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The Criminal Culpability of Health-Care Practitioners in South Africa[1]

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[1] This article also draws on the unpublished LLM thesis by Ms Asavela Dweba titled "The Criminal Liability of Healthcare Practitioners for Culpable Homicide", Nelson Mandela University, Gqeberha, 21 April 2022 supervised by Prof Henry Lerm and Dr Esther Gumboh, Nelson Mandela University and amplified by other sources referred to herein.

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SUMMARY

Health-care practitioners are not superhuman. They are fallible and prone to making mistakes that have legal consequences. Mercifully, given that medicine is not an exact science and that anything can happen during a surgical procedure or otherwise, mistakes are not a frequent occurrence. From a legal perspective, it remains a challenge to distinguish inadvertence from wilful disregard for consequences. Health-care practitioners are anxious about the perceived eagerness of the law-enforcement agencies, including the South African Police Service and National Prosecuting Authority, to attach criminal responsibility to health-care practitioners and to pursue criminal charges against them, apparently without regard to what type of mistake has been made, nor the degree of deviation from the expected standard of care. The circumstances under which health-care practitioners work are also relevant. This article argues that health-care practitioners, like other professionals such as engineers and architects, as well as members of the community such as motorists where the circumstances so warrant, are criminally accountable for their actions. However, our law, unlike other foreign jurisdictions, does not recognise degrees of negligence in determining criminal liability. As the law in South Africa currently stands, an accused is either negligent or they are not. Even the slightest degree of negligence would be sufficient for the National Prosecuting Authority to sustain a conviction on a charge of culpable homicide. This article advocates that the threshold for measuring criminal culpability is too low, and that, in order to avoid unfair and unreasonable results, it should be increased to the level of gross negligence or recklessness. To achieve this, it will be necessary to bring about law reform in South Africa in cases involving all forms of professional liability, and other forms of criminal liability such as that involving motorists. The South African Law Reform Commission has recently announced that it will be investigating the matter under *Project 152 Criminal Liability of Healthcare Professionals*. It is expected that the Commission will call for submissions from all interested parties to assist in its investigation. It is also anticipated that the Commission will explore whether the South African legal system is ripe for a paradigm shift, adjusting the threshold for criminal liability in cases of culpable homicide. What is suggested is that South Africa should follow the legal systems of Scotland, New Zealand, India and England, which have all changed in the last few decades. The reason these legal systems have been chosen stems from the fact that they all have the same common-law heritage. The inception and initial application of the law of negligence in those countries, especially in criminal-law matters, closely resemble steps in the South African legal system. Ordinary negligence was originally the yardstick by which criminal conduct was measured and judged. Unlike South Africa's legal system, there have been distinct threads of development in the other legal systems. Because of the principles of fairness and public interests, countries like Scotland, New Zealand, India and England have all moved away from a low threshold involving ordinary negligence, to a high threshold that includes gross negligence or recklessness.

KEYWORDS: criminal culpability, threshold, culpable homicide, gross negligence, recklessness

1 INTRODUCTION

In recent years, the legal response to death caused by medical negligence has produced considerable upheaval among health-care practitioners and notable academic debate in South Africa.[2] Incidents that have caused

[2] Lerm and Stellenberg "South African Doctors Call for Law Reform, Fearing a Harsh Penalty if Patients Die" (21 February 2022) https://theconversation.com/south-african-Doctors-call-for-law-reform-fearing-a-harsh-penalty-if-patients-die-17518 (accessed 2022-12-19);

consternation among health-care practitioners include the conviction and subsequent successful appeal of Dr Danie van der Walt, an obstetrician and gynaecologist, who was charged with culpable homicide arising from an alleged act of negligence that led to the death of a patient. It was alleged by the prosecutorial staff that the accused failed to heed the nurses' calls to render timeous medical assistance, which ultimately led to complications and the death of the patient. The accused was subsequently acquitted on appeal.[3] That case was preceded by the case of Prof Peter Beale, an anaesthetist, and Dr Abdullah Munshi, a paediatric surgeon, who were both charged with a similar offence arising from the death of a 10-year-old boy shortly after an operation.[4] More recently, in a shock move, the South African police arrested a Richards Bay surgeon on a charge of murder; Dr Avindra Dayanand appeared in court on Friday, 26 August 2022, relating to the death in 2019 of a patient after surgery.[5]

Those incidents have triggered much alarm among health-care practitioners and medical societies, including the Medical Protection Society, Association of Surgeons of South Africa, Federation of South African Surgeons, Radiological Society of South Africa, South African Medical Association, and the South African Medico-Legal Association in South Africa.[6] They fear, *inter alia*, the readiness of the National Prosecuting Authority (NPA) arbitrarily to cause the arrest and prosecution of health-care practitioners on charges of murder or culpable homicide where, for example, mistakes are made in practice, leading to the death of patients or unexpected complications over which health-care practitioners sometimes have no control. Many practitioners have expressed their unwillingness to continue practising if they face the risk of arrest for murder upon the unexpected death of a patient.[7] Other concerns expressed by health-care practitioners include fast-moving and potentially hazardous health-care environments in which practitioners are prone to errors of judgement that they fear increase the risk of being criminalised. The prospect of facing criminal investigation or charges impacts their mental health. For a medical practitioner, there can be nothing more professionally damaging, and emotionally and mentally draining, than awaiting trial in instances where they

McQuoid-Mason "Liability of Doctors Based on Negligence for Culpable Homicide: No Need to Change the Law Concerning Medical Negligence or to Establish Special Medical Malpractice Courts – Use Mediation and Medical Assessors Instead" 2022 112(3) *South African Medical Journal* 216–218.

3 *Van der Walt v S* 2020 (11) BCLR 1337 (CC).

4 The child's death occurred hours after Dr Beale performed what was meant to be a routine operation to stop reflux. Dr Munshi has since died and the charge against Professor Beale has since changed to murder. The trial against Dr Beale has started and, at the time of writing, is running in the Gauteng High Court in Johannesburg.

5 Majozi "KZN Surgeon Arrested for Murder Following Death of a Patient – *SAPPF*" (30 August 2022) https://www.politicsweb.co.za/documents/kzn-surgeon-arrested-foll (accessed 2022-12-20).

6 Medical Brief "KZN Surgeon's Murder Charge Triggers New Alarm Among Doctors" (5 October 2022) https://www.medicalbrief.co.za/kzn-surgeons-murder-charge-trigger (accessed 2022-12-20).

7 *News 24* "Richards Bay Surgeon Faces Shock Murder Charge After Death of Patient" (5 September 2022) https://www.news24.com/news24/southafrica/news/surgeon-faces-sh (accessed 2022-12-20).

have put in earnest efforts to help a patient.[8] This continues to evoke widespread fear and concern for health-care practitioners in the current climate.[9]

It has also resulted in the exodus of health professionals and an ongoing threat by some to leave South Africa. What exacerbates the position is the adverse effect of such exodus on the South African health-care system.[10]

Owing to the very low threshold in South African law for blameworthiness when a patient dies under medical care, this article advocates for a higher threshold to measure the culpability of health-care practitioners in culpable homicide cases.[11] The low threshold for criminalisation when there is a lack of clear intent to cause harm is perceived as punitive and leaves health-care practitioners vulnerable to criminal charges and heavy-handed arrests.[12] The downside of using a low threshold that includes ordinary negligence amounts to this: although the loss by families of a loved one through tragic circumstances should not be underplayed, doctors risk losing their career and liberty, sometimes owing to an error of judgement or mistake, but in circumstances where the practitioner was only interested in caring for the patient.[13]

Health-care practitioners, like other citizens in this country (for example~~,~~ motorists), are accountable for their actions. Where their conduct is culpable, they are not immune from prosecution. However, this article pleads for law reform to be introduced in South Africa where accused persons are charged with culpable homicide. It is our argument and submission that the low threshold of ordinary negligence that serves as the yardstick to measure culpability in our current criminal justice system should be replaced by a higher threshold. Both gross negligence and, alternatively, recklessness could serve as the minimum standard. Not only would such a move result in avoiding adverse outcomes (including criminal prosecutions) owing to inadvertent human errors, but it would also lead to health-care practitioners and others being treated less harshly.

Law reform is a slow process and is often influenced by various role players. Bringing about legal changes in a legal system is often met with great resistance. In this regard, it is anticipated that both the South African Police Service and the Department of Justice may contend that the law as it stands, is fair. Healthcare practitioners, like all other members of society are

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8 *Ibid.*

9 Govender "Doctors Say They Should Not Be Criminally Charged When Patients Die Due to Errors" (5 November 2021) https://www.timeslive.co.za/news/south-africa/2021-11-05-doctors-say-they-should-not-be-criminally-charged-when-patients-die-due-to-errors/ (accessed 2021-11-06).

10 Here, the Medical Protection Society under the stewardship of Dr Graham Howarth, Head of Medical Services has been very active. See the letter sent to the Minister of Justice, Mr Ronald Lamola, by the Medical Protection Society (MPS) dated 2 October 2020. The letter can be found at the offices of the Medical Protection Society.

11 *Ibid*.

12 Howarth and Behrman "Prosecuting Healthcare Professionals for Culpable Homicide – Who Benefits?" (22 January 2020) https://www.medicalbrief.co.za/archives/prosecuting-healtcare-professionals-for-culpable-homicide-who-benefits/ (accessed 2020-10-14).

13 Govender https://www.timeslive.co.za/news/south-africa/2021-11-05-doctors-Say-they.

accountable for their actions. Why should the yardstick in measuring the culpability of professionals be different to that of the ordinary members of society? So, they may argue.

Change is driven by the need for transformation and augmented by public-policy considerations that occur from time to time. Situations that threaten the public interest or public policy may induce the courts to effect changes considered to be equitable and in line with the sense of justice of the community.[14] This article highlights the need for South Africa's jurisprudence to change the threshold to measure the culpability of healthcare practitioners and so, align our law with international trends.

In addition to the considerations highlighted herein, the South African courts may also have regard to foreign law before bringing about law reform.[15] For that reason, before any reform is introduced in South Africa, it is useful to consider foreign jurisprudence as a means to determine whether other jurisdictions have undergone similar changes. If so, guidance will be sought from those jurisdictions to establish how they coped in bringing about reform. The countries identified and the reasons for choosing them have been stated earlier. A striking feature of the reform in those countries is that they have all moved away from a low threshold involving ordinary negligence to a high threshold that includes gross negligence, alternatively recklessness, when measuring criminal liability – including culpable homicide or manslaughter cases.

The introductory part of this article takes a brief look at the increase in the number of prosecutions of health-care practitioners – especially medical doctors and specialists. It highlights the increased concern of the medical fraternity. The first part of this article focuses on the criminal-law jurisprudence in South Africa, with specific reference to the criminal liability of health-care practitioners. This includes a brief discussion on the most frequent charges that practitioners face; these include murder and culpable homicide. It also highlights what the State needs to prove to sustain a conviction. The offence of culpable homicide occupies a special and problematic position in South Africa. What this chapter highlights is that the South African criminal justice regime fails to identify the degree of fault required for criminal conduct. A practitioner charged with culpable homicide may be convicted upon the slightest degree of negligence. In South Africa, the same degree of negligence is used to prove both civil liability and criminal culpability. This part identifies how far South African legal jurisprudence lags behind when compared with Scotland, New Zealand, India and England.

The second part of this article reveals the challenges those countries faced before bringing about paradigm shifts in their legal systems, and from which South Africa can learn. The third part of this article explains how law reform in South Africa should be introduced. This provides useful information to the South African Law Reform Commission, which may endeavour to find

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14 *Bank of Lisbon & South Africa v Ornelas* [1988] ZASCA 35; [1988] 2 All SA 393 (A).

15 S 39(1)(*c*) of the Constitution of Republic of South Africa, 1996 (the Constitution).

a long-term solution to the issue at hand.[16] What follows is an investigation into the legal position in South Africa with regard to the culpability of health practitioners.

2 THE SOUTH AFRICAN LEGAL SYSTEM

Until the recent increase in the number of prosecutions of health-care practitioners, the South African criminal-law system appeared fairly settled. South Africa does not distinguish between the culpability of ordinary citizens and health-care practitioners. An act or omission without justification, leading to the death of another human being, will lead to culpability. It is trite law that *mens rea*, is an essential element for a crime involving blame or fault.[17] Under South African criminal law, *mens rea* takes two forms, namely intention and negligence.[18]

There are two common-law crimes that health-care practitioners may face while practising medicine. These offences are murder[19] and culpable homicide.[20] When dealing with common-law crimes, fault is one of the elements needed to prove the commission of an offence.[21] Fault in the form of intention may take the form of direct intent, also known as *dolus directus*. Snyman defines *dolus directus* as comprising a person "directing his will towards achieving the prohibited result or towards performing the prohibited act".[22] A *locus classicus* includes the case of *S v Hartmann*,[23] in which the court found a medical doctor guilty of a so-called mercy killing, for terminating his father's life with direct intent, notwithstanding that his motive for killing was good. In a more recent case, *S v Tembani,*[24] fault in the form of intent was established. In this case, the Supreme Court of Appeal (SCA) held a Tembisa man liable for the murder of his girlfriend after he inflicted a life-threatening wound on her that was readily treatable. However, the treatment she received at Tembisa Hospital was sub-standard and negligent. The SCA held that where an attacker with murderous intent inflicts a wound that will ordinarily cause death, the fact that subsequent medical treatment is negligent, or even grossly negligent, does not relieve the attacker from criminal responsibility for the injured person's death. The trial judge accordingly found that the negligence of the hospital and doctors was not, in the circumstances, so overwhelming as to make the original wound merely part of the history behind the patient's presence in the hospital, and so that it could be said that the death did not flow from the wound. Applying

16 *Ibid.*

17 Snyman *Criminal Law* 6ed (2014) 145.

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

19 Snyman *Criminal Law* 6ed (2014) 437. The author defines murder as "the intentional unlawful killing of another human being".

20 Snyman *Criminal Law* 6ed (2014) 442.

21 Burchell *Principles of Criminal Law* 5ed (2016) 60–63; Snyman *Criminal Law* 6ed (2014) 145.

22 Snyman's *Criminal Law* 6ed (2014) 177.

23 1975 (3) SA 532 (C); *Stransham-Ford v Minister of Justice and Correctional Services* 2015 (6) BCLR 737 (GP).

24 2007 (2) SA 291 (SCA).

a "flexible approach to causation" – one that was "practical" rather than "over-theoretical" – the judge considered that it accorded with justice to hold, in the juridical sense, that the medical negligence had not ousted the causal connection between the shooting and the deceased's death. The appellant was accordingly convicted of murder. The Tembisa Hospital was consequently exonerated from criminal liability.

Fault in the form of intention may also take the semblance of constructive intent known as *dolus eventualis*. Here, the accused foresees that their prohibited conduct could lead to the death of another person but reconciles themselves with the ensuing result.[25] The concept of *dolus eventualis* was dealt with in the case of *S v Pistorius* [26] In this case, Oscar Pistorius was arraigned to stand trial in the Pretoria High Court on 3 March 2014, and was charged with one count of murder. Pistorius won stardom as an athlete with a disability after successfully competing in multiple Paralympic Games and the 2012 Summer Olympics. He was charged after killing his model girlfriend Reeva Steenkamp in the early hours of the morning on 14 February 2013. The incident happened at his Pretoria home when he shot the deceased behind a toilet door of his apartment. Pistorius acknowledged that he shot Steenkamp but alleged that he mistook her for an intruder. He was convicted in the court *a quo* on a charge of culpable homicide, a competent verdict to a charge of murder. Pistorius was sentenced to five years' imprisonment. The case was later heard on appeal in the SCA. The verdict was altered to murder, and the appeal court imposed a sentence of 13 years and 5 months' imprisonment. What is significant is the appeal court's approach to the doctrine of *dolus eventualis*. The SCA stated that the defence of putative private defence or self-defence cannot be sustained and was no bar to a finding that he acted with *dolus eventualis* in causing the death of the deceased.[27] Consequently, the SCA held that, on count one in the indictment, the accused ought to have been found guilty of murder on the basis that he had fired the fatal shots with criminal intent in the form of *dolus eventualis*.[28] In analysing the concept of *dolus eventualis*, the SCA referred to the case of *Sigwahla*, where Holmes JA pointed out that the distinction must be observed between what actually went on in the mind of the accused and what would have gone on in the mind of a [reasonable person] in the position of the accused.[29] The court cautioned that the distinction between subjective foresight and objective foreseeability must not become blurred.[30] The appeal court found that the issue was not whether the accused had as his direct objective the death of the person behind the door. What was required in considering the presence or otherwise of *dolus eventualis* was whether he had foreseen the possible death of the person behind the door

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[25] Burchell, Hunt, Milton and Burchell *South African Criminal Law and Procedure: General Principles of Criminal Law* Volume 1. 2ed Juta (1983) 148.

[26] (CC13/2013) [2014] ZAGPPHC (11/09/201).

[27] See *Director of Public Prosecutions, Gauteng v Pistorius* (96/2015) [2015] ZASCA 204; [2016] 1 All SA 346 (SCA); 2016 (2) SA 317 (SCA); 2016 (1) SACR 431 (SCA) (3 December 2015) par 55.

[28] *Director of Public Prosecutions, Gauteng v Pistorius supra* par 55.

[29] *S v Sigwahla* 1967 (4) SA 566 (A) 570–571.

[30] *Ibid*.

and reconciled himself with that event.[31] The appeal court found that at the time the fatal shots were fired, the possibility of the death of the person behind the door was clearly an obvious result.[32] The court also asserted that, in firing not one but four shots, the death of the deceased became even more likely.[33]

Where an accused foresaw the possibility of harm materialising as something less than a real possibility, but, instead as a remote possibility, conscious negligence rather than *dolus eventualis* would be present and the accused would be found guilty of culpable homicide.[34] It is unlikely that health-care practitioners would be convicted of such a crime where a patient dies while being treated. The difficulty lies in the State being able to prove that the health-care practitioner foresaw the possibility of the death of the patient and reconciled themselves with the death.

The law punishes not only unlawful acts that are committed intentionally, but also unintentional acts. Therefore, negligence is part of South African criminal law, especially in cases involving culpable homicide.[35] Here, fault may take the form of negligence, otherwise known as *culpa*.[36] It is generally the only common-law crime for which proof of negligence, as opposed to intention, is sufficient.[37] In a general context, negligence means that the accused has failed to anticipate the possibility of harm befalling another person in situations where a reasonable person in the same position as the accused would have foreseen the possibility of harm occurring to another, and would have taken steps to avoid or prevent it.[38] For a finding of negligence, it must be demonstrated that the accused's conduct did not meet the standard of care required by the law in the particular circumstances, and that they acted with guilt and thus can be blamed for the deed.[39]

The SCA further observed that the rhetorical question posed by the trial court when handing down judgment indicates that the trial court found the presence of a person behind the door not to have been reasonably foreseeable; but this conflicted with its later conclusion, which stated that the

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31 *Director of Public Prosecutions, Gauteng v Pistorius supra* par 29.

32 *Director of Public Prosecutions, Gauteng v Pistorius supra* par 50.

33 *Ibid.*

34 Burchell *Principles of Criminal Law* 5ed (2016) 583–586.

35 Snyman *Criminal Law* 6ed (2014) 442 who defines Culpable Homicide as "the unlawful, negligent causing of the death of another human being".

36 *S v Ngubane* 1985 (3) SA 677 (A); see also Burchell *Principles of Criminal Law* 5ed (2016) 62–63.

37 *Kruger v Coetzee* 1966 (2) SA 428 (A); *Oppelt v The Head: Department of Health*, *Provincial Western Cape* 2015 (12) BCLR 1471 (CC); *R v Mbombela* 1933 AD 269; *S v Ngubane supra*.

38 Burchell *Principles of Criminal Law* 5ed (2016) 416–424; Carstens "Revisiting the Maxim *Imperitia Culpae Adnumeratur* in Context of Medical Negligence – Can the Maxim Be Extended to Include the Application of *Luxuria*?" 2017 38(3) *Obiter* 613–622 https://journals.co.za/docserver/fulltext/obiter_v38_n3_a9.pdf?expires=1595603499&id=id&accname=58211&checksum=CE9860C42A206BB9D9D65840AEAC8D60 (accessed 2020-06-16).

39 *Ibid.*

accused was guilty of culpable homicide on the basis that a reasonable person in the same circumstances would have foreseen the reasonable possibility that the shots would kill the person in the toilet.[40]

Furthermore, the finding that the accused had not subjectively foreseen that he would kill whoever was behind the door and that, if he had intended to do so, he would have aimed higher than he did, combines the test of what is required to establish *dolus directus* with the assessment of *dolus eventualis*.[41]

The SCA also stated that a court, blessed with the wisdom of hindsight, should always be careful of determining that, just because an accused ought to have foreseen a consequence, they must have done so.[42] It was held that the foreseeability of death was irresistible.[43]

The charge of culpable homicide is most frequently found in South Africa among drivers for negligence resulting in the death of passengers or others.[44] In medical negligence cases, culpable homicide is the only common-law crime for which a negligent practitioner can be held liable.[45] In South African case law, culpable-homicide convictions have resulted from negligent over-prescription of medicine,[46] a blood transfusion performed on the wrong patient,[47] an excessive amount of contrast medium administered to a baby,[48] failure to correctly insert an endotracheal tube and to monitor the patient properly during anaesthesia,[49] and failure by a general practitioner to call in a specialist obstetrician when complications set in during delivery.[50]

The test for negligence in South African criminal law is the same as in civil law. Whereas negligence in the general sense is tested against the criteria of the reasonable person,[51] in a medical context, it is tested against the criteria of the reasonable medical practitioner, the reasonable specialist or the reasonable nurse in the same circumstances.[52] The standard that is

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40 *Director of Public Prosecutions, Gauteng v Pistorius supra* par 28.

41 *Director of Public Prosecutions, Gauteng v Pistorius supra* par 29.

42 *Ibid.*

43 *Ibid.*

44 Van Oosten "Professional Medical Negligence in Southern African Legal Practice" 1986 17(5) *Obiter* 22; *S v Naidoo* [2002] ZASCA 136; [2002] 4 All SA 710 (SCA).

45 Van Oosten 1986 *Obiter* 22.

46 *R v Van Schoor* 1948 (4) SA 349 (C); *S v Mkwetshana* 1965 (2) SA 493 (N); *R v Van der Merwe* 1953 2 PH H 24 (W).

47 *S v Berman* 1996 (T) (unreported).

48 Strauss "Oormatige Toediening van Kontrasmiddel: Strafbare Manslag [Excessive Administration of Contrast Medium: Culpable Homicide]" 1987 8(1) *S Afr Prac Mgmt* 27.

49 *S v Kramer* 1987 (1) SA 887 (W).

50 Strauss "Versuim van Geneesheer om Spesialis-Verloskundige by Probleem-Bevalling in te Roep, Stel Nalatigheid Daar [Failure of General Practitioner to Call in Specialist Obstetrician in Case of Complicated Delivery Constitutes Negligence]" 1988 9(1) *S Afr Prac Mgmt* 27; see also *S v Nel* 1987 TPD.

51 *Kruger v Coetzee supra* 430; Saner *Medical Malpractice in South Africa* (2018) 2–3.

52 Dutton *Medical Malpractice in South African Law* (2015) 89; see *Van Wyk v Lewis* 1924 AD 438 quoted by Saner *Medical Malpractice in South Africa* 2–3 to 2–4; see also the criminal

required is not that of the exceptionally skilled, gifted or diligent medical practitioner, but is rather the standard of the ordinary practitioner, in the branch of the profession to which they belong, who is acting reasonably.[53] One of a practitioner's professional obligations is the duty of care they need to show towards their patients. Any deviation from the duty of care leading to the death of a patient will result in criminal culpability. The court in the seminal case of *Mitchell v Dixon*[54] held that, as a rule, a medical practitioner is expected to exercise the degree of skill and care of a reasonably skilled practitioner in their field of practice. To minimise the risk to others, the law requires that the activity be carried out carefully, prudently and circumspectly.[55] Although civil law has not developed since the case was decided over a century ago, what must be borne in mind is the core investigation in this article focuses on the development of South African law in the criminal-law sphere. One of the broad arguments raised in this article is the hardship that using slight negligence as a yardstick for criminal culpability can cause health-care practitioners. Some of the challenges are discussed below.

In establishing liability for culpable homicide, our law does not require proof that the health-care practitioner acted in disregard of the patient's life and safety and that the health-care practitioner was aware that their conduct could result in the patient's death but nevertheless continued with the course of action.[56]

A problem with the South African system is that the criminal-justice regime fails to identify the degree of fault required for criminal conduct. An accused is either negligent or not.[57] The slightest degree of negligence could lead to criminal liability. What is troublesome is that health-care practitioners are required daily to make delicate decisions and to exercise a high degree of care and skill. What is inescapable in those circumstances is that even the most skillful and prudent doctor will, from time to time, omit something that should have been done, and that leads to the death of the patient. Yet, their conduct does not necessarily manifest a careless or insouciant approach towards the patient. In the sweep of a moment, the health-care practitioner may find themself in a court of law and being criminally charged with culpable homicide. It also matters not whether the health-care practitioner acted in good faith. A lack of care and an error in judgement will result in culpability where negligence is the cause of a patient's death, unless the law regards such conduct as excusable.[58]

position in the cases of *R v Van Schoor supra* 350; *R v Van der Merwe supra* 125; *S v Kramer supra*.

53 Dutton *Medical Malpractice in South African Law* 89.

54 1914 AD 519.

55 Burchell *Principles of Criminal Law* 4ed (2005) 522.

56 Dinnie "Medical Defence Doctors and Culpable Homicide" (04-09-2019) https://www.medicalacademic.co.za/ethics/doctors-and-culpable-homicide/ (accessed 2021-06-18).

57 *R v Van der Merwe supra*.

58 Dutton *Medical Malpractice in South African Law* 109.

Like all other persons, health-care practitioners are fallible and prone to making mistakes. This article raises the argument that it seems unfair to prosecute a medical practitioner for what may be little more than a slip. Eminent writer Alexander McCall Smith views slips as endemic in the everyday lives of health-care practitioners. He indicates that they are common in practice and arise from a slight deviation in methods routinely applied by practitioners.[59] This must also be viewed against the background of medicine not being an exact science. Medical practice in this regard is filled with uncertainties, with health-care practitioners often being confronted with the risks of uncertainty in treating patients. What is worse is that some practitioners find themselves in potentially hazardous environments in which they often need to make instant decisions that could result in errors of judgement, resulting in a patient dying and practitioners being criminally charged. This has led to considerable discontent among many South African health-care practitioners and their respective professional bodies in relation to the increase in prosecutions.

