications Authority* 1.

86 See heading 1.

87 Erasmus "Ensuring a Fair Trial: Striking the Balance Between Judicial Passivism and Judicial Intervention" 2015 3 *Stellenbosch Law Review* 662 674.

88 See Cambridge Dictionary "Socratic" (2020) https://dictionary.cambridge.org/dictionary/english/socratic (accessed 2020-12-10); Sullivan et al *Educating Lawyers*; The Carnegie Foundation for the Advancement of Teaching 4; Welgemoed *Integration of Clinical Legal Education With Procedural Law Modules* 179–192 and Wizner "The Law School Clinic: Legal Education in the Interests of Justice" 2002 70(5) *Fordham Law Review* 1929 1930 in this regard. The Socratic teaching methodology has been said to be very effective as far as the training of attorneys is concerned. It involves training by way of classroom sessions with

These methodologies mainly entail students attending lectures while undergoing learning in a passive manner. It is submitted that, although these methodologies do hold value as far as acquiring knowledge is concerned, something additional is required to prepare students for practice. In this regard, Huber[89] stated that students who merely listen to law teachers in a classroom setting are not at all sufficiently provided with a ready and sound knowledge of the law.[90] He suggested that students should get practice in disputing existing legal rules and doctrines, and this should permeate through and continue for the duration of the students' academic training.[91] This will prepare the students' minds and modes of expression, and equip them with an appropriate manner of practising public speaking, which is important in the case of litigation.[92] These aspects are central to the successful discharge of duties by jurists.[93]

Although Huber focused on rhetoric and public speaking, which is a pivotal skill that law students should develop, it is submitted that students will not be able to "discharge their duty successfully" without applying, through practical skills, the law that they have acquired. Knowledge of substantive legal principles is important, but it is submitted that it is more important to know how to go about enforcing such legal principles in order to reach a specific outcome desired by a client. Legal procedure now becomes important, and students cannot become familiar with procedure and the intricacies thereof if they do not practise it at university level, perhaps at their moot court or at the law clinic. This involves specifically the procedural-law modules. The Preamble of the LPA provides that the legal profession must be accountable to the public by providing high-quality legal services. It is submitted that this will be achieved with greater success should legal education be adapted in order to instil principles and skills in law students that will shape them into professional legal practitioners for the future. Law schools must therefore also focus on the future of law students after graduation when considering appropriate teaching methodologies for these modules – in particular, the procedural subjects. Parmanand believes that law schools should become more proactive.[94] To achieve this, law schools should demand that all students, from their first academic year onwards, become involved with clinical legal training. Students can achieve this, *inter alia*, by working in the offices of attorneys and/or advocates. They could also engage in performing clerking duties for judges or magistrates during their

very little or no practical sessions. The case-dialogue teaching methodology, also referred to as the Langdellian methodology, in essence, involves students reading appellate cases to determine what judgments the courts have reached in the past and present, as well as to predict what their judgments might be in future.

89 See Van der Bergh "Book Reviews: *De Ratione Juris Docendi & Discendi Diatribe Per Modum Dialogi*, by Ulrich Huber" 2011 128(2) *South African Law Journal* 381 382. Ulrich Huber is described as an outstanding Roman-Dutch jurist and an exceptionally good law teacher.

90 Domanski 2011 *Fundamina* 52.

91 *Ibid.*

92 *Ibid.*

93 *Ibid.*

94 Parmanand "Raising the Bar: A Note on Pupillage and Access to the Profession" 2003 2 *Stellenbosch Law Review* 199 202.

vacations.[95] As an alternative, Parmanand innovatively suggests that law schools could implement the whole pupillage curriculum as a final-year course, which should be set as a prerequisite for the law degree.[96] It is submitted that the learned author is correct in stating that law schools should be more proactive. Whether it will be logistically possible for a university law clinic to train additional students, apart from the students enrolled for the clinical course, is more challenging. It is also not certain whether members of the legal profession will have the necessary infrastructure and/or time to host students for shadowing purposes. It may also not be possible to provide legal training at their respective offices or other venues. Whatever the case may be, it is submitted that, while students are involved in clinical work, even first-year students will be able to learn more about procedural law and how to enforce the law. However, it will not be an easy task since first-year students will not know the specific legal principles that must be enforced as they would not have studied the theory yet. University law clinics generally only offer a module in clinical law in the final academic year. It is then that students perform practical work at the law clinic for the first time, either in a live client-student setting, or as part of simulations.[97] Although this module is an important one as far as legal practice is concerned, two problems are apparent. First, the module is not compulsory at all universities,[98] which means that not all students are exposed to legal practice before graduation. Secondly, the module is only offered for one year, and sometimes for less than a year. What impacts negatively on the academic year is the start and end times of the official university academic programmes, student recess periods and public holidays. It would therefore be desirable if students' exposure to legal practice could be prolonged or enhanced by integrating legal practice with their conventional academic curriculum.

3 2 A theoretical basis supporting the integration of clinical legal education in teaching procedural law

The theoretical cornerstone, argued in this article to support the provision of more practical training to law students, is the concept of transformative constitutionalism, which should impact the content of, and methodologies used to present procedural-law modules to law students.

Transformative constitutionalism denotes a change brought about in a structured manner to better things by way of adherence to a constitutional system of government.[99] In the South African context, transformative constitutionalism is a process, not an event that has taken place and been

95 *Ibid.*

96 *Ibid.*

97 Hall *et al* 2011 *International Journal of Clinical Legal Education* 33; Bloch "A Global Perspective on Clinical Legal Education" 2011 4 *Education and Law Review* 1 3; Du Plessis and Dass "Defining the Role of the University Law Clinician" 2013 13(2) *South African Law Journal* 390 395; Welgemoed *Integration of Clinical Legal Education with Procedural Law Modules* 24, 52, 151 and 293.

98 In this regard, see Holness 2013 *Potchefstroom Electronic Law Journal* 328 333.

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

completed.[100] It is a transformative process in itself.[101] This is significant, especially considering South Africa's former apartheid regime. During the apartheid regime, the law was based on a culture of authority and coercion.[102] The apartheid regime was founded upon parliamentary sovereignty.[103] What Parliament stated was law, without any justification needed.[104] However, with the advent of the constitutional dispensation, a major change occurred, namely a move away from a culture of authority and coercion towards a culture of justification.[105] Contrary to the apartheid regime where actions did not have to be justified, all government actions are now expected to be justified.[106] To illustrate the importance of such justification for the purpose of this article, it is necessary to discuss briefly the impact that transformative constitutionalism should have on the law, as well as how it should be instilled in law students as far as the procedural-law modules are concerned.

It has been stated before that the South African civil-law tradition had conceptual clarity.[107] From this, general legal principles could be deduced – principles that would apply to specific scenarios.[108] This is apparently different from the casuistic English common law.[109] However, the difference has not been apparent. Instead, a manner of formalised legal reasoning was developed, immobilising the flexibility, adaptability and fairness of the civil-law system.[110] A formal manner of reasoning, or a conservative approach, is confined to a purely textual interpretation of a particular legal text.[111] The effect was that substantive legal reasoning, as the basic underlying corrective measure to ensure that formalised rule and concepts fulfilled their original purpose, was not being applied at all.[112] A substantive manner of reasoning invokes a contextual and purposive interpretation of a particular text, taking into account, *inter alia*, the background of a specific scenario.[113] The advent of the Constitution however brought change. The Constitution is a protective measure to ensure that substantive legal reasoning is considered when all legal principles are considered.[114]

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100 Mbenenge 2018 *Speculum Juris* 2; Langa "Transformative Constitutionalism" 2006 3 *Stellenbosch Law Review* 351 354.

101 *Ibid.*

102 Mureinik "A Bridge to Where? Introducing the Interim Bill of Rights" 1994 (10) *South African Journal on Human Rights* 31 32.

103 Mureinik 1994 *South African Journal on Human Rights* 32.

104 *Ibid.*

105 Mureinik 1994 *South African Journal on Human Rights* 32; Langa 2006 *Stellenbosch Law Review* 353; Klare "Legal Culture and Transformative Constitutionalism" 2017 14(1) *South African Journal on Human Rights* 146 147.

106 Mureinik 1994 *South African Journal on Human Rights* 32.

107 Froneman "Legal Reasoning and Legal Culture: Our 'Vision of Law'" 2005 16 *Stellenbosch Law Review* 3 17.

108 *Ibid.*

109 *Ibid.*

110 *Ibid*.

111 Froneman 2005 *Stellenbosch Law Review* 6.

112 Froneman 2005 *Stellenbosch Law Review* 17.

113 Froneman 2005 *Stellenbosch Law Review* 6.

114 Froneman 2005 *Stellenbosch Law Review* 17.

It therefore appears that the Constitution does not afford the courts any choice other than to apply substantive reasoning.[115] A formalised system of law would not regard such an approach as proper law.[116] This clearly shows the impact that transformative constitutionalism has – or should have – on the legal system in South Africa, including both substantive law and adjectival or procedural law. It is consequently submitted that the traditional teaching and learning methodologies, as far as procedural-law modules are concerned, should be subjected to change, based on substantive rather than conservative reasoning. The challenged background of education in South Africa, the notion of development of people as informed by the Constitution, and the spirit of the LPA are all important factors in motivating such change. Moreover, law teachers will have to take into account that millennial students are in need of extensive justification for whatever tasks they are required to perform or complete.[117] The rationale behind each strategy and task they have to perform therefore becomes important. In addition, centennial students have been born into a technology-rich world and prefer the use of technology in teaching-and-learning experiences.[118] Law teachers can therefore no longer ignore changes to the teaching-and-learning environment. Such changes will contribute towards the development of students and society as a whole.

Froneman advocates that the study and practice of law is a practical discipline aimed at solving practical issues.[119] Practising law often requires instantaneous decisions. There is no time to postpone conclusions.[120] According to Froneman, when practising law, decisions are made by a process that involves the following:[121]

a) an analytical element, i.e., the use of language to systemise and make sense of the various areas of legal disciplines;
b) an empirical element, i.e., what is happening in practice, how the law is being applied and what is happening in the courts; and
c) a normative element, i.e., the justification for a particular principle that is being applied.

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115 Also see Froneman 2005 *Stellenbosch Law Review* 17 and Le Roux "The Aesthetic Turn in the Post-Apartheid Constitutional Rights Discourse" 2006 1 *Tydskrif vir die Suid-Afrikaanse Reg* 101 112.

116 Froneman 2005 *Stellenbosch Law Review* 17.

117 Laskaris "How to Engage Millennials: 5 Important Moves" (2016) https://www.efrontlearning.com/blog/2016/03/5-strategies-to-engage-the-millennials.html (accessed 2023-06-20); Welgemoed *Integration of Clinical Legal Education With Procedural Law Modules* 391.

118 Meola "Generation Z News: Latest Characteristics, Research and Facts" (2023) *Insider Intelligence* https://www.insiderintelligence.com/insights/generation-z-facts/ (accessed 2023-06-20); Francis and Hoefel "'True Gen': Generation Z and its Implication for Companies" (12 November 2018) https://www.mckinsey.com/industries/consumer-packaged-goods/our-insights/true-gen-generation-z-and-its-implications-for-companies (accessed 2023-06-20); TTI Success Insights "10 Defining Characteristics of Generation Z" (16 January 2019) https://blog.ttisi.com/10-defining-characteristics-of-generation-z (accessed 2023-06-20); McKinsey & Company "Who is Generation Z?" (March 2023) https://www.psychologytoday.com/za/blog/nudging-ahead/202012/who-is-generation-z (accessed 2023-06-20).

119 *Ibid.*

120 *Ibid.*

121 Froneman 2005 *Stellenbosch Law Review* 15–16.

These elements apply to legal education in general, including the teaching and learning of the procedural-law modules. The "stock-in-trade" culture, as indicated by Froneman, is therefore also applicable to teaching and learning. Law teachers must question the direction in which the teaching and learning of these modules is heading.[122] Where needed, innovative steps should be introduced in providing programmes to promote access to justice and high-quality legal services. Here, law teachers involved in promoting CLE and practical legal training would play a role in getting students, for example, to draft pleadings in live sessions at law clinics and oversee the quality thereof. Transformative constitutionalism plays a pivotal role in this exercise in that a critical pedagogy is required, i.e., a methodology where students can be taught to look at the law, as it currently is, and critically evaluate the *status quo* in light of the values of the Constitution.[123] Turning to students drafting pleadings, it is especially in cases involving motion-court applications where students often rely on constitutional rights and values in promoting their clients' interests. In this regard, Zitske suggests that, because the Constitution is the supreme law of South Africa, it applies to all laws, thus promoting transformative constitutionalism. There is a constitutional duty on all law teachers to conduct teaching and learning in a transformative manner.[124] This argument is fully supported in this article and forms the basis of the plea for change as far as the teaching and learning of procedural-law modules are concerned. It aligns with the constitutional spirit of justification. Law teachers of procedural-law modules are encouraged to use such justification as a good reason for new teaching and learning methods. This involves introspection regarding what is taught, and how it is taught, as well as providing justification to students as to why study content is being taught.[125]

3 3 The importance of an integrated approach to the teaching and learning of procedural-law modules

3 3 1 The importance of Clinical Legal Education

In light of the theoretical basis of CLE, it goes without saying that students will need to be knowledgeable and skilled in legal procedure and the principles of evidence to promote the spirit and purport of the Constitution and the LPA in legal practice. As stated by Froneman,[126] the study and practice of law is a practical discipline. It is consequently argued in this

[122] Zitske 2014 *Acta Academica* 54.

[123] See Zitske 2014 *Acta Academica* 55 in this regard. This approach is an answer to the Critical Legal Studies theory. See Legal Information Institute "Critical Legal Theory" (undated) https://www.law.cornell.edu/wex/critical_legal_theory (accessed 2020-03-29) with regard to Critical Legal Studies (CLS). In short, this theory promotes the point of view that the law is intertwined with social issues. CLS theorists believe that the law supports the interests of those who created the law. They state that law is in favour of the historically privileged members of society but is a disadvantage to underprivileged members.

[124] Zitske 2014 *Acta Academica* 55.

[125] *Ibid.*

[126] See heading 3 2.

article that, by presenting the procedural-law modules by way of CLE, the students will experience a much more practical approach to these modules, as they should be. Generally, legal procedure encountered in practice, does not appear to take a theoretical form, but rather a practical one. By subjecting students only or mainly to lectures based on theoretical presentations, law schools are not doing students justice in preparing them for legal practice. It is consequently argued that CLE is an appropriate methodology, for it combines the teaching of theory with practice, which is foundational to training law students for legal practice. It does not mean that law schools need to choose between theory and practice, as both disciplines are important and complement each other.[127] It simply means that the one must not exist without the other. As far as procedural-law modules are concerned, students should not merely study abstract doctrinal principles that may be confusing and difficult to understand, but should also practise legal procedure, including, for example, practically orientated tutorials, mock trials, moot courts or undertaking duties at a university law clinic.

3 3 2 The need for a new approach to teaching procedural-law modules

Cappelletti convincingly argues that legal education should not follow a traditional, easy and abstract approach.[128] As motivation, he states: "[T]he law is a tool for the pursuance of social policies and therefore, the role of a legal practitioner, includes a responsibility towards such social policies."[129] Therefore, the law must be seen and taught as an instrument for ordering and changing society.[130] In this regard, Cappelletti states that professional ethics and clinical education must be included in the law curriculum and, in the process, the connection between clinical education, legal aid and other public legal services needs to be emphasised.[131] His argument is founded on the fact that the law consists not only of norms and doctrines, but also of processes, stakeholders and institutions that create and operate the legal system.[132] Legal education therefore needs to focus on such processes, stakeholders and institutions in order to evaluate their actions in light of values such as freedom and equality.[133] Cappelletti's argument further strengthens the importance of human elements in the legal system. He believes that, wherever possible, the law should be used as an instrument to improve human lives. The learned author further states that law clinics and CLE are important in this regard.[134] He calls upon all law schools to sponsor a system in terms of which final-year law students are encouraged to work at law clinics in return for academic credit.[135] Although this system is currently

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127 Parmanand 2003 *Stellenbosch Law Review* 202.

128 Cappelletti "The Future of Legal Education: A Comparative Perspective" 1992 8 *South African Journal on Human Rights* 1 11.

129 *Ibid.*

130 *Ibid.*

131 *Ibid.*

132 *Ibid.*

133 *Ibid.*

134 Cappelletti 1992 *South African Journal on Human Rights* 12.

135 *Ibid.*

in place in many law clinics in South Africa, CLE is not compulsory at all law schools. It is submitted that it would be beneficial if CLE could become compulsory at all law schools. That will ensure exposure to legal practice for all law students. This will also have an impact on how students experience the practical application of the procedural-law modules in a practical environment. It will also influence how students perceive procedural justice against a background of the values enshrined in the Constitution.

It is not only Cappelletti who calls for a new approach to the teaching and learning of the law. It is submitted that a novel approach to teaching law, more specifically, the procedural-law modules in the context of this article, can be inferred from the National Qualifications Framework (NQF). The LLB degree is currently registered at NQF level 8.[136] The South African Qualifications Authority (SAQA) exit level outcomes for the LLB degree are, *inter alia*, as follows:[137]

a) the learner will have acquired a coherent understanding of, as well as the ability to critically analyse, fundamental legal and related concepts, principles, theories and their relationship to values;
b) the learner will have acquired the ability to communicate effectively in a legal environment by means of written persuasive methods and sustained discourse;
c) the learner can solve complex and diverse legal problems in creative, critical, ethical and innovative ways;
d) the learner is able to work effectively with colleagues and other role players in the legal process as a team or group and contribute significantly to the output presented by such a group;
e) the learner is able to manage and organise professional activities in the legal field in a responsible and effective manner;
f) the learner has sufficient skills and knowledge to participate as a responsible citizen in the promotion of a just society and a democratic and constitutional state under the rule of law; and
g) the learner has acquired legal skills and knowledge in order to solve problems responsibly and creatively in a given legal and social context.

With the focus on procedural-law modules, these outcomes imply something more than mere legal education in the traditional sense, as students will not acquire skills and knowledge merely from studying theory in textbooks and other relevant study material. Students must therefore be afforded the opportunity to practise effectively what they have studied in the classrooms or elsewhere in order to acquire such skills. Also, because the LLB qualification is listed as generic, i.e., LLB degrees from various universities are not all required to be identical, innovation in curricular design can be facilitated.[138] Law schools can therefore devise new ways in which to teach

[136] Whitear-Nel *et al* 2015 *Fundamina* 244.
[137] South African Qualifications Authority "Registered Qualification: Bachelor of Laws" (undated) http://regqs.saqa.org.za/viewQualification.php?id=22993 (accessed 2023-06-20). Also see Swanepoel *et al* 2008 *Journal for Juridical Science* 101 and McQuoid-Mason 2006 *Obiter* 167–168 in this regard.
[138] Whitear-Nel *et al* 2015 *Fundamina* 244.

procedural-law modules. Taking into consideration the above-mentioned SAQA outcomes, it is essential that law schools consider more practical ways to better prepare students for legal practice when teaching procedural-law modules. Furthermore, the mentioned outcomes show a similarity to the focus of CLE, which the MacCrate Report describes as "[w]hat lawyers need to be able to do".[139] As the law of procedure and evidence is the spool around which the functioning of the law is running, it is submitted that it should be taught by way of CLE. This will ensure that graduates are competent in putting substantive law in motion when confronted with legal problems in legal practice. It will also ensure that the SAQA outcomes, highlighted above, are complied with as far as the procedural-law modules – and CLE – are concerned.

In the United States of America, the MacCrate Task Force was established following the investigations of their Bar Association into the quality of their candidates applying for admissions. Part of their investigations had been to examine the extent to which law schools were really preparing law students for entry into the profession.[140] Their report was published in 1992 under the title *Legal Education and Professional Development – An Educational Continuum*, also referred to as *The Report of the Task Force on Law Schools and the Profession: Narrowing the Gap*.[141] The latter title stated the problem, namely that there was an existing gap between what is taught at law schools and what is actually experienced in legal practice. The Task Force made specific recommendations with a view to improving legal education and professional development of students.[142] Within the confines of "professional development" in the said report, the following aspects are of special significance to ensure that the teaching of lawyering skills and professional values is effective:[143]

a) the development of concepts and theories underlying skills and values being taught;
b) the opportunity for students to perform lawyering duties, followed by feedback and self-evaluation; and
c) reflective evaluation of the performance of the students by a qualified assessor.

What relevance does this have for the teaching of procedural-law modules? First, aspects, like lawyering skills and professional values, mentioned by the MacCrate Task Force, are all part of CLE training.[144] Secondly, it shows that, outside of South Africa, there are also efforts being made to increase the practical skills training of law students by way of experience. The MacCrate Task Force suggested that these skills and values can best be enhanced by

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139 Du Plessis "Forty-Five Years of Clinical Legal Education in South Africa" 2019 25(2) *Fundamina* 12 21.

140 Chavkin "Experience is the only Teacher: Meeting the Challenge of the Carnegie Foundation Report" (2007) http://classic.austlii.edu.au/au/journals/LegEdDig/2007/48.html.

141 Engler 2001 *Clinical Law Review* 110 113.

142 Chavkin http://classic.austlii.edu.au/au/journals/LegEdDig/2007/48.html (accessed 2019-06-20); Morgan 2011 *GW Law Faculty Publications & Other Works* 19.

143 Chavkin http://classic.austlii.edu.au/au/journals/LegEdDig/2007/48.html.

144 Chavkin http://classic.austlii.edu.au/au/journals/LegEdDig/2007/48.html.

way of a student's active involvement in the clinical programme of a university.[145] It stated the following:[146]

> "Clinics have made, and continue to make, a valuable contribution to the entire legal education enterprise. They are a key component in the development and advancement of skills and values throughout the profession. Their role in the curricular mix of courses is vital."

The aforementioned substantiates the argument in this article that CLE is the appropriate methodology by which practical modules like procedural-law modules (in which many of these skills and values find application) can and should be taught.

After the publication of the MacCrate Report, the Clinical Legal Education Association in the United States of America, better known as CLEA, appointed a joint task team of clinicians with regard to the implementation of the report's recommendations.[147] Briefly stated, this task team proposed that students undergo classroom training, as well as live-client representation or simulated activities.[148] It is submitted that the proposals of this task team resonate with the focus of this article. Classroom sessions are important for imparting foundational theoretical knowledge to students, which they can use as the basis and background for the other more practical tasks and activities that they will be required to do. The importance of classroom sessions is compatible with the argument that theory and practice should not be separated when using CLE as teaching methodology. This argument leads to a further discussion about experiential learning.

3 3 3 Experiential learning

Experiential learning[149] entails the integration of theory and practice by combining the foundational knowledge of students, acquired during classroom sessions, with the actual experience that they may acquire during live-client sessions at law clinics, at law firms or during simulated activities.[150] Students can gain experience by assuming the role of legal practitioners or observing how legal practitioners practise law.[151] In doing so, students are active in contributing to their own education, which is fully underscored by the philosophy of constructivism. In short, constructivism entails student learning by way of new experiences, which learning adds to the knowledge they already possess.[152] Contrary to the classroom component, student learning, as part of experiential learning, is active and students and law teachers engage on a regular level.[153] It is submitted that

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145 Morgan 2011 *GW Law Faculty Publications & Other Works* 20; Engler 2001 *Clinical Law Review* 114.

146 Engler 2001 *Clinical Law Review* 114.

147 Engler 2001 *Clinical Law Review* 121.

148 Engler 2001 *Clinical Law Review* 121–122.

149 See heading 2, where the concept of experiential learning was briefly mentioned.

150 Bodenstein (ed) *Law Clinics and the Clinical Law Movement in South Africa* (2018) 229.

151 Bodenstein (ed) *Law Clinics and the Clinical Law Movement in South Africa* 229.

152 Quinot *et al* 2015 *Stellenbosch Law Review* 29 35; Welgemoed *Integration of Clinical Legal Education With Procedural Law Modules* 63.

153 Bodenstein (ed) *Law Clinics and the Clinical Law Movement in South Africa* 230.

this is the best method for teaching and learning in procedural-law modules. For example, in teaching civil procedure, students can be instructed to attend practical sessions at attorneys' firms or at law clinics during which they observe attorney-client consultations. During such consultations, students will be able to make educated decisions as to what type of questions to ask clients for purposes of determining *locus standi*, causes of action and jurisdiction, as well as the applicable issues that need to be included in legal documents such as letters of demand, summonses and particulars of claim, as well as other documents. During tutorial sessions and/or reflective exercises, the teacher can ascertain the students' progress in this regard, as well as assist them with anything on which they need clarification.

The majority of clinicians are in agreement that the most important objectives of CLE are to teach lawyering skills and social justice to students.[154] The integration of the context of legal theory and lawyering skills into legal education can play an important role in motivating students to develop a passionate attitude towards other people, towards the craft of practising law and to seeking justice.[155] It is submitted that this passion and commitment is of crucial value as far as the role of transformative constitutionalism in legal education and legal practice is concerned. It may also move students to be amenable to render *pro bono* legal services for people who are not able to afford legal representation, but who are in definite need of legal assistance, especially where their fundamental rights are affected. In order to maintain students' passion for the practice of law and the social good,[156] opportunities, as part of legal education, need to be created where students can interact with people.[157] The most plausible way to achieve this is the live-client method.[158] Experiential learning of this nature will make students more familiar with people and their circumstances, social institutions, the tasks that legal practitioners perform, legal doctrines behind the performance of such tasks[159] and legal procedure.[160] Students will be able to assume responsibility for their actions in representing members of the public,[161] which responsibility plays a significant role in the creation of accountable legal practitioners, as envisaged by the LPA.[162] For example, in teaching criminal procedure students can be directed to attend court proceedings with legal practitioners to see how a bail application is

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154 Bodenstein (ed) *Law Clinics and the Clinical Law Movement in South Africa* 230. Also see Stuckey Barry, Dinerstein, Dubin, Engler, Elson, Hammer, Hertz, Joy, Kaas, Merton, Munro, Ogilvy, Scarnecchia and Schwartz *Best Practices for Legal Education: A Vision and a Road Map* (2007) 84.

155 Bodenstein (ed) *Law Clinics and the Clinical Law Movement in South Africa* 230; Stuckey, *et al Best Practices for Legal Education* 84.

156 Stuckey *et al Best Practices for Legal Education* 84.

157 Bodenstein (ed) *Law Clinics and the Clinical Law Movement in South Africa* 230.

158 *Ibid*. However, see heading 3 3 5; the live-client model is not always practical to use for the learning and teaching of procedural-law modules.

159 The doctrines of legal professionalism and ethical behaviour of legal practitioners are important in this regard.

160 Bodenstein (ed) *Law Clinics and the Clinical Law Movement in South Africa* 231.

161 See Bodenstein (ed) *Law Clinics and the Clinical Law Movement in South Africa* 235 and Stuckey *et al Best Practices for Legal Education* 195 in this regard.

162 See the Preamble of the LPA in this regard.

conducted. Students can thus gain an informed perception as to why certain questions are asked and what type of evidence is required for a person to be released on bail. Students will be placed in a position to learn what it means to perform services in the interest of the well-being of clients, as well as what it means to be a legal practitioner who ensures that, procedurally speaking, everything is done to promote access to justice and social justice. As mentioned before, students receive feedback from their supervisors and also have the opportunity to perform self-reflection as far as their efforts are concerned.[163]

3 3 4 Reflection

Self-reflection further emphasises self-directed learning, which the philosophy of constructivism underpins. Reflection plays a key role in lifelong learning.[164] The law-school experience should assist students to develop expertise in reflecting on what they have learned.[165] This will contribute towards students identifying the causes of both their successes and failures and using such knowledge to plan any future efforts to learn so as to improve continuously.[166] It is submitted that this may advance transformative constitutionalism. Having received the appropriate foundational background during classroom sessions, students should reflect on their practical performance and continuously ask themselves whether what they are doing is advancing social justice and improving the lives of their clients. In repeating this exercise of reflection, students get into the habit of doing so during and after every practical activity, with the result that reflection moves with them past law school and into legal practice. For example~~,~~ at some university law clinics, students may be in a position to learn how to operate digital data systems relating to clients and their cases. Teaching students how to use a digital system is part and parcel of transformative legal education, enabling them to embrace the demands of the Fourth Industrial Revolution when they enter legal practice. As students engage with digital systems in entering client data and client documentation, as well as document-generating software in creating legal documents, they are in a position to reflect on the benefits of such systems for their own education, as well as for their careers. They may, for example, discover how document-generating software can assist with the speedy and accurate drafting of legal documents, thus facilitating civil procedure in practice.[167] Should they, for example, enter legal practice after graduation, they will be in a position to transfer their new-found knowledge to law firms where digital systems are not yet implemented, thus assisting to modernise legal practice and the manner in which legal procedure and the handling of evidence are perceived and approached.

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163 Bodenstein (ed) *Law Clinics and the Clinical Law Movement in South Africa* 236.

164 Stuckey *et al Best Practices for Legal Education* 66.

165 *Ibid*.

166 *Ibid*.

167 As a side note, students should be reminded always to peruse the final document generated by document-generating software. They should be mindful that the responsibility for ensuring accurate legal documents always rests with the drafter of such documents.

3 3 5 Simulated activities

Although the live-client method is recommended, it will not always be possible to employ such a methodology. For this reason, simulations may also be beneficial in teaching skills and values. The use of simulations proves that teachers are increasingly making use of more active learning experiences.[168] Simulations are excellent exercises where the live-client model is not available, but where teachers nevertheless are looking for opportunities to introduce active learning in modules.[169] Simulations can be used as teaching tools for almost any activity in which legal practitioners may be involved,[170] and may include mock trials, moots, client consultations, negotiations, mediations and alternative dispute resolution, as well as drafting exercises based on real or simulated case scenarios.[171] The more authentic simulations are being presented, the more purposeful and effective they can be as far as teaching and learning is concerned.[172] Simulations should include topics from a variety of areas of law, including the law of property, law of succession, law of contract, law of delict, criminal law and law of persons and marriage. Some of these areas should even be combined in order to illustrate the complex nature of the law and that studying law should not be confined to compartments and silos.

3 3 6 Tutorials

Tutorial sessions are also part of the CLE teaching methodology that helps to place the knowledge gathered during classroom sessions, as well as the experience gained during practical sessions, into context, and to clarify any questions that students may have in that regard. A tutorial session is another opportunity to teach/train students in the same way that classroom sessions are being conducted. It should be used as an interactive manner to engage with students and to further develop their knowledge and skills. It is submitted that, during tutorial sessions, theory and practical experiences can be analysed, and important lessons from them should be highlighted. The topic of demand, in civil procedure, serves as a good example in this regard. During a classroom session, the relevance and importance of a demand can be explained and discussed. During a following practical or experiential session, the students can be required to draft a letter of demand, illustrating what they have learned from the classroom session, and whether they know how to apply such knowledge to a practical scenario. During a tutorial session, students must reflect on what they have learned, as well as identify their strengths and weaknesses in drafting a proper letter of demand. This will contribute to lifelong learning by students, enabling them to constantly review and expand their knowledge and skills with a view towards their entry into the working world and practical application of their procedural knowledge and skills to real-life events.

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168 Bodenstein (ed) *Law Clinics and the Clinical Law Movement in South Africa* 217.

169 *Ibid*.

170 Bodenstein (ed) *Law Clinics and the Clinical Law Movement in South Africa* 218.

171 Bodenstein (ed) *Law Clinics and the Clinical Law Movement in South Africa* 217.

172 Bodenstein (ed) *Law Clinics and the Clinical Law Movement in South Africa* 217. Also see Stuckey *et al Best Practices for Legal Education* 186 in this regard.

4 CONCLUSION

In this article, the importance of integrating CLE with the learning and teaching of procedural-law modules has been the focal point. As with all arguments, a foundation has to underpin such an integration. The foundation, advanced in this article, is a transformative approach to the learning and teaching of procedural-law modules. This simply means that, when approaching procedural-law modules, students must be taught in a manner that will make them more skilled to enter the working world after graduation. It is submitted that, for graduates wanting to enter legal practice, the effect of such training will be that they will have sufficient knowledge of procedure and evidence when entering practical vocational training. This will enable them not only to provide better access to justice to members of society, but also ensure that graduates are more employable, making them more attractive for employment to prospective employers. It is submitted that the same result is also attainable for graduates who may want to choose careers other than legal practice. They will learn to appreciate theory and to apply it practically, thus enabling them to think clearly through certain problem situations before deciding how to resolve them.

It is submitted that CLE is an approach that possesses all the qualities required for teaching procedural-law modules to students with the aim of preparing them more adequately for the working world. The CLE approach provides students with a firm theoretical foundation with regard to relevant concepts. Students also get the opportunity to engage with some of these concepts during practical sessions, either in a live-client or simulated scenario, depending on the preference of the particular law school. During tutorial sessions, students can further refine their skills by way of additional practical work and reflection. Reflection provides students with the opportunity to celebrate their successes, but also to learn from their mistakes. This leads to an improvement in student skills. It is furthermore submitted that, in light of the school system in South Africa,[173] such an approach to learning and teaching practical modules like procedural-law modules, is more than a necessity – it is a constitutional imperative.[174]

A noteworthy challenge is whether sufficient time in the curriculum could be found to teach procedural-law modules in this proposed manner.

[173] See heading 2 in this regard.
[174] See headings 3 2 and 3 3 for a detailed discussion in this regard.

THE RIGHT TO BASIC EDUCATION AS A PRIMARY DRIVER OF TRANSFORMATION IN SOUTH AFRICA: CONSIDERING COOPERATION

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SUMMARY

The South African Constitution provides expressly for the right to basic education, with a specific provision dedicated to such a right. The right to basic education is enshrined in section 29(1)(*a*) of the Constitution, which provides everyone with the right to a basic education. The constitutional right to basic education is viewed as a primary driver for effecting and advancing transformation in South Africa; the right to basic education is therefore considered through the lens of South Africa's transformative constitution. In analysing the transformative potential of the right to basic education, the article considers to what extent this transformative potential has been embraced with specific reference to compulsory and free basic education. The manner in which the Constitution and the South African Schools Act provides for compulsory and basic education is considered in relation to transformation. The article examines the effect of South Africa's history on the current education system. The role of the courts in providing content to the right is also analysed with reference to the incremental approach that has been adopted. At issue is also how we measure transformation and the availability of and access to data and information. The argument is made that cooperation and collaboration between different stakeholders and role players should be considered to be a key mechanism in advancing transformation to ensure that the transformative potential of the right to basic education is fully embraced.

1 INTRODUCTION

Considering South Africa's discriminatory past and the fact that the effects of apartheid are still visible today, the need for transformation is evident. When transformation takes place, it must be within this specific context.[1] The need

[1] Liebenberg *Socio-Economic Rights: Adjudication under a Transformative Constitution* (2010) 25; Klare "Legal Culture and Transformative Constitutionalism" 1998 14 *SAJHR*

for transformation is encapsulated in the nature of the Constitution, which is cognisant of the past, while at the same time looking to the future so as to enable transformation of the South African society.[2] The concept of "transformative constitutionalism" has thus formed part of South African jurisprudence and academic literature, with the South African Constitution clearly acknowledged as being transformative in nature.

Education plays a central role in every community, as it prepares and enables individuals to participate fully in their society.[3] The right to basic education is acknowledged as a precondition to the enjoyment of other rights, and is often referred to as a multiplier or empowerment right.[4] The right to basic education directly affects the majority of individuals and can play a central role in transforming society.[5]

With this in mind, this article focuses specifically on the transformative potential of the right to basic education in South Africa as enshrined in section 29(1)(*a*) of the Constitution of the Republic of South Africa, 1996 (Constitution), and considers to what extent its transformative potential has indeed been embraced in the South African legal context. Specific emphasis is placed on two components of the right to basic education – that is, the compulsory and free components.

The article provides a brief discussion of the interpretation of transformative constitutionalism in the broader sense, and then turns to examine the right to basic education as a primary driver of effecting transformation in South Africa. The interpretation of the right to basic education is analysed by focusing on the legal framework that recognises and regulates the right, and on how the courts have interpreted and given substantive content to the right to basic education. The article also questions the methods used in measuring transformation, and it reflects on the role of

146–188; Langa "Transformative Constitutionalism" 2006 3 *Stell LR* 351–360; Pieterse "What Do We Mean When We Talk About Transformative Constitutionalism?" 2005 20 *SAPL* 155–166; Moseneke "The Fourth Bram Fischer Memorial Lecture: Transformative Adjudication" 2002 18 *SAJHR* 309–315. See for e.g., *S v Makwanyane* 1995 3 SA 391 (CC); *Governing Body of the Juma Musjid Primary School v Essay NO* 2011 (8) BCLR 761 (CC).

2 Liebenberg *Socio-Economic Rights* 25; Klare 1998 *SAJHR* 149.

3 Liebenberg *Socio-Economic Rights* 245; Veriava and Coomans "The Right to Education" in Brand and Heyns *Socio-Economic Rights in South Africa* (2005) 57–83.

4 Committee on Economic, Social and Cultural Rights *General Comment No 13* (21st session, 1999) "The Right to Education (art 13)" UN Doc E/C.12/1999/10 par 1 (CESCR *General Comment No 13*); Lundy "Mainstreaming Children's Rights in, to and Through Education in a Society Emerging From Conflict" 2006 14 *International Journal of Children's Rights* 339 339; Beiter *Protection of the Right to Education by International Law: Including a Systematic Analysis of Article 13 of the International Covenant of Economic, Social and Cultural Rights* (2006) 17; Coomans "Content and Scope of the Right to Education as a Human Right and Obstacles to its Realization" in Donders and Volodin (eds) *Human Rights in Education, Science and Culture: Legal Developments and Challenges* (2007) 185–186; Coomans "In Search of the Core Content of the Right to Education" in Chapman and Russel (eds) *Core Obligations: Building a Framework for Economic, Social and Cultural Rights* (2002) 219; Malherbe "Education Rights" in Boezaart (ed) *Child Law in South Africa* 2ed (2009) 399.

5 Skelton *Strategic Litigation Impacts: Equal Access to Quality Education* (2017) 21.

cooperation and collaboration between different stakeholders and role players in advancing transformation.

2 A TRANSFORMATIVE CONSTITUTION

With the end of apartheid came the transition to a new constitutional democracy, which required not only political transformation but also the transformation of socio-economic circumstances. The Constitution was drafted in response to South Africa's discriminatory past and is commonly referred to as a transformative constitution or as being transformative in nature.[6] The constitutional project for transformation necessitates continuous change with the ultimate goal being to transform society for the better; it requires that the relationship between the past, present and future be acknowledged and that such acknowledgement be applied in order to further transformation.[7] Flexibility and adaptability should thus be allowed for within the normative framework provided by the Constitution.

In his seminal article on transformative constitutionalism, Klare writes that transformative constitutionalism can be understood as:

> "a long-term project of constitutional enactment, interpretation and enforcement committed … to transforming a country's political and social institutions and power relationships in a democratic, participatory, and egalitarian direction. Transformative constitutionalism connotes an enterprise of inducing large-scale social change through nonviolent political processes grounded in law."[8]

This transformative intention can be identified in the Postamble to the Interim Constitution,[9] which describes the Constitution as a bridge between the past and future. Building on the Interim Constitution, the Preamble to the Constitution identifies the specific historical context against which the Constitution was drafted. Thus, it highlights the importance of context and that the Constitution was adopted in response to South Africa's history of oppression and inequality.[10] The Constitution thereby clearly acknowledges not only the need for transformation but that the Constitution serves as the foundation for transformation to take place in South Africa.[11]

The Constitution itself however does not provide an exact method for achieving this transformed society.[12] There is also no identified method provided to measure transformation effectively. The Constitution does however provide guidance and instruction in the rights, values, and

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6 Preamble of the Constitution; Klare 1998 *SAJHR* 149; Langa 2006 *Stell LR* 354; Pieterse 2005 *SAPL* 155; Moseneke 2002 *SAJHR* 309–315.

7 Ngang "Human Rights and Socio-Economic Transformation in South Africa" 2021 22 *Human Rights Review* 349 355.

8 Klare 1998 *SAJHR* 150.

9 Constitution of the Republic of South Africa Act 200 of 1993; Mureinik "A Bridge to Where? Introducing the Interim Bill of Rights" 1994 10 *SAJHR* 31 31.

10 Pieterse 2005 *SAPL* 158; Moseneke 2002 *SAJHR* 313.

11 Pieterse "The Transformative Nature of the Right to Education" 2004 4 *TSAR* 700 701.

12 Liebenberg *Socio-Economic Rights* 29.

institutions that it enshrines and creates.[13] The legal system should therefore be aligned with the underlying values of the Constitution, and should embrace and advance substantive equality and human dignity.

The Constitution not only looks to the past but also the future and requires addressing the underlying causes of enduring and systemic inequalities.[14] Integral to achieving transformation is continued discourse and debate that is sensitive and cognisant of societal change and new developments that require legal reform to further the constitutional project.[15]

The need for transformation in the South African context is evident. Since the legacy of apartheid is still visible, especially in the education context, the current legal framework regulating the right to basic education must be examined to determine if it is aligned with the transformative potential of the Constitution and the right itself.

3 THE TRANSFORMATIVE POTENTIAL OF THE RIGHT TO BASIC EDUCATION

3 1 The legal framework

In analysing the applicable legal framework, it is clear that section 29(1)(*a*) of the Constitution explicitly recognises the right to basic education for everyone. The South African Schools Act[16] (Schools Act), building on the Constitution, is the relevant legislation that regulates the education system. The Schools Act acknowledges the transformative potential of the right to education and states in its Preamble that the new education system must redress past injustices in education and advance transformation. The courts have also confirmed that education is a primary driver of transformation and plays a crucial role in developing South African society.[17]

The formulation of section 29(1)(*a*) does not include internal limitations or qualifiers.[18] The provision does not include concepts such as progressive realisation and the availability of resources, and does not make the realisation of the right subject to reasonable legislative measures. This is in

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13 Liebenberg *Socio-Economic Rights* 29; Ngang 2021 *Human Rights Review* 357.

14 Liebenberg *Socio-Economic Rights* 28.

15 Liebenberg *Socio-Economic Rights* 28–29.

16 84 of 1996.

17 *Governing Body of Juma Musjid Primary School v Essay supra* par 42; *Khula Community Development Project v Head of the Department, Eastern Cape Department of Education* Eastern Cape Division of the High Court, Makhanda (unreported) 2022-03-22 Case no 611/2022.

18 Skelton "How Far Will the Courts Go in Ensuring the Right to Basic Education?" 2012 *SAPL* 392 396; Veriava and Skelton "The Right to Basic Education: a Comparative Study of the United States, India and Brazil" 2019 *SAJHR* 1 2; Kamga "The Right to Basic Education" in Boezaart (ed) *Child Law in South Africa* 2ed (2017) 520; Skelton *Strategic Litigation Impacts* 46; Cameron "A South African Perspective on the Judicial Development of Socio-Economic Rights" in Lazarus, McCrudden and Bowles (eds) *Reasoning Rights: Comparative Judicial Engagement* (2014) 323; Seleoane "The Right to Education: Lessons from *Grootboom"* 2003 7 *Law, Democracy & Development* 137 140.

contrast to other socio-economic rights in the Constitution[19] such as the right of access to adequate housing,[20] or access to health care services.[21] The Constitutional Court has fortunately confirmed in the oft-quoted paragraph from *Governing Body of the Juma Musjid Primary School v Essay NO (Juma Musjid)*[22] that, unlike some of the other socio-economic rights, which are formulated as an access to a right, the right to basic education is immediately realisable.[23] This means that the right to basic education is unqualified and not subject to the State implementing reasonable legislative and other measures to effect the progressive realisation thereof. The right can therefore only be limited in terms of the limitations clause in section 36 of the Constitution.

While the litigants in the *Juma Musjid* case found the judgment disappointing,[24] the clarity and guidance provided by Nkabinde J in the judgment on the interpretation of the right to basic education is significant. The judgment sets a legal precedent by confirming that the right is immediately realisable and unqualified. The judgment was the first time that the Constitutional Court explicitly provided clarity on the nature of the right to basic education. However, it was the strategic decision of the Legal Resources Centre to promote an interpretation of the right to basic education as being immediately realisable.[25] What has followed has been jurisprudence in the lower courts, in terms of which the *Juma Musjid* judgment has been relied on to give further content to the right to basic education, when dealing with specific infringements of the right. An incremental approach has subsequently been adopted by the courts, which have systematically given content to the right to basic education.[26] The incremental approach by the courts is discussed in more detail below with reference to free and basic education.

A basic reading of section 29(1)(*a*) of the Constitution reveals that the provision does not specifically refer to compulsory basic education. Nonetheless, it does aim to make basic education universally accessible as required by international standards.[27] Free basic education is also not guaranteed by the Constitution, which means that schools may charge fees.[28] However, a child's access to basic education may not be denied

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19 Skelton 2012 *SAPL* 395–396; Kamga in Boezaart *Child Law* 520; Proudlock "Children's Socio-Economic Rights" in Boezaart (ed) *Child Law in South Africa* 2ed (2017) 360 364; Liebenberg *Socio-Economic Rights* 244; Veriava and Skelton 2019 *SAJHR* 2; Cameron in Lazarus *et al Reasoning Rights* 322.

20 S 26 of the Constitution; Liebenberg *Socio-Economic Rights* 232; Cameron "Judicial Development" in Lazarus *et al Reasoning Rights* 322.

21 S 27(1)(*a*) of the Constitution.

22 *Supra*.

23 *Governing Body of Juma Musjid Primary School v Essay supra* par 37.

24 Skelton *Strategic Litigation Impacts* 66.

25 Skelton *Strategic Litigation Impacts* 66.

26 Skelton *Strategic Litigation Impacts* 66; Arendse "Slowly but Surely: The Substantive Approach to the Right to Basic Education of the South African Courts Post-*Juma Musjid*" 2020 20 *AHRLJ* 285 291.

27 Simbo "A Hexagon Right: The Six Dimensions of the Right to Basic Education" 2018 39 *Obiter* 126 127.

28 Devenish *A Commentary on the South African Constitution* (1998) 76.

owing to their financial circumstances.[29] These two main components of the right to basic education form the foundation of the analysis, which focuses on how these components effect and affect transformation.

3 2 Compulsory basic education

Section 3(1) of the Schools Act provides guidance on defining basic education in the form of compulsory school attendance. The section provides that all children must attend a school from the first school day in the year in which that learner reaches the age of 7 to the last school day in the year that the learner turns 15 or of the ninth grade – whichever of these two occurs first. Compulsory basic education is understood to be from grade one to grade nine, or from the age of 7 to 15. Basic education should, however, not be equated with compulsory education. In *Moko v Acting Principal of Malusi Secondary School*,[30] the Constitutional Court found that, "basic education" is not limited to compulsory education and thus extends to grade 12.[31]

While the availability of schools is central to realising the right to basic education, schools must be accessible. If basic education is compulsory, then it must be economically accessible; otherwise, compulsory education simply cannot stand.[32] Non-discrimination is also essential, as basic education must be accessible to all – especially to learners from vulnerable groups and those with disabilities.[33] A clear connection can be established between economic accessibility and non-discrimination. If school fees and indirect costs associated with basic education obstruct learners from education, this amounts to economic inaccessibility, discrimination against the poor and an infringement on the right to basic education. Physical accessibility is also required, and means that schools must, for example, be within a safe physical distance from children's homes.[34] If education is compulsory, children cannot be required to attend schools that are far away from their homes and that entail them having to undertake long and unsafe journeys in order to access their education.

In terms of section 3(3) of the Schools Act, every Member of the Executive (MEC) is compelled to ensure the availability of enough school places for every child in their province to attend school.[35] Section 3(4),

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29 Devenish *Commentary on the Constitution* 76; Veriava and Coomans in Brand and Heyns *Socio-Economic Rights in South Africa* 79; Joubert "The South African Schools Act" in Boezaart (ed) *Child Law in South Africa* 2ed (2017) 579; Skelton *Strategic Litigation Impacts* 47.

30 2021 (3) SA 323 (CC).

31 *Moko v Acting Principal of Malusi Secondary School supra* par 33.

32 Veriava and Coomans in Brand and Heyns *Socio-Economic Rights in South Africa* 70–71; Seleoane 2003 *Law, Democracy & Development* 145.

33 CESCR *General Comment No 13* par 6(b)(i) and (iii).

34 CESCR *General Comment No 13* par 6(b)(ii).

35 Department of Education *South African Schools Act, 1996 (Act No. 84 of 1996) and National Education Policy Act, 1996 (No. 27 of 1996): National Norms and Standards for School Funding* GN 2362 in *GG* 19347 of 1998-10-12; Department of Education *South African Schools Act, 1996 (Act No 84 of 1996): Amended National Norms and Standards for School Funding* GN 869 in *GG* 29179 of 2006-08-31; Abdoll and Barberton *Mud to Bricks: A*

however, elaborates on this obligation and provides for the situation in which an MEC cannot comply with section 3(3). Section 3(4) provides that the MEC must comply with the obligation as soon as possible by remedying the lack of capacity and reporting annually to the Minister of Basic Education. It seems that the legislation recognises the importance of availability of educational institutions, while at the same time acknowledging that this can be a challenge. However, it can be argued that this weakens the obligation on the MEC and lowers the standard of the duty on the State to ensure the availability of schools.

The availability and accessibility of schools is unfortunately not a new challenge and continues to pose a barrier to accessing education. Compulsory basic education requires the State to take positive steps in ensuring that children have access to education that is available, acceptable and adaptable.[36]

3 3 Free basic education

From a cursory reading of section 29(1)(*a*) of the Constitution, the constitutional commitment to basic education seems egalitarian, as the right to basic education is afforded to everyone. However, upon a closer reading, it becomes clear that there is no indication that the constitutional right to basic education can be equated to free basic education. The initial egalitarian reading then becomes somewhat questionable.[37]

The "free" component of the right to basic education brings into question the payment of school fees required in order to attend a school or educational institution. The charging of school fees and how it relates to the availability of free basic education is crucial, as fees have a direct impact on the accessibility of a child's education. Moreover, other indirect costs pose a further challenge to accessing basic education. Examples here include costs related to school uniforms, teaching and learning materials, and transport.

With free basic education not being constitutionally mandated, legislation must fill the gap to ensure that a child has access to basic education. The Schools Act does not provide for free basic education for everyone. However, free basic education for children is allowed, depending on their circumstances.[38] The legislation stipulates that schools are classified as "no-fee" or "fee-free" when no fees are charged at a school, or a learner can be exempted from the payment of school fees.[39] The aim of this article is not to

Review of School Infrastructure Spending and Delivery (2014) 5; Liebenberg *Socio-Economic Rights* 243.

36 CESCR *General Comment No 13* par 6.

37 Woolman and Bishop "Education" in Woolman and Bishop (eds) *Constitutional Law of South Africa* 2ed (RS 5 2013) 57–5.

38 See ss 5(3)(*a*), 39, 40, 41 of the Schools Act; Skelton *Strategic Litigation Impacts* 47.

39 See ss 1, 2, 39 of the Schools Act; Education Laws Amendment Act 24 of 2005; Woolman and Fleisch *The Constitution in the Classroom: Law and Education in South Africa 1994–2008* (2009) 192; Veriava and Coomans in Brand and Heyns *Socio-Economic Rights in South Africa* 68; Skelton *Strategic Litigation Impacts* 47; Woolman and Bishop "Education" in *CLOSA* 57–29.

establish the constitutionality of the current school-fee system,[40] but rather if and how the current legal framework affects transformative change.

Section 2 of the Schools Act specifies that "school fees" refers to any form of contribution that has a monetary nature, and which is paid by either a person or a body with regard to a learner's attendance or participation in a public school.[41] From a simple reading and interpretation of the definition, it seems that school fees are mainly concerned with a learner's ability to attend and participate in school. It is however not only direct school fees that pose a challenge; indirect fees related to education are an additional barrier.

In order to provide for basic education that is economically accessible, there are two ways in which children can attend school without having to pay school fees. The first is by means of no-fee schools as regulated by the National Norms and Standards for School Funding.[42] Schools in South Africa are categorised into quintiles depending on the funding received from the State. Schools in quintiles 1 to 3 form the lower quintiles and are categorised as no-fee schools. Schools in quintiles 1 to 3 receive a higher level of funding from the State compared to those in quintiles 4 and 5. Schools in quintiles 4 and 5 may accordingly charge school fees as they receive less funding from the State.

The second way in which provision is made for free basic education is by means of an exemption system. If parents cannot afford the school fees of schools in quintiles 4 and 5, they have the option of applying for an exemption in terms of section 39 of the Schools Act. This means that even though schools in quintiles 4 and 5 may charge school fees, they must also take into account the exemption system in their admission policy.[43] Section 39 of the Schools Act provides that schools must provide total,[44] partial[45] or conditional exemption.[46] Provision is also made for automatic exemption.[47]

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40 See for e.g., Veriava "The Amended Legal Framework for School Fees and School Funding: A Boon or a Barrier?" 2007 23 *SAJHR* 180–194; Roithmayr "Access, Adequacy and Equality: The Constitutionality of School Fee Financing in Public Education" 2003 19 *SAJHR* 382–429; Fleisch and Woolman "On the Constitutionality of School Fees: A Reply to Roithmayr" 2004 22(1) *Perspectives in Education* 111–123.

41 S 2 of the Schools Act.

42 Department of Basic Education *South African Schools Act, 1996 (Act No 84 of 1996): National Norms and Standards for School Funding (NNSSF)* GN 3964 in *GG* 49491 of 2023-10-12, comprising a notice of publication relating to schools that may not charge school fees.

43 Liebenberg *Socio-Economic Rights* 247.

44 See Department of Education *South African Schools Act, No. 84 of 1996: Regulations Relating to the Exemption of Parents from Payment of School Fees in Public Schools* GN 1052 in *GG* 29311 of 2006-10-18 (Exemption Regulations), specifically reg 6(3); Veriava and Coomans in Brand and Heyns *Socio-Economic Rights in South Africa* 68.

45 See specifically reg 6(4) of the Exemption Regulations; Veriava and Coomans in Brand and Heyns *Socio-Economic Rights in South Africa* 68.

46 S 39(2)(*b*) of the Schools Act; reg 5 of the Exemption Regulations provides for four categories of exemption: total, partial, conditional and no exemption. Veriava and Coomans in Brand and Heyns *Socio-Economic Rights in South Africa* 68.

47 Automatic exemption is available to a person who has the responsibility of a parent in respect of a child placed in, for example, a foster home, orphanage or a child who heads a household.

However, even though the Schools Act specifically provides for exemptions, obstacles remain – especially for indigent learners.[48] The process of applying for an exemption can be very time-consuming, complex and complicated, and can have a negative effect on the dignity and time of learners and families.[49] Discrimination against those who are granted exemptions is also a concern.[50] Some parents do not want to apply for an exemption, as they would have to admit to their poverty or make it known to others.[51] This ultimately results in families who qualify for exemptions not applying.[52]

It is clear that school fees can lead to making basic education inaccessible.[53] Not only are schools fees a financial obstacle to enjoyment of the right to basic education, but the secondary costs associated with education such as textbooks, uniforms, transport and stationery also pose an obstacle to education.[54] When one unpacks the reality that schools are reliant on fees, it is clear that wealthier communities are able to contribute higher fees, leading to better facilities and in most instances a higher standard of basic education. In contrast, poorer communities, where parents cannot afford to pay fees, will not be able to provide the same facilities and infrastructure.[55] This ultimately results in reinforcement of the racial inequalities that have been left by apartheid in schools.[56] While the legal framework aims to transform the education system, and provides methods to increase access to education, challenges still remain. The difficult relationship between the right to basic education and questions of compulsory and free basic education is also evident, as is the negative effect such difficulties have on advancing transformation. Compulsory basic education must be accessible economically and physically, and must not be discriminatory in nature; otherwise, the transformative project will be inhibited.

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48 Liebenberg *Socio-Economic Rights* 246; Veriava and Coomans in Brand and Heyns *Socio-Economic Rights in South Africa* 68–71; Veriava "The Amended Legal Framework for School Fees and School Funding: A Boon or a Barrier?" 2007 23 *SAJHR* 180 180; Roithmayr "Access, Adequacy and Equality: The Constitutionality of School Fee Financing in Public Education" 2003 19 *SAJHR* 382 382.

49 Liebenberg *Socio-Economic Rights* 246; Veriava and Coomans in Brand and Heyns *Socio-Economic Rights in South Africa* 68–71; Veriava 2007 *SAJHR* 180; Roithmayr 2003 *SAJHR* 382.

50 *Ibid*.

51 Roithmayr 2003 *SAJHR* 382; Woolman and Bishop "Education" in *CLOSA* 57–25; Seleoane 2003 *Law, Democracy & Development* 148.

52 Liebenberg *Socio-Economic Rights* 246; Veriava and Coomans in Brand and Heyns *Socio-Economic Rights in South Africa* 68–71; Veriava 2007 *SAJHR* 180; Roithmayr 2003 *SAJHR* 382.

53 Liebenberg *Socio-Economic Rights* 246.

54 Woolson and Bishop "Education" in *CLOSA* 57–27.

55 Veriava and Coomans in Brand and Heyns *Socio-Economic Rights in South Africa* 70; Liebenberg *Socio-Economic Rights* 246; Roithmayr 2003 *SAJHR* 383.

56 Veriava and Coomans in Brand and Heyns *Socio-Economic Rights in South Africa* 70; Roithmayr 2003 *SAJHR* 382.

4 MEASURING TRANSFORMATION

4 1 The importance of context

In considering the right to basic education and transformation, one cannot attempt to separate the current context from its legal and political history. Apartheid policies on basic education were used as a tool of oppression and to enforce a racist system of education.[57] Several challenges and barriers to a child's right to basic education continue to exist owing to the legacy of apartheid, and this impedes transformation.[58] The persistent consequences of apartheid in the quality divide between the previously White state schools and the formerly Black schools are still evident today.[59]

In examining the transformative nature of the right to education in South Africa, one must consider the specific contextual history of basic education to ensure a comprehensive understanding of the development of the right to basic education and its relationship to transformation.[60] The rationale for underscoring the historical context of South African basic education is two-fold. The first reason relates to how historical context can aid in identifying existing issues in basic education;[61] and the second assists in the development of new educational policies and systems.[62] This two-fold rationale should be understood in light of the transformative potential of the right to basic education, and aids in determining if (or to what extent) transformative change has taken place.

The Constitutional Court has also noted the importance of historical context in adjudicating the right to education in light of transformation, and that, while significant progress and transformation has taken place, this journey is not yet completed.[63] Langa CJ in *MEC for Education: KwaZulu Natal v Pillay*[64] stated that even though circumstances have improved somewhat, the disadvantage that has been engraved into our education system by apartheid is still visible.[65] In the seminal case of *Governing Body of Juma Musjid Primary School v Essay*, Nkabinde J made it clear that

> "[t]he significance of education, in particular basic education for individual and societal development in our democratic dispensation in the light of the legacy

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57 Mncube and Madikizela-Madiya "South Africa: Educational Reform: Curriculum, Governance and Teacher Education" in Harber (ed) *Education in Southern Africa* (2013) 166.

58 Skelton *Strategic Litigation Impacts* 47.

59 Skelton *Strategic Litigation Impacts* 47–48.

60 Wolhuter "History of Education as a Field of Scholarship and the Historiography of South African Education" in Booyse, Le Roux, Seroto and Wolhuter (eds) *A History of Schooling in South Africa: Method and Context* (2011) 1.

61 Wolhuter in Booyse *et al A History of Schooling in South Africa* 2.

62 Wolhuter in Booyse *et al A History of Schooling in South Africa* 2; See also Coetzee "Toekomsstudie as Opgawe vir die Historiese Opvoedkunde: Regverdiging en Motivering" 1989 9(1) *Suid-Afrikaanse Tydskrif vir Opvoedkunde* 36–43; Nkomo *Pedagogy of Domination: Toward a Democratic Education in South Africa* (1990) 291.

63 *Juma Musjid Primary School v Essay supra* par 38.

64 2008 (1) SA 474 (CC).

65 *MEC for Education v Pillay supra* par 123.

> of apartheid, cannot be overlooked. The inadequacy of schooling facilities, particularly for many blacks was entrenched by the formal institution of apartheid, after 1948, when segregation even in education and schools in South Africa was codified. Today, the lasting effects of the educational segregation of apartheid are discernible in the systemic problems of inadequate facilities and the discrepancy in the level of basic education for the majority of learners."[66]

It is therefore important that the transformative nature and potential of the right to basic education should be understood against the historical background and legacy of apartheid. It is crucial that the legacy of apartheid is acknowledged to assess how the current constitutional and legislative framework affects transformation but also how it is currently hindering the transformative project. This will aid in the process of identifying which challenges persist and why some methods have been successful in advancing transformation.

4 2 The role of the courts

As noted above, the courts have had to play a key role in interpreting the right to basic education. Civil society organisations such as the Legal Resources Centre, Equal Education, Equal Education Law Centre, Section27 and the Centre for Child Law have played an integral role in instituting litigation dealing specifically with infringements of the right to basic education. These judgments have, case by case, provided scope and content to the right to basic education. The judgments have confirmed that textbooks form part of the right to basic education,[67] as do furniture,[68] teaching and non-teaching staff,[69] and transportation, to name but a few examples.[70]

In relation to the delivery of textbooks, the court has held that textbooks are an essential component of the right to basic education, and that it is difficult to comprehend how the right to basic education can be realised without textbooks.[71] In another judgment, the court stated that, if the State fails to provide all the prescribed textbooks to even one learner, it would be in breach of its constitutional obligation.[72] The Supreme Court of Appeal[73] has ultimately also confirmed that the failure to provide textbooks would result in a violation of the right to basic education.[74]

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66 *Juma Musjid Primary School v Essay supra* par 42.

67 *Minister of Basic Education v Basic Education for All* 2016 (4) SA 63 (SCA).

68 *Madzodzo v Minister of Basic Education* 2014 2 All SA 339 (ECM).

69 *Centre for Child Law v Minister of Basic Education* [2012] 4 All SA 35 (ECG).

70 *Tripartite Steering Committee v Minister of Basic Education* 2015 (5) SA 107 (ECG).

71 *Section 27 v Minister of Basic Education* 2013 (2) SA 40 (GNP); Skelton *Strategic Litigation Impacts* 53; Veriava (2016) *SAJHR* 327.

72 *Basic Education for All v Minister of Basic Education* 2014 (4) SA 274 (GP) par 82; Veriava (2016) *SAJHR* 330.

73 *Minister of Basic Education v Basic Education for All* 2016 (4) SA 63 (SCA).

74 *Minister of Basic Education v Basic Education for All supra* par 46; Skelton *Strategic Litigation Impacts* 53.

With regard to transportation, the National Learner Transport Policy[75] was challenged in the case of *Tripartite Steering Committee v Minister of Basic Education.*[76] The court found that learners' access to schools is hindered by the inability to pay for transport or if schools are too far away geographically.[77] The court found that learner transport forms part of the right to basic education because without the aid of transport, learners' right to basic education cannot be realised.[78]

In *Madzodzo v Minister of Basic Education*,[79] the State's failure to provide essential school furniture was challenged.[80] The court found that a lack of appropriate furniture undermined the right to basic education and that the continued failure on the part of the State led to an enduring violation of the right to basic education.[81] The judgment makes it clear that furniture such as desks and chairs form part of the right to basic education.[82] This case was materially successful as the State was ordered to provide and deliver the necessary furniture to the schools, and R300 million was then allocated to address the furniture problem in schools. While problems with the State's compliance with court orders have unfortunately remained, major steps have been taken to improve the availability and acceptability of basic education in this instance.[83]

From these judgments, it becomes clear that this incremental approach is aligned with the view that the right to basic education is best interpreted substantively to further transformation. This is because a substantive approach allows for adaptability and the development of the right to basic education in a way that is sensitive to context and change. It also strengthens the relationship between education and substantive equality. A substantive interpretation that incorporates rights and values underlying the Constitution also recognises the right to basic education as an empowerment right, and acknowledges the interrelatedness of rights. The incremental approach is an excellent example of how the adjudication process and the law have been used as tools to advance transformation. Such an approach identifies practical needs or gaps in the State's policy or legislation, and relies on the court to provide clarity and legal judgment in this regard.

Recent judgments have also shown that the courts have continued to recognise the transformative potential of the right to education. Application of the transformative nature of the right can be used to further develop the right. As noted above, in *Moko v Acting Principal of Malusi Secondary*

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75 Department of Basic Education and Department of Transport *National Learner Transport Policy* GN 997 in *GG* 39314 of 2015-10-23.

76 2015 (5) SA 107 (ECG).

77 *Tripartite Steering Committee v Minister of Basic Education supra* par 19.

78 *Tripartite Steering Committee v Minister of Basic Education supra* par 66–67.

79 *Madzodzo v Minister of Basic Education* 2014 2 All SA 339 (ECM).

80 *Madzodzo v Minister of Basic Education supra* par 1–2.

81 *Madzodzo v Minister of Basic Education supra* par 20, 36; Skelton *Strategic Litigation Impacts* 53.

82 Skelton *Strategic Litigation Impacts* 53.

83 Skelton *Strategic Litigation Impacts* 59.

School, the Constitutional Court provided clarity to the meaning and interpretation of basic education. In reaching its judgment, the court refers specifically to the role that education plays in transformation. The court found that the exclusion of students in grades 10, 11 and 12 would be "an unduly narrow interpretation of the term ["basic education"] that would fail to give effect to the transformative purpose and historical context of the right".[84]

While the delivery of learning and teaching materials has been dealt with by courts on numerous occasions in relation to textbooks, the court in *Khula Community Development Project v Head of the Department, Eastern Cape Department of Education*[85] once again had to deal with the failure of the Eastern Cape Provincial Government to deliver and provide learning and teaching materials (specifically textbooks and stationery) to several schools in the province. The Department argued that a lack of financial resources was to blame, but the court made it clear that the bald claims of budgetary shortfalls by the State could not excuse the violation of the constitutional duty.[86] The court also underscored the transformative nature of the right to basic education and stated that it "provides the key mechanism through which society can be transformed".[87]

The role of the courts in advancing the right to basic education and transformation is crucial, with the court also clearly embracing the transformative potential of the right. Courts should be cognisant of the right's transformative nature and potential when holding government accountable for failing in its constitutional obligations.

4 3 Considering cooperation in advancing transformation

In order to determine if transformation has indeed taken place, the question of how to measure transformation should be addressed. It is submitted that transformation should be measured in two ways: normatively and practically. Determining transformation normatively requires an examination of the legal framework. However, without implementation of the legal framework, there is of course no true transformation. Transformation should therefore also be measured by assessing how and to what extent the right has been realised in line with its transformative potential. Determining transformation normatively and practically should be done in a complementary manner. It is also important to consider transformation not only within the education system, but also more broadly with reference to the transformation of South African society, as the one will lead to the other. The argument may be made that, normatively, transformation has indeed taken place, at least at

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84 *Moko v Acting Principal of Malusi Secondary School supra* par 32.

85 *Khula Community Development Project v Head of the Department, Eastern Cape Department of Education* Eastern Cape Division of the High Court, Makhanda (unreported) 2022-03-22 Case no 611/2022.

86 *Khula Community Development Project v Head of the Department, Eastern Cape Department of Education supra* par 47.

87 *Khula Community Development Project v Head of the Department, Eastern Cape Department of Education supra* par 49.

face value. The legal framework provided by the Constitution and legislation shows that great strides have been made to move away from the discriminatory education system under apartheid, and that transformation is incorporated in the legal framework.

One must however acknowledge that while it is clear that the courts have played an indispensable role in advancing the right to basic education, they are of course limited by the separation-of-powers doctrine. It is crucial that other branches of government come to the table in a significant way so as to fulfil their obligations. Unsurprisingly, however, challenges have been faced in this regard. This is illustrated, for example, when the implementation of court orders is delayed or progress is very slow, with follow-up or additional litigation required to ensure compliance. In many instances, therefore, the legal framework for the child's right to basic education is unfortunately not mirrored by reality in South Africa.[88] A disconnect is identifiable and visible between the normative and the practical. This is also demonstrable and identifiable in education jurisprudence.

To advance transformation and the realisation of the right to basic education requires knowledge of which challenges persist and also why. Access to data and information then becomes relevant in measuring transformation.[89] Cooperation and collaboration is required between different role players and stakeholders in the sharing of information. In some instances or sectors, transformation and progress is easily quantifiable. The data, numbers or statistics can, for example, indicate how many children have access to schooling, or textbooks. The inverse will also be clear, indicating which learners do not have access to these resources. The data should set out which challenges persist, and which have been successfully addressed. It is crucial, however, to acknowledge that in some instances transformation is not easily measured or quantifiable. It is not only about the physical, quantifiable aspects but also about the dignity of children and their lived realities. Measuring transformation should consequently not only consider what is easily quantifiable.

To ensure that a holistic view is provided, and that transformation is advanced, it is recommended that the various measures that can bring about transformative change be acknowledged – be it legislation, litigation, mobilisation, protest action, or advocacy and lobbying.[90] These measures make it clear that there are different role players and stakeholders, both in the public and private spheres, that can be significant in effecting change. It is however necessary that these different measures be employed by different stakeholders – both separately and together. Cooperation between different role players and stakeholders is critical in the advancement of

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88 Berger "The Right to Education Under the South African Constitution" 2003 103 *Columbia Law Review* 614 628; Krüger and McConnachie "The Impact of the Constitution on Learners' Rights" in Boezaart (ed) *Child Law in South Africa* 2ed (2018) 535; McConnachie and McConnachie "Concretising the Right to a Basic Education" 2012 129 *SALJ* 554 555–590; *Juma Musjid Primary School v Essay supra* par 42; Liebenberg *Socio-Economic Rights* 245; *MEC for Education: KwaZulu-Natal v Pillay supra* par 123.

89 Skelton *Strategic Litigation Impacts* 62.

90 Skelton *Strategic Litigation Impacts* 57.

transformation. By sharing information and data, issues can be more easily identified. The State should not view civil society organisations and other stakeholders as being on the opposite side, but should rather see them as a valuable resource that can aid in the transformative project.

5 CONCLUSION

The transformative potential of the right to basic education has been analysed with specific emphasis on the provision of compulsory and free education in terms of the South African legal framework. It is clear that the right to basic education has the potential to transform South African society and to serve as a primary driver to effect transformative change. While the legal framework embraces and advances the transformative nature of the right, it is unfortunate that this is not reflected in the current education system, as several challenges endure and hinder transformation. It seems that there is disconnect between the normative legal framework and how it plays out in real life. This has led to parties approaching the courts for relief to ensure that the State fulfils its constitutional obligations. The courts have thus played a central role in the interpretation of the right to basic education, thereby providing content to section 29(1)(*a*) of the Constitution. This is illustrated in the incremental approach, which demonstrates how the law can be used as a tool to effect transformative change, and once more emphasises the crucial role of the courts in embracing the transformative potential of section 29(1)(*a*).

The article has also considered the methods used to measure transformation in order to determine whether the transformative potential of the right to education has been embraced. It is argued that access to data and cooperation between different role players should be a central consideration. Measuring transformation is of course not an easy task, and it requires looking beyond the numbers and taking into account the lived realities of those who are denied their right to basic education. The State should value the role of civil society organisations that are directly involved with communities, and the information that they gather on enduring challenges. Cooperation between different role players and stakeholders can play a critical role in advancing transformation. It is accordingly recommended that, to advance transformation, access to information and data should be shared between role players and stakeholders in the education sector. This would also enable and advance various measures that result in the adoption of a holistic approach to advance transformation on different fronts.

AN APPRAISAL OF SELECTED SALIENT HUMAN RIGHTS BEING IMPACTED AND ALTERED BY ARTIFICIAL INTELLIGENCE (AI)

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SUMMARY

With the emergence and broad deployment of Artificial Intelligence (AI) in all sectors of the economy and human endeavours, this article accentuates the possibility that some fundamental human rights (guaranteed by most civilised nations) will be impacted and altered. To this end, the article appraises selected salient human rights being impacted by the deployment of AI, and which violate protected and guaranteed human rights, raising major concerns. The article assesses the theoretical grounding of human-rights law and its catalytic role in informing and shaping the emergence of new fundamental rights. Equally important, the article delves into pertinent legal issues emanating from the use of AI technologies and their potential threats to vulnerable new rights. While AI promises a significant positive impact on the economy and human development, there is a need to address pertinent concerns about the manner in which AI could impact existing human rights, and ultimately alter the form and content of these rights, resulting in the emergence of new fundamental rights.

1 INTRODUCTION

The key elements underpinning the theory of human rights are ethics, morality and the protection of individual freedoms.[1] Human rights are a set of

[1] Mantelero "AI and Big Data: A Blueprint for a Human Right, Social and Ethical Impact Assessment" 2018 34(4) *Computer Law & Security Review* 754–772.

fundamental rights and freedoms that are inherent, universal and inalienable to a human being.[2] According to Sen, human rights need not be seen in legal terms, but they serve to inform and inspire laws aimed at protecting such rights and freedoms. In this regard, Sen posits:

> "Human rights can be seen as primarily ethical demands. They are not principally 'legal', 'proto-legal' or 'ideal-legal' commands. Even though human rights can, and often do, inspire legislation, this is a further fact, rather than a constitutive characteristic of human rights."[3]

While successive industrial revolutions have contributed to the development of numerous technologies, they have also impacted the evolution of international law and, by extension, human rights law.[4] Transformation in the agriculture industry, the discovery of the steam engine and improvement in industrial operations gave rise to the formalisation and development of human rights theory.[5] Similarly, the revolutions in mass production, electricity, automation, aviation, radio and telecommunications came with various ramifications for the human rights front.[6] While the emergence and development of the modern industrial economy from the ancient economy came with its positives, it also had a negative impact on the pertinent fundamental rights enjoyed by human beings.[7]

Expansion in science and new technologies, mobile devices and biotechnology propelled the 3rd Industrial Revolution (3IR).[8] The current millennium is described as introducing the 4th Industrial Revolution (4IR) and has witnessed a massive expansion in scientific ideas and methods.[9] It is predominantly characterised by machine learning, big data, robots, drones, 3D printing, nanotechnology and artificial intelligence (AI), among others. The tone for the 5th Industrial Revolution has been set and will be dominated by advanced computing and the integration of people with collaborative

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2 Pocar "Some Thoughts on the Universal Declaration of Human Rights and the Generations of Human Rights" 2015 10 *Intercultural Hum Rts L Rev* 43.

3 Sen "Elements of a Theory of Human Rights" 2004 32(4) *Philosophy & Public Affairs* 315–56 http://www.jstor.org/stable/3557992 (accessed 2023-07-04).

4 Stearns *The Industrial Revolution in World History* (2020) 13.

5 Sima, Gheorghe, Subić and Nancu "Influences of the Industry 4.0 Revolution on the Human Capital Development and Consumer Behavior: A Systematic Review" 2020 12(10) *Sustainability* 4035.

6 Palattella, Dohler, Grieco, Rizzo, Torsner, Engel and Ladid "Internet of Things in the 5G Era: Enablers, Architecture, and Business Models" 2016 34(3) *IEEE Journal on Selected Areas in Communications* 510–527.

7 Mokyr, Vickers and Ziebarth "The History of Technological Anxiety and the Future of Economic Growth: Is This Time Different?" 2015 29(3) *Journal of Economic Perspectives* 31–50.

8 Mohajan "Third Industrial Revolution Brings Global Development" 2021 7(4) *Journal of Social Sciences and Humanities* 244.

9 Skilton and Hovsepian "The 4th Industrial Revolution Impact" 2018 *The 4th Industrial Revolution: Responding to the Impact of Artificial Intelligence on Business* 3–28.

robotic systems.[10] Many have also raised concerns about the existential threat posed by AI to human life.[11]

The Western scientific narrative claims the history, development and discovery of technology and AI for its own scientific community (led by Turing), while no credit is given to its origin in Africa and its diaspora, who have greatly advanced it. The narrative paints the predominantly white male technologists as innovators, while the rest are regarded as beneficiaries of their genius innovations.[12] Africa's contribution to and account of the origin and development of technology and its impact on human rights can be viewed from two angles: first, with the assertion that technology originated in the continent of Africa; and secondly, that the principles and values underlying the *Ubuntu* theory informed the development of human rights.[13]

All over the world, states are integrating and deploying AI systems within their apparatus as part of law enforcement, criminal justice, national security and the provision of other public services.[14] While these AI systems assist in service delivery, they also raise concerns about human-rights issues.[15] Algorithms are key, as they are used in forecasting and analysing large quantities of data to assess the risks and predict future trends.[16] The data in question may relate to crime hot spots, social media posts, communication data or the provision of social services, among others. To complement states' use of AI, corporate companies are at the forefront of manufacturing and producing AI systems, which in turn are traded to public authorities.[17]

To mitigate harms and damages arising from the production and deployment of AI systems, this duty entails that states should ensure that their laws respect human rights and that they are applied across all sectors, such as the management of state-owned enterprises, as well as research-and-development funding bodies, including the private corporate companies and vendor.[18] This includes requiring responsible business conduct, including robust due diligence before releasing new AI. A robust due diligence exercise entails overseeing the development and deployment of AI systems by assessing their risks and accuracy before they are brought to

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[10] Horn, Rosenband and Smith *Reconceptualizing the Industrial Revolution* (2020) https://www.tandfonline.com/doi/epdf/10.1080/07373937.2021.1875185?needAccess=true&role=button (accessed 2023-06-01).

[11] Nahavandi "Industry 5.0: A Human-Centric Solution" 2019 16 *Sustainability* https://doi.org/10.3390/su11164371 (accessed 2023-06-01).

[12] Siyonbola *A Brief History of Artificial Intelligence in Africa* (2021) https://noirpress.org/a-brief-history-of-artificial-intelligence-in-africa/ (accessed 2023-04-06).

[13] Gwagwa, Kazim and Hilliard "The Role of the African Value of Ubuntu in Global AI Inclusion Discourse: A Normative Ethics Perspective" 2022 3(4) *Patterns 2.*

[14] Kuziemski and Misuraca "AI Governance in the Public Sector: Three Tales From the Frontiers of Automated Decision-Making in Democratic Settings" 2020 44(6) *Telecommunications Policy* 101976.

[15] Pizzi, Romanoff and Engelhardt "AI for Humanitarian Action: Human Rights and Ethics" 2020 102(913) *International Review of the Red Cross* 145–180.

[16] Sarker "Machine Learning: Algorithms, Real-World Applications and Research Directions" 2021 2(3) *SN Computer Science* 160.

[17] Oatley "Themes in Data Mining, Big Data, and Crime Analytics" 2022 12(2) *Wiley Interdisciplinary Reviews: Data Mining and Knowledge Discovery* e1432.

[18] Council of Europe "Unboxing Artificial Intelligence: 10 Steps to Protect Human Rights" (2019) https://rm.coe.int/unboxing-artificial-intelligence-10-steps-to-protect-human-rights-reco/1680946e64 (accessed 2024/10/02) 7.

market.[19] Equally important is to expect developers, programmers, operators, marketers and other users of AI systems within the value chain to be transparent about the details and impact of systems at their disposal.[20] They should in fact go further and inform the public and affected individuals about how AI systems arrive at particular decisions autonomously.[21] This would also include notifying individuals about the use of their personal data.

It is against this backdrop that the article highlights, with reference to the jurisdictional parameters of South Africa and the European Union (EU), specific international instruments that have direct and indirect impacts on AI. This is juxtaposed with both binding and non-binding international and domestic instruments on selected human rights that are vulnerable to disruptions by AI systems. Guidance is also derived from soft-law principles, which play a critical role in shaping the regulation and governance of AI systems. According to the earlier EU Proposal on AI Act, AI systems are a fast-evolving family of technologies that can bring a wide range of socio-economic benefits across the entire spectrum of the value chain.[22] AI systems are regarded as being instrumental in improving prediction and optimising operations and allocation of public goods and resources. The use of AI systems plays a critical role, in supporting socio-economic spin-offs and improving the welfare of people.[23]

2 TECHNOLOGICAL GROUNDING OF HUMAN-RIGHTS THEORY

The theoretical background for human rights and their application to AI can be located within the principles underpinning ethics, morality and the broad freedoms to which an individual is entitled. Human rights have been defined as a set of fundamental rights and freedoms that are inherent in all individuals. This is regardless of an individual's nationality, race, gender or other personal characteristics. In particular, these rights include the right to dignity, life, liberty, security, privacy, freedom of thought, expression and many others. Consequently, human rights are said to be inalienable and, as such, inherent to all human beings, regardless of race, sex, nationality, ethnicity, language, religion or any other status. When it comes to AI, the theoretical background for human rights also involves ensuring that the development,

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19 UN Report of the Special Rapporteur on the Right to Privacy (February–March 2020) A/HRC/43/29 https://documents-dds-ny.un.org/doc/UNDOC/GEN/G20/071/66/PDF/G2007166.pdf?OpenElement (accessed 2023-06-04) par 52.

20 UN Report on the Promotion and Protection of the Right to Freedom of Opinion and Expression (August 2018) A/73/348 https://documents-dds-ny.un.org/doc/UNDOC/GEN/N18/270/42/PDF/N1827042.pdf?OpenElement (accessed 2023-06-04) par 49.

21 Council of Europe "Guidelines on Addressing the Human Rights Impacts of Algorithmic Systems" (Recommendation CM/Rec (2020)1 of the Committee of Ministers to member states on the human rights impacts of algorithmic systems) section B par 4.2.

22 On 21 April 2021, the European Union Parliament proposed the Artificial Intelligence Act and made proposals for the regulation of the European Parliament and the Council laying down harmonised rules on Artificial Intelligence (the Artificial Intelligence Act) and further amending certain Union legislative acts.

23 Novelli, Bongiovanni and Sartor "A Conceptual Framework for Legal Personality and Its Application to AI" 2022 13(2) *Jurisprudence* 194–219 https://doi.org/10.1080/20403313.2021.2010936.

deployment and use of AI systems respect and uphold these fundamental rights. AI technologies have the potential to impact various aspects of human life, including employment, health care, education, and decision-making processes. Overall, the theoretical motivation for applying human rights to AI is based on the recognition that AI should be developed and used in a manner that respects and upholds the fundamental rights and freedoms of individuals, ensuring fairness, transparency and accountability in its design and implementation.[24]

While the United Nations (UN) Universal Declaration of Human Rights (UDHR) and other international human rights treaties provide a foundation for human-rights theory, various scholars have asserted that technological innovations, in all the epochs of industrial revolutions, have also affected international law, and by extension human rights.[25]

3 IMPACT OF TECHNOLOGY ON DEVELOPMENT OF HUMAN RIGHTS

Compared to ancient international law, contemporary international law is inextricably linked to ever-unfolding technological developments. The emergence of the age of information technology and its influences on international law and human rights in particular make the current period more interesting. The increased interest in human rights in this field can be ascribed, in the main, to developments in international space law and to the international regulation of weapons of mass destruction.

Advancements in ship and navigation technologies resulted in the first waves of globalisation in the world's economy, thus enhancing diplomatic relations among nations and their behaviour towards each other. For instance, during the Spanish *conquistadores*, navigational aids were used in the oceans resulting in the "discovery" (according to a Eurocentric view) of native peoples, especially in the Americas.[26]

The production and proliferation of new military technologies, such as gunpowder in 1648, contributed immensely to the development of international law and later ushered in the Treaty of Westphalia. The treaty was regarded as the foundation of the modern international order as it resulted in the acknowledgement of the coexistence of sovereign states. It must be noted that the same military technologies and weaponry were used during the First World War, while nuclear armaments played a key role in the Second World War. Following these two developments, the Permanent Court of International Justice was established and, later, the United Nations Organisation came into being. The subsequent manufacture of new technology-enhanced weaponry led to the generation of landmark legal innovations to mitigate threats to international peace.

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[24] Prabhakaran, Mitchell, Gebru and Gabriel "A Human Rights-Based Approach to Responsible AI" 2022 *arXiv:2210.02667*.

[25] Maas "International Law Does Not Compute: Artificial Intelligence and the Development, Displacement or Destruction of the Global Legal Order" 2019 20(1) *Melbourne Journal of International Law* 29–56.

[26] Merrills "Francisco De Vitoria and The Spanish Conquest of the New World" *The Irish Jurist* 1968 3(1) 187–94 http://www.jstor.org/stable/44026069 (accessed 2023-07-08).

From the 1950s to the 1970s, the outer space law, the law of the sea and international law continued to develop and dominate, especially in relation to the testing of nuclear weapons and energy. As a result, information technologies, the Internet and AI are now the technologies that have a historical connection with emerging human rights law. It is important to indicate that the private sector has, throughout, been complicit and highly involved in influencing the development of the international law regime, as Ohlson asserted.[27] This is because within the private sector exist various interests and ambitions with different (including transnational global) agendas. As a result, different versions of how technology can be useful are fed to government officials and bureaucrats in order to influence policy direction and the make-up of envisaged legislative frameworks to the advantage of those having an upper hand. In some instances, government officials are misled, hoodwinked or lured by massive kickbacks.

In the case of *Irma Flaquer*, the Inter-American Commission on Human Rights received a petition comprising complaints involving numerous human rights violations, including breaches of media freedom and access to information, kidnapping and the murder of a journalist in Guatemala.[28] The petitioners alleged that the journalist was a victim of forced disappearance and had been presumably murdered owing to their revelation of massive corruption involving senior government officials, the military and multinational companies. As part of a compromise to end countrywide protests and pressure from civil society, the Guatemalan government transformed its media laws into a settlement that was made an order of the regional body.

In South Africa, the Constitutional Court, in *Glenister* held:

> "Endemic corruption threatens the injunction that government must be accountable, responsive and open. … It is incontestable that corruption undermines the rights in the Bill of Rights and imperils democracy."[29]

4 THE ROLE OF SOFT LAW IN THE DEVELOPMENT AND GOVERNANCE OF AI SYSTEMS

Soft law can be defined as comprising those international norms, rules and principles that guide states and international non-state parties in their relations with no binding effect. Soft law operates where there is no degree of normative content to create enforceable rights and obligations.[30] Although it may have certain legal effects, it is nevertheless not binding. In the absence of binding legal norms, soft law serves to close the unregulated gap, guiding states and other stakeholders in the right direction. In the absence of a clear legislative instrument regulating the recognition and

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27 Olson "Corporate Complicity in Human Rights Violations Under International Criminal Law" 2015 1(3) *International Human Rights Law Journal* https://via.library.depaul.edu/ihrlj/vol1/iss1/5 (accessed 2023-06-30).

28 *Irma Flaquer v Guatemala*, Case 11 766 Report No 67/03 Inter-Am CHR OEA/Ser L/V/II 118 Doc 70 rev 2 at 635 (2003).

29 *Glenister v President of the Republic of South Africa* [2011] ZACC 6 par 176 and 177.

30 Choudhury "Balancing Soft and Hard Law for Business and Human Rights" 2018 67(4) *International & Comparative Law Quarterly* 961–986.

governance of AI systems at the international level, a credible body of soft-law rules has been established, at least informally at regional and national levels. The abrupt surge of the coronavirus pandemic in early 2020 spurred many jurisdictions into legislating and regulating various aspects of societal life so as to contain and control the disease. Some of these measures were seen as draconian as they interfered with some fundamental rights. Various organs of the UN also issued regulations and policy guidelines as part of disease management.[31] In contrast, the international community has not applied the same energy and zeal to tackling the emergence of AI in the era of the 4IR.

Some scholars argue that self-regulation of AI systems by corporate companies should be left to unfold because it may work to the advantage of humanity.[32] The disadvantage of such an approach is that humanity might lose the only opportunity available to assert itself over AI before it surpasses human intelligence.[33] On the other hand, subjecting AI to hard laws could be negative because it may scupper creativity and ultimately the potential for the full development of AI. Both the public and private sectors have been actively involved in the development of a body of soft-law rules that attempt to regulate AI, at least at the operational level.[34] This partnership has gone to great lengths, such that an implied consensus has been reached on the basic management and governance of AI systems. While there is laxity in some instances, various agreements and conventions have been adopted and complied with. Most such agreements are based on and guided by important international instruments such as the Universal Declaration of Human Rights.

To establish some regulatory framework, various states and stakeholders have committed themselves to using the advantages of AI and to minimising possible inherent risks. To this end, states and regional bodies, together with the private sector, have adopted some agreements and treaties. In the EU, states have agreed to adopt the Ethics Guidelines for Trustworthy Artificial Intelligence,[35] as well as the Assessment List for Trustworthy AI.[36] The Guidelines identified key principles and requirements for trustworthy AI,

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31 The United Nations, through the World Health Organisation, went to great lengths to ensure that the disease was mitigated and controlled. Some of the guidelines and policy directives are found at https://www.ohchr.org/en/covid-19/covid-19-guidance (accessed 2022-06-29).

32 Candelon, Di Carlo, De Bondt and Evgeniou *AI Regulation Is Coming* 2021 99(5) *Harvard Business Review* https://hbr.org/2021/09/ai-regulation-is-coming (accessed 2023-07-04).

33 Snider "Evolving Online Terrain in an Inert Legal Landscape: How Algorithms and AI Necessitate an Amendment of Section 230 of the Communications Decency Act" 2022 107 *Minn L Rev* 1829.

34 Blanchette and Tolley *Public and Private Sector Involvement in Healthcare Systems: A Comparison of OECD Countries* (May 1997, revised February 2001) https://publications.gc.ca/Collection-R/LoPBdP/BP/bp438-e.htm (accessed 2023-07-07).

35 European Commission "Ethics Guidelines for Trustworthy AI" (April 2019) https://digital-strategy.ec.europa.eu/en/library/ethics-guidelines-trustworthy-ai#:~:text=According%20to%20the%20Guidelines,%20trustworthy%20AI%20should%20be:%20(1)%20lawful (accessed 2024-09-30).

36 European Commission "Assessment List for Trustworthy Artificial Intelligence (ALTAI) for Self-Assessment" (17 July 2020) https://digital-strategy.ec.europa.eu/en/library/assessment-list-trustworthy-artificial-intelligence-altai-self-assessment#:~:text=The%20Ethics%20Guidelines%20introduced%20the%20concept%20of%20Trustworthy%20AI,%20based (accessed 2024-09-30).

while the Assessment List provides a framework to support compliance with ethical standards by developers and users of AI. The Guidelines also address issues of data protection, algorithmic transparency, and openness, among other issues. The General Data Protection Regulation (GDPR) is regarded as the centrepiece of the EU law that regulates automated processing of personal data in the European Economic Area. [37] The regulations play a key role in safeguarding the fundamental rights that are threatened by the deployment and use of AI systems and related technologies. The Treaty on the Functioning of the European Union adds impetus by laying down principles of non-discrimination as a fundamental value, especially in articles 2 and 10, which require the EU to combat discrimination on listed grounds. [38] The European Union Charter on Fundamental Rights serves as a primary regional instrument and directly and indirectly provides a basis for the regulation of AI systems.[39] This can be seen in articles 20 and 21, which provide for equality before the law and non-discrimination. Such values are further elucidated in a raft of non-discrimination directives, with varying scopes of application that enshrine more detailed sector-specific legislation and directives aimed at safeguarding fundamental human rights.[40] In the EU, the Council of Europe's ad hoc committee on AI (CAHAI) is considering a proposal for an AI treaty and a pilot study to this effect has already been put in place. The proposals for the AI treaty contain key values, mostly derived from the OECD's five Principles on AI.[41] The principles include the following:[42]

> "AI should benefit people and the planet by driving inclusive growth, sustainable development, and human well-being. AI systems should be designed in a way that respects the rule of law, human rights, democratic values, and diversity, and they should include appropriate safeguards – for example, enabling human intervention where necessary – to ensure a fair and just society. There should be transparency and responsible disclosure around AI systems to ensure that people understand AI-based outcomes and can challenge them. AI systems must function in a robust, secure, and safe way throughout their life cycles and potential risks should be continually assessed and managed. Organisations and individuals developing, deploying, or operating AI systems should be held accountable for their proper functioning in line with the above principles."

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37 The EU's General Data Protection Regulation was adopted in 2018 by the EU as part of harmonising data privacy laws across Europe. "General Data Protection Regulation (GDPR)" (undated) https://gdpr-info.eu/ (accessed 2024-09-30).

38 The Treaty on the Functioning of the European Union (TFEU), was developed in 2007 from the Treaty establishing the European Community (TEC or EC Treaty), which sought to establish the European Economic Community (TEEC), signed in Rome on 25 March 1957.

39 The Charter of Fundamental Rights of the European came to force in 2009 and is intended to bring together the most important personal freedoms and rights enjoyed by citizens of the EU into one legally binding document.

40 These include Employment Equality Directive (2000/78/EC), Racial Equality Directive (2000/43/EC), Gender Goods and Services Directive (2004/113/ EC), and the recast Gender Equality Directive (2006/54/EC). In addition, the majority of EU member states are also party to other international human-rights conventions.

41 In May 2019, the OECD AI Principles were adopted by 40 countries in the West to promote innovation and trustworthiness in terms of human rights and democratic values by setting standards that are practical and flexible enough to stand the test of time. The OECD Artificial Intelligence (AI) Principles – https://oecd.ai (accessed 2022-07-03).

42 OECD. AI Policy Observatory "OECD AI Principles Overview" https://oecd.ai/en/ai-principles/ (accessed 2022-07-03).

Currently, at the international level, sufficient soft-law rules have been developed and entrenched to cope with the deployment and use of AI systems globally. While the rules are not binding, some possess some degree of enforceability and are compulsory.

5 EMERGING FUNDAMENTAL RIGHTS

AI may change international legal situations by enabling new behaviours and by generating new legal entities.[43] In the same way, it may also change how states interact with international law, which may also have ramifications for human rights. In her theory of law and technology, Moses argues that technology creates recurring dilemmas for law, as it contributes to the formation of new entities and new behaviours.[44] These observations imply that there is a need for the development of *sui generis* rules to handle newly created technological situations and behaviours. Among others, the behaviours may include the systematic monitoring and control of populations through enhanced surveillance technologies, which have negative impacts on existing human rights such as privacy and dignity.

The impact of newly created legal behaviours and situations may also result in legal uncertainty and conflicting rules, since existing laws may not be adequate to cope with the classification of new activities, relationships and entities. According to Scherer, technological challenges posed by these situations are a result of the autonomy, opacity and unpredictability of certain AI systems, leading to uncertainty on issues of attribution, control and responsibility.[45]

In enacting new legislative frameworks to cater for new technological challenges, the possibility exists that their scope may be incorrect resulting in over-inclusiveness or under-inclusiveness.[46] This may be the case where liability is to be determined for new technological entities powered by AI operating on their own, without human involvement. A case in point would be the incorporation of a limited liability company whose memorandum of incorporation may place it under an AI system.[47] An additional challenge may be that existing laws are rendered obsolete as they may no longer be justified, needed or cost-effective owing to the production and deployment of AI systems. On how technology may render *jus in bello* principles regulating international humanitarian law obsolete, Mandel argues that this could be the case where AI-powered combat platforms are deployed on the battlefield, replacing human soldiers, and thus throwing to the fore questions

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43 Maas 2019 *Melbourne Journal of International Law* 29–57.

44 Moses "Why Have a Theory of Law and Technological Change?" 2007 8 *Minn JL Sci & Tech* 589 https://scholarship.law.umn.edu/mjlst/vol8/iss2/12 (accessed 2023-07-05).

45 Scherer "Regulating Artificial Intelligence Systems: Risks, Challenges, Competencies, and Strategies" 2015 29(2) *Harvard Journal of Law & Technology* https://ssrn.com/abstract=2609777 (accessed 2022-07-05).

46 McAllister "Stranger Than Science Fiction: The Rise of AI Interrogation in the Dawn of Autonomous Robots and the Need for an Additional Protocol to the UN Convention Against Torture" 2016 101 *Minn L Rev* 2527.

47 Bayern "The Implications of Modern Business Entity Law for the Regulation of Autonomous Systems" 2015 19 *STAN TECH L REV* 93 https://law.stanford.edu/wp-content/uploads/2017/11/19-1-4-bayern-final_0.pdf (accessed 2023-07-05).

on how humanitarian-law principles affect the treatment of prisoners of war in such a scenario.[48]

6 IMPACT OF TECHNOLOGY ON SELECTED VULNERABLE HUMAN RIGHTS

The UDHR serves as the source from which human and fundamental rights are derived and have evolved over time. It remains a source for all these rights and has informed subsequent binding and non-binding international, regional and national instruments regulating human and fundamental rights. Key instruments, among others, include the International Covenant on Civil and Political Rights (ICCPR),[49] the European Convention of Human Rights and the African Charter.[50]

In South Africa, human and fundamental rights are contained in Chapter 2 of the Constitution of the Republic of South Africa, 1996 (Constitution) and in related legislation.[51] The transformative nature of the Constitution is evident in section 8(3), which provides that in interpreting the Bill of Rights,[52] the courts must develop rules and the common law to give effect to a constitutional right, and may also limit a right with the proviso that a limitation is in accordance with the provisions of section 36(1). Similarly, the interpretation clause in section 39(2) provides for courts and related bodies to consider international and foreign law when interpreting any legislation, and to promote the spirit, purpose and object of the Bill of Rights. Section 39(3) is interesting in that it accommodates any other rights conferred by common law, customary law or legislation, provided they are in line with the overall provisions of the Constitution.[53] According to Klare, a post-liberal approach is the best way to interpret the Bill of Rights in South Africa,[54] informed (among other things) by the consciousness of key aspects of transformative constitutionalism such as social rights, substantive equality, multiculturalism, participatory governance and consistent fulfilment of positive obligations by the State. This means that courts must not be trapped

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48 Mandel "Legal Evolution in Response to Technological Change" in Brownsword, Scotford and Yeung (eds) *The Oxford Handbook of Law, Regulation, and Technology* (2017) 225 233–4.

49 The ICCPR, which was adopted on 16 December 1966 and initially signed by 116 States Parties, is currently ratified by 173 of the 193 UN member states. South Africa and a significant number of EU member states are also parties to the Covenant.

50 The European Convention on Human Rights was adopted by the Council of Europe in 1950 and entered into force on 3 September 1953. Similarly,the African Charter on Human and Peoples Rights came into being in 1981 and entered into force in 1986. In the main, the two instruments are designed to promote human rights.

51 The European Convention of Human Rights came into force on 3 September 1953 and was acceded to by all the 27 member states in the EU.

52 S 8(3) imposes a duty on the courts to apply and develop common-law rules, subject to the limitation clause contained in s 36(1), while s 8(2) provides that the Bill of Rights applies and binds a natural or a juristic person, depending on the nature of the right and nature of the duty imposed by that right.

53 Section 39(3) provides that "the Bill of Rights does not deny the existence of any other right 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."

54 Klare "Legal Culture and Transformative Constitutionalism" 1998 *South African Journal on Human Rights* 153–154 10.1080/02587203.1998.11834974 (accessed 2022-12-20).

in classical notions of human rights when interpreting constitutional provisions but must instead adopt transformative constitutionalism. Allison concurs with Klare that the Constitution places positive duties on the State to create a more egalitarian and equal society, rather than simply protect liberties as in a classical liberal design.[55]

New technological developments, in the form of the Internet of Things, AI, 3D technology and sophisticated algorithms, are, on the one hand, bound to have a significant impact on existing human and fundamental rights, and on the other, have the potential to give rise to new rights. Based on the discussions above, it is clear that most of these potential rights cannot be accommodated in existing legislative and regulatory frameworks. In South Africa, the right to Internet access has, at the time of writing, been curtailed for over 17 years as a result of delays by the telecoms regulator, the Independent Communications Authority of South Africa (ICASA), in allocating licences for radio-frequency spectrum for various uses. This has obstructed the realisation of much-needed low data costs and increased network capacity provided by the rollout of 4G and 5G technologies for high-speed broadband. The radio-frequency spectrum is a limited natural resource used to carry information wirelessly; it is vital and critical for social life as it enables telecommunication, radio broadcasting, television, cellular phones and the Internet through the transmission of electronic signals. Therefore, free availability and unfettered access to the frequency spectrum have implications for a myriad of constitutional values and rights, such as freedom of trade and freedom of expression and information, including universal access to the Internet. Radio-frequency spectrum is allocated through undersea cable by the International Telecommunications Union, of which South Africa is a member, while locally, it is allocated by the Minister of Telecommunications in the radio-frequency plan.

Control of the radio-frequency spectrum in South Africa is vested with ICASA in terms of section 30(1) of the Electronic Communications Act and the related legislative framework.[56] The regulator controls, plans, manages and administers the use and licensing of radio-frequency spectrum,[57] in line with the National Radio Frequency Plan 2018, which has been prepared under section 34 of the Act.[58] The impact of these technologies can be seen in three ways: the violation of rights; potentially conflicting rights; and new

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55 Klare 1998 *South African Journal on Human Rights* 154.

56 Electronic Communications Act 36 of 2005. It should be noted that the two statutes that regulate the use of radio frequency, i.e., the Independent Communications Authority Act 13 of 2000 (the ICASA Act), and the Electronic Communications Act 36 of 2005 (ECA) were each amended recently by the Electronic Communications Amendment Act 1 of 2014. Together, they are the statutory foundation for the regulatory regime for radio-frequency spectrum.

57 S 2 of the ICASA Act describes ICASA as an independent authority, mandated to regulate electronic communications in the public interest. In terms of section 3(3), it is further expected to act independently and subject only to the Constitution and the law, meaning that ICASA must be impartial in performing its functions without fear, favour or prejudice. In carrying out this mandate, ICASA is obliged to comply with both bilateral agreements and international treaties entered into by the Republic.

58 ICASA "National Radio Frequency Plan 2018 (NRFP-18)" GN 266 in *GG* 41650 of 2018-05-25 https://www.gov.za/sites/default/files/gcis_document/201805/41650gen266.pdf (accessed 2023-07-14).

issues emanating from the use of new technologies. A violation of rights may arise, for example, when AI analytics systems interfere with privacy rights, or when risk profiling discriminates against any individual. Conflicting rights may arise in instances that use AI systems for intelligence gathering in the interest of public safety and the opposing right to privacy. New issues would include the right to anonymity, to oblivion or to not be forgotten, as provided for in article 17 of the EU's GDPR.

The contemporary regulatory landscape for AI systems attempts to address their undesirable impact, while also striving to enhance innovation and technology development. There is a degree of legal uncertainty as to how existing legislative and regulatory frameworks can address both the violation of existing rights and conflicting rights. This leaves citizens exposed to potential violations with no or few legal protections. Existing human and fundamental rights were conceived and drafted many years ago,[59] and were formulated in general terms that align with ethical and societal values, as opposed to specific current situations and environments. While existing rights were widely phrased to provide sufficient space for interpretation and application, the values underpinning these rights have fundamentally evolved and changed.[60] This is attested to by Custers, who argues that the rise of social media platforms has resulted in people increasingly sharing personal information, thus diluting perceptions regarding the right to privacy, for instance. This demonstrates not only regulatory gaps in privacy rights but also applies to many other fundamental and human rights threatened by the deployment and use of AI systems.

In order to identify these gaps, Custers argues that the assessment of how these rights apply in practice may result in stretching the interpretation of existing legal frameworks and possibly yielding untenable distortions that drift away from how the rights were originally conceived, leading to legal uncertainty.[61] To address this, the EU adopted the Declaration on European Digital Rights and Principles for the Digital Decade in December 2022, as a commitment to safe, secure and sustainable digital transformation that prioritises European people, underpinned by European core values and principles. The principles are shaped around six themes:

> "They include putting people and their rights at the centre of the digital transformation, supporting solidarity and inclusion, ensuring freedom of choice online, fostering participation in the digital public space, increasing safety, security and empowerment of individuals and promoting the sustainability of the digital future."[62]

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59 For instance, the European Convention on Human Rights (ECHR) and the GDPR were adopted and ratified in the 1950s when there was no Internet or AI systems.

60 Custers "New Digital Rights: Imagining Additional Fundamental Rights for the Digital Era" 2022 44 *Computer Law & Security Review* https://www.sciencedirect.com/science/article/pii/S0267364921001096 (accessed 2023-03-09).

61 Custers 2022 *Computer Law & Security Review* 5.

62 The European Declaration on Digital Rights and Principles for the Digital Decade was adopted in December 2022 and serves as a vision for digital transformation, in line with EU values and fundamental rights. The Declaration provides a reference framework for citizens and guides the EU and Member States on a digital transformation journey. European Commission "European Declaration on Digital Rights and Principles for the Digital Decade" (15 December 2022) https://digital-strategy.ec.europa.eu/en/library/european-declaration-digital-rights-and-principles (accessed 2023-03-07).

To assess this Declaration and the digital rights it proposes, the article discusses specific digital rights identified in the literature across the board.

6 1 Privacy rights and data protection

The development, as well as the training, testing and use of AI systems that rely on the processing of personal data, is supposed to secure and respect personal privacy rights fully. These privacy rights also relate to a person's family life and the right to self-determination in relation to their data. Privacy rights are protected under article 12 of the UDHR and article 17 of the ICCPR, which affords a person protection of individual privacy rights in their home, including their correspondence as well as personal honour and reputation. These rights are further explicitly enshrined in article 8 of the EU's Charter of Fundamental Rights, which guarantees the protection of the right to personal data.[63] The provisions further require consent as a pre-condition before personal data can be fairly processed for a legitimate purpose. In this way, privacy is viewed as a fundamental right that is essential to human security and comfort. The right is also interwoven with other rights, such as the right to freedom of expression and association. It is also closely related to the right to privacy and as a result, it can be considered to be part of the UN human-rights system. It is for this reason that most governments in the EU now recognise the right to data protection.

Article 50 of the draft EU AI Act and its Regulations imposes certain transparency obligations for corporate companies.[64] These obligations include that a person must be informed when their character or emotions interact with an AI system, such as a chatbot. Such an obligation also arises where there is a manipulation of image, audio or video content by an AI system through automation, though there are exceptions to this case. Most significantly, AI systems are trained to use analysis of big datasets to provide feedback through the collection, refinement, and calibration of personal data. It is during these processes that sensitive personal and private information about individuals is collected and stored. Some of these models are able accurately to estimate personal data by merely using previous and future locations of cell phones, including those of a person's close associates.[65] It is clear that most such personal details are protected information that must be treated with all sensitivity and respect for the person concerned.

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63 Article 8 provides that: 1. Everyone has the right to the protection of personal data concerning him or her. 2. Such data must be processed fairly for specified purposes and on the basis of the consent of the person concerned or some other legitimate basis laid down by law. Everyone has the right of access to data which has been collected concerning him or her, and the right to have it rectified. 3. Compliance with these rules shall be subject to control by an independent authority.

64 The draft EU AI Act has been in place for consultations and was expected to be passed into law in subsequent months.

65 Bellovin and Hutchins "When Enough is Enough: Location Tracking, Mosaic Theory, and Machine Learning" 2014 8(2) *NYU Journal of Law and Liberty 555-628* https://digitalcommons.law.umaryland.edu/cgi/viewcontent.cgi?article=2379&context=fac_pubs (accessed 2022-08-25).

In the EU, the European Court on Human Rights, in the *Liberty* case,[66] dealt with the requirement of foreseeability when surveillance measures are used in the interception of communication. The surveillance measures were used to monitor a person through filtering techniques. The techniques consisted of automated sorting systems that selected keywords from a technical database.[67] In this case, the court ruled that the applicable law at the relevant time did not indicate, with sufficient clarity, adequate protection against abuse of power by the State regarding the interception and examination of external communications.[68] The reason for this insufficiency relates to fragmented legislation in the EU on this aspect. The current proposals seek to harmonise regulations within the EU. As a result, the court found that the existing law does not spell out the procedure for selection, examination, sharing and storing of data intercepted from individuals. Accordingly, it was ruled that the interference with the applicants' rights could not be regarded as violating article 8 of the ECHR.

Among other things, notification to concerned individuals should always be at the fore, although it should not necessarily take place during surveillance, but afterward so as not to defeat the object of surveillance. Therefore, the court in *Liberty* viewed notification as being inextricably linked to safeguarding against abuse of surveillance measures that are intrusive to privacy rights.[69]

6 2 Vulnerable platform workers and the right to work

States Parties are obliged to work towards the full realisation of the right to work and adequate living standards in line with the provisions of articles 6 and 11 of the International Convention on Economic, Social and Cultural Rights (ICESCR).[70] There is a recognition by the parties that appropriate steps must be taken to ensure that everyone is granted an opportunity to earn their living to fulfil these rights. While these rights are not absolute, States Parties are obliged to work towards achieving these rights as they constitute the minimum core obligations within the UN human rights system.

The deployment of AI systems at the workplace poses a serious challenge to the constitutionally protected right to work, especially to vulnerable platform workers whose rights are violated and who face discrimination. One of the most visible and disconcerting effects of the latest technological revolution in the world of work is represented by digital labour platforms. These platforms bear different names and business models, and play different roles, vacillating between labour brokers, outsourcing and

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66 *Liberty v the United Kingdom* (58243/00) ECHR 01/07/2008 https://hudoc.echr.coe.int/eng#{%22itemid%22:[%22001-87207%22]} (accessed 2022-08-25).

67 *Liberty v the United Kingdom supra* 43.

68 *Liberty v the United Kingdom supra* 69.

69 *Liberty v the United Kingdom supra* 67.

70 Article 6 requires State Parties to recognise the right to work, which includes the right to choose or accept work that provides a living, while Article 11 urges State Parties to recognise the right to an adequate standard of living, including food, clothing, and housing amongst others.

intermediaries based on labour demand and supply. Most affected workers only interact or work from home, or work as telemarketers for various apps and platforms that are AI-driven. According to Rasioru, this has become a common practice in Romania where different digital platforms and apps circumvent existing labour laws to manipulate desperate workers.[71]

Most public sector entities and companies procure AI systems from specialist tech companies for purposes that include advertisement, recruitment, performance management and payroll management systems. Machine-learning algorithms used by these third-party companies may reinforce human prejudices targeting unsuspecting employees. For example, unscrupulous advertising companies may use algorithms to target people with low incomes to generate high-interest loans. The reality of the matter internationally is that existing employment laws are crafted and geared at preventing discrimination based on the grounds of race, sex, religion, disability and age, among other grounds. In evaluating individual employees for possible employment or promotion, AI systems are used to choose suitable candidates, and it may prejudice anyone based on these particular grounds. A real threat exists that automation of jobs by AI could result in massive job losses and unemployment, resulting in an infringement of the right to work and, ultimately, of the right to adequate living standards. Throughout the world, the automation of workplace operations has already resulted in the shedding of jobs in certain economic sectors. It would seem that this trend will continue to rise with time. Conversely, there is consensus that effective use of AI will also yield more jobs as opposed to job destruction, given expected shifts in the labour market.

The use of software for background screening has also raised concerns, not only regarding the possible perpetuation of discriminatory practices against potential employees but also with regard to organisational rights at the workplace. The emergence of the novel coronavirus forced many companies to fall back on home-based remote working, using technological tools of the trade linked to company servers. This has resulted in significant union bashing and has limited employees' right to assemble, protest and bargain, especially with regard to employees' loss of benefits as a result of lockdown regulations throughout the world.[72] In the midst of this, the data protection authorities declared invalid the use of fingerprints at the workplace as part of the clocking system in Italy[73] and Greece.[74] This was because such mechanisms use AI systems that infringe on the right to privacy, dignity and personal data. The basis of these decisions is that the purpose of using

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71 Rosioru "The Status of Platform Workers in Romania" 2020 41 *Comp Lab L & Pol'y J* 423 https://heinonline.org/HOL/P?h=hein.journals/cllpj41&i=447 (accessed 2022-06-29).

72 Major international brands such as H&M, Michael Kors, Zara and Levi Strauss have been accused of union busting and unfairly dismissing or suspending workers during the Covid-19 lockdown in countries like Myanmar, Bangladesh and Cambodia. The rationale for this was solely to reduce their production costs, while workers would be in a weaker position. See Business and Human Rights Resource Centre "Union Busting and Unfair Dismissals: Garment Workers During COVID 19" https://media.business-humanrights.org/media/documents/files/200805_Union_busting_unfair_dismissals_garment_workers_during_COVID19.pdf (accessed 2022-09-28).

73 The Garante per la protezione dei dati personali, Provision of July 21, 2005.

74 The Greek Data Protection Authority, Decision of 20/3/2000.

fingerprints could still be attained using other systems that do not impinge on privacy and do not involve an employee's body.

The use of AI systems may also affect the right to work, especially for workers whose responsibilities include driving any connected and automated transport. In the EU, liability for connected and autonomous driving is currently regulated at both the Union and national levels by adopting different approaches. On the one hand, they use norms regulating the fault-based liability of the driver, and on the other the objective liability of the owner, coupled with the European product-liability regime.

Germany is one of the first EU states formally to adopt a legal framework for allowing the user of a vehicle to disengage from driving completely.[75] The legislation also imposes a ban on non-passenger driving systems, except for low-speed parking systems operating on private property.[76] The legislation further prescribes that the design of these vehicles should allow for proper space and time to transition from an automated system to a human-driver system to ensure there is control. It is also obligatory for manufacturers to install electronic units and black boxes in vehicles; these are mainly used for recording the operations of connected and autonomous driving. According to the legislation, if a driver is at fault, they will be held liable; if not, the owner is held accountable for damages. The owner may still sue the manufacturer in claims for product liability.

6 3 The right to Internet access or to be online

Internet access has become critical in the 4IR as most services and products are only offered online, sometimes reasonably cheaply, but may be expensive if purchased offline. Inability or obstacles to accessing the Internet put people in a disadvantageous position, especially when it comes to public-service job applications, access to social services and submission of online tax returns. Similarly, some repressive regimes have resorted to shutting down the Internet in order to stamp authority over civilian protests and uprisings.[77] To ensure access to applications for social-relief grants, the South African government used electronic systems in 2020 during the COVID-19 state of disaster. Most applicants found it difficult to submit their applications online owing to a lack of free access to the Internet. According

[75] The Law of 11 June 2017, the Federal Law Gazette, Amending the Road Traffic Act, as announced on 5 March 2003 (Federal Law Gazette 310). Gesley "Germany: Road Traffic Act Amendment Allows Driverless Vehicles on Public Roads" 2021 https://www.loc.gov/item/global-legal-monitor/2021-08-09/germany-road-traffic-act-amendment-allows-driverless-vehicles-on-public-roads/ (accessed 2022-06-30).

[76] Bertolini and Riccaboni "Grounding the Case for a European Approach to the Regulation of Automated Driving: The Technology-Selection Effect of Liability Rules" 2021 51 *European Journal of Law and Economics* 243–284 https://link.springer.com/article/10.1007/s10657-020-09671-5 (accessed 2022-06-30).

[77] Report of the Office of the United Nations High Commissioner for Human Rights: Internet Shutdowns: Trends, Causes, Legal Implications and Impacts on a Range of Human Rights, (13 May 2022) https://documents-dds-ny.un.org/doc/UNDOC/GEN/G22/341/55/PDF/G2234155.pdf?OpenElement (accessed 2023-03-08).

to the collaborative study by the National Income Dynamic Study, the applications systems collapsed and this delayed payment of such grants.[78]

Section 2 of the ICASA Act describes ICASA as an "independent authority", mandated to regulate electronic communications in the public interest; and in terms of section 3(3), it is expected to act independently, "subject only to the Constitution and the law, and must be impartial and must perform its functions without fear, favour or prejudice". In carrying out this mandate, ICASA is obliged to comply with bilateral agreements, as well as international treaties entered into by the Republic. These provisions were the subject of protracted legal tussles between the Minister, ICASA and service providers in the telecommunications industry; among other things, the delays denied a basic right of access to the Internet.[79] The bone of contention in this case centred on the independence and extent to which ICASA as a regulator and a Chapter 9 institution can exercise its discretion in the allocation of radio-frequency spectrum. The issue was whether ICASA is legally entitled to issue an Invitation to Apply (ITA) for auctioning rights to use certain bands of radio-frequency spectrum to mobile and non-mobile operators, without considering ministerial policy or the White Paper. It was alleged that the ITA did not comply with the radio-frequency plan and statutory obligations aimed at promoting competition.[80] The Minister approached the court to set aside this decision by ICASA. The radio-frequency plan in force was drafted by ICASA and approved by the Minister in order to regulate the allocation of various uses of spectra in mobile telecommunication and broadcasting, with ranges of 700mhz, 800mhz and 2.6ghz bandwidth.[81] The Minister argued that the bandwidth in issue cannot be made available for exclusive use by mobile networks under the plan and that the plan would have to be amended to provide for exclusive use. It was further argued that exclusive assignment to mobile operators cannot take place until non-mobile operators are migrated from the above bandwidth, hence their unavailability.[82]

In turn, the counter-argument by ICASA was that the radio-frequency plan does allow for multiple uses and that it is empowered by sections 31(3) and (4) of the Electronic Communications Act[83] to migrate operators out of a spectrum by changing the terms of the licence. It was held that although a conditional assignment would not adversely impact non-mobile operators who had already been assigned spectrum, it would be invalid to re-assign the spectrum to mobile operators. Regarding the interpretation of the radio-spectrum plan and its enabling legislation as to whether the allocation by the Minister could precede the assignment of licences by ICASA for exclusive use by mobile operators for only eligible usages, it was held that the contemplated assignment by ICASA would "be out of kilter with the

78 Wills "Household Resource Flows and Food Poverty During South Africa's Lockdown, Short-Term Policy Implications for Three Channels of Social Protection" 2023 https://www.uj.ac.za/wp-content/uploads/2021/10/nids_cram-wave-1.pdf (accessed 2023-03-08).

79 *Minister of Telecommunications and Postal Services v Acting Chair, Independent Communications Authority of South Africa* [2016] AGPPHC 883.

80 *Minister of Telecommunications & Postal Services v Acting Chair supra* par 18.

81 *Minister of Telecommunications & Postal Services v Acting Chair supra* par 50.

82 *Minister of Telecommunications & Postal Services v Acting Chair supra* par 51.

83 36 of 2005.

prescribed 'allocations'". [84] Secondly, it was held that the envisaged deference of amendment of the plan by the Minister would be invalid and irrational.[85] However, the court had to consider exceptional circumstances posing possible irreparable harm and balance of convenience to respondent companies if an interdict were granted. The court observed thus:

> "[T]he assignment of spectrum already assigned to other operators is of questionable validity and secondly, to assign now and defer access to an unknown future date, which is dependent on a host of process-dependent happenings has the look of a reckless decision and for that reason an irrational decision. In my view, there is a real prospect that the review court could reach these conclusions. A prima facie case is made out."[86]

Based on these observations, the court found that bidding by the respondent companies based on the ITA would incur substantial costs, running into millions of rands and that dismissing the application for an interdict ran the risk of violating the rule of law. The court was of the view that potential irreparable arising from substantial costs incurred by respondent companies would amount to exceptional circumstances justifying the granting of an interdict as per prayers.[87] It must also be indicated that article 19 of the UDHR points to a right to the Internet, in that it recognises the right to freedom of opinion and expression, as well as access to information.[88] In particular, to give effect to the right to the Internet, the UN Human Rights Council, in 2021, passed a resolution declaring that access to the Internet was a catalyst to the enjoyment of social, economic and cultural rights. However, the UN stopped short of recognising this particular right, and as such the resolution does not have binding force. It was adopted in anticipation of future technological developments.

The African Commission on Human and Peoples' Rights adopted a Declaration of Principles on Freedom of Expression and Access to Information in Africa in 2002, later updated in 2019. The Declaration is geared at accommodating some of the novel but obscured digital rights occasioned by the 4IR.[89] It states: "[U]niversal, equitable, affordable and meaningful access to the internet is necessary for the realisation of freedom of expression, access to information and the exercise of other human rights." It may however be observed that conditions on the ground show that this principle is still far from realised. A precondition for access to the Internet is access to a stable power supply. According to the World Bank, only 46,5 percent of the population in sub-Saharan Africa had access to electricity in 2019. The share of people using the Internet in Africa as a whole was 39,3 percent in 2020, compared to 62,9 percent in the rest of the world. On the

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84 *Minister of Telecommunications & Postal Services v Acting Chair supra* par 58.
85 *Minister of Telecommunications & Postal Services v Acting Chair supra* par 59.
86 *Minister of Telecommunications & Postal Services v Acting Chair supra* par 59–60.
87 *Minister of Telecommunications & Postal Services v Acting Chair supra* par 78–83.
88 Article 19 provides everyone with the right to freedom of opinion and expression. This right includes freedom to hold opinions without interference and to seek, receive and impart information and ideas through any media, regardless of frontiers.
89 African Commission on Human and Peoples' Rights "Declaration of Principles on Freedom of Expression and Access to Information in Africa" 2002 https://achpr.au.int/en/special-mechanisms-reports/declaration-principles-freedom-expression-2019 (accessed 2022-12-22).

continent, regional and national differences are extreme, with 59,5 percent of people in southern Africa having Internet access.[90]

6 4 The right to be offline or to disconnect

The right to be offline or to disconnect, especially after working hours, is currently applicable within the context of employment law in some countries. The right presupposes that employees may not be contacted by employers or their representatives outside working hours and days through any form of communication. These include emails, telephone calls or any other form of communication. While this is considered to be in line with existing labour legislation, it is advisable that employers put in place acceptable policy guidelines in consultation with their employees. Apart from the employment perspective, the propagation of the right is also considered to have some social benefits, especially in dealing with issues of Internet addiction and its negative impacts on society. From a social point of view, it is clear that compulsive and excessive uncontrollable use of the Internet, especially social media, tends to cause considerable anxiety, affecting the mental health and well-being of individuals. Therefore, the right to be offline and disconnected is expected to set and enhance necessary standards and expectations to prevent addictions and help people become productive members of society.

6 5 The right to change your mind

It should be noted that some websites would seldom require a person to enter their personal details and their preferences of what they want to see or know about, directly or indirectly. In this way, one would be required to disclose individualised preferences, which are then captured by algorithms to determine the kind of information, products and services that can be offered to you by inference.[91] In a review of Pariser's works, Samuels argues that this demonstrates that the digital empires behind the websites may use their innocuous ways to monitor consumer behaviour, conduct purchase correlation research and predictive marketing, among others.[92] Correctly, Pariser has characterised this as filter bubbles, where you are stuck and bombarded with feedback loops of information.[93] As a result, every time a person visits a particular website, this kind of information is displayed.

A critical question is what happens when a person changes their mind and is, for example, no longer interested in certain items or other social activities.

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90 Bussiek "Digital Rights are Human Rights, An Introduction to the State of Affairs and Challenges in Africa" (April 2022) *Friedrich Ebert Stiftung* https://library.fes.de/pdf-files/bueros/africa-media/19082-20220414.pdf (accessed 2023-03-09).

91 Samuels "Review: The Filter Bubble: What the Internet is Hiding From You by Eli Pariser" 2012 8(2) *InterActions: UCLA Journal of Education and Information Studies* http://dx.doi.org/10.5070/D482011835 or https://escholarship.org/uc/item/8w7105jp (accessed 2022-07-20).

92 Samuels 2012 *InterActions: UCLA Journal of Education and Information Studies* 92.

93 Pariser *The Filter Bubble: What the Internet is Hiding From You* (2011) 294. https://hci.stanford.edu/courses/cs047n/readings/The_Filter_Bubble.pdf (accessed 2022-07-20).

Attempts to change settings may not be effective since algorithms may try to prevent this, leaving one stuck in filter bubbles and echo chambers owing to previous preferences and interests. While articles 18 and 19 of the UDHR, together with articles 9 and 10 of the ECHR, guarantee the fundamental right to freedom of thought and expression, the state of current technological developments demands renewed and stronger protections for these rights. Such protections would go a long way to reinforcing the right to change your mind, by putting more weight on values supporting informed consent, online freedom and personal development, among others.

6 6 The right to know the value of your personal data

While the provision of online services and products such as search engines and social media platforms are freely available at no financial cost, companies offering these services make a profit by collecting, leasing and trading personal data on their systems. People are duped into believing that accessing these platforms is free, while there is in fact no free lunch in this world.[94] From a financial and economic perspective, it would seem that there is no transparency in how such data is processed. It is entirely unclear how the value of personal data is weighed and measured. It is valid for consumers using these platforms to exercise their right to know the value of their data.[95] The application of privacy rights is not feasible and adequate to protect the commodification of personal data collected from search engines and social media platforms. It is thus important to regulate the value attached to personal data as a commodity and this should include pricing models, bodies responsible for determining pricing and how this should be enforced.

6 7 The right to a clean digital environment

The universal right to a clean environment that is not harmful to human health and well-being is codified in various international instruments and pieces of legislation across jurisdictions. The right imposes obligations on governments and the private sector to strive for a clean environment. The continued efforts to digitise the world and narrow the digital divide come with a massive expansion of digital technologies and related infrastructure. Deliberate efforts must be put in place to ensure that this does not cause exponential energy consumption, harmful environmental impact and e-waste across the supply chains within the digital corporate world. An example is the use of blockchain technologies, which tend to use or generate very large amounts of energy, which may put pressure on the environment.[96]

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94 Malgieri and Custers "Pricing Privacy: The Right to Know the Value of Your Personal Data" 2017 *Computer Law & Security Review* https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3047257 (accessed 2023-03-10).

95 Malgieri and Custers 2017 *Computer Law & Security Review* 4.

96 De Vries "Bitcoin's Growing Energy Problem" 2018 2(5) *Joule* 801–805; Dittmar and Praktiknjo "Could Bitcoin Emissions Push Global Warming Above 2ºC" 2019 *Nature Climate Change* 656–657.

According to Coalition for Digital Environmental Sustainability (CODES), the digitalisation process is crucial to achieving the UN's Sustainable Development Goals (SDGs) by 2030. To this end, an assessment by CODES in 2020 found that 70 per cent of 169 targets base-lining the world's sustainability goals can be positively influenced using digital technology applications.[97] Thus the development of artificial intelligence technologies could result in destruction of the natural ecosystem as a result of the need for energy-intensive computing power and data centres. To this end, Zhuk argues that their impact could cause cooling problems while electronic waste could be formed due to the need for their continuous and rapid improvement.[98] This implies that technologies dominated by AI systems will play an influential role in environmental sustainability. With digital traces everywhere, it could therefore be argued that data will be the pollution issue in the 4IR. Combined with other data, digital pollution may result in digital biases and noises when sucked into the aggregation of data analysis, resulting in pollution of the online ecosystem.

7 PERTINENT LEGAL ISSUES THAT MAY GIVE RISE TO HUMAN RIGHTS VIOLATIONS

7 1 Transparency and explainability challenges

The possibility exists that the inner workings and interactions between components of an AI system may be opaque and unexplainable. Similarly, the involvement of multiple individuals and firms in the design, modification and incorporation of the components of AI systems may make it difficult to point to the exact party who is to be held responsible for any harm that may occur. It is highly possible that some components may have been designed a long time previously and also that a designer may not have foreseen that their designs would be used and incorporated into an AI system that would cause harm. With AI systems, anyone with access to modern smartphones and computer software can compose a computer code from anywhere in the world without needing the privileges of a resourceful large corporation.

7 2 Liability and accountability constraints

Despite well-established product-liability regimes in both South Africa and the EU, legal difficulties have arisen with software and hardware infrastructure insofar as AI liability is concerned. Another difficulty centres on whether software falls within the notion of a "product". One of the requirements for product liability is its characterisation of a product as a tangible thing. While software and hardware may originate from different companies, software components integrated into hardware are deemed to

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97 Koroleva "Action Plan for a Sustainable Planet in the Digital Age" (31 May 2022) https://wedocs.unep.org/bitstream/handle/20.500.11822/38482/CODES_ActionPlan.pdf?sequence=3&isAllowed=y (accessed 2023-03-10).