Some of the scathing criticism concerning this issue include the arbitrary, unreasonably harsh and counterproductive prosecutions that may emerge.[60] Whether or not a health-care practitioner is convicted, a prosecution may be catastrophic for the practitioner and their family. Going to jail will cause the practitioner to close their practice and be deprived of freedom of movement. Even where a practitioner is acquitted, they will suffer reputational harm and are likely to be removed from the roll of medical practitioners. Removing a practitioner from the roll of practitioners, especially those who are not "bad" doctors, can be counterproductive to the medical profession. It may cause an exodus of health-care practitioners who fear that, if they make a mistake, they may walk the same path, ending up in prison. The importance of health-care practitioners to health care in South Africa cannot be overemphasised. This is not to say that a health-care practitioner should not be prosecuted where bad clinical care, or omissions where clinical care was necessary, lead to the death of a patient. What is advocated is that where gross negligence or recklessness is established, the practitioner ought to be charged.

What South Africa urgently needs is a paradigm shift, raising the threshold from slight negligence to gross negligence or recklessness as the yardstick by which the criminal conduct of medical practitioners is measured and judged.

Because the NPA does not appear to have a firm policy regarding a standard threshold for when to charge a health-care practitioner, arbitrary prosecutions could result. A major concern is that the slightest negligent mistake leading to the death of a patient could cause the NPA to set the wheels in motion to charge a health-care practitioner with culpable homicide, which may end in the practitioner receiving a jail sentence.

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[59] McCall Smith "Criminal or Merely Human? The Prosecution of Negligent Doctors" 1995 12 *Journal of Contemporary Health Law and Policy* 131 136.

[60] Dr Howarth "Doctors in the Dock: Should Healthcare Professionals Be Criminally Charged for Medical Negligence?" (16 January 2020) https://www.medbrief.namibia.com/doctrine-in-criminally-charged-for-medical-negligence/ (accessed 2021-11-15).

It is contended in the section dealing with how reform should be introduced in South Africa that the NPA's readiness to pursue prosecutions fairly depends very much on an effective investigative mechanism, amplified by the provisions of the Inquest Act.[61]

An inquest is not a trial but rather, as the term suggests, a public inquiry presided over by a magistrate or judge. It is suggested that the magistrate or judge appointed to hold the inquiry should be assisted by an expert assessor or assessors sufficiently endowed with the necessary medical expertise to assist the presiding officer with very technical and complex matters not known to the judge or magistrate. The purpose of the inquest is to establish how the death occurred and who is to be blamed. In a medical malpractice context, an inquest may play an important role in the initiation of criminal proceedings for culpable homicide or murder against a medical practitioner who is alleged to have caused the death of a patient in a negligent or intentional manner. It can serve as a front-runner for a later criminal prosecution. As part of its investigative mechanism, the inquest may also flesh out to what degree a health-care practitioner has deviated from the standard of care and so establish whether they are culpable, especially in light of the suggested law reform that is envisaged. An inquest will also ensure that the offence of culpable homicide fairly represents an offender's wrongdoing.[62]

It should be noted that South Africa has not been alone in seeking law reform regarding medical culpable homicide because of the unfairness brought about by the low threshold for charging medical practitioners.[63] The foreign jurisdictions of Scotland, New Zealand, England and India have been chosen for a comparative study with the South African criminal legal system pertaining to the crime of culpable homicide as it affects health-care practitioners.

3 THE SCOTTISH LEGAL SYSTEM

Scottish law, like South Africa's, recognises both murder and culpable homicide as offences.[64] The offence of culpable homicide occurs when a person is killed in circumstances where the perpetrator lacks the malicious intent to kill, or the wicked recklessness required for murder.[65] The rationale for punishing a perpetrator for culpable homicide can be found in society's

61 58 of 1958.

62 Ashworth "Is the Criminal Law a Lost Cause?" 2000 (116) *Law Quarterly Review* 225.

63 Robson, Maskill and Brookbanks "Doctors Are Aggrieved – Should They Be? Gross Negligence Manslaughter and the Culpable Doctor" 2020 84(4) *The Journal of Criminal Law* https://doi.org/10.1177/0022018320946498 (accessed 2021-08-21) 312.

64 McDiarmid *Killings Short of Murder: Examining Culpable Homicide in Scots Law* (2018) https://strathprints.strath.ac.uk/66383/ (accessed 2025-01-28) 1; Bohlander, Wake, Engleby and Adams *Homicide in Criminal Law: A Research Companion* (2018) 21–36.

65 Law Society of Scotland "Culpable Homicide" (20 January 2021) https://www.lawscot.org.uk/media/wxrdpkik/2021-01-20-crim-culpable-homicide-s-bill-stage-1-briefing.pdf (accessed 2025-01-28) 6.

repugnance at the taking of someone's life, albeit not deliberate, but still reprehensible.[66]

Unlike the English legal system, the Scottish system does not recognise the offence known as gross negligence manslaughter found in England where it is used widely and not just in medical cases.[67] However, what is common to the English, Scottish and South African jurisdictions is that the Crown or the State, being responsible for criminal prosecutions, is required to prove the presence of negligence.

The Scottish standard for culpable homicide prosecutions is also said to be potentially harder to achieve than gross negligence manslaughter in England and Wales.[68] Equally, formulating the charge in Scotland has at times proved quite onerous, especially where the death of another through a mere mistake renders the agent of the death so little blameworthy that the question may be whether to prosecute at all.[69] What the Scottish Crown must show to sustain a conviction is that the defendant's conduct was unlawful and that the act was reckless or extremely careless and that the death was a direct result of the unlawful act.[70] Both recklessness and carelessness point to something more than ordinary negligence. The core nature of criminal negligence has sometimes been referred to by the courts as "grossness",[71] "wantonness",[72] or even "wickedness",[73] alternatively, "negligence seen as deserving of criminal punishment".[74] In other words, the accused's negligence showed such disregard for the lives and safety of others as to amount to a crime against the Crown and to be deserving of punishment.[75] The Scottish legal system, besides using the high bar of recklessness as the starting point for culpability, also requires that any prosecution must be in the public interest.[76] Recklessness usually involves acting in the face of a known risk of harm[77] and running the risk that these consequences materialise.[78] Social harm is posed by reckless conduct where the conduct exposes the community to the possibility of harm, even if the harm does not materialise.[79] Before recklessness can be considered culpable, it must be shown that the accused knew of the risk that their

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66 McDiarmid https://strathprints.strath.ac.uk/66383/ 21.

67 Law Society of Scotland "Medical Death: A Case to Answer" (17 September 2018) https://www.lawscot.org.uk/members/journal/issues/vol-63-issue-09/medical-death-a-case-to-answer/ (accessed 2025-01-28).

68 *Ibid*.

69 *Ibid.*

70 *Ibid.*

71 *R v Horvath* (1972) VR 533.

72 *R v Greisman* (1926) 46 CCC 172.

73 *Moore v R* (1926) SASR 52.

74 *Ibid.*

75 Gordon *The Criminal Law of Scotland* 2ed (1978) 790.

76 Robson *et al* 2020 *The Journal of Criminal Law* 312–340.

77 McCall Smith "Criminal Negligence and the Incompetent Doctor" 1993 1 *Med L Rev* 336 340 340–341.

78 Barton "Recklessness in Scots Criminal Law: Subjective or Objective?" 2011 *Juridical Review* 143.

79 *HM Advocate v S* (unreported) (15 October 1999) High Court of Justiciary.

behaviour entailed.[80] If this requirement is met, then the accused may appropriately be called to account and be punished.[81]

Culpable and reckless conduct is said to constitute intentional behaviour where the actor exposes individuals or the public at large to danger, including death or serious injury.[82] As the crime's name signifies, the behaviour must be reckless.[83] Recklessness refers to conduct that has a total disregard for the consequences of an actor's actions.[84] The nature of the crime excludes any accidental conduct.[85]

The Scots have cardinalised the *mens rea* element for the crime of reckless endangerment. The presence of foreseeable risk is, therefore, a prerequisite.[86] The principle *actus non facit reum nisi mens sit rea* holds that an act cannot be reprehensible unless the mind is also guilty.[87] The causing of death is punishable where it violates the sanctity of life or infringes a victim's right to life. A guilty mind is a factor that determines the seriousness of culpable homicide.[88]

With regard to offences involving health-care practitioners, Scottish law, unlike its English counterpart, is not replete with reportable cases decided by its courts. Since 2018, the only case involving culpable homicide was the prosecution of a doctor, Katy McAllister, who was acquitted after the trial.[89] Most Scottish cases involve prosecutions of the National Health Services (NHS) and Health Boards under Scottish common law.[90]

To bring about greater consistency in when prosecutorial staff should charge an alleged suspect with culpable homicide, the Scottish parliament investigated possible law reform. The (Scotland) Bill was tabled in the Scottish Parliament on 1 June 2020 but was not passed. The idea was to create statutory culpable homicide offences relating to recklessness and gross negligence.[91]

Scotland, as does England, uses inquests as a mechanism to determine *inter alia* whether health practitioners should be criminally charged. The Lord

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80 McCall Smith 1993 *Med L Rev* 336 340.

81 Alison *Principles* (1832) 92 113–126.

82 Crosbie "A Work-In-Progress Guide to Scottish Criminal Law" (undated) https://crime.scot/culpable-and-reckless-conduct/ (accessed 2021-10-01).

83 The Scottish Law Commission in 2003 in a draft Legal Code described recklessness as: "a) something is caused recklessly if the person causing the result is, or ought to be, aware of an obvious and serious risk that acting will bring about the result but nonetheless acts where no reasonable person would do so ... ."

84 *Ibid.*

85 Crosbie https://crime.scot/culpable-and-reckless-conduct/; see also McCall Smith "Criminal Negligence and the Incompetent Doctor" 1993 1 *Med L Rev* 336.

86 *Cameron v Maguire* 1999 JC 63.

87 McDiarmid https://strathprints.strath.ac.uk/66383/ 22–23.

88 *Ibid.*

89 BBC News "Doctor Acquitted Over Friend's Drug Death" (26 May 2017) https://www.bbc.com/news/uk-scotland-tayside-central-40057847 (accessed 2021-10-20).

90 Pollock and Dematagoda "Doctors in the Dock: Are the Courts Moving Towards Assigning Criminal Liability to Health Professionals?" (undated) https://peacockjohnston.co.uk/doctors-in-the-dock/ (accessed 2021-11-07).

91 *Ibid.*

Advocate is Scotland's independent prosecutor with constitutional responsibility for investigating all sudden, suspicious, unexpected and inexplicable deaths. The Crown Office and the Procurator Fiscal Service (COPFS) oversee this on behalf of the Lord Advocate.[92] Their investigation processes are the same as each other, and the result will determine what route if any, the investigation into the death should take.[93] The COPFS unit was established to promote openness in the decision-making process in both prosecutions and fatal accident inquiries in which the Lord Advocate plays an oversight role.[94] The Lord Advocate has a wide discretion in deciding *inter alia* whether it is in the public interest for a doctor to be prosecuted for culpable homicide, and/or in whether to order a fatal accident inquiry. This system also allows the Lord Advocate to decide objectively whether the death gives rise to matters of "significant public concern".[95] The role of the Lord Advocate in authorising the prosecutions of health professionals in Scotland is also noteworthy. In this regard, it is expected of the Lord Advocate to certify that it is in the public interest to charge and bring prosecutions against health practitioners.[96] It has been mooted that such an approach promotes consistency in each case in which factors such as the circumstances of the death, the sufficiency of the evidence, and what has been learned are closely considered.[97] It needs to be emphasised that the Scottish legal system requires a high degree of sufficiency of evidence before a suspect is charged.[98] That probably accounts for fewer people, including doctors, being charged with culpable homicide.

4 THE NEW ZEALAND LEGAL SYSTEM

The crime of culpable homicide is unknown in New Zealand. The comparable crime is known as negligent manslaughter. Depending on the circumstances of a case, the National Prosecuting Authority may charge an accused with a statutory offence where the offence arises from the death of a person without lawful excuse.[99] The offence is committed when, without lawful excuse, there is an unlawful act or an omission to perform or observe a legal duty or both.[100] The legal duty is imposed on motor vehicle drivers as

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92 Hamilton "Independent Review of Gross Negligence Manslaughter and Culpable Homicide" (June 2019) https://www.gmc-uk.org/-/media/documents/independent-review-of-gross-negligence-manslaughter-and-culpable-homicide---final-report_pd-78716610.pdf (accessed 2021-10-01) 42.

93 Law Society of Scotland https://www.lawscot.org.uk/members/journal/issues/vol-63-issue-09/medical-death-a-case-to-answer/ 2.

94 Law Society of Scotland https://www.lawscot.org.uk/members/journal/issues/vol-63-issue-09/medical-death-a-case-to-answer/ 2.

95 *Ibid.*

96 Medical Protection Society "English Law on Gross Negligence Manslaughter in Healthcare Must Move Towards Scottish Position" (13 March 2018) https://www.medicalprotection.org/uk/join (accessed 2021-11-10).

97 *Ibid.*

98 *Ibid.*

99 S 155 of the New Zealand Criminal Code.

100 Robson *et al* 2020 *The Journal of Criminal Law* 322.

well as health-care practitioners, among others.[101] Negligent manslaughter was first criminalised under the Crimes Act in 1961.[102]

In a medico-legal sense, if a patient dies owing to a doctor's failure to exercise reasonable knowledge, skill and care, the practitioner may be charged with manslaughter.[103] What the Crown must show is that the actor acted unlawfully by breaching their professional duty.[104] The rationale for regarding an unlawful act as a crime stems from the promotion of public safety.[105]

Significantly, the threshold for negligent conduct before law reform was introduced in New Zealand in 1997 was low and took the form of ordinary negligence.[106] This included mistakes through carelessness or even errors arising from emergency situations.[107] Mitigating factors in the case of health-care practitioners were primarily relevant to sentencing rather than to the question of whether the doctor should be convicted. The position was the same as we experience in South Africa at present. It did, however, lead to some criticism, especially among medical practitioners and academics in New Zealand.[108] However, it was not until the case of *R v Yogasaharan*[109] that real calls for law reform within New Zealand gathered momentum.[110] The case concerned a doctor who should have administered Doxapram, but instead, and in haste, used the ampule Dopamine. The two drugs were erroneously put together in the same container. The patient sustained fatal physiological stresses and died shortly thereafter.[111] The doctor's honest mistake resulted in the death of the patient. After his conviction in the court *a quo* on a charge of negligent manslaughter*,* the Appeal Court dismissed the appeal. The court found that a reasonable anaesthetist would not have breached their duty by failing to check the packaging of the drug, regardless of the circumstances.[112]

What followed was a flurry of cases in which the New Zealand prosecutorial staff set in motion a few prosecutions against health-care

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101 Merry "Mistakes, Misguided Moments, and Manslaughter" 2009 41(1) *J Extra Corpor Technol* 2–6; *R v Dawe* 1911 30 NZLR 673; *R v Storey* 1931 NZLR 417 432. For the more recent seminal case involving a health-care practitioner, see *R v Yogasakaran* [1990] 1 NZLR 399.

102 The Crimes Act 43 of 1961.

103 Collins "New Zealand's Medical Manslaughter" 1992 11(2) *Medicine and Law* 221.

104 See Merry and McCall Smith *Errors, Medicine and the Law* (2001) 3 with reference to s 155 of the Criminal Code, which states: "Duty of persons doing dangerous acts: Everyone who undertakes (Except in a case of necessity) to administer surgical or medical treatment, or to do any other lawful act the doing of which is or may be dangerous to life, is under a legal duty to have and to use reasonable knowledge, skill, and care in doing any such act, and is criminally responsible for the consequences of omitting without lawful excuse to discharge that duty."

105 S 160(2) of the Crimes Act 1961.

106 The Crimes Amendment Act 88 of 1997.

107 Merry 2009 *J Extra Corpor Technol* 5.

108 Merry 2009 *J Extra Corpor Technol* 4.

109 (1990) 1 N2 LR 399 (CA).

110 Merry and McCall Smith *Errors, Medicine and the Law* 3.

111 *R v Yogasaharan supra* 401.

112 *R v Yogasaharan supra* 405.

practitioners who were charged with negligent manslaughter, arising from varying degrees of culpability.[113] This caused a widespread unease among medical professionals. Those working in high-risk specialities felt particularly vulnerable.[114] What followed was the establishment of a New Zealand Medical Law Reform Group, consisting of several plastic surgeons and anaesthetists who felt particularly vulnerable.[115] The group's aim was to bring about law reform in New Zealand and to seek a proper balance between the criminal code and other means of accountability in medicine.[116] The group sought reform that was not limited to the medical profession, but included everyone, including motorists.[117]

Some of the salient arguments advanced by academics in New Zealand include the following. Robson *et al*[118] suggest that, besides criminalising negligent doctors, some may face professional disciplinary proceedings. Others concentrate on the harm imprisonment may bring to health-care practitioners – for example, the public shunning the doctor on inadequate grounds.[119] To avoid professional ruin, some critics suggest "civil action".[120]

Some of the main policy concerns were raised by Sir Duncan McMullin,[121] who promoted the equitable idea of adopting a higher threshold to prove criminal liability involving health-care practitioners charged with manslaughter. McMullin advanced the idea of practitioners being encouraged to report mistakes in order to remove the fear of punishment for minor mistakes. In his view, this would counter defensive medical practices and practitioners refusing to administer dangerous treatments.[122] McMullin also promoted the idea of aligning with foreign jurisdictions where countries had moved away from the threshold of an ordinary standard of care and adopted a gross negligence standard to measure criminal culpability involving medical mistakes.[123] He also believed that it would promote consistency among common-law jurisdictions[124] and allow judges to seek

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113 Merry "When Are Errors A Crime? – Lessons From New Zealand" in Erin and Ost *The Criminal Justice System and Healthcare Coup* (2009) 257; see the cases of *R v Morrison* (unreported and delivered by Fraser J in the High Court Dunedin in 1991) and *R v Brown* (unreported and delivered by Gallen J on May 1994 in the High Court, Wellington 6 May on 1994) in each of which health-care practitioners were convicted – cited by Manning H *Consequences of the Yogasakaran Decision: A Review of New Zealand's Medical Manslaughter Law* (LLB (Honours) Treatise, Victoria University of Wellington) 1 September 1994 5–6.

114 Merry 2009 *J Extra Corpor Technol* 4.

115 *Ibid.*

116 The New Zealand Medical Law Reform Group Crimes Amendment Bill (No 5) 1996 "Medical Manslaughter" Submission (1997) cited in Merry 2009 *J Extra Corpor Technol* 3.

117 Merry 2009 *J Extra Corpor Technol* 4.

118 Robson *et al* 2020 *The Journal of Criminal Law* 321–322.

119 Tadros *Fair Labelling and Social Solidarity* (2012) 70.

120 Brazier and Alghrani "Fatal Medical Malpractice and Criminal Liability" 2009 25(2) *Journal of Professional Negligence* 56.

121 McMullin *Report of Sir Duncan McMullin to Hon Douglas Graham, Minister of Justice, on Sections 155 and 156 of the Crimes Act 1961* (1995) 12.3.

122 *Ibid*.

123 McMullin *Report of Sir Duncan McMullin to Hon Douglas Graham, Minister of Justice, on Sections 155 and 156 of the Crimes Act 1961* 4.2, 5.1, 6.0.

124 *Ibid.*

guidance from foreign court judgments.[125] This is a principle known to South Africa and provided for by the South African Constitution.[126] It is argued by this article that South Africa should heed McMullin's call to bring about law reform.

After much lobbying, the New Zealand Medical Law Reform Group was instrumental in having the traditional Crimes Act[127] amended in 1997. The Crimes Amendment Act[128] incorporated a new section, namely section 150A, which changed the standard of proof, raising the level to higher than just ordinary negligence. Section 150A(2) provides for "a major departure from the standard of care expected of a reasonable person".[129] A charge of manslaughter will be filed against the wrongdoer if a major departure from the prescribed standard can be demonstrated. The "major departure test" is said to be beneficial to those surgeons or other health practitioners who operate in error-ridden activities and who are exposed to the risk of prosecutions because of the vital work they do, often at the mercy of moral luck.[130] Put simply, some practitioners are just lucky that patients do not die in their hands. In those settings, criminal law should only be used in cases of deliberate harm or recklessness.[131]

Since the 1997 law reform in New Zealand, these types of case are said to have become rare.[132] Health professionals are now encouraged to report any unintended, unexpected or unplanned events to their Health Quality and Safety Commission. The Commission in turn runs an adverse-event learning programme that revisits events and shares lessons learned to improve consumer safety.[133] It is suggested that South Africa take a leaf from the law reform experience in New Zealand and adopt those principles most suitable to our own environment.

5 THE INDIAN POSITION

Because of the historical ties between the United Kingdom and India, the Indian legal system has over centuries been especially influenced by the English legal system, both in civil and criminal law. English precedent-setting cases[134] had a tremendous effect on Indian jurisprudence. The test

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125 *R v Hamer* [2005] 2 NZLR 59.

126 S 39(1) of the Constitution of the Republic of South Africa, 1996 (Constitution).

127 43 of 1961.

128 88 of 1997.

129 S 150A of the Crimes Amendment Act 88 of 1997. The change in the law was illustrated in a New Zealand Appeal Court decision in *R v Powell* [2002] 1 NZLR. The court held in this case that the "major departure" test applied not only to manslaughter by omission to perform a legal duty, but also to manslaughter (under s 160(2)(*a*) of the Crimes Act of 1961) by an unlawful act involving either carelessness or negligence.

130 Quick "Prosecuting Gross Medical Negligence: Manslaughter, Discretion and the Crown Prosecution Service" 2006 33(3) *Journal of Law and Society* 421.

131 *Ibid.*

132 Merry and McCall Smith *Errors, Medicine and the Law* 41.

133 *Ibid.*

134 Civil terrain cases like *Donoghue v Stevenson* [1932] UKHL 100 and *Bolam v Friern Hospital Management Committee* [1957] 2 All ER 118; [1957] 1 WLR 582 have left their

established in *Bolam's* case for determining medical negligence is still valid.[135] The idea of negligence is defined differently in civil and criminal law in India. What may constitute negligence in civil law is not always negligence in the criminal-law sense. The element of *mens rea* must be present for negligence to be considered a criminal offence. The degree of negligence must also be substantially higher than ordinary negligence for a health-care practitioner's conduct to constitute a criminal act. Deviation from the standard of care towards a patient needs to be gross or extremely high for an act or omission to be considered criminal negligence. Negligence that is neither gross nor of a high degree may give rise to civil action, but cannot be used to prosecute an accused.[136]

Criminal action and the bringing of charges against health-care practitioners are regulated under the Indian Penal Code, 1860 (the Code), as amended.[137] The concept of culpable homicide is defined in section 299 of the Code.[138] According to this section:

> "A person commits culpable homicide if he or she executes an act with the intent to kill/cause the death of another person, or with the intent to cause such bodily injury that it is likely to kill another person, or with the knowledge that such acts are likely to kill another person."[139]

Section 304 of the Code expands on the idea of culpable homicide, which does not amount to murder.[140]

Although the word "gross" is not used in section 304A of the Code, it is well established that in criminal law, negligence or recklessness must be of such a high degree to be considered "gross". The phrase "rash or negligent act", as used in section 304A of the Code, must be construed with the qualifier "grossly". To prosecute a medical practitioner for negligence under criminal law, it must be demonstrated that the accused did or failed to do something that no medical professional using their usual senses and prudence would have done or failed to do in the given facts and circumstances. The risk taken by the accused doctor should have been such that the injury or death that ensued was most likely imminent. However, to be penalised for criminal negligence, the degree of negligence must be so severe that it goes beyond the need only for compensation. Insofar as the harm is concerned, it must be inflicted not only on the victim but also on

imprint on the Indian common-law position on professional negligence, especially concepts such as the "patient-doctor relationship" and the "duty of care". These set the tone for the modern requirement to prove civil negligence and more specifically, the degree of negligence. On the criminal side, cases like *Andrews v Director of Public Prosecutions* [1937] AC and *R v Lawrence* [1981] 1 All ER 974 (HL) have played a significant role in drawing a distinction between the degree of negligence required in civil matters as opposed to criminal matters in determining criminal liability.

135 *Bolam v Friern Hospital Management Committee supra* 4.

136 *Bolam v Friern Hospital Management Committee supra* 5.

137 The Indian Penal Code was promulgated in 1860.

138 The Indian Penal Code of 1860.

139 S 299 of Indian Penal Code of 1860.

140 Kanwar "Culpable Homicide" (undated) http://www.legalservicesindia.com/article/582/Culpable-Homicide.html (accessed 2021-12-01).

society, and the behaviour must disregard the patient's life and safety, and be deserving of punishment.[141]

The Indian courts have been loath to hold qualified medical practitioners criminally responsible for patient deaths that result from a mere mistake or error of judgement or inadvertent death. What must be shown is the presence of gross negligence or recklessness – for instance, the reckless dispensation of medications; outrageous negligent performance of diagnostic measures that lead to death; reckless handling of ventilators or other life-sustaining equipment; reckless administration of anaesthesia; or performing surgery under the influence of alcohol or drugs.[142] The court in *Banavarlal v State*[143] held that the mere fact that a life has been lost or that someone has been injured should not be used to infer reckless or careless behaviour. Courts in India have frequently maintained that for a qualified doctor to be found guilty of criminal negligence, the negligence must be of a severe and gross nature.[144]

In 2009, the Indian Supreme Court also developed the common law. Until then, Indian law, like current South African law, did not distinguish between the degrees of negligence required for civil and criminal liability. Since developing Indian common law, the courts now require gross negligence or recklessness to be proved in a doctor's manslaughter prosecution.[145]

In the judgment of *Jacob Mathew v State of Punjab*,[146] the honorable Apex Court explained that in the context of the medical profession, negligence necessitates a unique approach. A case of workplace negligence differs from one involving professional negligence. The court held that a simple lack of care, a lapse in judgement or the occurrence of an accident are not evidence of medical professional negligence.[147]

The rationale for introducing a higher threshold for measuring criminal culpability in a health-care practitioner that includes gross negligence or recklessness ensures that prosecutions are not arbitrary; arbitrary prosecutions lead to fear among practitioners. This position has been aptly described by Indian authorities: "A surgeon with shaky hands under fear of legal action cannot perform a successful operation and a quivering physician cannot administer the end-dose of medicine to his patient."[148]

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141 *Ibid.*

142 Mathiharan "Criminal Medical Negligence: The Need for a Re-Look" 2002 15(6) *The National Medical Journal of India* 351.

143 (1961) 2 *Cri L J* 561.

144 Dr *Wagh v State of Maharashtra,* Criminal Appeal No 607 of 1962 (Kotwal and Chandrachud JJ) (unreported judgment of 5 December 1961 of the Bombay High Court).

145 *Martin F D'Souza v Mohd Ishfaq* (2009) 3 SCC 1.

146 AIR 2005 SC 3180 2.

147 *Ibid.* See also Mathiharan 2002 *The National Medical Journal of India* 351.

148 The Association of Surgeons "Medical Negligence – The Judicial Approach by Indian Courts" (2021) https://asiindia.org/medical-negligence-the-judicial-approach-by-indian-courts/ (accessed 2025-01-28) par 29.

6 THE ENGLISH LEGAL SYSTEM

Both the English and Welsh criminal legal systems use grades of negligence. An offence will only be punishable where there is a severe degree of negligence. In the general sense, the standard is measured against that of the reasonable man, the bar against which the conduct of the wrongdoer is measured and judged.[149] In the criminal-law systems of England and Wales, there are different levels of negligence. But it is only the highest degree of negligence that is criminally punishable.[150] In a criminal case, the negligence that would warrant a conviction must be culpable or of a higher degree, rather than a slight degree of negligence. A slight deviation from the standard of care, or a mere error of judgement leading to harm, would lead only to a civil action.[151]

The English legal system uses different grades of negligence for different criminal offences, including negligent manslaughter. The term "gross negligence" or "recklessness" is commonly used to express this distinction in practice. The distinction between gross negligence and recklessness can be quite narrow at times.[152] The position was set out in a very early English judgment of *Andrews v DPP*,[153] which stated:

> "Simple lack of care such as will constitute civil liability is not enough for the purpose of the criminal law. There are degrees of negligence, and a very high degree of negligence is required to be proved before the felony is established."

The court goes on to say:

> "The degree of negligence, which would justify a conviction, must be something more than mere omission or neglect of duty."

The English legal system clearly distinguishes between manslaughter, a less serious offence, and murder, with the difference being differing levels of fault, based on the *mens rea.* In the absence of the required *mens rea* or intent to kill, the defendant may only be charged with manslaughter.[154]

The courts have developed the condition that negligence must be "gross" to satisfy the threshold of criminal liability.[155] If the accused was aware of the risk and decided to take it, the accused was reckless[156] Gross negligence manslaughter (equivalent to the South African culpable homicide) is said to have been committed where a death is the result of a grossly negligent act

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149 *Connor v Surrey* CC [2010] EWCA Civ 286, [2011] QB 429 66.

150 *Ibid.*

151 McCall Smith "Criminal Negligence and the Incompetent Doctor" 1993 *Med L Rev* 336–349.

152 *Ibid.*

153 *Andrews v DPP* 1937 AC 583.

154 *Ibid.*

155 *R v Adomako* [1994] UKHL 6.

156 Badar and Marchuk "A Comparative Study of the Principles Governing Criminal Responsibility in the Major Legal Systems of the World (England, United States, Germany, France, Denmark, Russia, China, and Islamic legal tradition)" 2013 24 *Crim Law Forum* https://doi.org/10.1007/s10609-012-9187-z 12–13.

or omission by the defendant.[157] The elements of manslaughter by gross negligence were stated by the English Queen's Bench Division in *R v Rudling*[158] as being

> "the breach of an existing duty of care which is reasonably foreseeable and gives rise to a serious and obvious risk of death and does in fact cause death in circumstances where, having regard to the risk of death, the conduct of the defendant was so bad in all the circumstances as to amount to a criminal act or omission."

In England and Wales, several prosecutions involving health practitioners for gross negligence manslaughter have taken place over decades.[159] Commencing with the case of *R v Bateman*,[160] the court of appeal found that

> "in order to establish criminal liability, the facts must be such that, the negligence of the accused went beyond a mere matter of compensation between subjects and disregard for the life and safety of others deserving punishment."

In the landmark case of *R v Adomako*,[161] a *locum* anaesthetist took over as the sole anaesthetist during an operation. The endotracheal tube dislodged from the ventilator. Despite attempts to resuscitate the patient, the patient suffered a cardiac arrest, causing irreversible brain damage. The patient died after six months. The health-care practitioner was charged with gross negligence manslaughter and was subsequently convicted. The court with reference to *R v Bateman*[162] and *Andrews v DPP*[163] accentuated the elements of manslaughter, *inter alia* that "the duty should be breached by gross negligence". The conviction was upheld in the House of Lords, the court agreeing that gross negligence was the proper test of criminality.[164] The court *a quo* also held that the degree of negligence must be extremely high before the conduct may be deemed criminal.[165]

The elements of manslaughter by gross negligence were stated concisely in *R v Rudling*[166] as being

> "the breach of an existing duty of care where it is reasonably foreseeable and gives rise to a serious and obvious risk of death and does, in fact, cause death in circumstances where, having regard to the risk of death, the conduct of the defendant was so bad in all the circumstances as to amount to a criminal act or omission."

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157 *R v Adomako* [1994] UK HL 6.

158 [2016] EWCA Crim 741 18.

159 Robson *et al* 2020 *The Journal of Criminal Law* 321–322.

160 (1925) 9 L JKB 791 794.

161 [1995] 1 AC 171.

162 (1925) 19 Cr App R 8.

163 [1937] AC 576.

164 *R v Adomako* [1994] UKHL 6.

165 Legal Guidance "Gross Negligence Manslaughter" (14 March 2019) https://www.cps.gov.uk/legal-guidance/gross-negligence-manslaughter (accessed 2025-01-28).

166 *Supra*.

The Crown Prosecution Service in England has directed that the foreseeability of risk should pertain to "a serious and obvious risk of death", not just a risk of injury at the time of the breach.[167] The position was supported by the English court in *R v Rose*,[168] when the court added that "an obvious risk is a present risk which is clear and unambiguous, not one which might become apparent on further investigation".

Notwithstanding the progress made in English law, it has been mooted that the English criminal system should undergo reform and move towards the Scottish criminal system and the way Scotland deals with its comparable offence of culpable homicide. What is mooted is that the bar or threshold be raised so that charges are only brought against health-care practitioners if it can be shown that the act or omission complained of was intentional, reckless or grossly careless.[169]

The call for a paradigm shift follows two noteworthy judgments in the English courts, namely *R v Sellu*[170] and *R v Bawa-Garba.*[171] Both the legal fraternity and the Medical Protection Society called into question the judicial treatment the health-care practitioners received. Besides their exemplary work records, the practitioners were also exposed to a high-risk working environment because of adverse working conditions. Dr Rob Hendry of the Medical Protection Society argues that most medical manslaughter cases are complex, often involving system failures. He argues that those cases require greater caution before prosecutions against health practitioners are instituted.[172]

The English Medical Protection Society has suggested that law reform is needed in England and that the law surrounding medical manslaughter be aligned with the legal test for culpable homicide in Scotland. It was also mooted that before the Prosecution Authority presses charges against medical practitioners, the Crown ought to ensure that the "act was intentional, reckless or grossly careless". Part of the law reform sought in England was the raising of the threshold for culpability. What was also recommended was that the Director of Public Prosecutions assume a similar role to that of the Lord Advocate in Scotland. Critics believe that would ensure that the public interest would play a key role in considering a prosecution against a health-care practitioner.[173] What has also been suggested is that national guidelines be created for investigating health-care practitioners suspected of gross negligence manslaughter and that such investigations should be carried out by a designated specialist unit.[174]

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167 Legal Guidance https://www.cps.gov.uk/legal-guidance/gross-negligence-manslaughter.

168 [2017] EWCA Crim 77.

169 Medical Protection Society in the United Kingdom "English Law on Gross Negligence Manslaughter in Healthcare Must Move Towards Scottish Position" (14 November 2018) https://www.medicalprotection.org/uk/join (accessed 2021-09-14).

170 [2016] EWCA Crim 1716.

171 [2016] EWCA Crim 1841.

172 Medical Protection Society https://www.medicalprotection.org/uk/join.

173 *Ibid.*

174 *Ibid.*

7 HOW SHOULD REFORM IN SOUTH AFRICA BE INTRODUCED?

For the reasons proposed here, South Africa needs law reform, especially regarding the criminal liability of health-care practitioners arising from medical mishaps leading to the death of patients. Practitioners involved are currently in danger of prosecution for culpable homicide. What has added to the woes of health-care practitioners is the very low threshold the NPA relies on to establish the blameworthiness of practitioners charged with culpable homicide. The slightest degree of negligence can lead to the prosecution of practitioners and, if convicted, a jail sentence. It could ultimately result in their losing their career and liberty. Besides being unreasonable and unfair, criminalisation in the absence of any clear intent or gross negligence is viewed as overly punitive and not in the public interest. To this end, it has been suggested before that the morally innocent should not be charged or convicted of serious crimes.[175]

Save for some recent support for law reform in this area of South African criminal-law jurisprudence, very little has been written about it for many decades. However, the writer Barlow, as long ago as 1948, suggested that "doctors should only be prosecuted in those cases where one feels a sense of shock, where the death could have been prevented by the practitioner paying more attention to the case".[176] It is submitted that the wording used by the learned writer hints at a shift in threshold towards gross negligence or recklessness.

The recent announcement by the South African Law Reform Commission to investigate criminal liability of health-care professionals under *Project 152* is to be welcomed. It will allow all interested parties to ventilate their opinions under the stewardship of the Commission. For law reform to be introduced in South Africa, it is crucial that the Law Reform Commission, when commencing its investigations, give thought to raising the bar for testing the culpability of health-care practitioners in culpable homicide matters. What is more, it is suggested that the Law Reform Commission when considering whether or not to raise the bar, should have regard to the reform approach adopted in Scotland, New Zealand, India and England. Critics in favour of change will hope that the Law Reform Commission recommends that health-care practitioners only face prosecutions for causing a patient's death through negligence if the NPA can show the presence of gross negligence or recklessness. Where it is shown that a practitioner's negligence leading to the death of a patient was slight, the practitioner should escape criminal liability. In its deliberations, the NPA should take into account any poor working conditions under which health-care practitioners work, including lack of resources, long hours and a shortage of staff.

Because the NPA does not appear to have a firm policy regarding a standard threshold for when to charge a health-care practitioner, it is

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[175] McCall Smith 1995 *Journal of Contemporary Health Law and Policy* 131 145.

[176] Barlow "Medical Negligence Resulting in Death" 1948 11(3) *Journal of Contemporary Roman-Dutch Law* 173–190.

suggested that the Law Reform Commission's investigation should *inter alia* focus on and recommend that the NPA in consultation with the Health Professions Council of South Africa formulate guidelines covering the prosecution of health-care practitioners. Besides raising the threshold for the degree of negligence required to pursue criminal proceedings against health-care practitioners for culpable homicide, it is hoped that the Law Reform Commission will also investigate the following issues. A designated specialist unit should be established to determine whether health-care practitioners should be criminally charged. However, first the sufficiency of evidence must be compelling after careful consideration. The head of the unit would be expected to certify that it would be in the public interest to charge and bring prosecutions against health practitioners. It is also suggested that the Law Reform Commission investigate the feasibility of introducing an inquest mechanism to serve as a screening system, especially where the unit in its initial investigations finds that there is an insufficiency of evidence to establish a *prima facie* case against a health-care practitioner whose conduct is being investigated. The inquest could serve as part of the investigative mechanism to determine the circumstances of the death, the degree of negligence displayed by the health-care practitioner, and the sufficiency of the evidence for a charge of culpable homicide or murder.

8 CONCLUSION

Central to this article is an investigation into possible law reform in South Africa, more particularly the call for raising the threshold test for culpability of health-care practitioners in culpable homicide matters. The investigation takes place against the background of reform measures put in place in countries like Scotland, New Zealand, England and India. What is significant is that historically their legal systems adopted a low threshold in the form of ordinary negligence when measuring the culpability of health-care practitioners in the event of the death of their patient(s). That has been the position in South Africa for centuries and is still the position today. The degree of the accused's negligence matters not since even the slightest negligence is sufficient to sustain a conviction.[177]

Medicine is not an exact science; despite practitioners acting in good faith when treating their patients, if their conduct is measured against this low threshold, it may lead to criminal culpability. The same applies to slip-ups, mishaps and errors of judgement on the part of practitioners. Most health-care practitioners do not intend to harm or hurt their patients. Criminalising mistakes while practitioners work in often challenging and complex environments is worrisome and regarded as unfair. The failure to identify the degree of fault involved in a death is viewed by health-care practitioners as a concerning gap that leads to uncertainty and injustice. This has led to a culture of fear of arrest and prosecution by health-care practitioners.

[177] *R v Meiring* 1927 AD 41.

The legal systems in countries like Scotland, New Zealand, England and India have faced similar predicaments in the past, which led to policy changes, including the adoption of an ethos that health-care practitioners should be left to render treatment and save lives and not tremble with the fear of criminal prosecution. Those countries have also drawn clear distinctions between various forms of negligence. Accentuating gross negligence as the requirement for measuring the criminal responsibility of health-care practitioners who face a potential charge of culpable homicide/manslaughter became universal in their legal systems. This meant that a criminal sanction should only be imposed where recklessness or gross negligence may be inferred from the health-care practitioner's conduct, which must also be accompanied by a blameworthy state of mind.[178]

A similar policy should be adopted in South Africa. It is suggested that prosecutions against health-care practitioners in South Africa should only be instituted where the public interest demands it. Gross negligence or recklessness in culpable homicide matters could warrant such prosecutions.

Given the development of the law in the comparative legal systems studied, this article suggests that the South African Law Reform Commission just appointed to investigate the criminal liability of health-care practitioners in South African criminal law should bring about the necessary reform. It is recommended that gross negligence or recklessness serve as the barometer to measure criminal culpability of health-care practitioners in South Africa. It should be noted that this article does not support mandatory exoneration of criminal liability of health-care practitioners. Bad or poor medical care should be prosecuted. However, the law must clearly define the standard of culpability deserving criminal sanction.

This article also suggests that an effective investigative mechanism be put in place to investigate an incident in which a patient dies. The idea is to allow for sufficient evidence to be gathered before criminal proceedings, if any, are instituted against a health-care practitioner. Because the complainant and the investigating officer may not always have knowledge of medical science to determine whether a health-care practitioner is culpable, it is also suggested that a specialised unit within the NPA be established. Here, members of the unit, including medical experts should be well equipped to distinguish between errors of judgement or inadvertence (which are part of life's misfortunes and for which nobody is morally responsible), and wrongs amounting to culpable conduct constituting grounds for prosecution that is in the public interest.

This article suggests the adoption of a mechanism involving inquests to flesh out evidence on the degree of negligence. An inquest should precede any criminal prosecution, which should only follow after the issues have been ventilated.

Criminal prosecution should, therefore, be reserved for those who have been reckless, and where the recklessness has caused the patient's death, or for those few individuals who willfully hurt patients. It is also

[178] McCall Smith 1995 *Journal of Contemporary Health Law and Policy* 131–146 139.

recommended that the legislation should include that prosecutions only be pursued against health-care practitioners if they are in the public interest. This will avoid indiscriminate prosecution of medical practitioners for criminal negligence that is counterproductive and does not serve the interests of society.

A Human-Rights-Based Approach to Front-Of-Package Labelling in South Africa

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SUMMARY

South Africa is facing a rapidly increasing rate of diet-related non-communicable diseases (NCDs), threatening the health, and consequently the protection, promotion and fulfilment of the human rights of South Africans. As part of its response to the growing epidemic, the government has proposed the adoption of a simplified nutrition-labelling system that includes a front-of-package warning label. The use of front-of-package labelling (FOPL) has been shown to improve diets by providing consumers with easy-to-understand information about food products that are generally difficult to interpret as a layperson, and to serve as a basis to adopt other effective obesity-prevention measures, such as marketing restrictions or taxes on unhealthy foods. FOPLs have been successfully implemented in other countries and endorsed as a mechanism to realise the rights to health, food and access to information by international human-rights commentators. A FOPL regime will also complement consumer-protection legislation in South Africa, being aimed at

https://doi.org/10.17159/93gbxm22

promoting access to information for South Africans. This article makes a human-rights-based case for FOPL by outlining why implementing FOPL would be a unique and effective mechanism for the South African government to meet its human-rights obligations under the Constitution and international human-rights instruments. Specifically, this article identifies rights that can be used to support the adoption of FOPL, and concretises the obligations and content within these rights to provide a human-rights-based justification for the adoption of simplified nutrition labelling in South Africa.

KEYWORDS: obesity, constitutional rights, right to food

1 INTRODUCTION

Front-of-package labelling (FOPL) has been identified as a potential intervention to improve diets by enabling consumers to more easily identify unhealthy foods and make better decisions about their diets.[1] In addition, FOPL can provide a basis for adopting other obesity-prevention measures such as marketing restrictions or taxes on unhealthy foods.[2] While there are a range of FOPL systems, it has been recognised that mandatory warning systems are particularly effective in achieving the aims of improving diet and obesity prevention.[3] There has also been an increased adoption of FOPL systems globally, with over 10 countries adopting such systems. Uruguay, Peru, Chile and Israel have adopted these warning systems and, in some instances, they are already seeing positive changes in diets as a result.[4]

South Africa first contemplated introducing a FOPL system in 2014 through draft regulations (R429).[5] At the time, a voluntary traffic-light system was proposed, but this fell short of current best practices.[6] In early 2023, South Africa published new draft regulations, which sought to introduce a mandatory FOPL scheme for unhealthy food products (R3337).[7] The proposed scheme draws substantially on FOPL systems adopted elsewhere but uses a purpose-built, nutrient-profiling system to identify foods that

1 Pan American Health Organization "Front-of-Package Labeling" (undated) https://www.paho.org/en/topics/front-package-labeling (accessed 2023-10-18).

2 Dintrans, Rodriguez, Clingham-David and Pizarro "Implementing a Food Labeling and Marketing Law in Chile" 2020 6(1) *Health Systems & Reform* e1753159.

3 Hammond, Acton, Rynard, White, Vanderlee, Bhawra, Reyes, Jáuregui, Adams, Roberto, Sacks and Thrasher "Awareness, Use and Understanding of Nutrition Labels Among Children and Youth From Six Countries: Findings From the 2019–2020 International Food Policy Study" 2023 20(55) *International Journal of Behavioral Nutrition and Physical Activity* 1; Song, Brown, Tan, MacGregor, Webster, Campbell, Trieu, Mhurchu, Cobb and He "Impact of Color-Coded and Warning Nutrition Labelling Schemes: A Systematic Review and Network Meta-Analysis" 2021 18(10) *PLOS Medicine* e1003765.

4 Reyes, Taillie, Popkin, Kanter, Vandevijvere and Corvalán "Changes in the Amount of Nutrient of Packaged Foods and Beverages After the Initial Implementation of the Chilean Law of Food Labelling and Advertising: A Nonexperimental Prospective Study" 2020 17(7) *PLOS Medicine* e1003220.

5 Regulations Relating to the Labelling and Advertising of Foods: Amendment GN R429 in *GG* 37695 of 2014-05-29.

6 Karim, Kruger and Hofman "Some Legal Issues Around the Adoption of Simplified Nutrition Labelling in South Africa: An Analysis of Draft Regulation R429" 2022 23 *ESR Review* 21.

7 Regulations Relating to the Labelling and Advertising of Foodstuffs GN R3337 in *GG* 48460 of 2023-04-21.

should carry a label and also feature a logo developed through consumer engagement.[8]

R3337 also introduces associated restrictions on marketing and the use of health claims for products bearing a label.[9] R3337 arises in a context where South Africa faces a growing burden of obesity, overweight and associated non-communicable diseases. Previously, South Africa has pioneered regulations aimed at preventing NCDs, particularly diet-related NCDs. Over the past decade, the government has introduced restrictions on the amount of sodium and trans-fats in foods, regulated infant formula and adopted a tax on sugary beverages, all with the goal of preventing NCDs.[10] The adoption of a mandatory FOPL system is the next logical step in the government's effort to prevent NCDs.

However, efforts to adopt mandatory FOPL systems are not without challenges. Governments that have attempted them have often faced extensive opposition from industry and corporate actors.[11] This opposition has come in the form of media and lobbying campaigns against mandatory FOPL systems (arguing that diet is a matter of individual choice), and litigation in both domestic and international fora, including challenges in the World Trade Organization.[12] In addition, FOPL and other obesity-prevention measures are frequently framed in opposition to human rights and are often understood to limit human rights.[13]

There is a growing recognition that adopting a human-rights-based approach (HRBA) to NCD prevention, and FOPL specifically, may support governments to adopt these measures and defend them against potential challenges from industry.[14] In addition to the need to manage the tensions between human rights and public-health interventions, human rights also offer an accountability mechanism and can be used to compel government action where the rights involved are justiciable. This article seeks to explore how human rights may support the adoption of a mandatory FOPL system in

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8 Frank, Thow, Ng, Ostrowski, Bopape and Swart "A Fit-for-Purpose Nutrient Profiling Model to Underpin Food and Nutrition Policies in South Africa" 2021 13(8) *Nutrients* 2584; Bopape, Taillie, Frank, Murukutla, Cotter, Majija and Swart "South African Consumers' Perceptions of Front-of-Package Warning Labels on Unhealthy Foods and Drinks" 2021 16(9) *PloS One* e0257626.

9 Regulations 46, 52 and Part V in GN R3337 in *GG* 48460 of 2023-04-21.

10 Ndinda, Ndhlovu, Juma, Asiki and Kyobutungi "The Evolution of Non-Communicable Diseases Policies in Post-Apartheid South Africa" 2018 18 *BMC Public Health* 89.

11 Castrunuovo, Guarnieri, Tiscornia, Allemandi and Pizzara "Stakeholders' Arguments Against and on Favor FOP Policy: An Analysis Using the Framing Framework in Argentina" (2021) https://idl-bnc-idrc.dspacedirect.org/handle/10625/60435 (accessed 2021-10-25) 1; Global Health Advocacy Incubator (11 August 2021) https://advocacyincubator.org/wp-content/uploads/2021/08/Evidence_to_Support_FOPL.pdf (accessed 2021-10-25) 1; Mialon, Charry, Cediel, Crosbie, Scagliusi and Tamayo "'I Had Never Seen so Many Lobbyists': Food Industry Political Practices During the Development of a New Nutrition Front-of-Pack Labelling System in Colombia" 2021 24(9) *Public Health Nutrition* 2737.

12 Castrunuovo *et al* https://idl-bnc-idrc.dspacedirect.org/handle/10625/60435 1; Mialon *et al* 2021 *Public Health Nutrition* 2737.

13 Patterson, Buse, Magnusson and Toebes "Identifying a Human Rights-Based Approach to Obesity for States and Civil Society" 2019 20 *Obesity Reviews* 45.

14 Garde and Abdool-Karim "Human Rights and Healthy Diet Research Support Initiative: Scoping Review" (December 2022) https://idl-bnc-idrc.dspacedirect.org/items/942db36d-7f22-4827-a756-f1138adfeeae (accessed 2023-12-08) 30.

South Africa. The article begins by discussing FOPL systems and their purpose. Thereafter, the authors outline an HRBA to FOPL and NCDs under international and regional law. This is used as a starting point to concretise the approach under the South African Constitution before outlining the particular obligations that arise from this approach as a means to support the adoption of mandatory FOPL in South Africa.

2 WHAT IS THE PURPOSE OF FOPL WARNING LABELS AND HOW DO THEY WORK?

South Africa, like other countries, is facing an obesity and NCD crisis, with rising levels of diabetes, hypertension and heart disease.[15] These conditions have been linked to the proliferation of ultra-processed foods and beverages that displace local, healthier options on supermarket shelves.[16] Owing to the relatively low cost of these readily available and filling ultra-processed products, many vulnerable people living in poverty opt for them, as healthier alternatives are unaffordable.[17] To counteract the effects of these unhealthy products, a number of countries including Chile,[18] Peru,[19] Israel,[20] Mexico,[21]

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15 Roomaney, Van Wyk, Turawa and Pillay-van Wyk "Multimorbidity in South Africa: A Systematic Review of Prevalence Studies" 2021 11(10) *BMJ Open* e048676; Pillay-van Wyk, Msemburi, Laubscher, Dorrington, Groenewald, Glass, Nojilana, Joubert, Matzopoulos, Prinsloo, Nannan, Gwebushe, Vos, Somdyala, Sithole, Neethling, Nicol, Rossouw and Bradshaw "Mortality Trends and Differentials in South Africa from 1997 to 2012: Second National Burden of Disease Study" 2016 4(9) *Lancet Global Health* e642; Statistics South Africa (StatsSA) *South African Demographic and Health Survey* (*SADHS*) 2016 (Pretoria, 2019).

16 Baker, Machado, Santos, Sievert, Backholer, Hadjikakou, Russell, Huse, Bell, Scrinis, Worsley, Friel and Lawrence "Ultra-Processed Foods and the Nutrition Transition: Global, Regional and National Trends, Food Systems Transformations and Political Economy Drivers" 2020 21(12) *Obesity Reviews* 1; Adams, Hofman, Moubarac and Thow "Public Health Response to Ultra-Processed Food and Drinks" 2020 *BMJ* m2391; Ronquest-Ross, Vink and Sigge "Food Consumption Changes in South Africa Since 1994" 2015 111(9/10) *South African Journal of Science* 1.

17 Monteiro, Moubarac, Cannon, Ng and Popkin "Ultra-Processed Products Are Becoming Dominant in the Global Food System" 2013 *Obesity Reviews* 21; Labadarios, Mchiza, Steyn, Gericke, Maunder, Davids and Parker "Food Security in South Africa: A Review of National Surveys" 2011 89(12) *Bulletin World Health Organisation* 891; Temple and Steyn "The Cost of a Healthy Diet: A South African Perspective" 2011 27(5) *Nutrition* 505; Stats SA "National Poverty Lines and Development Methodological Report on Rebasing of National Poverty Lines and Development on Pilot Provincial Poverty Lines Technical Report" (2015) 1; Shisana, Labadarios, Rehle, Simbayi, Zuma, Dhansay, Reddy, Parker, Hooisan, Naidoo, Hongoro, Mchiza, Steyn, Dwane, Makoae, Maluleke, Ramlagan, Zungu, Evans, Jacobs, Faber and SANHANES-1 Team "The South African National Health and Nutrition Examination Survey (SANHANES-1)" (2013) https://hsrc.ac.za/uploads/pageNews/72/SANHANES-launch%20edition%20(online%20version).pdf (accessed 2023-12-08) 182.

18 Food and Agriculture Organization and Pan American Health Organization "Approval of a New Food Act in Chile: Process Summary" (2017) https://www.fao.org/3/i7692e/i7692e.pdf (accessed 2023-12-08) 2.

19 Ministerio de Salud del Perú *Aprueban Manual de Advertencias* (2018) 58.

20 Global Agricultural Information Network Information "New Nutritional Labeling Regulation – Israel" (29 January 2018) https://apps.fas.usda.gov/newgainapi/api/report/downloadreportbyfilename?filename=New%20Nutritional%20Labeling%20Regulation%20_Tel%20Aviv_Israel_1-29-2018.pdf (accessed 2023-12-08) 1.