98 Zhuk "Artificial Intelligence Impact on the Environment: Hidden Ecological Costs and Ethical-Legal Issues" 2023 1(4) *Journal of Digital Technologies and Law* 932–954 https://doi.org/10.21202/jdtl.2023.40.

be a product. Therefore, consideration of software as a product affects the liability of a software manufacturer together with a hardware manufacturer. On its own, software would qualify as a product if it were stored on a tangible medium like a DVD or memory stick. Confusion creeps in only when the software is downloaded, in which case no clarity exists as to how it should be treated in terms of the applicable product-liability regime.

Apart from autonomy, which encompasses foreseeability problems, AI systems also pose risks relating to control. Human control of machines that are programmed with considerable autonomy is bound to be difficult and may result in loss of control, malfunctioning, flawed programming, corrupted files, or damage to input equipment, among other problems. The possibility exists that when an AI system learns its environment and improves its performance, it may be difficult for humans to regain control once it is lost, and this may have catastrophic and existential risk consequences for humanity.[99] This depends on the ability of AI systems to improve their hardware and software programming to the extent of surpassing human consciousness and cognitive abilities.[100]

7 3 Emergence and protection of new fundamental rights

While the international community, and the UN in particular, seems to have taken a backseat in actively agitating for the legal protection of vulnerable rights threatened by the emergence and deployment of AI systems, existing international instruments appear to withstand new threats to human and fundamental rights in the era of the 4IR. Emanating from the discussion above, it is observed that, on the one hand, new technologies are bound to have an adverse impact on existing human and fundamental rights, and on the other, they lay a solid base for the emergence of new rights. It is however clear that most of these potential rights cannot be accommodated in existing legislative and regulatory frameworks. The negative impact of these technologies can be identified in the form of the violation of rights, conflicting rights and new issues, all emanating from the use and deployment of new technologies.

Conflicting rights may also arise in instances where the interest of the public is at stake on the one hand, and when a corresponding right to privacy has to be protected on the other hand. The discussion finds that the interpretation and application of existing legal and regulatory frameworks may be overstretched and may yield untenable distortions that drift from how the rights were originally conceived, leading to legal uncertainty and possible infringement of legally protected rights.

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[99] Akash "AI the Biggest Existential Threat to Humankind Says Elon Musk" (14 July 2021) *Analytics Insight* https://www.analyticsinsight.net/artificial-intelligence/ai-the-biggest-existential-threat-to-humankind-says-elon-musk (accessed 2023-01-18).

[100] Dr Roman Yampolskiy, a computer scientist from Louisville University, is of the view that "no version of human control over AI is achievable as it is not possible for the AI to both be autonomous and controlled by humans". Hamrud "AI Is Not Actually an Existential Threat to Humanity, Scientists Say" (11 April 2021) https://www.sciencealert.com/here-s-why-ai-is-not-an-existential-threat-to-humanity (accessed 2023-01-18).

7 4 Development and conceptualisation of relevant legislative frameworks

Responsible authorities at all levels should ensure that data collection processes are democratic, transparent and accountable with a view to eliminating any form of discrimination, biases and prejudice. There is a need to ensure that Internet connectivity is a basic commodity that is freely accessible, and provided to everyone. It has also been shown that a significant number of existing laws need to be revamped and adapted to conditions and environments for conducive deployment and operation of AI systems. This will ensure investor and business certainty in our laws, while also encouraging the responsible use of AI systems.

8 RECOMMENDATIONS

Having outlined various aspects of the impact of AI systems on human rights and noted how emerging pertinent rights could be affected, the following observations and recommendations have emerged. The recommendations are meant to serve as a guide to the development and shaping of rights arising from the use of AI systems.

It is clear that the radio-frequency spectrum is critical for access to reliable and cheaper Internet connection, and that delays in its roll-out are negatively affecting rights of access to the Internet and other connected rights. Both bureaucratic bungling and corporate selfishness have resulted in this situation. In this light, it is appropriate to recommend that both legislative and regulatory frameworks be reviewed to clarify the role of the regulator and the executive in relation to the allocation and assignment of the radio-frequency spectrum.

Since it is unfair to apportion blame to component designers whose work may be far removed in space and time from the completion and operation of AI systems, the conception of any regulation and legislation must try to ensure efficient disclosure of information, particularly where there are differences in time and geographic location between stakeholders involved in the development and production of AI systems.

In addition, regulation should ensure effective protection of the user's intellectual property, and encourage innovation in the deployment of AI systems in an equitable manner.

Given that the distinction between tangible and intangible objects becomes more blurred as we enter the 4IR, dominated by digital content, it is submitted that, in the medium to long term, a common-liability regime for AI systems should be developed to bring certain aspects of software into the product-liability fold.

It becomes imperative that the international community, led by the UN, should consider developing a specific international instrument focusing on various legal dimensions aimed at regulating AI systems and their implications for human and fundamental rights. The international community should also ensure that existing efforts to regulate international trade and copyright laws do not disadvantage developing countries. They must

therefore be aimed at ensuring equitable access to the benefits of AI systems since there should be a collective approach in confronting challenges posed by the 4IR and AI systems in particular.

The South African Law Reform Commission should consider conducting research on the feasibility of enacting digital rights in a single legislative instrument to augment and realise constitutional rights already provided for in the Constitution and other pieces of legislation. The Presidential Commission on AI, together with the Department of Justice and the South African Law Reform Commission should strengthen research into the investigation of the possibility of conferring legal personhood and legal liability on AI systems. Relentless efforts should be made to ensure that South Africa considers clustering various economic sectors, like the financial sector, in order to properly regulate and manage the introduction of AI systems in a concerted manner.

The final recommendation is that the government should consider establishing a public liability company or insurance company to deal with all liability claims emanating from the deployment and use of AI systems.

9 CONCLUSIONS

It has been observed that, apart from contributing to technological advancements, successive industrial revolutions have also impacted both negatively and positively throughout the formalisation and evolution of human rights. This has also resulted in the expansion of science and new technologies, coupled with immense growth in the computational power used in computer hardware and software. Thus has the tone for the 5th Industrial Revolution now been set; it will be dominated by advanced computing and the integration of people with collaborative robotic systems. Many have raised concerns about the existential threat posed by artificial intelligence to human life. The discussion has also highlighted and dispelled the Eurocentric scientific narrative that places the history, development and discovery of technology and artificial intelligence in the hands of white European natives. In challenging this narrative, the argument is advanced that Africa's contribution and account for the origin and development of technology and its impact on human rights can be viewed from the assertion, first, that technology originated in the continent of Africa and, secondly, that the principles and values underlying *Ubuntu* theory have informed the development of human rights theory.

The EU has acknowledged that AI systems are a fast-evolving family of technologies with the potential to bring a wide range of socio-economic benefits across the entire spectrum of the value chain. As a result, the systems are regarded as instrumental to improving prediction and optimising operations and allocation of public goods and resources. While systems play a critical role in supporting socio-economic spin-offs and in improving the welfare of people, they have also given rise to new and nascent human rights issues that need to be addressed by the international community and state actors.

All over the world, states are integrating and deploying AI systems within their apparatus as part of law enforcement, criminal justice, national security

and the provision of other public services. While these AI systems assist in service delivery, concerns are also raised about their dire implications for the protection and enjoyment of basic human rights. As critical economic actors, states are obliged to shape and develop policy and legislative instruments on how AI systems are produced and deployed. This places states as the primary duty bearers in upholding, protecting and respecting human rights in line with international human rights law. This duty entails that nation-states should ensure that both international and domestic laws are applied to the management of both state-owned enterprises, and research-and-development institutions. The same should also be applied to corporate companies as part of mitigating potential harms and damages arising from the production and deployment of AI systems. The rights identified in the discussion are not exhaustive nor is it suggested that they are not currently legislated. Some of these rights are already catered for, although not in a comprehensive manner.

In South Africa, it is critical for the State to consider the enactment of digital rights in a single legislative instrument to augment existing constitutional rights contained in the Bill of Rights. Apart from identifying pertinent digital rights, such legislation may also regulate business conduct and expect robust due diligence from companies in their deployment and use of AI systems ahead of placement in public spaces. A robust due diligence exercise entails overseeing the development and deployment of AI systems by assessing risks and accuracy before they are brought to market. Equally important is to expect developers, programmers, operators, marketers and other users of AI systems within the value chain to be transparent about the details and impact of systems at their disposal. They should instead go further and inform the public and affected individuals about how AI systems arrive at particular decisions autonomously. This should also include notifying individuals about the use of their personal data.

THE EFFECT OF BUSINESS RESCUE'S MORATORIUM ON PROPERTY BELONGING TO THE COMPANY OR IN ITS LAWFUL POSSESSION AND THIRD-PARTY CONTRACTS*

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SUMMARY

The rights of both company and property owner have been a burning issue when a company embarks on business rescue proceedings. This issue has been plagued by difficulties with the interpretation of "moratorium" as found in section 133(1) of the Companies Act 71 of 2008. Property owners who have concluded contracts of lease or instalment sale with a company constantly find themselves in difficult positions when the company commences business rescue proceedings. These difficulties include, *inter alia*, the business rescue practitioner's cancelling of agreements between the property owner and the company, and the associated procedure; the failure of the company to pay in accordance with the agreements and the property owners' recourse/cause of action; and the effect of a moratorium on those properties. This article therefore deals with the competing legal and commercial interests, including rights, of both company and property owners when a company has commenced business rescue proceedings.

1 INTRODUCTION

Once a company has commenced business rescue, several consequences follow. Among these consequences are a moratorium, and the appointment of and powers of a business rescue practitioner. In order to rehabilitate the company, business rescue proceedings provide for a temporary moratorium on the rights of claimants against the company, or in respect of property in

* This article is based on a PhD titled "The Evolution of an Effective Business Rescue Statutory Regime in South Africa 1926–2021" obtained at the University of KwaZulu-Natal in 2022.

its possession.[1] Section 133(1) of the Companies Act[2] (the Act) provides: "During business rescue proceedings, no legal proceeding, including enforcement action, against the company, or in relation to any property belonging to the company, or lawfully in its possession, may be commenced or proceeded with in any forum." Ever since the moratorium was introduced in 1932,[3] the objective has always been to provide a financially distressed company with breathing space while being rescued. In *Cloete Murray NO v FirstRand Bank Limited t/a Wesbank*,[4] the court held:

> "It is generally accepted that a moratorium on legal proceedings against a company under business rescue is of cardinal importance since it provides the crucial breathing space or a period of respite to enable the company to restructure its affairs. This allows the practitioner, in conjunction with the creditors and other affected parties, to formulate a business rescue plan designed to achieve the purpose of the process."[5]

The idea is to give the company and the business rescue practitioner space and time to deal with rescuing the company, without having to deal with litigation by creditors.[6]

Although the moratorium has this important purpose, it has been subjected to academic and court scrutiny in relation to the meaning of "property belonging to the company or in its lawful possession". This scrutiny is also evident when dealing with a company's contracts with third-party owners of property in the company's possession. This article therefore deals with the competing legal and commercial interests, including rights, of both company and property owners when a company has commenced business rescue proceedings. It looks at the meaning of "property belonging to the company or in its lawful possession" and what this entails in instances of a dispute between company and third-party owner of the property. Furthermore, the article looks at the cancellation of agreements that a company in business rescue may have with third parties. In the process, the article comments on instances where agreements are cancelled by the business rescue practitioner on behalf of the company, as well as where agreements are cancelled by property owners.

2 PROPERTY BELONGING TO THE COMPANY

No legal proceedings may be enforced against any property belonging to the company or lawfully in its possession except with the written consent of the

1 S 128(1)(*b*) of the Companies Act 71 of 2008.

2 71 of 2008.

3 The moratorium was introduced by the Companies Amendment Act 11 of 1932.

4 2015 (3) SA 438 (SCA).

5 Par 14.

6 *Cloete Murray NO v FirstRand Bank Ltd t/a Wesbank supra* 14; *Southern Value Consortium v Tresso Trading 102 (Pty) Ltd* 2016 (6) SA 501 (WCC); [2015] JOL 34787 (WCC) 34; *Chetty t/a Nationwide Electrical v Hart* 2015 (6) SA 424 (SCA) 28 and 39; *Elias Mechanicos Building & Civil Engineering Contractors (Pty) Ltd v Stedone Developments (Pty) Ltd* 2015 (4) SA 485 (KZD) 7, 9 and 11; *Merchant West Working Capital Solutions (Pty) Ltd v Advanced Technologies and Engineering Company (Pty) Ltd* [2013] ZAGPJHC 109 4.

practitioner or with the leave of the court.[7] The inclusion of "property belonging to the company or in its lawful possession" is a new concept in the South African business rescue regime. There are two parts to the concept: on the one hand, the property must belong to the company or be in its lawful possession. If this is not the case, the moratorium will not apply. In *Timasani (Pty) Ltd (in business rescue) v Afrimat Iron Ore (Pty) Ltd*,[8] the court accepted that "property 'belonging to the company' in s 133(1), sensibly construed, could only mean property belonging in a legally valid sense, such as property owned by the company, which in s 133(1) is expressly distinguished from property 'lawfully in its possession'".

The facts in *Timasani* were briefly that the business rescue practitioner instructed the auctioneer to invite offers for the purchase of, *inter alia*, the farm, mineral rights and mining equipment. This invitation was published through the auctioneer's website and a deposit of 15 per cent was payable on submission of an offer with the balance being payable within 30 days of confirmation of accepting that offer. After expressing interest and being provided with a draft offer, Afrimat made a counter-offer with certain amendments, including, *inter alia*, that: Afrimat was going to pay a deposit of 15 per cent of the purchase price; the deposit was to bear interest, which would accrue for Afrimat's benefit; the balance of the purchase price was payable upon fulfilment of suspensive conditions, which included the conduct of a legal, technical and financial due-diligence investigation yielding satisfactory results and approval of an agreement by Afrimat's Board of Directors; and Afrimat would not be liable for any liabilities of Timasani, including any costs associated with its business rescue. Afrimat's counter-offer was accepted by the business rescue practitioner on behalf of Timasani with a deposit of 10 per cent instead of 15 per cent. The deposit was duly paid by Afrimat.

However, subsequent to the payment of the 10 per cent deposit, the sale agreements did not materialise and were never concluded. This was owing to a dispute concerning the amount of commission due to the auctioneer. The auctioneer claimed commission on the purchase price of all the assets, while Afrimat argued that it was only liable for 10 per cent commission on the purchase price of the farm. The dispute remained unresolved. A few days later, Afrimat informed Timasani's business rescue practitioner that its offer to conclude sale agreements had lapsed, and it requested that the deposit be repaid.

The issue before the court was whether Afrimat was precluded from instituting legal proceedings against Timasani by the section 133 moratorium. The court found that Afrimat could rightly order Timasani to repay the deposit. It was held by the court that "[n]o purpose connected to the process of business rescue warrants the company under business rescue being protected against proceedings to recover property that it neither owns, nor lawfully possesses."[9] Since Timasani and Afrimat had not concluded the sale agreements, there was no right to retain the deposit

7 S 133(1)(*a*) and (*b*) of the Act.
8 [2021] ZASCA 43 31.
9 *Timasani supra* par 29.

because such deposit did not belong to the company, and nor was it in its lawful possession.[10] The court remarked, obiter, that "[c]ommon sense dictates that it could never have been intended that the restructuring of the affairs of a company during business rescue should prevent recovery of property not belonging to it or unlawfully in its possession."[11] Thus, property "belonging to the company" does not include property belonging to the company unlawfully.[12] Unlawfulness in this context includes civil and criminal unlawfulness.[13] The company may not invoke the moratorium in respect of property that it does not lawfully possess.

3 MORATORIUM ON PROPERTY OWNERS

3 1 Cancellation of agreements

The interpretation of the phrase "legal proceedings and enforcement action thereof" in section 133(1) affects contracts that have been entered into by the company and property owners. The UNCITRAL guidelines provide:

> "In reorganisation, where the objective of the proceedings is to enable the debtor to survive and continue its affairs to the extent possible, the continuation of contracts that are beneficial or essential to the debtor's business and contribute value to the estate may be crucial to the success of the proceedings. These may include contracts for the supply of essential goods and services or contracts concerning the use of property crucial to the continued operation of the business, including property owned by third parties. Similarly, the prospects of success may be enhanced by allowing the insolvency representative to reject burdensome contracts, such as those contracts where the cost of performance is higher than the benefits to be received or, in the case, for example, of an unexpired lease, the contract rate exceeds the market rate."[14]

This raises the question of how contracts with third parties have been dealt with by the courts in relation to the property owned by those third parties.

When a company commences business rescue proceedings, it is likely to have existing contracts requiring performance – that is, executory contracts where one or all of the obligations remain unfulfilled.[15] However, business rescue – specifically the moratorium – has an effect on those executory contracts. Although the moratorium gives a company breathing space to restructure its affairs, it has far-reaching consequences for other property owners, once the company has embarked on business rescue. Property owners may not bring legal proceedings or exercise any right in respect of any property in the lawful possession of the company, irrespective of

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10 *Timasani supra* par 35.

11 *Timasani supra* par 31.

12 *Southern Value Consortium v Tresso Trading supra* 29–30.

13 *JVJ Logistics (Pty) Ltd v Standard Bank of South Africa Ltd* 2016 (6) SA 448 (KZD) 37.

14 United Nations Commission on International Trade Law (UNCITRAL) "Legislative Guide on Insolvency Law Part 2" (2005) 121 par 122 https://uncitral.un.org/sites/uncitral.un.org/files/media-documents/uncitral/en/05-80722_ebook.pdf (accessed 2020-12-07).

15 Lawrenson "Lease Agreements and Business Rescue: In Need of Rescue" 2018 3 *Tydskrif vir die Suid-Afrikaanse Reg* 657.

whether it is owned by the company (except to the extent that the practitioner consents or with leave of the court).[16] It has been argued that this constitutes injustice for a property owner whose claims are stayed while the company enjoys the use of the property.[17] However, although executory contracts are stayed during business rescue, they are not automatically cancelled or terminated. Consequently, section 136(2)(*a*) gives the practitioner powers to cancel, entirely, partially or conditionally, obligations of the company arising from agreements "to which the company was a party at the commencement of the business rescue proceedings; and would otherwise become due during those proceedings".[18] Levenstein argues that the purpose of section 136(2)(*a*) is to identify which contracts are detrimental or prejudicial to the continued viability of the company in business rescue,[19] with the result that section 136(2) does have an effect on property owners. In terms of both section 133(1) and section 136(2)(*a*), once the company commences business rescue, property owners are faced with several consequences, including:

- a stay on the enforcement of action or legal proceedings where the company has failed to pay rent and any incidental expenses in relation to lease agreements or instalments in relation to credit agreements; and
- the partial, whole or conditional suspension of the company's obligations arising out of executory contracts.

As a result of the competing legal interests and rights, a contest often ensues between company and property owner.

Furthermore, owing to the importance of executory contracts in the commercial world, legal certainty on how the moratorium affects property owners has been tested by the courts. The courts have been called upon to test the balance between the goals of the moratorium against the prejudice caused by the moratorium on property owners. The SCA has held that the moratorium does not prevent a property owner from cancelling an agreement with a company under business rescue.[20] The court was tasked with determining whether, once business rescue proceedings have commenced, the creditor of a company under business rescue could unilaterally cancel a contract it had concluded with the company prior to the company being placed under business rescue. Fourie AJA (Navsa ADP, Ponnan JA, Zondi JA and Schoeman AJA concurring) held:

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16 S 133(1)(*a*), read with s 134(1)(*c*). Since the Act uses the words "any property", both owners of both movable and immovable property are affected by the moratorium.

17 Cassim "The Effect of the Moratorium on Property Owners During Business Rescue" 2017 29(3) *South African Mercantile Law Journal* 422.

18 S 136(2) provides: "Subject to subsection (2A), and despite any provision of an agreement to the contrary, during business rescue proceedings, the practitioner may – (*a*) entirely, partially or conditionally suspend, for the duration of the business rescue proceedings, any obligation of the company that (i) arises under an agreement to which the company was a party at the commencement of the business rescue proceedings; and (ii) would otherwise become due during those proceedings."

19 Levenstein *An Appraisal of the New South African Business Rescue Procedure* (unpublished LLD thesis, University of Pretoria) 2016 470.

20 *Cloete Murray NO v FirstRand Bank Limited t/a Wesbank supra.*

> "In the context of s 133(1) of the Act it is significant that reference is made to 'no legal proceeding, including enforcement action *in any forum*'. (My emphasis.) The inclusion of the term 'enforcement action' under the generic phrase 'legal proceeding' seems to me to indicate that 'enforcement action' is considered to be a species of 'legal proceeding' or, at least, is meant to have its origin in legal proceedings. The concepts 'enforcement' and 'cancellation' are traditionally regarded as mutually exclusive. The term 'cancellation' connotes the termination of obligations between parties to an agreement. However, the liquidators contended for a wider meaning to be attributed to the expression 'enforcement action', to include the cancellation of an agreement. In so doing I believe that they are doing violence to the wording of s 133(1) of the Act. Cancellation is a unilateral act of a party to an agreement and, save for giving the other party notice of such cancellation, it does not occur in or by means of any process associated with any form of forum ... It therefore seems to me that, linguistically, the phrase 'enforcement action' in s 133(1) is unable to bear the meaning of the cancellation of an agreement, as contended for by the liquidators. Contextually it must be understood to refer to enforcement by way of legal proceedings."[21]

Several commentators and courts have agreed with this judgment and accepted that a moratorium does not affect the cancellation of an executory agreement.[22] However, the court did not dwell on whether the property owner may repossess such property after the cancellation of an agreement. Consequently, the question remains whether property owners are given special power to disregard a moratorium and repossess their property when they have cancelled an agreement with a company under business rescue. The courts appear to have eased application of the moratorium when dealing with owners' repossession of property,[23] leaning towards favouring property owners rather than the company in business rescue. Academics such as Cassim have criticised this as misconstruing the moratorium.[24]

3 2 Moratorium on movable property

Some judgments in KwaZulu-Natal and Gauteng have upheld the right of property owners to repossess movable property after the cancellation of an

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21 *Cloete Murray NO v FirstRand Bank Limited t/a Wesbank supra* par 32 and 33.

22 Cassim 2017 *South African Mercantile Law Journal* 423–424; Weyers "Cancellation or Suspension of Agreements During Business Rescue" 2015 15(4) *Without Prejudice* 17; *Southern Value Consortium v Tresso supra*; *JVJ Logistics (Pty) Ltd v Standard Bank of South Africa supra.*

23 See for e.g., *Madodza (Pty) Ltd v Absa Bank Ltd* [2012] ZAGPPHC 165, *Southern Value Consortium v Tresso Trading supra*; *JVJ Logistics (Pty) Ltd v Standard Bank of South supra*; *Kythera Court v Le Rendez-Vous Café* CC 2016 (6) SA 63 (GJ).

24 Cassim 2017 *South African Mercantile Law Journal* 432 and 437. In her arguments (at 433), Cassim argues that "[b]y freezing the rights of property owners to bring enforcement actions or legal claims to repossess their property from the company, the moratorium prevents property owners from disturbing the company's possession of the property, interfering in the rescue process, and upsetting the chances of saving the company. The wide application of the moratorium to include hired and leased property, and other property possessed but not owned by the company, thus allows the company to continue in business by restricting creditors from depriving the company of property that is key to its business. Without it, the entire business rescue regime would fall apart. If property owners were freely permitted to divest the company of goods or assets used and enjoyed by it, it would impair the business rescue practitioner's capacity to manage the company and to use those assets in the conduct of the company's business with a view to achieving the goal of the rescue."

agreement. In both judgments discussed below, companies had failed to make payments as required in their agreements with the banks. In both cases, the banks had obtained, prior to the companies being placed in business rescue, court orders for the return of motor vehicles in the possession of the companies.

In *Madodza (Pty) Ltd v Absa Bank Ltd*,[25] the company brought an urgent application to prevent the sheriff from removing several vehicles from its possession until such time as the business rescue proceedings came to an end. The company argued that it should be allowed to restructure its affairs in a way to allow it to continue operating, and the business rescue proceedings would fail if the vehicles were returned.[26] The bank, however, contended that the vehicles did not form part of the assets of the company, nor was the company in lawful possession of the vehicles. The bank argued that the agreement had been cancelled prior to the commencement of business rescue. The court ruled in favour of the bank and found that the company was not in lawful possession of the vehicles and, therefore the applicant was not entitled to rely on section 133(1);[27] it held further that the agreements were cancelled, and the company had been ordered to return the vehicles prior to commencing business rescue proceedings.[28] Consequently, the company had failed to prove that it was in lawful possession of the vehicles.

The court in *JVJ Logistics (Pty) Ltd v Standard Bank of South Africa Ltd* agreed with the *ratio* in *Madodza* that the company could not rely on section 133(1) because it was not in lawful possession of the vehicle in question.[29] Interestingly, the court acknowledged that the execution or enforcement of an order made prior to the commencement of business rescue would amount to "enforcement action" as per section 133(1) of the Act.[30] However, from the moment the agreement was cancelled, the company lost lawful possession of the vehicle.[31]

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25 *Supra*. This case was decided before the judgment of the SCA in *Cloete Murray NO v FirstRand Bank Limited t/a Wesbank supra*.

26 *Madodza (Pty) Ltd v Absa Bank Ltd supra* par 11.

27 *Madodza (Pty) Ltd v Absa Bank Ltd supra* par 18.

28 *Madodza (Pty) Ltd v Absa Bank Ltd supra* par 17.

29 *JVJ Logistics (Pty) Ltd v Standard Bank of South Africa Ltd supra* par 51.

30 *JVJ Logistics (Pty) Ltd v Standard Bank of South Africa Ltd supra* par 13.

31 *JVJ Logistics (Pty) Ltd v Standard Bank of South Africa Ltd supra* par 27. In reaching the decision, Olsen J held: "It seems to me that there are two possible meanings to be ascribed to the word "lawfully" in s 133(1) of the Act. The first is wider than the second. The first, being the one adopted in *Madodza*, regards the affected company's possession of property as unlawful, and therefore not protected by s 133(1) of the Act, whenever the company lacks the so-called *jus possidendi*, which Professor Silberberg described as 'a right which justifies a person's claim to have a thing in his possession'. A purchaser under a normal bank instalment agreement reserving ownership to the bank acquires a *jus possidendi* when put in possession of the property in terms of the agreement; and loses it if the agreement is cancelled. On this approach the requirement of s 133(1) is that the company's possession should be lawful when judged from any perspective; or if not that, then lawful when judged from the perspective of any claim by a third party to possession of the property. The second possibility involves a distinction not unknown to our law between *iusta* and *iniusta* possession. Professor Silberberg considered this distinction to be one between just and unjust possession. The learned authors of his work (Badenhorst, Pienaar and Mostert,

A common thread in both these cases was that the company's use of vehicles was key to their business and important for the success of business rescue proceedings. However, the courts rejected this argument and focused on the meaning of "lawful possession" of the property. It is submitted that the court should have considered critically the use of vehicles as a key component in rescuing these companies. While the vehicles would have decreased in value with use,[32] the courts should have realised that repossession of such vehicles negatively affected the purpose of business rescue; focusing on the meaning of "lawful possession" made life more difficult for the companies in their quest for business rescue. The courts appear to have favoured property owners by allowing them to cancel the agreements[33] and to bypass the moratorium, frustrating the intention of a moratorium. Cassim's argument that, by favouring a wider literal meaning of the phrase "lawful possession", the courts have undermined the purpose of the legislation,[34] is supported. However, the rights of property owners should be considered carefully. In considering these rights and the purpose of a moratorium, it is necessary to look at the surrounding circumstances. There may be circumstances where property that is not critical to the "lawful owner" may threaten the goal of business rescue if repossessed.[35] There may be circumstances in which it is vital for the company to retain possession of the property to continue its commercial services. In such circumstances, the moratorium should apply, despite the property owner seeking to recover it. In judicial management cases, the courts have emphasised that the circumstances are important in order to determine whether the moratorium is to be upheld.[36]

2006) render the same distinction in English as one between lawful and unlawful possession. In both cases the examples of unjust or unlawful possession immediately dealt with are possession acquired by force or stealth (secretly). The learned authors add as a further example of unlawful possession that which is exercised 'on sufferance as against the opponent'. They accordingly equate the concept of lawful (or just) possession with possession *nec vi*, *nec clam, nec precario*, as those terms were used in s 2 of the repealed Prescription Act 18 of 1943."

32 A bank may therefore argue that if it repossesses the vehicle, it can get a better return rather than to wait for even just one day while the vehicle is in the possession and used by the company.

33 It appears that as long as the agreement was cancelled prior to commencing business rescue, the property owners have a "special" power to repossess their property.

34 Cassim 2017 *South African Mercantile Law Journal* 439.

35 Depending on the type of business, vehicles may not always be as critical as they were in *Madodza* and *JVJ Logistics*.

36 See *Unitrans Botswana (Pty) Ltd v North-West Transport Investment (Pty) Ltd* [2005] ZANWHC 1. Although this case did not concern property in the company's possession, it concerned the issue of moratorium and surrounding circumstances. Landsman J at 15 held that the absence of a complaint that the judicial management of the company would be prejudiced financially by the claim weighed the heaviest. In both *Madodza* and JVJ *Logistics* the companies complained that the taking of vehicles would prejudice the success of business rescue. Furthermore, in *Samuel Osborn (SA) Ltd v United Stone Crushing Co (Pty) Ltd (Under Judicial Management)* 1938 WLD 229 235, the court took the view that the discretion of the court should not be exercised so as to wreck the prospects of the successful issue of the judicial manager's administration, unless it was clear that this administration was doomed to failure.

3 3 Moratorium on immovable property

While a moratorium bars the enforcement of action and legal proceedings against a company in business rescue, judgments in the KwaZulu-Natal, Western Cape and Gauteng courts have implications for the moratorium that affect property owners in lease agreements. In some of the judgments, cancellations were made prior to a company commencing business rescue,[37] while in others cancellation was post-commencement.[38] In *178 Stamfordhill CC v Velvet Star Entertainment CC,*[39] which originated in KwaZulu-Natal, the property owner brought an urgent application for a declarator that the lease had been cancelled, and sought the eviction of the respondent from the property. The case was founded primarily on section 136(2) of the Act, since the respondent argued that the business rescue practitioners had suspended the agreement.[40] The respondent argued that the court's legal proceedings could not be brought in relation to possession of the property without the leave of the court, and that the court should not grant an order for eviction.[41] However, the court held that while section 136(2) had an effect on rental claims that were due after the commencement of business rescue, this did not apply to rental claims that had been due prior to the commencement of business rescue; therefore the property owner was entitled to cancel the contract,[42] and the respondent was ordered to remove its movables from the applicant's premises.[43]

Although the court did not rely on the fact that the business rescue proceedings were likely to fail, it is submitted that this factor should play an important role in such disputes. This was a case of abuse of business rescue and of the moratorium against the property owner; the property was no longer needed for effective rescue, and repossession of such property was not going to affect business rescue proceedings negatively.

However, in *Kythera Court v Le Rendez-Vous Café CC*[44] (originating in the Gauteng High Court, per Boruchowitz J), the applicant sought the urgent eviction of the respondent on the grounds that the lease agreement had been cancelled. Although the case was more about the interpretation of section 133(1), the court nevertheless touched on the interpretation of section 136(2) as follows:

> "The section provides that the business practitioner may – despite any provision of an agreement to the contrary – entirely, partially or conditionally suspend, for the duration of the business rescue proceedings, any obligation of the company that arises under an agreement to which the company was a

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37 *Southern Value Consortium v Tress Trading supra*.

38 *178 Stamfordhill CC v Velvet Star Entertainment CC* [2015] ZAKZDHC 34; *Kythera Court v Le Rendez-Vous Café* CC *supra*.

39 *Supra*.

40 See *178 Stamfordhill CC v Velvet Star Entertainment CC supra* par 11, where the court accepted that although the letter suspending the agreement did not form part of the court papers, it appeared that a letter had been sent to the property owner.

41 *178 Stamfordhill CC v Velvet Star Entertainment CC supra* par 21.

42 *178 Stamfordhill CC v Velvet Star Entertainment CC supra* par 25 and 27.

43 *178 Stamfordhill CC v Velvet Star Entertainment CC supra* par 37.

44 *Supra*.

> party at the commencement of the business rescue proceedings. By invoking this section, the business practitioner may prevent a landlord from cancelling a lease and from instituting eviction proceedings."[45]

Significantly, the court accepted that the respondent did not invoke section 136(2) and therefore the "respondent's obligation to pay monthly rentals and municipal utilities had not been suspended prior to applicant's cancellation."[46] If section 136(2) had been invoked by the respondent, the applicant might have been prevented from cancelling the lease agreement.[47] Cassim has criticised this interpretation, arguing that a section 136(2) suspension applies only to post-commencement obligations.[48] The argument by Cassim, therefore, supports the *ratio* in *178 Stamfordhill CC*.

The court went further to deal with the application of section 133(1) to lease agreements. Citing the case of *Cloete Murray NO v Firstrand Bank Ltd t/a Wesbank*, the court held that the agreement had been validly cancelled.[49] The court went on to deal with the issue of eviction. In this regard, Boruchowitz J held:

> "It is trite law that on the termination of a lease (whether by cancellation or the effluxion of time) it is the duty of the lessee to vacate the property subject only to the lessee's right to compensation for improvements. The failure to vacate properties when there is an obligation to do so renders the lessee an unlawful occupier."[50]

The court viewed the phrase in section 133(1) "in relation to any property belonging to the company, or lawfully in its possession" as inapplicable to legal proceedings or enforcement action in relation to property belonging to persons or entities other than the company in business rescue, or in relation to property that is unlawfully possessed by the company.[51] The court held further that "vindicatory proceedings or proceedings for the repossession or attachment of property in the unlawful possession of a company in business rescue would be permissible."[52] Accordingly, the court found that leave to eject the company from premises – once the agreement had been validly cancelled – was not necessary,[53] and the order of eviction was granted.[54]

In the Western Cape case of *Southern Value Consortium v Tresso Trading 102 (Pty) Ltd* (per Blignault J),[55] the issue of the moratorium and lease agreements arose. Unlike in the *178 Stamfordhill CC* and *Kythera Court* cases, the lease agreement was cancelled prior to the

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45 *Kythera Court v Le Rendez-Vous Café CC supra* par 15.
46 *Kythera Court v Le Rendez-Vous Café CC supra* par 31.
47 *Ibid*.
48 Cassim 2017 *South African Mercantile Law Journal* 427.
49 In *Kythera Court v Le Rendez-Vous Café CC supra* par 13, the court held that "cancelling the agreement does not constitute enforcement action as contemplated in s 133(1) and that it is permissible for an agreement to be cancelled during business rescue proceedings."
50 *Kythera Court v Le Rendez-Vous Café CC supra* par 14.
51 *Kythera Court v Le Rendez-Vous Café CC supra* par 9.
52 *Ibid*.
53 *Kythera Court v Le Rendez-Vous Café CC supra* par 16.
54 *Kythera Court v Le Rendez-Vous Café CC supra* par 41.
55 *Supra*.

commencement of business rescue proceedings. As in *178 Stamfordhill CC* and *Kythera Court*, the company fell into arrears with the payment of rent and other additional charges, including operating costs, utilities consumption and municipal charges. After commencing business rescue proceedings, the company opposed an application for eviction on the grounds that sections 133(1) and 134(1)(*c*) precluded the property owner from pursuing such claims. Interpreting both sections, the court found in favour of the property owner, holding that the company was not in lawful possession of the property. Blignault J held:

> "The applicant claims to be the lawful owner of the property. The business practitioners did not refute this claim. It follows that the property never belonged to respondent. Following the cancellation of the lease agreement respondent was, furthermore, no longer in lawful possession of the property. The business practitioners can therefore not rely on the provisions of s 133(1) of the Companies Act as a defence to applicant's claim. Similar reasoning applies to the interpretation of s 134(1)(c) of the Companies Act. The key concept is the lawful possession of the company. After the cancellation of the lease agreement respondent was no longer in lawful possession of the property."[56]

The court added that it could not have been the legislature's intention that the company in business rescue would restructure its affairs by using assets to which it has no lawful claim.[57]

4 FURTHER COMMENTARIES

On the issue of property belonging to the company or in its lawful possession, the SCA in *Timasani* has created precedent on when a company in business rescue is protected by the moratorium. Significantly, the judgment's interpretation of "property belonging to the company or in its lawful possession" reinforces the purposive interpretation of section 133 that the moratorium cannot sensibly be construed to provide a defence to the institution of legal proceedings in instances where the company under business rescue unlawfully possesses the property in dispute. Therefore, in the context of property, it has been clarified that the moratorium protection can only possibly apply to property that is owned by or in the lawful possession of the company in business rescue. Such moratorium protection cannot prevent the recovery of property not belonging to the company or which is unlawfully in its possession. Therefore, a third party is allowed to institute legal proceedings in relation to property in dispute if that property does not belong to the company or is not in its lawful possession. However, this leads to another interesting issue – the importance of that property for business rescue proceedings – that is, the issue of the commercial importance of the property in dispute when the company is in business rescue. This also touches on the cancellation of agreements.

In relation to the cancellation of agreements – and the interpretation of section 133(1) – the cases discussed above have leaned towards protecting

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56 *Southern Value Consortium v Tresso Trading 102 (Pty) Ltd supra* par 31 and 32.

57 *Southern Value Consortium v Tresso Trading 102 (Pty) Ltd supra* par 35.

property owners once an agreement has been cancelled, irrespective of whether the contract had been cancelled prior to or after commencement of business rescue proceedings. Such protection of property owners has been the subject of academic criticism for failing properly to consider the purpose of the moratorium for business rescue, especially in regard to eviction or repossession of property once an agreement has been cancelled. Cassim argues: "[I]n a misguided attempt to protect property owners, the courts have regrettably overlooked the fundamental aim of the moratorium."[58] Lawrenson argues that it was a practical question of how a company under business rescue could survive if the property owner cancelled the agreement in question, depriving the company of the property in its possession.[59]

The criticisms carry weight, subject to reservations in cases of potential abuse of the process. The courts have indeed appeared to favour owners, giving little weight to the moratorium. The decisions in *Madodza* and *JVJ Logistics* disregarded the important role of vehicles in rescuing the companies. Refusing repossession would have helped the companies to conduct efficient[60] rescue proceedings. As mentioned above, the case of *178 Stamfordhill CC* constituted an exception to this proposition because the business rescue had palpably failed, and refusal of repossession would have been unfair to the owner. The court should look at the circumstances when interpreting section 133(1), including the protection of property owners. If repossession serves to obstruct the business rescue, it should be refused. This requires the courts to balance the interests of the company under business rescue and those of the property owner. The moratorium is intended to allow the company under business rescue to remain in possession of property vital for its continued commercial activities.[61] Considering that the property owner may argue that the moratorium infringes property rights to their detriment (that is, loss of rent), Cassim concedes that the time period of the moratorium must be capped, and the court should limit

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58 Cassim "The safeguards and protective measures for property owners during business rescue" 2018 30 1 *South African Mercantile Law Journal* 40. See also the same author in Cassim 2017 *South African Mercantile Law Journal* 437 when she cites a judgment to stress the point that the courts have misconstrued the moratorium's purpose.

59 Lawrenson 2018 *Tydskrif vir die Suid-Afrikaanse Reg* 661.

60 The word efficient is used deliberately in face of the argument that the companies could have raised further loans to buy new vehicles. However, raising new loans might take time that the company does not have.

61 Cassim 2018 *South African Mercantile Law Journal* 57. At 51, Cassim gives sound guidelines for circumstances where the courts are considering whether to grant a property owner leave to exercise their rights. According to Cassim, the court should consider the following factors:

1. Where the property is not required for the rescue of the company, or where the repossession of the property would not obstruct the purpose of the rescue, the court or the business rescue practitioner should lift the moratorium and permit the property owner to enforce its right to reclaim the property.
2. Where the repossession of the property would obstruct the purpose of the rescue, a balancing test must be undertaken by the courts (or the business rescue practitioner) in deciding whether or not to lift the moratorium and to permit the repossession of the property by the owner.
3. Thirdly, where the property owner is refused permission to repossess their property, this, as a general rule, must be on the basis of the continued payment of current rent (or other relevant compensation) to the property owner.

the time (to about three months) in which the company is allowed to use the property without paying rent or compensation.[62] While this is a sound guideline and is supported in principle, the threshold should be determined by the court in the given circumstances. Three months may be too long or too short, depending on the circumstances. The court's discretion would therefore necessarily ensure that neither the company nor the property owner could abuse this guideline.

In the *Cloete Murray* case, the court held:

> "the effect of s 136(2) of the Act is that a contract concluded prior to the commencement of business rescue proceedings is not suspended or cancelled by virtue of the business rescue but that the practitioner may suspend, or apply to court to cancel, any obligation of the company under the contract."[63]

Cassim submits that when there has been suspension of lease agreements or instalment-sale agreements in terms of section 136(2)(*a*), the property owner should be permitted to apply to the court to lift the suspension and seek leave of the court to enforce the right to receive payment or repossession of property if this is justifiable.[64] Wyers asserts that, if section 136(2) has been invoked prior to the cancellation of an agreement, the creditor needs a business rescue practitioner or leave of the court to enforce cancellation of the agreement.[65] However commentators differ on whether such cancellation has an effect on obligations incurred prior to commencement of business rescue. Cassim argues that suspension applies only to post-commencement obligations,[66] whereas Weyers is of the view that section 136 applies even to pre-commencement obligations.[67] The issue of the cancellation of executory agreements in business rescue is not a clear-cut issue.

Citing the UNCITRAL Model Law and the 2007 Companies Bill, Lawrenson adds a further argument that:

> "a provision similar to section 139(1)(*a*) of the 2007 Companies Bill be inserted into the Act, prohibiting a landlord from cancelling an executory lease

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62 Cassim (2018 *South African Mercantile Law Journal* 68) lists a number of factors that the court should look at when weighing the loss and benefits of the property owner and those of the company. These include: "(i) the purposes of business rescue; (ii) the company's circumstances; (iii) the nature of the property and the rights claimed in respect of it; (iv) the financial position of the company; (v) the company's ability to pay ongoing and arrear compensation to the property owner; (vi) whether the grant of leave would be inimical to the object and purpose of business rescue proceedings; (vii) the goal or end result sought by the rescue of the company; (viii) the proposals of the business rescue practitioner; (ix) the prospects of success of the business rescue endeavour; (x) the length of time for which business rescue has already been in force and the expected period for which it is to continue; (xi) the views of the business rescue practitioner; (xii) the effect on the business rescue process if leave is given and the effect on the property owner if leave is refused; (xiii) the likelihood or degree of probability of each of the above factors; (xiv) the history of the business rescue proceedings; and (xv) the conduct of the parties."

63 *Cloete Murray NO v FirstRand Bank Limited t/a Wesbank supra* 15.

64 Cassim 2018 *South African Mercantile Law Journal* 59.

65 Weyers 2015 *Without Prejudice* 17.

66 Cassim 2017 *South African Mercantile Law Journal* 447.

67 Weyers 2015 *Without Prejudice* 17.

> agreement; [and] that a business rescue practitioner should be granted the option of continuing with, or cancelling an executory contract without having to obtain a court order − in line with international best practice."[68]

The reasons for suspending the contract in its entirety, partially or with a condition, may include onerous obligations in the form of excessive interest of credit agreements or high rentals. Since time is of the essence for business rescue, it may be argued that suspending a contract for those reasons without going to court may save time and legal costs. However, it is submitted that the role of the court may be necessary in certain circumstances. For example, there may be an obligation in terms of which a third party continuously performs a specific task for which the company pays, and the question that arises is whether the company's obligation may be cancelled or suspended while the third party is still obligated. This calls into question the wider issue of contractual liability in which the third party may argue that its obligation ceases when the company stops paying. Such disputes call for the guidance of the courts; in fact, the involvement of the courts may play a major role in resolving the issue.

5 CONCLUSION

This article has dealt with the consequences of business rescue – and particularly of the moratorium as a defence mechanism raised by a company in business rescue. What has become clear is that a moratorium can be used by a financially distressed company to enjoy a breathing space while it is in the business rescue process. However, on the interpretation of the moratorium defence raised by the company in business rescue, it is clear that competing legal and commercial interests, including the rights of both company and property owners, come into play when a company has commenced business rescue proceedings. The article has interpreted the meaning of "property belonging to the company or in its lawful possession" and what it entails in instances where there is a dispute between the company and the third-party owner of the property. Furthermore, the article has looked at the cancellation of agreements between the company and third parties, and the difficulties after such cancellation. In doing so, the article has commented on instances where agreements are cancelled by the business rescue practitioner on behalf of the company, as well as where agreements are cancelled by property owners.

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[68] Lawrenson 2018 *Tydskrif vir die Suid-Afrikaanse Reg* 662 and 669.

THE IMPACT OF GLOBAL TRANSFORMATION ON DECENT WORK IN SOUTH AFRICA

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SUMMARY

This article provides a comprehensive analysis of the impact of global transformation on the concept of decent work in South Africa. By examining the country's unique historical, social and economic circumstances, the article explores the challenges and opportunities that arise from global dynamics. It investigates various dimensions of decent work affected by global transformation, including employment patterns, wages, working conditions, skills requirements, job security and social protection. The article highlights the need for adaptive strategies to address evolving labour-market dynamics, and emphasises the crucial role of government and stakeholders in promoting decent work. Through collaborative efforts, social dialogue and inclusive policy frameworks, South Africa can effectively navigate global transformation and work towards a labour market that ensures equitable, dignified and fulfilling employment opportunities for all its workers. This research contributes to the academic discourse on the intersection of global transformation, labour markets and decent work, and offers insights and recommendations for policy makers, scholars and practitioners in South Africa and beyond.

1 INTRODUCTION

In today's interconnected world, countries around the globe are continually influenced by global changes that shape their economic, social and political landscapes.[1] A crucial aspect affected by these changes is the concept of "decent work", which encompasses productive and fulfilling employment opportunities that provide fair wages, security and rights for workers. South Africa, as a nation undergoing its own economic and social evolution, is not immune to the effects of global transformation on its labour market.

This article delves into the profound impact of global transformation on decent work in South Africa by analysing the challenges and opportunities

[1] Carnegie Europe "From the Local to the Global: The Politics of Globalisation" (undated) https://carnegieeurope.eu/2022/02/17/from-local-to-global-politics-of-globalization-pub-86310 (accessed 2023-07-25).

that arise from this complex interplay. By examining the connections between global factors and local dynamics, light is shed on the multifaceted implications for workers and policy makers in South Africa.

South Africa's history of apartheid,[2] followed by a period of political transition and economic restructuring, has contributed to a unique set of circumstances that shape the country's labour market. The nation's workforce faces both long-standing and emerging challenges, ranging from persistent inequality and high unemployment to evolving patterns of global trade, technological advances and shifting labour-market demands.

Within this context, the article explores how global transformation influences the dimensions of decent work in South Africa. It examines the impact of international trade agreements, foreign direct investment and globalisation on employment patterns, wages and working conditions. The article also investigates how technological advances, automation and the rise of the gig economy affect job opportunities, skills requirements and job security in the country.

Furthermore, the article considers the efforts made by the South African government, civil-society organisations and social partners to address the challenges posed by global transformation and the need to promote decent work. It explores policy initiatives, social-dialogue mechanisms and labour-market interventions aimed at creating inclusive growth, reducing inequality and enhancing workers' rights and protection.

By examining these complex dynamics, the article seeks to provide a comprehensive understanding of the impact of global transformation on decent work in South Africa. It emphasises the need for adaptive policies, proactive strategies and inclusive approaches to ensure that the benefits of globalisation and technological advances are shared equitably, and that decent work becomes a reality for all South African workers.

As South Africa navigates the challenges and opportunities presented by global transformation, understanding their impact on decent work is essential for creating a sustainable and inclusive economy. By examining the interplay between global and local factors, policy makers, stakeholders and researchers can work together to develop strategies that promote decent work, improve labour-market conditions and advance the well-being of workers across the country.

2 DEFINING DECENT WORK

The International Labour Organization (ILO) defines decent work as follows:

> "Decent work, the core mandate of the ILO, is defined as productive work for women and men in conditions of freedom, equity, security and human dignity. Decent work involves work opportunities that are productive and delivers a fair income, provide security in the workplace and social protection for workers and their families, offer prospects for personal development and encourage interaction, give people the freedom to express their concerns, and organise

[2] South Africa's apartheid policy was a system of institutionalised racial segregation and discrimination enforced by the government from 1948 until the early 1990s.

> and participates in decisions affecting their lives and guarantees equal opportunities and equal treatment for all."[3]

Decent work consists of four inseparable, interrelated and mutually supportive strategic objectives: employment; fundamental principles and rights at work; social protection (social security and occupational safety and health); and social dialogue. Gender equality and non-discrimination are cross-cutting principles of decent work.

Global transformation refers to the dynamic changes occurring on a global scale that significantly influence economies, societies and political landscapes around the world. This transformation is driven by a variety of interconnected factors and processes, including globalisation, technological advances, demographic shifts and changes in geopolitical dynamics.

Decent work means that all individuals have access to productive, fulfilling, and socially acceptable employment opportunities. It encompasses several dimensions that contribute to a dignified and satisfactory work experience, including fair wages, job security, social protection and the opportunity for personal and professional development. Elaborating on the dimensions of decent work provides a deeper understanding.

- Decent work emphasises the creation of sufficient employment opportunities that enable individuals to engage in productive and meaningful work. It entails promoting job creation and reducing unemployment rates to ensure that individuals have access to decent employment options.[4]
- Furthermore, decent work entails fair remuneration, where workers receive wages that are sufficient to meet their basic needs and provide a decent standard of living for themselves and their families.[5] It involves addressing issues of wage inequality, promoting minimum-wage policies, and ensuring that workers receive just compensation for their labour.[6]
- In addition, decent work recognises the importance of job security where workers have confidence in the continuity of their employment.[7] It involves protecting workers against arbitrary dismissal, providing avenues by which to redress grievances, and promoting stable employment relationships that foster long-term engagement and commitment.[8]
- Decent work also emphasises the provision of social-protection measures to support workers in times of economic uncertainty or vulnerability. This includes access to health care, social-security

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3 See ILO *Report of the Director General : Decent Work* 87th International Labour Conference (1999) https://www.ilo.org/public/english/standards/relm/ilc/ilc87/rep-i.htm (accessed 2021-04-23).

4 *Ibid*.

5 Mokofe "The International Labour Organisation in Pursuit of Decent Work in South Africa: An Appraisal" 2020 41(3) *Obiter* 573–592.

6 *Ibid*.

7 Mokofe "Achieving Decent Work for Digital Platform Workers in South Africa" 2022 43(2) *Obiter* 349–365.

8 *Ibid.*

benefits, unemployment insurance and other forms of support that mitigate the risks associated with employment and promote social inclusion.[9]

- It further underscores the need for safe and healthy working conditions in which workers are protected from hazards and risks in their workplace. This involves implementing occupational health-and-safety regulations, promoting workplace-wellness programmes, and providing adequate training and protective equipment to mitigate work-related accidents and illnesses.[10]
- Decent work recognises the importance of achieving a balance between work and personal life. It involves promoting policies and practices that enable individuals effectively to manage their work responsibilities alongside family and personal commitments and so foster well-being and quality of life.[11]
- It includes the protection of workers' rights and the promotion of fair labour practices, and includes ensuring freedom of association and collective bargaining, preventing discrimination in the workplace, and guaranteeing equal opportunities and treatment for all workers.[12]
- Finally, decent work entails providing opportunities for skills development, training and lifelong learning to improve workers' employability and facilitate career advancement.[13] It recognises the importance of investing in human capital to ensure that workers can adapt to changing labour-market demands and access better job opportunities.

Overall, the concept of decent work strives to create a work environment that upholds the rights and well-being of workers, promotes inclusive growth, and contributes to sustainable development. It requires a comprehensive approach that involves collaboration between governments, employers, workers' organisations and other stakeholders to address the diverse dimensions of work, and build fair and equitable labour markets.

3 GLOBALISATION

The term "globalisation" is not easy to define, given that it has in most instances been contextualised. For this article, the following definition is helpful:

> "[The] increase in cross-border economic interdependency resulting from a greater mobility of factors of production and goods and services has established linkages over a broader geography of location. This trend is reflective of increasing economic liberalisation and falling tariff barriers, modern communications, free flow of capital and modern technologies,

9 *Ibid*.
10 Occupational Health and Safety Act 85 of 1993 (OHSA).
11 See ILO https://www.ilo.org/public/english/standards/relm/ilc/ilc87/rep-i.htm.
12 *Ibid.*
13 *Ibid*.

> integrated financial markets and corporate strategies of multinational companies that operate on the premises of [a] homogenous world market."[14]

Generally, globalisation refers to the increasing interconnectedness and interdependence of countries and their economies. It involves the flow of goods, services, capital, information and people across national borders. Globalisation has led to the integration of economies into a global market that enables the expansion of international trade, the growth of multinational corporations, and the establishment of global supply chains. It has also facilitated the transfer of technologies, ideas and cultural influences across nations. During the past decades much has been written on globalisation.[15] Globalisation has created some challenges for the ILO with greater attention being paid to competition between states – as opposed to workers' rights – which seldom supports the ILO's key objective of seeking social justice.

Globalisation has transformed the patterns of engagement in labour markets, not only in South Africa but throughout the world. Studies in Australia, Europe and North America published in the last ten years of the twentieth century showed shifts in the hiring of workers.[16] In a study of employment trends in the "new economy" in the United States, Smith contends:

> "[U]ncertainty and unpredictability, and to varying degrees personal risk, have diffused into a broad range of post-industrial workplaces, services and production alike; opportunity and advancement are intertwined with temporariness and risk."[17]

At about the same time, Osterman noted that in the United States:

> "[T]he ties that bind the workforce to the firm have frayed. … New work arrangements, captured by the phrase 'contingent work' imply a much looser link between firm and employee."[18]

Cappelli has argued: "[T]he old employment system of secure, lifetime jobs with predictable advancement and stable pay are dead."[19] The view that employment relationships are becoming less secure is strengthened by Hacker, who contends that the unpredictability of the labour market is increasingly borne by workers, as employers back off from long-term employment standards.[20] In an in-depth study of economic reorganisation and changing corporate forms, Weil contends that the growth of supply chains and the popularity of franchising have culminated in "fissured"

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14 Harbrige "Globalisation and Labour Market Deregulation in Australia and New Zealand: Different Approaches, Similar Outcome" 2002 24 *Employee Relations Journal* 424.

15 See *Webster's Third New International Dictionary of the English Language* (1961) 965.

16 Cappelli *The New Deal at Work: Managing the Market-Driven Workforce* (1999) 17.

17 Smith *Crossing the Great Divide: Worker Risk and Opportunity in the New Economy* (2001) 7.

18 Osterman *Securing Prosperity: The American Labour Market: How It Has Changed and What to Do about It* (2000) 3–4.

19 Cappelli *The New Deal at Work* 17.

20 Hacker *The Great Risk Shift: The Assault on American Jobs, Families, Health Care and Retirement and How You Can Fight Back* (2006).

workplaces.[21] This has led to a reduction in the pervasiveness of direct employment relationships, a growth in more non-standard categories of work, and an erosion of labour's capacity to bargain for better employment conditions. Standing contends that a new category of worker – the "Precariat" – has emerged.[22] These are workers in less secure employment who enjoy few employment benefits and minimal social protection. This has a direct impact on the pursuit of decent work in South Africa.

There is evidence of significant change in the South African labour market in the last 20 years of the twentieth century, including a meteoric rise in non-standard work relationships.[23] The South African government investigated the need to amend the Labour Relations Act (LRA)[24] in light of these developments and adopted the Labour Relations Amendment Act (LRAA)[25] in 2014. At the heart of the LRAA is the understanding that work today is less secure. The amendments follow the understanding that the labour laws and regulations adopted in the decades following World War II, when standard work relationships were more widespread, no longer serve the needs of workers.[26]

The orthodox employment paradigm based on a model of full-time employment with one employer has not escaped globalisation. Today, we see an increase in non-standard employment resulting from informalisation, casualisation and externalisation of work.[27]

4 TECHNOLOGICAL ADVANCES

The "Fourth Industrial Revolution", characterised by the integration of digital, physical and biological worlds, along with the increasing use of advanced technologies such as artificial intelligence, robotics, 3-D printing and wireless technologies, has wrought significant changes in the global economy. These developments have led to the emergence of new forms of irregular or non-standard work.

Non-standard employment refers to work arrangements that deviate from the traditional standard employment relationship, which typically involves full-time work with job security until retirement or notice of termination. Instead, non-standard work includes various forms of work – temporary, part-time, casual, freelance and in the gig economy. While technological advances may create new job opportunities, they have also contributed to the growth of non-standard employment. This can have both positive and negative effects on decent work. On the positive side, technology-driven industries can generate new jobs and economic growth, potentially

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21 Weil *The Fissured Workplace: Why Work Became So Bad for so Many and What Can Be Done to Improve It?* (2014).

22 Standing *The Precariat: The New Dangerous Class* (2003).

23 Department of Labour, Green Paper on Labour*, Minimum Standards Directorate Policy Proposals for a New Employment Standard Statute*.

24 66 of 1995.

25 6 of 2014.

26 Mitchell and Murray *Changing Workplaces Review: Special Advisors' Interim Report* (Ministry of Labour, Canada 2016).

27 Cheadle "Regulated Flexibility: Revisiting the LRA and the BCEA" 2006 27 *ILJ* 663 699.

increasing the availability of work opportunities in South Africa. These industries often require specialised skills, which may result in workers benefitting from upskilling and reskilling programmes to meet the demand for these roles.

However, the proliferation of non-standard work in the context of the fourth industrial revolution has both positive and negative consequences. On the one hand, it offers opportunities for flexibility and increased access to various job opportunities. On the other hand, it brings negative effects, a major concern being the difficulty in identifying the parties involved in the employment relationship.

With complex networks and online platforms facilitating work arrangements, establishing clear employer-employee relationships is challenging. This poses significant obstacles for workers to access essential labour rights and social-security protection. As a consequence, the quality of work deteriorates leading to situations where work is not considered decent or fair.

In addition, non-standard employment often lacks the same level of job security, benefits and protection as traditional, full-time jobs. Workers engaged in gig-economy jobs or short-term contracts may face uncertain income, limited access to benefits such as health care and retirement plans, and reduced job stability.

In the context of South Africa, where socio-economic imbalances have long been an issue, the growth of non-standard employment could exacerbate inequalities and hinder progress toward decent work. Policy makers and stakeholders need to address these challenges and ensure that workers in non-standard employment are protected and have access to essential labour rights, social security and fair working conditions.

To promote decent work in the era of the fourth industrial revolution, South Africa must strike a balance between embracing technological advances and ensuring that the workforce benefits from these changes. This may involve implementing policies that protect the rights of workers in non-standard employment, investing in education-and-training programmes to equip the workforce with relevant skills, and fostering a supportive environment for innovation and job creation.

Overall, the impact of the fourth industrial revolution on decent work in South Africa will depend on how effectively the country can address the challenges posed by non-standard employment, while harnessing technological advancements to promote inclusive and sustainable economic growth.

5 DEMOGRAPHIC SHIFTS AND THEIR IMPACT ON DECENT WORK IN SOUTH AFRICA

Changes in global demographics, including population growth, urbanisation and migration patterns, have significant implications for economies and

labour markets.[28] Urbanisation has concentrated economic activities in cities, and led to the emergence of new industries and service sectors. The expansion of the global population, particularly in emerging economies, has posed challenges to providing decent work opportunities for all.[29] Ensuring that people have access to jobs that offer fair wages, social protection and safe working conditions has become a priority for policy makers and organisations. Furthermore, migration, both internal and international, has contributed to the diversification of workforces and the transfer of skills and knowledge across borders.

Some migrants, in particular those with irregular or undocumented status, may be vulnerable to exploitation[30] by unscrupulous employers who take advantage of their legal status and lack of knowledge of local labour laws. In cases where migrants are willing to accept lower wages or subpar working conditions,[31] they may create downward pressure on wages and labour standards for local workers in similar jobs.

In addition, high levels of migration can lead to social tensions between local workers and migrants, especially if there is a perception that migrants are taking job opportunities away from locals or impacting local cultures.[32]

In some cases, migration can result in a "brain drain" where highly skilled individuals from developing countries emigrate to seek better opportunities abroad, leading to a loss of talent and human capital in their home countries.[33]

To ensure that migration has a positive impact on decent work, governments and organisations need to implement policies that protect the rights of migrant workers, promote fair labour practices, and ensure their access to social protection. It is also crucial to address the root causes of migration, such as economic disparities and lack of opportunities in migrants' home countries, to reduce forced migration, and to ensure that migration is a voluntary choice based on opportunities rather than necessity. By fostering inclusive and well-managed migration, countries can harness the potential of migrant workers to contribute positively to their economies and labour markets, while safeguarding migrants' rights and welfare.

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28 World Bank "Democratic Trends and Urbanisation" (undated) https://www.worldbank.org/en/topic/urbandevelopment/publication/demographic-trends-and-urbanization (accessed 2023-07-22).

29 ILO "World Employment Outlook" (2023) https://www.ilo.org/wcmsp5/groups/public/dgreports/inst/documents/publication/wcms_865387.pdf (accessed 2023-07-25).

30 ILO "Protecting the Rights of Migrant Workers in Irregular Situations and Addressing Irregular Labour Migration: A Compendium" (2018) https://www.ilo.org/wcmsp5/groups/public/---ed_protect/---protrav/---migrant/documents/publication/wcms_832915.pdf (accessed 2023-07-25).

31 Crepeau "Workplace Exploitation of Migrants" (undated) https://www.ohchr.org/sites/default/files/Documents/HRBodies/CMW/Discussions/2014/FrancoisCrepeau.pdf (accessed 2023-07-25).

32 Dewa "Migrants Scapegoated in South Africa as Inequality and Unemployment Surge" (2022) https://www.opendemocracy.net/en/5050/migrants-scapegoated-in-south-africa-as-inequality-and-unemployment-surge/ (accessed 2023-07-25).

33 Berger "Brain Drain, Brain Gain and Its Net Effect" (2O22) https://www.knomad.org/sites/default/files/2022-11/knomad_paper_46_brain_drain_brain_gain_and_its_net_effect_sandra_berger_november_2022.pdf (accessed 2023-07-25).

6 GEOPOLITICAL DYNAMICS

The geopolitical dimension can impact significantly on decent work in several ways, both direct and indirect. Geopolitical shifts can lead to changes in trade policies, including the imposition of tariffs and trade barriers. These protectionist measures can disrupt global supply chains, affect international trade flows, and result in job losses in industries that rely heavily on exports or imports.

- Geopolitical tensions and conflicts tend to create uncertainty in financial markets, leading to fluctuations in investment flows. Reduced investments can limit economic growth and lead to job losses or slower job creation.
- Geopolitical events also influence migration policies and affect the movement of workers across borders. Restrictions on labour mobility can limit access to international job opportunities for workers seeking better employment prospects abroad.
- Geopolitical alliances and agreements can promote regional economic integration and cooperation, which may create new employment opportunities in integrated markets.

However, geopolitical initiatives can also face challenges and tensions that may impact labour markets.

- Geopolitical conflicts, wars and territorial disputes can lead to large-scale displacement of populations, creating humanitarian crises and disrupting labour markets in affected regions. Displaced workers often face difficulties in accessing decent work opportunities and may be subject to exploitation in informal or precarious employment.
- Geopolitical dynamics can also affect the availability and cost of natural resources, including energy resources. Fluctuating energy prices can impact industries and negatively influence job creation or lead to job losses in sectors sensitive to energy costs.
- Geopolitical conflicts and disagreements can result in the imposition of economic sanctions on certain countries. These sanctions can have significant economic consequences, affecting businesses, industries, and employment opportunities within and beyond the targeted countries.
- Geopolitical tensions can influence technology transfer and the flow of knowledge and innovation across borders. Restrictions on access to technology may limit economic development and the creation of decent work opportunities in certain regions.
- Geopolitical events can influence consumer attitudes and preferences and affect demand for products and services. Changes in consumer behaviour can lead to shifts in employment patterns across industries.