21 Secretaria de Economia *Mexico Regulation NOM-051* (2020) 1 4.

Uruguay[22] and Brazil[23] have introduced regulations on mandatory warning labels on the front of packaged food and beverage products. Warning labels are designed to warn consumers about products high in unhealthy nutrients such as saturated fat, sugar or sodium, which are predominantly ultra-processed and linked to poor health outcomes.[24]

Owing to the increasing volume of ultra-processed products available in supermarkets, it is challenging for consumers to make healthy choices,[25] and these warning labels provide easily identifiable information to facilitate informed choices.[26] On their own, warning labels support the right to information by improving consumer knowledge and understanding of products that are linked to poor health outcomes and which should be restricted.[27] As many South Africans' food choices are dictated by affordability, rather than improved knowledge,[28] improved access to information alone may not change consumption patterns. However, when warning labels are used in combination with other regulations, such as those that inform criteria to identify unhealthy products to be restricted in the school food environment, or that restrict marketing to children, they have the potential to improve the health of societies by promoting a healthier food environment.[29] In this way, warning labels can be viewed as a tool to protect and promote the right to food and health.[30]

As warning labels have become more prominent globally, their success has been evident. Chile, the first country to implement warning labels (and the country with the most evidence of their effect) has found that attitudes of low and middle-income mothers towards purchasing have shifted,[31] and that consumers understand that a product with no warning labels is healthier than a product with warning labels.[32] There has been a decline in sugary

22 Ministerio de Salud de Uruguay *Manual Para La Aplicación Del Decreto No 272/018 Sobre Rotulado Frontal de Alimentos* (2018) 32.

23 National Agency of Sanitary Surveillance (ANVISA) and Ministério da Saúde *Resolution of the Collegiate Board 429 and Normative Instruction 75* (2020).

24 Corvalán, Reyes, Garmendia and Uauy "Structural Responses to the Obesity and Non-Communicable Diseases Epidemic: Update on the Chilean Law of Food Labelling and Advertising" 2019 20(3) *Obesity Reviews* 367.

25 Monteiro *et al* 2013 *Obesity Reviews* 21.

26 Taillie, Hall, Popkin, Ng and Murukutla "Experimental Studies of Front-of-Package Nutrient Warning Labels on Sugar-Sweetened Beverages and Ultra-Processed Foods: A Scoping Review" 2020 12(2) *Nutrients* 569.

27 *Ibid*.

28 Temple and Steyn 2011 *Nutrition* 505.

29 Corvalán *et al* 2019 *Obesity Reviews* 367.

30 Constantin, Cabrera, Ríos, Barbosa, Ramírez, Cinà and Guzmán "A Human Rights-Based Approach to Non-Communicable Diseases: Mandating Front-of-Package Warning Labels" 2021 *Globalization and Health* 1.

31 Correa, Fierro, Reyes, Carpentier, Taillie, Corvalan, Taillie and Corvalan "Responses to the Chilean Law of Food Labeling and Advertising: Exploring Knowledge, Perceptions and Behaviors of Mothers of Young Children" 2019 16(1) *International Journal of Behavioral Nutrition and Physical Activity* 1.

32 Uribe, Manzur and Cornejo "Varying the Number of FOP Warnings on Hedonic and Utilitarian Food Products: Evidence from Chile" 2020 26(2) *Journal of Food Product Marketing* 123.

beverage purchases,[33] and of products containing high levels of sodium, energy and saturated fat since implementation of the law.[34] In addition, warning labels have improved the healthfulness of packaged products in stores by encouraging manufacturers to reformulate products in order to avoid the warning labels.[35] A modelling study in Mexico predicts that the warning-label system could prevent over one million new obesity cases and save 1.8 billion US dollars in health-care costs over five years.[36]

3 FORMULATING AN HRBA TO FRONT-OF-PACKAGE LABELLING

The development and application of an HRBA to NCDs more broadly, and to FOPL specifically, is a fairly new field, featuring limited scholarship. At its core, an HRBA to NCD prevention seeks to utilise human rights to buttress myriad efforts: from ensuring access to food and health-care services, and protecting individual rights from industry interference, to limiting the availability of harmful products.[37] NCD-prevention measures such as FOPL can be supported by referencing the right to health and life, as well as other socio-economic rights such as the right to food or education.[38] However, the implementation of these measures or interventions may infringe or negatively implicate other rights.[39] For example, limiting or prohibiting the advertising of unhealthy products to children may assist in protecting health but has implications for freedom of speech; these need to be weighed and balanced before adoption. In this sense, a comprehensive HRBA to NCD prevention must not only be anchored in supportive rights but also consider rights negatively impacted by the measures.

When applying human-rights frameworks to FOPL, it is important to identify and distinguish between rights that are supportive of the intervention, such as the rights to health and food, and rights that may impede efforts to prevent NCDs, such as the right to freedom of expression.[40]

In addition, the full value of an HRBA can only be realised if the broad obligations outlined in international instruments are translated to the

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33 Taillie, Reyes, Colchero, Popkin and Corvalán "An Evaluation of Chile's Law of Food Labeling and Advertising on Sugar-Sweetened Beverage Purchases From 2015 to 2017: A Before-and-After Study" 2020 17(2) *PLOS Medicine* e1003015.

34 Taillie, Bercholz, Popkin, Reyes, Colchero and Corvalán "Changes in Food Purchases After the Chilean Policies on Food Labelling, Marketing, and Sales in Schools: A Before and After Study" 2021 5(8) *Lancet Planet Health* e526.

35 Reyes *et al* 2020 *PLOS Medicine* e1003220.

36 Basto-Abreu, Torres-Alvarez, Reyes-Sánchez, González-Morales, Canto-Osorio, Colchero, Barquera, Rivera and Barrientos-Gutierrez "Predicting Obesity Reduction After Implementing Warning Labels in Mexico: A Modeling Study" 2020 17(7) *PLOS Medicine* e1003221.

37 Vos, Stefanini, Ceukelaire and Schuftan "A Human Right to Health Approach for Non-Communicable Diseases" 2013 381 *The Lancet* 533; Nygren-Krug "A Human Rights-Based Approach to Non-Communicable Diseases" in Grodin, Tarantola, Annas and Gruskin (eds) *Health and Human Rights in a Changing World* (2013); Garde and Abdool-Karim https://idl-bnc-idrc.dspacedirect.org/items/942db36d-7f22-4827-a756-f1138adfeeae.

38 Karim *et al* 2022 *ESR Review* 21.

39 Patterson *et al* 2019 *Obesity Reviews* 45.

40 *Ibid*.

domestic context and concretised within domestic legal instruments such as national constitutions and legislation.[41] This requires not only anchoring the approach in the broad human-rights principles but also identifying specific rights in which to locate the NCD-prevention response. As Ferguson outlined:

> "Human rights provide an internationally recognised legal framework under which governments have concrete obligations relevant to NCDs. However, these obligations should be further articulated to better address the challenges posed by NCDs, not only in relation to the rights to life, health, food and education but also in relation to the human rights responsibilities of the private sector … human rights norms should be further and better articulated to incorporate the risk factors and underlying determinants of NCDs."[42]

For this reason, there is a need to develop a context-specific HRBA to FOPL by first identifying the specific constitutional rights implicated and then seeking to concretise the obligations that emanate from these rights.

The purposes of FOPL are closely linked to the protection, fulfilment or realisation of human rights.[43] For example, ultra-processed foods, predominately produced by multinational corporations for profit, undermine the health of consumers, and in turn, interfere with the realisation of the right to health. The displacement of healthier food options through the proliferation of ultra-processed products can interfere with the right to food. According to General Comment No 12,[44] the full realisation of the right to adequate food incorporates nutritional quality and safety. More and more evidence links the consumption of ultra-processed foods to poor health outcomes such as obesity, diabetes and hypertension[45] – in clear contradiction to protecting the right to nutritious and safe food. Although the State has the primary responsibility to protect the realisation of rights, according to the UN Guiding Principles on Business and Human Rights,[46] food and beverage manufacturers have a responsibility to minimise the negative impacts of their practices on the right to health. Unfortunately, owing to the profit-driven focus of multi-national conglomerates, they are

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41 Ayala and Meier "A Human Rights Approach to the Health Implications of Food and Nutrition Insecurity" 2017 38(10) *Public Health Reviews* e20.

42 Ferguson, Tarantola, Hoffmann and Gruskin "Non-Communicable Diseases and Human Rights: Global Synergies, Gaps and Opportunities" 2017 12(10) *Global Public Health* 1200; Vallgårda "Why the Concept 'Lifestyle Diseases' Should Be Avoided" 2011 39(7) *Scandinavian Journal of Public Health* 773.

43 Karim *et al* 2022 *ESR Review* 21.

44 United Nations Committee on Economic Social and Cultural Rights (CESCR) *General Comment No 12*: *The Right to Adequate Food (Art. 11)* (12 May 1999) E/C.12/1999/5.

45 Baker *et al* 2020 *Obesity Reviews* 1; Adams *et al* 2020 *BMJ* m2391.

46 United Nations Human Rights Office of the High Commissioner (OHCHR) "Guiding Principles on Business and Human Rights" (2011) https://www.ohchr.org/sites/default/files/documents/publications/guidingprinciplesbusinesshr_en.pdf.

failing to respect human rights,[47] and the onus is on the State to step in and provide protection to citizens.[48]

By implementing mandatory front-of-package warning labels on unhealthy, ultra-processed products, the South African State could make progress towards realising the rights to information, food, and health care. It is imperative that consumers be made aware of harmful products that negatively impact their health: warning labels offer a solution by providing simplified, clear information to support informed decision-making.[49] This is supported in the proposed regulations by including a context-specific warning label that is appropriate and developed for use in the low-literacy setting of South Africa.[50] By enacting this step in the realisation of the right to information, the State creates a knock-on effect in protecting other human rights. For instance, when these warning labels are used to underpin restrictive food policies, this promotes the right to food as the consumption of unhealthy foods (which can be regarded as non-nutritious and not safe for consumption) is discouraged. This, in turn, eases the burden on the health-care system, allowing resource reallocation and better performance of the State's obligation to fulfil the right to health care.[51]

At a conceptual level, there are several rights implicated in the adoption and implementation of FOPL (see Figure 1 below). Being socio-economic rights, the right to health and the right to food may support adoption of a FOPL system, particularly a mandatory one that is more effective in protecting these rights. A FOPL system, in addition to being linked to improved diet and health, is also immediately an attempt to communicate information more clearly to consumers and improve their understanding of the food they are consuming; thus, the right to information is implicated. Finally, the right to freedom of expression is implicated; if products are required to carry a FOPL logo or symbol, it is a form of compelled speech, which may serve as an impediment to the adoption of the system. Other rights, such as the rights to dignity and life, are also impacted when one considers the real-life consequences of NCDs on mortality and quality of life. The next section discusses some of these rights.

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47 Constantin *et al* 2021 *Globalization and Health* 1; Igumbor, Sanders, Puoane, Tsolekile, Schwarz, Purdy, Swart, Durão and Hawkes "'Big Food', the Consumer Food Environment, Health, and the Policy Response in South Africa" 2012 9(7) *PLoS Medicine* e1001253.

48 Elver "The Challenges and Developments of the Right to Food in the 21st Century: Reflections of the United Nations Special Rapporteur on the Right to Food" 2016 20(1) *UCLA Journal of International Law and Foreign Affairs 1.*

49 Taillie *et al* 2020 *Nutrients* 569.

50 Bopape *et al* 2021 *PLOS ONE* e0257626.

51 Abdool Karim and Shozi "Is a Right to Health a Means to Protect Public Health? South Africa as a Model for a Communitarian Interpretation of the Right to Health for the Promotion of Public Health" 2023 27(5) *The International Journal of Human Rights* 925.

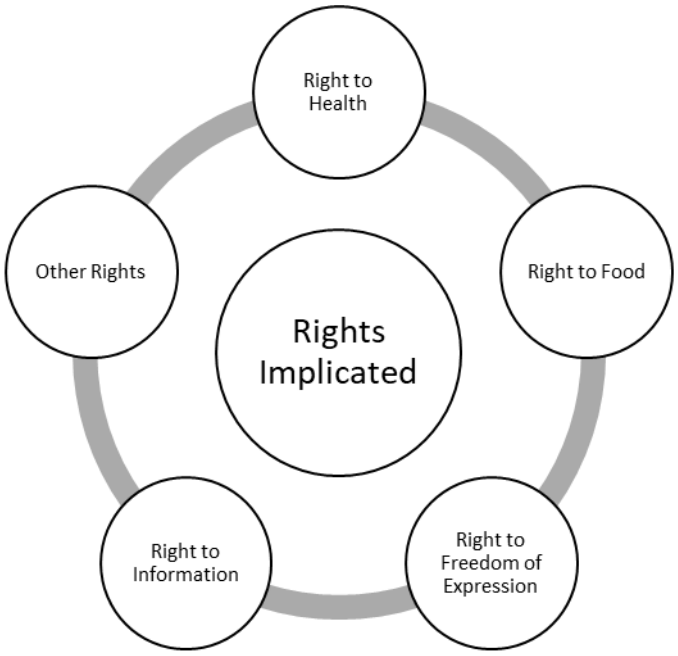

Figure 1: Rights implicated in a mandatory FOPL system (Authors' construction)

4 HUMAN RIGHTS IMPLICATED IN FOPL SYSTEMS: AN INTERNATIONAL-LAW PERSPECTIVE

4 1 The right to health

The right to health is recognised in a number of international treaties and conventions. In 1946, the right to the "highest attainable standard of living" was recognised in the World Health Organization's Constitution (1946). Two years later, in the Universal Declaration of Human Rights (UDHR),[52] the "right to a standard of living adequate for the health and well-being" of all people was recognised in article 25.

In 1966, the International Covenant on Economic, Social and Cultural Rights (ICESCR) provided that everyone is entitled to the "enjoyment of the highest attainable standard of physical and mental health" as well as a right to food. However, the inclusion of NCDs and the prevention of these diseases remains a point of contention. For example, in General Comment No 14, the Committee on Economic, Social and Cultural Rights (CESCR) appears to exclude illness emanating from "genetic factors, individual

[52] UN General Assembly (UNGA) *Universal Declaration of Human Rights* A/RES217(III) (10 December 1948).

susceptibility to ill health and the adoption of unhealthy or risky lifestyles" from the ambit of the right to health, placing these causes outside the relationship between the State and individuals.[53]

This framing of NCDs as lifestyle diseases or attributable to individual behaviours was a dominating narrative that moved the risk factors contributing to NCDs outside the domain of state regulation.[54] However, there has been a growing recognition that, while NCDs are partly influenced by lifestyles, individual behaviours and genetics, there are modifiable risk factors and obesogenic environments that significantly contribute to the burden of NCDs.[55] In many respects, the consensus is that if effective state action and regulation are adopted to target the built environment as underlying determinants of NCDs, this burden of disease can be reduced.[56]

The right to health is most often invoked in an HRBA to NCD prevention.[57] The limited scholarship and discussion of rights supporting the adoption of mandatory FOPL systems also rely heavily on the right to health. In 2020, for example, Dainius Pūras, as United Nations Special Rapporteur on the right to health, issued a statement outlining how mandatory FOPL warning labels were aligned with state obligations under the right to health:

> "[NCDs] are a major challenge of this century highly rooted on overweight, obesity and unhealthy diets. As part of their right-to-health duties, States should address the diet-related NCDs preventable risk factors and promote frameworks whereby the food and beverage industry convey accurate, easily understandable, transparent and comprehensible information on their products. Front-of-package warning labelling regulations are much needed in this regard."[58]

Pūras further outlined how a human-rights-based approach could inform the development of a compliant FOPL system:

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53 CESCR *General Comment No 14: The Right to the Highest Attainable Standard of Health (Art. 12)* (11 August 2000) https://www.refworld.org/pdfid/4538838d0.pdf (accessed 2021-07-02) par 9.

54 Ferguson *et al* 2017 *Global Public* Health 1200; Vallgårda 2011 *Scandinavian Journal of Public Health* 773.

55 Swinburn and Egger "Preventive Strategies Against Weight Gain and Obesity" 2002 3(4) *Obesity Reviews* 289; Egger and Swinburn "An 'Ecological' Approach to the Obesity Pandemic" 1997 315(7106) *BMJ* 477; De Lorenzo, Romano, Di Renzo, Di Lorenzo, Cenname and Gualtieri "Obesity: A Preventable, Treatable, but Relapsing Disease" 2020 *Nutrition* 110615.

56 Gorman and Handsley "International Human Rights Law and the Prevention of Childhood Obesity" 2017 23(3) *Australian Journal of Human Rights* 391; Swinburn and Egger 2002 *Obesity Reviews* 289.

57 Ferguson *et al* 2017 *Global Public Health* 1200; Vallgårda 2011 *Scandinavian Journal of Public Health* 773; Gruskin, Ferguson, Tarantola and Beaglehole "Noncommunicable Diseases and Human Rights: A Promising Synergy" 2014 104(5) *American Journal of Public Health* 773; Patterson *et al* 2019 *Obesity Reviews* 45; Twinomugisha "Using the Right to Health Framework to Tackle Non-Communicable Diseases in the Era of Neo-Liberalism in Uganda" 2020 20(1) *African Human Rights Law Journal* 147; Durojaye and Aboubakrine "Adopting a Rights-Based Approach to Non-Communicable Diseases Among Indigenous Peoples in Africa" 2019 26(1) *International Journal of Minority Group Rights* 138.

58 OHCHR "Statement by the UN Special Rapporteur on the Right to Health on the Adoption of Front-of-Package Warning Labelling to Tackle NCDs" (27 July 2020) https://www.ohchr.org/en/statements/2020/07/statement-un-special-rapporteur-right-health-adoption-front-package-warning (accessed 2022-06-14).

> "Within the framework of the right-to-health, States are required to adopt regulatory measures aimed at tackling NCDs, such as front-of-package warning labelling on foods and beverages containing excessive amounts of critical nutrients. Front-of-package warning labelling should follow the best available evidence free from conflicts of interest, as a mechanism through which healthy choices can become the easier and preferred option."[59]

Constantin *et al* expanded upon the obligations that emanate from the right to health in respect of FOPL systems.[60] They argue that the food and beverage industry interferes with the right to health when they "convey inaccurate, deceptive, or misleading information on unhealthy products to encourage their consumption". On this basis, Constantin *et al* argue that under their obligation to protect the right to health, governments are required to regulate these private actors; the obligation to protect the right to health provides a basis upon which states may be required to adopt a FOPL system.[61]

4 2 The right to food as a determinant of good health

The right to food has particular relevance to the introduction of FOPL, as FOPL systems are aimed at improving consumer diets. However, it is the relationship between the rights to food and health, and specifically the fact that food is a determinant of health, that is relevant for an HRBA to FOPL. Most human-rights instruments also recognise a right to food, either as an underlying determinant of the right to health, a component of the right to life or as its own self-standing right.[62] The right to food was first recognised in the UDHR as part of "the right to a standard of living adequate for the health and well-being of [a person] and of his family, including food".[63] Under the ICESCR,[64] the right to food was developed as part of a composite set of entitlements that includes a right to housing and clothing, which together support the right to an adequate standard of living.[65] The Convention on the Rights of the Child[66] (CRC) mandates the combatting of disease and malnutrition through the provision of "adequate nutritious foods" as part of the right of the child to enjoy the highest attainable standard of health.[67]

General Comment No 12 (from the CESCR) recognises that the realisation of the right to adequate food is indispensable to the realisation of other fundamental rights.[68] The General Comment also states that the

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59 *Ibid*.

60 Constantin *et al* 2021 *Globalization and Health* 1.

61 *Ibid*.

62 Abdool Karim and Kruger "Unsavoury: How Effective Are Class Actions in the Protection and Vindication of the Right to Access to Food in South Africa?" 2021 37(1) *South African Journal on Human Rights* 59.

63 Art 25(1) of the UDHR.

64 UNGA *International Covenant on Economic, Social and Cultural Rights* 993 UNTS 3 (1966). Adopted: 16/12/1966; EIF: 03/01/1976.

65 Art 11.1 of the ICESCR.

66 UNGA *Convention on the Rights of the Child* E/CN.4/RES/1990/74; 1577 UNTS 3 (1989). Adopted: 20/11/1989; EIF: 02/09/1990.

67 Art 24(2)(*c*) of the CRC.

68 CESCR *General Comment No 12 on the Right to Adequate Food* par 4.

adequacy of food should not be determined narrowly as merely a "minimum package of calories, proteins and other specific nutrients".[69]

This relationship between the right to food and health was noted in Pūras's statement on FOPL, which stated that states had an obligation to ensure "equal access for all to nutritiously safe food as an underlying determinant of health".

At a regional level, the African Charter on Human and Peoples' Rights[70] (African Charter) recognises the right to health as the right of every individual "to enjoy the best attainable state of physical and mental health".[71] In *Social and Economic Rights Action Center v Nigeria* (*SERAC*), the African Commission on Human and Peoples' Rights recognised a right to food as being implicitly contained in both article 4 (the right to life) and article 16 (the right to health) of the African Charter.[72] The African Commission explicitly recognised a conceptualisation of the right to health that was contingent upon the enjoyment of other rights, stating:

> "While the right to food is not specifically enumerated in the African Charter, it is implicit in such provisions as the right to life (art.4), the right to health (art. 16) and the right to economic, social and cultural development (art. 22) ... It is undeniable that food is central to the enjoyment of such other rights as health, education, work and political participation."[73]

Notably, the *SERAC* decision also underscored the enforceability of the right against private individuals whose actions could result in the infringement of rights under the African Charter.

The African Commission has also acknowledged a clear link between the right to health (and other rights) and access to, not only sufficient, but also nutritious food, by stating in a 2019 resolution that the Commission is concerned that "malnutrition which includes conditions such as under-nutrition, micronutrient deficiencies or excess, overweight, obesity and other diet-related non-communicable diseases seriously affects the health and well-being of individuals."[74]

Under Resolution 431, the African Commission expressed concern regarding malnutrition and, specifically the growing epidemic of NCDs and their impact on people's health.[75] In this resolution, the Commission called for states to take steps to ensure enjoyment of the right to food, including nutrition, and access to adequate food to allow for enjoyment of the right to health.[76] With regard to NCDs, the Commission indicated that states should regulate the import and marketing of processed foods, efforts that can be

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69 CESCR *General Comment No 12 on the Right to Adequate Food* par 6.

70 Organisation of African Unity (OAU) *African Charter on Human and Peoples' Rights* 1520 UNTS 217; CAB/LEG/67/3 rev. 5; 21 ILM 58 (1982). Adopted: 27/06/1981; EIF: 21/10/1986.

71 Art 16 of the African Charter.

72 *Social and Economic Rights Action Center & the Center for Economic and Social Rights v Nigeria, Communication No 155/96* ACHPR/COMM/A044/1 (27 May 2002).

73 *Ibid*.

74 African Commission on Human and Peoples' Rights *Resolution on the Right to Food and Nutrition in Africa* ACHPR/Res.431(LXV) 2019 (Resolution 431).

75 Preamble of Resolution 431.

76 Resolution 431 par 1 and 5.

assisted through the adoption of FOPL systems.[77] The African Charter on the Rights and Welfare of the Child[78] echoes this concern over malnutrition in a manner similar to the CRC, providing that adequate nutrition is part of the composite right to health and health services.[79]

All of these instruments can inform the content of a somewhat underdeveloped right to food under the South African Constitution so that it can be understood to include a right to nutritious food that does not result in overnutrition or diet-related non-communicable diseases.

4 3 The right to information and freedom of expression

Article 19(2) of the International Covenant on Civil and Political Rights (ICCPR) provides:

> "Everyone shall have the right to freedom of expression; this right shall include freedom to seek, receive and impart information and ideas of all kinds, regardless of frontiers."[80]

While this is generally seen as a right to access information held by public bodies, the scope of the right has slowly increased to cover also access to information from private bodies, such as the right to know which private bodies have stored the personal data of a person.[81]

Article 9 of the African Charter guarantees that "every individual shall have the right to receive information".[82] The Declaration of Principles on Freedom of Expression and Access to Information in Africa 2019[83] (Declaration of Principles) specifically provides that states shall ensure protection against acts or omissions of non-state actors that curtail access to information.[84] It reiterates that information held by private actors is subject to article 9, providing: "Every person has the right to access information of private bodies that may assist in the exercise or protection of any right expeditiously and inexpensively."[85] The Declaration also provides that special measures should be taken to evolve the capacities of children to access information and to address the needs of marginalised groups.[86]

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77 Resolution 431 par 7.

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

79 Art 14.2(*c*) of the African Charter on the Rights and Welfare of the Child.

80 UNGA *International Covenant on Civil and Political Rights* 999 UNTS 171; 6 ILM 368 (1967). Adopted: 16/12/1966; EIF: 23/03/1976.

81 United Nations Human Rights Committee *General Comment No 34, Article 19, Freedoms of Opinion and Expression* (12 September 2011) CCPR/C/GC/34 par 18.

82 Art 9 of the African Charter.

83 African Commission on Human and Peoples' Rights *Declaration of Principles on Freedom of Expression and Access to Information in Africa 2019*. Adopted: 10/11/2019; EIF: 17/04/2020 art 19.

84 Principle 1.2 of the Declaration of Principles.

85 Principle 26.1(*b*) of the Declaration of Principles.

86 Principles 7 and 8 of the Declaration of Principles.

Finally, the Declaration provides that the right to access information is guided by the principle of maximum disclosure.[87]

5 CONSTITUTIONAL RIGHTS IMPLICATED BY FOPL SYSTEMS

5 1 Approach adopted in South African NCD prevention policies

Although most of the literature uses the right to health to anchor an HRBA to NCD prevention and control, there is recognition that multiple rights are implicated and may be used to support different aspects of control and prevention. The question is how this approach can be adapted and formulated to fit within the framework of the South African Bill of Rights and the Constitution.[88]

An HRBA is frequently invoked in the National Department of Health's policies related to NCD prevention. For example, the 2011 Declaration explicitly recognises the human right to health as foundational to preventing and controlling NCDs.[89] The Draft Strategic Plan invokes the child's right to the highest attainable standard of health to support the adoption of measures that address childhood obesity.[90] The "Health Promotion Strategy" contained within the Plan anchors the policy objectives in the Constitution under section 24's right to a healthy environment as well as the rights provided for in section 27.[91]

The rest of this section discusses how the Bill of Rights may assist in supporting the adoption of FOPL in South Africa.

5 2 A composite right to health

Although the South African Constitution does not explicitly include a right to health, the right is most often discussed in the context of section 27(1)(*a*), which provides that everyone has a right to access adequate health care, subject to progressive realisation and the resources of the State. Health-related rights are given further recognition in other sections. For example, section 27(3) provides an unqualified right to emergency medical treatment.

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87 Principle 28 of the Declaration of Principles.

88 Ss 8–36 of the Constitution of the Republic of South Africa, 1996 (the Constitution).

89 NCD Alliance "South African Declaration on the Prevention and Control of Non-Communicable Diseases" (13 September 2011) https://ncdalliance.org/sites/default/files/South%20Africa%20Declaration%20on%20NCDs.pdf (accessed 2023-01-03) 1. The Preamble recognises "the right of all South Africans to the enjoyment of the highest attainable standards of physical and mental health", which echoes the right to health contained in the first WHO Constitution (1946), as well as the wording of art 12 of the ICESCR.

90 National Department of Health "Draft National Strategic Plan for the Prevention and Control of Non-Communicable Diseases 2020-2025" (28 October 2019) https://www.samedical.org/file/1202 (accessed 2023-01-03) 116.

91 The policy makes mention of the right to health care services as well as the rights to sufficient food, water and social security, although it mistakenly states that these rights fall under s 24 of the Constitution.

The right to bodily integrity under section 12(2) entitles all to the right to make decisions concerning reproductive health and requires informed consent for medical and scientific experiments.[92] There are also specific rights to medical treatment for children and prisoners under sections 28 and 35, respectively, that are not subject to progressive realisation.

Section 24 provides that every South African is entitled to a healthy environment, which is broadly defined. However, the limited enforceable and justiciable elements outlined in section 24(*b*) are more clearly linked to promoting sustainability and preventing environmental degradation.[93] In addition, section 27(1) encompasses not just a right to access health-care services but also entitlements related to sufficient food and water, social security and electricity.[94] It has been argued that these rights create a composite right to health,[95] through the protection of the different determinants, an approach that aligns with the provisions of section 39(2), which requires the courts to consider international law when interpreting the Bill of Rights.

Previous case law related to tobacco-control measures aligns to this interpretation. In *British American Tobacco (Pty) Ltd v Minister of Health*,[96] the Supreme Court of Appeal relied on both sections 24 and 27 to justify a ban on tobacco products; the finding sought to reduce the consumption of tobacco products and prevent the public-health harms that emanate from the use of tobacco. The court explicitly linked the public-health objectives of the ban to the right to a healthy environment under section 24.

In addition, the court found that the government had an obligation, under the section 27(1) right to health, to implement tobacco-control measures owing to the burden tobacco use placed on the health-care system.[97] During the COVID-19 pandemic, extensive jurisprudence developed on measures that prevented diseases and reduced the burden on the health-care system, thus assisting in protecting and fulfilling the right to health.[98]

This reasoning could apply equally to measures such as FOPL, which aims to alleviate the burden of disease caused by the consumption of unhealthy products, and can be used to justify the limitations on freedom of expression that may also result from a FOPL system.

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92 S 12(2) of the Constitution.

93 S 24 of the Constitution.

94 S 27(1) of the Constitution.

95 Pieterse (*A Benefit-Focused Analysis of Constitutional Health Rights* (doctoral thesis, University of the Witwatersrand) 2005 59) writes: "There is no single provision in the Constitution that simultaneously protects all aspects of the right to 'the enjoyment of the highest attainable standard of physical and mental health'. Rather, chapter 2 of the Constitution contains several scattered provisions aimed at promoting the realisation of the right to health, which ought to be read together when ascertaining the extent of health-related protection awarded by the Bill of Rights."

96 *British American Tobacco South Africa (Pty) Ltd v Minister of Health* 2012 (3) All SA 593 (SCA).

97 *BATSA v Minister of Health supra* par 26.

98 Abdool Karim and Kruger "Which Rights? Whose Rights? Public Health and Human Rights Through the Lens of South Africa's Covid-19 Jurisprudence" 2021 11 *Constitutional Court Review* 533.

5 3 Right to food

The Bill of Rights contains a right to food (or nutrition) in three separate sections. Each uses different phrasing and arguably has distinct content. Section 27 contains the general right of access to "sufficient food" for everyone, which is subject to progressive realisation.[99] The right of children to basic nutrition[100] and of detainees to "adequate nutrition"[101] are both unqualified. Despite the fact that the right to food, like the other socio-economic rights contained in the Bill of Rights, is justiciable,[102] there is limited case law delineating the content of the right.

At a minimum, the constitutional right to food includes an entitlement to be free from hunger.[103] In *Wary Holdings,*[104] the scope of the right was defined to include the means to produce food, and the ability to acquire food, as well as the need for sufficient food to be available.[105] To this extent, the elements of acceptability and accessibility, as defined under international law, form part of the content of the section 27(1)(*b*) right to access sufficient food. Brand suggests that the interdependent nature of the right to food is central to this:

> "In short, the right to food is more or less embedded in other rights – measures to give effect to it are intertwined with measures to give effect to other rights, and its violation is often inseparable from the violation of a range of other rights. As a consequence, the right to food is seldom directly protected, whether through legislation or adjudication."[106]

Section 28(1) of the Constitution provides: "Every child has the right – …(*c*) to basic nutrition, shelter, basic health care services and social services; [and] (*d*) to be protected from maltreatment, neglect, abuse or degradation ... ." This set of rights functions in a manner distinct from the other socio-economic rights in the Constitution – in that they are unqualified rights, but also in that the primary responsibility for protection and fulfilment of the right lies with parents and caregivers rather than the State.[107] However, the State still bears some obligations under this right where parents are unable adequately to meet their obligations towards their children under the right.[108]

Case law has recognised interdependence between a child's access to food and their ability to experience and realise their rights to health and education.[109] This is illustrated in *Equal Education v Minister of Basic*

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99 S 27 of the Constitution.

100 S 28 of the Constitution.

101 S 35 of the Constitution.

102 *Certification of the Constitution of the Republic of South Africa, 1996* 1996 (10) BCLR 1253 (CC) par 78.

103 Khoza "Realising the Right to Food in South Africa: Not by Policy Alone – Need for Framework Legislation" 2004 20(4) *South African Journal on Human Rights* 667.

104 *Wary Holdings (Pty) Ltd v Stalwo (Pty) Ltd* 2008 (11) BCLR 1123 (CC).

105 *Wary Holdings (Pty) Ltd v Stalwo (Pty) Ltd supra* par 85.

106 Brand "The Right to Food" in Brand and Heyns (eds) *Socio-Economic Rights in South Africa* (2005) 164–165.

107 May, Witten, Lake and Skelton "The Slow Violence of Malnutrition" in Children's Institute *South African Child Gauge* (2020) 38–39.

108 *Minister of Health v Treatment Action Campaign (No 2)* 2002 (5) SA 721 (CC) par 77–79.

109 May *et al* in Children's Institute *South African Child Gauge* 39.

Education,[110] which concerned the suspension of the National School Nutrition Programme (NSNP) during the COVID-19 pandemic and the lockdown when schools were closed.

In respect of the first question, the court went to great lengths to explain the interrelationship and interdependence of the rights to education, nutrition and health.[111] The court also highlighted the role of food insecurity and hunger in contributing to adverse health conditions, including obesity and micronutrient deficiencies, something that the NSNP assisted in ameliorating.[112] The court went on to find that the NSNP was part of the State's constitutional obligations to fulfil the right of children to basic nutrition.[113]

This case highlights two integral components of the children's right that are of relevance to supporting NCD prevention measures. The first is that it underscores the interrelated nature of the rights contained in section 28, expressly recognising that there are links between nutrition and health, and, specifically, that there is an obligation on the State to address nutrition and prevent diseases that emanate from malnutrition, including obesity. The second is that the State bears a higher burden in justifying a failure to discharge its obligations under section 28, a justification that must be provided in terms of section 36 of the Constitution and that cannot rely on resource constraints. In particular, where children have been provided with a certain entitlement, the rolling back of that entitlement would be retrogressive. This is important in the context of a changing food system, and may provide a basis upon which existing access to healthier, or less harmful foods, may be preserved on the basis that reduced access may be retrogressive in the context of the right to basic nutrition.

As has been discussed above, there is clear recognition within international law that the nutritional composition of food is central to its sufficiency, and that nutrition is a core component of the right to food, as well as the realisation of other rights such as the rights to life and health. South African case law on socio-economic rights, specifically in respect of food, supports the contention that nutrition and the impact that it has on the realisation of other rights has constitutional protection and that there is a right to nutritious food within the framework of the Bill of Rights. But how does the right to access sufficient food apply within the context of FOPL systems?

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110 *Equal Education v Minister of Basic Education* 2021 (1) SA 198 (GP).
111 *Equal Education v Minister of Basic Education supra* par 34–41.
112 *Equal Education v Minister of Basic Education supra* par 30.
113 *Equal Education v Minister of Basic Education supra* par 42.

Table 1 *Matrix of human rights obligations related to FOPL (Adapted from the Food Security Matrix*[114] *and Nutrition Security Matrix)*[115]

	Nutritional adequacy	**Safety**	**Cultural acceptability**	**Availability**	**Accessibility**
Respect	Recognise the positive nutritional aspect of existing food patterns	Provide mechanisms to address violations of food-safety codes	Create awareness and social acceptability of traditional diets	Refrain from creating conditions that promote the production of unhealthy foods	Preserve existing pathways of accessing nutritious food (whether informal or formal) Refrain from creating conditions promoting disease and epidemics through the proliferation of unhealthy food
Protect	Prevent private actors from displacing healthier food items with unhealthy foods		Limit the influence of private actors in changing the acceptability of traditional diet and promotion of unhealthy foods	Regulate food production to ensure private food production is meeting the population's nutrition and health needs	Regulate private actors to ensure pricing and accessibility of foods is adequate to make food sufficiently available to the population
Promote	Prevent distortions of positive nutritional aspects of existing food patterns	Create/improve food standards Mandatory (incentivise) reformulation to remove harmful nutrients from food	Counteract influences that may negatively erode positive aspects of existing food culture	Incentivise the production of healthier foods	Make healthy food choices more financially accessible to low-income groups
Fulfil	Correct negative aspects of existing food patterns; guide dietary change when necessary	Improve understanding of the healthfulness of foods and harms from unhealthy nutrients Create an effective mechanism for food control and inspection	Incorporate positive aspects of food culture into relevant development activities	Allow food production at a community / individual level	Provide mechanisms to make healthy food financially accessible

[114] Eide, Oshaug and Eide "The Food Security and the Right to Food in International Law and Development Symposium: The Global Food Regime in the 1990s: Efficiency, Stability and Equity" 1991 *Transnational Law & Contemporary Problems* 415 452.

[115] Oshaug, Eide and Eide "Human Rights: A Normative Basis for Food and Nutrition-Relevant Policies" 1994 19(6) *Food Policy* 491 512.

Drawing on Eide, Oshaug and Eide's matrix on the right to food, which has a multiplicity of prongs and components such as nutritional adequacy, safety, acceptability, availability and accessibility,[116] a FOPL system can be used to promote and protect the right to food in three ways.

a) A mandatory FOPL system can promote the nutritional sufficiency of diets by making it easier for consumers to make healthier and informed choices about the types of food they consume. Under the ambit of food safety, the reformulation that results from the introduction of FOPL systems can reduce the presence of harmful nutrients and thus reduce the prevalence of disease-causing nutrients in food such as sodium, saturated fats and sugar.
b) FOPL systems can promote the availability and acceptability of healthier foods by creating an incentive for industries to produce and promote healthier foods that are not subject to FOPL warning labels.
c) Where FOPL systems are linked to advertising restrictions, FOPL systems can reduce the acceptability of unhealthy foods, thus protecting the cultural norms and acceptability of traditional diets that are frequently displaced by ultra-processed products.

5 4 Right to information

Section 32 of the Constitution provides for a right to information:

> "(1) Everyone has the right of access to–
> (a) any information held by the state; and
> (b) any information that is held by another person and that is required for the exercise or protection of any rights.
> (2) National legislation must be enacted to give effect to this right, and may provide for reasonable measures to alleviate the administrative and financial burden on the state."

Although the Promotion of Access to Information Act[117] is the primary mechanism to realise this right, the obligation under 32(1) means that there is also an entitlement to access information required for the exercise or protection of other rights. The right to information is also buttressed by section 16(1)(*b*), which guarantees "everyone" the right to freedom of expression, including "freedom to receive or impart information or ideas". In *My Vote Counts NPC v Minister of Justice and Correctional Services*,[118] the Constitutional Court underscored this interrelationship in enabling the public to fully enjoy the right to information. The court went further, holding that where the full exercise of one right is dependent on certain kinds of information being made available, there is then an obligation on the State to make that information available to enable citizens to exercise their rights.

In *Clutchco v Davis*,[119] the SCA described the Constitution's extension of the right of access to information, imposing a duty not only on the State but

[116] See Table 1 above.
[117] 2 of 2000.
[118] *My Vote Counts NPC v Minister of Justice and Correctional Services* 2018 (5) SA 380 (CC).
[119] 2005 (3) SA 486 (SCA).

also on private bodies, as "unmatched in human rights jurisprudence", a characterisation that shows the strength of the right albeit in an exaggerated fashion.[120] However, the SCA also highlighted that this right is not untrammelled and that access to privately held information only becomes subject to the constitutional duty where the information is "required", "'required' meaning "the information does not have to be essential, but it certainly has to be more than 'useful' […] or 'relevant' […] or simply desired".[121]

However, the right to access information from private parties is not *per se* a right to automatic disclosure, or to disclosure in a certain format such as the simple and accessible format the authors maintain that FOPL will facilitate. In combination with a reading of other rights being promoted by FOPL, the authors submit that access to information is not being serviced through the availability of information upon request or other forms of labels. In *My Vote Counts*, the court noted that disclosure on application of political party funding only poses a barrier to the exercise of the right to access information,[122] and it held that the mechanism to disclose information should keep the "electorate as a whole meaningfully informed".[123] In *My Vote Counts,* the court specifically highlighted that ease of access to information is a fundamental concern and a substantive part of the broader right.[124] While this case is not a perfect analogy for accessing information about food, it does highlight the court's understanding of the right to access information to mean true access, in that the mechanism to provide the information should in fact serve the function of informing the public who needs to exercise a particular right.

How does this duty impact the freedom of expression of companies? The term "compelled speech" is largely used in the United States to indicate that parties are required, against their will, to inform the public of specific information.[125] Currently, companies are already subjected to compelled speech in various ways, such as in current labelling laws, provision for disclosure duties in terms of the Consumer Protection Act (for example, grey-market goods and GM-labelling), and tobacco and liquor legislation that mandates warning labels.[126] While South Africa does not have case law on compelled speech, some insights might be gleaned from challenges to commercial speech where regulations seek to restrict the information publicised by companies.

In *City of Cape Town v Ad Outpost*,[127] the Western Cape division of the High Court had to answer the question whether restricting third-party advertising through municipal by-laws unjustifiably limits freedom of

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120 *Clutchco (Pty) Ltd v Davis supra* par 10.

121 *Clutchco v Davis supra* par 11.

122 *My Vote Counts v Minister of Justice supra* at par 94, being the judgment of Cameron J and concurring judges.

123 *My Vote Counts v Minister of Justice supra* par 96.

124 *My Vote Counts v Minister of Justice supra* par 52.

125 Tsesis "Compelled Speech and Proportionality" 2021 97(3) *Indiana Law Journal* 3.

126 E.g., s 25 of the Consumer Protection Act 68 of 2008; s 9(1) of the Liquor Act 59 of 2003; s 3 of the Tobacco Products Control Act 83 of 1993.

127 *City of Cape Town v Ad Outpost (Pty) Ltd* 2000 (2) SA 733 (C).

expression, among other rights. The court stated that "[t]he tendency to conclude uncritically that commercial expression bears less constitutional recognition than political or artistic speech needs to be evaluated carefully".[128] However, the Constitutional Court was more critical of the protections awarded to commercial speech where it clashes with public-health concerns. In a challenge to tobacco-marketing restrictions, the court endorsed the view expressed in *Canada (Attorney-General) v JTI-MacDonald Corp* that "[w]hen commercial expression is used … for the purpose of inducing people to engage in harmful and addictive behaviour, its value becomes tenuous."[129] It upheld the restrictions and found that the reliance on freedom of expression to protect the ability to promote harmful products is secondary to the right to a healthy environment.[130]

Unlike socio-economic rights such as the right to health and the right to food, which are deemed progressively realisable and therefore subject to resource limitations, the right of access to information and freedom of expression is immediately realisable. The ICCPR provides:

> "Where not already provided for by existing legislative or other measures, each State Party […] undertakes to take the necessary steps […] to adopt such laws or other measures as may be necessary to give effect to the rights recognised in the present Covenant."[131]

This approach is echoed in the South African Constitution where no internal limitation relating to resources is provided for in relation to the right of access to information.[132] However, it is apt to recall that a child's right to basic nutrition is also immediately realisable.[133]

6 THE DUTY TO LABEL: FOPL AND THE CONSUMER PROTECTION ACT

FOPL is not only supported by the rights encapsulated by the Bill of Rights but also has the ability to give effect to national legislation aimed at protecting South African consumers. The most pertinent example, of course, is the Consumer Protection Act[134] (CPA). The CPA was passed with several goals, including to realise South Africa's international-law obligations to "improve access to, and the quality of, information that is necessary so that consumers are able to make informed choices according to their individual wishes and needs" and to "promote and provide for consumer education, including education concerning the social and economic effects of consumer choices".[135] The stated purpose of the Act in section 3, *inter alia*, is that the CPA aims to reduce or improve any disadvantages experienced in accessing any supply of goods or services by consumers who are from lower-income groups or who experience lower levels of literacy, and to

[128] *City of Cape Town v Ad Outpost supra* 749 E.
[129] *BATSA v Minister of Health supra* par 25.
[130] *BATSA v Minister of Health supra* par 41.
[131] Art 2.2 of the ICCPR.
[132] S 16 of the Constitution.
[133] S 28(1)(*c*) of the Constitution.
[134] 68 of 2008.
[135] Preamble of the CPA.

improve consumer awareness and information and encourage responsible and informed consumer choice and behaviour.[136] In South Africa, one in eight adults is illiterate, with the brunt of illiteracy being borne by Black South Africans.[137]

The CPA contains several key sections on the consumer's right to information. Section 58(1) provides:

> "The supplier of any activity or facility that is subject to any–
> (a) risk of an unusual character or nature;
> (b) risk of which a consumer could not reasonably be expected to be aware, or which an ordinarily alert consumer could not reasonably be expected to contemplate, in the circumstances; or
> (c) risk that could result in serious injury or death,
> must specifically draw the fact, nature, and potential effect of that risk to the attention of consumers in a form and manner that meets the standards set out in section 49."

It also provides in section 58(2) that the packager of any hazardous or unsafe goods must display on or within that package a notice in plain language providing the consumer with the relevant information to allow for "safe handling". What constitutes plain language? The CPA relies on a clear and comprehensive definition in section 22(2):

> "[A] notice, document or visual representation is in plain language if it is reasonable to conclude that an ordinary consumer of the class of persons for whom the notice, document or visual representation is intended, with average literacy skills and minimal experience as a consumer of the relevant goods or services, could be expected to understand the content, significance and import of the notice, document or visual representation without undue effort, having regard to–
> (*a*) the context, comprehensiveness and consistency of the notice, document or visual representation;
> (*b*) the organisation, form and style of the notice, document or visual representation;
> (*c*) the vocabulary, usage and sentence structure of the notice, document or visual representation; and
> (*d*) the use of any illustrations, examples, headings or other aids to reading and understanding."

Section 58(2)'s definition of "hazardous or unsafe" is surely informed by section 58(1)(*a*) to (*c*). However, the reference to "safe handling" does create the impression that "hazardous or unsafe" might potentially refer to products that pose an external risk of harm that can be mitigated by safety protocols.

Much as warning labels on tobacco products, as mandated by the Regulations on Labelling, Advertising and Sale of Tobacco Products, intend to go further than simply restricting positive misrepresentations (such as health claims), and also mandate that consumers be protected from

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[136] S 3(*b*) & (*e*) of the CPA.

[137] Khuluvhe "Adult Illiteracy in South Africa, Department of Higher Education and Training, Pretoria" (March 2021) https://www.dhet.gov.za/Planning%20Monitoring%20and%20Evaluation%20Coordination/Fact%20Sheet%20on%20Adult%20Illiteracy%20in%20South%20Africa%20-%20March%202021.pdf (accessed 2023-01-03).

misrepresentations by omission (no health claims, but no warnings or disclosures either),[138] the importance of providing clear guidance to consumers on the healthfulness or otherwise of products is even more important when the harmful nature of products is not as clear-cut as with cigarettes, for example.

Introducing a more informative labelling system would also promote other important sections of the CPA, including the right to fair and responsible marketing to protect consumers from misleading representations (including omissions),[139] and against unconscionable conduct by suppliers of goods, which includes a prohibition against taking advantage of illiteracy or ignorance,[140] and the right to be protected against discriminatory marketing practices, especially considering the disproportionate impact of NCDs on poorer communities that have limited access to information from alternative sources based on resources.[141]

7 CONCLUSION

This article set out to analyse how human rights can support the adoption of mandatory FOPL in South Africa, as recently proposed by the Department of Health. Given that FOPL is a unique policy intervention that fulfils human-rights obligations in terms of the rights to health, food, access to information and freedom of expression (among others), and that NCDs have turned into a catastrophic threat to the enjoyment of rights by a large portion of South Africans, the authors argue that an HRBA not only supports the adoption of FOPL, but mandates it as part of the South African State's duties towards it citizens. FOPL is a low-cost, low-resource solution that creates an opportunity for the South African State immediately to improve the food environment in the country. This will be a step towards better realisation of the rights to food, health and information for South Africans. This will therefore give effect to the State's duty to realise progressively the socio-economic rights of South Africans, but also the State's immediate duty to facilitate adequate access to information and guarantee freedom of expression. South Africa has already moved towards legislating for increased consumer awareness and access to information with the enactment of the CPA. FOPL will give effect to, and build upon, the aims and objectives of national legislation like the CPA.

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138 GN R1148 in *GG* 16588 of 1995-08-04 2.

139 S 29(*a*) of the CPA, which protects consumers from marketing that includes packaging of goods in a manner that is reasonably likely to imply or mislead consumers in terms of several components, including the nature, properties and advantages or uses of a product. S 41 provides additional context as to which misrepresentations are prohibited and includes the failure to disclose a material fact (s 41(1)(*b*)) and the failure to correct an apparent misapprehension on the part of the consumer (s 41(1)(*c*)). The authors note the limited circumstances in which an omission is actionable, or put differently, where a duty to discloses arise, but highlights that a duty to disclose can arise from policy considerations (*McCann v Goodall Group Operations (Pty) Ltd* 1995 (2) SA 718 (C) 726A–G). Given that increasing understanding that the right to access food includes the right to access nutritious and safe food, there is scope to argue that food suppliers have a duty to disclose in the form of more expansive product labelling.

140 S 40(2) of the CPA.

141 S 8(2) of the CPA.

A Critical Review of the Unwelcome Element in the Determination of Sexual Harassment in Kenya: Guidance From South Africa

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SUMMARY

Sexual harassment in the workplace is a burning issue, both in Kenya and South Africa. Both Kenyan and South African labour laws outline the specific elements or prerequisites that must be met for the conduct of the harasser to be considered sexual harassment. One such element is the presence of unwanted or offensive conduct by the harasser. Nevertheless, in Kenya, enforcing this element is still challenging, and there has been a lack of uniformity in the courts over whose viewpoint should determine if the behaviour is unwanted or offensive – that is, whether from the harasser's or the complainant's perspective. This issue is exacerbated by a lack of extensive research in Kenyan employment law on this element. This article presents a critical analysis of the "unwelcome or offensive" element in determining cases of sexual harassment in the Kenyan employment setting using lessons from South African legislation. The results from the analysis indicate that in the Kenyan context harassers often employ this element as a defence to argue that the complainant's behaviour, if examined carefully, demonstrates their acceptance of the harasser's conduct. In essence, this leads courts to scrutinise the behaviour of the complainant for any slight indication that the conduct was unwelcome. The underlying implication is that the complainant is subjected to a trial-like process, diverting attention away from the conduct and behaviour of the alleged perpetrator of the sexual harassment. In navigating such sensitive terrain, there is a need for the Employment Act to be amended and to consider adopting similar tests to those in the South African 2022 Code of Good Practice on the Prevention of Elimination of Harassment in the Workplace.

KEYWORDS: unwanted or offensive conduct, harasser, complainant, sexual harassment

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1 INTRODUCTION

Sexual harassment has been a matter of global concern, particularly following the "Me Too" movement in which several high-profile personalities shared their experiences of sexual harassment in the world of entertainment.[1] It remains a burning issue, both in the Kenyan and South African workplace and is arguably a vice woven into the tapestry of the workplace to the extent that it has become almost invisible owing to its normalisation.

In particular, the problem is very much alive in the Kenyan context and may be attributable to the inadequacies of the existing legal structure, which is primarily dependent on harassed employees voicing complaints about incidents of sexual harassment. Notwithstanding the existence of the current established statutory framework aimed at eradicating sexual harassment in the workplace, this article argues that the Employment and Labour Relations Court has repeatedly made decisions in an inconsistent manner, raising questions whether the Employment Act of 2007 provides a clear and definitive definition of sexual harassment. Over the years, a lack of certainty in the definition of sexual harassment has led to an increased volume of cases filed at the Employment and Labour Relations Court, some going back and forth through the court. This article provides a critical analysis of the Kenyan Employment Act provisions prohibiting sexual harassment in the workplace in Kenya. The article compares similar provisions under South African employment legislation. The objective is to draw significant insights and lessons from South African jurisprudence.

2 THE LEGISLATION THAT PROHIBITS SEXUAL HARASSMENT IN THE KENYAN WORKPLACE

The Preamble to the Kenyan Constitution states that Kenya is founded on the principles of "human dignity, the achievement of equality and the advancement of human rights and freedoms and the rule of law".[2] Sexual harassment in its different forms, be it a *quid pro quo* or sexual favouritism, violates these constitutional rights.[3] The Constitution as the supreme law in Kenya states that any law or behaviour inconsistent with it is to that extent invalid.[4] The equality clause[5] forbids discrimination on a number of listed grounds, including gender and sex, and further encourages the enactment of law preventing and prohibiting unfair discrimination.[6] The Constitution, therefore, does deal with sexual harassment, albeit indirectly, as a form of discrimination based on sex. Other provisions in the Constitution outlaw

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1 Tippett "The Legal Implications of the Me Too' Movement" 2019 *Minnesota Law Review* 23513. See also Ramsini "The Unwelcome Requirement in Sexual Harassment: Choosing a Perspective and Incorporating the Effect of Supervisor-Subordinate Relations" 2014 *Wm & Mary L Rev* and Jackson "Different Voicing of Welcomeness: Rational Reasoning and Sexual Harassment" 2005 *NDL Rev* 752–754.