Overall, the effects of geopolitics on decent work are complex and multifaceted. Geopolitical stability and cooperation can create an environment conducive to economic growth and job creation, while geopolitical conflicts and tensions can lead to uncertainties and disruptions in labour markets. Policy makers, businesses and international organisations need carefully to consider the potential impacts of geopolitical events on

decent work, and implement measures to promote fair and inclusive employment practices amid changing global dynamics.

7 SOUTH AFRICA'S CONTEXT OF DECENT WORK

South Africa's context of decent work reflects a unique historical, social and economic landscape that shapes the country's labour market, and influences the dynamics of decent work.[34] South Africa's history of apartheid, a system of institutionalised racial segregation and discrimination, has had a profound impact on the country's social and economic structure.[35] The legacy of apartheid includes deep-rooted inequalities, disparities in access to education and opportunities, and a history of marginalised groups in the labour market. Overcoming these historical challenges is ongoing in efforts to realise decent work for all.

In addition, South Africa underwent a significant political transition in the 1990s when apartheid ended and a democratic government was established. This transition brought about changes in governance, legal frameworks and policy priorities. It created opportunities for social and economic reforms, as well as the promotion of inclusive growth and the protection of workers' rights. Following the political transition, South Africa embarked on a process of economic restructuring, transitioning from a largely segregated and resource-dependent economy to a more diversified and globally integrated one. This restructuring process aimed to address historical inequalities, stimulate economic growth and attract foreign investment. However, it came with new challenges, including job displacement, skills gaps and unequal distribution of economic benefits. In addition, South Africa is characterised by high levels of inequality[36] and poverty.[37] Despite efforts to address these issues, disparities persist, affecting access to decent work for many individuals. Economic inequality, coupled with historical inequalities based on race, gender and geography, contribute to limited employment opportunities, wage disparities and precarious working conditions.

South Africa faces significant unemployment challenges with high rates of unemployment, particularly among the youth.[38] An increase of 1,1 per cent in the youth unemployment rate to 46,5 per cent in the first quarter of 2023[39] means that, unless there is a drastic change, 4.9 million young people have little-to-no hope of a future in South Africa. The informal sector plays a substantial role in the economy, absorbing a significant portion of the labour

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34 Mokofe 2020 *Obiter* 573–592.

35 Britannica "History and Society Apartheid Social Policy" (2023) https://www.britannica.com/topic/apartheid (accessed 2023-07-22).

36 World Bank "The World's Bank Strategy in South Africa Reflects the Government's Development Priorities and Its Unique Leadership Position at Sub-Regional and Continental Levels" (2023) https://www.worldbank.org/en/country/southafrica/overview (accessed 2023-07-22).

37 Statista "National Poverty Line in South Africa 2023" https://www.statista.com/statistics/1127838/national-poverty-line-in-south-africa/ (accessed 2023-07-25).

38 Stats SA *The Quarterly Labour Force Survey* (QLFS) Q1:2023.

39 *Ibid*.

force.[40] However, informal employment often lacks job security, social protection and adequate wages, which poses challenges to achieving decent work for those engaged in the sector.[41]

Another challenge is that South Africa faces a mismatch between the skills demanded by the labour market and those on offer by the workforce. This gap contributes to unemployment and underemployment and restricts access to decent work.[42] Addressing this skills mismatch through education and training initiatives is essential for promoting inclusive economic growth and improving the prospects of decent work. The country does, however, have a strong tradition of social dialogue and collective bargaining that plays a vital role in shaping labour-market policies and in promoting workers' rights. Social dialogue refers to the process of negotiation and consultation between government, employers and trade unions to address labour-related issues such as wages, working hours, job security and workplace safety. It involves open discussion and interaction among these stakeholders to find mutually acceptable solutions that benefit all parties involved. Tripartite engagement between the government, employers and trade unions helps address labour-market challenges, negotiate working conditions and advocate for workers' interests.

Understanding South Africa's context is crucial to comprehending the specific challenges and opportunities related to decent work in the country. It highlights the need for targeted policies and interventions that address historical inequalities, promote inclusive growth, advance skills development and foster social dialogue to ensure that decent work becomes a reality for all South African workers.

8 CHALLENGES AND OPPORTUNITIES RELATED TO DECENT WORK IN SOUTH AFRICA

8 1 Challenges

South Africa faces deep-rooted inequalities stemming from its history of apartheid, and these continue to impact access to decent work. Income inequality, disparities in education and unequal distribution of resources contribute to limited employment opportunities and wage gaps, particularly for marginalised groups.[43] Limited job opportunities and structural factors, such as skills mismatches and insufficient economic growth,[44] contribute to

[40] World Economics "South Africa's Informal Economy Size" (2023) https://www.worldeconomics.com/National-Statistics/Informal-Economy/South%20Africa.aspx (accessed 2013-07-10).

[41] Fourie "Analysing the Informal Sector in South Africa; Knowledge and Policy Gaps, Conceptual and Data Challenges" in Fourie (ed) *The South African Informal Sector: Creating Jobs, Reducing Poverty* (2018) 3–15.

[42] Pauw, Oosthuizen and Van der Westhuizen "Graduate Unemployment in the Face of Skills Shortages: A Labour Market Paradox" 2008 76(1) *South African Journal of Economics* 45–57.

[43] Makgetla "Inequality in South Africa: An Overview" (undated) https://www.tips.org.za/images/TIPS_Working_Paper_Inequality_in_South_Africa_An_Overview_September_2020.pdf (accessed 2023-07-22).

[44] Stats SA *The Quarterly Labour Force Survey* (QLFS) Q1:2023.

this challenge, although after contracting by a revised 1,1 per cent in the fourth quarter of 2022, real gross domestic product (GDP) edged higher in the first quarter of 2023 (January–March) by an estimated 0,4 per cent.[45] The country is still struggling to regain pre-pandemic employment levels with an unemployment rate of 32,9 per cent in the first quarter of 2023[46] – one of the highest rates globally.[47] This undermines the ability of individuals to secure decent work and hinders inclusive economic development.

Many workers in South Africa face precarious work conditions, such as temporary employment, informal-sector engagement, and low job security. Informal-sector workers often lack access to social protection, fair wages and adequate working conditions, making it difficult to achieve decent work standards.[48] In addition, the labour market experiences a significant gap between the skills demanded by employers and the skills on offer by the workforce. This skills mismatch contributes to unemployment and underemployment, limits individuals' ability to secure decent work and hinders productivity and economic growth.[49] The absence of comprehensive social-protection measures for all workers is a challenge in South Africa. Lack of access to health care for all, social security and unemployment benefits leaves many workers vulnerable to economic shocks, and limits their ability to secure decent work – in particular those who earn a living in the informal economy.[50]

8 2 Opportunities

South Africa has considerable economic potential in a diverse range of sectors such as mining, manufacturing, agriculture and services. Leveraging this potential can create employment opportunities, stimulate economic growth and contribute to decent-work outcomes. Promoting skills-development initiatives and vocational training programmes can bridge the gap between the skills demanded by employers and the skills of the workforce. Improving educational opportunities, aligning training with industry needs, and supporting lifelong learning can equip workers with the skills required for decent work.

South Africa has a strong tradition of social dialogue and collective bargaining, offering opportunities for stakeholders to address labour-market challenges, negotiate fair working conditions, and advocate for workers' rights. Strengthening social-dialogue mechanisms fosters collaboration between government, employers and trade unions in promoting decent work. Implementing targeted policy reforms that address inequality, promote inclusive growth and enhance labour market regulation can create an

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45 *Ibid*.

46 *Ibid*.

47 Stoltz "South Africa Remains Most Unequal Country, World Bank Report Finds" (2022) https://mg.co.za/news/2022-03-10-south-africa-remains-most-unequal-country-world-bank-reportfinds/ (accessed 2023-07-14).

48 Fourie in Fourie (ed) *The South African Informal Sector: Creating Jobs, Reducing Poverty*.

49 Pauw *et al* 2008 *South African Journal of Economics.*

50 Mokofe "The Changing World of Work and Further Marginalisation of Workers in South Africa: An Evaluation of the Relevance of Trade Unions and Collective Bargaining" 2022 54 *CILSA* 1.

enabling environment for decent work. These reforms may include minimum wage legislation,[51] labour-market protection, and measures to address discrimination and unequal access to opportunities.

Embracing technological advances can lead to job creation and improved productivity. Encouraging innovation, supporting entrepreneurship and facilitating the adoption of technology in various sectors can generate new employment opportunities and improve working conditions. Recognising these challenges and opportunities is crucial to designing and implementing strategies that promote decent work in South Africa. It requires collaborative efforts among policy makers, employers, trade unions and civil society to address inequalities, create employment opportunities, enhance skills development and ensure the protection of workers' rights within the evolving labour market.

Global transformation, such as changes to international trade agreements and global economic trends, significantly impact employment patterns in South Africa. Such transformation can lead to shifts in industries, job creation or displacement, and changes in the demand for specific skills. Understanding these shifts is essential to ensuring that employment opportunities align with the principles of decent work. Global transformation, including global trade dynamics and foreign direct investment, can influence wage levels in South Africa. Factors such as competition, outsourcing and technological advances may affect wage growth and contribute to income inequality. Ensuring fair and decent wages for workers is vital to addressing inequality and promoting decent work.

Global transformation can influence working conditions, including factors such as health-and-safety standards, job security and work/life balance. Technological advances, automation and the rise of the gig economy may alter traditional employment arrangements, and results in diverse working conditions.[52] It is important to ensure that workers have access to safe and healthy working environments, job security and an adequate work/life balance.

Technological advances and evolving global demands shape the skills required in the labour market. South Africa's workforce needs to adapt to the need for emerging skills, and address skills gaps to improve workers' employability and promote decent work.[53] Providing access to good-quality education, training and lifelong-learning opportunities is crucial to equipping workers with the necessary skills for the changing labour market.

Global transformation can also contribute to the emergence of precarious work arrangements such as temporary or informal employment.[54] Factors such as globalisation, technological disruptions and changing employment practices may influence job security.[55] Ensuring stable and secure

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51 It is noteworthy that South Africa adopted the National Minimum Wage Act 9 of 2018. The minimum wage is set at R25,42 per hour.

52 ILO "Digitalization and Employment" (2022) https://www.ilo.org/wcmsp5/groups/public/---ed_emp/documents/publication/wcms_854353.pdf (accessed 2023-07-25).

53 *Ibid*.

54 Cappelli *The New Deal at Work* 17.

55 *Ibid*.

employment opportunities, social protection and worker rights are essential for promoting decent work.

Global transformation in technology, automation and digitalisation has implications for the nature of work. While technological advances offer potential efficiency gains and improved productivity, they can also lead to job displacement and changes in job roles. Managing the impact of technology on employment, reskilling workers and creating new job opportunities are critical for promoting decent work.

The informal economy plays a significant role in South Africa, particularly for vulnerable and marginalised workers. Global transformation can influence the size and dynamics of the informal sector,[56] and impact on working conditions, social protection and access to decent work. Developing policies that support the formalisation of informal work, and provide social protection for informal-sector workers is essential.

Understanding and addressing the dimensions of this impact are crucial for promoting decent work in South Africa. This calls for a comprehensive approach that considers the interplay between global transformation and local labour-market dynamics. Policy makers, employers, trade unions and other stakeholders need to collaborate to develop strategies that foster inclusive growth, improve working conditions, address income inequality and promote skills development within the changing global landscape.

9 GOVERNMENT AND STAKEHOLDER EFFORTS

Government and stakeholder efforts play a crucial role in addressing the challenges posed by global transformation and in promoting decent work in South Africa. By developing and implementing inclusive policies, fostering social dialogue, protecting worker rights and investing in skills development, the government, employers, trade unions and civil-society organisations can work together to create an enabling environment that supports decent work for all South African workers. The article elaborates on these efforts to provide a more comprehensive understanding.

9 1 Policy initiatives

The South African government implements various policy initiatives aimed at promoting decent work. These initiatives may include labour-market regulations, minimum-wage legislation, skills-development programmes and social-protection measures. Policies focused on job creation, entrepreneurship and investment promotion are also crucial for expanding employment opportunities and fostering decent work.

9 2 Social-dialogue mechanisms

South Africa has a strong tradition of social dialogue that involves constructive engagement and negotiation between the government,

[56] *Ibid*.

employers, trade unions and other stakeholders. Social-dialogue mechanisms, such as tripartite structures, provide platforms for discussions on labour-market issues, worker rights and policy formulation. This collaboration ensures that multiple perspectives are considered, and facilitates the development of inclusive labour-market policies.

9 3 Labour-market interventions

The government, in collaboration with stakeholders, implements labour-market interventions to address specific challenges. These interventions may include skills-development programmes, job-placement services, support for entrepreneurship and initiatives targeting vulnerable groups. These interventions aim to improve employability, address unemployment and create conducive environments for decent work.

9 4 Worker protections and rights

The South African government plays a crucial role in enacting legislation and regulations that protect workers' rights and ensure fair treatment in the labour market. These include laws on a minimum wage,[57] working hours,[58] occupational health and safety,[59] and protection against unfair labour practices.[60] The government also promotes access to justice and mechanisms for resolving labour disputes.

9 5 Social partnerships

Collaboration between government, employers, trade unions and civil-society organisations is vital for promoting decent work. Social partnerships allow for joint efforts to address labour-market challenges, promote inclusive growth and advance workers' rights.[61] These partnerships foster cooperation, shared responsibility and collective action in efforts to achieve decent-work objectives.

9 6 Skills development and education

The government invests in skills-development programmes and education initiatives to improve workforce capabilities. These include vocational training, adult education and initiatives targeting youth unemployment. The Skills Development Act[62] was adopted to expand the knowledge and competencies of the labour force so as to improve productivity and employment. The main aims of the Act are to improve the quality of workers'

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57 National Minimum Wage Act 9 of 2018.

58 Basic Conditions of Employment Act 75 of 1997.

59 Occupational Health and Safety Act 85 of 1993.

60 S 23 of the Constitution of the Republic of South Africa, 1996.

61 See the National Economic Development and Labour Council (NEDLAC), the vehicle by which government, labour, business and community organisations seek to cooperate through problem-solving and negotiation on economic, labour and development issues, and related challenges facing the country.

62 197 of 1998.

lives, their prospects for work and labour mobility. By providing relevant skills and educational opportunities, the government contributes to improving employability and ensuring access to decent work.

9 7 Monitoring and evaluation

The government plays a crucial role in monitoring and evaluating the implementation of labour-market policies and initiatives. This includes assessing the impact of interventions on decent-work outcomes, identifying areas for improvement and making evidence-based adjustments to policies and programmes. Monitoring and evaluation enable the government to ensure that efforts align with the objectives of promoting decent work.

10 ADAPTIVE STRATEGIES

Adaptive strategies are required to meet the dynamic nature of global transformation and its impact on decent work in South Africa.

Global transformation, such as technological advances and shifts in global trade patterns, continually reshape the labour market. These changes lead to evolving employment opportunities, emerging skills requirements and shifts in working conditions. Adaptive strategies are necessary to respond to these changing dynamics and ensure that workers are equipped with the skills and support needed to thrive in the evolving labour market.[63] Technological advances, automation and globalisation can disrupt traditional job roles and lead to job displacement in certain sectors.[64] Adaptive strategies are essential to manage these disruptions effectively. These include providing opportunities to reskill and upskill to enable workers to transition to new employment sectors or acquire skills needed in evolving industries.[65]

Global transformation can contribute to income inequality and exclusion, particularly for marginalised groups.[66] Adaptive strategies are needed to promote inclusive growth, ensuring that the benefits of economic development and decent work are shared equitably. These strategies may include targeted policies, affirmative-action measures[67] and social-protection initiatives that address inequalities and promote equal access to employment opportunities.

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63 Kirkham "Adaptability in the Workplace: Benefits and Importance" (2023) https://www.indeed.com/career-advice/career-development/adaptability-in-the-workplace (accessed 2023-27-25).

64 Mokofe and Van Eck "COVID-19 at the Workplace: What Lessons Are to Be Gained From Early Case Law" 2022 55 *De Jure* 155–172.

65 Li "Reskilling and Upskilling the Future-Ready Workforce for Industry 4.0 and Beyond" (2022) *Information System Front* https://link.springer.com/article/10.1007/s10796-022-10308-y (accessed 2023-07-26).

66 Human Rights Council "Inequality, Social Protection and the Right to Development" A/HRC/EMRTD/7/CRP.4 (2023).

67 Affirmative action measures are measures designed to ensure that suitably qualified people from designated groups have equal employment opportunities and are equitably represented in all occupational categories and on all levels in the workforce of a designated employer.

Rapid technological advances can bring both opportunities and challenges to the labour market. Adaptive strategies are crucial for harnessing the potential of technology while mitigating its negative impacts. This includes promoting digital literacy, supporting digital entrepreneurship and ensuring that workers have the necessary skills to adapt to technological changes and take advantage of emerging job opportunities.

Global transformation can create vulnerabilities and precarious work conditions for some workers. Adaptive strategies are needed to improve worker-protection measures, strengthen labour rights, and ensure fair and decent working conditions. This may involve updating labour laws, strengthening enforcement mechanisms and improving social-protection programmes to address the changing dynamics of work.

Global transformation also necessitates a shift towards lifelong learning to enable workers to adapt continually and acquire new skills throughout their careers. Adaptive strategies should prioritise investment in education and training to provide accessible and affordable opportunities for individuals to upgrade their skills and remain relevant in the evolving labour market.

By working together, these stakeholders can identify emerging challenges, share knowledge and best practices, and develop coordinated responses that address the complex and interconnected issues related to global transformation and decent work.

Adaptive strategies are essential in navigating the challenges and harnessing the opportunities presented by global transformation in South Africa. By embracing flexibility, innovation and collaboration, these strategies can enable the country to respond effectively to the changing dynamics of the labour market, promote inclusive growth, protect workers' rights and ensure that decent work remains a central focus in the face of ongoing transformation.

11 CONCLUSIONS

The impact of global transformation on decent work in South Africa is complex and multifaceted. The country's unique context, including its history of apartheid, political transition, and economic restructuring, shapes the labour-market dynamics and the challenges and opportunities for decent work.

Global transformation, such as globalisation, technological advances and changing trade patterns, significantly influence various dimensions of decent work in South Africa. These dimensions include employment patterns, wages, working conditions, skills requirements, job security and social protection. Understanding the interplay between global factors and local dynamics is crucial to addressing the challenges and leveraging the opportunities presented by this transformation.

Government and stakeholder efforts play a vital role in promoting decent work in the face of global transformation. These efforts encompass policy initiatives, social-dialogue mechanisms, labour-market interventions and investments in skills development and education. Collaboration between the government, employers, trade unions and civil-society organisations is key

to ensuring inclusive growth, protecting worker rights, and fostering an enabling environment for decent work.

Given the dynamic nature of global transformation, adaptive strategies are essential in this context. These strategies involve adapting to changing labour-market dynamics, addressing disruptions and job displacement, promoting inclusive growth, navigating technological advances, ensuring worker protection, fostering lifelong learning and adopting a collaborative and multi-stakeholder approach.

By embracing adaptive strategies and considering the diverse dimensions of decent work, South Africa can strive to realise a more inclusive, equitable and sustainable labour market. This requires ongoing monitoring, evaluation and adjustment of policies and programmes to ensure that the benefits of global transformation are shared equitably, and that decent work becomes a reality for all South African workers. Ultimately, by placing decent work at the centre of discussions and actions, South Africa can promote social justice, reduce inequality, and create a work environment that respects the dignity and rights of all workers and contributes to the overall well-being and prosperity of the nation.

NOTES / AANTEKENINGE

USE OF AGENCY FEES FOR UNION'S POLITICAL CAUSES: DOES OUR LAW ADEQUATELY PROTECT RIGHTS OF NON-MEMBERS OF A REPRESENTATIVE TRADE UNION AGAINST ITS UNSCRUPULOUS USE OF AGENCY FEES FOR POLITICAL IDEALS?

1 Introduction

The inclusion of a fundamental right to conclude agency-shop agreements in section 23(6) of the Constitution of the Republic of South Africa, 1996 (Constitution) places beyond dispute the issue regarding the constitutionality of such agreements. This is in recognition of the crucial role that agency shops play in facilitating collective bargaining, which is fundamental to advancing peace in the workplace. This legitimate and worthwhile purpose justifies the limitation (in accordance with section 36 of the Constitution) of non-members' right to freedom of association.

Agency-shop agreements are defined by section 25 of the Labour Relations Act (66 of 1995) (LRA). This provision requires employers to deduct an agreed-upon agency fee from the wages of non-union workers and pay it to the representative union to cover expenses related to collective bargaining. The purpose is to maintain parity in collective bargaining by bolstering the financial power of unions, thereby balancing the bargaining power between unions and economically advantaged employers. In essence, this eliminates the risk of employers using their economic superiority to determine unilaterally the outcomes of collective bargaining.

Agency fees assist unions in appointing highly skilled negotiators to match those appointed by employers, ensuring equality in the bargaining process. Furthermore, agency shops make it easier for workers to organise themselves under a single union, which is crucial for reducing conflicts and rivalry among members of different unions and non-members, thereby promoting a healthy collective-bargaining environment (see Budeli "Understanding Freedom of Association at the Workplace: Components and Scope" 2010 31 *Obiter* 16 31).

The essence of this note is an examination of the legislature's failure to adequately regulate a union's use of agency fees for political activities under section 25 of the LRA. The key object is to demonstrate that South Africa's

failure to regulate the use of agency fees for political activities undermines the reformed labour law's intention to protect the constitutional rights of workers. It argues that this ideal is compromised when, owing to such omission, unions can use agency fees for political activities under section 25(3)(*d*) without regulation.

This omission has significant implications, as the use of agency fees for political purposes can lead to problematic and disappointing consequences. In particular, it infringes on non-members' rights to freedom of association and to make political choices. The use of agency fees for political activities is thus of serious concern.

The need for legislative regulation of the use of agency fees for political activities is informed by the fact that major trade unions in South Africa are aligned with political parties, working together to advance shared political ideals. (The Congress of South African Trade Unions (COSATU), presently the country's largest trade union federation, is an alliance partner of both the African National Congress and the Communist Party. Similarly, the founders of the South African Federation of Trade Unions (SAFTU), the second largest trade union federation, created a socialist-orientated political party (Social Revolutionary Workers Party) to work in conjunction with the union to promote workers' welfare. However, there are instances where unions that are not affiliated with a political party may work together with a party to advance shared political ideals. This happened between the Solidarity union and the political party, Freedom Front Plus, when together they worked to challenge the Tourism Ministry's use of Black economic empowerment criteria to award relief to ailing business in the tourism sector from the Tourism Equality Fund as unlawful and irrational (see Afriforum and Solidarity's press statement "Success: Solidarity and Afri-forum Stop Racist Tourism Fund in Con Court" (08/02/2023) https://solidariteit.co.za/en/success-solidarity-afriforum-stop-racist-tourism-fund-in-con-court/ (accessed 2023-04-12).) It is for this reason that section 25 should be amended to ensure adequate regulation of a union's use of agency fees for political causes, so as to protect the rights of non-members of a representative union from being unjustifiably compromised by unscrupulous trade unions.

2 The current legal position of a union's use of agency fees for political activities in South Africa

At present, our labour law, the LRA, lacks provisions to regulate the union's use of agency fees for political activities. Although section 25(3)(*d*) of the LRA prohibits the use of agency fees to pay affiliation fees to political parties or to contribute to political parties or candidates standing for election to a political office, it does not explicitly regulate the broader use of agency fees for political activities. Landman has pointed out that section 25(3)(*d*) need not be seen as seeking to regulate unions' use of agency fees for political activities, but rather as a measure to define what agency fees may not be used for (see Landman "Hey Ho Silver and the 'Freerider' Rides Free Again – A Note on Greathead v SACCAWU (2001) 22 ILJ 595 (SCA)" 2001 22 *Industrial Law Journal* 856 860).

On the basis of legislature's omission to engraft a provision in section 25(3)(*d*) that is aimed to explicitly regulate a union's use of agency fees for political activities, it is lamentable that section 25(3)(*d*) is misconstrued to be relevant provision that must give effect to union's use of agency fees for its political ideal. This raises questions about the rationale for the legislature's decision not to regulate explicitly the union's use of agency fees for political activities. In other words, does this omission serve a legitimate and justifiable purpose that warrants protection under labour law, which is intended to uphold constitutional values and principles?

The legislature's rationale for not seeking to regulate unions' use of agency fees for political activities is informed by the need to allow unions to engage in political activities. This recognition stems from the understanding that disputes in the public sector are often political in nature. Consequently, unions may need to direct their disputes towards the government as an employer, and potentially require political decisions to influence budget allocations and accommodate union demands (see Clark "Politics and Public Employee Unionism; Some Recommendations for an Emerging Problem" 1975 44 *U Cincinnati Law Review* 680 680; Kupferberg "Political Strikes, Labour Law and Democratic Rights" 1985 71 *Virginia Law Review* 685 690; and Hatch "Union Security in the Public Sector: Defining Political Expenditure Related to Collective Bargaining" 1980 *Wisconsin Law Review* 134 145, where the authors state that unions in the public sector need to be seen as part of political interest groups that are competing for a share of government's unit budget as they bargain with the State to ensure that it allocates a portion of the budget to satisfy the demands of workers).

Secondly, the legislature acknowledges the role unions play as participants in the National Economic Development and Labour Council (NEDLAC), where they represent workers in promoting sustainable economic growth and participating in economic decision-making at national, company and shop-floor levels. This necessitates their engagement in political activities.

The third reason is informed by the political role South Africa's trade unions have played in the country's struggle for democracy. They used the collective power of their membership to influence the political processes without legislative interference (Cheadle "Labour Relations" in Cheadle, Davis and Haysom *South African Constitutional Law: The Bill of Rights* 2ed (2007) 18–34; Finnemore *Introduction to Labour Relations in South Africa* 9ed (2006) 79). To that end, the legislature felt impelled to recognise unions' role as one of the primary drivers of social transformation; unions use concerted worker action to influence social and political processes aimed at improving workers' lives (see Hepple "Role of Trade Unions in a Democratic Society" 1990 11 *Industrial Law Journal* 645 646; Van Jaarsveld and Van Eck *Principles of Labour Law* 2ed (2002) 265; Cheadle in Cheadle *et al South African Constitutional Law: The Bill of Rights* 32 and Cassim "The Legal Status of Political Protest Action Under the Labour Relations Act 66 of 1995" 2008 29 *Industrial Law Journal* 2349). In other words, the legislature did not seek to prevent unions from engaging in political activities to address the aftermath of apartheid – namely, the patriarchal and colonial legal systems. Union activities are intended to challenge the government to repeal

or pass legislation that improves working conditions, secures conducive working hours, ensures safe work environments, promotes better and equitable salaries and benefits, and advances gender equality in the workplace (see Finnemore *Introduction to Labour Relations in SA* 82).

Although the legislature's decision to abstain from regulating unions' use of agency fees for political activities seems genuine and justifiable, it falls short of adequately protecting non-members' fundamental rights to freedom of association and political choice. This omission creates a loophole, which unscrupulous unions could manipulate under section 25(3)(*d*) in order to use agency fees to fulfil ulterior political objectives at the expense of non-members. Reforming the law, particularly amending section 25 to include provisions regulating unions' use of agency fees for political activities, is crucial to prevent non-members' rights in question from being unjustifiably overridden under the guise of facilitating workers' participation in economic decision-making and societal transformation.

3 Critique of the legislature's failure to regulate unions' use of agency fees for political activities

The legislature's failure to regulate the use of agency fees for political activities leaves this matter to be dealt with in terms of section 25(3)(*d*) of the LRA, which produces anomalous and disappointing results. Section 25(3)(*d*) was introduced to facilitate the use of agency fees for purposes that, although unrelated to collective bargaining, are minimally invasive of non-members rights and unlikely to raise controversy. For instance, section 25(3)(*d*)(iii), in particular, is ideal for facilitating the use of agency fees to cover expenses relating to first-aid training for workers, disseminating information about chronic illnesses affecting workers (such as HIV/Aids and asthma). As a result, applying section 25(3)(*d*)(iii) of the LRA to legitimise a union's use of agency fees for political activities that are not a minimal use, and which affect non-members' rights to freedom of association and political choice, is irrational and antithetical to the country's commitment to constitutional principles. This is informed by the fact that the regulation of unions' use of agency fees in terms of section 25(3)(*d*) of the LRA is overly relaxed, focusing only on determining whether the union adhered to the proscription against using or donating these fees for party-political activities.

The use of section 25(3)(*d*) to legitimise the use of agency fees for a union's political activities results in non-members' rights to freedom of association and political choice being overlooked. This stems from the fact that the enquiry into the legitimacy of such use is restricted to determining whether the union adhered to the proscription against using or donating these fees for party-political activities. It would be anomalous and disappointing to legitimise the use of agency fees for political activities merely by proving that the representative union did not pay the agency fee as an affiliation fee to a political party and did not contribute agency fees to a political party or candidate standing for election. The magnitude of right to freedom of association and right to make apolitical choices in the democratic

society demands that the legitimacy of their limitation be subjected to constitutional analysis in terms of section 36 of the Constitution.

It is argued that the legislature's inclusion of section 25(3)(*d*)(i) and (ii) in the LRA to proscribe unions from using the agency fees for party-political activities produces undesirable results. Although the legislature intends to prevent unions from contributing agency fees to political parties or candidates standing for national presidential or municipal elections, section 25(3)(*d*)(i) and (ii) impedes unions from using agency fees for political activities that are in the best interests of workers, including non-members. Of interest is the use of the term "political office" in section 25(3)(*d*)(ii), which effectively proscribes unions from using or contributing agency fees to facilitate the appointment of individuals to hold office in government or public institutions (see the dictionary meaning of "politics", defined as involvement in using the public sphere to influence decisions that affect a country or society, and of "political," in respect of action, defined as actions connected with the State, government or public affairs (Hornby *Oxford Advanced Learner's Dictionary of Current English* (2015) 1150)). This prevents unions from using agency fees to fund the lobbying of individuals they believe have the credentials to serve workers' interests. For example, a union might want to support a candidate for the Private Security Regulation Board who would protect the welfare and interests of workers in the security industry. The prohibition could stunt such efforts, ultimately harming the very workers the union represents.

Using section 25(3)(*d*)(iii) in the LRA to allow the use of agency fees for political activities may compound the anomaly, as it could be read to allow unions to use agency fees for those political purposes that serve the socio-economic interests of workers. The crucial question to grapple with concerns whether the labour law's objective of advancing social justice, as contained in section 1 of the LRA, constitutes a compelling and legitimate reason to limit non-members' rights to freedom of association and political choice. Put differently, should non-members be compelled, through the use of their agency fees, to participate in social activities aimed at improving the lives of indigent people within their communities? Proponents of using agency fees for political activities that promote the socio-economic interests of workers may argue that the Constitution's Preamble emphasises social justice as a fundamental principle to heal the divisions of the past and create a society founded on the values of human dignity, equality and freedom (Van Staden "Towards a South African Understanding of Social Justice: The International Labour Organization Perspective" 2012 1 *Tydskrif vir Suid-Afrikaanse Reg* 91 91). This argument is supported by the landmark case of *Government of the Western Cape v COSATU* (1999 20 *ILJ* 151 (LC)). In this case, the court found that workers' protest actions seeking socio-economic advantages for workers from institutions other than their employer were legitimate, as they served the socio-economic interests of workers. The court's decision was informed by two objectives of the LRA that it considered vital: the advancement of economic development and the promotion of social justice. On that basis, the court construed "socio-economic interests of workers" to allow workers to participate in social activities that are meant to improve living conditions in the communities they live. To that end, court found workers protest against their children's poor education system to be in the

interest of workers since it is their responsibility to ensure that their children do not suffer the same ills they experienced as a result of past apartheid policies. It is submitted that non-members should not be compelled, through the union's use of agency fees, to take part in the country's aspiration to promote social justice. Non-members should be allowed individually or collectively to associate with political activities of their choice so that they can raise their opinions or views on matters of interest to them (Motala and Ramaphosa *Constitutional Law: Analysis and Cases* (1994) 248).

It would be anomalous to use the socio-economic interests of workers to justify limiting non-members' rights to make political choices without subjecting such a limitation to analysis under section 36 of the Constitution – particularly considering the centrality of the right to make political choices in a democratic society. Section 19 of the Constitution ensures that everyone, including non-members of representative unions, can freely align with the political cause of their choice without adverse consequences, and thereby participate in law-making processes on issues of interest to them. (The importance of s 19 in SA's constitutional framework was echoed by Cameron J in *My Vote Counts NPC V Speaker of National Assembly* [2015] ZACC 31 par 39, where he stated that the right to make a political choice will be valuable if a person knows what he's choosing and as a result associates himself with that view. See also Harms "Political Rights" in Currie and De Waal *Bill of Rights Handbook* (2005) 446.)

Forcing non-members to support a union's demonstration for free tertiary education that aligns with a political party's campaign for the national election contradicts the country's aspiration to create a democratic society founded on constitutionalism, the rule of law and democracy. The country's transition to democratic dispensation requires that the government be based on freedom, and that citizens be allowed to align freely with political causes that affect them. This is consistent with the Constitution's foundational principle in section 1(*d*) aimed at ensuring that people are not disenfranchised without valid reason, and that they are able to exercise their free will in participating in the country's democratic processes, particularly in electing a new government.

4 Concluding remarks

It has been demonstrated that the legislature introduced section 25(3)(*d*) in the LRA to allow unions to use agency fees for minimal and uncontroversial purposes intended to better serve workers' interests in the workplace. Since the use of agency fees for a union's political ideals is neither minimal nor uncontroversial, section 25(3)(*d*) has not adequately articulated it. This necessitates reforming section 25 of the LRA to introduce explicit and unambiguous provisions that outline how agency fees should be used for political or ideological purposes. Such reform is crucial to promote certainty regarding how unions must use agency fees for their political ideals, ensuring that the law becomes predictable, reliable and capable of uniform application. Such clarity will enable non-members to understand when their fundamental rights are at stake and to challenge infringements with confidence that they will be granted a remedy.

The case of *Greathead v SACCAWU* (2001 22 *ILJ* 595 (SCA)) highlights the difficulty non-members face in formulating objections to the use of agency fees for political activities. The obscurity surrounding the union's use of agency fees for political activities impeded the complainant's ability adequately to articulate his dispute, leading the court of first instance (the Witwatersrand Local Division) to dismiss it and grant leave to appeal solely to challenge the validity of the agency-shop agreement between the union and his employer. Notably, the applicant invoked the right to make a political choice as one of the grounds for challenging the constitutionality of the agency-shop agreement. However, this challenge was overlooked because of the obscurity regarding the use of agency fees for political activities by the union.

The introduction of a provision to regulate the use of agency fees for political activities is crucial to inform non-members that their right to make a political choice cannot be at stake or infringed upon simply because the union is affiliated to a political party that they detest. Instead, their rights are at stake when the union uses agency fees for purposes that advance a party's political ideals to which they object.

Moreover, incorporating such a provision in section 25 is crucial to compel unions to inform non-members about the intended use of agency fees for political purposes, allowing them the opportunity to raise conscientious objections. It is unconscionable to expect non-members to learn about the use of agency fees for political purposes solely through the auditor's report that trade unions are compelled to submit to the registrar in terms of sections 98 and 100 of the LRA. Clarifying the protection of non-members' fundamental rights is essential, especially since the current law is silent on the consequences of a union's inappropriate use of agency fees. In particular, there is a lack of certainty regarding whether a union can be compelled to refund the agency fees to a separate account.

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THE IMPACT OF ARTIFICIAL INTELLIGENCE ON THE LAW OF DELICT AND PRODUCT LIABILITY

1 Introduction

The test for delict requires an assessment of a defendant's conduct on the foundation of a standard that is acceptable to society. The standard is demonstrated by the fictional "reasonable man/person" (Ahmed "The Standard of the Reasonable Person in Determining Negligence: Comparative Conclusions" 2021 24 *Potchefstroom Electronic Law Journal* (*PELJ*) 1). In the law of delict, this norm demonstrates society's expectation of proper and balanced behaviour. The criterion is an objective one, demonstrating that all legal persons must ensure that their actions are in keeping with this standard (Ahmed 2021 *PELJ* 1). In addition, establishing delictual liability requires an assessment of all five elements (Zipursky "Reasonableness in and out of Negligence Law" 2015 *U Pa L Rev* 2131–2170), the central examination being the question of wrongfulness. In cases dealing with artificial intelligence (AI), it is important to recognise that AI may not be the trigger to causing harm; rather, it is human beings who use AI to carry out tasks. The question that arises is who will be held accountable for the consequences (Abbott "The Reasonable Computer, Disrupting the Paradigm of Tort Liability" 2018 86 *Geo Wash L Rev* 8). The contention is that AI does not directly cause accidents; instead, they arise when individuals using AI carry out different tasks (Duffy and Hopkins "Sit, Stay, Drive: The Future of Autonomous Car Liability" 2013 *Sci & Tech L Rev* (SMU) 16). AI can be said to function as an aid, given that it is created by humans. The investigation that comes into play enquires whether a reasonable person would have used AI in a way that caused harm (Lior "The AI Accident Network: Artificial Intelligence Liability Meets Network Theory" 2021 *Tul L Rev* 95). The argument to hold AI solely liable is weak, as AI serves as a tool controlled by humans. In these circumstances, it would be better for the test determining liability to be modified to investigate whether a reasonable person erred in some way during the design phase that led to harm (Lior 2021 *Tul L Rev* 95). It is acknowledged that there is an absence of specific legislation in South Africa dealing with AI cases. It is proposed that the existing legal framework requires reconsideration in light of the evolving nature of AI and its consequences. It is important to bear in mind that AI cannot act autonomously, but human choices and actions in using AI may contribute to harm as a result. Furthermore, while investigating the consequences of AI, it is imperative to acknowledge the intrinsic relationship between product liability and delict. The note thus provides a brief examination of how AI impacts product liability in South Africa. The note also briefly examines how AI influences the interpretation of the Consumer Protection Act (68 of 2008) (CPA).

2 What is artificial intelligence (AI)?

Artificial intelligence (AI) is at the forefront of technological advancement. AI boasts of developing computer systems that can perform and carry out tasks of which previously only the human intellect was capable (Sheikh, Prins and Schrijvers "Artificial Intelligence: Definition and Background" *Mission AI. Research for Policy* (2023) https://doi.org/10.1007/978-3-031-21448-6_2 (accessed 2024-01-16)). AI can be categorised into two main branches: narrow AI and general AI. Narrow AI was created for specific purposes, such as image or speech recognition. General AI, on the other end of the spectrum and also known as strong AI, has the ability to carry out an intellectual task that is similar to that requiring human abilities (Sheikh *et al* https://doi.org/10.1007/978-3-031-21448-6_2). In the 1950s and 1960s, computer specialists began creating algorithms and technologies. Currently, AI appears in various industries, including health care and finance (Domingos *The Master Algorithm: How the Quest for the Ultimate Learning Machine Will Remake Our World* (2017) 157). AI has the ability to be flexible and transformative. A major stride was taken with the development of deep-learning algorithms (Domingos *The Master Algorithm* 158). These mimic the structural intricacies of the human brain. The creation of such algorithms resulted in computers being able to identify patterns in data without precise programming (Domingos *The Master Algorithm* 158).

Hintze categorises AI into four categories:

1. reactive machines, which are task-specific AI systems without memory;
2. limited memory systems that have memory ability and can control past experiences to advise future decisions (this decision-making function is used in areas of self-driving cars);
3. theory-of-mind systems, which operate with social intelligence, being in a position to identify human emotions, intentions and forecast behaviour; and
4. systems that are self-aware, having a sense of self akin to consciousness, which assists the system in understanding its own current state (AI with such self-awareness is currently a theoretical notion) (Hintze "Understanding the Four Types of AI, From Reactive Robots to Self-Aware Beings" *The Conversation* (14 November 2016) https://theconversation.com/understanding-the-four-types-of-ai-from-reactive-robots-to-self-aware-beings-67616.)

The exciting opportunities that come with AI are welcome. However, there are fears pertaining to its societal impact. Some fears include job displacement and a possible rise in social inequality, and a threat to humanity (Floridi *The Fourth Revolution: How the Infosphere Is Reshaping Human Reality* (2014) 103–108). One should include AI working as an independent system to the discussion. Independent or autonomous in this setting may be defined as AI operations that are detached from human decision or participation (Floridi *The Fourth Revolution* 103–108). If human involvement is present to control the system, then it is not autonomous. The

control then remains with the human (Floridi *The Fourth Revolution* 103–108).

The rapid evolution of AI creates hope for changing various aspects of human life. However, the challenges and dangers that accompany AI development require amendments to the legal framework (Leung "Who Will Govern Artificial Intelligence? Learning From the History of Strategic Politics in Emerging Technologies" (2019) https://ora.ox.ac.uk/objects/uuid:ea3c7cb8-2464-45f1-a47c-c7b568f27665 (accessed 2024-01-15). The law will undoubtedly face challenges with the complexities posed by AI. It is therefore incumbent on legislators to address the implications and ethical concerns that surround AI, especially in delict.

3 Current requirements for a delictual claim, including the implications of AI

Five essential elements are associated with delict – namely, conduct, wrongfulness, fault, causation and harm or loss (Neethling and Potgieter *Law of Delict* (2021) Ch 2–Ch 6). These elements need consideration in relation to AI.

3 1 Conduct

The conduct of a wrongdoer in the form of a commission or omission can result in harm to a victim. The harm could lead to death or injury. Where an AI system is concerned, it independently makes decisions, and the discussion now includes conduct created by AI that leads to harm or injury. The question that arises is how AI actions, based on complex algorithms, impact or alleviate harm suffered by a victim.

3 2 Wrongfulness

Wrongfulness pertains to conduct that causes harm in a legally unacceptable manner. The arrival of AI turns the conversation to an evaluation of whether AI-generated harm falls within the domain of legal wrongfulness. The ethical scope of AI decision-making needs to be examined to determine whether harm caused by AI is governed by the legal principles of reasonableness and fairness.

3 3 Fault

Fault is another important element in establishing harm. There are two types of fault: intention and negligence. In cases of negligence, the reasonable-person test is used. It questions whether a reasonable person in the position of the defendant would have foreseen the harm and then taken measures to prevent the harm from arising. Adding AI to the equation broadens the focus to include the accountability and foreseeability of AI systems. This may require re-examination of the reasonable-person test in the context of autonomous technologies.

3 4 Causation

The case of *Barnard v Santam Bpk* ([1998] ZASCA 84; 1999 (1) SA 202 (SCA); [1998] 4 All SA 403 (A)) recognised that it is important to prove causation in addition to the other elements to establish delictual liability. It must be proved that the conduct was the factual and legal cause of the harm suffered. In respect of AI, one would have to take cognisance of the relationship between AI-generated conduct and its effects when proving causation. A flexible approach to causation encompasses factors like foreseeability and directness. It requires an assessment of how AI actions influence or remove themselves from the harm experienced. Moreover, the advancing nature of AI technology will introduce new factors, such as the presence or absence of a *novus actus interveniens*, which is a key component in establishing legal causation.

As noted, a flexible approach is important in determining legal causation. It demonstrates the importance of establishing a link between the wrongdoer's conduct and its effects. In the realm of AI, this approach requires continuous review. One would want to ensure and safeguard policy considerations based on reasonableness, fairness and justice, and these should be applied to emerging technological settings.

The elements of delict, as applied to AI, require ongoing assessment and understanding as AI evolves and affects legal liability. It must be noted that AI has the ability to disrupt many parts of our legal system, including the law of delict. AI's implications for delict are broad, and include the following areas:

- *product liability*: increased use of AI in products, such as self-driven vehicles and medical devices, leads to an elevated risk that AI-related defects could cause harm to consumers, leading to a rise in product liability clauses against manufacturers and developers of AI systems (Dimatteo, Poncibo and Cannarsa *The Cambridge Handbook of Artificial Intelligence: Global Perspectives on Law and Ethics* (2022) 87–160);
- *negligence*: as briefly discussed, AI could alter the standard of care required of individuals or bodies that use AI (e.g. in respect of self-driving car incidents and accidents, the standard of care for the car manufacturer may be higher than that expected of a human motorist (Puntoni, Reczek, Giesler and Botti, "Consumers and Artificial Intelligence: An Experiential Perspective" 2021 85(1) *Journal of Marketing* 131–151);
- *strict liability*: the advent of AI may lead to a shift in the application of strict liability; challenges will arise as to who is at fault when an AI system causes harm, with some contending that manufacturers or developers of AI systems should be held strictly liable for the harm caused (Dimatteo *et al The Cambridge Handbook of Artificial Intelligence* 87–160); and
- *privacy and data protection:* the current widespread use of AI systems to process large amounts of personal data could result in increased litigation stemming from possible misuse of personal data by AI systems

(Dimatteo *et al The Cambridge Handbook of Artificial Intelligence* 87–160).

As AI advances, active legal reforms are required to traverse the attendant complexities.

4 Product liability and AI implications

The advent of AI in consumer products has prompted a re-evaluation of standard legal frameworks, particularly in the context of product liability. A discussion on delict and its consequences for AI is intertwined with a discussion of product liability (Puntoni *et al* 2021 *Journal of Marketing* 131–151). As discussed, product liability holds manufacturers or suppliers accountable for harm caused by defective products. The introduction of AI in products creates intricacies around elements of foreseeability and fault (Puntoni *et al* 2021 *Journal of Marketing* 131–151). It is common cause that delict deals with civil wrongs and subsequent liability. The effects of AI has legal challenges on product liability and delict. Thus, both delictual principles in general and product liability in particular need to adapt to the varying issues introduced by AI technology (Puntoni *et al* 2021 *Journal of Marketing* 131–151).

In South Africa, product liability in most instances focuses on consumer protection. The CPA is the legislative framework that safeguards consumer rights (Loubser and Reid *Product Liability in South Africa* (2012) 31–35). The Act provides that suppliers and manufacturers are responsible for supplying safe products of good quality (Basson "The South African Law on 'Products Liability' – Quo Vadis?" 2001 *SAIIE* 85). However, AI creates its own challenges, and this includes machine-learning algorithms and autonomous systems that are found in consumer products (Puntoni *et al* 2021 *Journal of Marketing* 131–151). This changes the conventional concept of accountability. The issue arises as to how conventional product-liability principles apply to products that demonstrate self-modifying traits (Wagner "Liability Rules for the Digital Age: Aiming for the Brussels Effect" 2022 *Journal of European Tort Law* 191–243). The CPA, enacted before the advent of AI in consumer products, requires careful examination in light of these technological advancements. Although the Act protects consumers' right to safe products, the changing complexity of AI systems can challenge the traditional meaning of product defects and safety standards. Interpretation of the CPA going forward has to occur with consideration for AI (Wagner 2022 *Journal of European Tort Law* 191–243).

Product liability also depends on principles of fault. While these principles are human-centric, AI lacks individual intent as it operates on algorithms and data (Selbst "Negligence and AI's Human Users" 2020 *Boston University Law Review* 1315). Cases attributing liability to the AI system itself or its human creators and manufacturers can result in challenging legal questions (Selbst 2020 *Boston University Law Review* 1315). A holistic approach to defining liability in the context of AI is required. It is common cause that amendments to the CPA are required to deal with the challenges of AI in product liability (Basson 2001 *SAIIE* 85). Proper standards should be established for AI-driven products. The onus should rest on manufacturers

and developers to provide ongoing information about AI functionalities (Ryan and Stahl "Artificial Intelligence Ethics Guidelines for Developers and Users: Clarifying Their Content and Normative Implications" 2021 *Journal of Information, Communication and Ethics in Society* 61). Moreover, there is a need for a framework that monitors and provides ongoing updates on product safety within AI systems.

The CPA and the principles of delict must advance to deal with harm caused by AI-driven products. These proactive legal improvements are necessary to uphold consumer rights. It is also necessary to promote accountability, and advance a legal environment that assists in the transformative potential of AI, while at the same time safeguarding against potential harms.

5 Guidance from international law in respect of AI

In the United States, the first collision case was recorded in the state of Arizona; it involved a self-driving car and a pedestrian fatality (BBC "Uber's Self-Driving Operator Charged Over Fatal Crash" (16 September 2020) https://www.bbc.com/news/technology-54175359 (accessed 2024-01-15)). The victim, Elaine Herzberg, was pushing a bicycle across a four-lane road in Tempe, Arizona when an Uber test vehicle hit her. The vehicle was operating in self-drive mode and had a human back-up driver seated in the driver's seat. Unfortunately, Herzberg died of her injuries (BBC https://www.bbc.com/news/technology-54175359). Following the incident, the National Transportation Safety Board (NTSB) made suggestions and Uber was criticised, resulting in Uber suspending the testing of self-driven vehicles in Arizona (BBC https://www.bbc.com/news/technology-54175359).

In light of cases mentioned above, international-law instruments play a crucial role in the development of AI law. The law and its encompassing principles will ultimately influence law at a national level. Some of the relevant international instruments are discussed below.

5 1 Universal Declaration of Human Rights (*UDHR*)

The Universal Declaration of Human Rights (UDHR), adopted by the United Nations General Assembly in 1948, is a foundational document highlighting the fundamental rights and freedoms to which all people are entitled (https://www.un.org/en/about-us/universal-declaration-of-human-rights (accessed 2024-01-17)). The UDHR demonstrates the absolute rights and dignity of every person. Its expansive body of rights includes rights to life, liberty and security; freedom from discrimination; and education. Insofar as AI is concerned, technological advancements must align with human-rights principles and the UDHR so as to ensure that innovation supports the values safeguarded in the UDHR. Maintaining these principles amid technological advancements means that human rights should not be compromised (United Nations "Artificial intelligence Must Be Grounded in Human Rights, Says High Commissioner" (12 July 2023) https://www.ohchr.org/en/statements/2023/07/artificial-intelligence-must-be-grounded-human-rights-says-high-commissioner (accessed 2024-01-17)).

5 2 Convention for the Protection of Individuals with Regard to Automatic Processing of Personal Data (*Convention 108*)

Convention 108 (Council of Europe *Convention for Protection of Individuals With Regard to Automatic Processing of Personal Data* https://rm.coe.int/1680078b37 (accessed 2024-01-17) protects an individual's right of privacy by regulating the administration of personal data. It is one of the first international treaties to deal with the topic of data protection and privacy. Convention 108 created common principles and guidelines for the protection of individuals concerning the automated management of personal data. It safeguards individuals' rights and freedoms. The Convention conveys that the processing of personal data must be legally recognised. Individuals' consent must be obtained for the purposes of data processing. This highlights the importance of transparency in data procedures. The Convention highlights that personal data should be correct for the purposes for which they are processed. The Convention highlights the importance of data security, and provides measures to protect personal data against unlawful access and release. Protecting these rights is significant in instances where data-driven decisions would influence individuals. The onset of AI brings about new additions to data processing. These additions bring about both advantages and disadvantages in the context of Convention 108. Although Convention 108 requires fairness and non-discrimination, the application of AI algorithms in decision-making processes can cause biases. Convention 108 places emphasis on people's rights and encourages support for increased privacy measures in AI structures. The Convention focuses on equality, transparency and accountability. The framework it presents is centered on developing and employing AI technologies in a fair manner. The Convention emphasises that parties must be cognisant of the ethical consequences of AI applications.

Convention 108 provides the basis for the protection of personal data, and provides significant guidance in the era of AI. With technology evolving, further review is necessary in interpreting Convention 108's provisions to alleviate the challenges presented by AI.

5 3 Council of Europe's guidelines on AI and human rights

The Council of Europe's guidelines on AI (Council of Europe "The Council of Europe & Artificial Intelligence" (2023) https://rm.coe.int/brochure-artificial-intelligence-en-march-2023-print/1680aab8e6 (accessed 2024-01-17)) provide suggestions for the development of AI technologies that ensure compliance with ethics and human rights. These guidelines take cognisance of the principles of the UDHR, the Convention on the Rights of the Child (CRC) (UNGA *Convention on the Rights of the Child* 1577 UNTS 3 (1989). Adopted: 20/11/1989; EIF: 02/09/1990 http://www.unicef.org/child-rights-convention (accessed 2024-01-17)) and Convention 108. The Council of

Europe's guidelines provide a comprehensive framework for the responsible use of AI technologies in different fields from health care to criminal justice. They emphasise the ethical and accountable use of AI. They focus on a human-rights approach to AI development. The protection of human rights is brought into focus against a backdrop of technological advancements.

The guidelines speak of the principle of proportionality, which strikes a cautious balance between the prospective advantages of AI and the protection of human rights. Clarity in AI systems is important as it allows individuals to understand and question decisions made by AI algorithms. Moreover, the guidelines highlight the significance of accountability in addressing potential biases. Attempts are directed at avoiding biases that may excessively impact certain individuals or groups. As AI is developing daily, it is challenging to implement. There is an urgent need for international cooperation as conflicts can arise between ethical issues and commercial interests. It is submitted that it will be a daunting and complex task to strike the balance between innovation and safeguarding human rights.

The Council of Europe's constant strides to develop and strengthen guidelines on AI and human rights demonstrate its commitment to addressing ethical considerations in respect of technological improvements. There will be constant changes and improvements made in respect of AI applications, making it important for individuals to keep abreast of these developments.

5 4 European Union's proposed AI regulation

The European Union (EU) has drafted AI regulations that encourage responsible AI development. The proposed AI regulation seeks to achieve a framework that provides for accountability that acknowledges the importance of human rights in the use of AI technologies (European Parliament "EU Guidelines on Ethics in Artificial Intelligence: Context and Implementation" (2018) https://www.europarl.europa.eu/RegData/etudes/BRIE/2019/640163/EPRS_BRI(2019)640163_EN.pdf (accessed 2024-01-19)). The regulation puts AI applications into different risk levels – namely, unacceptable risk, high risk, and low or minimal risk. The regulation further highlights the importance of data privacy. It emphasises that developers and users of AI systems must comply with data minimisation principles to ensure that only necessary data is processed. Specific consent is required for AI systems that create or influence content. The regulation calls for clarity in AI systems, specifically those affecting individuals. Users should be conscious when they are engaging with AI. The regulation calls for the provision of reasons for AI-generated conclusions to promote accountability and user confidence. It is important to note that elevated-risk AI applications require human administration to alleviate the potential risks linked with programmed decision-making. Creators must ensure that skilled people examine and control AI systems. Despite the positive aspects of the EU's projected AI regulation, there are also negative ones, which include creating hurdles to striking the balance between innovation and potential risks. Stringent regulations may constrain technological developments, while ineffective administration could result in ethical problems. Nonetheless, the proposed

regulation encourages international cooperation, and it aims to achieve global harmonisation.

The projected AI regulation demonstrates an important step towards creating a robust and morally ethical framework for AI development. The introduction of a risk-based approach encourages transparency as well as human oversight. The regulation seeks to ensure that AI technologies align with European values. However, the challenges will be ongoing and require global cooperation. Comprehensive navigation of the AI governance path will be imperative. The ongoing development of the regulation has the ingredients for the creation of responsible AI governance.

6 Future of product liability and the law of delict

As discussed, the blending of common-law principles and CPA provisions presents significant difficulties in relation to AI-related product liability. A domestic legal framework that addresses issues arising from AI-related harm would be beneficial (Wagner 2022 *Journal of European Tort Law* 191–243). Our legal systems should attempt to distinguish and explain negligence standards with specific reference to AI-related matters. Moreover, taking into account the technical difficulties accompanying AI, the formation of specialised courts or tribunals with trained professionals in both legal and technological fields could streamline adjudication procedures (Coglianese and Ben Dor "AI in Adjudication and Administration" 2021 *Brooklyn Law Review* 792), ensuring more informed and competent resolution of AI-related product liability disputes. The rapid growth of AI requires a commitment to continual review, as this would guarantee its relevance and effectiveness. Moreover, revisiting existing legislation to ensure AI development is important. This would address emerging challenges posed by improvements in AI technology (Diaz-Rodriguez, Del Ser, Coeckelbergh, De Prado, Herrera-Viedma and Herrera "Connecting the Dots in Trustworthy Artificial Intelligence: From AI Principles, Ethics, and Key Requirements to Responsible AI Systems and Regulation" 2023 *Information Fusion* 101896). The understanding of AI-related product liability can be complex and it would be beneficial to provide education and training programmes for legal professionals (Rodriguez *et al* 2023 *Information Fusion* 101896). In addition, it is imperative that legal experts are aware of technological advances to allow for successful navigation through the difficulties of AI-related product liability cases. In addition, a collaborative effort between legal bodies, industry and AI developers should be encouraged to advance and publicise best practices (Buiten *Product Liability for Defective AI* (2023) 21–23). Encouraging responsible AI development and operation will assist in preventing harm and mitigating liability.

Tailored regulations like the proposed regulation by the EU can address the distinctive challenges posed by AI at a domestic level. The CPA should play a major role in enhancing consumer awareness regarding AI-related risks. As the global nature of AI technology grows, South Africa should actively engage in international alliances aimed at creating regulated AI standards and guidelines (Roff "Artificial Intelligence: Power to the People" 2019 *Ethics & International Affairs* 127–140). In addition, manufacturers of AI systems should undertake periodic risk assessments to identify

prospective dangers and problems linked to their products in order to prevent harm and exhibit responsibility for consumer protection (Buiten *Product Liability for Defective AI* 24–25).

The active and rising nature of AI-related product liability requires a comprehensive and adaptive legal response. The suggested measures aim to strike a balance between protecting consumer rights and adopting sensible innovation, while providing legal clarity on the scope of AI-related harm.

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CASES / VONNISSE

FOLLOWING DUE PROCESS BEFORE DEDUCTING AMOUNTS FROM SALARY: A REFLECTION ON

Ngcangula v Mhlontlo Local Municipality; Nqekeho v Mhlontlo Local Municipality (2022) 43 *ILJ* 2398 (ECM)

1 Introduction

Procedural fairness in labour disputes is an important requirement that employers must adhere to if they are to pass court scrutiny. Employers often focus only on the substantive part of labour disputes, oblivious that due process must also be followed. Such a process, which takes centre stage in this note, embraces the right to make representations and is derived from the principles of natural justice. In the absence of an opportunity to make representations, the outcome of such a process is flawed. Such deficiencies are scrutinised in this note with a view to warn and sensitise employers that any flawed process vitiates the outcome of a disciplinary hearing. The requirement that employers follow due process before making an adverse decision against employees, even if they have a *prima facie* case, is often undermined. South African labour law is grounded in the principles of natural justice to the extent that a wrong procedure or failure to adhere to procedural requirements vitiates any outcome or renders it unfair. This discussion examines the case of *Ngcangula v Mhlontlo Local Municipality; Nqekeho v Mhlontlo Local Municipality* ((2022) 43 *ILJ* 2398 (ECM)), which illustrates the implications for employers when they fail to give employees the opportunity to be heard before deducting amounts from their salary.

2 Factual matrix

The applicants were senior employees of the respondent municipality. Both applicants were employed pursuant to contracts of employment that provided a basic salary and a car allowance. In 2019, the municipal council resolved to grant a 2,5 per cent increase to all employees. The applicants also benefited from this resolution, and their salaries and car allowances were increased. However, in 2020, the municipal council resolution of 2019 was reversed, and deductions were made from the applicants' salaries. The council was of the view that the applicants were not entitled to the 2,5 per cent increase; they did not qualify for the notch increment as the applicants

had to undergo job evaluations, which were not yet complete. Alternatively, the municipality stated that the applicants might be entitled to the notch increment upon the conclusion of the wage curve collective agreement taking place in the bargaining council. The respondent viewed the monies paid thus far as overpayments. The deduction was calculated retrospectively from March 2019 to December 2020.

As a result of the reduction in their salaries, which the applicants considered unlawful, they approached the High Court in terms of section 34(1) and (2) of the Basic Conditions of Employment Act (75 of 1997) (BCEA) for a declaratory order that the decision to reduce their salaries was unlawful.

3 Findings

The applicants contended that the reduction was unlawful because they were not allowed to make representations before the deductions had been effected. They submitted that no legal basis justified the reduction in their remuneration, and that the municipality was the author of its own misfortune should it suffer loss. They then contended that they had no legal obligation to refund any portion of their remuneration because a reduction in their remuneration was a breach of their contractual rights and was made without following due process. On the other hand, the municipality raised numerous special defences – among others, that the High Court lacked jurisdiction and that the contractual entitlement had not been pleaded.

As regards the jurisdictional issue, the court disposed of it on the basis that section 77(1) and (3) of the BCEA confers jurisdiction on the High Court to determine a labour dispute if it concerns a breach of a contractual right that has been specifically pleaded on affidavit. In so doing, the court rejected the municipality's contention that the breach had not been pleaded in the affidavit.

Concerning the merits of the dispute, the court reasoned that the founding affidavits deposed to by the applicants showed that there were contracts of employment between the parties entitling the applicants to the payment of a basic salary and car allowances. The court ruled that the unilateral deduction of the 2,5 per cent notch increment on salaries and allowances amounted to a contractual breach. In so doing, the court found unsustainable the municipality's defence that the payment of the salary and allowance adjustments were unlawful. On the contrary, the court found the payment lawful because no legislation prevented the benefits of the notch increment. In the court's view, the unilateral implementation of the reduction contravened section 34(2)(*b*) of the BCEA, as the applicants were not afforded the right to be heard. The implementation was, therefore, effected without following due process. The court accordingly found that the municipality's unilateral decision to reduce the employees' salaries and allowances was unlawful. The court ordered the municipality to reinstate retrospectively the applicants' salaries and allowances.

As alluded to in the introduction, this case raises the question of the application of the principles of natural justice, which employers quite often ignore. The principles of natural justice are discussed in detail below.

3 1 The concept of natural justice

Subsumed under the concept of natural justice are the Latin maxims "*nemo iudex in sua propria causa*" and "*audi alteram partem*", which, loosely translated, mean "no one may or should be a judge in his/her [own] cause" and "hear the other side" (Burns and Beukes *Administrative Law Under the 1996 Constitution* (2006) 317). These two principles form the epicentre of procedural fairness when dealing with cases of an administrative nature. They are of particular importance when one takes into account the dictates of section 33(1) of the Constitution of the Republic of South Africa, 1996 (Constitution), which guarantees everyone a right to administrative action that is procedurally fair. As evinced in the court's reasoning *in casu*, it is imperative for an administrator to ensure that their decision-making process is not unjustly arbitrary but adheres to fair and legally correct procedures. It is only fair, before taking a decision that adversely affects the rights of an individual, that they should be heard. The applicants *in casu* premised their contentions on this basis and the court confirmed the unlawfulness of their salary reduction. To fully understand the court's decision, it is necessary to unpack the full contents of the Latin maxims above *seriatim*.

3 2 Audi alteram partem

Inspection of the jurisprudence concerning the scope and content of the principle above reveals that compliance with the *audi alteram partem* rule entails:

(i) An individual should be granted an opportunity to be heard before an adverse decision is taken against them.

Thus, an individual must be given proper notice of the intended action; reasonable and timely notice; an opportunity to appear personally to defend the action; an opportunity for legal representation; an opportunity to lead evidence and cross examine the evidence led against them; and finally, a public hearing. The above steps are necessary to give full effect to an individual's right to be heard. These are expatiated on below, *seriatim*:

(1) Proper notice entails furnishing an individual with all the necessary details that will aid them in preparation for the pending case. Lord Denning in *Kanda v Government of Malaya* ([1962] AC 322) affirmed this notion when he held:

> "If the right to be heard is to be a real right which is worth anything, it must carry with it a right in the accused man to know the case which is made against him." (See generally *Minister van Landbou v Heatherdale Farms* 1970 (4) SA 184 (T); *Dhlamini v Minister of Education and Training* 1984 (3) SA 255 (N); *Zondi v Administrator Natal* 1991 (3) SA 583 (A))

Furthermore, where an individual stands accused of more than one charge, they must be informed of all the charges. Merely informing them of one and excluding others would be contrary to natural justice (*Board of Trustees of the Maradama Mosque v Mahmud* [1962] 1 AC

13 24–25). Equally, finding an individual guilty of an offence that differs from the one with which they have been charged contradicts the principles of natural justice (*Lau Luit Meng v Disciplinary Committee* [1968] AC 391).

Finally, a plethora of cases denotes that the confirmation of an order that is premised on facts that an individual has not been allowed to challenge is repugnant to natural justice (*Fairmount Investment Ltd v Secretary of State for the Environment* [1976] 1 WLR 1225, 1260, 1265–1266; *R v Deputy Industrial Injuries Commissioner, ex p Jones* [1962] 2 QB 677 685; *Sabey & Co Ltd v Secretary of State for the Environment* [1978] 1 All ER 586; *Mahon v Air New Zealand* [1984] AC 808).

(2) An exposition of the surrounding jurisprudence suggests that a court will employ a subjective test to determine whether an individual in question has been given sufficient time to process all the relevant information. For example, in the case of *Du Preez v Truth and Reconciliation Commission* (1997 (3) SA 204 (A)), Corbett CJ unequivocally stated that merely affording a person detrimentally implicated an opportunity to make representations or give evidence was not itself enough to dispense with the requirements of fairness; there was a further obligation to ensure that timeous and sufficient notice be given to the person giving evidence. This confirms the findings of the Appellate Division in *Turner v Jockey Club of South Africa* (1974 (3) SA 633 (A)), where the disciplinary action of the Jockey Club was set aside because the jockey was confronted with serious allegations of which the plaintiff had not been given prior notice. Similarly, in *Nkomo v Administrator Natal* (1997 (3) SA 204 (A)), the 48 hours afforded to employees to make representations concerning impending dismissals was found wanting.

(3) It is also imperative that an affected person be afforded the opportunity to appear in person as elucidated in section 3(3)(*c*) of the Promotion of Administration of Justice Act (3 of 2000). However, personal appearance is discretionary, and the administrator exercises a prerogative to determine instances where it is unnecessary to have a statutory provision mandating personal appearance. In *Rutenberg v Magistrate, Wynberg* (1997 (4) SA 735 (C)), Conradie J suggested that due regard must be given to the fairest way of resolving the dispute. In other words, a decision whether to hear oral evidence should be determined by the circumstances of the case and not necessarily be left to the discretion of the administrator. The rationality of this view is best exemplified in the case of *Fraser v Children's Court* (1996 (8) BCLR 1085 (T), *Pretoria*), where Wunsh J considered the denial of a father's request to present *viva voce* evidence prejudicial and amounting to a gross irregularity. In contrast, in *Bam-Mugwanya v Minister of Finance and Provincial Expenditure, Eastern Cape* (2001 (4) SA 120 (Ck)) and in *Imbali 13 and 15 Taxi Association v KwaZulu Natal Provincial Taxi Registrar* (2001 (4) SA 120 (Ck) par 24 and 26), the courts found the absence of oral evidence not prejudicial to an individual's right to procedural fairness.

In *Bam-Mugwanya* (*supra*), the court held that the denial of a request to lead oral evidence to supplement written submissions did not negate the fairness of the procedure. This sentiment is also found in the case of *Imbali* (*supra*), where Nicholson J confirmed the non-essentiality of interested parties appearing before an administrator if they had been granted ample time to make written representations.

(4) Despite not being explicitly included in the *audi alteram partem* rule, the right to legal representation tends to find expression in statutes or through implication. In *Yates v University of Bophuthatswana* (1994 (3) SA 815 (B) 273), the court found that Bophuthatswana's constitution had in its declaration of founding rights expressly provided for the right to legal representation. In *Dladla v Administrator Natal* (1995 (3) SA 769 (N)), the court had to determine whether legal representation was permissible at an employee's disciplinary hearing if the empowering statute was silent. The court found that the administrator had a discretionary power, and that such an exercise of discretion would be subject to review at the instance of an aggrieved party.

(5) Leading evidence and cross-examining witnesses is also not intrinsically rooted in the rules of natural justice. The right to cross-examination in administrative proceedings was not given due regard by courts in the past as they allowed for hearsay and opinion evidence (*Geneeskundige en Tandheelkundige Raad v Kruger* 1972 (3) SA 318 (A) and *Davies v Chairman Committee of the Johannesburg Stock Exchange* 1991 (4) SA 43 (W)). It has, however, been posited that section 34 of the Constitution changed this as it guarantees everyone the right to a fair public hearing or, where appropriate, an independent and impartial tribunal (Burns *et al Administrative Law Under the 1996 Constitution* 171).

(6) The right to a public hearing is also not absolute under common law and, despite the "fair public hearing" guarantee of section 34, some cases require confidentiality. Such cases include disciplinary hearings and matters dealing with state security (Devenish, Govender and Hulme *Administrative Law and Justice in South Africa* (2001) 287). The court in *Botha v Minister van Wet en Orde* (1990 (3) SA 937 (W)) denied the request of a respondent who sought to have their proceedings heard *in camera*. The request had been based on a similar application involving the release of a detainee that had received wide media coverage. In rejecting the request, the court held that where the exercise of a discretion relates to the detention of a person, the public should be apprised of how the judiciary addresses the issue.

(ii) An individual ought to be privy to the considerations that count against them.

For a person to be effectively heard, they must know what the essential factors are that may negatively impact them so they can adequately prepare a sound defence (Devenish *et al Administrative Law and Justice in South Africa* 88). *Loxton v Kenhart Liquor Licensing Board* (1942 AD 287–315) is a *locus classicus* in this regard, but it was subsequently

qualified in *Down v Malan* (1960 (2) SA 734 (A)): the court reasoned that, where an interested party could foresee the prejudicial facts and failed to act accordingly, such a person cannot use non-disclosure of the facts as a factor constituting an impediment to their fair trial. In *Lawson v Cape Town Municipality* (1982 (4) SA 1 (C)), the applicant was denied a licence to run a massage parlour – based on a confidential report in the licensing board's possession to which the applicant was not privy. The court considered this non-disclosure to be a defect in the applicant's right to a fair trial and consequently the decision was set aside (*Lawson v Cape Town Municipality supra*).

The importance of the disclosure of facts was further buttressed in *Tseleng v Chairman Unemployment Insurance Board* (1995 (3) SA 162 (T)), where an applicant for unemployment benefits had their application denied based on a policy that was unknown to the applicant. Heher J held:

> "It is beyond the question administratively unfair to fail to draw the attention of an applicant [to the fact] that the board relies on a particular policy and that by such failure to deprive the applicant of the opportunity of making submissions as to why he should be treated as one who qualifies within the terms of that policy." (*Tseleng v Chairman supra* 178j–179A)

Thus, in the spirit of strict compliance with the *audi alteram partem* rule, an administrator who stumbles upon information that is prejudicial to an affected person must disclose such information. Even in instances where a hearing has taken place and more information comes to light, a further hearing must be held in order for the affected person's side of the story to be heard (*Tseleng v Chairman supra* 178j–179A).

In *Maharaj v Chairman of the Liquor Board* (1997 (2) BCLR 248 (N) 251 G-1), the court ruled that an applicant must also be alerted to deficiencies in their application and afforded an opportunity to supplement their application. Nicholson J observed the following:

> "It is trite law that a party whose rights are subject to an enquiry is entitled to be informed of the facts and information gleaned by the authority in question which may be detrimental to her interests and that she be given an opportunity to reply thereto." (*Maharaj v Chairman supra* 260)

This finding was confirmed in *Kotzé v Minister van Onderwys en Kultuur* (1996 (3) BCLR 417 (T)), where the court found that the Director-General's consideration of information not contained in the applicant's application constituted a denial of procedurally fair administrative action. The court was of the view that the applicant should have been allowed to deal with the information that did not form part of their application, yet was taken into account when their application was considered (*Kotzé v Minister van Onderwys en Kultuur supra* 418).

(iii) An individual is entitled to the reasons for the decision taken by the administrator.

The importance of furnishing reasons for an administrative action cannot be gainsaid, especially when considering the history of apartheid in South Africa. Whether an administrator acted lawfully or unlawfully, rationally or

arbitrarily, can be inferred from the reasons the administrator provides (Baxter *Administrative Law* (1984) 290). Baxter articulates the importance of furnishing reasons for administrative action as follows:

(1) It is submitted that the requirement to provide reasons entails a duty to rationalise the decision, as the administrator must subsequently justify their mindset and thought process in deciding the question (Baxter *Administrative Law* 290).

(2) Reasons may console the affected individual as they have insight into why the administrator took the decision they did. It is submitted that this instils confidence in the public's view of administrative decisions (Baxter *Administrative Law* 290).

(3) Constructive criticism of administrative decisions may only ensue if the critics are privy to the thought process of the administrator. Being privy to these thoughts also provides a basis for appeal or review (Baxter *Administrative Law* 290).

(4) The reasons furnished serve a genuine educational purpose in that an affected applicant may remedy future applications of a similar nature (Baxter *Administrative Law* 290).

Prior to the 1996 Constitution, furnishing reasons for administrative actions was seldom applied. This phenomenon is largely attributed to the absence of this right at common law and to its exclusion by the enabling statutes of that time (Burns *et al Administrative Law under the 1996 Constitution* 328*).*

This position has been changed by section 33(2) of the Constitution, which specifically provides for a right to written reasons for any administrative action taken. Courts have consequently abandoned their previous acquiescence to administrators' not giving reasons for their decisions, and they now enforce section 33(2). Examples of such enforcement are evident in the following cases.

In *Maharaj* (*supra*)*,* the court found that reasons should still be furnished despite doubts that the licence was in the public's best interests. The court reasoned that the denial of an applicant's application, without informing them of the Board's doubts and allowing them an opportunity to address these doubts, was unjust and unfair.

In *ABBM Printing and Publishing (Pty) Ltd v Transnet Ltd* 1998 (2) SA 109 (W)*,* the court found that an applicant was entitled to written reasons on why their tender bid had been rejected and awarded to another.

In summation, the *audi alteram partem* rule ultimately fosters rationality, fairness and transparency in administrative acts. It creates due process procedures that hold an administrator accountable for their decisions, ultimately instilling public confidence in administrative decisions.

3 3 Nemo iudex in propria causa

The second principle of natural justice is against bias, which finds expression in the Latin maxim "*nemo iudex in propria causa*"*.* Loosely

translated, the maxim means “no one should be a judge in their own cause”. This guards against the partiality of an arbitrator who may be called upon to decide a case in which they have a vested interest. In *President of South Africa v South African Rugby Union* (2000 (1) SA 1 (CC); 1999 (10) BCLR 1059 (CC)), the court held that the impartiality of a court in adjudicating disputes that come before it is the cornerstone of any fair and just legal system.

The court in *Rose v Johannesburg Local Road Transportation Board* (1947 (4) SA 287 (W)) stated:

> “The right of everyone to equal justice before the law, … requires that every party in a matter upon which a judicial body is called upon to give a decision should be entitled to what must appear to be a fair, impartial and unbiased consideration of their case.”

Bias can manifest in three ways: pecuniary interest, personal interest and prejudice. Whether a reasonable suspicion of bias exists in the mind of an adjudicator remains subjective, and must be determined based on the evidence available. It follows that it would be wasted for the *audi alteram partem* rule to be followed meticulously only to have this exercised before an adjudicator who has a vested interest in the outcome.

4 Analysis

The *Ngcangula v Mhlontlo Local Municipality; Nqekeho v Mhlontlo Local Municipality* (*supra*) case raises the fundamental applicability of natural justice, which entitles everyone to be given an opportunity to be heard before a decision is made against that person. The principles of natural justice are embedded in the maxim of *audi alteram partem*. The *audi alteram partem* rule is imported from administrative law and applied in the employment context. Thus, in *Modise v Steve’s Spar Blackheath* (2000 (21) *ILJ* 519 (LAC)) (*Modise*), although in the context of dismissal, the Labour Appeal Court held that a worker is, as a general rule or requirement, entitled to an opportunity to be heard before they can be dismissed. Such a general rule is consonant with the principle of fairness, which underpins labour disputes. Hence in *Modise*, procedural fairness was found to be a dominant thread in both administrative and labour law. In administrative law, a decision-maker must give an affected person an opportunity to make representations and to be heard before any adverse decision is taken against them. Similarly, in labour law, fairness dictates that an employer must afford the employee an opportunity to tell their side of the story to mitigate any decision that may be taken against them. Fairness is therefore an important principle of labour law; it mandates that fair procedure be followed in all labour disputes, regardless of whether an employer has a *prima facie* case against its employee.

Thus, in *Department of Education (Province of the Northern Cape) v Kearns NO* (2019 (40) *ILJ* 1764 (LAC)), the Labour Appeal Court held that the *audi alteram partem* principle was the cornerstone of procedural fairness because it provides any accounting officer with an opportunity to obtain information that may be relevant for the proper exercise of the power. The *audi alteram partem* rule is therefore indispensable for any proceedings to

be fair. This means that procedural fairness gives a party who is likely to be affected by the outcome of any decision the opportunity to make representations and to be heard before an adverse decision is made. This accords with the prescripts of section 188 of the Labour Relations Act (66 of 1995) (LRA), which requires that dismissal be effected in accordance with a fair procedure. The LRA also requires, in section 188(2), that a fair dismissal be made in accordance with the Code of Good Practice: Dismissal (Schedule 8 to the LRA).

Indeed, clause 4 of the Code of Good Practice clearly provides guidance for a fair procedure. The employer should conduct an investigation to determine whether there are grounds for dismissal. This does not need to be a formal enquiry. The employer should notify the employee of the allegations using a form and language that the employee can reasonably understand. The employee should be allowed the opportunity to state a case in response to the allegations. The employee should be entitled to a reasonable time to prepare the response and to the assistance of a trade union representative or fellow employee. After the enquiry, the employer should communicate the decision taken, and preferably furnish the employee with written notification of that decision.

Thus, in the case under consideration in this note, the municipality that decided through its council to reverse the salary and allowance increment that it had implemented after its earlier council meeting fell short of the requirements of procedural fairness. This is because the municipality did not give the applicants any opportunity to make representations, nor were they heard before the decision was made. The deduction was unlawful and made unilaterally. This conduct was clearly against the rule of natural justice. Thus, the court correctly found that the reduction was not authorised by any law and constituted self-help because the applicants were not at fault. The finding against self-help was the subject of the Constitutional Court judgment in *Lesapo v North West Agricultural Bank* (2000 (1) SA 409 (CC); 1999 (12) BCLR 1420 (CC)) (*Lesapo*). Although the case concerns the validity of section 38(2) of the North-West Agricultural Bank Act (14 of 1981) (which permits the Bank to seize the property of defaulting debtors with whom it had concluded loan agreements, and to sell such property to recover its debt, without recourse to a court of law), its finding is relevant for present purposes. The court in *Lesapo* stressed the importance of the rule proscribing self-help. The prohibition protects individuals against arbitrary and subjective decisions; it guarantees impartiality and protects against the injustice that may arise therefrom (par 18). In a constitutional democracy underpinned by the rule of law, there is no place for legislation that is inimical to and infringes the fundamental principles enshrined in the Constitution (par 17), especially when the tendency for aggrieved persons to take the law into their own hands is a constant threat.

Almost two decades later, the finding in *Lesapo* was applied in *Public Servants Association obo Ubogu v Head of the Department of Health, Gauteng, Head of the Department of Health, Gauteng v Public Servants Association obo Ubogu* (2018 (2) BCLR 184 (CC); (2018) 39 *ILJ* 337 (CC); [2018] 2 BLLR 107 (CC); 2018 (2) SA 365 (CC)). Again, the issue was constitutionality – this time that of section 38(2)(*b*)(i) of the Public Service

Act (103 of 1994), which the Labour Court had declared invalid. The issue was whether section 38(2)(*b*)(i) of the Act entitles the State to deduct amounts from an employee's salary in respect of incorrect payments, without due process or the employee's knowledge, or an agreement between the parties. The court per Nkabinde ADCJ held that section 38(2)(*b*)(i) does not pass constitutional scrutiny as it permits unfettered self-help in violation of the principle of legality enshrined in section 1(*c*) of the Constitution. The court reasoned that section 38(2)(*b*)(i) was not only unfair, but also imposed strict liability on an employee for overpayments, irrespective of whether the employee could afford to pay the arbitrarily determined instalments or had been afforded an opportunity for legal redress before the deductions were made (par 64–67). The court then found that self-help, in such instances, undermines the judicial process as protected by section 34 of the Constitution. Section 34 of the Constitution not only guarantees access to the courts but also safeguards the right to have a dispute resolved by the application of law in a fair hearing before an independent and impartial tribunal or forum. Relying on *Ubogu*, the Labour Court per Steenkamp J in *Bux v Minister of Defence & Military Veterans* ((2018) 39 *ILJ* 2298 (LC)) also found that the continuing deductions from the applicant's remuneration, purportedly in terms of section 8 of the Public Service Act, were unlawful.

From the *Lesapo* (*supra*) and *Ubogu* (*supra*) judgments, two important issues are raised in relation to self-help. The first is that any deductions should be made subject to an employee's prior agreement. On this score, it is imperative that both employer and employee agree on a number of points. They must first agree that there is an overpayment that warrants reimbursement and subsequent deduction. Thereafter, both parties should agree on the monthly instalment amount to be deducted from the employee's salary. If the employer and employee fail to agree on the deduction, or whether there is an overpayment, then the second option is to approach a court or impartial forum for a determination as to whether there is an overpayment warranting reimbursement and what the deductible amount should be.

Any deduction from an employee's salary that is outside the two options mentioned above amounts to self-help. Borrowing from *Ubogu*, that would amount to the employer being a judge in its own case. It is precisely to avoid arbitrary decisions that may adversely affect employees that the court guards against self-help. This would avoid a situation like *Ubogu* where the deducted amount may be more than what the employees could afford. Thus, instead of helping itself, an employer should approach a court if an employee refuses to agree to the deduction. The Labour Appeal Court in *North-West Provincial Legislature v National Education Health & Allied Workers Union on behalf of Members* ((2023) 44 *ILJ* 1919 (LAC)) reiterated that self-help is prohibited, even if negotiations have failed. In this case, the employer informed striking employees of the application of the principle of "no work, no pay", but then erroneously paid the employees. The employer later attempted to deduct the overpayment from remuneration, but negotiations failed, and the employer unilaterally proceeded with making deductions. The court ruled that an employer is only entitled to make deductions if the employee agrees in writing to a deduction, or if the deduction is permitted by law, collective agreement, court order or award.

That an employee should consent in writing to the deduction, it is argued, is no more than the *audi* rule. It is in the process of engaging or allowing the employee to make representations as to the veracity of the overpayment that an agreement may arise.

In casu, although the court did not specifically refer to the *audi alteram partem* rule, it nevertheless correctly ruled that the salary reduction contravened section 34(2)(*b*) of the BCEA. In terms of section 34(2)(*b*), read with section 34(1), an employer may not make any deduction from an employee's salary unless the employer has followed a fair procedure and has given the employee a reasonable opportunity to show why the deductions should not be made. Although the Act is silent as to what fair procedure entails, guidance may be sought from the employer's policy. In the absence of such a policy, a fair procedure would entail engaging with the employee about the overpayment and the deduction to be made. As stated above, if an employee does not consent to the deduction, the employer should refer the dispute to the relevant tribunal. Any deduction that falls short of this process would amount to self-help and be potentially arbitrary. In this case, the municipality decided that the applicants were not entitled to the increases because they did not meet the requirements, and so it resolved to reduce the salary and car allowance increments. The reduction, as the court found, amounted to self-help and was therefore unfair. Evidently, the municipality, through its council, flouted the principles of natural justice, which are embedded in labour law. For most employees, a salary is their only income and that is why the legislator has enacted stringent conditions before deductions may be made from an employee's salary. Thus, section 34 of the BCEA makes any deduction from salary subject to the written approval of an employee, and ensures that an employer must follow a fair procedure and give an employee a reasonable opportunity to show why the deductions should not be made. Without meeting the requirements of section 34, it cannot be said that a deduction is lawful.

Clearly, in the discussed case, the municipality's decision to implement the deduction was unilateral and in contravention of *pacta sunt servanda*, which principle underpins the law of contract and emphasises that parties must honour their contractual obligations. The municipality failed to meet its obligations when it made the deduction, amounting to a breach of contract and entitling the applicants to claim specific performance in the form of payment of their salaries, hence the court's order of reinstatement of the applicants' salaries with retrospective effect.

5 Conclusion

Section 34 of the BCEA makes a deduction from an employee's salary subject to prior agreement between the parties. When an employer forms the view that there has been an overpayment to an employee, the employer is required to engage with the employee on the overpayment and the deduction that should be made. Both parties should agree on the monthly instalment amount and the period over which deductions will be made. If parties cannot agree on either the overpayment or the deductible amount, the employer should refer the dispute to the relevant tribunal. In the event

that an employer resorts to deducting from an employee's salary outside the prescripts of section 34, this amounts to self-help. Such a practice is in violation of the fundamental principle of the rule of law and the principle of legality. It is against this backdrop that the proscription of section 34 should be understood.

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A STEP IN THE RIGHT DIRECTION OR ADDITIONAL BURDEN FOR WOMEN MARRIED IN TERMS OF ISLAMIC LAW?

Women's Legal Centre Trust v President of the Republic of South Africa [2022] ZACC 23

1 Introduction

Marriages concluded in terms of Islamic rites have until recently not enjoyed the same legal recognition that is accorded to civil and customary marriages. The non-recognition of Muslim marriages meant that there was no legal regulatory framework to enforce any of the consequences that arise as a result of the marriage. Furthermore, parties to a Muslim marriage were left without adequate legal protection when the marriage was dissolved either by death or divorce. In the absence of legal recognition and regulation of their marriages, Muslims (particularly Muslim women) endured many hardships and challenges. The consequence of non-recognition and non-regulation of Muslim marriages was that the married lives of Muslims remained unpredictable and outside their control. Non-recognition has also effectively meant that although parties to a Muslim marriage regard themselves as married, there has been no legal connection between them. The confirmation judgment of the Constitutional Court in *Women's Legal Centre Trust v President of the Republic of South Africa* ([2022] ZACC 23) sought to remedy the dire situation in which parties found themselves when they were married in terms of Islamic law; it provides interim relief for Muslim marriages until such time as the State either enacts legislation or amends existing legislation to grant legal recognition and regulation of Muslim marriages.

Historically, the South African courts and the legislature have adopted a piecemeal, *ad hoc* approach to issues arising from disputes where spouses are married by Muslim rites (Moosa "The Dissolution of a Muslim Marriage or Hindu Marriage by Divorce" in Heaton (ed) *The Law of Divorce and Dissolution of Partnerships in South Africa* (2014) 287). In essence, the courts and the legislature were prepared to grant legal recognition to some of the consequences flowing from Muslim marriages, but not to Muslim marriages *per se* (for e.g., *Rylands v Edros* 1997 (2) SA 690 (C); *Amod v Multilateral Motor Vehicle Accidents Fund* 1997 (4) SA 753 (CC)).

The non-recognition and regulation of Muslim marriages have had a severe impact on the parties to these marriages, particularly women and children, who are vulnerable groups, as they are disadvantaged both on a social and economic level. Non-recognition of Muslim marriages in essence meant that there was no legal regulatory framework to enforce any of the consequences that arise as a result of the marriage, or any orders made by

the *Ulama* (learned male religious scholars (theologians)) at the dissolution of the marriage. This created a perilous situation as the *Ulama* could not compel compliance with their orders as they lacked the force of law (Shabodien "Making Haste Slowly: Legislating Muslim Marriages in South Africa" Muslim Marriages in South Africa Workshop 14 December 2010).

As Muslim marriages were not granted legal recognition, parties who were financially vulnerable were left without much legal protection.

Taking cognisance of the hardship experienced by parties married in terms of Islamic law, especially the plight of Muslim women and children, the Women's Legal Centre (WLC) brought an application in the Western Cape High Court (WCC) on 17 December 2014 (*Women's Legal Centre Trust v President of the Republic of South Africa; Minister of Justice and Constitutional Development; Minister of Home Affairs; Speaker of the National Assembly; Chairperson of the National Council of Provinces* Case No: 22481/14), seeking an order to force the President and Parliament to enact a law recognising Muslim marriages. This application culminated in the judgment of the WCC in *Women's Legal Centre Trust v President of the Republic of South Africa; Faro v Bingham NO; Esau v Esau* (2018 (6) SA 598 (WCC)). The President and the Minister of Justice were granted leave to appeal by the WCC to the Supreme Court of Appeal (SCA). Similarly, the WCC also granted the WLC, Mrs Faro and Mrs Esau leave to cross-appeal.

The Constitutional Court confirmation judgment, which was delivered on 28 June 2022 in *Women's Legal Centre Trust v President of the Republic of South Africa* (*supra*), arose as a result of the decision of the SCA in *President of the RSA v Women's Legal Centre Trust; Minister of Justice and Constitutional Development v Faro; and Minister of Justice and Constitutional Development v Esau* ([2020] ZASCA 177). A discussion of these pertinent cases leading to the Constitutional Court confirmation is, therefore, essential.

2 *Women's Legal Centre Trust v President of the Republic of South Africa; Minister of Justice and Constitutional Development; Minister of Home Affairs; Speaker of the National Assembly; Chairperson of the National Council of Provinces* Case No: 22481/14

In an application to the WCC, the WLC Trust challenged the government's failure to pass legislation granting recognition to Muslim marriages, despite it having been on the cards since the SA Law Reform Commission completed a draft Bill in 2003.

In the application, the WLC averred that the President, as head of the national executive, together with the National Cabinet and National Assembly, had failed to fulfil the obligation imposed on them in terms of section 7(2) of the Constitution to promote and fulfil the rights in sections 9(1), (2), (3) and (5), 10, 15(10) and (3), 28 (2), 31 and 34 of the Constitution (*WLC Trust v President of the RSA; Minister of Justice and*

Constitutional Development; Minister of Home Affairs; Speaker of the National Assembly; Chairperson of the NCOP supra par 4). The WLC further called for the enactment of legislation providing for the recognition of all Muslim marriages as valid marriages for all purposes in South Africa, as well as for regulation of the consequences flowing from the recognition of Muslim marriages (*WLC Trust v President of the RSA; Minister of Justice and Constitutional Development; Minister of Home Affairs; Speaker of the National Assembly; Chairperson of the NCOP supra* par 7). Without being prescriptive as to what the legislation should entail, the WLC asked the court to compel government to pass legislation that would give Muslim marriages legal status.

In the alternative, the WLC sought a declaration that the Marriage Act (25 of 1961) and the Divorce Act (70 of 1979) were inconsistent with sections 7(2), 9(1), (2), (3) and (5), 10, 15(10) and (3), 28(2), 31 and 34 of the Constitution (*WLC Trust v President of the RSA; Minister of Justice and Constitutional Development; Minister of Home Affairs; Speaker of the National Assembly; Chairperson of the NCOP supra* par 8). In a further alternative, the WLC sought a declaration: first, that the Divorce Act should apply to Muslim marriages; secondly, that Muslim marriages be deemed valid in terms of the Marriage Act; and lastly, that the common-law definition of marriage be extended to include Muslim marriages (*WLC Trust v President of the RSA; Minister of Justice and Constitutional Development; Minister of Home Affairs; Speaker of the National Assembly; Chairperson of the NCOP supra* par 9).

On 2 December 2015, Judge Desai heard arguments from the WLC, the State and other interested parties, including South African Lawyers for Change, the Commission for Gender Equality, United Ulama Council of South Africa (UCSA) (which has the same name as UUCSA) and Lajnatun Nisaa-ll Muslimaat (Association of Muslim Women of South Africa), whose membership comprises approximately 1 000 members, on whether the law's failure to recognise Muslim marriages discriminated against women. The application by Lajnatun Nisaa-ll Muslimaat and UCSA was heard on 5 February 2016. In this matter, the court ruled that Lajnatun Nisaa-ll Muslimaat and UCSA would be admitted as intervening parties.

The main application, initially set down for May 2016, was then postponed to 28 August 2017.

3 *Women's Legal Centre Trust v President of the Republic of South Africa; Faro v Bingham NO; Esau v Esau* 2018 (6) SA 598 (WCC)

In 2018, the WCC heard three consolidated applications brought by the WLC, Tarryn Faro (who was also represented by the WLC) and Ruwayda Esau. The primary applicant in this matter was the WLC.

The relief claimed in the 2014 application (discussed above) was reiterated in 2018. The WLC sought a reading-in in terms of the Recognition of Customary Marriages Act (120 of 1998) so as to make provision for the recognition and regulation of Muslim marriages, pending the enactment of

legislation granting such recognition and regulation (*WLC Trust v President; Faro v Bingham; Esau v Esau* (WCC) *supra* par 36). Furthermore, in addition to or in the alternative to a reading-in, the WLC sought to suspend the declaration of invalidity in relation to the various impugned pieces of legislation for a period of 12 months, during which time Parliament was required to correct the defects of the impugned legislation (*WLC Trust v President; Faro v Bingham; Esau v Esau supra* par 37), failing which the declaration of invalidity would take effect, and the reading-in into the Recognition Act would occur (*WLC Trust v President; Faro v Bingham; Esau v Esau supra* par 37).

In the alternative to the relief sought above, the WLC sought a declarator deeming Muslim marriages to be valid in terms of the Marriage Act and the Divorce Act, and extending the common law to include Muslim marriages (*WLC Trust v President; Faro v Bingham; Esau v Esau supra* par 38).

The relief sought by Faro was an order declaring that marriages concluded in terms of Islamic law be deemed to be valid marriages in terms of the Marriage Act, and alternatively that the common-law definition of marriage be extended to include Muslim marriages. This overlaps with the relief sought by the WLC in the alternative (*WLC Trust v President; Faro v Bingham; Esau v Esau supra* par 41).

Esau sought a declaration that the failure on the part of the Cabinet and the Minister of Justice (second and third defendants) to initiate and prepare legislation providing for the recognition of Muslim marriages as valid marriages in South Africa, and regulating the consequences of such recognition, discriminates against Muslim women married in terms of Islamic law on the grounds of their gender and/or their religion and is inconsistent with sections 9(3) and 7(2) of the Constitution. The declaration sought by Esau was based primarily on an alleged breach of the right to equality on the grounds that Muslim women are unfairly discriminated against. On this basis, Esau sought an order directing the Cabinet and the Minister of Justice to prepare and initiate, within 18 months, legislation recognising and regulating Muslim marriages (*WLC Trust v President; Faro v Bingham; Esau v Esau supra* par 48). Esau also sought a declaration that a *de facto* monogamous marriage concluded in terms of Islamic law should be regarded as valid for the purposes of the Matrimonial Property Act (88 of 1984), the Divorce Act and the common-law duty of support upon divorce (*WLC Trust v President; Faro v Bingham; Esau v Esau supra* par 48).

For the purposes of this case note, the relevant sections of the order by the WCC are summarised as follows (*WLC Trust v President; Faro v Bingham; Esau v Esau supra* par 252):

1. The court declared that in terms of section 7(2) of the Constitution, the State is under an obligation to respect, protect, promote and fulfil the rights in sections 9, 10, 15, 28, 31 and 34 of the Constitution. The State is, therefore, under an obligation to prepare, initiate, introduce, enact and bring into operation, diligently and without delay (s 237 of the Constitution) legislation that grants legal recognition to Muslim marriages and to regulate the consequences of such recognition.

2. The court held that the President and the Cabinet had failed to fulfil their respective constitutional obligations as stipulated in paragraph 1 above and that such conduct was invalid.
3. The court ordered the President and Cabinet, together with Parliament, to rectify the failure within 24 months of the date of this order as contemplated in paragraph 1 above. (In terms of this judgment, the State was given the deadline of 31 August 2020 to provide a remedy that would grant recognition to and provide for the regulation of Muslim marriages).
4. Furthermore, if the contemplated legislation were referred to the Constitutional Court by the President in terms of section 79(4)(*b*) of the Constitution, or referred by members of the National Assembly in terms of section 80 of the Constitution, the relevant deadline would be suspended pending the final determination of the matter by the Constitutional Court.
5. Failing the enactment of legislation granting legal recognition and regulation of Muslim marriages within 24 months from the date of the order or such later date as contemplated in paragraph 4 above, and until such time as the coming into force thereafter of such contemplated legislation, the following order would come into effect:

    5.1 Valid Muslim marriages subsisting at the time of this order becoming operative may (even after their dissolution in terms of *Sharia* law) be terminated in accordance with the Divorce Act. Furthermore, all the provisions of the Divorce Act shall be applicable, provided that the provisions of section 7(3) of the Divorce Act shall apply to such a union regardless of when it was concluded; and

    5.2 In the case of a polygynous Muslim marriage, the court shall:

        (a) take into consideration all relevant factors including any contract or agreement and must make any equitable order that it deems just; and

        (b) may order that any person who in the court's opinion has a sufficient interest in the matter be joined in the proceedings.

While the decision of the WCC was welcomed as it made provision for the recognition and regulation of Muslim marriage, it is important to note the following concerns in respect of the judgment of the WCC:

1. The order of the WCC makes provision for Muslim marriages to be dissolved in terms of the Divorce Act even after their dissolution in terms of Islamic law. The question that arises is what exactly is dissolved in accordance with the Divorce Act, as there is no marriage once it is dissolved in terms of Islamic law. The order of the WCC appears to imply that a Muslim marriage remains intact even after its dissolution in terms of Islamic law.
2. The order also makes provision for a secular court to dissolve the Muslim marriage in terms of the Divorce Act. This may be problematic, as Islamic law states that a Muslim marriage can only be dissolved in terms of Islamic law by a Muslim judge (Ibn Farhoon *Tabsiratul Ahkaamfil Usoolil Aqthiyawa Minhajil Ahkaam* vol 1 (1986) 49).

3. Furthermore, the order makes all the provisions of the Divorce Act applicable, and the provisions of section 7(3) of the Divorce Act shall apply to such a union regardless of when it was concluded. Cognisance must be taken of the fact that Islamic law does not recognise "in community of property" as a matrimonial property regime. Spouses in an Islamic marriage maintain separate estates and each spouse retains sole ownership and control of his or her property, whether movable or immovable, and whether acquired before or after the marriage (Rautenbach and Bekker *Introduction to Legal Pluralism* (2014) 368). According to authentic narrations from Islamic jurists (Ibn Katheer *Tafseer al-Quran al-Adheem* vol 1 (2003) 93), a person is only allowed to receive benefits and wealth that has been earned through lawful means, and if the parties are married in terms of a shared matrimonial property system (*Qur'an Surah Al-Nisa* verse 33), they become entitled to receive benefits to which they are not Islamically entitled. The *Ulama* in South Africa are unanimous that the only matrimonial property regime that is *Shari'ah* compliant is the standard antenuptial contract where there is no sharing of assets and liabilities during the subsistence of the marriage (*Surah Al-Nisa* verse 33.) The following injunction from the *Quran* can be cited in this respect:

> "To men is allotted what they earn and to women what they earn." (*Surah Al-Nisa* verse 33)

In other words, the spouses retain sole rights of ownership and control over their individual property, as a marriage concluded in terms of Islamic law is a non-sharing system unless the parties have entered into a marriage contract. Where a marriage contract has been entered into prior to the conclusion of the marriage, the matrimonial property will be divided according to the terms of the marriage contract. Before the parties conclude the marriage, they may enter into a prenuptial agreement, or *taqliq,* in terms of which they can agree upon any legal condition or conditions that will apply to their marriage, provided that these conditions are not contrary to the meaning of marriage. For example, the parties cannot agree to live separately. In essence, the parties can also enter into a marriage contract to regulate their marital assets (see Alkhuli *The Light of Islam* (1981) 72–73). Islamic law does not make provision for the sharing of assets at the termination of a marriage by divorce. In particular, a claim for the forfeiture of patrimonial benefits and a redistribution order, which is allowed in terms of South African divorce law, is foreign to Islamic law.

4 *President of the RSA v Women's Legal Centre Trust; Minister of Justice and Constitutional Development v Faro; and Minister of Justice and Constitutional Development v Esau* [2020] ZASCA 177

The WCC granted the President and the Minister of Justice leave to appeal to the SCA. Similarly, the court also granted the WLC, Mrs Faro, and Mrs Esau leave to cross appeal. The appeal by the President of the RSA and the

cross-appeal by the WLC was argued before the SCA on 25 and 26 August and 30 September 2020. The judgment of the SCA was handed down electronically on 18 December 2020.

The concessions made by the appellants had a profound impact on the determination of the appeal. (The appellants conceded that the Marriage Act and the Divorce Act infringed the constitutional rights to equality, dignity and access to justice of women in Muslim marriages in that they failed to recognise Muslim marriages as valid marriages for all purposes. Furthermore, the appellants conceded that the rights of children born in Muslim marriages were, under s 28 of the Constitution, similarly infringed.) As a result, the main issues that the SCA was required to consider were: first, whether there is a constitutional obligation on the State to enact legislation recognising Muslim marriages; secondly, whether the provisions of the Marriage Act and Divorce Act are inconsistent with section 15 of the Constitution; and thirdly, whether the interim measure provided by the High Court should be retrospective.

In its judgment, the SCA took cognisance of the fact that the appeal centred on the non-regulation and non-recognition of Muslim marriages (*President of the RSA v Women's Legal Centre Trust* (SCA) *supra* par 1). Notwithstanding that South Africa became a constitutional democracy with the enactment of the Constitution in 1996, and despite prior judgments from both the Constitutional Court and High Court that criticised Parliament's failure to enact legislation granting legal recognition to and regulation of Muslim marriages, the historical disadvantages, hardships, prejudice and offensive attitude displayed towards parties married in terms of Islamic law continue to prevail (*President of the RSA v Women's Legal Centre Trust* (SCA) *supra* par 1).

The SCA also approved of the judgments of *Daniels v Campbell NO* (2004 (5) SA 331 (CC)) and *Hassam v Jacobs NO* (2009 (5) SA 572 (CC), as the decisions in these two cases alleviated the plight of Muslim women in relation to inheriting in terms of the Intestate Succession Act (81 of 1987), or claiming from the estates of the deceased in terms of the Maintenance of Surviving Spouses Act (27 of 1990).

The SCA (par 4) cited the following passages from the *Daniel's* case:

> "This "persisting invalidity of Muslim marriages" is, of course, a constitutional anachronism. It belongs to our dim past. It originates from deep-rooted prejudice on matters of race, religion and culture. True to their worldview, Judges of the past displayed remarkable ethnocentric bias and arrogance at the expense of those they perceived different. They exalted their own and demeaned and excluded everything else. Inherent in this disposition, says Mahomed CJ, is "inequality, arbitrariness, intolerance and inequity." (*Daniels v Campbell supra* par 74)

and

> "These stereotypical and stunted notions of marriage and family must now succumb to the newfound and restored values of our society, its institutions and diverse people. They must yield to societal and constitutional recognition of expanding frontiers of family life and intimate relationships. Our Constitution guarantees not only dignity and equality but also freedom of religion and belief. What is more, s 15(3) of the

> Constitution foreshadows and authorises legislation that recognises marriages concluded under any tradition or a system of religious, personal or family law. Such legislation is yet to be passed in regard to Islamic marriages." (*Daniels v Campbell supra* par 75)

Furthermore, the SCA (par 5) cited the following by Nkabinde J in the *Hassam* case:

> "The prejudice directed at the Muslim community is evident in the pronouncement by the Appellate Division in *Ismail v Ismail*. The court regarded the recognition of polygynous unions solemnised under the tenets of the Muslim faith as void on the ground of it being contrary to accepted customs and usages, then regarded as morally binding upon all members of our society. Recognition of polygynous unions was seen as a retrograde step and entirely immoral. The court assumed, wrongly, that the non-recognition of polygynous unions was unlikely to 'cause any real hardship to the members of the Muslim communities, except, perhaps, in isolated instances'. That interpretive approach is indeed no longer sustainable in a society based on democratic values, social justice and fundamental human rights enshrined in our Constitution. The assumption made in *Ismail*, with respect, displays ignorance and total disregard of the lived realities prevailing in Muslim communities and is consonant with the inimical attitude of one group in our pluralistic society imposing its views on another." (*Hassam v Jacobs NO supra* par 25)

In approving and citing the above cases, the SCA was setting the tone for the manner in which it would approach the appeal and cross-appeal. The issues for determination by the SCA as set out above are discussed below.

4 1 Whether there is a constitutional obligation on the State to enact legislation recognising Muslim marriages

The WCC found that section 7(2) of the Constitution placed an enforceable duty on the State to enact legislation that granted legal recognition to Muslim marriages. In dealing with this issue, the SCA stated:

> "Section 7(2) is a broad general provision that must be read in the context of the Constitution and specifically in the context of the carefully constructed separation of powers entrenched in the Constitution. The principle of separation of powers is crucial to our democracy." (*President of the RSA v Women's Legal Centre Trust* (SCA) *supra* par 35)

The SCA referred to section 85 (which vests the power to prepare and initiate legislation in the President and Cabinet), section 43 (which vests the legislative authority of the national sphere of the Republic exclusively in Parliament) and section 44 (which vests the national legislative authority also exclusively in Parliament) of the Constitution to lend weight to the fact that it is the responsibility of Parliament to enact legislation. The SCA elaborated on this responsibility but referred to the discretionary nature of the President and Cabinet's power in respect of the nature and content of the legislation that it prepares and initiates (*President of the RSA v Women's Legal Centre Trust* (SCA) *supra* par 42). The SCA, therefore, concluded that section 7(2) of the Constitution cannot be the premise for the argument that a duty is placed on Parliament to enact legislation granting legal recognition

to Muslim marriages (*President of the RSA v Women's Legal Centre Trust* (SCA) *supra* par 42).

In fact, the SCA stated that to order the State to enact legislation granting recognition of Muslim marriages on the basis on section 7(2) would be in conflict with the doctrine of the separation of powers in light of sections 85, 43 and 44 of the Constitution (*President of the RSA v Women's Legal Centre Trust* (SCA) *supra* par 43). In the reasoning of the SCA in respect of the first issue, it disagreed with the finding of the WCC on the basis of the doctrine of the separation of powers. As a result, this aspect of the order of the WCC was set aside.

4 2 Whether the provisions of the Marriage Act and Divorce Act are inconsistent with section 15 of the Constitution

The SCA quoted section 15 of the Constitution, which makes provision for freedom of religion, belief and opinion. It was noted by the SCA that while the WCC made reference to section 15 of the Constitution in paragraph 1 of its order, it did not rule that the provisions of the Marriage Act and the Divorce Act were in conflict with the rights contained in section 15 (*President of the RSA v Women's Legal Centre Trust* (SCA) *supra* par 47). The SCA, furthermore, noted that this was also not the basis of the argument of the WLC; rather, it was that the permissive powers in terms of section 15(3) do not prevent the enactment of legislation that is sought by the WLC (*President of the RSA v Women's Legal Centre Trust* (SCA) *supra* par 47). The SCA, therefore, concluded that the declarations of unconstitutionality in respect of the Marriage Act and the Divorce Act should not contain a reference to section 15 of the Constitution.

4 3 Whether the interim measure provided by the High Court should be retrospective

In respect of the third issue – namely, retrospectivity – the SCA took cognisance of the WLC's request that the order granting interim relief should be retrospective and be applicable to all Muslim marriages that were terminated under Islamic law as far back as April 1994.

The SCA regarded the matter of retrospectivity as a complex one that could have profound unforeseen consequences (*President of the RSA v Women's Legal Centre Trust* (SCA) *supra* par 48). While the SCA made reference to section 172(1) of the Constitution (which empowers the SCA to make any order that is just and equitable where a declaration of invalidity is made), it stated that the matter of retrospectivity is the prerogative of Parliament, and that the legislature was best placed to deal with this matter (*President of the RSA v Women's Legal Centre Trust* (SCA) *supra* par 48). The SCA, therefore, did not accede to the request of the WLC.

Having considered these three pertinent issues, the SCA concluded with the following remarks: it had crafted an effective and comprehensive order so as to alleviate the hardships experienced by parties to Muslim marriages;

the order would be operational until such time as the necessary legislation was enacted by Parliament giving legal recognition to and regulating Muslim marriages; the non-recognition constituted both a travesty and a violation of the constitutional rights of adherents to the religion of Islam, especially, in respect of women and children; and lastly, the legal recognition and regulation of Muslim marriages "will afford protection and bring an end to the systematic and pervasive unfair discrimination, stigmatisation and marginalisation experienced by parties to Muslim marriages including, the most vulnerable, women and children" (***President of the RSA v Women's Legal Centre Trust*** (SCA) *supra* par 50).

The relevant sections of the SCA judgment for the purposes of this case note are summarised as follows:

> The appeal and the cross-appeals succeed in part, and the order of the Western Cape High Court as the court *a quo* is set aside and replaced with the following order:
>
> 1. Both the Marriage Act and the Divorce Act are declared to be inconsistent with sections 9, 10, 28 and 34 of the Constitution, in that these Acts fail to recognise marriages that are not registered in terms of civil law, but which are concluded in terms of Islamic law, as valid marriages for all intents and purposes in South Africa, and these Acts also fail to regulate the consequences of such recognition.
> 2. Section 6 of the Divorce Act is declared to be inconsistent with sections 9, 10, 28(2) and 34 of the Constitution insofar as it fails to provide for mechanisms to safeguard the welfare of minor or dependent children of Muslim marriages at the time of dissolution of the Muslim marriage in the same or similar manner as it provides mechanisms to safeguard the welfare of minor or dependent children of other marriages that are being dissolved.
> 3. Similarly, section 7(3) of the Divorce Act is inconsistent with sections 9, 10, and 34 of the Constitution insofar as it fails to provide for the redistribution of assets on the dissolution of a Muslim marriage, when such redistribution would be just.
> 4. Section 9(1) of the Divorce Act is inconsistent with sections 9, 10 and 34 of the Constitution insofar as it fails to make provision for the forfeiture of the patrimonial benefits of a Muslim marriage at the time of its dissolution in the same or similar terms as it does in respect of other marriages.
> 5. The court ordered that the declarations of constitutional invalidity be referred to the Constitutional Court for confirmation.
> 6. The court declared the common-law definition of marriage to be inconsistent with the Constitution as it excludes Muslim marriages and is, therefore, invalid.
> 7. The declarations of invalidity in paragraphs 1.1 to 1.4 above are suspended for a period of 24 months to enable the President and Cabinet, together with Parliament to remedy the foregoing defects by either amending existing legislation, or by passing new legislation within 24 months, to ensure the recognition of Muslim

marriages as valid marriages for all purposes in South Africa and to regulate the consequences arising from such recognition.

8. Pending the enactment legislation or amendments to existing legislation referred to in paragraph 1.7, it is declared that a union, validly concluded as a marriage in terms of *Sharia* law and subsisting at the date of this order, or, which has been terminated in terms of *Sharia* law, but in respect of which legal proceedings have been instituted and which proceedings have not been finally determined as at the date of this order, may be dissolved in accordance with the Divorce Act as follows:
   (a) all the provisions of the Divorce Act shall be applicable save that all Muslim marriages shall be treated as if they are out of community of property, except where there are agreements to the contrary, and
   (b) the provisions of section 7(3) of the Divorce Act shall apply to such a union regardless of when it was concluded.
   (c) In the case of a husband who is a spouse in more than one Muslim marriage, the court shall:
      (i) take into consideration all relevant factors including any contract or agreement and must make any equitable order that it deems just, and
      (ii) may order that any person who in the court's opinion has a sufficient interest in the matter be joined in the proceedings.
9. It is declared that, from the date of this order, section 12(2) of the Children's Act 38 of 2005 applies to Muslim marriages concluded after the date of this order.
10. For the purpose of applying paragraph 1.9 above, the provisions of section 3(1)(*a*), (3)(*a*) and (*b*), (4)(*a*) and (*b*), and (5) of the Recognition of Customary Marriages Act shall apply, *mutatis mutandis*, to Muslim marriages. (***President of the RSA v Women's Legal Centre Trust*** (SCA) *supra* par 51)

The importance of the SCA judgment can be summarised as follows:

1. Some measure of protection was now offered to parties to a Muslim marriage, especially women and children born of these unions, who were previously left to their own peril as they were not offered the same protection as partners to a civil marriage (as stated above, the Marriage Act and the Divorce Act did not grant legal recognition to marriages concluded in accordance with Islamic law).
2. The judgment confirmed that the Marriage Act and Divorce Act infringed the following sections of the Constitution, namely, section 9 (the right to equality); section 10 (the right to human dignity); section 28 (children's rights) and section 34 (the right to have access to courts).
3. Furthermore, the SCA held that the Divorce Act failed to provide mechanisms to safeguard the welfare of minor or dependent children of Muslim marriages at the time of the dissolution of a Muslim marriage in the same manner as section 6 of the Divorce Act provides safeguards for the welfare of children when civil marriages are being terminated.

4. In addition to the above breach of rights, the SCA held that the Divorce Act differentiates: between widows married in terms of the Marriage Act and those married in terms of Islamic law (s 7(3) and s 9(1) of the Divorce Act provide for redistribution orders and forfeiture of benefits orders respectively, but did not apply to Muslim marriages at the dissolution of marriage); between widows in monogamous Muslim marriages and those in polygynous Muslim marriages; and between widows in polygynous customary marriages and those in polygynous Muslim marriages. The Divorce Act works to the detriment of Muslim women and not Muslim men.

The following concerns in respect of the SCA judgment should be noted:

1. The same concern expressed above in relation to the WCC judgment in respect of sections 7(3) and 9(1) of the Divorce Act should be noted with regard to the SCA judgment.
2. The SCA held that children are not protected by a statutory minimum age for consent to marriage insofar as the conclusion of a marriage in terms of Islamic law is concerned as neither section 24 of the Marriage Act nor section 12(2)(*a*) of the Children's Act (38 of 2005) are applicable to a minor who wishes to conclude a marriage in terms of Islamic law. In terms of Islamic law, no particular age has been stipulated for marriage (Siddiqi *The Family Laws of Islam* (1984) 68). *Shari'ah* allows for the conclusion of a marriage when the age of puberty (*mukallaf* or *bulugh*) is reached (Ibn Rushd *The Distinguished Jurist's Primer: A Translation of Bidayat Al-Mujtahid* (1996) 4; Esposito with DeLong-Bas *Women in Muslim Family Law* (2001) 15; Ahmed *Muslim Law of Divorce* (1978) 913; Pearl *A Textbook on Muslim Law* (1987) 43). Puberty is determined by signs of physical maturation or, where there is no declaration of puberty, there is a presumption that puberty has been reached, in the case of girl, when she has reached the age of nine years and, in the case of a boy, when he has reached the age of 12 years. (In the past, marriages at a young age were common but in recent times countries like Sudan and Tunisia have a legislated age when parties are deemed to have the necessary capacity to conclude a marriage. For example, in Sudan, the marriageable age of a girl is deemed to be 16 years, and in Tunisia, it is 22 years.) It is submitted that differing climatic, hereditary, physical and social conditions existing in different countries affect the age at which a person is deemed to be marriageable. As a result, no particular age is stipulated, as there would be a difference as to the marriageable age in the different countries (Siddiqi *Family Laws of Islam* 68). Islamic law, therefore, without stipulating a specific age, requires parties to have reached the age of puberty. Where one or both of the parties is below the age of puberty, the marriage is deemed to be void. However, in Islamic law, a presumption arises that the age of puberty for girls is nine years old and twelve years old for boys. The fact that there is no specific age requirement Islamic law may cause conflict with the South African law position where there is a move towards changing the age requirement for marriage to 18 years with no exceptions for parental consent (South African Law Reform Commission *Single Marriage Statute* Issue paper 35 (Project 144) (2019)).

The SCA order of constitutional invalidity was confirmed by the Constitutional Court on 28 June 2022 in *Women's Legal Centre Trust v President of the Republic of South Africa* ([2022] ZACC 23).

5 *Women's Legal Centre Trust v President of the Republic of South Africa* [2022] ZACC 23

In the confirmation judgment, the Constitutional Court confirmed the SCA decision that the Marriage Act, Divorce Act and the common-law definition of marriage were in conflict with sections 9, 10, 28 and 34 of the Constitution (*Women's Legal Centre v President of the Republic of South Africa* (CC) *supra* par 86). However, the court suspended the declarations of invalidity for a period of 24 months so as to provide the President, Cabinet and Parliament an opportunity to formulate a suitable remedy that grants legal recognition to and regulation of Muslim marriages.

Furthermore, the Constitutional Court held that, pending the enactment or amendment of existing legislation granting the recognition and regulation of Muslim marriages, the provisions of the Divorce Act are applicable where parties to Muslim marriages seek to have their marriage dissolved. This interim relief was, however, limited to: Muslim marriages in existence on 15 December 2014 (15 December 2014 is the date on which the WLC instituted action in the WCC); or which were dissolved in terms of Islamic law as at 15 December 2014; and those in respect of which legal proceedings were instituted but not finalised at the date of this order (*Women's Legal Centre v President of the Republic of South Africa* (CC) *supra* par 86). In other words, the interim relief provided by the Constitutional Court could now be used by parties married in terms of Islamic Law while an appropriate remedy is being formulated by the State, but the cut-off date for the application of the interim relief for Muslim parties was 15 December 2014.

The Constitutional Court held that the matrimonial property system applicable to Muslim marriages would be out of community of property (without accrual) (although the latter is not explicitly stated in the judgment) unless there are agreements to the contrary (*Women's Legal Centre v President of the Republic of South Africa* (CC) *supra* par 86). The reason is that a marriage in terms of Islamic Law is deemed to be out of community of property – that is, the standard antenuptial contract. Community of property is not recognised under Islamic law. (See discussion of concerns with the WCC judgment under heading 3 above.) This may be problematic as a wife may be left destitute where all or most of the assets accrued during the subsistence of the marriage are registered in the husband's name.

The judgment also makes provision for the application of section 12(2) of the Children's Act to a prospective spouse in a Muslim marriage that is entered into after the date of the Constitutional Court order. Section 12(2) of the Children's Act makes provision for the age and consent requirements of a marriage as it relates to minor children. To enter into a valid marriage in terms of the Marriage Act or the Recognition of Customary Marriages Act, minors require the consent of their parents or guardians (s 18(3)(*c*)(i) read with s 18(5) of the Children's Act; s 3(3)(*a*) of the Recognition of Customary Marriages Act; children under the age of 18 years may not enter into a civil

union in terms of the Civil Union Act). With regard to age and consent requirements when concluding a Muslim marriage, the Constitutional Court declared:

> "the provisions of sections 3(1)(a), 3(3)(a) and 3(3)(b), 3(4)(a) and 3(4)(b), and 3(5) of the Recognition of Customary Marriages Act 120 of 1998 [(Recognition Act)] shall apply, *mutatis mutandis,* to ... [Muslim] marriages." (***Women's Legal Centre v President of the Republic of South Africa*** (CC) *supra* par 86)

This means that both prospective spouses must be 18 years old to conclude a marriage in terms of Islamic law. The age requirement is in direct conflict with Islamic law, as the latter does not require prospective spouses to be 18 years of age.

The Constitutional Court judgment also brought relief for women in polygamous Muslim marriages and children born from these unions.

The following concerns in respect of the SCA judgment should be noted:

1. Cognisance must again be taken of the concerns raised with regard to the age requirement as discussed in respect of the SCA decision. Notwithstanding these concerns, these requirements will be applicable and will require adherence where a minor concludes a marriage in terms of Islamic law. It is, therefore, important that Muslim theologians who officiate at a Muslim marriage familiarise themselves with the requirements relating to age and consent.
2. See the discussion above in respect of the dissolution of a Muslim marriage by the secular courts, as opposed to by a Muslim judge as required by Islamic law.
3. See also the discussion above in relation to the application of sections 7(3) and 9(1) of the Divorce Act to Muslim marriages.
4. The Constitutional Court makes provision for the legal recognition and regulation of Muslim marriages, but the question arises as to how Muslim marriages are going to be legally recognised while still being in conformity with the rules and principles of Islamic law.
5. The Constitutional Court judgment makes provision for Muslims married in terms of Muslim law to terminate their marriage in terms of the Divorce Act. Cognisance must be taken of the fact that while the Divorce Act does now apply to Muslim marriages, Muslims face a dual process as they are still required to terminate their marriage by means of a *talaq* or a *faskh* in terms of Islamic Law. This seems to imply that parties married in terms of Islamic law now have to undergo additional processes in order to realise their rights as confirmed by the Constitutional Court judgment.
6. It must also be noted that the judgment does not deal with Islamic law *per se* but is based on the fact that Muslim women, and children born of Muslim marriages, have been the victims of discriminatory practices and abuse within South African law (***Women's Legal Centre v President of the Republic of South Africa*** (CC) *supra* par 63). The fact that the Marriage Act and Divorce Act were not applicable to Muslim marriages further reinforced these discriminatory practices.

While acknowledging that the judgment is long overdue and a step in the right direction, it must nevertheless be welcomed with caution for the reasons stated above.

6 Conclusion

From the above discussion, it is evident that the fundamental values of the Constitution took precedence, and that the courts applied the constitutional values as they were meant to be applied. The courts all took cognisance of the need to recognise and regulate Muslim marriages, as well as of the harsh and discriminatory consequences that arose as a result of the non-recognition and non-regulation of Muslim marriages.

It is submitted that the Constitutional Court judgment is to be welcomed and is without doubt a move in the right direction insofar as the recognition of Muslim marriages is concerned, and also insofar as the judgment addresses issues of parity and social justice, which are now enforceable in a court of law. Furthermore, the judgment is also welcomed because it has brought relief for women in Muslim marriages and children born from these unions as the judgment recognised that it is women and children who are the victims of discrimination owing to the fact that Muslim marriages are not recognised by the common law, the Marriage Act and the Divorce Act.

It is, however, submitted that the judgment must be welcomed with caution as the Constitutional Court did not go far enough in recognising the Islamic system associated with Muslim marriages.

If South African society is to overcome past discrimination and achieve the vision of equality that is fundamental to a constitutional democracy, the courts and the State must recognise and promote the full range of diversity prevalent in South Africa, which includes recognising Muslim marriages in South Africa without breaching fundamental principles and rules of Islamic personal law. There should be no delay in either enacting or rectifying legislation in order to grant legal recognition to Muslim marriages. It is imperative that Parliament be held accountable to ensure that this is done within 24 months as per the judgment and that there is a broad legislative process to remedy that which was held to be unconstitutional by the Constitutional Court.

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AN UNJUST INTERPRETATION OF SECTION 116(1) OF THE CONSUMER PROTECTION ACT 68 OF 2008: THE IMPACT OF

First Rand Bank Limited v Ludick GP (unreported) 2020-06-18 Case no A277/2019

1 Introduction

One of the key objectives of the Consumer Protection Act (68 of 2008) (CPA) is to ensure that consumers are provided with "an accessible, consistent, harmonised, effective and efficient system of redress" (s 3(1)(*h*) of the CPA). This has not been an easy task. Some difficulties have arisen with the interpretation of the detailed, yet unclear, system of redress set out in section 69 of the CPA, particularly in relation to when the court can be approached, and whether there is an implied hierarchy that applies in the dispute-resolution process (see generally *Imperial Group (Pty) Ltd v Dipico* 2016 ZANCHC 1; *Joroy 4440 v Potgieter* 2016 (3) SA 465 (FB); *Imperial Group t/a Auto Niche Bloemfontein v MEC: Economic Development, Environmental Affairs and Tourism Free State Government* 2016 (3) SA 564 (FB); *Motus Corporation v Wentzel* [2021] ZASCA 40). In other instances, the reluctance of industry members to cooperate with accredited industry ombuds has made the work of these dispute-resolution agents challenging (see generally *Consumer Goods and Services Ombud NPC v Voltex (Pty) Ltd* [2021] ZAGPPHC 309; see also definition of "alternative dispute resolution agent" in s 1 of the CPA). Furthermore, an aspect that has undermined the key objective of the CPA to ensure that consumers have access to redress is the interpretation that has been afforded to section 116(1) of the CPA following the decision of the High Court in *FirstRand Bank Limited v Ludick* (GP (unreported) 2020-06-18 Case no A277/2019) (*Ludick*). Section 116(1) of the CPA regulates prescription in terms of the statute. It provides that consumers ought to approach the consumer court or the National Consumer Tribunal (Tribunal) within a period of three years from the date of the act or omission, or, in the case of conduct that is ongoing or continuing, from the date upon which, the conduct in question ceased. The court in *Ludick* considered the equivalent provision in the National Credit Act (34 of 2005) (NCA), namely, section 166(1) of the NCA. Before *Ludick*, the Tribunal adopted a less stringent approach when interpreting section 116(1) of the CPA. Where circumstances required, such as where a consumer had referred a matter to an alternative-dispute-resolution agent (ADR agent), prescription was considered to have been suspended or interrupted (see, for e.g., *Lazarus v RDB Project Management CC t/a Solid* [2016] ZANCT 15 par 31; *Mpofu v Terry's Auto* [2017]

ZACONAF 5 par 19; *Stemmet v Motus Corporation* [2018] ZANCT 150 par 8; *Littlewood Building and Garden Services Projects CC v Hyundai Automative SA* [2018] ZANCT 91 par 33; *Auto Glen Motors (Pty) Ltd t/a Auto Glen v Barnes In re: Barnes v Auto Glen Motors (Pty) Ltd t/a Auto Glen* [2018] ZANCT 51 par 21; *Mountville Mkhalemba Lubisi v Imperial Select Multifranchise (Pty) Ltd* [2018] ZANCT 141 par 45).

Following *Ludick*, however, the approach of the Tribunal in CPA-related matters concerning the interpretation of section 116(1) of the CPA changed – arguably for the worse. This note analyses the decision in *Ludick* and its application over the past few years to CPA-prescription matters. This discussion is prefaced by a discussion of the facts and the finding of *Ludick*. Following thereon is a critical discussion of the court's prescription-related findings, which assesses: (i) the nature of the prohibited conduct, rights and purposes of the NCA and the CPA respectively; (ii) the Tribunal's establishment and powers; (iii) the enforcement processes under the NCA and the CPA respectively; (iv) the adverse impact of *Ludick* on the Tribunal's interpretation of section 116(1) of the CPA; and (v) the need to afford section 116(1) of the CPA a constitutionally aligned interpretation.

2 Factual background

During the course of 2015, Annet Ludick (Ludick) received large amounts of credit, in the form of various credit agreements, from First Rand Bank (the Bank) (*Ludick* par 6). The credit received comprised, *inter alia*, an overdraft, which was increased to R68 000 and then R80 000 between October and December 2015 (*Ludick v First National Bank, A Division of Firstrand Bank Limited* [2019] ZANCT 28 par 9 and 10) (Tribunal judgment). Ludick was also granted a revolving loan of R10 000 (Tribunal judgment par 8); and her FNB credit limit was increased to R61 000 (Tribunal judgment par 7). According to Ludick, all of these requested increases were granted to her without any further request for information by the Bank. Around March 2016, Ludick experienced financial difficulties owing to being over-indebted (Tribunal judgment par 11). Given that she was struggling to pay her accounts, she approached Zero Debt and began a process of debt review (*Ludick* par 9 and Tribunal judgment par 11). A reckless credit complaint was lodged on Ludick's behalf by Zero Debt with the National Credit Regulator (NCR) in September 2016 (*Ludick* par 9). Ludick's contention was that the Bank had not conducted an adequate assessment of her ability to afford repayment of the credit received (*Ludick* par 6). After investigating the matter, the NCR reached the conclusion that there had not been an instance of reckless credit lending, which was confirmed in a letter to Zero Debt dated 22 June 2017 (*Ludick* par 10). Following further submissions that the NCR received on behalf of Ludick, the NCR re-opened the case and issued a non-referral letter on 28 June 2018 (*Ludick* par 11). The non-referral letter was limited to only two of the credit agreements (*Ludick* par 11). The NCR indicated that it could not find that any provisions of the NCA had been contravened (par 12). Ludick applied for leave to refer the matter to the Tribunal (Tribunal judgment par 3).