2 Preamble to the Constitution of the Republic of Kenya, 2010.

3 *Ngunyule v MEIBC* [2023] ZALCJHB par 21.

4 Art 2 of the Kenyan Constitution.

5 Art 27 of the Kenyan Constitution.

6 Art 27(6) of the Kenyan Constitution.

sexual harassment. These are article 28 (the right to dignity) and article 29(d) (the right not to be subjected to torture in any manner, whether physical or psychological), as well as article 31 (the right to privacy).[7] The right to the protection of a person's dignity is a guarantee supporting the right to be free from sexual harassment.

To give effect to the Constitution, a number of statutes have been enacted pursuant to articles 21(2)[8] and 27(6).[9]

3 THE SEXUAL OFFENCES ACT[10]

The Kenyan Sexual Offences Act has addressed the power dynamic between employers and employees extensively by pointing out that incidents of sexual harassment are committed by persons in positions of leadership and authority.[11] This legislation defines sexual harassment as "continuous unwelcome sexual advances, request for sexual favors, lewd verbal or physical gestures by someone in authority".[12] Essentially, this legislation holds that any person who is in a position of authority or holding a public office, who persistently makes any sexual advances or requests that they know, or on reasonable grounds ought to know, are unwelcome, is guilty of the offence of sexual harassment. The spirit of this provision echoes the South African Constitutional Court decision in *McGregor v Public Health and Social Development Sectoral Bargaining Council*,[13] where the court held that the seniority of a perpetrator and disparity in age between perpetrator and complainant are aggravating factors in instances of sexual harassment. This also confirms the approach in *Campbell Scientific Africa v Simmers*.[14]

Nevertheless, the Act has limited itself by neglecting to anticipate incidents of sexual harassment occurring between peers or by a subordinate against a superior, as well as between employees. Consistent with the Labour Appeal decision in *Samka v Shoprite Checkers (Pty) Ltd,*[15] this article opines that sexual harassment is not limited to hierarchical structures and systems. This is because it can be committed by a co-worker or even by

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7 In *Reed v Stedman* (1999) IRLR 299, the court held that "a characteristic of sexual harassment is that it undermines the complainant's dignity at work and constitutes a detriment on the grounds of sex, and that the lack of intent is not a defence".

8 This provision states: "The State shall take legislative, policy and other measures, including the setting of standards, to achieve the progressive realisation of the rights guaranteed under Article 43."

9 This provision stipulates: "To give full effect to the realisation of the rights guaranteed under this Article, the State shall take legislative and other measures, including affirmative action programmes and policies designed to redress any disadvantage suffered by individuals or groups because of past discrimination."

10 3 of 2006.

11 Ss 23 and 24 of the Sexual Offences Act.

12 S 23(1) of the Sexual Offences Act.

13 (2021) 42 *ILJ* 1643 (CC).

14 [2015] ZALAC 51 par 21.

15 In *Samka v Shoprite Checkers (Pty) Ltd* (2020) 41 *ILJ* 1945 (LAC), the Labour Appeal Court held that "the Employment Equity Act applies only to the actions of the employee or the employer. The court held that employers exercise authority over employees only and not over customers, and there is no basis upon which the employer could be held responsible for the actions of third parties."

a subordinate against a higher-ranking employee or superior. It is therefore imperative for Kenyan legislators and policymakers to recognise that the power imbalance inherent in sexual harassment incidents extends beyond positions of authority and power. This would ensure the achievement of a community that acknowledges equality and respects others' dignity. This Act also adopts a criminal-law perspective by decreeing a sanction of no less than three years of imprisonment or payment of 100 000 shillings or more as a fine for anyone declared a sexual offender.[16] Be it a verbal or physical form of indecent behaviour by a person in authority, the act will be punishable if the alleged perpetrator is found guilty.[17] Be that as it may, the Employment and Labour Relations Court has held previously that although this Act provides a remedy to the complainant, "money cannot adequately compensate wounded feelings, but it could reasonably provide a convenient mechanism to assist the person affected in picking up the pieces and moving on with his or her life."[18]

4 EMPLOYMENT ACT, 2007

Section 6 of the Employment Act provides, *inter alia*:

> "An employee is sexually harassed if the employer of that employee or a representative of that employer or a co-worker shows physical behaviour of a sexual nature which directly or indirectly subjects the employee to behaviour that is unwelcome or offensive to that employee and that by its nature has a detrimental effect on that employee's employment, job performance, or job satisfaction."[19]

Given the existence of these statutes, along with policies developed by employers, it would appear reasonable to believe that sexual harassment would be eradicated in workplaces. However, it is evident that despite these legislative developments, they appear inadequate to effectively address workplace sexual harassment. The legislative regime adopted to deal with this plague has largely remained ineffective. This article provides recommendations that will attempt to fill this cavity.

5 UNPACKING "UNWELCOME" OR "OFFENSIVE" BEHAVIOUR

The crucial factor in identifying sexual harassment is the existence of an unwelcome or offensive element.[20] In nearly all experiences of sexual harassment, the unwelcome or offensive element is an important

16 S 23(1) of the Sexual Offences Act.

17 *G M V v Bank of Africa Kenya Limited* [2013] eKLR.

18 *Ooko v SRM* (2022) KECA 44 (eKLR) par 14.

19 S 6(1) of the Employment Act. See also *JWN v Securex Agencies (K) Limited* [2018] eKLR.

20 6(1)(d) of the Employment Act. "An employee may indicate that the sexual conduct is unwelcomed either verbally or non-verbally. Non-verbal conduct indicating that the behaviour is unwelcomed includes conduct such as walking away or not responding to the perpetrator. Where an employee has difficulty indicating to the perpetrator that the conduct is unwelcomed, such employee may seek the assistance and intervention of another person such as a co-worker, superior, counsellor, human resource official, a family member or friend."

consideration that the courts must take into account when assessing what constitutes sexual harassment.[21] In essence, this implies that the provisions of section 6(1) of the Employment Act may only be invoked if the behaviour of the alleged harasser is considered sexual harassment according to the complainant's perception. It is worth highlighting with regard to this element or requirement that the aspect that is considered "unwelcome" or "offensive" arises from a difference between the complainant's perception of the accused's behaviour as offensive or unwelcome, and the alleged harasser's viewpoint in which such behaviour may be considered appropriate. Ultimately, it is up to the complainant to determine whether or not the behaviour is unwelcome or offensive.[22]

However, the current challenges lie primarily in establishing the criteria for identifying sexual harassment, especially when assessing whether the behaviour of the harasser is deemed unwelcome or offensive from the perspective of the individual alleging they have been harassed. This raises the question of whether the assessment should be based on the subjective viewpoint of the harasser, the objective viewpoint of the harasser, or both combined. Moreover, the investigation into the unwelcome aspect poses practical challenges, as a court primarily scrutinises the complainant for the slightest signal of having welcomed the harasser's actions, rather than assessing the harasser's behaviour to ascertain if it was indeed welcomed.[23]

In practice, it is accepted that it is the duty of the employer or other responsible persons in the workplace to prevent or deter the commission of acts of sexual harassment and to provide the procedure for resolution, settlement or prosecution of acts of sexual harassment by taking all steps required.[24] However, the difficulty with interpreting employment legislation when dealing with instances of sexual harassment is that the complainant bears the burden of determining if the behaviour is unwelcome, unwanted or offensive. This situation poses a particular difficulty and raises the following question: if an employee is subjected to clearly sexually harassing behaviour, for example, but does not express any complaint, does such behaviour automatically become acceptable just because it does not cause obvious or evident upset or distress to the recipient?

In the case of *Lydiah Mongina Mokaya v St Leornard's Maternity Nursing Home Limited*,[25] the court stated: "Cases and instances of sexual harassment are extremely personalized and difficult to proof." Also recently, the Employment and Labour Relations Court in *Ooko v SRM*[26] held that "the unwelcome or unwanted element is essential in cases of sexual harassment and cannot be underestimated". The court further stated that the question as to what constituted unwanted behaviour was not what the court or tribunal

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21 *Ooko v SRM supra* par 9.

22 *Reddy v University of Natal* (1998) 1 BLLR 29 (LAC). See also Du Toit, Godfrey, Cooper, Giles, Cohen, Conradie and Steenkamp *Labour Relations Law: A Comprehensive Guide* (2015) 701.

23 *Ooko v SRM supra* par 10.

24 S 6(2) and (3) of the Employment Act, 2007. See also Fitzgerald "Legal and Psychological Constructions of Women's Resistance to Sexual Harassment" in Mackinnon and Siegal *Directions in Sexual Harassment Law* (2004) 103.

25 [2018] eKLR.

26 *Ooko v SRM supra*.

would or would not find offensive, but whether the individual complainant had made it clear that they found the behaviour offensive and unwelcome. The argument is also supported by the decision in *PO v Board of Trustees, AF*.[27] The Employment and Labour Relations Court emphasised that the presence of behaviour that is "offensive or unwelcome" requires the complainant to inform the accused that the behaviour is inappropriate. In essence, this is because some forms of behaviour may be deemed appropriate, and others may not. Most importantly, the Employment Act requires that the individual alleged to have experienced harassment must give a warning to the alleged harasser to stop the unwanted behaviour.

6 THE TEST FOR SEXUAL HARASSMENT

The significance of the unwanted or offensive component within the framework of the Employment Act, particularly in situations of sexual harassment, justifies the need for a precise definition of this element. Since similar questions are posed, there appears to be a lack of differentiation between guidelines for determining sexual harassment and the test used to assess how the behaviour in question was unwanted or offensive.

This article contends that the courts should not heavily rely on a complainant's subjective views as the only test for determining what constitutes the act of sexual harassment. This is for the simple reason that legislation cannot grant operational legislative authority to private individuals to create laws. The Employment and Labour Relations Court's excessive dependence on a complainant's perspective or sentiments might be interpreted as a disregard for the constitutional duty of the legislature to create laws, or even as a potential cause for legal instability. The legislature is obligated to enact laws that are sufficiently clear and unambiguous, ensuring that everyone fully understands their obligations. Accordingly, the Kenyan legislature should consider an amendment to the current statutory framework to formulate an appropriate test for determining incidents of sexual harassment in employment.

Currently, in order to establish cases of unwanted or offensive conduct, the complainant is duty-bound to provide proof indicating their lack of consent. This is instead of assessing the unwelcome nature of the harasser's behaviour. Within the framework of the Employment Act and the employment setting, requiring proof of no consent redirects attention and focus onto the response of an already devastated individual filing a sexual harassment complaint. The complainant is required to articulate explicitly to the court their perception of what they consider to be unwelcome or offensive. As such, the court is required to enquire whether or not the complainant wanted sexual attention. Consequently, the question that arises for determination is whether the complainant employee asked for it and whether they enjoyed it. Be that as it may, there may still be an ensuing challenge over the difference between the court's characterisation of unwelcome conduct and the complainant's understanding of the same.

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[27] (2014) eKLR par 29.

This article observes that the Employment and Labour Relations Court ought to adopt a test that investigates whether the harasser's behaviour affected the complainant's dignity negatively. This is because the unwelcome behaviour undermines the individual's constitutional right to dignity, and their sense of worth and self-esteem within the workplace. Furthermore, it affects the complainant's social standing, good name, and job security. In addition, this article argues that the court should focus not only on the damage inflicted on the victim owing to unwelcome and offensive conduct but should instead comprehensively and simultaneously holistically assess all relevant circumstances.[28]

Furthermore, as mentioned earlier, the difficulty in interpreting labour laws pertaining to sexual harassment is that the burden of determining whether the conduct is offensive or unwelcome falls on the complainant. For this reason, the Kenyan court is primarily concerned with assessing and analysing the complainant's reactions, attitude and response to the harasser's behaviour, rather than evaluating the behaviour of the harasser in order to decide whether it was welcomed. This presents a significant problem; the Kenyan courts should therefore strive to determine cases of sexual harassment from both a subjective and objective viewpoint. This should be "the rub" of the sexual harassment investigation and inquiry, since the complainant may see the behaviour of a sexual nature as unwanted, based on their subjective experience, while the harasser or other colleagues may perceive the behaviour as being welcomed.[29] Accordingly, the inquiry should seek to determine whether the complainant considered the harasser's behaviour to be unwanted and offensive, which is the subjective test. The inquiry should in addition aim to determine whether the harasser had a reasonable belief that their behaviour was unwelcome, which is the objective test.[30] This article stresses the importance of establishing a clear objective test under the Employment Act. In order for an act of sexual attention to be deemed harassment, the Employment Act specifies that the harasser must have known that their actions were unwanted or offensive.

7 SOUTH AFRICAN LEGAL PERSPECTIVE

In 2021, the Constitutional Court in *McGregor v Public Health and Social Development Sectoral Bargaining Council* emphasised that sexual harassment is the "most egregious kind of misconduct that plagued the workplace".[31] Furthermore, the court astutely remarked that the legal framework established to tackle this prevalent issue has proved largely ineffective.[32]

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28 Jackson 2005 *NDL Rev* 752–754.

29 Monnin "Proving Welcomeness: The Admissibility of Evidence of Sexual History in Sexual Harassment Claims Under the 1994 Amendments to Federal Rule of Evidence" 1995 *Vand L Rev* 1155 1166.

30 Halfkenny "Legal and Workplace Solutions to Sexual Harassment in South Africa (Part 2): The South African Experience" 1996 17 *ILJ* 217 218.

31 *Supra* par 23. See also *Ekurhuleni Metropolitan Municipality v South African Local Government Bargaining Council* (2022) 43 *ILJ* 825 (LAC).

32 *Ekurhuleni Metropolitan Municipality v SALGBC supra* par 13.

Like Kenya, South Africa has adopted several legislative measures to address sexual harassment in the workplace. Legislation and Codes of Good Practice have established accessible processes and advice desks to facilitate the reporting of complaints by complainants. These measures also provide protection against revenge and ensure privacy. In fact, under South African labour law, employees who file complaints may choose to quit and assert that they have been constructively dismissed.[33]

7 1 The Constitution of the Republic of South Africa, 1996

The Constitution of South Africa, like the Kenyan Constitution, is based on tenets such as "human dignity, equality, and the supremacy of the Constitution and the rule of law".[34] Writing in 1989, in its first reported case on sexual harassment, the erstwhile Industrial Court, sounding the alarm that sexual harassment cannot be tolerated, highlighted that

> "[u]nwanted sexual advances in the employment sphere are not a rare occurrence" and it is 'by no means uncommon'.[35] Unfortunately, that truth rings as loudly today as it did then. The only difference between now and then is that today we hold in our hands a constitution that equips us with the tools needed to protect the rights that are violated when sexual harassment occurs. Yet, what this means is that for as long as sexual harassment persists, so the Constitution becomes an eidolon, and its promises of equality and dignity, equally illusive."[36]

In addition, the Constitution, particularly the Bill of Rights, guarantees the protection of the right to equality and condemns all forms of discrimination that are unfair.[37] It further ensures that employees have recourse if they are subjected to unfair labour practices.[38] To give effect to the Constitution, courts have a duty to advance the principles, meaning and goals of the Bill of Rights while carrying out their interpretational functions.[39] Although the obligation to provide a secure and safe work environment is not explicitly stated in the Constitution, it may be inferred from section 24, which states: "Everyone has the right to an environment that does not pose a threat to their health or well-being." Moreover, the Constitution explicitly guarantees the right to security as outlined in section 12, as well as the right to dignity as outlined in section 10.[40] Notably, the Constitution does not contain a

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33 *Mkhutshulwa v Department of Health, Eastern Cape* [2023] 8 BLLR 809 (LC). See also *Centre for Autism Research and Education CC v Commission for Conciliation, Mediation and Arbitration* (2020) 41 *ILJ* 2623 (LC) and Dupper and Strydom *Essential Employment Discrimination Law* (2004) 242.

34 S 1(*a*) to (*c*) of the Constitution of the Republic of South Africa, 1996. See also *Ekurhuleni Metropolitan Municipality v South African Local Government Bargaining Council supra* par 1.

35 *J v M Ltd* (1989) 10 *ILJ* 755 (IC) (*J v M*) 757F–I.

36 *McGregor v Public Health and Social Development Sectoral Bargaining Council supra* par 1.

37 Art 9 of the Constitution.

38 S 23 of the Constitution.

39 S 39 of the Constitution.

40 *Campbell Scientific Africa v Simmers* (2016) 37 *ILJ* 116 (LAC) par 21. See also *Motsamai v Everite Building Products (Pty) Ltd* [2011] 2 BLLR 144 (LAC) par 20 and *Department of*

definition for what is meant by "sexual harassment". Nevertheless, it cautions the courts to uphold the "principles that form the foundation of a transparent and democratic society, which include human dignity, equality, and freedom as outlined in the Bill of Rights".[41] Primarily, sexual harassment in South Africa has been regulated as a form of unfair discrimination, which is prohibited on the grounds of sex, gender and sexual orientation.[42]

7 2 The South African Employment Equity Act 55 of 1998 (EEA), as amended

The purpose of the EEA is to promote equality and fairness in the workplace, in line with the principle of equality enshrined in the Constitution.[43] Harassment in any form is explicitly condemned and discouraged under section 6 of the EEA. According to subsection 3, harassment of a worker is considered unfair discrimination based on any one or more grounds of unfair discrimination mentioned in subsection 1, and is forbidden. Along with that, section 51(1) to (5), read in tandem with section 60 of the EEA, safeguards workers against discrimination perpetrated by any party (including the employer) in response to the exercise of any right granted by the EEA. The aforementioned sections were incorporated to acknowledge the likelihood that some employers (owing to their supervisory and disciplinary powers, along with personal interests) might want to take revenge against employees who report workplace harassment. The decisions in *Christian v Colliers Properties*[44] and *Makoti v Jesuit Refugee Service SA*[45] serve as noteworthy examples in this context.

7 3 The Occupational Health and Safety Act 85 of 1993 (OHSA), as amended

The purpose of OHSA is to broaden the protection, and improve the safety and well-being, of employees. In terms of this Act, the employer is obligated to provide, to the extent reasonably possible, a safe and healthy working environment for workers.[46] Prevention and eradication of sexual harassment in the workplace form an integral part of this safeguard.

Labour v General Public Service Sectoral Bargaining Council (2010) 31 *ILJ* 1313 (LAC) par 37.

41 S 7 of the Constitution.

42 *Solidarity obo B v South African Police Service* (2022) 43 *ILJ* 2869 (LC), *Campbell Scientific Africa (Pty) Ltd v Simmers supra* par 21. See also *Rustenburg Platinum Mines Limited v UASA obo Pietersen* (2018) 39 *ILJ* 1330 (LC): *Motsamai v Everite Products (Pty) Ltd supra* par 19; s 6(1) of the EEA and *Potgieter v National Commissioner of the SA Police Service* (2009) 30 *ILJ* 1322 (LC) par 46.

43 Ss 1 and 9 of the Constitution.

44 [2005] ZALC 56.

45 (2012) 33 *ILJ* 1706 (LC).

46 S 8 of OHSA.

7 4 The Labour Relations Act 66 of 1995 (LRA), as amended

The LRA implements the Code of Good Practice on the Handling of Sexual Harassment Cases[47] (1998 Code) in a manner consistent with the EEA. The LRA provides an additional layer of protection against sexual harassment by stating that if a person is dismissed in response to reporting sexual harassment, the dismissal is considered automatically unfair.[48] Furthermore, according to the LRA, workers have the right to resign and lodge a claim for constructive dismissal under section 186(1)(*e*) should the employer neglect to take action concerning a reported incident of sexual harassment.[49]

7 5 The Protection From Harassment Act 17 of 2011, as amended

This Act seeks to protect victims of harassment, although it does little more than confirm the definition of the term "sexual harassment" in the EEA and the Code. Going further than the EEA and the Code, the Act provides and regulates some other forms of harassment. Notably, before 2011, there were numerous problems with the existing harassment prevention strategies. These included the fact that they did not help financially disadvantaged complainants who had to navigate judicial red tape before they could get a court order to defend their rights.[50] For complainants, the court proceeding was tedious, expensive and laborious.

This legislation was therefore enacted with the primary aim of protecting the rights of victims.[51] The legislation strengthens victims' rights, providing legal recourse to victims of harassment by establishing procedures to ensure that appropriate government agencies fully implement statutory provisions.[52] In addition, the Act was passed because there were increasing difficulties with defining and determining harassment in the South African context and because there needed to be criminal and civil remedies to prevent or mitigate harassment in different kinds of relationships.[53]

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47 GenN 1367 in GG 19049 of 17 July 1998.

48 S 187(1) of the LRA.

49 In terms of s 186(1)(*e*) of the LRA, constructive dismissal is defined to mean that "an employee terminated employment with or without notice because the employer made continued employment intolerable for the employee."

50 Similarly, s 1(viii) of the Domestic Violence Act 116 of 1998 also defines domestic violence to include "(e) intimidation; (f) harassment; and (g) stalking".

51 Preamble to the Protection From Harassment Act.

52 *Ibid*.

53 South African Law Reform Commission "Discussion Paper Project 130: Stalking" (September 2004) https://www.justice.gov.za/salrc/dpapers/dp108.pdf (accessed 2023-11-16).

8 TESTS TO DETERMINE "UNWANTED OR OFFENSIVE" BEHAVIOUR

8 1 The objective test to determine "unwanted or offensive" behaviour

The unwelcome element of conduct was evident in the 1998 Code. This Code defined sexual harassment to mean an "unwanted behaviour of a sexual nature".[54] Sexual behaviour would be considered "unwanted" if "the recipient had made it clear that the behaviour was offensive; and/or if the perpetrator should have known that the behaviour is regarded as unacceptable".[55] The 1998 Code thus supported an objective approach to identifying the unwelcome element when determining whether or not the victim was sexually harassed. The objective approach attempts to determine whether a reasonable individual, in the alleged perpetrator's position, knew or should have been aware that their sexual behaviour was offensive and unwelcome.

8 2 The subjective test to determine "unwanted or offensive" behaviour

The 1998 Code of Good Practice on the Handling of Sexual Harassment Cases was amended by the 2005 Code,[56] which defined sexual harassment to mean "unwelcome conduct of a sexual nature that violates the rights of an employee and creates an obstacle to fairness in the work environment".[57] The 2005 Code seemed to support a more subjective approach when determining the "unwelcome" element of the test, taking into account the complainant's emotional state of mind and the degree of severity and extent of the sexual conduct. In summary, the subjective assessment sought to ascertain whether the alleged sexual harassment victim had, in their own opinion, communicated that the alleged conduct was undesirable, either explicitly or implicitly.

But even though the labour courts in South Africa have consistently employed both objective[58] and subjective approaches to ascertain whether sexual conduct was unwelcome, these approaches have also consistently been in conflict. The court's approach to evaluating the unwelcome

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54 Item 3(1) of the 1998 Code.

55 Item 3 of the 1998 Code.

56 *Amendments to the Code of Good Practice on the Handling of Sexual Harassment Cases in the Workplace* GN 1357 in *GG* 27865 of 2005-08-04 (2005 Code).

57 Item 4 of the 2005 Code.

58 In *Centre for Autism Research and Education CC v Commission for Conciliation, Mediation and Arbitration supra*, the Constitutional Court advocated for and supported a purely objective approach for cases of racial harassment – that is, focusing on the conduct of the harasser. However, this approach is problematic and could face criticism because it might result in an unfair result and perpetuate the existing state of affairs by condoning and accepting the objectification of women and defining them based only on their sexuality.

component of sexual harassment has lacked consistency. For instance, in *Bandat v De Kock*,[59] it was held:

> "What is clear from … the Code is that central to the existence of sexual harassment is behaviour that must be 'unwelcome'. If the conduct is not unwelcome, it cannot be sexual harassment. The determination of whether behaviour is 'unwelcome' is an objective one, because behaviour that may be subjectively unwelcome to one person may not be unwelcome to another."[60]

Be that as it may, the objective test has faced criticism for endorsing standards of behaviour that have traditionally been favoured by men and are not objectively acceptable. For example, the Labour Appeal Court reached a different conclusion in the case of *Motsamai v Everite Building Products (Pty) Ltd*,[61] where it upheld a subjective interpretation of the test. The Labour Appeal Court determined that "sexual harassment goes to the root of one's being and must therefore be viewed from the point of view of a complainant: how does he/she perceive it, and whether or not the perception is reasonable."[62] The Labour Appeal Court has thus endorsed an approach that combines subjective and objective elements, focusing on the complainant's perceptions and whether such a perception was reasonable.

The subjective approach, similar to the objective approach of the test, exhibits some drawbacks and flaws. This is because conduct that would not ordinarily be deemed sexual harassment according to societal norms may be misconstrued as such by hypersensitive individuals owing to their subjective judgment.[63]

8 3 Code of Good Practice on the Prevention and Elimination of Harassment in the Workplace (2022 Code): Combination of objective and subjective tests to determine the unwanted behaviour

The 2022 Code[64] came into effect on 18 March 2022. It is intended to address the prevention, elimination and management of all forms of harassment that pervade the workplace. It is guided by ILO Convention 190[65] and its recommendations concerning the elimination of violence and harassment in the world of work, the Discrimination (Employment and Occupation) Convention 111 of 1958,[66] and ILO Convention 151[67] relating to occupational health and safety. The 2022 Code stipulates that an

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59 (2015) 36 *ILJ* 979 (LC).

60 *Bandat v De Kock supra* par 72.

61 *Supra.* See also *Campbell Scientific Africa (Pty) Ltd v Simmers supra.*

62 Motsamai v Everite Building Products (Pty) Ltd supra par 20.

63 *Mokoena v Garden Art Ltd* (2008) 29 *ILJ* 1196 (LC) par 42–43.

64 GN R1890 in *GG* 46056 of 2022-03-18.

65 International Labour Organization (ILO) *Violence and Harassment Convention* C190 (2019). Adopted: 21/06/2019. EIF:25/06/2021.

66 ILO *Discrimination (Employment and Occupation) Convention* C111 (1958). Adopted: 25/06/1958; EIF: 15/06/1960

67 ILO *Labour Relations (Public Service) Convention* C151 (1978). Adopted: 27/06/1978; EIF: 25/02/1981.

investigation into sexual harassment must take into concurrent consideration both subjective and objective factors. Item 5.2 of the Code establishes its own rules, tests and guidelines for establishing whether the conduct was unwanted. These include:

a) An employee may indicate that the conduct is unwanted in different ways, including by walking away or not responding to the perpetrator.[68]
b) Previous consensual participation in sexual conduct does not necessarily mean the conduct continues to be acceptable to the employee.[69]
c) Where a complainant has difficulty indicating to the perpetrator that the conduct is unwanted, such complainant may seek the assistance and intervention of another person such as a co-worker, superior, counsellor, human resource official, family member or friend.[70]
d) The fact that the complainant does not indicate that the conduct is unwanted does not entail that there has not been sexual harassment if the conduct is such that the harasser/perpetrator ought to have known it could be regarded as unwanted.[71]

Furthermore, the 2022 Code stipulates that the test for sexual harassment demands a critical assessment of the following inquiry:

a) whether the harassment is based on the prohibited grounds of sex and/or gender and/or sexual orientation;[72]
b) whether the sexual conduct was unwelcome or unacceptable;[73]
c) the nature and extent of the sexual behaviour;[74] and
d) the detrimental effect of sexual behaviour on the employee.[75]

As outlined in the 2022 Code, the determination of whether behaviour qualifies as sexual harassment ought to be conducted objectively, taking into account the point of view of the employee making the allegation. This aligns with the approach taken by Kenya, since the main emphasis of the investigation on harassment is on the effect of the conduct on the employee. However, there may be instances when the complainant's beliefs may not align with the perspective of a "reasonable person" in the complainant's particular position. Under such conditions, an individual or employer accused of harassment may arguably attempt to demonstrate that the complainant's perspective or perceptions do not align with the norms of society, which reflect our fundamental constitutional principles.

What is evident from the Code is that when evaluating the unwelcome, unwanted or offensive element, it is essential to ascertain if the alleged conduct was detested or deemed inappropriate. This formulation of the test

68 Item 5.2.1 of the 2022 Code.
69 Item 5.2.2 of the 2022 Code.
70 Item 5.2.3 of the 2022 Code.
71 Item 5.2.4 of the 2022 Code.
72 Item 5.3.2.1 of the 2022 Code.
73 Item 5.3.2.2 of the 2022 Code.
74 Item 5.3.2.3 of the 2022 Code.
75 Item 5.3.2.4 of the 2022 Code.

is a combination of an objective and subjective test. Accordingly, the behaviour can be deemed unwelcome if the complainant explicitly, implicitly, directly, or indirectly indicated that the conduct was unwelcome. Alternatively, if the behaviour was such that a reasonable person in the same situation would have found it unacceptable, it can also be considered unwelcome. In this regard, it is important to note that the absence of an explicit indication from the complainant that the behaviour is unwelcome does not automatically exclude the possibility of sexual harassment. If the perpetrator should reasonably have considered that the behaviour may be seen as unwanted, it can still be considered to be sexual harassment. In the recent case of *Amathole District Municipality v Commission for Conciliation, Mediation and Arbitration* (*CCMA*),[76] the Labour Appeal Court declared that the determination as to whether behaviour is offensive or unwelcome is based on an objective test.[77] However, despite the Labour Appeal Court's declaration that an objective test should be used, it seems from an analysis of the judgment that subjective factors were also taken into account when reaching its conclusion.

Perhaps a notable deficiency in the 2022 Code is that it extends its protection to employees who were harassed by third parties.[78] This is clearly at odds with the vicarious-liability provisions of the EEA[79] and the interpretation given thereto by the courts. As a sanction or preventative measure, the Code also allows for a perpetrator to be transferred to another department or employer if found guilty.[80] The question must be asked whether this amounts to justice for a victim of sexual harassment and if the employer would not simply be transferring the problem to another department.

8 4 The need to adopt a "compromise test"

In summary, both the subjective and objective tests assess whether sexual conduct has been offensive or unwelcome from the point of view of the harasser or complainant, thus posing challenges for both assessments. To address such challenges, South African employment law has devised a balanced approach that serves as an acceptable compromise between the subjective and objective tests.[81] This test, also known as the "reasonable victim" test, counterbalances the harasser's perspective by examining the complainant's perceptions or emotions, combining the subjective element with the objective element when analysing the conditions surrounding the incident.[82]

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76 (2023) 44 *ILJ* 109 (LAC).

77 *Amathole District Municipality v CCMA supra* par 56.

78 Item 10.3 of the 2022 Code. See also *Future of SA Workers Union obo AB v Fedics (Pty) Ltd* (2015) 36 *ILJ* 1078 (LC).

79 S 60 of the EEA.

80 Item 10.9.3 of the 2022 Code.

81 Botes "Sexual Harassment as a Ground for Dismissal: A Critical Evaluation of the Labour Court and Labour Appeal Courts decisions in Simmers v Campbell Scientific Africa" (2017) (4) TSAR 772.

82 Dupper *et al Essential Employment Discrimination Law* 246.

The primary criticism and detractor of the test is that it specifically targets and extensively probes the complainant's behaviour and actions. The complainant is essentially subjected to a trial-like process that turns on evidentiary issues and the consequence is that the focus shifts away and is no longer on the behaviour of the harasser, which should be the heart of the matter. Consequently, the unwelcome or offensive element represents a "roadblock" for complainants in sexual harassment cases. This obstacle appears to stem from the fact that the inquiry or investigation concerning the unwelcome element never hinges on whether the harasser's conduct was in fact offensive or unwelcome. Instead, the courts scrutinise the complainant's conduct in search of evidence that the harasser's conduct was indeed offensive or unwelcome. When determining whether behaviour is unwelcome or offensive, it is also crucial to evaluate the specific dynamics, as well as the nature, of the relationship between the harasser's conduct and the complainant. This dynamic should be examined not just within the framework of the working relationship, but also on a personal level. It may be that the dynamic provides a valid justification and reasonable explanation for a scenario where there is no complaint about the behaviour, even when the behaviour itself seems to be deserving of a complaint.

9 CONCLUSION

In order to establish if behaviour constitutes sexual harassment according to Kenyan law, the conduct must be classified as "unwelcome or offensive". In most cases, the "unwelcome or offensive" element of the conduct is often evident. Nevertheless, situations may develop when the nature of such "unwelcome or offensive" behaviour is unclear, resulting in courts and employers struggling to determine the most appropriate way to respond to it, and the appropriate standards of assessment. Understanding the standard, test and guidelines for determining "unwelcome or offensive" conduct when analysing cases of alleged sexual harassment would assist employers in enhancing awareness while fostering commitment to eliminate gender-based violence in the workplace.

This article observes that the current regulatory efforts and interventions on sexual harassment under the Employment Act are to a large extent adequate. However, the legislation in question has some notable deficiencies. For instance, if an employee tolerates conduct that clearly and objectively qualifies as sexual harassment without lodging a formal complaint, is that conduct transformed into something acceptable simply because the recipient or victim does not consider it unwanted or offensive? In other words, does the fact that a party may have previously welcomed or participated in the conduct mean that the conduct remains welcome? This article disagrees and contends that the Kenyan legislators may not have kept this in mind. An employee is not precluded from lodging a sexual harassment complaint against a perpetrator when attention becomes unwelcome even if the employee was previously in a relationship with the perpetrator. The Kenyan legislator may draw significant lessons from the South African 2022 Code, which deals specifically with this aspect.

This article argues further that the question of what constitutes sexual harassment should not be defined based on an individual's subjective

feelings or views. This article is unaware of any operational legislature that grants private individuals the authority to make laws. Focusing only on the perspective of a complainant is, at the very least, a failure on the part of a legislature to fulfil its constitutional duty of creating legislation. In the worst-case scenario, this might lead to a state of anarchy and disorder. The harasser's behaviour, when seen objectively, is the most important factor to be investigated and scrutinised. The legislative branch is obligated to enact a law that is sufficiently clear, enabling citizens to understand their obligations.

However, the primary challenge is the Kenyan Employment and Labour Relations Court's highly subjective approach to evaluating what constitutes "unwanted or offensive" behaviour. Being so reliant or dependent on the complaint begs to be challenged. In the case of *Lydiah Mongina Mokaya v St Leornard's Maternity Nursing Home Limited*,[83] the court highlighted that cases of sexual harassment are highly individualised and difficult to prove. While it is important to acknowledge that sexual harassment is a subjective experience, and to take the complainant's perspective into account, it is crucial to avoid relying solely on subjective criteria. This is because the complainant may be excessively sensitive, leading to unfounded allegations of sexual harassment against an alleged harasser. In addition, this might result in liability without fault, which is a major problem when it comes to sexual harassment in the workplace. Moreover, the difficulty with Kenyan courts employing a subjective test is that forms of behaviour that an extremely sensitive individual could perceive as harassment may be identified for disciplinary action. The Employment and Labour Relations Court ought therefore to shy away from embracing this approach.

To navigate this delicate situation, it is necessary to amend the Employment Act and consider implementing the extensive tests and guidelines used by the South African courts and the 2022 Code. In particular, the Kenyan legislature ought to adopt the perspective that sexual behaviour ought to be deemed "unwelcome or offensive" not only when a recipient explicitly expresses offence but also when a perpetrator is aware or should be aware that the behaviour is considered unacceptable. By doing so, the legislators and courts would support a fair and objective approach to the "unwelcome or offensive" component of the sexual harassment test. The objective approach seeks to determine whether a reasonable individual, in the accused perpetrator's situation, was aware or should have been aware that their sexual behaviour was inappropriate.

It is also worth highlighting that, unlike South Africa, Kenya has yet to ratify ILO Convention 190, which aims to eradicate violence and harassment in workplaces.[84] The Preamble to the Convention mandates its parties to foster actively an atmosphere where sexual harassment is completely unacceptable, and emphasises that all individuals involved in the realm of employment must take action against violence and harassment. The Convention calls for comprehensive legislative amendments, primarily because it separates and detaches sexual harassment from unfair

[83] *Supra*.

[84] ILO *Violence and Harassment Convention* C190 (2019). Adopted: 21/06/2019. EIF:25/06/2021.

discrimination and equality. Rather, it places sexual harassment within a wider and more comprehensive framework (which includes workplace bullying) in order to combat different types of workplace violence and harassment. As such, this article recommends that, as South Africa has done, Kenya should move with speed to ratify this important Convention and its accompanying recommendations aimed at preventing sexual misconduct in the workplace.

According to section 23(1) of the Kenyan Sexual Offences Act, sexual harassment is defined as "continuous unwelcome sexual advances, request for sexual favours, lewd verbal or physical gestures by someone in authority".[85] Surprisingly, the Employment Act does not explicitly address the requirement of a "continuous" element to the unwelcome or offensive conduct. Accordingly, the Employment Act being the primary law in employment matters fails to realise that unwelcome or offensive behaviour could be a once-off incident and that continuity is not a prerequisite. This stands in stark contrast to the position under the South Africa LRA and the 2022 Code, where the legal system and courts[86] recognise that unwelcome or offensive behaviour may be a single or one-off occurrence,[87] particularly if it is serious and has a noticeably harmful effect on the person filing the complaint.

Section 6(3)(iii) of the Kenyan Employment Act states: "The employer shall take such disciplinary measures as the employer deems appropriate against any person under the employer's direction, who subjects any employee to sexual harassment." However, several principles are missing from this provision or deserve more attention. First, this Act gives the employer very wide discretion to "take such disciplinary measures as the employer deems appropriate". This is problematic as employers have the discretion to impose lenient sanctions such as written warnings, which are not advisable in sexual harassment cases. Section 6 of the Employment Act, which was developed to eradicate sexual harassment in the workplace, makes no mention of any specific available sanctions in cases of sexual harassment. If sexual harassment, one of the most egregious forms of misconduct to plague the workplace, is to be eradicated, the Employment Act must incorporate a Code and guidelines similar to the 2022 Code under South African law on sanctions – and stricter sanctions for that matter. As the South African Constitutional Court reiterated in *McGregor v Public Health and Social Development Sectoral Bargaining Council*,[88] a strict sanction serves an important purpose in that it:

> "sends out an unequivocal message that employees who perpetrate sexual harassment do so at their peril and should more often than not expect to face the harshest penalty. In fact, incorporating criminal liability may ultimately be needed so that employers finally take sexual harassment seriously."[89]

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85 *JWN v Securex Agencies (K) Limited supra* par 22.

86 *Motor Transport Workers Union obo Zikhali v Izinkobe Construction (Pty) Ltd* (2020) 7 BALR 715 (BCCEI).

87 *Future of SA Workers Union obo AB v Fedics (Pty) Ltd supra* par 44.

88 *Supra* par 49.

89 *McGregor v Public Health and Social Development Sectoral Bargaining Council supra* par 49, citing *Campbell Scientific Africa (Pty) Ltd v Simmers supra* par 35.

A Critical Analysis of the Application of Section 37C(1) of the Income Tax Act

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SUMMARY

Section 37C(1) of the Income Tax Act 58 of 1962 was introduced as a tax incentive to encourage private landowners to incur conservation and maintenance expenditure for the public good. Section 37C(1) of the Income Tax Act deems conservation and maintenance expenditure incurred under a biodiversity management agreement concluded in terms of section 44 of the National Environmental Management: Biodiversity Act 10 of 2004 to be incurred in the production of income and for the purposes of trade. Consequently, section 37C(1) of the Income Tax Act serves as a deeming provision that allows taxpayers to apply section 11(*a*) of the Income Tax Act. Section 37C(1) of the Income Tax Act does not specify the types of maintenance and conservation expenditure that would qualify for a deduction. In contrast, section 11(*a*) of the Income Tax Act does not permit the deduction of any expenditure of a capital nature. The Explanatory Memorandum to section 37C(1) of the Income Tax Act further specifies that expenditure of a capital nature will not qualify for a deduction.

Given that section 37C of the Income Tax Act was introduced as a tax incentive – to encourage taxpayers to incur conservation and maintenance expenditure for the preservation of nature and the environment for the public good – its introduction raises the question whether the legislature intended for expenditure beyond that normally permitted in terms of section 11(*a*) of the Income Tax Act to be deductible. Section 37C(1) of the Income Tax Act further allows the deduction of conservation and maintenance expenditure against taxable income earned on land, including land in the proximity of the land that is subject to a biodiversity management agreement,

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suggesting that taxable income not directly related to the conservation and maintenance activities may be reduced by such expenditure.

The objective of this article is to provide a critical analysis of the application of section 37C(1) of the Income Tax Act in an attempt to provide clarity as to when and how the section will apply. In analysing the application of section 37C(1) of the Income Tax Act, the first step is to establish the meaning of the words "conserve" or "maintain" to determine whether capital expenditure incurred in terms of a biodiversity agreement would potentially qualify for a deduction in terms of section 37C(1) read with section 11(*a*) of the Income Tax Act. Furthermore, the article evaluates whether the intended objective of section 37C(1) is impeded by the exclusion of capital expenditure.

The second step is to establish the appropriate meaning and interpretation of "immediate proximity" to determine when expenditure incurred for the conservation or maintenance of land is deductible from taxable income that is not necessarily related to conservation or maintenance activities.

The article concludes by exploring the use of biodiversity tax incentives in Australia and Canada to determine whether the principles applied in these jurisdictions: 1) allow for the expenditure of a capital nature to be deducted; and 2) could potentially be suitable to adjust the current format of section 37C of the Income Tax Act to assist in reaching the intended objective of being a tax incentive; or 3) could be used to formulate alternative biodiversity tax incentives to encourage biodiversity conservation in South Africa.

KEYWORDS: section 37C of the Income Tax Act, conservation and maintenance expenditure, biodiversity management agreement, conserve or maintain, immediate proximity

1 INTRODUCTION

South Africa ranks as the third most biologically diverse country in the world and is home to over 95 000 known plant and animal species.[1] However, agriculture, industrial development, climate change and urban expansion pose a significant threat to the country's biodiversity.[2] Since the early 2000s, there has been increasing recognition of the importance of biodiversity conservation for the public benefit.[3] Section 24(1)(*b*)(ii) of the Constitution[4] provides: "Everyone has the right to have the environment protected, for the benefit of present and future generations through reasonable legislative and other measures that promote conservation." One of the acts promulgated by Parliament to give effect to section 24(1)(*b*)(ii) of the Constitution is the National Environmental Management: Biodiversity Act[5] (NEMBA). Parliament enacted NEMBA with the aim of preserving biological diversity. It allows the Minister of Environmental Affairs to enter into bilateral biodiversity

1 Department of Environmental Affairs *Biodiversity Finance Initiative (BIOFIN) South Africa: Biodiversity Finance Plan* (2017).

2 United Nations Environment Programme (UNEP) *Convention on Biological Diversity* 1760 UNTS 79; 31 ILM 818 (1992). Adopted: 05/06/1992; EIF: 29/12/1993 https://wqww.cbd.int/countries/profile/?country=za (accessed 2023-12-03).

3 Paterson "Tax Incentives – Invaluable Tools for Biodiversity Conservation in South Africa" 2005 122(1) *South African Law Journal* 182 184.

4 Constitution of the Republic of South Africa, 1996.

5 10 of 2004.

management agreements with private landowners to conserve and maintain specific areas of land for the public good.[6]

Before the enactment of the Revenue Laws Amendment Act[7] (RLAA of 2008), minimal tax relief was provided to private landowners involved in biodiversity conservation and management.[8] Prior to the RLAA of 2008, expenditure incurred by private landowners that did not constitute a donation in terms of section 18A of the Income Tax Act[9] would not have been deductible unless it met the requirements of the general deduction formula contained in section 11(*a*) of the Income Tax Act.

Section 37C(1) of the Income Tax Act was introduced by the RLAA of 2008 to allow the government to enter into bilateral agreements with private landowners as an incentive for them to conserve or maintain land for the public good.[10] According to the Explanatory Memorandum on the Revenue Laws Amendment Bill[11] (Explanatory Memorandum), the intended purpose of section 37C(1) is to create a mechanism for deducting environmental conservation and maintenance expenditure, thereby encouraging taxpayers to preserve nature and the environment for the public good.[12] Section 37C(1) reads verbatim as follows:

> "Expenditure actually incurred by a taxpayer to conserve or maintain land is deemed to be expenditure incurred in the production of income and for purposes of a trade carried on by that taxpayer if,–
>
> *(a)* the conservation or maintenance is carried out in terms of a biodiversity agreement that has a duration of at least five years entered into by the taxpayer in terms of section 44 of the National Environment Management: Biodiversity Act, 2004; and
>
> *(b)* land utilised by the taxpayer for the production of income and for purpose of a trade consists of, includes or is in the immediate proximity of the land that is the subject of the agreement contemplated in paragraph *(a)*."

In the Preamble to section 37C(1) of the Income Tax Act, expenditure actually incurred to conserve or maintain land is deemed to be incurred in the production of income and for the purposes of a trade. Consequently, section 37C(1) serves as a deeming provision that allows taxpayers to consider applying section 11(*a*) of the Income Tax Act. However, section 37C(1) does not specify the types of maintenance and conservation expenditure that would qualify for a deduction. In contrast, section 11(*a*) of the Income Tax Act does not permit the deduction of any expenditure of a capital nature. Given that section 37C of the Income Tax Act was introduced

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6 S 44 of NEMBA.

7 60 of 2008.

8 Van Wyk "Tax Incentives for Biodiversity Conservation in the Western Cape" 2010 18(1) *Meditari Accountancy Research* 58 65.

9 58 of 1962.

10 Stiglingh, Koekemoer, Van Heerden, Wilcocks, De Swardt and Van der Zwan *Silke: South African Income Tax 2023* (2023) 467.

11 National Treasury *Explanatory Memorandum on the Revenue Laws Amendment Bill,* 2008 https://www.sars.gov.za/wp-content/uploads/Legal/ExplMemo/LAPD-LPrep-EM-2008-01-Explanatory-Memorandum-Revenue-Laws-Amendment-Bill-2008.pdf (accessed 2023-12-03).

12 National Treasury *Explanatory Memorandum (2008)* 88.

as a tax incentive – to encourage taxpayers to incur conservation and maintenance expenditure for the preservation of nature and the environment for the public good – its introduction raises the question whether the legislature intended for expenditure beyond that normally permitted in terms of section 11(*a*) of the Income Tax Act to be deductible. Therefore, it is essential to define and clarify the meaning of the phrase "to conserve or maintain land" to determine whether it includes expenditure of a capital nature. If it is determined that "to conserve or maintain land" does not include capital expenditure, it prompts questions about the rationale for the introduction of section 37C(1) to provide a tax incentive, as such an interpretation would not provide for a different tax treatment of maintenance and conservation expenditure from that already provided for in section 11(*a*) of the Income Tax Act.

Furthermore, section 37C(1) deems expenditure incurred for the conservation and maintenance of land under a biodiversity management agreement, and signed in terms of a biodiversity management plan, to be incurred in the production of income and for the purposes of trade. However, section 37C(1) allows the deduction of this expenditure against "taxable income earned on the land or in the proximity of the land", suggesting that taxable income not directly related to the conservation and maintenance activities may be reduced by such expenditure. It is, therefore, essential to define and clarify the interpretation of the phrase "in the immediate proximity".

2 PROBLEM STATEMENT AND RESEARCH OBJECTIVE

The objective of this article is to provide a critical analysis of the application of section 37C(1) of the Income Tax Act, and to provide clarity as to when and how the section is applicable. Uncertainty regarding the section's application exists owing to ambiguous words and phrases used in the section. The ambiguous wording of the section creates uncertainty about when taxpayers are eligible for a deduction for conservation or maintenance expenditure incurred in terms of a biodiversity management agreement concluded in terms of section 44 of the NEMBA, as well as the nature of expenditure that would be deductible.

The first step in this article is to determine how capital expenditure incurred for the conservation and maintenance of land is treated in terms of section 37C(1) of the Income Tax Act. The terms "conservation" and "maintenance" are defined in neither the Income Tax Act nor the Interpretation Act.[13] The analysis therefore commences by clarifying the meaning and interpretation of these words so as to determine whether capital expenditure would include expenditure incurred for the conservation or maintenance of land. This is an important analysis since section 37C(1) was introduced as a tax incentive, which raises the question of whether the legislature intended expenditure beyond that normally allowed in terms of

[13] 33 of 1957.

section 11(*a*) of the Income Tax Act to be deductible. After determining the meaning of "conservation or maintenance", the article evaluates whether the intended objective of section 37C(1) of the Income Tax Act is impeded owing to such interpretation. This analysis examines the broader purpose of tax incentives, as well as the specific objectives of section 37C(1) as outlined in the Explanatory Memorandum, along with the circumstances that led to the section's enactment.

Section 37C(1) allows conservation and maintenance expenditure to be deducted against taxable income earned on the land (or on land in proximity to the land) that is subject to a biodiversity management agreement. It therefore appears that taxable income not directly related to conservation and maintenance activities could potentially be reduced by conservation and maintenance expenditure. A further objective of the article is to establish the appropriate meaning and interpretation of "immediate proximity" to enable taxpayers to determine whether expenditure incurred for the conservation or maintenance of land is deductible from taxable income that is not necessarily related to conservation or maintenance activities.

The article concludes by exploring tax incentives used in Australia and Canada to assess whether the principles applied in these jurisdictions offer insights into the application of section 37C(1) of the Income Tax Act and whether they can be applied to the South African tax landscape.

3 CAPITAL EXPENDITURE INCURRED FOR THE CONSERVATION AND MAINTENANCE OF LAND IN TERMS OF SECTION 37C(1) OF THE INCOME TAX ACT

3 1 Ordinary meaning of "conserve or maintain land"

The terms "conserve" and "maintain" are defined in neither the Income Tax Act nor the Interpretation Act. As established by the court in *Mincer Motors v Commissioner of Customs and Excise*,[14] words with no definitions in the relevant Act or the Interpretation Act should be given their ordinary dictionary meaning unless a contrary intention appears.

The *Oxford English Dictionary* (2022) assigns the following ordinary meaning to "conserve":

> "Conserve (Verb): to prevent (something of natural or environmental importance) from being damaged or destroyed; to preserve by conservation."

Since the definition of "conserve" provided by the *Oxford English Dictionary* (2022) references "conservation", it is crucial also to consider the definition of the word "conservation" in order to comprehend fully the meaning of "conserve".

[14] 1958 (1) SA 652 (T) par 653.

The *Oxford English Dictionary* (2022) assigns the following ordinary meaning to "conservation":

> "Conservation (Noun): the preservation, protection, or restoration of the natural environment and or wildlife; the practice of seeking to prevent the wasteful use of a resource in order to ensure its continuing availability."

Section 37C(1) of the Income Tax Act further deems expenditure incurred to "maintain" land to be incurred in the production of income and for the purposes of a trade. The *Oxford English Dictionary* (2022) provides the following definition of "maintain":

> "Maintain (Verb): to keep up, preserve, cause to continue in being (a state of things, a condition, an activity, etc.); to keep vigorous, effective or unimpaired; to guard against loss or deterioration."

Based on the ordinary meanings of conserve, conservation and maintain, it is concluded that the meanings of these words encompass a broad spectrum of activities and expenditures aimed at protecting the environment. This conclusion is consistent with the discussions below, which consider the definitions of "conservation" and "conserve" within the context of environmental law as well as relevant jurisprudence, which offers insights into distinguishing between expenditure of a capital or revenue nature.

3 2 The meaning of "conserve or maintain land" in the context of environmental law

The objective of section 37C(1) of the Income Tax Act is to incentivise taxpayers to incur expenditure for the conservation and maintenance of the environment, and further requires the conclusion of a biodiversity management agreement under section 44 of NEMBA.[15] There is, therefore, a significant interaction between section 37C(1) of the Income Tax Act and environmental law. Academic literature has sought to define conservation within the environmental-law framework. Saunders defines conservation as encompassing any behaviour aimed at the protection, improvement and wise use of the planet's natural resources.[16] It has been held that conservation entails the management of people's use of the environment to retain the advantage thereof for future generations.[17]

The Department of Forestry, Fisheries and the Environment recently published the White Paper on Conservation and Sustainable Use of South Africa's Biodiversity (White Paper of 2023).[18] The White Paper of 2023 defines conservation as:

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15 National Treasury *Explanatory Memorandum (2008)* 88.

16 Saunders "The Emerging Field of Conservation Psychology" 2003 10(2) *Human Ecology Review* 137 138.

17 Hugo, Viljoen and Meeuwis *The Ecology of Natural Resource Management: The Quest for Sustainable Living. A Text for South African Students* (1997) 53.

18 Department of Forestry, Fisheries and the Environment (DFFE) *White Paper on Conservation and Sustainable Use of South Africa's Biodiversity* (2023) 5.

> "protection, management, care, sustainable use, maintenance, rehabilitation, restoration, and recovery of ecological and evolutionary processes, biological diversity and its components, for their intrinsic and instrumental value, to improve the well-being of people and nature".

Although the White Paper of 2023 has not yet been enacted, it was approved by the Cabinet for implementation on 29 March 2023 and has persuasive power, since it is expected that the government will use it to amend existing laws or introduce new legislation regarding the conservation of the environment.[19] The Western Cape recently enacted the Western Cape Biodiversity Act[20] to give effect to section 24 of the Constitution. In section 1 of the Western Cape Biodiversity Act, conservation is defined as follows:

> "in relation to biodiversity and nature, [conservation] means the protection, care, management, rehabilitation and maintenance of ecosystems, habitats and indigenous species and populations, including the genetic variability within ecosystems and species, to safeguard the natural conditions for their long-term persistence and the ecosystem services that they may provide, and 'conserve' has a corresponding meaning."