Before the Tribunal, the Bank raised certain points *in limine* (*Ludick* par 18). The first point *in limine* pertained to the referral of the matter to the Tribunal. In this regard, it was first argued that after receiving the NCR letter, the matter was not referred within the prescribed 20 business days as required in terms of section 141(1)(*b*) of the NCA (Tribunal judgment par 20). In addition, it was argued *in limine* that the matter was not referred to the Tribunal within the three years prescribed in terms of section 166(1)(*a*) of the NCA (*Ludick* par 26–27 and Tribunal judgment par 21). Accordingly, the Bank submitted that two of the credit agreements fell outside of the prescribed three-year period, given that they were concluded on 6 November 2007 and 7 May 2015 respectively (Tribunal judgment par 21).

The second point *in limine* raised by the Bank was, *inter alia*, that the application before the Tribunal lacked a basis and sufficient information in order to support a reckless credit allegation or an over-indebtedness declaration, contrary to the requirements of sections 80 and 83 of the NCA (Tribunal judgment par 22).

The third point *in limine* raised by the Bank was that the Tribunal did not have jurisdiction to grant the relief sought by the applicant (*Ludick* par 23). This was based on the Bank's submission that no case was made by Ludick for any of the credit agreements to be set aside; and, further, no provision permitted a refund to consumers once a finding of reckless credit was made under section 83 of the NCA, as allegedly sought by Ludick (Tribunal judgment par 23).

On the merits of the matter, the Bank denied the allegation of reckless trading and illustrated to the Tribunal how it had applied affordability assessments in respect of each credit agreement that was granted to Ludick (Tribunal judgment par 31–43).

The Tribunal granted leave for the matter to be referred to it (Tribunal judgment par 61). On the merits, the Tribunal declared the three credit agreements concluded by Ludick and the Bank to be reckless, and set aside three of the four credit agreements entered into by the parties (par 1–2). According to the Tribunal order, the future rights and obligations of Ludick were set aside, releasing Ludick from any liability or future payments (par 3). The Tribunal further ordered the Bank to credit the relevant accounts with payments that had been made on the account by Ludick, including interest, fees and charges. It was further ordered by the Tribunal that the revolving loan and all the additional credit that had been granted, be considered as settled with effect from 30 September 2015 (*Ludick* par 4). The decision of the Tribunal was taken on appeal by the Bank to the High Court (*Ludick* par 1).

3 Court findings

The High Court highlighted that the Tribunal's decision to consider all the credit agreements as opposed to those provided for in the non-referral notice was contrary to the Tribunal's jurisdiction in terms of section 141 of the NCA (*Ludick* par 19, 21–25). It therefore usurped the inherent jurisdiction to investigate the credit accounts, despite the fact that they were not included

in the notice of non-referral (par 19). This made the decision of the Tribunal in respect of these additional agreements *ultra vires* (par 24).

Furthermore, and most importantly for purposes of this case note, the High Court held that the Tribunal did not have the authority to make the determination that the three-year period had been interrupted while the matter was before the NCR (par 28). In this regard, the High Court held that the wording of section 166 of the NCA does not give the Tribunal a discretion (par 28). Accordingly, the High Court found that the Tribunal acted contrary to its powers and that its order should be set aside (*Ludick* par 30).

4 Discussion

As mentioned above, the main impact of the *Ludick* decision in the CPA context concerns the interpretation of section 116(1) of the CPA. As such, this is the focal point of this note. Accordingly, the most critical component of the *Ludick* decision for purposes of this note is the High Court's finding that, in terms of section 166(1) of the NCA: (i) the Tribunal did not have the power to decide that the three-year prescription period had been interrupted; and (ii) the Tribunal could not exercise any discretion in this regard (*Ludick* par 28). The High Court's approach in *Ludick* is understandable, given that the Tribunal is a creature of statute (*Ngoza v Rogue Quality Cars* [2018] ZANCT 110 par 19). However, as evidenced in the discussion below, the interpretation of legislative provisions is not as simple as looking through the wording of the provision; a unitary approach should be adopted (see discussion under heading 4 4 below). For the sake of completeness, the disputed provision in *Ludick* reads as follows:

> "166. Limitations of bringing action
> (1) A complaint in terms of this Act may not be referred or made to the Tribunal or to a consumer court more than three years after–
> (a) the act or omission that is the cause of the complaint; or
> (b) in the case of a course of conduct or continuing practice, the date that the conduct or practice ceased." (s 166(1) of the NCA)

As mentioned above, prescription matters under the CPA are regulated by section 116(1) of the CPA, which uses exactly the same wording as section 166(1) of the NCA quoted above. The Tribunal in *National Consumer Commission* (*NCC) v Auto Brokers cc t/a Omar Auto City* ([2021] ZANCT 10) held that the *Ludick* High Court judgment is binding on it when considering matters under the CPA (*NCC v Auto Brokers supra* par 20. See also Van Heerden "Section 116" in Naudé and Eiselen (eds) *Commentary on the Consumer Protection Act* (Revision Service 9 2023) 116–10)). The Tribunal further indicated that sections 116(1) and 166(1) of the CPA and NCA, respectively, have identical wording; and highlighted that the applicant too had made a concession that the Tribunal has no "additional powers to override section 116" (NCC v *Auto Brokers supra* par 20).

However, the following alternative outlook was highlighted by the Tribunal in *Winter v Kove Empire CC* ([2021] ZANCT 35):

> "As the two clauses in the two different acts are similarly worded, the perception may be created that the two clauses must be applied the same. Such a deduction is misplaced. Although similarly worded, the application of the two sections may be different due to the nature of the prohibited conduct being regulated in the two pieces of legislation and the nature of the complaint being lodged." (*Winter v Kove Empire CC supra* par 54, footnotes omitted)

It is submitted that the approach to *Ludick* adopted by the Tribunal in *NCC v Auto Brokers* was narrow and unduly restrictive of the rights of the consumer under the CPA. The Tribunal in *Winter v Kove Empire CC* (*supra*) correctly highlighted the intricacies that ought to be considered in the application of the *Ludick* decision in the CPA context. Despite exactly the same wording being used for the prescription provisions of the NCA and the CPA respectively, transplanting the finding of *Ludick* in respect of section 166(1) of the NCA to section 116(1) of the CPA is inappropriate in light of: (i) the differing nature of the purposes, rights and prohibited conduct regulated by the two statutes; (ii) the variation in the powers of the Tribunal, when dealing with matters in terms of either the CPA or the NCA; and (iii) the dispute-resolution process followed under each statute. A discussion on each of these aspects follows.

4 1 The nature of prohibited conduct, rights and purposes under the NCA and the CPA

Both the NCA and the CPA provide that "prohibited conduct" consists of acts or omissions that are in contravention of the respective statutes (s 1 of both the NCA and the CPA). However, the definition of "prohibited conduct" under the NCA excludes acts or omissions in terms of section 55(2)(*b*) of the Act, which are contraventions of provisions in the NCA that are subject to the compliance procedure set out in the Protection of Personal Information Act (4 of 2013). The definition further excludes acts or omissions that are considered offences under the NCA by: unregistered persons who should be registered for purposes of engaging in a particular act; or credit providers, credit bureaus or debt counsellors (s 1 of the NCA).

Save for certain exceptions, the NCA generally applies to all credit agreements in South Africa that are concluded at arm's length (s 4 of the NCA; see also ss 1 and 8 of the NCA for the meaning of "credit agreement"). The broad purpose of the NCA is, through various means, to ensure that the socio-economic welfare of South Africans is promoted and advanced (s 3 of the NCA). The NCA essentially ensures that consumers are protected when entering into credit agreements, and seeks to ensure, *inter alia*, that access to credit is fair and responsible (see s 3(*a*)–(*d*) of the NCA, for example). The granting of credit is a delicate balancing exercise to enable economic participation of consumers, while being mindful of their financial wellness. Accordingly, consumer credit policy in terms of the NCA ensures that consumers are afforded certain rights to try to manage this balance (Ch 4, Part A of the NCA). For example, the NCA provides consumers with the right to: (i) apply for credit (s 60 of the NCA); (ii) be protected from discrimination regarding credit (s 61 of the NCA); (iii) be provided with reasons when credit is refused (s 62 of the NCA); (iv) have information provided to them in an

official language (s 63 of the NCA); (v) be provided with information in plain and understandable language (s 64 of the NCA); receive documents (s 65 of the NCA); and have their consumer credit rights protected (s 66 of the NCA). Furthermore, the NCA actively seeks to guard the financial wellness of consumers by regulating over-indebtedness and reckless credit (Ch 4, Part D of the NCA). Contravention of these rights and regulatory measures would constitute a few examples of prohibited conduct in terms of the NCA.

The CPA, by contrast, applies to all transactions that are concluded in South Africa, subject to certain exceptions (s 5 of the CPA; see also definition of "transaction" in s 1 of the CPA). For instance, the CPA expressly does not apply to credit agreements regulated under the NCA (s 5(2)(*d*) of the CPA). However, goods and services that are a component of the credit agreement are not excluded from the CPA's scope (see also Stoop "The Overlap Between the Consumer Protection Act 68 of 2008 and the National Credit Act 34 of 2005: A Comparison with Australian Law" 2014 77 *THRHR* 135–144).

In contrast to the NCA's specific objective of protecting consumers in the limited context of credit agreements, the CPA seeks to ensure that the socio-economic welfare of consumers as a whole is promoted and advanced through various means (s 3 of the CPA). The CPA further affords consumers an array of rights, which are there to protect broadly consumers entering into transactions to which the CPA applies. These include the consumer's right to equality within the consumer market (Ch 2, Part A of the CPA); privacy (Ch 2, Part B of the CPA); choice (Ch 2, Part C of the CPA); disclosure and information (Ch 2, Part D of the CPA); marketing that is fair and responsible (Ch 2, Part E of the CPA); dealings that are fair and honest (Ch 2, Part F of the CPA); just, reasonable and fair terms and conditions (Ch 2, Part G of the CPA); and "fair value, good quality and safety" (Ch 2, Part H of the CPA). A duty is also placed on the supplier to be accountable to consumers (Ch 2, Part I of the CPA).

The interpretation provisions of both the CPA and the NCA provide that each statute must be interpreted in a manner that gives effect to its purposes (see s 2(1) of both the NCA and CPA). However, there are clear and critical distinguishing factors between the purposes of the two statutes. In this respect, section 3 of the CPA includes the protection of vulnerable consumers within its purposes (s 3(1)(*b*) of the CPA). This refers to consumers who are low-income persons, those who live in remote areas, those who are minors or seniors, and those who have low literacy, visual impairments or limited fluency in a language, to name a few. The protection of vulnerable consumers is an aspect on which the objectives of the NCA are silent. Linked to this, is the unique provision in the CPA that provides for the "realisation of consumer rights" (s 4 of the CPA). In terms of this unique provision, when matters are brought to the Tribunal or courts under the CPA, the common law must be developed as may be required in order to ensure that the realisation of consumer rights is improved, particularly for the benefit of vulnerable consumers (s 4(2)(*a*) of the CPA). Furthermore, in instances where a provision is potentially ambiguous, the Tribunal or court must "prefer a meaning that best promotes the spirit and purposes of [the CPA] and will

best improve the realisation and enjoyment of consumer rights generally, and in particular [vulnerable consumers]" (s 4(3) of the CPA).

What is evident from assessing the scope and objectives of the respective statutes is that what will be considered as prohibited conduct under the two statutes is fundamentally different in nature, given that the NCA specifically regulates credit agreements concluded at arm's length, while the regulation of the CPA is broader and expressly excludes credit agreements. This reinforces the *obiter* remark made in *Winter v Kove Empire CC* (*supra*). The significance of distinguishing between the nature of the prohibited conduct that is regulated by each Act respectively is that it illustrates that the contexts of the two statutes are not the same. This is further emphasised by the key differences in the purposes and mandates of the two statutes, as highlighted above. Therefore, since the High Court did not expressly make a finding on section 116(1) of the CPA, the interpretation of section 166(1) of the NCA cannot simply be transplanted to prescription matters under the CPA. While both statutes protect consumers, the scope of application, rights, prohibited conduct and purposes of the two statutes is not identical. This distinction sets the foundation to the differing contexts of the two statutes, which is a tenet of statutory interpretation and is elaborated upon in further detail below (see heading 4 4).

4 2 Establishment and powers of the Tribunal

The Tribunal was established under section 26 of the NCA as a juristic person with jurisdiction over matters throughout South Africa. In terms of this section, it is a tribunal of record, and it is required to exercise its functions in terms of the NCA and any other applicable legislation, which would include the CPA. In terms of section 27 of the NCA, the functions of the Tribunal are to adjudicate any matters, grant cost orders and exercise powers that are conferred on it by law. This is in respect of both the NCA and the CPA. Section 150 of the NCA makes provision for the orders that the Tribunal can make. In this regard, the Tribunal can make an order that is considered to be appropriate in terms of the NCA and the CPA, including: declaring conduct as being prohibited under the NCA; issuing an interdict regarding prohibited conduct; imposing administrative fines; confirming a consent agreement as an order of the Tribunal, in respect of both the NCA or the CPA; cancelling the registration of a registrant; requiring that consumers be refunded any excess amounts charged, including interest; and any other order that might be appropriate to give effect to a right under the NCA and the CPA.

The CPA further elaborates on the role and function of the Tribunal. In terms of section 4 of the CPA, the Tribunal and courts are required to ensure that the spirit and objectives of the CPA are promoted (s 4(2)(*b*)(i) of the CPA). These forums are further required to make the appropriate orders to give practical effect to the right to access redress. This can be in the form of an order that is provided for in terms of the CPA, and – more importantly – innovative orders that give effect to the realisation of consumer rights under the CPA (s 4(2)(*b*)(ii) of the CPA). The term "innovative order" is not defined in the CPA. The ordinary meaning of "innovative" is "to make changes in something already existing, as by introducing new methods, ideas or

products" (Pearsall (ed) *The Concise Oxford Dictionary* 10ed (1999) 730). Therefore, an innovative order can be understood to be an order that includes the introduction of a new approach, which might even require a level of creativity on the part of the court or the Tribunal, while maintaining the necessary alignment with the purpose and context of the CPA.

An apt case to consider in this context is *Vousvoukis v Queen Ace cc t/a Ace Motors* (2016 (3) SA 188 (ESG)). In this matter, the court considered the application of the power to make innovative orders in the context of section 56(2) of the CPA, which provides for a six-month limitation period when returning goods under its provisions. The relevance of a case of this nature is that a provision-specific time limit has a similar effect to a prescription clause in the statute as it prevents the applicant concerned from enforcing a right before the relevant forum. Accordingly, in the *Vousvoukis v Queen Ace* matter, the court held that section 56(2) is not ambiguous, and it is thus not possible for the court to extend the period under the guise of making an "innovative order". The court's finding was that

> "[a]ny innovative order made under s 56(2) must be made within the constraints of the legislation and cannot afford a consumer more rights than those specifically provided to them by the Act." (*Vousvoukis v Queen Ace supra* par 110)

Naude and De Stadler rightfully disagree with the court's finding in *Vousvoukis v Queen Ace*. The authors argue that it is not relevant whether or not section 56 is ambiguous. Instead, the issue is primarily that section 55(2)(*c*) of the CPA creates a right without providing a corresponding remedy (Naude and De Stadler "'Innovative Orders' under the South African Consumer Protection Act 68 of 2008" 2019 22 *Potchefstroom Electronic Law Journal* 2 6). In this regard, section 55(2)(*c*) of the Act provides that the consumer has the right to receive goods that "will be useable and durable for a *reasonable period of time*" (own emphasis) considering the ordinary use of the goods and the circumstances surrounding the supply thereof. The authors argue that the court did not properly consider arguments regarding whether certain goods could reasonably be expected to last longer than six months. Accordingly, granting a remedy that goes beyond six months would still be considered as being within the constraints of the CPA, given the lack of a sufficient remedy to enforce section 55(2)(*c*). The authors further support their argument with reference to an advisory note of the Consumer Goods and Services Ombud (CGSO) that rejected the finding in *Vousvoukis v Queen Ace.* In this regard, the CGSO argued that

> "this sub-section is arguably ambiguous by emphasising the words 'at the direction of the consumer' in section 56(2). The [CGSO] stated that this can mean that within the six months period the consumer may choose between repair, replacement or refund, but that after the six months period it is not the consumer who may choose between these remedies, but the supplier." (Naude and De Stadler 2019 *PELJ* 7 footnotes omitted)

There is indeed room for an ambiguous meaning to this provision. To further support the above arguments, it is submitted that the authors' approach is validated by sections 2(1) and 4(3) of the CPA. In this regard, section 2(1) provides that the Act must be interpreted in a way that enforces the

purposes of the Act as set out in section 3. This includes protecting vulnerable consumers and protecting consumers from trade practices that are "unreasonable, unfair and unjust" (s 3(1)(*b*) and (*d*)(i) of the CPA). In addition, section 4(3) of the Act provides that where there is ambiguity in a provision, as is argued by the CGSO, then the court considering the matter must prefer a meaning that best promotes the objectives of the Act and that protects the rights of vulnerable consumers (see also discussion under heading 4 above).

Sections 55 and 56 of the Act provide for a consumer's right to safe goods of good quality and an implied warranty of quality respectively. These are both provisions that broadly protect vulnerable consumers and also ensure that consumers are not subject to unreasonable or unfair practices. Accordingly, the narrow interpretation adopted in *Vousvoukis v Queen Ace* (*supra*) is not properly aligned with sections 2(1) and 4(3) of the Act.

In the context of section 116 of the Act, Naude and De Stadler argue with merit that providing an innovative order in the context of prescription under section 116 of the CPA would be an instance where "the Act is arguably ambiguous and policy considerations cry out for an innovative order" (see Naude and De Stadler 2019 *PELJ* 10–16). While the NCA provides the Tribunal with the power to make an appropriate order required to give effect to a right under either statute, it is critical to note that the nature of the Tribunal's power in the context of the CPA is more flexible. The Tribunal and court are permitted to exercise this flexibility to ensure that the consumer's right to access redress is achieved. However, the innovative-order remedy is not available under the NCA. The implication is that the running of prescription ought to be suspended using this innovative order for only CPA matters, particularly in instances where matters are in the process of being resolved by ADR agents or the National Consumer Commission (Commission), as the case may be. An exercise of this power by the Tribunal would not be *ultra vires* in the context of the CPA. What follows is a discussion of the enforcement process under the CPA, which often results in delays for the consumer. This is contrasted to the ADR process provided for under the NCA.

4 3 The enforcement processes

The enforcement process provided for in section 69 of the CPA is not particularly clear (see Du Plessis "Redress for Consumers in Terms of the Consumer Protection Act 68 of 2008: The Watchdog's Failure to Support an Accredited Industry Ombud – Alternative Suggestions" 2022 33 *Stellenbosch Law Review* 230 231). A consumer seeking to resolve a dispute may refer the matter directly to the Tribunal where a direct referral is permissible (ss 69(*a*) and 75(1) of the CPA, but the latter provision also provides for direct referral to the consumer court). In instances where the supplier falls within the jurisdiction of a statutory ombud, then the matter should be referred to an ombud with jurisdiction (s 69(*b*) of the CPA). Where there is no such ombud with jurisdiction, then there are four options available to the consumer, namely: (i) a referral to the applicable industry ombud; (ii) an application before a consumer court in a province with jurisdiction over the

matter; (iii) a referral of the matter to an ADR agent; or (iv) bringing the complaint before the Commission (s 69(c) of the CPA). The ordinary courts may be approached only once all the other remedies that are available under national legislation have been exhausted (s 69(*d*) of the CPA).

As is evident from the examples provided in the Tribunal judgments below, what often happens in the context of the CPA enforcement process is that "the consumer may be sent from pillar to post and may have an interest in eventually getting a ruling from the [Tribunal] or a court" (Naude and De Stadler 2019 *PELJ* 11–12). Another pertinent issue faced by consumers is that they are required to follow this specialised enforcement framework laid out by the CPA; however, "[a]ll these steps take time. The speed at which a complaint is dealt with also depends on the efficiency of the various enforcement agencies, over which the consumer has no control" (Naude and De Stadler 2019 *PELJ* 12).

In contrast, the NCA sets out its ADR procedure in section 134 of the NCA. This provision applies in instances other than debt-enforcement matters. Insofar as "credit-related disputes" or disputes arising from allegations of reckless-credit agreements are concerned, section 134(1) of the NCA provides that an ombud with jurisdiction, a consumer court or an ADR agent are forums that may be approached as an alternative to the NCR. Matters or disputes regarding reckless-credit matters may be directed towards an ombud with jurisdiction where the credit provider is a financial institution as contemplated in the Financial Sector Regulation Act (9 of 2017) (s 134(1)(*a*) of the NCA). Where the credit provider is not a financial institution in terms of that Act, then the matter can be referred either to the consumer court or an ADR agent (s 134(1)(*b*) of the NCA). However, where the respondent in the referred matter provides a written objection to such referral, then the matter cannot be resolved by the ADR agent (s 134(2)(*a*) of the NCA). In such an instance, the matter is deemed to have been filed as a complaint with either the NCR under section 136 of the NCA or an application to the Tribunal under section 137 of the NCA, if it is considered to be a matter that is within the scope of either forum (s 134(2)(*b*) and (*c*) of the NCA). Where the Tribunal considers a deemed application of this nature and finds that it is a matter that could have been resolved by following a good-faith process of conciliation, mediation or arbitration, then an exceptional costs order can be made against the respondent (s 134(3) of the NCA). Providing for an objection system, along with consequences for an objection made by the respondent in bad faith, is an aspect that is not incorporated into the CPA's ADR provisions. This arguably prolongs the process for consumers lodging claims in terms of the CPA, as respondents often ignore the ADR agent's processes (see Du Plessis 2022 *Stellenbosch Law Review* 231). It is submitted that making provision for similar objection processes under the CPA might circumvent the delays experienced by consumers. It is further submitted that a deemed referral system would be beneficial to the consumer, as a consumer who is subject to a deemed application is able to make a direct application to the Tribunal (rule 9(3) of the Tribunal rules). In the CPA context, if a matter is unresolved by an ADR agent, the consumer would still need to bring the matter before the Commission, whereafter an application to the Tribunal or consumer court can only be made if the

Commission issues a notice of non-referral (ss 70(1) and 75(1)). This is an additional step that the consumer needs to take in the dispute-resolution process under the CPA, taking time and affecting the running of prescription. It is thus another important distinction to highlight between the dispute-resolution processes under the CPA and NCA respectively.

In any dispute between credit providers and consumers, an attempt must be made, by either the credit provider or the consumer, to resolve the matter themselves, prior to approaching the Tribunal (s 134(4)(*a*) of the NCA). If they are not able to resolve the matter themselves, then the matter should be referred either to an ombud with jurisdiction (where the credit provider is a financial institution under the Financial Sector Regulation Act 9 of 2017) (s 134(4)(*b*)(i) of the NCA); or a consumer court or an ADR agent (where the credit provider is not a financial institution in terms of the Financial Sector Regulation Act 9 of 2017) (s 134(4)(*b*)(ii) of the NCA). Should the ADR agent be of the view that either party is not a good-faith participant in the process or that there is no reasonable prospect of resolving the dispute between the parties, then it can issue a certificate stating that the process has not been successful (s 134(5) of the NCA). This opens the door for the consumer or credit provider to approach the Tribunal under the NCA under section 137(3). Again, a consideration of this nature, particularly the *bona fides* of the parties, is not available in terms of the CPA.

Finally, both the CPA and the NCA provide for instances where matters can be referred directly to the Tribunal – in terms of section 141 of the NCA and section 75 of the CPA. The NCA provides that once a notice of non-referral is issued by the NCR, the complainant, with leave, may refer the matter directly to the consumer court or the Tribunal (s 141(1) of the NCA). This is applicable in respect of all matters other than those concerning offences under the Act or complaints under section 61 of the NCA, which deals with protection against discrimination in respect of credit. Similarly, the CPA allows a complainant to refer a matter to the consumer court or the Tribunal once the Commission has issued a notice of non-referral. This applies in all instances other than when section 116 applies (s 75(1) of the CPA). Therefore, it is evident that the prescription provisions under the two statutes are treated differently. While section 166 of the NCA is not an express ground for preventing referral to the Tribunal in credit-agreement matters, section 116 is such a ground under the CPA.

From the ADR process prescribed under Part A of Chapter 7 of the NCA, as referred to above, it is notable that the NCA makes provision for the shortening of the ADR process where there is either an objection to, or bad-faith participation in, the ADR process, and where there is no reasonable prospect of resolving the dispute between the parties. The ADR process under the NCA also makes provision for deemed referrals as discussed above, which is significant as a consumer under the NCA can move an unresolved matter from ADR directly to the Tribunal, whereas a consumer under the CPA must still approach the Commission before referring a matter to the Tribunal or consumer court. The additional step in the CPA dispute-resolution process potentially places the consumer enforcing a matter under the CPA in a more prejudiced position from a prescription perspective, as

each of these forums takes time. The NCA also makes provision for an exceptional costs order where the Tribunal finds that a deemed application before it could have been resolved by following a good-faith process of conciliation, mediation or arbitration; such a deterrent is not available under the CPA. Lastly, a consumer under the NCA is not expressly precluded from making a direct referral owing to the prescription provision of the NCA, while the opposite is true for a consumer enforcing a right under the CPA. Therefore, consumers enforcing their rights under the CPA and the NCA respectively are not in exactly the same position.

4 4 Adverse impact of Ludick on CPA prescription matters

Adoption of the *Ludick* interpretation in the context of section 116(1) of the CPA has broadly had an adverse impact on consumers seeking to enforce their rights under the CPA. Post-*Ludick*, consumers have found relief from the restrictive interpretation only "in a case of a course of conduct or continuing practice" as contemplated in section 116(1)(*b*). In such instances, prescription would only begin to run once the conduct or practice has ceased (see *Winter v Kove Empire CC supra* par 74). However, in many cases that reach the Tribunal, consumers have not found themselves on the receiving end of a favourable interpretation of section 116(1) of the CPA, and a strict interpretation has deprived them of their right to access the Tribunal although they followed the dispute-resolution process prescribed by section 69 of the CPA (see, for e.g., *Shabangu v RSM Auto CC* [2022] ZANCT 10 par 15; *National Consumer Commission v Jida Auto Investments (Pty) Ltd t/a Auto Elegance* [2022] ZANCT 12 par 27; *Mthembu v Boundlesstrade 11 (Pty) Ltd t/a Jaguar Land Rover Waterford* [2023] ZANCT 3 par 19; *Kennedy Winmac Service Centre CC* [2022] ZANCT 36 par 20–21).

The matter of *Auto Brokers* pertained to a faulty vehicle that was purchased by the consumer on 19 December 2016. The car had an oil leak and made a crackling sound (*NCC v Auto Brokers supra* par 8). The leak was seemingly repaired by the respondent, but the noise worsened, and the respondent refused to fix the vehicle (*NCC v Auto Brokers supra* par 10). On 13 July 2017, a complaint was lodged with the Motor Industry Ombudsman of South Africa (MIOSA). However, the respondent was not responsive, which led to the file being closed on 6 June 2018 (*NCC v Auto Brokers supra* par 12). The consumer then referred a complaint to the Commission for investigation. As the respondent also did not cooperate with the Commission in that process, the matter was referred to the Tribunal in November 2022 (*NCC v Auto Brokers supra* par 14). The Tribunal asked the consumer to address the issue of prescription as the cause of the complaint arose more than three years before the referral to the Tribunal was made (*NCC v Auto Brokers supra* par 16). The Tribunal, bearing in mind the decision in *Ludick*, was of the view that the matter should have been referred to it by 19 December 2019 (*NCC v Auto Brokers supra* par 19). This is despite the fact that, for at least two of the three years, the matter sat with an accredited industry ombud – namely, MIOSA – and the Commission. The Tribunal was also not convinced that the Commission (being the applicant in this matter)

had "vigorously [pursued] its submission that the Tribunal should exercise its discretion by considering the purposes of the CPA and the time the complaint lay with the Ombud." It was of the view that the Commission's submissions were just "bald statements" that lacked merit (*NCC v Auto Brokers supra* par 21).

In another matter, the Tribunal in *Mphasane v Afropulse 145 (Pty) Ltd* ([2022] ZANCT 46) dealt with a matter in which the consumer had a very expensive kitchen door installed in June 2016. However, this kitchen door leaked every time it rained from September 2016 (*Mphasane v Afropulse supra* par 4). The respondent had seemingly tried to repair the door, but unsuccessfully (*Mphasane v Afropulse supra* par 4). On 22 June 2018, after lodging a complaint with the Consumer Goods and Services Ombud (CGSO), the consumer received a response that the respondent no longer wished to cooperate. Therefore, the CGSO could not assist (*Mphasane v Afropulse supra* par 5). The consumer lodged a complaint with the Commission on 28 August 2018 (*Mphasane v Afropulse supra* par 5). Only on 6 April 2022 did she receive a notice of non-referral from the Commission, indicating that her claim had lapsed (*Mphasane v Afropulse supra* par 5). This was despite the fact that the consumer had referred her complaint to the Commission within the three-year period. The Commission took almost four years to provide her with a non-referral notice on the basis of the matter having prescribed. The Tribunal nevertheless referred to *Ludick* to support its finding that the Tribunal does not have the power to extend the three-year period (*Mphasane v Afropulse supra* par 20).

It is evident from the above judgments that the strict interpretation of *Ludick* has placed consumers who lodge complaints in terms of the CPA in a very precarious position.

The question arising is whether the interpretation applied to section 116(1) of the CPA following *Ludick* is a reasonable and sensible interpretation. The court in *Natal Joint Municipal Pension Fund v Endumeni Municipality* (2012 (4) SA 592 (SCA) par 18) indicated:

> "Interpretation is the process of attributing meaning to the words used in a document, be it legislation, some other statutory instrument, or contract, having regard to the context provided by reading the particular provision or provisions in the light of the document as a whole and the circumstances attendant upon its coming into existence. Whatever the nature of the document, consideration must be given to the language used in the light of the ordinary rules of grammar and syntax; the context in which the provision appears; the apparent purpose to which it is directed and the material known to those responsible for its production. Where more than one meaning is possible each possibility must be weighed in the light of all these factors. The process is objective, not subjective. A sensible meaning is to be preferred to one that leads to insensible or unbusinesslike results or undermines the apparent purpose of the document. Judges must be alert to, and guard against, the temptation to substitute what they regard as reasonable, sensible or businesslike for the words actually used. To do so in regard to a statute or statutory instrument is to cross the divide between interpretation and legislation; in a contractual context it is to make a contract for the parties other than the one they in fact made. The 'inevitable point of departure is the language of the provision itself', read in context and having regard to the

> purpose of the provision and the background to the preparation and production of the document." (footnotes omitted)

Furthermore, the Constitutional Court in *Cool Ideas 1186 CC v Hubbard* ([2014] ZACC 16 par 28) stated:

> "A fundamental tenet of statutory interpretation is that the words in a statute must be given their ordinary grammatical meaning, unless to do so would result in an absurdity. There are three important interrelated riders to this general principle, namely:
> (a) that statutory provisions should always be interpreted purposively;
> (b) the relevant statutory provision must be properly contextualised; and
> (c) all statutes must be construed consistently with the Constitution, that is, where reasonably possible, legislative provisions ought to be interpreted to preserve their constitutional validity. This proviso to the general principle is closely related to the purposive approach referred to in (a)." (footnotes omitted)

Thus, the process to be applied when objectively interpreting a provision involves an analysis of the language used; the context of the provision; its purpose; and an interpretation that preserves constitutional validity. The provision interpreted by the court in *Ludick* was section 166(1) of the NCA. Exactly the same language is used in section 116(1) of the CPA. However, given the nature of the prohibited conduct, the powers of the Tribunal when considering a matter under the CPA, and the structure of the enforcement system under the CPA, the context in which each provision will apply is not the same.

As established above, the court in *Ludick* held that the previous interpretation of section 166(1) of the NCA by the Tribunal that allowed for interruption of prescription was incorrect, considering the wording of the provision (par 28). Without delving deeply into the appropriateness of the interpretation process adopted by the High Court in *Ludick* in the NCA context, it is apparent that a more holistic interpretation of provisions such as section 166(1) of the NCA should have been undertaken. Nonetheless, this note's focus is on the effect of *Ludick* on the Tribunal's subsequent interpretation of section 116(1) of the CPA. In this regard, it is submitted that the interpretation that has been transposed from *Ludick* to section 116(1) of the CPA is not suitable. It focuses on the plain language used in the provision and fails to adopt a more unitary approach that takes into account the broader context and purpose of the provision (*Independent Community Pharmacy Association v Clicks Group Ltd* [2023] ZACC 10 par 238; *Chisuse v Director-General, Department of Home Affairs* [2020] ZACC 20 par 52).

In the CPA context, the application of the interpretation adopted in *Ludick* regarding prescription has translated into a loss of access to redress for consumers, even in instances where the delay is an aspect that is not within the consumer's control (see, for e.g., *NCC v Auto Brokers supra* and *Mphasane v Afropulse supra* as discussed above). Logic dictates that a consumer should not be prejudiced for following the enforcement process that is prescribed by the CPA itself. Such an interpretation is counter-intuitive, leads to unbusinesslike results and undermines the objectives of the CPA. The purpose of section 116(1) of the CPA is to ensure that there is

legal certainty insofar as the period within which a claim can be pursued is concerned (Van Heerden "Chapter 6: Enforcement of Act" in Naude *et al* "Commentary on the Consumer Protection Act" (Revision service 9, 2023) 116–1; see also Scott *Realisation of Rights in Terms of the Consumer Protection Act 68 of 2008* (doctoral thesis, University of South Africa) 2018 108). However, considering the CPA's purpose, the additional powers of the Tribunal and the dispute-resolution process under the CPA as discussed above, a unitary interpretation should have been applied to section 116(1) of the CPA. This would also preserve the constitutional validity of the provision.

4 5 A constitutionally-aligned interpretation of section 116(1) of the CPA

The Constitution of the Republic of South Africa, 1996 (the Constitution) is the supreme law of South Africa and all laws must be consistent with it (s 2 of the Constitution). Section 39(2) of the Constitution provides that in the interpretation of any legislation, all courts, tribunals and forums must ensure that "the spirit, purport and objects of the Bill of Rights" are promoted. The key provision of the Bill of Rights when considering section 116(1) of the CPA is section 34 of the Constitution, which provides for the right to access courts. In this regard, section 34 provides:

> "Everyone has the right to have any dispute that can be resolved by the application of law decided in a fair public hearing before a court or, where appropriate, another independent and impartial tribunal or forum."

While the post-*Ludick* interpretation of section 116(1) of the CPA has led to an undue limitation of the consumer's right to access the Tribunal, the section can be interpreted in a manner that promotes the purpose of the Bill of Rights. As a point of departure, the right to access courts, including the Tribunal, is supported by the CPA's objective to ensure that consumers are provided with "a consistent, accessible and efficient system of consensual resolution of disputes arising from consumer transactions" (s 3(1)(*g*) of the CPA). Insofar as section 116(1) of the CPA is concerned, the two forums that a consumer may be deprived of accessing owing to the effluxion of time are the Tribunal and the consumer court. The Tribunal judgments cited and referred to in this note are examples of how consumers enforcing their rights under the CPA have been deprived of their access to the Tribunal in particular (*NCC v Auto Brokers supra*; *Mphasane v Afropulse supra*; see also *Shabangu v RSM Auto CC supra*; *NCC v Jida Auto Investments supra*; *Mthembu v Boundlesstrade 11 (Pty) Ltd supra*).

It is not disputed that the purpose of the limitation imposed by section 116(1) of the CPA is to ensure legal certainty. This is critical in the context of transactions between suppliers and consumers. The limitation ensures that claims are not brought by consumers against suppliers after prolonged periods when recollection or supporting documents in relation to the transaction might no longer be clear or accessible (see *Mohlomi v Minister of Defence* 1997 (1) SA 124 (CC) par 11). However, this necessity must be balanced against the constitutional right of all persons (including consumers) to access courts, which includes tribunals.

The post-*Ludick* interpretation of section 116(1) of the CPA has had the effect of depriving consumers of their right to access the Tribunal, even where they have followed the channels prescribed under the CPA itself (see discussion of *NCC v Auto Brokers supra*; and *Mphasane v Afropulse supra*). The result is preposterous as consumers are essentially prejudiced for following the enforcement framework that is set out in section 69 of the CPA (see also Naude and De Stadler 2019 *PELJ* 11–12). This undermines the specialised ADR interventions provided for under section 69 of the CPA, as well as the rights afforded to consumers under the CPA.

While the Tribunal cannot be expected to act outside of the scope of the CPA, the power of the Tribunal to make innovative orders provides it with the authority to remedy the ambiguous results of the post-*Ludick* interpretation of section 116(1) of the CPA (see Naude and De Stadler 2019 *PELJ* 10–12). This is also a remedy that is only available under the CPA and not the NCA (see discussion under heading 4 2) Provision can be made for the interruption or suspension of prescription, particularly in matters where the consumer has approached the forums contemplated in section 69 of the CPA. Such an approach is aligned with the CPA's purpose and context (see discussion under heading 4 1). As mentioned, this approach was followed by the Tribunal prior to *Ludick.* The Tribunal would also be acting within its powers under the CPA, to the extent that it considers this step to be an innovative order. Such an approach would ensure that the purpose of maintaining legal certainty is achieved, without undermining the objectives of the CPA or the section-34 right to access courts in terms of the Constitution (s 39(2) of the Constitution).

Accordingly, the pre-*Ludick* approach by the Tribunal is preferable and within the scope of the CPA, to the extent that the Tribunal expressly indicates that it is making an innovative order. This would save the provision from potentially being considered unconstitutional.

5 Concluding remarks

The *Ludick* decision has clearly had an adverse impact on the rights of consumers under the CPA. Given the distinction in the nature of the prohibited conduct regulated by the NCA and the CPA respectively, the section-69 dispute-resolution process of the CPA, and the extended powers of the Tribunal in the context of the CPA, it is submitted that superimposing the *Ludick* interpretation of section 166(1) of the NCA, onto section 116(1) of the CPA is a flawed approach that ought to be urgently revisited. This interpretation should also be in alignment with the Constitution to ensure that consumers are not deprived of access to courts (particularly the Tribunal for purposes of this note). The post-*Ludick* interpretation of section 116(1) of the CPA unnecessarily "ties the hands" of the Tribunal and prevents it from protecting the interests of consumers.

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SOUND SUBSTANTIVE LAW APPLICATION YET DUBIOUS ADJECTIVAL PROCESS IN

R K v Minister of Basic Education [2019] ZASCA 192

1 Introduction

S K's was a life cut short. He was another victim of the dangerous and unsanitary school pit-latrine system, a rudimentary toilet infrastructure consisting of concrete slabs covering a French drain, with large holes that serve as a death trap for young pupils who accidentally fall through (Yates "Deadly Pit Toilets and the Right to a Basic Education" (2 December 2018) *Daily Maverick*). Thousands of children from underprivileged conditions face this shameful latrine system daily, despite ageing government promises to address the situation promptly (Somdyala "Almost 4000 Pit Latrines in SA's Schools, Zero Target Set 'Within the Next 3 Years'" (11 March 2019) *News24*; Chaskalson "Pit Toilets at Schools: You Can't Fix What You Can't Count" (10 May 2021) *Daily Maverick*; Fengu "MPs Give Angie Motshekga 60 Days to Submit Time Frames to Eradicate 'Death Trap' Pit Latrines at Schools" (21 February 2024) *Daily Maverick*).

The injustice of five-year-old S K's horrible drowning in a pit latrine at his Limpopo primary school in 2014 was finally vindicated in *R K v Minister of Basic Education* ([2019] ZASCA 192) when the Supreme Court of Appeal (SCA) delivered judgment in December 2019. The court awarded general damages to S K's family based on the emotional shock that they suffered and held that the common law is flexible enough to come to the aid of the aggrieved family. Although the court declined to award constitutional damages, it added to the context-sensitive body of jurisprudence that outlines constitutional damages as a relatively novel concept within the South African law of damages.

First, this case note relays that the court's reasoning (when applying the common law of delict and when it surveyed the law of constitutional damages) was in keeping with key legal developments and precedent. These long-standing legal principles are constitutionally imbued by the supremacy of the Constitution of the Republic of South Africa, 1996 (Constitution), particularly the "single-system-of-law" principle enunciated by the Constitutional Court in *Pharmaceutical Manufacturers Association of South Africa: In re Ex parte President of the Republic of South Africa* (2000 (2) SA 674 (CC)). As far as substance goes, the judgment failed neither S K's memory, nor his family nor the need to hold the government accountable for failing to provide safe school-latrine infrastructure.

However, this case note argues further that the court did not rule correctly on two key adjectival issues in the case, namely the prayer for a declaration of invalidity and the admission of an *amicus curiae*. These are problematic aspects of the case. An incorrect or inadequate adjectival process falls short of the standard of a "fair public hearing" found in section 34 of the Constitution. Regarding the fairness of a hearing, adjectival law is key in maintaining due process and equality before the law, as enshrined in section 9(1) of the Constitution. Despite the private *lis*, a fair and consistent application of due adjectival process is in the public's interest and has implications for law as a public phenomenon.

This case note thus seeks to show how the court conflated a declaration of invalidity (a mandatory remedial procedure in terms of section 172(1)(*a*) of the Constitution) and a declaration of rights (a discretionary remedial procedure at common law and authorised by section 38 of the Constitution). Furthermore, the case note analyses how the *ratio* justifying the non-admission of the *amicus curiae* in *R K v Minister of Basic Education* (*supra*) was flawed in a certain respect. The court correctly refused admission on the basis that the *amicus* would relay superfluous assistance. However, the court's application of the test regarding an *amicus*'s interest in a matter sets the bar too high for future *amicus* applicants owing to its blanket approach to financial interests in the outcome of a case. The finding threatens to cause a chilling effect, particularly on juristic commercial entities' willingness to assist the courts as *amici* in future.

2 Facts and judgment of *R K v Minister of Basic Education*

2 1 Salient facts

S K attended a public school in rural Limpopo. The pit latrines used by learners were in an appalling condition for years. The school complained to the education authorities, asking them to improve the latrine system, to no avail. To fix the latrines, the school had appointed a handyman to construct a platform and seating structure over the pits. The rudimentary system deteriorated badly (*R K v Minister of Basic Education supra* par 9). Evidence showed structural improvement costs would have been R500 per toilet seat, which the education authorities had failed to provide. The school was placed on a list of schools scheduled to receive sanitation infrastructure support. Unfortunately, no work was done (*R K v Minister of Basic Education supra* par 10).

On 20 January 2014, while S K was at the latrines, a seat collapsed, and he fell into the pit where he drowned. When he could not be found, the school enquired if he was at home. His mother did not know where he was and rushed to the school. When she arrived at the school, S K's body was found in the latrine pit. His hand was outstretched from the filth as if looking for help (*R K v Minister of Basic Education supra* par 11). S K's mother, father, and eldest sister saw his body in the pit, while his eldest brother and other three siblings heard of how S K had passed on (*R K v Minister of Basic Education supra* par 12–14). The whole family was diagnosed with post-

traumatic stress disorder. In addition, S K's parents developed a depressive disorder (*R K v Minister of Basic Education supra* par 52).

They instituted claims in the Limpopo High Court for damages for emotional shock and grief. In addition to these claims, S K's family claimed constitutional damages for breach of their rights to a peaceful family life (*R K v Minister of Basic Education supra* par 1, 15, 17, 32–33 and 45). These claims were denied, and S K's family appealed to the SCA. A firm of attorneys (Richard Spoor Incorporated, or "RSI") filed an *amicus* application, as did Equal Education, a non-governmental organisation.

2 2 Judgment

The SCA dismissed RSI's *amicus* application because it adjudged the firm to have a financial interest in the outcome of the matter (*R K v Minister of Basic Education supra* par 5). The court held further that certain of the firm's submissions were not useful. It pointed out that certain of the firm's other submissions did not differ from the submissions that were made by S K's family and the other *amicus curiae*, Equal Education (*R K v Minister of Basic Education supra* par 8). On the merits, the court began with the claims made by S K's family regarding emotional shock. It held that the High Court had erred in dismissing the claims for emotional shock on the basis that a requirement of psychiatric injury had not been proved (*R K v Minister of Basic Education supra* par 25–27 and 47–48).

The court then considered the argument made by S K's family that the common law should be developed in terms of section 39(2) of the Constitution to recognise a claim for grief and bereavement experienced owing to S K's death without there being an underlying psychiatric injury, or to allow S K's family to be awarded constitutional damages flowing from their grief and bereavement. The court found that it was unnecessary to develop the common law to recognise a claim of damages for grief not arising from a psychiatric injury. S K family's grief was associated with the recognised psychiatric injuries underlying their claims for emotional shock and could be compensated for in the damages awards for those claims (*R K v Minister of Basic Education supra* par 33–35, 40, 45 and 49–50).

The court dismissed the claim for constitutional damages for breach of S K family's rights to a peaceful family life (*R K v Minister of Basic Education supra* par 57 and 63) because there was no authority for such an award in these circumstances. No financial loss had occurred and an award of damages for psychiatric injury could be granted (*R K v Minister of Basic Education supra* par 58). The SCA found that an award for constitutional damages could not be justified to compel the State to improve sanitation facilities (*R K v Minister of Basic Education supra* par 59).

On the prayer for declaratory relief, the SCA found that the High Court's refusal to grant a declaratory order that the Department of Education breached its constitutional obligations had been an appropriate exercise of the court's discretion (*R K v Minister of Basic Education supra* par 64 and 67). It reasoned that the request for the declaratory order was based on the court's obligation to declare invalid any unconstitutional policy, but it had not been state policy to provide poor sanitation (*R K v Minister of Basic*

Education supra par 64–65). The High Court reprimanded the State for its failure to provide proper sanitation facilities in the hope that it would act properly (*R K v Minister of Basic Education supra* par 65). Accordingly, the SCA found that a declaration would have no useful purpose, as the State was already aware of the problem and of its obligations to resolve it (*R K v Minister of Basic Education supra* par 66).

3 Sound substantive law application yet dubious adjectival process: Engaging with the *R K v Minister of Basic Education* judgment

3 1 A single system of law

This part of the case note considers whether the common law of delict provides an adequate remedy for the breach claimed in *R K v Minister of Basic Education* (*supra*). The supremacy clause in section 2 of the Constitution provides that the Constitution is the supreme law of the land, and that all law or conduct that is not in line with the Constitution is invalid. The section further provides that obligations that are imposed by the Constitution must be fulfilled, and is coupled with the "single-system-of-law" principle, as stated in *Pharmaceutical Manufacturers* (*supra*). In *Pharmaceutical Manufacturers* (*supra*), the court held that there is only one system of law in the Republic. The Constitution as the supreme law shapes the system. The court further mentioned that all law, including the common law, derives its force from the Constitution and is subject to constitutional control (*Pharmaceutical Manufacturers supra* par 44; see also Van der Walt "Normative Pluralism and Anarchy: Reflections on the 2007 Term" 2008 1 *CCR* 77 90–98).

The common law of delict is part of a single system of South African law. It is shaped by the Constitution as the supreme law, and it derives its force from the Constitution. This means that the common law of delict is subject to constitutional control and regulation. Considering this framework, a litigant must first determine what source of law can be applied to protect their constitutional rights. The sources of law that may generally apply are the Constitution and the common law. In this instance, the common law seems to be the obvious source of law regarding the claim for emotional shock (see Buthelezi "The Impact of the *Komape* judgment on the South African Common Law of Delict: An Analytical Review – *Komape v Minister of Basic Education* [2020] 1 All SA 651 (SCA); 2020 (2) SA 347 (SCA)" 2022 43 *Obiter* 630 630–640).

The Constitutional Court has developed two subsidiarity principles to determine the legal source that applies in a legal dispute. The first subsidiarity principle provides that where legislation was enacted to give effect to a constitutional provision, a litigant must first rely on the provisions of the specific legislation, and may not rely directly on the constitutional provision to protect their rights (Van der Walt 2008 *CCR* 100–103; Van der Walt *Property and Constitution* (2012) 49–61; *Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs and Tourism* 2004 (4) SA 490 (CC) par 21–26; *Minister of Health v New Clicks South Africa (Pty) Ltd* 2006 (2) SA 311

(CC) par 92–97 and 436–437; *South African National Defence Union v Minister of Defence* 2007 (5) SA 400 (CC) par 51–52; *MEC for Education: KwaZulu-Natal v Pillay* 2008 (1) SA 474 (CC) par 39–40; *Chirwa v Transnet Ltd* 2008 (2) SA 347 (CC) par 59 and 69; *Walele v City of Cape Town* 2008 (6) SA 129 (CC) par 29–20; *Nokotyana v Ekurhuleni Metropolitan Municipality* 2010 (4) BCLR 312 (CC) par 47–49; *Mazibuko v City of Johannesburg* 2010 (4) SA 1 (CC) par 73; *PFE International v Industrial Development Corporation of South Africa Ltd* 2013 (1) SA 1 (CC) par 4 and 32; *Sali v National Commissioner of the SA Police Service* 2014 (9) BCLR 997 (CC) par 4; *De Lange v Methodist Church* 2016 (2) SA 1 (CC) par 53; *My Vote Counts NPC v Speaker of The National Assembly* 2016 (1) SA 132 (CC) par 53; *Thubakgale v Ekurhuleni Metropolitan Municipality* 2022 (8) BCLR 985 (CC) par 178; *Residents of Industry House, 5 Davies Street, New Doornfontein, Johannesburg v Minister of Police* 2022 (1) BCLR 46 (CC) par 112; *Women's Legal Centre Trust v President of the Republic of South Africa* 2022 (5) SA 323 (CC) par 82; *Esorfranki Pipelines (Pty) Ltd v Mopani District Municipality* 2023 (2) SA 31 (CC) par 46; *Eskom Holdings SOC Ltd v Vaal River Development Association (Pty) Ltd* 2023 (4) SA 325 (CC) par 149). This first subsidiarity principle will not apply to a claim for emotional shock because this area of the law is not regulated by legislation.

The second subsidiarity principle provides that where there is no legislation that deals with a claim (such as for emotional shock), the common law should be directly relied upon (Van der Walt 2008 *CCR* 115–125; Van der Walt *Property and Constitution* 40–91). The application of the subsidiarity principles "denotes a hierarchical ordering of institutions, of norms, of principles, or of remedies, and significance of the Constitution" (*My Vote Counts NPC v Speaker of The National Assembly supra* par 46). The principles of subsidiarity explained above indicate the common law as the initial *locus* for a claim for emotional shock. The matter should then be decided according to common-law principles associated with emotional shock – unless these principles are not in line with the Constitution (section 39(2) of the Constitution; Van der Walt *Property and Constitution* 82). Once the relevant common-law position has been determined, the common law should be applied to the facts of the case. It must be determined what the common-law position entails and what outcome is prescribed by the common law, given the facts (*Mighty Solutions CC t/a Orlando Service Station v Engen Petroleum Ltd* 2016 (1) SA 621 (CC) par 38).

At this stage, it is not necessary to question whether the prescribed outcome of the case is fair or whether the common law should be developed, but the aim is primarily to set out what the position is in terms of the common law (*Mighty Solutions t/a Orlando Service Station v Engen Petroleum Ltd supra* par 38; Van der Walt 2008 *CCR* 115–125). Regarding a claim brought under the separate heading for grief or bereavement (allegedly suffered because of negligence, but which does not flow from a psychiatric lesion), the assessment of the common law becomes relevant (*R K v Minister of Basic Education supra* par 33). The common law holds that a litigant may only claim damages for nervous or emotional shock suffered owing to a detectable psychiatric injury (*R K v Minister of Basic Education supra* par 25; *Bester v Commercial Union Versekeringsmaatskappy van SA Bpk* 1973 (1) SA 769 (A) 779–782; *Clinton-Parker v Administrator,*

Transvaal; Dawkins v Administrator, Transvaal 1996 (2) SA 37 (W) 54; *Barnard v Santam Bpk* 1999 (1) SA (SCA) 214–215; *Road Accident Fund v Sauls* 2002 (2) SA 55 (SCA) par 13 and 17).

In *R K v Minister of Basic Education* (*supra*), the court considered whether a claim brought under the separate heading of grief or bereavement allegedly suffered owing to negligence, but not flowing from a psychiatric lesion, could entitle S K's family to an award of damages (*R K v Minister of Basic Education supra* par 33). The court found that S K family's grief was associated with the recognised psychiatric injuries underlying their emotional-shock claims (*R K v Minister of Basic Education supra* par 33–35, 40, 45 and 49–50). As such, the family could be compensated under those claims.

Since the common-law position has been established, the next step is to determine whether the outcome prescribed by the common law is adequate, acceptable and justifiable in the context of constitutional rights (section 39(2) of the Constitution; Van der Walt 2008 *CCR* 115–125). The common law of delict is not immune to the Constitution, nor can it be excluded from constitutional scrutiny, especially where the common law seems not to provide an adequate or appropriate remedy (*Pharmaceutical Manufacturers supra* par 44; Van der Walt 2008 *CCR* 115–125).

The question is whether the common law should be developed, having regard to the spirit, purport and objects of the Bill of Rights (section 39(2) of the Constitution). In the SCA, the appellants argued that the common law should be developed either to recognise a claim for grief and bereavement experienced as a result of the death without there needing to be an underlying psychiatric lesion (*R K v Minister of Basic Education supra* par 16), or to allow an award to a litigant for constitutional damages flowing from their grief and bereavement. In other words, it was important to consider when constitutional damages may be awarded, as is explained below in detail. It should be mentioned that the SCA did not agree to a development of the common law (*R K v Minister of Basic Education supra* par 45). It first needed to be established whether the common law as developed in case law dealing with a claim for damages regarding nervous or emotional shock was sufficient to provide a litigant with adequate or appropriate relief for the breach of constitutional rights (*R K v Minister of Basic Education supra* par 42, relying on *Minister of Police v Mboweni* 2014 (6) SA 256 (SCA) par 21).

The starting point for investigating the impact of the Constitution on the outcome prescribed by the current position of the common law is to determine whether the common law conflicts with constitutional rights such as the right to a peaceful family life (section 11 of the Constitution; *R K v Minister of Basic Education supra* par 42; *Mighty Solutions CC t/a Orlando Service Station v Engen Petroleum Ltd supra* par 38; Van der Walt 2008 *CCR* 115–125). Although *R K v Minister of Basic Education* (*supra*) was decided solely on common-law principles and essentially prescribes the ambit of the common-law position regarding a claim for emotional shock, the case shows how the court's application of common-law rules may protect constitutional rights because the court recognised that S K family's grief was in fact associated with the recognised psychiatric injuries caused by their emotional shock, for which they claimed compensation.

However, if the court found that psychiatric injury – a requirement for a claim for emotional shock – had not been proved, the application of the common law in that regard would arguably have resulted in S K's family being denied a claim for damages that protects their right to a peaceful family life, which would then have opened up consideration of the need to develop the common law to comply with constitutional values. Nevertheless, the way that *R K v Minister of Basic Education* (*supra*) was decided ensured that S K's family was compensated by the claim for damages. In this regard, there was no need to develop the common law because it was applied in an unproblematic and flexible way, as necessitated by the "single-system-of-law".

It is submitted that the common law is sometimes sufficient to provide litigants with an adequate or appropriate remedy for breach of constitutional rights. The way that the SCA in *R K v Minister of Basic Education* (*supra*) applied the common law of delict in a flexible manner indirectly upheld constitutional rights through the court's willingness to safeguard S K family's right to a peaceful family life (*Fose v Minister of Safety and Security* 1997 (3) SA 786 (CC) par 58; Currie & De Waal *The Bill of Rights Handbook* 6ed (2013) 202). *R K v Minister of Basic Education* (*supra*) indicates that the common law of delict is inherently part of a "single-system-of-law", shaped by the Constitution as the supreme law of the land (*Pharmaceutical Manufacturers supra* par 44–49).

As a result, the common law of delict does in effect promote the spirit, purport and objects of the Bill of Rights in terms of section 39(2) of the Constitution (Van der Walt 2008 *CCR* 115–125). It is important to state that when the Constitution was put into effect it was intended that the law, including the common law of delict, should reflect the recognised normative value-based system as found in the Constitution (Davis "How Many Positivist Legal Philosophers Can Be Made to Dance on the Head of a Pin? A Reply to Professor Fagan" 2012 129 *SALJ* 59 59; Woolman "The Amazing, Vanishing Bill of Rights" 2007 124 *SALJ* 762 769).

3 2 Constitutional damages: When and where to be awarded?

Constitutional damages flow directly from section 38 of the Constitution (*Residents of Industry House v Minister of Police supra* par 90). Msimanga, however, states:

> "[T]he awarding of constitutional damages is a contentious issue in the South African legal system. Our courts, including the Constitutional Court, have struggled to determine the circumstances under which constitutional damages should be awarded." (Msimanga *Thubakgale v Ekurhuleni Metropolitan Municipality* [2021] ZACC 45*; Municipal Non – Fulfilment of Socio-Economic Rights and Constitutional Damages* (treatise, Nelson Mandela University) 2022 60; see also Mukheibir "Constitutional Damages: A Stagnant or a Changing Landscape" 2023 6 *PELJ* 1 41)

Section 38 of the Constitution allows for an appropriate remedy, including an award of constitutional damages following an infringement of a right in the Bill of Rights (*Fose v Minister of Safety and Security* 1997 (7) BCLR 851 par

60; *Modder Estate Squatters v Modderklip Boerdery (Pty) Ltd, President of the Republic of South Africa Modderklip Boerdery (Pty) Ltd* [2004] 3 All SA 169 (SCA) par 20 and 57; *MEC for the Department of Welfare v Kate* 2006 (4) SA 478 (SCA) par 27; *Residents of Industry v Minister of Police supra* par 90; *Thubakgale v Ekurhuleni Metropolitan Municipality supra* par 40). As *per Fose v Minister of Safety and Security* (*supra*), constitutional damages should be awarded only when such relief would be most appropriate in the circumstances of the case (*Fose v Minister of Safety and Security supra* par 60; see also *Hoffmann v South African Airways* 2001 (1) SA 1 CC par 55). Such an award must be reasonable in the opinion of the court to compensate the affected party (Currie & De Waal *The Bill of Rights Handbook* 200). The case note now discusses the development of constitutional damages in South Africa from the decision in *Fose v Minister of Safety and Security* (*supra*) to the most recent judgment in *Thubakgale v Ekurhuleni Metropolitan Municipality* (*supra*).

The first case to deal with the issue of constitutional damages in South Africa was *Fose v Minister of Safety and Security* (*supra*). Mr Fose was allegedly assaulted by police (*Fose v Minister of Safety and Security supra* par 11), and he claimed delictual damages for pain and suffering, loss of enjoyment of amenities of life and shock, *contumelia* and past and future medical expenses (*Fose v Minister of Safety and Security supra* par 13). Fose further claimed constitutional damages for the infringement of his constitutional rights to human dignity, freedom and security of the person and privacy (*Fose v Minister of Safety and Security supra* par 12–13). The Constitutional Court refused to award constitutional damages because the plaintiff had received relief in delict and such relief was powerful enough to vindicate the plaintiff's violated constitutional rights (*Fose v Minister of Safety and Security supra* par 67).

The court in *Fose v Minister of Safety and Security* (*supra*) acknowledged the need to vindicate the violation of constitutionally entrenched rights through effective relief that might include constitutional damages, but held that such relief would not have to amount to punitive damages, which are damages over and above a successful delictual claim (*Fose v Minister of Safety and Security supra* par 68, 71 and 72). Owing to the prevailing economic circumstances in our country, awarding constitutional damages even when not appropriate, would leave us in an untenable position (*Fose v Minister of Safety and Security supra* par 71–72; see also *Olitzki Property Holdings v State Tender Board* [2001] ZASCA 51 par 40). In essence, the court in *Fose v Minister of Safety and Security* (*supra*) did not set itself against constitutional damages as a means of vindicating rights, especially given our past of gross human-rights violations. It simply did not see an award of constitutional damages as appropriate given the circumstances of the case (*Fose v Minister of Safety and Security supra* par 60 and 67).

The matter of *Olitzki Property Holdings v State Tender Board* (*supra*) involved a company that had tendered to house the Gauteng provincial government offices following the move of the provincial government from Pretoria to Johannesburg (*Olitzki Property Holdings v State Tender Board supra* par 4). Olitzki Property Holdings, the plaintiff, obtained an option to purchase a building and tendered to provide office space to the provincial

government. Unfortunately, its tender was not accepted (*Olitzki Property Holdings v State Tender Board supra* par 4). The plaintiff sued the provincial government and tender board, alleging misconduct by the government and tender board during the tender process (*Olitzki Property Holdings v State Tender Board supra* par 4). The plaintiff sought damages, which according to the plaintiff, were payable because of how the tender process and award were managed. The damages consisted in the profit the plaintiff asserted it would have made from rentals if it had been awarded the tender. The relevant issue was whether constitutional damages may be awarded for loss of profits (*Olitzki Property Holdings v State Tender Board supra* par 1). The plaintiff fashioned its case in two claims, namely A and B. Claim A dealt with whether a breach of the procurement provisions of the Constitution of the Republic of South Africa Act, 1993 (Interim Constitution) gave rise to a civil claim in damages for loss of profit. Claim B addressed whether an award for damages for loss of profit was an appropriate remedy for breach of administrative-justice provisions of the Interim Constitution. Unfortunately, both claims failed.

In rejecting the plaintiff's Claim A, the SCA *per* Cameron JA held that the argument that an award for loss of profit was just and reasonable, or in line with the convictions of society, or aligned to the Interim Constitution, was not persuasive (*Olitzki Property Holdings v State Tender Board supra* par 30). Cameron JA also highlighted the exorbitance of the plaintiff's "loss of profit" claim, which amounted to R10 million, and the hammering effect it would have on the public purse, because the State would have to pay the plaintiff (*in casu,* R10 000 000.00) and still pay the successful tenderer (*Olitzki Property Holdings v State Tender Board supra* par 30) – a situation the court called a "double imposition on the state". Cameron JA found no basis in the procurement provisions (see section 187) of the Interim Constitution, and in consideration of public policy, that entitled the plaintiff to claim lost profits (*Olitzki Property Holdings v State Tender Board supra* par 31). The court set aside Claim A (*Olitzki Property Holdings v State Tender Board supra* par 31).

Regarding Claim B, the court held that an interdict of the tender process would have been the more appropriate relief, rather than trying to convince the court that an award for loss of profit for not getting the tender was appropriate (*Olitzki Property Holdings v State Tender Board supra* par 38). Not only would an interdict have anticipated a dispute, but it would also have eliminated the source of the loss the plaintiff claimed to have suffered (*Olitzki Property Holdings v State Tender Board supra* par 38). The court held that the plaintiff ought to have considered a review application to review the tender process, and not to have resorted to a claim for loss of profit (*Olitzki Property Holdings v State Tender Board supra* par 40–41). Finally, the court held that Claim B was correctly set aside because the plaintiff had alternative relief by way of an interdict before the award of the impugned tender and a review of the process (*Olitzki Property Holdings v State Tender Board supra* par 42). Therefore, the court concluded that the lost profit claimed by the plaintiff was not an appropriate constitutional remedy (*Olitzki Property Holdings v State Tender Board supra* par 42). It is submitted that the court in *Olitzki Property Holdings v State Tender Board* (*supra*) dismissed the plaintiff's claims because a claim for loss of profit was

unfounded and had no basis. According to the court, the plaintiff ought to have pursued other remedies available to it, such as an interdict or review process.

In *Modder Estate Squatters v Modderklip Boerdery (Pty) Ltd* (*supra*), the SCA awarded constitutional damages to Modderklip Boerdery (Pty) Ltd, a company whose land was occupied by more than 40 000 unlawful occupiers (*Modder Estate Squatters v Modderklip Boerdery (Pty) Ltd supra* par 8). The company had applied to court for an eviction order. The Pretoria High Court granted the eviction, but it could not be enforced, because consideration had to be given to the number of people to be evicted (*Modder Estate Squatters v Modderklip Boerdery (Pty) Ltd supra* par 7 and 9). This resulted in Modderklip applying for a declaratory order of its section 25(1) right and the unlawful occupiers' section 26(1) right (*Modder Estate Squatters v Modderklip Boerdery (Pty) Ltd supra* par 11). The court *inter alia* declared that Modderklip's right not to be deprived of its property had been violated and that the unlawful occupiers' right to housing had also been violated (*Modder Estate Squatters v Modderklip Boerdery (Pty) Ltd supra* par 15). It ordered the police to investigate whether the unlawful occupiers should be prosecuted to protect Modderklip's property rights (*Modder Estate Squatters v Modderklip Boerdery (Pty) Ltd supra* par 16). Finally, the court imposed a structural interdict on the State to report to it on its compliance with the order (*Modder Estate Squatters v Modderklip Boerdery (Pty) Ltd supra* par 16).

The President and the unlawful occupiers appealed to the SCA (*Modder Estate Squatters v Modderklip Boerdery (Pty) Ltd supra* par 51–52). The SCA confirmed the High Court's declaratory order. However, the structural interdict was not regarded as an effective remedy and the SCA awarded constitutional damages against the State to vindicate Modderklip's property rights (*Modder Estate Squatters v Modderklip Boerdery (Pty) Ltd supra* par 40). The President appealed to the Constitutional Court. The Constitutional Court *per* Langa ADCJ (as he then was) confirmed the order of the SCA. It held that constitutional damages were the more effective remedy based on the facts in issue, even though a declarator clarifying rights was also available as an alternative remedy (*Modder Estate Squatters v Modderklip Boerdery (Pty) Ltd supra* par 60). The court had regard to the long history of Modderklip's efforts to free its property from unlawful occupation and held that more effective relief (an award of constitutional damages) would be the more appropriate relief (*Modder Estate Squatters v Modderklip Boerdery (Pty) Ltd supra* par 60). The position taken in *Modder Estate Squatters v Modderklip Boerdery (Pty) Ltd* (*supra*) confirms the decision in *Fose v Minister of Safety and Security* (*supra*) that courts should grant appropriate relief, and that such relief should be effective relief in vindicating a right (*Fose v Minister of Safety and Security supra* par 69). Therefore, in *Modder Estate Squatters v Modderklip Boerdery (Pty) Ltd* (*supra*), constitutional damages were awarded because they were a more effective relief compared to a declaratory order.

In *MEC for the Department of Welfare v Kate* (*supra*), the SCA awarded constitutional damages to Mrs Kate, a disabled 54-year-old woman, because of the State's delay in granting her a social grant (*MEC for the Department of Welfare v Kate supra* par 10). Kate's right to social security in terms of

section 27(1)(*c*) of the Constitution had been infringed (*MEC for the Department of Welfare v Kate supra* par 1 and 28). The court in that case held that constitutional damages were not a remedy of last resort, to be looked to only when there is no alternative and indirect means of asserting and vindicating constitutional rights (*MEC for the Department of Welfare v Kate supra* par 27). According to Nugent J, while consideration of alternative remedies is an option, it is not decisive in determining whether to grant or not grant constitutional damages, because there are cases in which direct assertion and vindication of constitutional rights is required (*MEC for the Department of Welfare v Kate supra* par 27).

Nugent J held that constitutional damages were the only appropriate remedy to award Kate for the breach of her right; however, what was left was how the loss would be measured in monetary terms (*MEC for the Department of Welfare v Kate supra* par 33). In answering this, the court held that:

> "[i]t has not been shown that Kate suffered direct financial loss and it is most unlikely that she did, for the grant was destined to be consumed and not invested, but the loss was just as real. Hence, to be held in poverty is a cursed condition. Quite apart from the physical discomfort of deprivation, it reduces a human in his or her dignity. The inevitable result of being unlawfully deprived of a grant that is required for daily sustenance is the unnecessary further endurance of that condition for so long as the unlawfulness continues. That is, the true nature of the loss that Kate suffered. There is no empirical monetary standard against which to measure a loss of that kind." (*MEC for the Department of Welfare v Kate supra* par 33)

It is submitted that the position in *MEC for the Department of Welfare v Kate* (*supra*) is that for constitutional damages to be invoked there must be an infringement of a constitutionally protected right, but the loss suffered need not be monetary and constitutional damages are not a remedy of last resort. Of course, consideration must be given to other remedies, but the availability of such should not be considered to bar an award for constitutional damages when such an award would be more effective in vindicating an infringed right.

In *Families of Mental Health Care Users Affected by the Gauteng Mental Marathon Project v National Minister of Health of the Republic of South Africa* (arbitration award https://www.saflii.org/images/LifeEsidimeniArbitrationAward.pdf (accessed 2024-03-15)), Moseneke J, the arbitrator, awarded constitutional damages in the sum of R1 000 000 to the families in addition to common-law damages for the breach of constitutional rights (*Families of Mental Health Care Users v National Minister of Health supra* par 214 and 266). The State opposed the award of constitutional damages, arguing that the claimants could rely on common-law damages (*Families of Mental Health Care Users v National Minister of Health supra* par 212). Most relevant is Moseneke's reasoning that the Constitution trumps the common law (par 216). To emphasise that constitutional damages were appropriate relief, he held that:

> "[m]ore importantly, the claim of the claimants in this arbitration for compensation arising from invasive and pervasive violation of constitutional guarantees by the Government cannot readily be couched in common law terms. What is the common law equivalent of a claim based on the State's

> breach of the right of access to healthcare; right of access to food and water; freedom from torture; protection from cruel degrading and inhuman treatment? Similarly, what is the common law equivalent of a claim against the State for breaching the rule of law, for disregarding protections provided by legislation that is meant to give effect to constitutional guarantees or a claim arising from a breach of international obligations on Mental Health care? And on the facts here all these breaches together led to agonising devastation for families of the deceased, survivors and their families." (*Families of Mental Health Care Users v National Minister of Health supra* par 217)

In this instance, Moseneke J awarded constitutional damages because of the "invasive and pervasive" violation of constitutional rights, which, according to him, could only be vindicated with a constitutional-damages award.

In *Residents of Industry House v Minister of Police* (*supra*), the Constitutional Court refused to award constitutional damages because the applicants had alternative appropriate relief in terms of the common law and the Promotion of Administrative Justice Act (3 of 2000) (*Residents of Industry House v Minister of Police supra* par 108, 111 and 126). The court also held that despite the availability of alternative remedies, it may be open to the court to award constitutional damages if the alternative remedies were not effective (*Residents of Industry House v Minister of Police supra* par 99; see also *MEC for the Department of Welfare v Kate supra* par 27 for the emphasis that constitutional damages may be awarded even if alternative remedies exist). The court in *Residents of Industry House v Minister of Police* (*supra*) developed a guide as to when constitutional damages may be awarded as follows:

> "When considering whether, on the facts of the particular case, constitutional damages are appropriate relief, several pertinent factors for consideration have emerged from the jurisprudence of this Court and of the Supreme Court of Appeal. There are two overarching considerations; the first is the existence of an alternative remedy that would vindicate the infringement of the rights alleged by the claimant and the second is, whether the alternative remedy is effective or appropriate in the circumstances. Ancillary factors include whether the infringement of the constitutional rights was systemic, repetitive and particularly egregious; whether the award will significantly deter the type of constitutional abuse alleged; the effect of the award on state resources; and the need to avoid opening floodgate in respect of similar matters." (*Residents of Industry House v Minister of Police supra* par 103)

Dealing with the issue of alternative remedies, Mhlantla J held that the availability of alternative remedies was not an absolute bar to an award of constitutional damages, but could be a factor mitigating against such an award (*Residents of Industry House v Minister of Police supra* par 104). According to Mhlantla J, the court must consider whether expecting a claimant to pursue alternative remedies would be manifestly unjust or unreasonable (*Residents of Industry House v Minister of Police supra* par 105). The nature and extent of the violation, the position of the claimants, and the impact of the violation on the requirements of obtaining alternative relief, all play a role in the determination of whether it would be manifestly unjust or unreasonable to expect the applicants to seek an alternative remedy (*Residents of Industry House v Minister of Police supra* par 105).

On the issue of appropriate relief, Mhlantla J held that section 38 of the Constitution grants courts flexibility in determining what constitutes appropriate relief in a particular case (*Residents of Industry House v Minister of Police supra* par 113). She added that appropriate relief means any relief that is justified by the facts of the case and all other legal considerations (*Residents of Industry House v Minister of Police supra* par 113; see also *Fose v Minister of Safety and Security supra* par 60, where it was highlighted, that appropriate relief was fact-specific). This is the relief that is suitable to the specific facts and needs of the applicants in a particular case (*Residents of Industry House v Minister of Police supra* par 113). If there are many appropriate remedies available in each case, the courts enjoy a discretion to select the most appropriate one (*Residents of Industry House v Minister of Police supra* par 113).

The court also held that "appropriate" in section 38 of the Constitution must be read as relief that is effective in protecting the claimants as well as the interests of good governance (*Residents of Industry House v Minister of Police supra* par 115; see also *Fose v Minister of Safety and Security supra* par 69). Mhlantla J concluded by holding that constitutional damages must be the most appropriate remedy available to vindicate constitutional rights, considering the availability of alternative common-law and legislative remedies (*Residents of Industry House v Minister of Police supra* par 118). In *Residents of Industry House v Minister of Police* (*supra*), the court focused on circumstances that would entail appropriate relief for the award of constitutional damages; the court may be summarised as saying that for constitutional damages to be awarded, it must be the most appropriate relief. This means that constitutional damages should follow the interrogation of whether or not other remedies would work, based on the facts of the case.

Most recently, in *Thubakgale v Ekurhuleni Metropolitan Municipality* (*supra*), the Constitutional Court refused to award constitutional damages to applicants whose rights to have access to adequate housing had been violated for more than two decades. The applicants had applied for housing in 1998 and been allocated housing subsidies and sites on which their houses would be built, but the applicants had not received their housing (*Thubakgale v Ekurhuleni Metropolitan Municipality supra* par 13 and 21). The lived realties of the applicants remained unfortunate as they were very poor people who were languishing in squalor, with no access to water, electricity and sanitation (*Thubakgale v Ekurhuleni Metropolitan Municipality supra* par 17).

After many failed attempts to get their housing, the applicants approached the High Court, which ordered that the municipality provide the applicants with housing by 31 December 2018 (*Thubakgale v Ekurhuleni Metropolitan Municipality supra* par 21). The municipality appealed to the SCA for an amendment of the delivery date, which was extended to 30 June 2019, coupled with a secondary order that the applicants had to be registered as titleholders of the erven by 30 June 2020 (*Thubakgale v Ekurhuleni Metropolitan Municipality supra* par 21). Owing to pervasive non-compliance with both the High Court and SCA orders, the municipality approached the High Court to have the decision of the High Court varied *(Thubakgale v Ekurhuleni Metropolitan Municipality supra* par 22). The court dismissed the

application by the municipality because the rights of the residents had vested, and the High Court did not have the powers to vary the SCA decision (*Thubakgale v Ekurhuleni Metropolitan Municipality supra* par 24). As a result of the municipality's recalcitrance, the applicants made a counter-application for constitutional damages, which was dismissed by the High Court (*Thubakgale v Ekurhuleni Metropolitan Municipality supra* par 8).

Left with no other option, the applicants sought leave to appeal directly to the Constitutional Court for constitutional damages, without success (*Thubakgale v Ekurhuleni Metropolitan Municipality supra* par 8 and 121). An unfortunate aspect to *Thubakgale v Ekurhuleni Metropolitan Municipality* (*supra*) is that it resulted in increasing the uncertainty regarding when exactly constitutional damages may be awarded. In these circumstances, it is necessary to sum up the three judgments in *Thubakgale v Ekurhuleni Metropolitan Municipality* (*supra*) – namely, the majority judgment by Jafta J, the concurrence by Madlanga J, and the dissent by Majiedt J.

The majority judgment by Jafta J refused to award constitutional damages because such damages could not be awarded for the violation of socio-economic rights, and the applicants had not suffered actual patrimonial loss (*Thubakgale v Ekurhuleni Metropolitan Municipality supra* par 121 and 162). Further reasons advanced by Jafta J for refusing to award constitutional damages were that the applicants had been granted relief in their favour by the High Court and they had not pleaded a proper case for constitutional damages (*Thubakgale v Ekurhuleni Metropolitan Municipality supra* par 122).

The concurrence by Madlanga J could not set itself against the awarding of constitutional damages for the breach of socio-economic rights (*Thubakgale v Ekurhuleni Metropolitan Municipality supra* par 196). Instead, Madlanga J held that, given the decision in *Residents of Industry House v Minister of Police* (*supra*), constitutional damages were not the most appropriate relief. Madlanga J held in *Thubakgale v Ekurhuleni Metropolitan Municipality* (*supra*) that, for constitutional damages to be awarded, they must be the most appropriate relief available to vindicate constitutional rights (*Thubakgale v Ekurhuleni Metropolitan Municipality supra* par 197). According to Madlanga J, contempt-of-court proceedings were available to the applicants as alternative relief, which would have been the most appropriate in vindicating their right of access to adequate housing, but they opted not to pursue such proceedings (*Thubakgale v Ekurhuleni Metropolitan Municipality supra* par 198).

In dissent, Majiedt J argued that, when determining the most effective remedy, the availability of other remedies must be considered (*Thubakgale v Ekurhuleni Metropolitan Municipality supra* par 46). However, in some cases constitutional damages may be the most effective remedy despite the availability of other remedies (*Thubakgale v Ekurhuleni Metropolitan Municipality supra* par 46). According to Majiedt J, in *Thubakgale v Ekurhuleni Metropolitan Municipality* (*supra*), constitutional damages were the most effective relief because the applicants had been denied their right to housing for more than two decades (*Thubakgale v Ekurhuleni Metropolitan Municipality supra* par 78). Majiedt J further held that, other than constitutional damages, no effective remedy existed to vindicate the

applicants' rights, given the intrusive and pervasive violation of their right of access to adequate housing (*Thubakgale v Ekurhuleni Metropolitan Municipality supra* par 70).

The *R K v Minister of Basic Education* case (*supra*) correctly reaffirms the principle that constitutional damages will not be awarded where the infringement of a constitutional right may be sufficiently compensated under a delictual claim. Therefore, the SCA in *R K v Minister of Basic Education* (*supra*) relied on *Fose v Minister of Safety and Security* (*supra*) in deciding to deny the claim for constitutional damages. As in *Fose v Minister of Safety and Security* (*supra*), *R K v Minister of Basic Education* (*supra*) set itself against the awarding of constitutional damages over and above delictual damages. In our view, *R K v Minister of Basic Education* (*supra*) took the stance in *Fose v Minister of Safety and Security* (*supra*) that if a litigant already has a successful delictual claim, that litigant cannot also be awarded constitutional damages, because such an award would be punitive.

The decision of the court in *R K v Minister of Basic Education* (*supra*) shows the flexibility of the law of delict. In most instances, the law of delict is broad enough to provide litigants with appropriate relief for a breach of constitutional rights (*R K v Minister of Basic Education supra* par 58; see also Currie & De Waal *The Bill of Rights Handbook* 202). However, this position will depend on the facts of each case (*R K v Minister of Basic Education supra* par 58). In this regard, the facts of R *K v Minister of Basic Education* (*supra*) fall within the precedent established in *Fose v Minister of Safety and Security* (*supra*).

As such, the judgment of *R K v Minister of Basic Education* (*supra*) cannot be faulted. It is submitted further that this is so even if *R K v Minister of Basic Education* (*supra*) is compared to cases decided after *Fose v Minister of Safety and Security* (*supra*) that awarded constitutional damages – matters such as *Modder Estate Squatters v Modderklip Boerdery (Pty) Ltd* (*supra*) and *MEC for the Department of Welfare v Kate* (*supra*). In those two cases, constitutional damages were awarded because they constituted more effective relief based on the facts of the cases as outlined above. Also, it is our considered view that despite constitutional damages not being a remedy of last resort as was decided in *MEC for the Department of Welfare v Kate* (*supra*), such damages should not be awarded where delictual damages may vindicate the breach of a constitutional right and be an effective remedy.

3 3 Declaratory relief: The courts' confusion

Notwithstanding the substantively just outcome of the claims for damages, the appellants also prayed for declaratory relief. However, such relief was not granted, based on, it is submitted, doubtful reasoning. It appears that both the court *a quo* (*R K v Minister of Basic Education* [2018] ZALMPPHC 18 par 13, for convenience "*R K HC*") and the SCA conflated two types of declaratory relief, namely a declaration of rights as provided for in section 38 of the Constitution, and a declaration of invalidity as provided for in section 172 of the Constitution.

The court *a quo* interpreted the appellants' (*a quo* plaintiffs') prayer for declaratory relief as a prayer for a declaration of rights *(R K HC supra* par 58), which is a discretionary remedial procedure at common law and contained within section 38 of the Constitution. The SCA proceeded, correctly, on the basis that the appellants' prayer was based on the mandatory remedial procedure in section 172(1)(*a*) of the Constitution (*R K v Minister of Basic Education supra* par 64). Yet, the SCA's reasoning shows that it confused the section 172(1)(*a*) procedure with a discretionary declaration of rights.

3 3 1 Mapping the courts' conflation

In the court ***a quo***'s judgment, Muller J sets out the prayer for declaratory relief:

> "In addition to the claims for damages, the plaintiffs also seek a declaratory order that the defendants have breached their constitutional obligations in respect of the rights contained in sections 9, 10, 11, 24, 27, 28 and 29 of the Constitution." (*R K HC supra* par 13)

The court *a quo* (*R K HC supra* par 69) found that "[a] declaratory order, to effectively vindicate the Constitution is a discretionary remedy". The court *a quo* cited the pre-constitutional case of *Ex parte Nell* (1963 (1) SA 754 (A)) in support of this finding, a case on the "verklaring van regte" (declaration of rights) in terms of the repealed Superior Courts Act (59 of 1959). Earlier in the relevant section of its judgment, the court *a quo* precedes its finding in paragraph 69 based on *Fose v Minister of Safety and Security* (*supra*):

> "Our object in remedying these kinds of harms should, at least, be to vindicate the Constitution, and to deter its further infringement." (*R K HC supra* par 55)

This may seem strange, since *Ex parte Nell* (*supra*) came long before *Fose v Minister of Safety and Security* (*supra*), the Interim Constitution and the Constitution. The *Ex Parte Nell* judgment does not mention the need for constitutional harm to be addressed with remedial procedures that vindicate the Constitution. What can be inferred from this finding is that the court *a quo* considered the plaintiffs' prayer to be for a "verklaring van regte", a declaration of rights. Such a declaration is authorised by section 38 of the Constitution:

> "Anyone listed in this section has the right to approach a competent court, alleging that a right in the Bill of Rights has been infringed or threatened, and the court may grant appropriate relief, including a declaration of rights."

The declaration of rights, accordingly, is the discretionary remedial procedure that Muller J considered in the judgment of the court *a quo*. Courts "may" grant a declaration of rights where rights in the Bill of Rights are threatened or infringed. Its discretionary nature is further confirmed by Didcott J in *JT Publishing (Pty) Ltd v Minister of Safety and Security* (1997 (3) SA 514):

> "[A declaration of rights] is also a discretionary remedy, in the sense that the claim lodged by an interested party for such an order does not in itself oblige

> the court handling the matter to respond to the question which it poses." (*JT Publishing v Minister of Safety and Security supra* par 15)

The appellants were not asking for a declaration of rights. They were praying for a section 172(1)(*a*) declaration that the government's conduct (its consistent failure to eliminate the dangerous pit-latrine system) is invalid for its inconsistency with the Constitution. The SCA itself pointed to section 172(1)(*a*) of the Constitution as the source of the plaintiffs' prayer (*R K v Minister of Basic Education supra* par 64), but it then embarked on reasoning that culminated in a finding that the court *a quo* exercised its discretion judicially when it refused a declaratory order (*R K v Minister of Basic Education supra* par 67). Here, the court clearly confused the discretionary declaration of rights with the remedial procedure that was prayed for, namely the mandatory section 172(1)(*a*) declaration of invalidity.

The court advanced two reasons for not interfering with the court *a quo's* refusal to grant declaratory relief. First, it held somewhat disingenuously that it could not have been government policy to provide abysmally inadequate pit-latrine facilities and accordingly there was nothing to declare invalid for constitutional inconsistency (*R K v Minister of Basic Education supra* par 64). The court draws this conclusion because section 172(1)(*a*) declarations had thus far been applied in cases involving government policy (see *Minister of Health v Treatment Action Campaign (II)* 2002 (5) SA 721 (CC)) or statute (see *National Director of Public Prosecutions v Mohamed NO* 2003 (4) SA 1 (CC)). It must be noted that neither of these cases provided a closed list of what may be declared invalid in terms of section 172(1)(*a*) of the Constitution. Those courts applied the section to conduct that manifested as government policy on HIV/AIDS, and section 38 of the Prevention of Organised Crime Act (121 of 1998), respectively. These cases placed no reasoned restriction on the meaning and extent of "conduct", and certainly did not exclude it from referring to omissions to act where a legal duty is owed.

Secondly, the court cemented its conflation of the two remedial procedures in a second advancement when it relied on its judgment in *MEC for the Department of Welfare v Kate* (*supra*). That case entailed a claim for damages by an elderly disabled woman after the Eastern Cape government failed to pay her social security grant. The court had to decide whether it would entertain the appellant's urging that the respondent's relief be limited to a declaration of rights, which the court refused (*MEC for the Department of Welfare v Kate supra* par 29). The SCA in *R K v Minister of Basic Education* (*supra* par 66) tailored its second argument for refusing the appeal according to case law that dealt with the discretionary remedial procedure in section 38 of the Constitution, and not the mandatory section 172(1)(*a*) procedure, which was at stake here.

3 3 2 Criticism

From the exposition above it appears that the court *a quo* misunderstood the plaintiffs' prayer as relying on the law relating to declarations of rights, while the SCA conflated the two remedial procedures. The SCA made use of the same term, "declarator", during its interweaving of case law relating to

declarations of rights and declarations of invalidity (*R K v Minister of Basic Education supra* par 64–67).

This poses problems. A failure by the courts to appreciate the difference between the two remedial procedures may lead to remedies being refused owing to judicial deliberation that is wrong on the law. The conflation also creates the risk of courts missing opportunities to declare invalid conduct that is patently inconsistent with the Constitution. Such declarations are not only mandatory in terms of 172(1)(*a*) of the Constitution, but are also necessary to hold the executive accountable to the Constitution. While accountability without judicial overreach is incidentally a trait shared by declarations of rights and declarations of invalidity (as stated in *MEC for the Department of Welfare v Kate supra* par 28: "[Declarations of rights] can promote a non-coercive dialogue between courts and government in preference to an injunction"), it is exactly the mandatory nature of the declaration of invalidity that makes it such a powerful remedial tool. If the substantive inquiry determines that a party's conduct was inconsistent with the Constitution, a court is mandated to issue a declaration of invalidity. This is unlike the discretionary declaration of rights, which can easily be declined if the court is not convinced of its usefulness to clarify a matter; it can instead declare the law on the facts (*MEC for the Department of Welfare v Kate supra* par 28).

It is fair to state beforehand that the plaintiffs *a quo* could have pleaded for declaratory relief in clearer terms. In the court ***a quo's*** judgment, the prayer reads

> "[T]he plaintiffs also seek a declaratory order that the defendants have breached their constitutional obligations in respect of the rights contained in sections 9, 10, 11, 24, 27, 28 and 29 of the Constitution." (*R K HC supra* par 13)

The court *a quo* ostensibly took this to mean a declaration of rights, since both section 38 of the Constitution and section 172(1)(*a*) of the Constitution entail declaratory relief where there is conduct infringing on constitutional rights. However, it remains questionable that the court *a quo* chose to rely on authority (*Ex parte Nell supra*), that has been superseded or at least been engrossed with new developments in the constitutional era.

Where an inconsistency with constitutional rights is present, such as in the facts of this case, a court in the constitutional dispensation is enjoined to consider section 172(1)(*a*) of the Constitution. Furthermore, in the SCA, the appellants quite puzzlingly chose to limit the scope of their understanding of "conduct" for purposes of the declaration of invalidity to "state policy". This approach forced them into the unenviable corner of having to argue that "state policy" led to the continued presence of the pit-latrine system and, eventually, to S K's death. To an extent, one may lay the failure of the plaintiffs *a quo* to succeed with the point of appeal on declaratory relief at their own feet.

When adjudicating a prayer for the mandatory remedial procedure in section 172(1)(*a*) of the Constitution, the question is whether the court is confronted with conduct that is inconsistent with the Constitution. If the answer is yes, then the court must issue a declaration of invalidity. If the

answer is no, the Constitutional Court held in *Rail Commuters Action Group v Transnet t/a MetroRail* (2005 (4) BCLR 301 (CC)):

> "[Section 172(1)(a)] does not mean, however, that this Court may not make a declaratory order in circumstances where it has not found conduct to be in conflict with the Constitution. Indeed section 38 of the Constitution makes it clear that the Court may grant a declaration of rights where it would constitute appropriate relief." (*Rail Commuters Action Group v Transnet t/a MetroRail supra* par 106)

When a prayer for the discretionary remedial procedure at common law, as contained in section 38 of the Constitution, is adjudicated, the court has a discretion to grant declaratory relief even if rights are merely threatened.

Case law such as *MEC for the Department of Welfare v Kate* (*supra*) and *Rail Commuters Action Group v Transnet* (*supra*) guide the court's discretion as follows:

> "A declaration of rights is essentially remedial and corrective and it is most appropriate where it would serve a useful purpose in clarifying and settling the legal relations in issue." (*MEC for the Department of Welfare v Kate supra* par 28)

Given this, the SCA's reasoning and refusal to interfere with the court *a quo*'s finding on the declaratory order remain perplexing. When the appellants framed their appeal on the prayer for declaratory relief within the bounds of the mandatory remedial procedure, the court was not at liberty to embark on an excursion in discretionary adjudication. Yet, this is exactly what it did when it considered that declaratory relief would be superfluous, given the court *a quo's* "stinging rebuke" of the government (*R K v Minister of Basic Education supra* par 66); it invoked *MEC for the Department of Welfare v Kate* (*supra*), an authority on the declaration of rights to bolster its reasons for refusal (*R K v Minister of Basic Education supra* par 67); and it concluded by having regard to the court *a quo's "*judicial exercising" of its discretion.

What the SCA should have done was consider whether there was conduct by the government that was inconsistent with the Constitution. First, it should have identified the government's conduct as the consistent omission to address the impugned pit-latrine facilities at S K's school. By constraining itself to state policy and statute, the court did not properly interpret the meaning of "conduct" within the meaning of section 172(1)(*a*) of the Constitution. It considered itself to be bound by how the term "conduct" was applied in *Minister of Health v TAC II* (*supra*). That case did not restrictively interpret the meaning of "conduct" in section 172(1)(*a*) of the Constitution. The court in *Minister of Health v TAC II* (*supra*) accepted state policy to be a subject of the remedial procedure in that section and did not place any constraints on its scope or create some form of closed list. This is the correct approach, being in line with the purposive and generous approach to interpretation that our courts ought to follow (see, for e.g., *African Christian Democratic Party v Electoral Commission* 2006 (3) SA 305 (CC) par 21–31; *Daniels v Campbell NO* 2004 (5) SA 331 (CC) par 22).

This is the approach that the SCA in *R K v Minister of Basic Education* (*supra*) ought to have adopted. It is in line with the interpretive rule

prescribed in section 39(2) of the Constitution, which mandates judicial *fora* to interpret legal provisions in such a way that the spirit, purport and object of the Bill of Rights are promoted (see *Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs and Tourism supra* par 91). Interpreting the scope of "conduct" widely, to include executive omissions by government as conduct for purposes of section 172(1)(*a*) of the Constitution, accepts that inconsistency with the Constitution may very well arise during government's *failure* to act. Failure to give effect to the spirit, purport and objects of the Bill of Rights and the aims of the Constitution is, after all, in conflict with section 172(1)(*a*)'s logical precursor, the supremacy clause in section 2:

> "This Constitution is the supreme law of the Republic; law or conduct inconsistent with it is invalid, and the obligations imposed by it must be fulfilled."

This generous approach to understanding "conduct" also accords with the mode of interpretation followed in *Natal Joint Municipal Pension Fund v Endumeni Municipality* (2012 (4) SA 593 (SCA)):

> "Whatever the nature of the document, consideration must be given to the language used in the light of the ordinary rules of grammar and syntax; the context in which the provision appears; the apparent purpose to which it is directed, and the material known to those responsible for its production. Where more than one meaning is possible each possibility must be weighed in the light of all these factors." (*Natal Joint Municipal Pension Fund v Endumeni Municipality supra* par 18)

Conduct is commonly understood as a person's behaviour, which itself ordinarily includes positive acts or refusals to act. The law of delict divides "conduct" into omission and commission – that is, failure to act and positive acts. Taken together, these ordinary meanings of a legal term and designation for behaviour very clearly include refusals to act. Moreover, in the context of section 172(1)(*a*) of the Constitution, there is no separate remedial procedure specially tailored for omissions. If "conduct" here excluded omissions, it would imply that omissions that are inconsistent with the Constitution are shielded from being declared so by a court of law, even if omissions may conceivably be as detrimental as commissions.

If the purpose of section 172(1)(*a*) of the Constitution is to provide a mandatory remedial procedure that "vindicate(s) the Constitution" (*Fose v Minister of Safety and Security supra* par 96), which flows from the supremacy clause in section 2 of the Constitution, then it follows that section 172(1)(*a*) of the Constitution is not curiously blind to seeing omissions as conduct. It is therefore a disingenuous rationalisation to hold narrowly that the government could not have created and acted in terms of a policy that directed dangerously inadequate toilet facilities at schools. It should have considered that the government's failure to end the pit-latrine system was omissive conduct, which falls within the remedial scope of section 172(1)(*a*) of the Constitution.

The second step that the court ought to have taken was to evaluate whether the government's omissive conduct was inconsistent with the Constitution. It should on that basis have decided if there was a need for a declaration of invalidity. It should not have applied a discretion-based

approach, because that is the approach under a declarations of rights, not the section 172(1)(*a*) procedure. It is submitted that insofar as the court considered the common law flexible enough to address the constitutional wrongs suffered by the appellants in *R K v Minister of Basic Education* (*supra*) owing to government neglect, a declaration of invalidity would have been appropriate to create a precedent for both the government and future victims of such omissive, harmful and constitutionally inconsistent conduct. It would have provided a blueprint for similar legal disputes with the State and have served as an enforceable accountability mechanism, without prescribing to the government exactly how to execute their constitutional duties. Issuing an order in terms of the section 172(1)(*a*) procedure would be effective: it goes further than a vaguely enforceable "stinging rebuke" (*R K v Minister of Basic Education supra* par 65*),* but not so far that it encroaches upon the separation of powers between the courts and the executive arm of the State.

3 4 Amicus procedure: Misapplication of the law

The SCA disposed of the *amicus* application on two main grounds. It is submitted that while the second of the court's two reasons for rejection of the application (*R K v Minister of Basic Education supra* par 8) is correct, the first misapplied the law on the admission of *amici curiae.* The court held that the *amicus* applicant, the attorney firm RSI, had a personal financial interest at stake in the matter, in that an outcome in line with its submissions (that a claim for emotional shock ought to be recognised) would provide it with a precedent. This would bolster RSI's chances of success in a pending class action where emotional-shock claims also came to the fore. Accordingly, RSI – acting for the plaintiffs in the separate class-action matter on a contingency basis – would see its contingency fee significantly increased (*R K v Minister of Basic Education supra* par 5)*.* The SCA held, as a first reason for rejecting RSI's application, that this apparent personal financial interest disqualified the application. This reasoning does not hold water in the face of case law relating to joinder and the requirement of a direct and substantial interest. The court also misinterpreted Moseneke DCJ's finding in *National Treasury v Opposition to Urban Tolling Alliance* (2012 (6) SA 223 (CC) par 18).

Rule 16 of the SCA Rules require *inter alia* a prospective *amicus* to explain their interest in a matter in which they purport to be offering assistance. Given that external parties with a direct and substantial interest in a matter or with a legal interest in the subject matter of litigation that may be prejudicially affected by the outcome of the litigation ought to be joined as litigants (*Amalgamated Engineering Union v Minister of Labour* 1949 (3) SA 637 (A) par 657), it follows that a prospective *amicus* with an interest that is direct and substantial ought to be joined as a litigant and cannot participate as an *amicus. Amici* merely offers assistance to the court in matters on which they can provide helpful expertise (*Hoffman v SA Airways* 2001 (1) SA (CC) par 63).

In *National Treasury v Opposition to Urban Tolling Alliance* (*supra*)*,* the Constitutional Court held that *amicus* submissions should

> "be directed at assisting the court to arrive at a proper and just outcome in a matter in which the friend of the court does not have a direct or substantial interest as a party or litigant." (*National Treasury v Opposition to Urban Tolling Alliance supra* par 13)

The interest of an *amicus* is a lesser interest than those of the parties. An *amicus* interest falls within the realm of indirect interests and within a context of usefulness and assistance to the court. There is no closed list of interests that qualify for *amicus* status, as the court in *National Treasury v Opposition to Urban Tolling Alliance* (*supra*) found, and the court's discretion is exercised within the bounds of case law and the rules governing *amici curiae* applications. Lastly, the court in *National Treasury v Opposition to Urban Tolling Alliance* (*supra* par 15) rejected the Democratic Alliance's *amicus* application on the basis that it is improper for a political party to use the *amicus* procedure as a means of advancing a "sectarian or partisan interest" against one of the opposing parties. If its interest was of a direct and substantial nature, even if politically partisan, it should intervene or join the proceedings (*National Treasury v Opposition to Urban Tolling Alliance supra* par 15).

The ruling rejecting the DA's application arose in the context of the court's wariness of being misused in political battles, which ought to be reserved for "the National and Provincial Legislatures and Municipal Councils where [the DA] says it is widely represented" (*National Treasury v Opposition to Urban Tolling Alliance supra* par 15). This differs markedly from what the SCA was seized with in *R K v Minister of Basic Education* (*supra*), where a firm of attorneys requested permission to provide its expert assistance – not an odd request at all, given that the legal practitioner's foremost duty is to lead the courts to law. This cannot be analogous to a political party using the *amicus* procedure to score political points against an ANC-led National Treasury.

The court's insistence that an *amicus* must be "objective and not seek to advance an interest of its own" (*R K v Minister of Basic Education supra* par 5) can be squared with a legal practitioner's duty to assist the court on objective points of law, but does not tally with the finding in *National Treasury v Opposition to Urban Tolling Alliance* (*supra* par 13) that an *amicus* may well "urge upon a court to reach a particular outcome". Indeed, *amici* are interested in select cases precisely because they have certain subjective socio-political or philosophical dispositions. Renowned *amici* such as the Helen Suzman Foundation or the Centre for Child Law provide briefs based on an interest in a certain outcome, concomitantly advancing their organisational purpose. Disparaging an *amicus* applicant for advancing its own interests shows a misunderstanding of how *amicus* briefs operate. Insofar as RSI could provide legal assistance on objective points of law and urge an outcome based on its interest in the matter, the firm was in the clear.

The court finally reasoned that RSI's personal financial interest lay at the heart of its application (*R K v Minister of Basic Education supra* par 5). If RSI's contentions won the day, the precedent would give it an edge over its opponent in the separate pending class action. If the class action were successful, RSI would benefit from its contingency-fee agreement with its plaintiff clients. The court saw RSI as better suited to being a litigant (*R K v Minister of Basic Education supra* par 5–6), but RSI would be disqualified

from intervening or joining the litigation in *R K v Minister of Basic Education* (*supra*) owing to its clear lack of a direct and substantial interest in that matter. The *lis* did not originate between it and the respondents in *R K v Minister of Basic Education* (*supra*).

Even if RSI applied the test and showed that it had a legal interest in the subject matter of the litigation that could be prejudicially affected, the finding by Horwitz AJP (as he then was) upon an exhaustive review of English and Roman-Dutch authority in *Henri Viljoen (Pty) Ltd v Awerbuch Bros* (1953 (2) SA 151 (O) par 169H) precludes those with an indirect financial interest from joining or intervening. Insofar as RSI may potentially benefit financially, depending on the outcome of *R K v Minister of Basic Education* (*supra*) and the myriad conditions affecting the litigation, its financial outlook cannot be said to depend directly on the *R K v Minister of Basic Education* (*supra*) judgment. In a rather ironic twist, the SCA found that a claim based on emotional shock does indeed lie in our law of delict. Whether RSI's submissions were admitted or not made no difference in the end. The outcome of the litigation in the class action suit in which RSI is involved might ultimately still benefit the firm, bolstering the argument that RSI's benefit was in any event of an indirect nature.

If RSI's interest was not direct and substantial, is precluded from joinder or intervention by the rule in *Henri Viljoen (Pty) Ltd v Awerbuch Bros* (*supra*), and does not amount to a partisan political spat such as in *National Treasury v Opposition to Urban Tolling Alliance* (*supra*), where does it fit in? Given the generous approach to assessing the interest of an *amicus (National Treasury v Opposition to Urban Tolling Alliance supra* par 15)*,* it is submitted that RSI was well placed to assess the applicable law. It faced a similar case, and if it is accepted that *amici* do act with a measure of self-interest, RSI still acted in the best interests of its indignant clients. It did so by submitting a brief that may eventually urge its similar class action towards a less litigious and settled end, saving both time and money. Additionally, RSI's practitioners offered to lead the courts to law, which is the primary duty of the legal practitioner. It is finally submitted that if an indirect financial interest is enough to disqualify a potential *amicus*, particularly legal practitioners, it would cast a chilling effect on lawyers willing to provide courts with expert input. It would simply set the bar too high and exclude valuable potential *amici* who are best placed to lead courts to law.

4 Conclusion

The SCA in *R K v Minister of Basic Education* (*supra*) illustrates how the "single-system-of-law" principle operates when constitutional considerations beg vindication through the common law. It shows that the common law may be flexible enough in various instances to come to the aid of parties who are constitutionally aggrieved. If the outcome prescribed by the common law is inadequate, unacceptable, or unjustifiable, given the implication of constitutional rights, the development of the common law will have to be considered by the court in view of relevant constitutional rights. Thus, apart from the courts developing a normative framework for decisions, the courts should always take into consideration the effect of the Constitution on the common law.

However, the sound application of our sources of law in accordance with the "single-system-of-law" approach should not lead to courts skimming over adjectival details. The adjectival law, *in casu* the adjudication of *amicus* applications and providing the correct declaratory relief, is essential to ensure that public trials are fair in all respects. A just outcome on most substantial points does not justify a less-than-thorough approach to matters of procedure. The SCA's finding shows how a conflation of two wholly different forms of declaratory relief can deprive a party of constitutionally mandated relief, which was probably due on these facts. Lastly, the incorrect application of law relating to *amici curiae* created precedent that may actively discourage legal practitioners from assisting courts with intelligent legal development, which indeed is the profession's finest skill and foremost duty.

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PRINCIPLES OF RESTRICTIVE COVENANTS AND THE RIGHTS OF AN EMPLOYEE IN THE WORKPLACE

Shoprite Checkers (Pty) Ltd v Kgatle [2023] ZAWCHC 159

1 Introduction

Indubitably, employees have been subjected to ill treatment and improper working conditions by their employers. Prior to South Africa attaining full democracy and adopting the Constitution of the Republic of South Africa, 1996 (the Constitution) as supreme law, and the passing of post-democratic labour legislation, employees suffered at the hands of their employers. Section 23 of the Constitution, dealing with labour relations, guarantees certain fundamental rights for employees in the workplace. Furthermore, the Labour Relations Act (66 of 1995), read together with the Basic Conditions of Employment Act (75 of 1997), has key provisions aimed at protecting and promoting the rights of employees in the workplace. Non-compete agreements, which can lawfully be introduced by an employer in a contract of employment, find difficult application, particularly because the South African government, especially the legislative branch, has travelled lengths to uphold and protect the rights of employees. In terms of the law, employers have the right to include non-compete agreements in the employment contract. The rationale for non-compete agreements is to prevent an employee from moving to a different employer in a similar trade or business to that of the employer after the employee's contract of employment is terminated either by the employee or the employer. The question that is most raised in disputes regarding the enforcement of non-compete agreements is whether the agreement violates the employee's right to work in an occupation of their choice. Another equally important consideration regarding non-compete agreements is whether such agreements unnecessarily limit the employee's chances of being economically active and of providing for themselves, and possibly dependants.

In this light, this case note reviews the judgment in *Shoprite Checkers (Pty) Ltd v Kgatle* ([2023] ZAWCHC 159). This case is significant in the South African context since it not only revisits some of the important principles of non-compete agreements, but does so having regard to the rights of employees. What is commendable in this case is the court's readiness to protect the rights of the employee in question. However, before analysing the case, it is essential to restate some of the legal principles of both contract law and employment law.

2 Principles of contract

The law of contract is based on several general notions, the first being privity of contract. Privity of contract simply means that an agreement between parties of a particular contract entitles them to bring lawsuits against each other, to the exclusion of third parties; accordingly, persons who are not parties to an employment contract do not have a say in the issues pertaining to the contractual relationship between the contracting parties. For instance, no third party may intervene in the affairs of an employment relationship that flow from the employment contract. Another equally important element of a contract is the *caveat subscriptor* principle. This principle states that whoever signs an agreement must be aware of what they sign and must equally be bound by the terms of the agreement that they have signed. Lastly, the principle of sanctity of contract needs consideration. This principle requires parties to honour their contractual obligations, failing which one can take the other to court on the basis of a breach of contract. A breach of contract refers to the failure by one or both parties to a contract to fulfil their contractual obligations. There are at least five common breaches of contract – namely, *mora debitoris*, *mora creditoris*, repudiation, positive malperformance and making performance impossible. Breaching a non-compete agreement can be classified as *obligatio non faciendi*. This type of breach of contract may fall under positive malperformance, in terms of which the debtor performs an act from which they are lawfully required to restrain themselves. Argued differently, a breach of a non-compete agreement may also be classified as repudiation, which in essence refers to a situation where a party to a contract, either through words or conduct, behaves in a manner indicating they no longer wish to be bound to the contract or a particular contractual term. Regardless of the classification of the breach, failing to comply with a non-compete contract or clause will result in a breach of contract, and subsequently be followed by the ordinary remedies for breach of contract.

3 Principles of employment law

At the dawn of democracy, South Africans in all spheres attained freedom. This freedom extended to the labour market, where employees now have rights such as the right to equal pay for equal work, the right to good working conditions and the right not to be unfairly dismissed, among others. Historically, workers in South Africa have been victims of slavery and unfair treatment. Thus, after the installation of democratic government in 1994, South Africa had to take legislative reforms to recognise and protect the rights and working conditions of employees. Generally, it is understood that an employer is in a position of authority and carries more bargaining power than do employees when negotiating terms of the employment contract. It is against this background and historical inadequacies that the courts seek to protect the rights of employees. Employees are sometimes viewed as receiving unfairly beneficial treatment when compared with the treatment to which employers are subjected. Where non-compete agreements are concerned, one's first thought may well be that an employer wants to ill-treat an employee by unfairly restricting the latter's freedom of occupation. This

reasoning is supported by several South African judgments in which the court, at the expense of an employer, refused to enforce non-compete agreements (see *Savvy Insurance Brokers (Pty) Ltd v Fourie* [2022] ZALCJHB 222; *Med 24-7 (Pty) Ltd v Kruger* [2022] ZAFSHC 79; *Forsure (Pty) Ltd v Puckle* [2022] ZALCJHB 221; and *DIY Superstores (Pty) Ltd v Kruger* ([2022] ZAFSHC 75) – all cases where the courts have dismissed an application for the enforcement of non-compete agreements).

These cases show that the courts consider employees to be the weaker partners in the employment relationship.

In cases such as *Dust A Side Partnership v Ludik* ([2014] ZALCJHB 97), the court, though finding that the employee had breached a non-compete clause, was hesitant to order specific performance. This is particularly because of the financial hardship the employee could suffer if ordered to leave employment with the new employer. In other cases, such as *AJ Charnaud & Company (Pty) Ltd v Van der Merwe* ([2020] ZALCJHB 1) and *SA Kalk and GIPS (Edms) Bpk v Krog* ([2017] ZALCCT 30), the court found that the applicant (employer) had failed to prove the existence of a restraint-of-trade agreement.

Considering the above, the courts evidently remain hesitant to enforce non-compete agreements, especially where enforcement will result in a failure to protect the rights and interests of an ex-employee. Again, one has to bear in mind that the employee is the weaker party in the employment relationship.

4 Non-compete agreements

Non-compete agreements, commonly known as restraint-of-trade contracts, operate in employment relationships or sale-of-business contracts. For instance, where parties enter into a contract of employment, they may agree that, after the termination of their employment relationship, the employee will not take up employment with a different employer operating in the same industry or field of business. Similarly, in sale-of-business contracts, a current business owner selling their business may undertake not to compete with a new owner by agreeing not to operate in the same trade or industry. There are several factors that courts look into when dealing with the enforcement of non-compete agreements.

In one of the leading cases, the court said:

> "A contractual restraint curtailing the freedom of a former employee to do the work for which he is qualified will be held to be unreasonable, contrary to the public interest and therefore unenforceable on grounds of public policy if the ex-employee (the covenantor) proves that at the time enforcement is sought, the restraint is directed solely to the restriction of fair competition with the ex-employer (the covenantee); and that the restraint is not at that time reasonably necessary for the legitimate protection of the covenantee's protectable proprietary interests, being his goodwill in the form of trade connection, and his trade secrets. If it appears that such a protectable interest then exists and that the restraint is in terms wider than is then reasonably necessary for the protection thereof, the Court may enforce any part of the restraint that nevertheless appears to remain reasonably necessary for that purpose." (*Magna Alloys and Research v Ellis* (1984 (4) SA 874 (A))

In other words, a non-compete agreement will not be enforceable where it is meant simply to prevent healthy competition. There should be justifiable reasons for restricting a person's freedom to trade or run a business. The test known as the Basson test was formulated in the case of *Basson v Chilwan* (1993 (3) SA 742 (A)) as follows:

> "a. Is there an interest of the one party, which is deserving of protection at the termination of the agreement?
> b. Is such interest being prejudiced by the other party?
> c. If so, does such interest so weigh up qualitatively and quantitatively against the interest of the latter party that the latter should not be economically inactive and unproductive?
> d. Is there another facet of public policy having nothing to do with the relationship between the parties but which requires that the restraint should either be maintained or rejected?" (*Basson v Chilwan supra* 7761 I–J)

In terms of the principles laid down in the *Magna Alloys* case, an employer bears a reverse onus to prove that there are indeed interests worthy of protection by a non-compete agreement, and it is not simply meant to prevent fair competition.

Furthermore, in the case of *Louw and Co (Pty) Ltd v Richter* ([2010] ZANCHC 54), the court said:

> "Covenants in restraint of trade are valid. Like all other contractual stipulations, however, they are unenforceable when, and to the extent that, their enforcement would be contrary to public policy. It is against public policy to enforce a covenant which is unreasonable, one which unreasonably restricts the covenantor's freedom to trade or to work. In so far as it has that effect, the covenant will not therefore be enforced. Whether it is indeed unreasonable must be determined with reference to the circumstances of the case. Such circumstances are not limited to those that existed when the parties entered into the covenant. Account must also be taken of what has happened since then and, in particular, of the situation prevailing at the time enforcement is sought." (*Louw and Co (Pty) Ltd v Richter supra* 243B–D)

Thus, the enforcement of non-compete agreements must be judged against the principles of reasonableness and the principles of public policy.

5 Facts

The first respondent (the employee) received a bursary from the applicant to complete his honours degree at the University of Stellenbosch. He then worked as a trainee for the applicant in its logistics section, and was promoted to the position of Design Planner on 1 July 2021. At this point, he signed an employment contract that contained two covenants relating to confidentiality and restraint of trade, respectively. The employee subsequently resigned, claiming that there were no opportunities for promotion with the applicant, that he was underpaid, and that he lacked a clear professional path. His resignation was motivated by these factors. He indicated that, with effect from 3 April 2023, he would be taking up employment with the second respondent, a significant and direct competitor of the applicant. This was notwithstanding that the restraint of trade forbade

the first respondent from working for any company that marketed and distributed identical goods to those of the applicant through the retail chain.

The applicant thus brought an urgent application to enforce the confidentiality agreement and trade-restraint undertaking. The second respondent, one of the largest retail chain stores, is in direct competition with the trade carried out by the applicant, and sells, among other things, the same pharmaceutical and household products as the applicant. The first respondent's employment with the applicant was extended to 2 May 2023 because (a) the applicant undertook to pay his remuneration for April 2023 and (b) the second respondent was prepared to keep his position open for him, pending the outcome of the interdict application by the applicant. The application also agreed to re-appoint the first respondent to his old position if the restraint were enforced.

6 Legal counsel's arguments

The applicant argued that the first respondent was legally bound by the terms of their contract. This is because the applicant contributed to the first respondent's education, and trusted him with sensitive information. Therefore, it was contended, his agreements with the applicant must be upheld.

The applicant claimed that if the first respondent wished to prove that application of the restraint in these circumstances was against public policy, he had to provide a sufficient factual basis on the papers. The applicant claimed that all of the first respondent's defences were technical and in need of more legal and factual support. This was claimed to be the case, among other things, owing to the first respondent's admission that the applicant had granted him access to its private information, which needed to be protected. This is the reason the first respondent reiterated his confidentiality commitment to the applicant, both before the application was launched and during the application process.

The first respondent's main defence was that the restraint should not be implemented for public policy considerations. He argued that even if the second respondent had access to the applicant's trade secrets and confidential information, it would not stand to earn anything from it. This is one reason that enforcing restraints may be against public policy.

The first respondent averred that it would be unfair, unreasonable and not in the public interest to enforce the restraint against him because: (a) he had given an undertaking that he would keep the applicant's information confidential and not share it with the second respondent; (b) his undertaking was sufficient protection for the applicant; (c) the enforcement of the restraint was unreasonable; (d) the confidential information he may have been exposed to was of no commercial benefit to the second respondent and, (e) taking into account the first respondent's interests in comparison to the applicant's, both qualitatively and quantitatively, it did not justify applying the restraint to his disadvantage.

The applicant claimed that the first respondent had received a promotion to a managerial position. He was therefore obliged to sign both covenants –

the restraint and the confidential undertaking – on which the petitioner had relied.

The first respondent made the following arguments as to why his restraint should not be enforced: He left the applicant for a number of reasons, including: (a) his youth; (b) the short amount of time he had worked there; (c) the fact that he was not a senior employee; and (d) his dissatisfaction with his job and the circumstances surrounding it. According to the applicant, the first respondent needed to make good on his promise.

According to the applicant, the first respondent must honour his undertaking, since the applicant had promoted him and given him access to confidential information.

7 Court's findings

The court concluded that it had unquestionably been shown that the first respondent intended to work in the same field as the second respondent, which is a direct rival of the applicant with similar expansionist goals and tactics, making the enforcement of the restraint (it was argued) in the public interest. Therefore, whether to enforce the restraint was the main question in this application.

The court considered the fact that the applicant remained ready to accept a withdrawal of the first respondent's resignation, and to retain his position. Thus, the court concluded that it was necessary to enforce the restraint on the basis of public policy in both a qualitative and quantitative sense. The balance between upholding constitutional principles regarding the restraint agreement and trade freedom was also taken into consideration by the court. The court held that the rule of law and legality norms were to be observed.

Furthermore, it was in the public interest that the applicant be encouraged to promote the first respondent into a position of trust. The applicant's reasons for the terms of the restraint were not rendered against public policy by the first respondent's allegations that he did not possess the knowledge. This was because the applicant required the first respondent to sign the restraint covenant when he was promoted.

Moreover, according to the court, the contract concluded between the applicant and the first respondent undoubtedly served an acceptable employment purpose for the benefit of both parties at the time that the applicant promoted the first respondent. The enforceability of contracts is essential both for commerce and fair employment practices.

As far as the principles of public policy are concerned, the court was not convinced that the restraint covenant was contrary to the principles of public policy in the circumstances of the case. The basis of this reasoning was that the first respondent, having been fully informed, elected voluntarily to consent to the terms of the restraint covenant; the first respondent expressly agreed and accepted that he understood what he agreed to in his employment contract and restraint covenant.

The court concluded that it is evident that the parties to the contract and clause in question possessed equal bargaining power, and they must have understood what they agreed to.

For these reasons, the court granted the interim and final relief contended for by the applicant against the first respondent and costs in addition thereto. Thus, the restraint-of-trade agreement was enforced against the employee.

8 Analysis

Parties to an employment contract essentially enter into such a contract freely and voluntarily. There is therefore an obligation on the parties to abide by the terms of such an employment contract. Whether an undertaking not to compete with your employer's business is included by way of an ancillary agreement or it forms part of the employment contract as a clause, parties need to honour the provisions of such restrictive covenants. Failure to do so without justifiable reasons allows an employer to apply for an interdict and any other applicable remedies for breach of a restrictive covenant. The court correctly interdicted the first respondent from continuing to breach the restrictive covenant.

Post-democracy and with the adoption of the Constitution, it has become customary for courts to consider public policy when adjudicating disputes arising from private agreements. Although the employment contract is a private formulation between employer and employee, whenever there is a dispute arising out of such a contract, the court considers the broader interests of society. In the case under review, the court has properly done this by decisively holding that the enforcement of a restraint-of-trade clause is not contrary to public interests. This pronouncement by the court is crucial considering that public interests and policy are key considerations in determining the legality of non-compete agreements. Failure to prove that a non-compete agreement is against public policy will result in the court enforcing such restraint clause or agreement.

The first respondent objected to the enforcement of the restrictive covenant. Ordinarily, the restraint denier is required to provide reasons why a restrictive covenant should not be enforced. However, counsel for the first respondent did not adequately set out the grounds on which he relied in challenging the enforcement of the restrictive covenant. The grounds raised – namely, (a) the youth of the first respondent; (b) the short amount of time he had worked there; (c) the fact that he was not a senior employee; and (d) his dissatisfaction with his job and the circumstances surrounding it – were not sufficient to deny the restrictive covenant. These grounds could be ancillary grounds but could not be said to be the main grounds for having the restrictive covenant set aside. A display of facts and evidence proving the unreasonableness of the restrictive covenant could have enhanced the first respondent's arguments. Furthermore, the argument that the enforcement of the restrictive covenant would be contrary to public policy should have been adequately debated. Simply arguing that a restraint is contrary to public policy without substantiated evidence is futile, as in the case under review.

At face value, restrictive covenants may seem unnecessary to prevent an ex-employee from pursuing the career or occupation of their choice.

However, a proper analysis of a non-compete agreement suggests that there is sometimes a need to protect an employer's business interests, especially where the employer has interests worthy of protection (*Basson v Chilwan supra*). Both the employer and the employee have commercial and monetary interests, and both need protection. The employer and the employee each need first to establish their interests and to provide evidence justifying the protection of such interests. The employer has commercial interests and desires to protect its business-related assets such as trade secrets, whereas the employee intends to earn a salary through finding new or different employment. Failure to establish commercial and monetary interests and the need for protection of same will result in either the employer or the employee being denied protection of such commercial or monetary interests.

9 Concluding remarks

Employees must not enter into employment contracts and non-compete agreements in haste. Owing to the nature of contracts, and surrounding principles such as sanctity of contract and the *caveat subscriptor* rule, employees risk being held to non-compete agreements they have signed.

Although not expressly apparent from the judgment, employers should also exercise caution when drafting employment contracts and restraint-of-trade agreements, and should pay attention to whether such restraint agreements are included as a clause in the contract of employment or whether they are intended to operate ancillary to the employment contract. Furthermore, a careful consideration must precede any amendments to a contract of employment generally, or restraint-of-trade agreement specifically, since such changes could potentially and materially affect the conditions of employment. Needless to say, employment contracts and restraint clauses should be properly designed. The conduct of both employer and employee after drafting a non-compete agreement, as well as at the time of enforcement of such an agreement, will be considered by the courts when dealing with disputes in relation to such agreements.

What is unique and commendable about the case under review is the court's willingness to protect the interests of the employer. Although not the first case in which the interests of the employer have been found to outweigh those of the employee, it is commendable that courts continue to consider an employer's interests worthy of protection, contrary to popular belief that an employee's rights outweigh those of an employer. One cannot credibly argue against the fact that employees as a category have suffered severely at the hands of employers, and therefore require some protection. Thus, judicial officers must interpret and apply legal principles, both from statute and the common law, in a manner that recognises and promotes the rights of employees. However, this does not take away an employer's rights and

the protection that should be afforded to an employer in exercising and enforcing its rights.

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THE TIMING OF A PROPOSED SETTLEMENT IN INSOLVENCY CAN BE A GAMBLE:

Corruseal Corrugated KZN v Zakharov [2023] ZAWCHC 48

1 Introduction

In *Corruseal Corrugated KZN v Zakharov* ([2023] ZAWCHC 48 (*Corruseal Corrugated*)), the court considered whether a donation made to a debtor after a provisional sequestration order (but before the final order of sequestration) with a view to enabling the debtor to settle debts against their estate did in fact settle the debtor's debts to the sequestrating creditor, thereby leaving the sequestrating creditor without *locus standi* to pursue a final order of sequestration. The court also enquired whether the respondent debtor was factually insolvent. The general legal position is that, upon sequestration of a person's estate, all their assets at the date of sequestration and all assets acquired after (during) sequestration (except for exempt or excluded assets) vest in the Master of the High Court, and thereafter in the trustee once appointed (s 20 of the Insolvency Act 24 of 1936 (Insolvency Act); Smith, Van der Linde and Calitz *Hockly's Law of Insolvency* (2022) par 5.2). Thus, a donation accepted and received by the insolvent after sequestration also vests in the insolvent estate (Bertelsmann, Evans, Harris, Kelly-Louw, Loubser, Roestoff, Smith, Stander, Calitz, De la Rey and Steyn *Mars: The Law of Insolvency in South Africa* 10ed (2019) par 9.5).

This case note discusses the judgment in *Corruseal Corrugated*, focusing on whether the court should have granted the final sequestration order under the circumstances, and if the matter should or could have been approached differently. The pertinent aspect to be addressed in this case note is, however, to consider the construction to be used if a third party, perhaps a family member or a friend, wants to give financial assistance to a debtor to avoid the final sequestration of their estate following an order of provisional sequestration.

In *Corruseal Corrugated*, the respondent, Mr Zakharov, was at the helm of a company called Exotic Fruit (Pty) Ltd (Exotic), which was in the business of exporting local fruit to various overseas destinations. The applicants, Corruseal KZN and Corruseal Gauteng, supplied packaging materials to Exotic in terms of a credit facility in respect of which, on 21 April 2016, Zakharov put up a personal suretyship for Exotic's future indebtedness to both applicants. By October 2019, in respect of goods sold and delivered under the credit facility granted, Corruseal KZN and Corruseal Gauteng were owed more than R16 000 000 and R1 200 000 respectively by Exotic (par 2).

In an application made by one of Exotic's creditors, Morgan Cargo (Pty) Ltd, Exotic was liquidated on 25 October 2019. On 27 November 2019, after the respondent, Mr Zakharov, had failed to satisfy a demand for payment, Corruseal KZN and Corruseal Gauteng, relying on the suretyship, issued summons against the respondent in the current application for compulsory sequestration in the amounts of R16 759 921.66 and R1 209 839.10 respectively (par 3). After the respondent filed his plea opposing the claims, Corruseal KZN and Corruseal Gauteng each sought summary judgment against him (par 4). In opposing that application, the respondent alleged that his suretyship with Corruseal KZN and Corruseal Gauteng was limited to R500 000 in respect of each company, and that Corruseal Gauteng had granted Exotic credit over that amount and, in so doing, had prejudiced him as surety (par 4).

On 25 May 2021, the court granted summary judgment against the respondent in this application in the sum of R500 000 in each case, and allowed the respondent to defend the claims on the balance. The court did not provide any reasons in the summary judgment proceedings, and applications for leave to appeal the judgments were refused in the High Court and also, on 3 November 2021, by the Supreme Court of Appeal (par 5). Subsequently, two warrants of execution were issued against the respondent by Corruseal KZN and Corruseal Gauteng for payment to each of the amount of R601 232.95, being capital of R500 000 plus interest (par 6).

On 1 December 2021, when the Sheriff attended at the respondent's home in Hout Bay demanding payment of the two judgment debts, the respondent informed the Sheriff that he was unable to pay the amounts claimed. He alleged that the movables in his residence belonged to Chestnut Hill (Pty) Ltd. Therefore, the Sheriff filed *nulla bona* returns on each of the writs (par 6).

On 14 March 2022, Corruseal KZN and Corruseal Gauteng jointly applied for the provisional sequestration of the respondent's estate (par 7). As the application was opposed, it was sent to the semi-urgent roll for hearing on 3 August 2022, when the provisional order was granted. The return day of the provisional order of sequestration was originally set for 3 September 2022 but, by agreement, was extended to 22 February 2023 (par 7). However, when the provisional order was granted on 3 August 2022, no judgment was delivered, and neither party requested reasons (par 1). Thus, on the return day, the court did not know the basis for the provisional finding that the respondent was insolvent (par 1).

On 20 October 2022, the respondent filed a supplementary answering affidavit, to which the applicants (collectively, Corruseal) replied in a supplementary affidavit filed early in February 2023 (par 8). Although the applicants' replying supplementary affidavit was out of time, the court accepted it (par 8). Subsequently, on 22 February 2023, Humansdorp Co-Operative Ltd, another creditor of Exotic, applied to intervene in this matter based on a suretyship it held from the respondent. However, that application was withdrawn (par 9).

On the return day, the respondent argued that, in the time since the

provisional order had been made, Corruseal's claims had been paid in full and that Corruseal accordingly no longer had the requisite *locus standi* to move for a final order. Furthermore, Corruseal had failed to establish beyond reasonable doubt that the respondent was factually insolvent (par 10).

2 Issues before the court

On the return day, the issues before the court were:

a) whether Corruseal had *locus standi* to apply for a final sequestration order against the estate of the respondent; and

b) whether the respondent was factually insolvent.

3 Judgment

Gamble J referred to the respondent's supplementary answering affidavit of 18 October 2022, which stated:

> "5. After the provisional Order was granted in this application, I took further legal advice and mentioned my provisional sequestration to a number of my friends and family. During the course of my discussions with a business associate and friend of mine, he informed me that he was in the position to assist me by making a payment to the Applicants in order to discharge the amounts comprising the judgments granted against me in case numbers 21281/2019 and 21282/2019 in the above Honourable Court.
>
> 6. I have not disclosed the identity of that friend and business associate of mine as he does not wish his name to be disclosed in these papers. That associate is the director and shareholder of an entity incorporated in Dubai, namely, Evergreen LLC (Evergreen).
>
> 7. On 12 August 2022, my attorneys of record wrote a letter to the Applicants' attorneys in which they asked for a calculation of the interest that accrued on the judgment debts which I have referred to above. A copy of that correspondence is attached marked "SA 1".
>
> 8. On 23 August 2022, my attorneys received a response from the Applicants' attorneys. A copy of that correspondence is attached marked "SA2". In that correspondence, the Applicants' attorneys:
>
> 8.1 Asked whether I would be making payment, alternatively, that my attorneys provide the identity of the person or entity which would be making the payment concerned.
>
> 8.2 Stated that they proposed that an interest calculation be performed by my attorneys but, without prejudice to their rights, attach an interest calculation by the Applicants.
>
> 9. …
>
> 10. Thereafter, Evergreen made payment into my attorneys' of record's trust account and on 25 August 2022 an amount of R1 283 286,88 was paid by my attorneys into the Applicant's attorney's trust account. That amount comprised the capital in respect of the judgments together with interest as calculated by the Applicants' attorneys.
>
> 11. On 25 August 2022, my attorneys sent a letter to the Applicants' attorneys. A copy of that letter is attached marked "SA 3". I ask that the contents of that letter be read as if specifically incorporated into this affidavit. In that letter, my attorneys:

11.1 Gave details of the entity which paid the amount in question on my behalf and that the amount paid for constituted a donation by Evergreen to myself.

11.2 Stated that I had no interest in Evergreen and that I am not a director and shareholder of that entity.

11.3 Tendered unconditionally payment of all costs as provided for in the judgments as taxed or agreed together with any execution costs incurred by the Applicants to date.

11.4 Stated that in the event that the Applicants disputed the interest calculation that they should advise my attorneys as a matter of urgency.

11.5 Attached proof of payment of the amount into those attorneys' trust account.

11.6 Called upon the Applicants to withdraw this application, failing which the supplementary affidavit would be delivered and that I would asked that the application be dismissed and the Rule nisi discharged.

12. As is apparent from that correspondence, payment of the amount of the judgments in question together with interest has been paid. Costs in respect of that application has (sic) also been tendered. Accordingly, there is no liquidated amount which is still owing to the Applicants.

13. My attorneys did not receive any response to that correspondence, despite requesting a response on 26 August 2022. I point out that to the extent to which the payment and tender is not satisfactory to the Applicants, and any further amounts that they demonstrate they are legally entitled to by virtue of the judgments can and will be paid to them.

14. Furthermore, I have not incurred any liability in respect of Evergreen and the amount which is being paid is a donation in order to avoid the indignity of sequestration. I have not incurred any liability to Evergreen or any other person or entity in respect of that amount.

15. Accordingly, liquidated amounts upon which the applicants bring this application have been discharged. I am advised that the balance of the amounts the Applicants allege are owned by me to them (which I deny) are the subject matter of dispute in the action proceedings which have been launched by the First and Second Applicant respectively. Those disputes will be dealt with in those proceedings in respect of which, I point out, the Applicants have not taken any further steps." (par 11)

The material portion of the letter from Dockrat Attorneys referred to by the respondent as Annexure SA 1 in the supplementary answering affidavit stated:

"2. Kindly, and as a matter of urgency provide us with a calculation of the interest that will have accrued on the judgment debt up to and including 15 August 2022, and up to and including 22 August 2022.

3. Kindly also furnish us with your trust account details." (par 12)

The material portion of the reply by Werksmans Attorneys to Dockrat Attorneys (referred to by the respondent as Annexure SA 2) stated:

"2. We note that you have requested our trust account details, and we assume that same is requested for purposes of making payment. In this regard, kindly advise whether your client would be making such payment, alternatively furnish us with the identity of the person or entity which will be making such payment, and the basis upon which such payment is being made.

3. …

4. Our client's rights remain expressly reserved herein." (par 13)

In the further reply by Dockrat Attorneys (referred to by the respondent as Annexure SA 3 in the supplementary answering affidavit), the material portion stated:

"2. It is correct that we requested your trust account details in order to make payment of the full amount of the judgment debts under the above case numbers, together with interest.
3. We have been instructed to make such payment by an entity incorporated in Dubai, namely Evergreen AZ Incorporated (Evergreen) on the basis that such payment constitutes financial assistance in the form of a donation by Evergreen to Mr. E.V. Zakharov. Mr. E.V. Zakharov has no interest in Evergreen and is not a director nor a shareholder of that entity.
4. We have in addition been instructed to tender unconditionally as we hereby do, payment of all costs provided for in the judgments, forthwith upon agreement or taxation together with all execution costs incurred by the judgment creditors to date.
5. …
6. A copy of the proof of payment into your trust account is annexed hereto.
7. Arising from this payment, your clients' *lack locus* standi to proceed with the sequestration application against our client under case number 2108/2022. We accordingly court upon your clients to withdraw that application and discharge the rule *nisi*.
8. In the event that your clients do not agree to withdraw the sequestration application, we propose that it be postponed to the semi-urgent roll and a timetable agreed for the further conduct of the matter. Should your clients not agree to that sensible proposal our client shall deliver a supplementary affidavit and seek an order on 2 September 2022 that the application be dismissed and the rule *nisi* discharged, alternatively that the matter be postponed as proposed and that your clients pay the costs occasioned by the hearing on 2 September 2022." (par 14)

Gamble J said that, even though there was no reply to the last letter, it was fair to infer that the postponement of the matter to 2 September 2022 was to allow the parties to assess their respective positions in light of the developments (par 15). He held that Corruseal's response to the respondent's *locus standi* argument was set out in their replying affidavit of 7 February 2023 in Annexure SR 10, which was a letter from Werksmans Attorneys to Dockrat Attorneys dated the same day (par 16). The material portion of the letter stated:

"4. We in any event point out that, as a consequence of your client's provisional sequestration, your client cannot validly tender payment personally in respect of the aforementioned bills of cost as your client's estate vests in the Master of the High Court, Cape Town.
5. Likewise, any amounts paid and/or donated by or on behalf of your client, subsequent to his provisional sequestration, vested in the Master and could not be used so as to extinguish any debt owed to our client. Accordingly, receipt of such payments were received by our client without prejudice to any of its rights, as per previous discussions between our offices.
6. Our client's rights remain reserved." (par 17)

Furthermore, Gamble J held that neither the supplementary affidavit nor the correspondence attached thereto informed the court of the current status of the money paid into Werksmans Attorneys' trust account (par 17). Therefore, the court asked the parties about the state of affairs, and it appeared that, on 25 August 2022, Dockrat Attorneys paid R1 283 286.88 into Werksmans Attorneys' trust account, which payment was verified by a "proof of payment" attached to Annexure SA 3. However, the source of the funds was not verified by any document (par 17). Gamble J said that it was only the say-so of the respondent, in paragraphs 10 and 11 of the supplementary answering affidavit, that Evergreen had paid the money into Dockrat Attorneys' trust account. The amount remained in Werksmans Attorneys' trust account and had not been paid to any party (par 17).

The applicants contended that the position was fairly straightforward: Evergreen had made a donation to the respondent, which the respondent had accepted (par 18). They reasoned that a donation is a contract like any other, and requires the donee to accept the benefit bestowed upon him/her, notwithstanding that the donor intended it to be an act of sheer generosity (par 18). Gamble J said that there was no debate that the money that Evergreen allegedly put up was an out-and-out donation to the respondent, intended to be immediately available for his benefit and with no obligation on the latter, having accepted same, to repay either the whole or part thereof (par 18).

The applicants further contended that the money was paid by Evergreen to Dockrat Attorneys, who received it on behalf of the respondent (par 19). Thereafter, the respondent's attorneys paid the money to Werksmans Attorneys, believing that the respondent's indebtedness to Corruseal would be wiped out *pari passu.* However, the applicants argued, that the problem was that the respondent's acceptance of the alleged donation from Evergreen and the alleged payment of the donation into his attorneys' trust account, meant that he acquired property after his provisional sequestration (par 19). That conduct, the applicants argued, fell foul of the provisions of section 20 of the Insolvency Act (par 19). Section 20 provides:

> "20 Effect of sequestration on insolvent's property
>
> (1) The effect of the sequestration of the estate of an insolvent shall be–
>
> (a) to divest the insolvent of his estate and to vest it in the Master until a trustee has been appointed, and, upon the appointment of a trustee, to vest the estate in him …
>
> (2) For the purposes of subsection (1) the estate of an insolvent shall include–
>
> (a) all property of the insolvent at the date of the sequestration, including property or the proceeds thereof which are in the hands of a sheriff or a messenger under writ of attachment;
>
> (b) all property which the insolvent may acquire or which may accrue to him during the sequestration, except as otherwise provided in section twenty-three."

Gamble J held that it was not argued that the donation was saved by the provisions of section 23 of the Insolvency Act (par 19). Gamble J referred to *Ex parte Vrey* (1947 (4) SA 648 650 (C)), where Herbstein J had to determine whether a donation made to an insolvent during sequestration

vested in him personally (par 20). It was held unequivocally in that case that it did not, but vested in his trustee. The decision was cited with approval by Meskin *Insolvency Law* ((2023) 5.39 par 1.13 (par 20)). Therefore, Gamble J held that the issue was not controversial, a donation made to the insolvent during insolvency falls and vests in the provisional trustee. He held that the only issue was whether the money held in trust by Werksmans Attorneys had been donated to the respondent (par 21).

The respondent then argued that, notwithstanding what Dockrat Attorneys and he had said, the court should have had regard to what the parties really intended (par 22). He said that the evidence continuously indicated that Evergreen wished to spare the respondent the spectre of a final order of sequestration, hence Evergreen's undertaking to settle the respondent's debts to Corruseal, which is permissible in law (par 22).

In support of the applicant's contention, Gamble J held that it was clear to him that Evergreen did not make payment to the creditor in settlement of its claim against the insolvent. Instead, it donated money directly to the insolvent, and that resulted in the payment falling into the hands of his trustee. Consequently, Gamble J concluded that Corruseal's debt had not been settled and it retained the requisite *locus standi* to move for a final order of sequestration (par 23).

Gamble J then addressed the second issue in the case, which was whether the respondent's insolvency had been established. He held that it is trite that on a return day, an applicant must establish the criteria required for a final order of sequestration on a balance of probabilities (par 24). He referred to Meskin *Insolvency Law* (2.1.13 (par 24)), wherein the criteria are described as follows:

> "On the return day of the provisional order the Court has a discretion to finally sequestrate the respondent's estate provided it is satisfied as to the three essential elements of the applicant's case, i.e. that the applicant 'has established against [the respondent] a claim' upon the basis of which one is able competently to seek sequestration, that the respondent has committed an act of insolvency or is actually insolvent and that there is reason to believe that "it will be to the advantage of creditors of the debtor if his estate is sequestrated'." (par 24)

With regard to the first criterion – that a claim over R100 must exist against the respondent – Gamble J held that it had been dealt with conclusively in the finding about Corruseal's *locus standi* (par 25).

As regards the second criterion – that the respondent must have committed an act of insolvency or been actually insolvent – Gamble J held that Corruseal addressed it by relying on section 8(*b*) of the Insolvency Act and presentation of the Sheriff's *nulla bona* returns (par 25). He held that the respondent did not engage with the allegation, nor did he in any manner attack the validity of the *nulla bona* returns in his answering affidavit. The respondent did not even answer Corruseal's conclusion in par 30 of its founding affidavit that he had committed an act of insolvency in terms of section 8(*b*) of the Insolvency Act. Therefore, Gamble J held that the allegation must be taken as admitted (par 25).

With regard to the respondent's argument concerning the *ratio* in *Duchen v Flax* (1938 WLD 119 125) – that a creditor could no longer argue for a final order of sequestration based on a *nulla bona* return once the debt had been settled – Gamble J said that that argument did not apply in this matter because it had been found that the payment by Evergreen fell into the hands of the respondent's provisional trustee. Thus, the debt was not settled (par 26). Gamble J held that Corruseal was therefore permitted to continue to rely on the *nulla bona* returns and that it had been conclusively established that the respondent had committed acts of insolvency as contemplated in section 8(*b*) of the Insolvency Act (par 27).

As to whether it had been established on a balance of probabilities that the respondent was in fact insolvent, Gamble J held that it was true that Corruseal was unable to furnish the court with a comprehensive list of the respondent's assets and liabilities (par 28); Corruseal was able to indicate some of the respondent's liabilities that they were aware of and some assets of which the respondent had disposed; however, actual insolvency could only be established through inference as indicated in *ABSA Bank Ltd v Rhebokskloof (Pty) Ltd* (1993 (4) SA 436 (C) 443B–F):

> "A case for the sequestration of a debtor's estate may be made out from the commission of one or more specified acts of insolvency or on the grounds of actual insolvency, i.e. that his total liabilities (fairly valued) exceed his total assets (fairly valued). The Legislature appreciated the difficulty which faces a creditor, whose dealings with his debtor might fall within a restricted ambit of business activity, in ascertaining the assets versus liabilities position of the latter. In alleviating this difficulty, the statutory provision was made for recognizing certain conduct on the part of the debtor as warranting an application to sequestrate his estate, this by way of introducing the concept of an act of insolvency.
>
> Even, however, where a debtor has not committed an act of insolvency and it is incumbent on his unpaid creditor seeking to sequestrate the former's estate to establish actual insolvency on the requisite balance of probabilities, it is not essential that in order to discharge the onus resting on the creditor if he is to achieve this purpose that he set out chapter and verse (and indeed figures) listing the assets (and their value) and the liabilities (and their value) for he may establish the debtor's insolvency inferentially. There is no exhaustive list of facts from which an inference of insolvency may be drawn, as for example an oral admission of the debt and the failure to discharge it may, in appropriate circumstances which are sufficiently set out, be enough to establish insolvency for the purpose of the prima facie case which the creditor is required to initially make out. It is then for the debtor to rebut this prima facie case and show that his assets have a value exceeding the total sum of his liabilities." (par 28)

The judge in *Rhebokskloof* also cited a well-known passage in a judgment from the former Transvaal Republic, which still holds good more than 115 years on:

> "A debtor's unexplained failure to pay his debts is … a fact to which the Court has always attached much weight in determining the question of solvency. The oft-repeated and, with respect, eminently commonsensical and practical statement of Innes CJ in *De Waard v Andrews &Thienhans Ltd* 1907 TS 727 at 733 is a singularly apt in the instant context, viz:

> 'To my mind the best proof of solvency is that a man should pay his debts; and therefore I always examine in a critical spirit the case of a man who does not pay what he owes'
>
> words which were echoed by Bristowe J in his judgment in the same case, in which he said at 739:
>
> 'After all, the prima facie test of whether a man is solvent or not is whether he pays his debts; and if he cannot pay them, that goes a long way towards proof that he is insolvent.'" (par 30)

Gamble J held that, in this matter, the respondent did not even try to convince the court by attempting to demonstrate that his assets exceeded his liabilities, notwithstanding the *prima facie* case of insolvency set up by the undisputed *nulla bona* returns (par 29). Gamble J also said that there was enough evidence in this case to infer the respondent's insolvency (par 31). Gamble J referred to the fact that, on 4 July 2022, an order for summary judgment in the amounts of R644 193.63 and US$254 648 (the present value of which is around R4.6 million) was granted against the respondent under a suretyship he put up with Morgan Cargo (Pty) Ltd for its exposure to Exotic (par 31). He referred also to the respondent's allegations in his answering affidavit:

> "22.20 The events which resulted in the liquidation of … Exotic Fruit severely set back my financial position. To pay for living expenses in South Africa my son and I both sold our cars and my wife has sold some valuable jewellery. She has been supporting me in South Africa using her funds.
>
> 22.21 I do to earn foreign income in Russia through consultancy work which I performed for a company there, but I do not need to explain why in the present environment those funds cannot be patriated to South Africa easily and used here." (par 31)

Gamble J further referred to the correspondence between Dockrat Attorneys and Werksmans Attorneys in August 2022 – in particular, the respondent's explanation in his supplementary answering affidavit for the purported benevolence of Evergreen:

> "14… (T)he amount which has been paid is a donation in order to avoid the indignity of a sequestration." (par 32)

Thus, Gamble J held that in addition to Corruseal's entitlement to continue relying on section 8(*b*) of the Insolvency Act, Corruseal had also established that the respondent was factually insolvent (par 33).

In relation to the third criterion – that there is reason to believe that "it will be to the advantage of creditors of the debtor if his estate is sequestrated" – Gamble J said that the phrase "benefit to creditors" should be interpreted widely (par 34). He referred to the observation by the learned Judge in *Meskin & Co v Friedman* (1948 (2) SA 555 (W) 559), which was cited with approval by the Constitutional Court in *Stratford v Investec Bank Limited* (2015 (3) SA 1 (CC) 43):

> "Sequestration confers upon the creditors of the insolvent certain advantages… which, though they tend towards the ultimate pecuniary benefit of creditors, are not in themselves of a pecuniary character. Among these is the advantage of full investigation of the insolvency affairs under the very extensive powers of inquiry given by the Act… In my opinion the court must

> satisfy itself that there is a reasonable prospect – not necessarily a likelihood that the prospect which is not too remote – that some pecuniary benefit will result to creditors. It is not necessary to prove that the insolvent has any assets. Even if there are none at all, but there are reasons for thinking that as a result of inquiry under the Act, some may be revealed or recovered for the benefit of creditors, that is sufficient." (par 34)

Gamble J held that an investigation into the respondent's affairs under an enquiry sanctioned by the Insolvency Act might yield some pecuniary benefit for creditors (par 35). This is because the respondent's financial affairs seemed to be controlled by a web of entities and trusts – for example, his furniture and appliances at his home in Hout Bay are owned by Chestnut Hill (Pty) Ltd, a company allegedly controlled by his daughter (para 35). Also, there was already an amount of R1 283 286.88 in the hands of the respondent's trustee that was available for distribution to creditors (par 36). Therefore, Gamble J held, a benefit to creditors had already been established (par 36).

Lastly, Gamble J discussed the court's discretion to refuse to sequestrate the respondent (par 37). He referred to *Orestisolve (Pty) Ltd t/a Essa Investments v NDFT Investments Holdings (Pty) Ltd* (2015 (4) SA 449 (WCC)), where Rogers J, after noting that a creditor whose claim has not been settled is entitled to demand the liquidation of the debtor *ex debito justitiae*, discussed how such a discretion ought to be exercised (par 37). In that case, Rogers J said that although the maxim did not imply an inflexible limitation on a court's discretion, he considered that it

> "conveys no more than that, once a creditor has satisfied the requirements for a liquidation order, the court may not on a whim decline to grant the order … To borrow another judge's memorable phrase, the court 'does not sit under a palm tree' … There must be some particular reason why, despite the making out of the requirements for liquidation, an order is withheld." (par 37)

In this matter, Gamble J agreed with the applicants that there was no reason to exercise his discretion in favour of the respondent (par 38). However, in the circumstances in which the creditors seemed to be circling, it was imperative that the order be granted, and the respondent's financial affairs be investigated (par 38). Therefore, the rule *nisi* was confirmed and the respondent's estate was placed under final sequestration.

4 Commentary

4 1 Vesting of assets and the status of the money

As indicated, section 20 of the Insolvency Act is clear that property acquired by the insolvent before and during sequestration falls into the insolvent estate and vests in the provisional trustee. The estate remains vested in the trustee until the acceptance by creditors of an offer of composition made by the insolvent or until the insolvent's rehabilitation (Bertelsmann *et al Mars: The Law of Insolvency in South Africa* par 9.3; Smith *et al Hockly's Law of Insolvency* par 5.1). This also applies to donations adiated or accepted and received by the insolvent before and during sequestration (Evans "Should a Repudiated Inheritance or Legacy Be Regarded as Property of an Insolvent

Estate?" 2002 14(1) *SA Merc LJ* 688 693). In the present matter, the respondent accepted the donation offered by Evergreen, and this can be ascertained from the respondent's supplementary affidavit, in which he explains that the money paid by Evergreen to Werkmans Attorneys was a donation to himself intended to discharge his debts with the applicant. Adiation can be express or implied (Evans 2002 *SA Merc LJ* 699). It is however submitted that Gamble J was correct in finding that the money paid into Werkmans Attorneys' trust account by Evergreen was not a settlement by Evergreen of the applicants' claim against the insolvent but was a donation to the respondent and thus fell into the insolvent estate. Gamble J's finding aligns with the *ratio* in *Wessels v De Jager* (2000 (4) SA 924 (SCA)) that a right to a benefit vests in the insolvent estate immediately upon acceptance by the beneficiary. In this case, Werkmans Attorneys were simply a conduit for the money donated to the respondent.

One of the consequences of sequestration of an insolvent is a limitation on their capacity to dispose of assets in their insolvent estate (Smith *et al Hockly's Law of Insolvency* par 5.4). Once property vests in the trustee, the insolvent no longer has a say as to how the property can be used. For the purposes of the vesting provisions in section 20 of the Insolvency Act, the respondent's contention (that the court should have had regard to the intent of the donation, which was to enable the respondent to settle his debts with Corruseal and avoid the indignity of sequestration) was thus irrelevant. This is because once a donation vests in the trustee, the trustee becomes the owner (*De Villiers v Delta Cables* 1992 1 SA 9 (A); Evans and Steyn "Property in Insolvent Estates: *Edkins v Registrar of Deeds*, *Fourie v Edkins*, and *Motala v Moller*" *PER* 2014 17(6) par 2); the trustee steps into the shoes of the respondent and the respondent no longer has control over that donation. Thus, Gamble J was correct in finding that the donation made by Evergreen to the respondent did not settle the respondent's debt, and that Corruseal retained *locus standi* to move for a final order of sequestration.

Furthermore, even if the donation by Evergreen had been made to the insolvent immediately before his sequestration (3 August 2022), and he had subsequently used that money to pay Exotic's debt with Corruseal, that money would have vested in Exotic's insolvent estate because Exotic had been placed in liquidation on 25 October 2019 by one of its creditors (Morgan Cargo (Pty) Ltd). This is because once the winding-up of an estate commences, a *concursus creditorum* is established (*Walker v Syfret* 1911 AD 141; Boraine and Swart "*NCA Plant Hire CC v Blackfield Group Holdings (Pty) Limited* [2021] JOL 51810 (GJ): Some Critical Observations on the Legal Effect of a Provisional Winding-Up Order" *De Jure* 125–132); the result is that a debtor is then not at liberty to pay a creditor. However, although the debtor or his estate would still have benefited from the donation, it would have been a different situation had Evergreen paid the money directly to Exotic on behalf of the respondent after the sequestration of the respondent's estate, instead of donating it to the respondent via the attorneys as his representatives. As the money would not have been paid to the respondent directly (or indirectly through his attorneys), thus vesting in his estate, the respondent's debt would have been settled and his argument, based on the ratio in *Duchen v Flax* (*supra*) that a creditor could no longer

argue for a final order of sequestration based on a *nulla bona* return once the debt had been settled, could have applied. On face value, therefore, the party who receives the payment makes a difference to the legal position.

Although not placed in issue in this case, it may be noted in passing that a creditor-applicant is not compelled to accept an offer of settlement from an insolvent debtor, since it could amount to a voidable preference that may be at risk to be set aside after the sequestration of such debtor's estate (see *Harvey NO v Theron* [2023] ZAWCHC 157 par 47).

4 2 Final Order of Sequestration and the Court's Discretion

In order to determine the respondent's insolvency, Gamble J had to ascertain that the applicants had established on a balance of probabilities that their claim against the respondent was more than R100, that the respondent had committed an act of insolvency or was actually insolvent, and that there was a reason to believe that the sequestration would be to the advantage of creditors.

As regards these three criteria, Gamble J was correct in finding that the first criterion had been dealt with conclusively in the finding about Corruseal's *locus standi*, since the applicants each claimed R601 232.95, an amount that is clearly more than R100. As the donation by Evergreen to the respondent was not paid directly to Corruseal in settlement of the respondent's debt, Gamble J was correct in finding that the ratio in *Duchen v Flax* (*supra*) did not apply to these facts; the debt had not been settled, since the donation fell into the insolvent estate. Gamble J was thus also correct in finding, in relation to the second criterion, that Corruseal had addressed the question of whether the respondent had committed an act of insolvency by relying on section 8(*b*) of the Insolvency Act, and by presenting the Sheriff's *nulla bona* returns. Once a creditor has established that a debtor has committed one or more acts of insolvency, a creditor may seek an order of sequestration without having to prove that the debtor is actually insolvent (Smith *et al Hockly's Law of Insolvency* par 3.1.2). In this case therefore, the court did not have to determine whether Corruseal had established that the respondent was actually insolvent because Corruseal had already established that the respondent had committed an act of insolvency. Nonetheless, the court was correct in finding that the respondent was actually insolvent, since insolvency could be inferred from the evidence of the *nulla bona* return.

As regards the third criterion, Gamble J was correct in finding that the term "advantage to creditors" should be interpreted widely. The meaning of the word "advantage" is broad and should not be rigidified (*Stratford v Investec Bank Limited supra* 19). It is true that a further investigation into the respondent's financial affairs would yield some pecuniary benefit to creditors, and that an amount of R1 283 286.88 was already in the hands of the respondent's trustee and was available for distribution to creditors. However, these are not the only factors to be considered in determining advantage to creditors. The term "creditors" means all creditors, or at least the general body of creditors (Smith *et al Hockly's Law of Insolvency* 52). If a debtor has only one creditor, there would be no conflicting interests between

creditors that must be equitably resolved. Furthermore, if the debtor's assets are not sufficient to cover the costs of sequestration, there could be no advantage to creditors unless, for instance, the sequestration became necessary to trace estate assets. That was seemingly not the case here, and thus sequestration would merely amount to a waste of time and money. However, the court could have been influenced by the possibility that there were more claims than those brought forward by Corruseal. As regards the court's discretion on whether to grant a final order of sequestration, it is true that a court should not on a whim decline to grant a final order (see Gamble J's reference to *Orestisolve supra*); there has to be some particular reason, despite the making out of the requirements for liquidation, for withholding an order. However, the reason provided by the court for granting the final sequestration order (that there was already the amount of R1 283 286.88 in the estate) could also be the particular reason a court exercises its discretion against the granting of a final order of sequestration. It must be remembered that sequestration is a drastic procedure and should not be granted if it is not essential. As indicated by the respondent, a certain indignity is attached to sequestration. Sequestration not only affects the insolvent's property, but also limits his status for up to 10 years if rehabilitation is not granted earlier, and it exposes the debtor to numerous statutory restrictions and disqualifications (ss 124 and 127A of the Insolvency Act; Bertelsmann *et al Mars: The Law of Insolvency in South Africa* par 8.4; Roestoff "Insolvency Restrictions, Disabilities and Disqualifications in South African Consumer Insolvency Law: A Legal Comparative Perspective" 2018 81 *THRHR* 395–417; Mabe *A Comparative Analysis of an Insolvent's Capacity to Earn a Living Within the South African Constitutional Context* (2022) par 1.1.1 (Mabe *Comparative*)). Since the effects of sequestration on a debtor affect his dignity as a member of society (Mabe *Comparative* par 4.3), sequestration is a remedy of last resort, and the first option would be to explore other available remedies. In this case, the donation was intended to avoid the indignity caused by sequestration, but the respondent was either not advised or ill-advised on the available procedures or alternatives that would have assisted him in avoiding a final order of sequestration.

4 3 Various options to consider to prevent an applicant-creditor from continuing with an application to obtain a final sequestration order following the granting of a provisional order

In view of the discussion above, the question is whether there are legal constructs that could be used to prevent an applicant-creditor (who has obtained a provisional sequestration order against the estate of a debtor) from moving for a final sequestration order – in other words, are there options to avoid final sequestration of the estate? It is submitted that the following options could be considered:

a) A third party – for instance, a family member or a friend – could consider paying the debt directly to the applicant-creditor, thus settling the debt and eliminating the possibility of the money vesting in the insolvent estate (by virtue of it having been received by the insolvent

directly or through a legal representative). In such an instance, the creditor would no longer be able to rely on a *nulla bona* return as an act of insolvency for a final order of sequestration (*Duchen v Flax supra*) since the debt on which it was based would have been extinguished. If the debt is settled in this way, the basis for the application may fall away. However, it remains important that the full facts be considered on a case-by-case basis since there may be other factors that still warrant the continuation of the application. Nevertheless, the approach followed by the court in the matter under discussion seems to support this viewpoint as well.

It must be noted as a side issue that the third party – in this case, Evergreen – could have been advised to donate the money strictly subject to a condition that the money only be used to settle the respondent's debt with the applicants. Although not raised in this case, it may be asked if the donation was not in any event made subject to a *modus*, in that the condition was that the donated money be used to settle the debt of the applicants in the matter to prevent final sequestration of the respondent-debtor's estate. In *Benoni Town Council v Minister of Agricultural Credit and Land Tenure* (1978 (1) SA 978 (T) 992A), the court specifically ruled that a donor has a sufficient interest in the donation to be entitled to recover the gift if the donee fails to comply with the conditions of the *modus.* In the present case, the respondent's supplementary affidavit of 18 October 2022, stated:

> "I took further legal advice and mentioned my provisional sequestration to a number of my friends and family. During the course of my discussions with a business associate and friend of mine, he informed me that he was in the position to assist me by making a payment to the Applicants in order to discharge the amounts comprising the judgments granted against me in case numbers 21281/2019 and 21282/2019 in the above Honourable Court."

It therefore remains questionable whether Evergreen ever intended the donation to be used for the payment of the respondent's creditors at large.

b) Attorneys for the respondent and the applicant respectively could, of course, settle the debt by mere negotiation, including withdrawing the application if the debt is paid. However, within the context of insolvency law and civil litigation, a common law compromise may also be of assistance.

The debtor may enter into a composition with their creditors; in particular, a common-law compromise would have been apt here since the first meeting of creditors – as is required in terms of the Insolvency Act (*Mahomed v Lockhat Brothers & Co Ltd* 1944 AD 230 241; Smith *et al Hockly's Law of Insolvency* 241) – had not yet happened. The common-law compromise is based on a contractual principle of consent and is binding on all the creditors who have consented to the agreement (*Prinsloo v Van Zyl* 1967 (1) SA 581 (T) 583; Bertelsmann *et al Mars: The Law of Insolvency in South Africa* par 24.2). Thus, there is no agreement unless all the creditors have consented, and they will

probably only consent if the terms of the composition are to their benefit. However, if all the creditors consent, the debtor will be released from all their debts to the extent that the compromise allows and the provisional sequestration order should in principle then be discharged without the debtor being subjected to all the restrictions and disqualifications imposed on unrehabilitated insolvent debtors (Bertelsmann *et al Mars: The Law of Insolvency in South Africa* par 24.1; Smith *et al Hockly's Law of Insolvency* par 18.1). In such an instance, a debtor will be able to continue with his trade if in business, and creditors may receive higher dividends, earlier, than in sequestration, which saves on sequestration costs (Bertelsmann *et al Mars: The Law of Insolvency in South Africa* par 24). Although a common-law composition requires consensus among all the respondent's creditors, the existence of a promise to donate R1 283 286.88 could have assisted the respondent in convincing his creditors, Corruseal KZN and Corruseal Gauteng, that a composition would be beneficial to them. If the concern was that since a provisional order had already been granted, sequestration costs had already been incurred, the debtor could have been advised to ask a friend or a family member to pay for the costs of sequestration as part of an agreement to stay out of sequestration. Because of the R1 283 286.88 donation to the insolvent, the court could have exercised its discretion against granting the final order, and have advised the parties to enter into a common-law compromise on the return date. However, although this is a possible route to follow where there is a need for a post-provisional sequestration order to prevent final sequestration, it must be conceded that the consent requirement for such a composition may be a problem – especially if there are more creditors than just the applicants.

c) Alternatively, as the court proceedings had already commenced, the statutory mediation process provided for by High Court Rule 41A could in principle also have provided a basis to deal with the matter at hand. This alternative procedural option would have avoided increasing the legal costs and, if a settlement had been reached between all interested parties, it would have become unnecessary for the court to make a final order of sequestration, because the application would probably have been withdrawn.

5 Conclusion

In summary, the court refused, on this particular set of facts, to allow the intent of the donation (which was to enable the respondent to settle his debts with Corruseal and avoid the indignity of sequestration) to sway its decision to grant the final sequestration order. The main reason for this approach was that it was the respondent who accepted the donation, which then became property in his insolvent estate. The court's disregard of the respondent's contention may be indicative that South African insolvency law is still very much creditor-friendly, placing the interests of creditors above those of debtors. However, at the same time, it must be conceded that the court merely ensured that the process was concluded in terms of the law as it

stands, and on the particular set of facts before it. The more important issue raised by this judgment is that, in extraordinary circumstances such as the facts in *Corruseal Corrugated,* a third party wishing to assist a debtor to avoid the final sequestration of their estate needs to be advised to make any donation subject to a condition that the money only be used to settle the insolvent's debt and be paid over to the creditor rather than to the debtor. The money should thus not be paid to the insolvent debtor directly, or to their legal representatives, as it then vests in the insolvent estate. Instead, the money should be paid directly to the applicant-creditor, thereby settling the insolvent's debt.

Alternatively, the attorneys could attempt to negotiate a settlement with the applicants to avoid a final sequestration order. If there is no possibility of other creditors coming forward, the debtor could consider also entering into a common-law compromise with the applicant-creditors. Otherwise, a voluntary and consensual considered mediation in terms of High Court Rule 41A could in principle provide a solution; if a settlement is then reached, a final sequestration order would become unnecessary. In these kinds of arrangements, the interests of the creditors nevertheless remain important.

This case illustrates that something as technically simple as the legal construction used to try to settle a debt that is the subject of an application for compulsory sequestration may determine if a respondent-debtor is successful in preventing an applicant-creditor from obtaining a final sequestration order against the estate. It is submitted that sequestration orders should not be granted where the reason for their granting may fall away before the final sequestration order is granted, since it remains a drastic debt-collecting measure with far-reaching consequences for the debtor.

On the one hand, it can be argued that the court in this instance acted correctly on the given set of facts, and since it also found that all the requirements for the granting of a final sequestration order had been met in principle – especially since there was apparently more debt, and other creditors involved than just the sequestrating applicants. However, the judgment serves as a reminder that even if the facts were different in this regard, the construction used to effect the settlement of the debt of the applicant-creditor remains crucial, and can determine the outcome of an attempt by the respondent-debtor to ward off final sequestration. To this end, this case note attempts to provide some constructions that could be employed to assist the respondent-debtor to avoid final sequestration when external funding becomes available to assist him in such a quest.

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TRANSFORMATIVE CONSTITUTIONALISM AND THE VALUE OF HUMAN DIGNITY IN INTERPRETING LEGISLATION TO PROMOTE WORKERS' RIGHT TO SOCIAL SECURITY:

Knoetze v Rand Mutual Assurance [2022] ZAGPJHC 4

1 Introduction

South Africa is still a country in transition and this is affirmed by the Preamble of the Constitution of South Africa, 1996 (the Constitution), which "recognises the injustices of our past" and makes a commitment to establishing "a society based on democratic values, social justice and fundamental rights" (*Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs and Tourism* [2004] ZACC 15; 2004 (4) SA 490 (CC); 2004 (7) BCLR 687 (CC) par 73). This constitutional commitment enjoins the courts to apply transformative principles to resolve legal problems by taking into account the values of the Constitution to achieve a just, democratic and egalitarian social order (Davis and Klare "Transformative Constitutionalism and the Common and Customary Law" 2010 26(3) *South African Journal on Human Rights* 412). This constitutional aspiration is evident in different parts of the Constitution, including the part that deals with interpretation of legislation in conformity with the spirit, purport and object of the Bill of Rights as in section 39(2) of the Constitution. The following case extract is instructive in this regard:

> "This means that all statutes must be interpreted through the prism of the Bill of Rights … The Constitution is located in a history which involves a transition from a society based on division, injustice and exclusion from the democratic process to one which respects the dignity of all citizens." (*Investigating Directorate: Serious Economic Offences v Hyundai Motor Distributors (Pty) Ltd In re: Hyundai Motor Distributors (Pty) Ltd v Smit NO* [2000] ZACC 12; 2000 (10) BCLR 1079; 2001 (1) SA 545 (CC) par 21; see also *Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs and Tourism supra* par 72; *Du Plessis v De Klerk* 1996 (3) SA 850 (CC) par 181)

This extract is also indicative of the fact that the achievement of transformative constitutionalism when interpreting legislation in line with the Constitution is partly dependent on the promotion of the value of human dignity. This legal position has recently been given effect to by the Constitutional Court in the case of *Mahlangu v Minister of Labour* ([2020] ZACC 24; 2021 (1) BCLR 1 (CC); [2021] 2 BLLR 123 (CC); (2021) 42 *ILJ* 269 (CC); 2021 (2) SA 54 (CC)). In this case, the Constitutional Court

reiterated the importance of transformative constitutionalism (*Mahlangu v Minister of Labour supra* par 55) and the value of human dignity (*Mahlangu v Minister of Labour supra* par 56) when it found, among other things, that section 1 of the Compensation for Occupational Injuries and Diseases Act (130 of 1993) (COIDA) was unconstitutional for violating workers' right to social security. (This finding was based on the fact that s 1 of COIDA excluded domestic workers from the "employee" definition for the purposes of claiming compensation emanating from occupational injuries).

It is against this background that this note analyses the extent to which transformative constitutionalism and the value of human dignity also serves as the basis for the court's judgment in the case of *Knoetze v Rand Mutual Assurance* ([2022] ZAGPJHC 4) (*Knoetze*), despite the fact that the court did not acknowledge these constitutional features in its judgment. This case note does not intend to analyse the manner in which the court interpreted COIDA to promote workers' right to social security. Instead, it investigates the extent to which transformative constitutionalism and the value of human dignity could also serve as a rationale for the judgment of the court. The first part of this note analyses transformative constitutionalism and the value of human dignity when interpreting legislation to promote the right to social security. The second part dissects the case of *Knoetze v Rand Mutual Assurance*, and the third and last part analyses the extent to which transformative constitutionalism and the value of human dignity could serve as a basis for the judgment of the court, even though the court did not refer to them in its judgment.

2 Transformative constitutionalism and the value of human dignity in interpreting legislation to promote workers' right to social security

The interpretation of legislation to promote workers' right to social security requires consideration of transformative constitutionalism and the value of human dignity. After all, section 39(2) of the Constitution requires the courts to interpret legislation in conformity with the spirit, purport and object of the Bill of Rights, taking into account transformative constitutionalism and the value of human dignity (*Investigating Directorate: Serious Economic Offences v Hyundai Motor Distributors supra* par 21; *Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs and Tourism supra* par 72; *Du Plessis v De Klerk supra* par 181; *Mahlangu v Minister of Labour supra* par 49). This legal obligation remains relevant despite the fact that there is no universal definition of the terms "transformative constitutionalism" (Kibet and Fombad "Transformative Constitutionalism and the Adjudication of Constitutional Rights in Africa" 2017 17(2) *African Human Rights Law Journal* 354) and "human dignity" (Steinmann "The Core Meaning of Human Dignity" 2016 19 *PER/PELJ* 2, citing the case of *Harksen v Lane* 1998 (1) SA 300 (CC) par 50), and despite the fact that transformative constitutionalism is not immune to criticism (Kibet and Fombad 2017 *African Human Rights Law Journal* 353; Roux "Transformative Constitutionalism and the Best Interpretation of the South African Constitution: Distinction Without a Difference?" 2009 2 *Stellenbosch Law Review* 260; Van Marle "Transformative Constitutionalism

as/and Critique" 2009 *Stell LR* 293). For instance, when finding section 1 of COIDA unconstitutional for excluding domestic workers from the "employee" definition for the purposes of claiming compensation emanating from occupational injuries, the Constitutional Court considered transformative constitutionalism and the value of human dignity in *Mahlangu v Minister of Labour* (*supra* par 55 and 56). Taking these constitutional features into account, among other things, the Constitutional Court found that section 1 of COIDA violated workers' right to social security by excluding domestic workers from the "employee" definition for the purposes of claiming compensation emanating from occupational injuries. (Workers' right to social security is guaranteed by section 27(1)(*c*) and (2) of the Constitution, which provides:

> "(1) Everyone has the right to have access to ... (c) social security, including, if they are unable to support themselves and their dependants, appropriate social assistance. (2) The state must take reasonable legislative and other measures, within its available resources, to achieve the progressive realisation of each of these rights.")

Consideration of transformative constitutionalism when interpreting COIDA to promote workers' right to social security can be deduced from the following extracts:

> "So, when determining the scope of socio-economic rights, it is important to recall the transformative purpose of the Constitution which seeks to heal the injustices of the past." (*Mahlangu v Minister of Labour supra* par 55)

> "[T]his right covers social security assistance for those in need of support and sustenance due to an injury or disease that is work-related or the death of a breadwinner as a result of such injury or disease." (*Mahlangu v Minister of Labour supra* par 48 and 52)

> "Domestic workers are the unsung heroines in this country and globally. They are a powerful group of women whose profession enables all economically active members of society to prosper and pursue their careers… domestic work as a profession is undervalued and unrecognised; even though they play a central role in our society." (*Mahlangu v Minister of Labour supra* par 1 and 2)

For one thing, these extracts are consistent with the essential aspects of transformative constitutionalism as described by Klare, who argues that transformative constitutionalism is a

> "long-term project of constitutional enactment, interpretation, and enforcement committed (not in isolation, of course, but in a historical context of conducive political developments) to transforming a country's political and social institutions and power relationships in a democratic, participatory, and egalitarian direction." (Klare "Legal Culture and Transformative Constitutionalism" 1998 *South African Journal on Human Rights* 150)

(Davis and Klare (2010 *SAJHR* 412) acknowledge this assertion when they argue that transformative constitutionalism employs a legal methodology informed by the values and aspirations of the Bill of Rights and specifically by the constitutional aspiration to lay the legal foundations of a just, democratic, and egalitarian social order). These extracts represent not only the consideration of a historical context of women employees that had to be

transformed, but they also give effect to the transformative-constitutionalism obligation to apply the law in a manner that achieves social justice (Langa "Transformative Constitutionalism" 2006 17 *Stellenbosch Law Review* 351; Kibet and Fombad 2017 *African Human Rights Law Journal* 353).

Consideration of the value of human dignity when interpreting COIDA to promote workers' right to social security can be deduced from the following extract:

> "The approach to interpreting the rights in the Bill of Rights and the Constitution as a whole is purposive and generous and gives effect to constitutional values." (*Mahlangu v Minister of Labour supra* par 55)

The judgment cites section 1 of the Constitution, which sets out our founding values: "The Republic of South Africa is one sovereign, democratic state founded on the following values: (a) Human dignity, the achievement of equality and the advancement of human rights and freedoms." The court goes on to state:

> "[A]rising from the founding values, one of the aims of the Constitution is to heal the divisions of the past, improve the quality of life of all citizens and free the potential of each person." (*Mahlangu v Minister of Labour supra* par 4 and 5)

> "It is unassailable that the inability to work and sustain oneself … subjects the worker to a life of untold indignity. The interpretative injunction in section 39(1)(a) of the Constitution demands that this indignity and destitution be averted." (*Mahlangu v Minister of Labour supra* par 56)

The foregoing extracts are representative of the contention that human dignity "is a value that informs the interpretation of many, possibly all, other rights" (*Khosa v Minister of Social Development, Mahlaule v Minister of Social Development* [2004] ZACC 11; 2004 (6) SA 505 (CC); 2004 (6) BCLR 569 (CC) par 41), and that the realisation of the social transformation objectives of the Constitution that include human dignity cannot be underestimated (Fuo "The Significance of the Constitutional Values of Human Dignity, Equality and Freedom in the Realisation of the Right to Social Protection in South Africa" Paper presented to session of the ANCL Working Group on Social and Economic Rights in Africa at ANCL Annual Conference, Rabat, Morocco 2–5 February 2011), even though there is uncertainty about the definition of the concept of human dignity. (According to, Steinmann 2016 *PER/PELJ* 2, citing the case of *Harksen v Lane supra* par 50, uncertainty about the definition of the concept of human dignity poses some difficulties for the courts because of its lack of precision and elaboration). These extracts also reflect the following elements of human dignity emanating from South African and German courts: First, they represent the ontological claim that a person, having inherent dignity, has unique qualities that are priceless and cannot be replaced (Steinmann 2016 *PER/PELJ* 6, citing *S v Lawrence* 1997 (4) SA 1176 (CC) par 168). Secondly, treatment that goes against not only the individual expectations but also the perceptions of a person's community is inconsistent with human dignity (Steinmann 2016 *PER/PELJ* 6, citing McCrudden "Human Dignity and Judicial Interpretation of Human Rights" 2008 19 *EJIL* 679). Thirdly,

human dignity includes the provision of minimum living conditions embodied in social and economic human rights (Steinmann 2016 *PER/PELJ* 6, citing McCrudden "Human Dignity and Judicial Interpretation of Human Rights" 2008 19 *EJIL* 679). This includes the importance of coming to the aid of the needy and vulnerable by taking into account their dignity and ensuring that the basic necessities of life are accessible to all to enable a life of dignity (*Khosa v Minister of Social Development, Mahlaule v Minister of Social Development supra* par 52; *Mahlangu v Minister of Labour supra* par 63).

Having thoroughly analysed the relevance of transformative constitutionalism and the value of human dignity when interpreting COIDA to promote workers' right to social security, it is now opportune to analyse the case of *Knoetze.*

3 *Knoetze v Rand Mutual Assurance*

3 1 Background of the case

The case concerned Mr Knoetze (appellant), who had spent a period of 39 years working on the gold mines in the Orange Free State and who had launched a claim for compensation against the respondent, Rand Mutual Assurance (an entity licensed in terms of section 30 of COIDA for the purposes of assessing and making payment of claims for compensation in relation to occupational injuries or diseases arising out of employment in the mining sector).

Section 30 of COIDA provides:

> "(1) The Minister may, for such period and subject to such conditions as he may determine, issue a licence to carry on the business of insurance of employers against their liabilities to employees in terms of this Act to a mutual association which was licensed on the date of commencement of this Act in terms of section 95(1) of the Workmen's Compensation Act: Provided that the Minister may, from time to time, order that, in addition to any securities deposited in terms of the Insurance Act, 1943 (Act No. 27 of 1943), and the Workmen's Compensation Act, securities considered by the commissioner to be sufficient to cover the liabilities of the mutual association in terms of this Act be deposited with the commissioner.
>
> (2) Subject to the provisions of subsection (4), a security so deposited shall be used solely for making good the default of the association concerned in respect of any liability of an employer in terms of this Act, and for payment of any expenses lawfully incurred in connection with such making good or the enforcement of such liability.
>
> (3) The Minister may from time to time determine the conditions upon which, the way and the period within which any such security shall be made available to a person entitled to payment therefrom.
>
> (4) If the Minister is satisfied that the whole or any portion of such security is no longer necessary and that the association concerned is not in a position to incur a liability payable therefrom, he shall cause such security, or portion thereof, to be returned to such association.
>
> (5) If an association has deposited with the commissioner any such security and thereafter fails to meet in full any of its liabilities in terms of this Act, or is

> placed in liquidation, then, notwithstanding the provisions of any other law, such security shall vest in the commissioner for the purpose of the liabilities of the association in terms of this Act.
>
> (6) If at any time the Minister is satisfied that a mutual association has failed to comply with any of the conditions imposed by him under subsection (1), he may suspend or withdraw the licence issued to that association under the said subsection, and no appeal shall lie against his decision."

The appellant's claim was based on a hearing impairment that he sustained while working in and on the gold mines. Essentially, the basis for his claim was that sections 65 and 66 of COIDA empower him to institute a claim for compensation for sustaining a hearing impairment without (as per a rebuttable presumption that his hearing impairment arose from or in the course of the scope of employment) having to prove that he contracted a disease while performing his duties.

Section 65 provides:

> "(1) Subject to the provisions of this Chapter, an employee shall be entitled to the compensation provided for and prescribed in this Act if it is proved to the satisfaction of the Director-General–
> (*a*) that an employee has contracted an occupational disease."

Section 66 provides:

> "If an employee who has contracted an occupational disease was employed in any work mentioned in Schedule 3 in respect of that disease, it shall be presumed, unless the contrary is proved, that such disease arose out of and in the course of his employment."

According to the appellant, he sustained a hearing impairment as a result of his exposure to very loud, excessive noise on a daily basis when maintaining and repairing heavy-duty machinery that generated high volumes of noise (par 14). The appellant's evidence was corroborated, respectively, by the mine-safety inspector and two medical experts (specialist ear, nose and throat surgeons), who indicated that various machines had labels indicating their noise level to be above 85 decibels and that the appellant's symptoms were consistent with noise-induced hearing loss (NIHL) as a result of his exposure to loud noise throughout his working career on the mines (par 14 and par 16). However, the respondent disputed the appellant's submission on the basis that the appellant had to show that excessive noise caused the hearing loss.

According to the respondent, "requiring the employee to prove, with evidence, that his work involved exposure to excessive noise does not eviscerate the section 66 presumption" (par 41). The respondent then rejected the claim, and the appellant lodged a notice of objection in terms of section 91(1) of COIDA.

Section 91(1) provides:

> "Any person affected by a decision of the Director-General or trade union or employers' organization of which that person was a member at the relevant time may, within 180 days after such decision, lodge an objection against that decision with the Commissioner in the prescribed manner."

The appellant's objection was heard by a tribunal consisting of a presiding officer assisted by two assessors. Having gone through the evidence, the tribunal dismissed the appellant's objection on the basis that he had not provided the panel with evidence of how the disease was contracted while working in the mines (par 39).

The appellant, as a result, launched an appeal in the High Court in terms of section 91(5)(*a*) of COIDA against the decision of the tribunal dismissing his objection to the rejection of his claim for compensation by the respondent. (S 91(5)(*a*) provides: "Any person affected by a decision referred to in subsection (3)(*a*) may appeal to any provincial or local division of the Supreme Court having jurisdiction against a decision regarding– (i) the interpretation of this Act or any other law.")

3 2 Legal issue on appeal

The legal issue was whether the tribunal had misinterpreted and thus misapplied the provisions of section 65(1)(*a*), read with section 66 of COIDA, in dismissing the appellant's objection.

3 3 Decision of the court

The court held that the tribunal had misinterpreted and thus misapplied the provisions of section 65(1)(*a*), read with section 66 of COIDA. This judgment was based on the fact that the tribunal ignored relevant factual evidence (supported by medical opinion) that the appellant's hearing loss, despite presenting as atypical in certain years, was compatible with NIHL. According to the court, this factual evidence was sufficient to trigger the presumption in section 66 of COIDA, which required the respondent to prove that the appellant's hearing loss did not arise out of and in the course of his employment (par 45). As a result, the court set aside the decision of the tribunal dismissing the appellant's objection to the respondent's rejection of his claim, and ruled that the appellant was entitled to compensation in terms of COIDA (par 60). This decision was based partly on the following factors:
a) the respondent did not prove that the appellant's hearing loss did not arise out of and in the course of his employment; b) statutory provisions must be interpreted in a manner that gives effect to the spirit, purport and object of the Bill of Rights; c) in *Mahlangu's* case, the Constitutional Court confirmed that COIDA must now be read and understood within the constitutional framework of section 27 and its objective to achieve substantive equality; and d) the court's interpretation promotes the employee's constitutional right to social security. This is evident in the court's contention:

> "It also effectively alleviates the imbalance of power between large employer organisations and individual employees who more often than not lack the resources or the knowledge to prove that their occupational disease was caused by their employment at a particular time and place. This would generally require further costly expert testimony and specific information in the hands of the employer, who may not always willingly part therewith." (par 51)

Having dissected *Knoetze*, it is now appropriate to analyse the extent to which transformative constitutionalism and the value of human dignity could also have served as a basis for the judgment of the court.

4 Transformative constitutionalism and the value of human dignity as a basis for the judgment of the court

This part of the article, as already stated, does not intend to analyse the way that the court interpreted section 65, read together with section 66 of COIDA, to promote the appellant's right to social security. However, it seeks to analyse the extent to which transformative constitutionalism and the value of human dignity could also serve as a basis for the judgment of the court that interpreted COIDA in a manner that promotes the appellant's right to social security. It is submitted that this contention emanates from section 39(2) of the Constitution, which requires the courts to interpret legislation (or sections 65 and 66 of COIDA, in this case) in a manner that promotes the employee's right to social security.

4 1 Transformative constitutionalism

Transformative constitutionalism could serve as a basis for the judgment of the court in *Knoetze* since the court is obliged to interpret legislation to promote the spirit, purport and object of the Bill of Rights in terms of section 39(2) of the Constitution (*Investigating Directorate: Serious Economic Offences v Hyundai Motor Distributors supra* par 21; *Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs and Tourism* (*supra*) par 72; *Du Plessis v De Klerk supra* par 181). This obligation, in essence, requires the courts to interpret sections 65 and 66 of COIDA in a manner that promotes the appellant's right to social security, irrespective of the fact that COIDA predates the Constitution (this is based on item 2 of Schedule 6 of the Constitution, which makes it clear that "old-order legislation" continues in force subject to its consistency with the Constitution, as enforced by the Constitutional Court in the case of *Mahlangu v Minister of Labour supra* par 49).

The essential elements to consider when interpreting the above-mentioned relevant sections of COIDA to promote the appellant's right to social security in line with transformative constitutionalism include, first, the need for South African courts to transform inadequate social security, which is still being experienced. (In *Soobramoney v Minister of Health (Kwazulu-Natal)* [1997] ZACC 17; 1998 (1) SA 765 (CC); 1997 (12) BCLR 1696 par 8, the court argued that inadequate social security partly determines the application of transformative constitutionalism when interpreting legislation). This sad reality, which requires to be transformed, is evident or has recently been exposed by the Constitutional Court in the case of *Mahlangu v Minister of Labour*, when it found section 1 of COIDA to be unconstitutional on the basis that it did not include domestic workers in the "employee" definition,

thereby denying domestic workers an opportunity to institute a claim for compensation under COIDA (*Mahlangu v Minister of Labour supra*).

Secondly, South African courts are obliged to consider that Mr Knoetze was 59 years old, unemployed and with no income, which rendered him worthy of being classified as needy and vulnerable, or in need of support and sustenance owing to a disease that is work-related (*Mahlangu v Minister of Labour supra* par 48, 51 and 52). (See also the case of *Khosa v Minister of Social Development, Mahlaule v Minister of Social Development supra* par 52, which held:

> "The right of access to social security, including social assistance, for those unable to support themselves and their dependants is entrenched because as a society we value human beings and want to ensure that people are afforded their basic needs. A society must seek to ensure that the basic necessities of life are accessible to all if it is to be a society in which human dignity, freedom and equality are foundational").

This consideration underlines the importance of interpreting sections 65 and 66 of COIDA for the benefit of the appellant in order to achieve social change (Langa 2006 *Stell LR* 351), or social justice (Kibet and Fombad 2017 *African Human Rights Law Journal* 353).

Thirdly, the transformative nature of section 66 of COIDA must be enforced; the section provides for a rebuttable presumption that an appellant contracted an occupational disease (in this case, hearing loss) while acting within the scope of his employment (probably owing to a lack of resources on the part of an employee). In indirectly acknowledging this reality, the court in *Knoetze* reasoned as follows:

> "It also effectively alleviates the imbalance of power between large employer organisations and individual employees who more often than not lack the resources or the knowledge to prove that their occupational disease was caused by their employment at a particular time and place. This would generally require further costly expert testimony and specific information in the hands of the employer, who may not always willingly part therewith." (par 51)

It is submitted that this extract is an excellent example of a context-sensitive view of transformative constitutionalism in that it takes into account socio-economic considerations for the appellant (Davis and Klare 2010 *SAJHR* 412). In terms of this approach, the appellant would have to be provided with social-security assistance as he was in need of support and sustenance owing to a disease that is work-related (*Mahlangu v Minister of Labour supra* par 48, 51 and 52). In other words, this extract has the effect of considering social justice for the appellant as already initiated by section 66 of COIDA, which considers that the appellant was an unemployed retiree with no income that would enable him to hire experts to prove his case.

Consideration of the foregoing essential elements of transformative constitutionalism is consistent with the court's acknowledgment that the appellant's hearing loss, despite presenting as atypical in certain years, was compatible with NIHL, and required the respondent to rebut the presumption that the appellant's hearing loss arose out of and in the course of the appellant's employment in terms of section 66 of COIDA (par 45). Thus,

transformative constitutionalism would compel the respondent to rebut this presumption; since the respondent had failed to do so, the appellant would have to be awarded compensation as a result of contracting a hearing loss while discharging his duties.

4 2 The value of human dignity

Apart from transformative constitutionalism, the basis for the court's acknowledgement – that the appellant's hearing loss, despite presenting as atypical in certain years, was compatible with NIHL, and required the respondent to rebut the presumption that the appellant's hearing loss arose out of and in the course of his employment in terms of section 66 of COIDA – was in conformity with the essential element of human dignity. (The basis for this assertion is that the effectiveness of transformative constitutionalism, as already mentioned, is dependent on consideration of constitutional values, which include the value of human dignity. See *Investigating Directorate: Serious Economic Offences v Hyundai Motor supra* par 21; *Bato Star Fishing* (*Pty*) *Ltd v Minister of Environmental Affairs and Tourism supra* par 72; *Du Plessis v De Klerk supra* par 181; *Mahlangu v Minister of Labour supra* par 48.) Pursuant to the need to give specific content to the value of dignity for the appellant in this case (*Matiso v Commanding Officer, Port Elizabeth Prison* 1994 (4) SA 592 (SE) 597 and 598), such an essential element of human dignity, it is submitted, would include but not be limited to the need to ensure that the appellant had access to the basic necessities to live a life of dignity. Such access would translate to financial assistance or compensation for the appellant as a result of a failure by the respondent to rebut the presumption (in terms of section 66 of COIDA) that the appellant's hearing loss arose out of and in the course of his employment. In other words, an award to the appellant of financial assistance in this case would be based on the fact that he ended up not being able to work and sustain himself owing to an ear disease that he contracted while discharging his duties for the respondent (*Mahlangu v Minister of Labour supra* par 63, citing *Khosa v Minister of Social Development, Mahlaule v Minister of Social Development supra* par 52). Furthermore, it would be based on the respondent's failure to rebut the presumption (in terms of section 66 of COIDA) that the appellant's hearing loss arose out of and in the course of his employment.

This line of reasoning, it is submitted, gives effect to an obligation on the court to prefer a reasonable interpretation of the legislation that is consistent with international law (s 233 of the Constitution). Pursuant to the need to identify and interpret relevant international law (Tladi "Interpretation and International Law in South African Courts: The Supreme Court of Appeal and the Al Bashir Saga" 2016 16(2) *African Human Rights Law Journal* 335) in this regard, a reasonable interpretation of the legislation that is consistent with international law emanates from an interpretation of article 9 of the International Covenant on Economic Social and Cultural Rights (ICESCR) (United Nations General Assembly 993 UNTS 3 (1966). Adopted: 16/12/1966; EIF: 03/01/1976, which South Africa signed on 3 October 1994 and ratified on 12 January 2015) and article 10 of the Charter of

Fundamental Social Rights in SADC, which guarantees the right to social security (Southern African Development Community *Charter of the Fundamental Social Rights in SADC* (2003) https://www.sadc.int/document/Charter-Fundamental-Social-Rights-sadc (accessed 2023-08-05)).

The right to social security in terms of article 9 of the ICESCR includes consideration of human dignity, which consists partly of an obligation to provide benefits to "cover the loss or lack of earnings due to the inability to obtain or maintain suitable employment" (UN Committee on Economic, Social and Cultural Rights (CESCR) *General Comment No 19: The Right to Social Security (Art 9 of the Covenant)* (4 February 2008) E/C.12/GC/19 (2008) Adopted: 23/11/2007; EIF: 04/02/2008 https://www.refworld.org/docid/47b17b5b39c.html (accessed 2023-03-01) par 16. This obligation was indirectly reiterated by the Constitutional Court in the case of *Mahlangu v Minister of Labour*, when it argued that "[e]conomic, social and cultural rights, of which the right of access to social security is a part, are indispensable for human dignity and equality" (*Mahlangu v Minister of Labour supra* par 48). On the other hand, the right to social security in terms of article 10 of the Charter of Fundamental Social Rights in SADC incorporates human dignity, which includes the creation of an enabling environment for old people, through social assistance, social insurance or social allowances, to promote measures that would assist in maintaining human dignity and prevention of destitution (SADC *The Code on Social Security in the SADC* (2008) https://www.sadc.int/document/Code-Social-Security-sadc (accessed 2023-08-05)). The foregoing interpretation of the right to social security in terms of article 9 of the ICESCR, and article 10 of the Charter of Fundamental Social Rights in SADC, draws inspiration from article 22 of the Universal Declaration of Human Rights (UDHR), which categorically states that the right to social security is indispensable to the dignity of the person in the sense that it is relevant to the protection of a person's dignity (Simpson, McKeever and Gray "Social Security Systems Based on Dignity and Respect" Equality and Human Rights Commission Report (7 August 2017)).

Apart from the cited international law, justification for the appellant's access to financial assistance emanates from the following factors: the appellant was an unemployed 59-year-old person who lost an income owing to a disease that rendered him unemployable. It would be difficult if not impossible for the appellant, the court reasoned, to source funds to hire experts to prove his occupational disease was caused by his employment at a particular time and place (par 51). Thus, failure to grant compensation to the appellant would not only subject appellant to a life of untold indignity (*Mahlangu v Minister of Labour supra* par 56) but also amount to a failure by the court to avert the indignity and destitution that emanates from the appellant's inability to work and sustain himself as a result of the ear disease he contracted while working for the respondent (*Mahlangu v Minister of Labour supra* par 56).

5 Conclusion

According to the Constitutional Court case of *Mahlangu v Minister of Labour* (*supra*), the right to social security includes the right of workers to receive compensation under COIDA. The promotion of workers' right to social security in line with section 39(2) of the Constitution includes consideration of transformative constitutionalism and the value of human dignity when interpreting sections 65 and 66 of COIDA. For this reason, it is submitted, in line with section 39(2) of the Constitution, that transformative constitutionalism and human dignity could serve as a justification for the judgment of the court in *Knoetze*, even though the court's judgment did not refer to these constitutional features.

It is submitted that consideration of transformative constitutionalism as a possible justification for the judgment in *Knoetze* is based on consideration of a context-sensitive view of transformative constitutionalism that takes into account socio-economic considerations (Davis and Klare 2010 *SAJHR* 412). This includes the fact that the appellant had to be provided with social-security assistance as he was in need of support and sustenance owing to a disease that was work-related (*Mahlangu v Minister of Labour supra* par 48 and 52); and that social justice, as already initiated by section 66 of COIDA, requires recognition that a vulnerable unemployed appellant with no income might not have financial resources to institute a successful claim for compensation under COIDA if he had to prove that he contracted a disease while acting within the scope of his employment, as required by section 65 of COIDA.

Consideration of the value of human dignity as a justification for the judgment in *Knoetze* should include ensuring access to financial assistance or compensation for the appellant because the ear disease he contracted while discharging his duties for the respondent meant he was unable to work and sustain himself (*Mahlangu v Minister of Labour supra* par 63, citing *Khosa v Minister of Social Development, Mahlaule v Minister of Social Development supra* par 52). It is submitted that relief would include giving effect to a reasonable interpretation of the legislation that is consistent with international law. Such an interpretation requires consideration of human dignity, which consists partly of the obligation to provide benefits to "cover the loss or lack of earnings due to the inability to obtain or maintain suitable employment" (CESCR *General Comment No 19* https://www.refworld.org/docid/47b17b5b39c.html (accessed 2023-03-01) par 16) as well as the creation of an enabling environment for old people, through social assistance, social insurance or social allowances, to promote measures that would assist in maintaining human dignity and prevention of destitution (SADC *Code on Social Security* https://www.sadc.int/document/Code-Social-Security-sadc (accessed 2023-08-05).

Consideration of human dignity in *Knoetze* includes considering that the appellant was an unemployed 59-year-old person who lost an income as a result of a disease that rendered him unemployable. The court also recognised it would be difficult, if not impossible, for the appellant to source

funds to hire experts to prove his occupational disease was caused by his employment at a particular time and place.

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