Based on the definition of conservation as outlined in the Western Cape Biodiversity Act, the White Paper of 2023, and academic literature that has sought to define conservation, it is concluded that the definition of conservation encompasses a broad range of activities and related expenditure. It is important to determine whether the activities and expenditure included in the definition of "conserve" and "conservation" are of a capital or revenue nature. Such a classification is necessary since it will determine the subsequent tax treatment of the expenditure. The guidance offered by the South African judiciary in relation to distinguishing between expenditure of a capital or revenue nature is considered below.

3 3 Guidance obtained from legal precedent

Distinguishing between capital and revenue expenditure can often be challenging, as the Income Tax Act does not specify what constitutes a capital or revenue expense.[21] However, the South African judiciary has provided guidelines for determining when expenditure should be considered to be of either a capital or revenue nature. In *BP South Africa (Pty) Ltd v The Commissioner for the South African Revenue Services,*[22] the Supreme Court of Appeal held that where no new asset is created for the enduring benefit of the taxpayer, the expenditure is likely to be of a revenue nature. The Appellate Division (now the Supreme Court of Appeal) held in *Heron Investments (Pty) Ltd v Secretary for Inland Revenue*[23] that an addition or alteration to an existing asset constitutes an improvement of the asset rather than a mere repair. By applying the principles of *BP South Africa (Pty) Ltd*[24]

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19 DFFE *White Paper of 2023* 6.
20 6 of 2021.
21 Stiglingh *et al Silke: South African Income Tax* 131.
22 2006 (5) SA 559 (SCA) 15.
23 1971 (4) SA 201 (A) 208A.
24 *Supra*.

and *Heron Investments (Pty) Ltd*[25] to the definition of conservation, as proposed by Saunders,[26] it can be argued that conservation expenditure incurred for the improvement of the environment is likely to be of a capital nature, since it will result in an enduring benefit. Similarly, applying the principles from *BP South Africa (Pty) Ltd*[27] to the definition of conservation as advocated by Hugo, Viljoen and Meeuwis[28] further indicates that expenditure incurred for the conservation of the environment will provide an enduring benefit and is therefore likely to qualify as expenditure of a capital nature. It is contended that if one aligns legal precedent (in which courts have provided guidance on distinguishing between expenditure of a capital and revenue nature) with the definitions of "conservation", the expenditure incurred by taxpayers to conserve the environment could include capital expenditure. This becomes particularly evident if such conservation expenditure results in an improvement to the environment or biodiversity.

3 4 Biodiversity management agreements

The application of section 37C(1) of the Income Tax Act is contingent upon taxpayers entering into a biodiversity management agreement concluded in terms of section 44 of NEMBA. In terms of that section, the Minister has the authority to enter into a biodiversity management agreement with a person for the implementation of an approved biodiversity management plan under section 43 of NEMBA. A biodiversity management agreement concluded under section 44 may outline expenditure that the party responsible for implementing a biodiversity management plan, or any related aspect thereof, may potentially incur. For example, a biodiversity management agreement focussing on the implementation of a biodiversity management plan for black rhinoceros (*Diceros bicornis*) lists expenditure related to infrastructure construction, transportation and the purchase of vehicles to contribute to the recovery and persistence of the global black rhino population in South Africa.[29] Applying the principles set out in *BP South*[30] and *Heron Investments (Pty) Ltd*[31] to the expenditure listed in the biodiversity management agreement for black rhinoceros – expenditure incurred for infrastructure construction, transportation and the purchase of vehicles – would typically be considered expenditure of a capital nature, as the expenditure enables the taxpayer to obtain a new asset as well as an enduring benefit.

Derived from the literature considered under headings 0, 0, and 0, it is submitted that the words "conserve" and "maintain" should be interpreted broadly, allowing for the inclusion of various activities and expenditures,

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25 *Supra*.
26 Saunders 2003 *Human Ecology Review* 137 138.
27 *Supra*
28 Hugo *et al The Ecology of Natural Resource Management* 53.
29 The biodiversity management agreement in question is not in the public domain but was shared with the authors by the African Wildlife Foundation. See also GN 49 in *GG* 36096 of 2013-01-25.
30 *Supra*.
31 *Supra*.

some of which will be classified as expenditure of a capital nature. While the literature discussed above offers useful insights into the interpretation of conservation and maintenance, it is vital to bear in mind that none of these interpretations has been examined with a specific focus on section 37C(1) of the Income Tax Act. It is, therefore, necessary to consider the circumstances that led to the enactment of the section, as well as of the Explanatory Memorandum.

3 5 Does the meaning assigned to "conserve" or "maintain" include capital expenditure for the purposes of section 37C(1) of the Income Tax Act?

The introduction of section 37C(1) of the Income Tax Act as a tax incentive raises the question whether the legislature intended expenditure beyond that normally allowed in terms of section 11(*a*) of the Income Tax Act to be deductible. Despite the absence of any explicit provision in section 37C(1) of the Income Tax Act regarding the treatment of expenditure of a capital nature, the Explanatory Memorandum explicitly disallows the deduction of capital expenditure.[32]

It was for many years uncertain when a court could consider extrinsic evidence such as an explanatory memorandum in determining the meaning and interpretation of a section in legislation, and the significance that should be attached thereto. The current approach to statutory interpretation was first articulated by the landmark Supreme Court of Appeal decision of *Natal Joint Municipal Pension Fund v Endumeni Municipality.*[33] In this judgment, Wallis JA held that the starting point for statutory interpretation is the language of the provision itself, read in its context and having regard to the purpose and the background of the provision.[34] Therefore, the appropriate statutory interpretation method is to consider, from the outset, the words used in their context and in light of all relevant factors.[35] In the recent case of *Mobile Telephone Networks (Pty) Limited v The Commissioner for the South African Revenue Services,*[36] the presiding judge held that an explanatory memorandum accompanying a Bill before it is enacted as a statute is the most appropriate source for determining the intended purpose of a section.

As a result of the approach to statutory interpretation laid down in *Natal Joint Municipal Pension Fund,*[37] a court tasked with determining the meaning and interpretation of section 37C(1) of the Income Tax Act will consider the Explanatory Memorandum from the outset. Since expenditure of a capital nature is explicitly disallowed in terms of the Explanatory Memorandum, taxpayers who incur conservation or maintenance expenditure of a capital

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32 National Treasury *Explanatory Memorandum* 89.

33 2012 (4) SA 593 (SCA).

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

35 Seligson "Judicial Forays in Statutory Construction" 2021 12(2) *Business Tax and Company Law Quarterly* 8 16.

36 2021 JOL 49403 (GP) 32.

37 *Supra*.

nature will not qualify for a deduction in terms of section 37C(1) read with section 11(*a*) of the Income Tax Act, irrespective of whether such expenditure has been incurred in terms of a biodiversity management agreement. This conclusion is supported by the inclusion of the word "potentially" in the Explanatory Memorandum, indicating that even if the expenditure is incurred in terms of a biodiversity management agreement, it may not necessarily qualify for a deduction in terms of section 37C(1) read with section 11(*a*) of the Income Tax Act.[38]

4 THE IMPACT OF EXCLUDING CAPITAL EXPENDITURE ON THE INTENDED APPLICATION OF SECTION 37C(1) OF THE ACT

Section 37C(1) of the Income Tax Act was introduced as a tax incentive to encourage taxpayers to incur expenditure for the conservation or maintenance of the environment.[39] Owing to the conclusion that expenditure of a capital nature will not be deductible in terms of section 37C(1) of the Income Tax Act, it is necessary to inquire whether such a conclusion impedes the intended purpose of the section.

According to the World Conservation Monitoring Centre of the United Nations Environment Programme (UNEP), South Africa is considered one of the world's 17 megadiverse countries.[40] These countries are home to more than two-thirds of the world's biodiversity.[41] The Constitution places an obligation on the government to safeguard the environment and promote conservation through reasonable legislative measures.[42] South Africa is also a signatory to two international conventions, namely the Convention on Biological Diversity,[43] and the Convention on Wetlands of International Importance Especially as Waterfowl Habitat[44] (Ramsar Convention). Both conventions emphasise the value of using incentives to promote biodiversity conservation.[45] To fulfil its obligations in terms of the above-mentioned conventions and the Constitution, the government has enacted various statutes to establish a framework for protecting and conserving the environment. One of the measures implemented to meet its obligations is the enactment of NEMBA, which provides a framework for managing and conserving biodiversity.[46]

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38 National Treasury *Explanatory Memorandum (2008)* 89.

39 National Treasury *Explanatory Memorandum (2008)* 88.

40 Republic of South Africa *White Paper* 9.

41 Republic of South Africa *White Paper* 14.

42 S 24(1)(*b*)(ii) of the Constitution.

43 UNEP *Convention on Biological Diversity* 1760 UNTS 79; 31 ILM 818 (1992). Adopted: 05/06/1992; EIF 29/12/1993.

44 UNESCO *The Convention on Wetlands of International Importance Especially as Waterfowl Habitat* 996 UNTS 245, 11 ILM 963 (1972). Adopted: 02/02/1971; EIF 21/12/1975 https://en.unesco.org/about-us/legal-affairs/convention-wetlands-international-importance-especially-waterfowl-habitat (accessed 2023-12-03).

45 Paterson 2005 *South African Law Journal* 184.

46 S 2(*a*)(i) of NEMBA.

The purpose of tax incentives is to provide a more favourable tax treatment for certain activities and expenditure than is normally allowed.[47] Tax incentives therefore deviate from the general rules provided for in a tax system and are often used to encourage taxpayers to change their behaviour positively towards the environment.[48] The Income Tax Act contains several provisions that allow for a deduction of expenditure incurred, even if the expenditure does not meet the requirements of the general deduction formula as outlined in section 11(*a*) of the Income Tax Act. Some notable environmental tax incentives can be found in section 37B and section 37D of the Income Tax Act.

Section 37C(1) of the Income Tax Act was introduced by the RLAA of 2008 as a tax incentive to provide tax relief to private landowners involved in biodiversity conservation and management for the public good.[49] The section's intended purpose is to create a mechanism for deducting environmental conservation and maintenance expenditure, so as to encourage taxpayers to incur expenditure to conserve the environment for the public good.[50] Given the significance of the Explanatory Memorandum in the interpretation of provisions, it is submitted that the South African Revenue Service (SARS) and the courts will exclude capital expenditure from the definition of expenditure incurred to "conserve" or "maintain" for purposes of section 37C(1). Section 37C(1) therefore does not allow for any expenditure to be deducted that is not already permitted in terms of section 11(*a*) of the Income Tax Act. Therefore, section 37C(1) is unlikely to achieve its intended purpose of incentivising taxpayers to conserve the environment since it does not deviate from the standard tax rules by offering more favourable treatment to taxpayers who incur capital conservation and maintenance expenditure. This conclusion is consistent with the findings of the Fiscal Benefits Project, which has indicated that there has been only one unsuccessful attempt to use the benefits of the section.[51]

5 THE MEANING OF "IMMEDIATE PROXIMITY" AS USED IN SECTION 37C(1) OF THE INCOME TAX ACT

From the opening provision of section 37C(1) of the Income Tax Act, it appears that the section deems expenditure incurred in the conservation and maintenance of land (in line with a biodiversity management agreement signed under a biodiversity management plan) to be expenditure incurred in the production of income and for the purposes of trade. However, section 37C(1) allows this expenditure to be deducted against taxable income earned on land, including land "in the immediate proximity of the land", that

47 Klemm "Causes, Benefits, and Risks of Business Tax Incentives" 2010 17(3) *International Tax and Public Finance* 3.

48 Arendse "Go Green for Tax Benefits: Tax" 2007 7(11) *Without Prejudice* 41 41.

49 Stiglingh *et al Silke: South African Income Tax* 456.

50 National Treasury *Explanatory Memorandum (2008)* 88.

51 The findings of the Fiscal Benefits Project were shared with the authors in conversation with Candice Stevens, Founder and CEO of the Sustainable Finance Coalition. She is a biodiversity finance expert and niche tax specialist.

is the subject of a contemplated agreement. This implies that taxable income not directly related to conservation and maintenance activities may be reduced by such expenditure. It is, therefore, essential to define and clarify how the phrase "in the immediate proximity" should be interpreted.

5 1 Ordinary meaning of "immediate proximity"

"Immediate proximity" is defined in neither the Income Tax Act nor the Interpretation Act. Therefore, it is uncertain when land would be considered to be in the immediate proximity of land in relation to which a NEMBA section-24 biodiversity management agreement has been concluded. Owing to the absence of a definition in those Acts for "immediate proximity", its ordinary dictionary meaning should be applied unless a contrary intention appears.[52]

The *Oxford English Dictionary* assigns the following ordinary meaning to "immediate":

> "Immediate (Adjective): having no person, thing, or space intervening, in place, order, or succession; standing or coming nearest or next; proximate, nearest, next; close, nearby. In reference to place often used loosely of a distance which is treated as of no account."

The term "proximity" is defined as follows by the *Oxford English Dictionary*:

> "Proximity (Noun): the fact, condition, or position of being near or close by in space; nearness. Now the dominant sense."

The ordinary dictionary meanings of "immediate" and "proximity" imply that two objects will be considered to be in "immediate proximity" in relation to each other if it can be confirmed that no other thing or object is positioned closer or nearer to the object in question. Applying the dictionary definition of "immediate proximity" to land used by the taxpayer for the production of income and for the purposes of a trade, it is evident that to be regarded as being in 'immediate proximity', the income-producing land must be the nearest or closest to the land that is subject to a biodiversity management agreement concluded under section 44 of NEMBA. Therefore, there should be no land that could be considered nearer or closer to the land in respect of which the biodiversity management agreement was concluded.

5 2 Guidance obtained from the Explanatory Memorandum

According to the Explanatory Memorandum, land would be considered to be in the "immediate proximity" of land subject to a biodiversity management agreement if it is adjacent or across the road from such land.[53] The guidance offered by the Explanatory Memorandum is consistent with the ordinary

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[52] French and Stretch *Income Tax in South Africa* (2023) 2.6 https://www.mylexisnexis.co.za/Index.aspx (accessed 2023-12-03).

[53] National Treasury *Explanatory Memorandum (2008)* 89.

meanings discussed earlier. Consequently, for land to qualify as being in "immediate proximity" to land that is subject to a biodiversity management agreement, for the purposes of section 37C(1) of the Income Tax Act, there should be no intervening land between the two parcels of land in question.

Section 37C(1) of the Income Tax Act was introduced as a tax incentive to encourage taxpayers to incur expenditure for the conservation and maintenance of land.[54] Applying the guidelines from the Explanatory Memorandum, expenditure incurred to conserve or maintain land would be deductible from taxable income earned on land adjacent or across the road from land that is subject to a biodiversity management agreement concluded in terms of section 44 of NEMBA. Allowing expenditure incurred for the conservation and maintenance of land to be deductible against taxable income earned on a different portion of land deviates from established tax principles, as set forth in section 11(*a*) of the Income Tax Act. Section 11(*a*) specifies that expenditure actually incurred in the production of income can be deducted from the taxable income derived by a person from carrying on any trade.

As discussed under heading 0, tax incentives deviate from the standard tax rules by offering more favourable treatment to taxpayers to incentivise certain positive behavioural changes. Therefore, providing clarity to taxpayers on determining when conservation and maintenance expenditure can be deducted from taxable income earned on land in the "immediate proximity" of land that is subject to a biodiversity management agreement may incentivise taxpayers to incur such expenditure.

6 INSIGHTS FROM THE USE OF BIODIVERSITY TAX INCENTIVES IN AUSTRALIA AND CANADA

The objective of this part of the article is to gain insights from other jurisdictions – Australia and Canada – regarding the use of biodiversity tax incentives. This exploration aims to determine whether the principles applied in these jurisdictions: 1) allow for expenditure of a capital nature to be deducted; 2) are potentially suitable for adapting the current format of section 37C of the Income Tax Act to achieve its intended objective as a tax incentive; and 3) could be used to formulate alternative biodiversity tax incentives to encourage biodiversity conservation in South Africa. Australia and Canada have been selected as comparable jurisdictions since they provide tax relief to taxpayers who enter biodiversity conservation covenants.[55] Furthermore, Australia has been identified owing to the frequent reliance of South African courts on Australian jurisprudence and the similarity of tax provisions in the two countries.[56]

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54 *Ibid*.

55 Smith, Smillie, Fitzsimons, Lindsay, Wells, Marles, Hutchinson, O'Hara, Perrigo and Atkinson "Reforms Required to the Australian Tax System to Improve Biodiversity Conservation on Private Land" 2016 33 *Environmental and Planning Journal* 443 448.

56 Moosa "A Comparison Between the Modalities of Interpreting Tax Legislation Applied in South Africa and Australia" 2018 25(1) *Revenue Law Journal* 1 2.

6 1 Biodiversity tax incentives in Australia

Australia's Income Tax Assessment Act[57] (Australian Act) provides a general deduction for expenditure incurred in producing assessable income or in carrying on a business, provided that such expenditure is not of a capital nature. As in South Africa, Australia's general deduction formula focuses primarily on business and income-producing expenditure, thereby excluding conservation activities and related expenditure unless it is directly associated with the commercial use of such land.[58] Therefore, taxpayers who incur expenditure for the conservation of the environment without generating assessable income will not qualify for a deduction in terms of section 8-1 of the Australian Act.

The first tax incentive under review is section 31-5 of the Australian Act, which provides an incentive to landowners to enter into conservation covenants for the environmental benefit of Australia.[59] The Australian Act stipulates that taxpayers who enter into a conservation covenant with an authorised entity may be eligible for a tax deduction, provided that the covenant is approved by the Minister for the Environment and satisfies the requirements set out in section 31-5.[60] The requirements for a conservation covenant are set out in section 31-5(2) of the Australian Act, which reads verbatim as follows:

> "These conditions must be satisfied:
> (a) the covenant must be perpetual;
> (b) you must not receive any money, property or other material benefit for entering into the covenant;
> (c) the market value of the land must decrease as a result of your entering into the covenant;
> (d) one or both of these must apply:
> (i) the change in the market value of the land as a result of entering into the covenant must be more than $5,000;
> (ii) you must have entered into a contract to acquire the land not more than 12 months before you entered into the covenant;
> (e) the covenant must have been entered into with:
> (i) a fund, authority or institution that meets the requirements of section 31-10; or
> (ii) the Commonwealth, a State, a Territory or a local governing body; or
> (iii) an authority of the Commonwealth, a State or Territory."

A taxpayer who enters a conservation covenant that complies with the above requirements qualifies for a deduction in terms of section 31-5(3) of the Australian Act. In terms of section 31-5(3) of the Australian Act, the amount deductible against the taxpayer's taxable income is the difference between the market value of the land prior to entering into the conservation covenant

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57 S 8-1 of Act 38 of 1007.

58 Guglyuvatyy "Failing to See the Wood for the Trees: A Critical Analysis of Australia's Tax Provisions for Land and Forest Conservation" 2018 33(3) *Australian Tax Forum* 551 559.

59 Woellner, Barkoczy, Murphy, Evans and Pinto *Australian Taxation Law* (2019) 1135.

60 *Ibid*.

and the market value of the land directly thereafter.[61] However, where a landowner receives any form of consideration for entering into a conservation covenant, such landowner is not eligible for a deduction in terms of section 31-5(3) of the Australian Act. This is because section 31-5(2)(*b*) of the Australian Act determines that a landowner should not have received any form of money, property or material benefit for entering into a conservation covenant. It is submitted that the requirements for a conservation covenant and the subsequent tax treatment thereof, as specified in section 31-5(3) of the Australian Act, bear a close resemblance to the requirements of section 37D of the Income Tax Act. Section 31-5(3) of the Australian Act requires the covenant to be perpetual, in alignment with section 37D(1)(*a*) of the Income Tax Act, which mandates that the agreement should have a duration of at least 99 years. Section 31-5(3) of the Australian Act and section 37D of the Income Act both use the market value of the land as a guideline for determining the available deduction, in contrast to section 37C(1) of the Income Tax Act, which considers the actual conservation and maintenance expenditure incurred.

The second tax incentive under review is subdivision 40-G of the Australian Act, which regulates the treatment of capital expenditure incurred for landcare operations. Section 40-635 of the Australian Act lists the types of activity that would be considered to constitute "landcare operations". Landcare operations include activities such as the eradication and extermination of animal pests, erecting fences to separate different land classes, the construction of a levee or similar improvement on the land, or any structural improvement, alteration or addition that is reasonably incidental to the construction of a levee or drainage.[62] The deduction for landcare operations is applicable under very limited circumstances, as the Australian Act requires the taxpayer to carry on a primary production business or use rural land for business purposes.[63] According to Smith, the deduction for landcare operations fails adequately to recognise the capital expenditure incurred by landowners who permanently conserve the environment for the public good without carrying on a primary production business or a business for a taxable supply.[64] These landowners do not receive any income for contributing to the conservation of the environment. Smith proposes expanding the deduction eligibility for landcare operations to include landowners with conservation covenants.[65] This would enable landowners who are not primary producers to claim a deduction for capital expenditure incurred in relation to landcare operations. Furthermore, it is suggested that landowners with conservation covenants should be permitted to deduct the capital expenditure incurred for landcare operations, regardless of their source of income or whether they are carrying on a business for a taxable purpose.[66] In addition, Guglyuvatyy[67] recommends broadening the scope of landcare operations to include "conservation of

61 Smith *et al* 2016 *Environmental and Planning Journal* 446.
62 S 40-635 of Act 38 of 1007.
63 *Ibid.*
64 Smith *et al* 2016 *Environmental and Planning Journal* 448.
65 *Ibid.*
66 *Ibid.*
67 Guglyuvatyy 2018 *Australian Tax Forum* 561.

environmentally sensitive land". Such an extension would enable landowners who do not use rural land for carrying on a business for a taxable purpose or primary production purpose still to qualify for a deduction for capital expenditure incurred on landcare operations, even if their land is solely dedicated towards conservation activities.

While the requirements for the deductibility of landcare operations expenditure are not similar to the requirements of section 37C(1) of the Income Tax Act, the criticism raised in relation to the deductibility of landcare operations expenditure offers valuable insights into the operation of conservation incentives in South Africa. The concern identified by Smith,[68] that the deduction for landcare operations does not adequately recognise capital expenditure incurred by landowners for the public benefit, is equally applicable to South Africa. The recommendation of Guglyuvatyy[69] that the definition of landcare operations allowing for the deduction of capital expenditure should be extended to include the conservation of sensitive land can be used to support the proposal that section 37C(1) of the Income Tax Act should similarly allow for a deduction of capital expenditure incurred for the conservation or maintenance of land.

6 2 Biodiversity tax incentives in Canada

Similar to section 11(*a*) of the Income Tax Act and section 8-1 of the Australian Act, section 18(1) of Canada's Income Tax Act[70] (Canadian Act) allows for a deduction of expenditure incurred by taxpayers for the purpose of generating or producing income, provided that such expenditure is not of a capital nature. Therefore, expenditure incurred in relation to conservation activities will not qualify for a deduction in terms of section 18(1) of the Canadian Act if the purpose of such expenditure is not to produce income.[71]

The Minister of Environment and Climate Change of Canada established Canada's Ecological Gifts Program (EGP) to incentivise taxpayers to incur expenditure for the conservation of the environment and to address the shortcomings of section 18(1) of the Canadian Act.[72] Through the EGP and the Canadian Act, taxpayers can receive a tax benefit for the donation of an ecological gift to a qualified conservation charity, federal, provincial, territorial or municipal government.[73] For landowners to be eligible for a deduction or tax credit in terms of the EGP and the Canadian Act, the gift must be ecologically sensitive land or an interest or right in such land, such as a conservation easement, covenant, or servitude, to a qualified recipient certified by the Minister of Environment and Climate Change. In contrast to the Australian Act, which disqualifies landowners from claiming a tax deduction under section 31-5 of the Australian Act if they receive any consideration for entering into a conservation covenant, the Canadian Act

68 Smith *et al* 2016 *Environmental and Planning Journal* 448.
69 Guglyuvatyy 2018 *Australian Tax Forum* 561.
70 RSC of 1985, c 1 (5th Supp).
71 Guglyuvatyy 2018 *Australian Tax Forum* 559.
72 Guglyuvatyy 2018 *Australian Tax Forum* 558.
73 *Ibid.*

permits the practice of split-receipting. The principle of split-receipting applies where a landowner makes an ecological gift and receives some form of consideration in return.[74] In instances where split-receipting applies, the value of the deduction or tax credit will be reduced by any advantage received by the taxpayer.[75]

Derived from the above literature, it is the author's opinion that the tax regime of Canada more effectively acknowledges the public benefits resulting from private landowners' participation in conservation of the environment. This recognition can be attributed to the principle of split-receipting, which enables taxpayers to qualify for a deduction despite receiving some form of consideration. However, it is submitted that owing to the differences between the requirements and tax treatment of conservation covenants in Canada, on the one hand, and biodiversity management agreements concluded in South Africa on the other, limited guidance can be obtained for the application and interpretation of section 37C(1) of the Income Tax Act.

7 CONCLUSION

The objective of the article was to analyse critically the application of section 37C(1) of the Income Tax Act by clarifying identified ambiguities related to undefined words and phrases in the section. It is submitted that the current wording of the section cannot have the intended consequence of incentivising taxpayers to incur expenditure for the conservation or maintenance of land, as the section does not allow for any expenditure to be deducted beyond what is already permitted in terms of section 11(*a*) of the Income Tax Act. It is recommended that the section be amended to enable taxpayers to deduct capital expenditure incurred in relation to the implementation of a biodiversity management plan concluded in terms of section 44 of NEMBA. Since section 44 of NEMBA already enables the Minister to enter into a biodiversity management agreement with a person regarding the implementation of a biodiversity management plan, there are already sufficient measures to ensure that the expenditure that taxpayers incur will contribute to the conservation or maintenance of the land.

The article ultimately concludes that owing to the ambiguous wording used in the section, the section does not allow for any expenditure to be deducted beyond what is already permitted in terms of section 11(*a*) of the Income Tax Act, therefore limiting the intended application of the section and the achievement of its purpose.

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74 Guglyuvatyy 2018 *Australian Tax Forum* 565.

75 *Ibid.*

Interpreting Conflicting Statutory Provisions – A Closer Look at Merger Provisions in the Companies Act and Income Tax Act

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SUMMARY

It sometimes occurs that provisions of two separate national laws are in conflict with each other, or certain inconsistencies arise with the interpretation of the two provisions. When interpreting legislation where there is an inconsistency or conflict, these provisions must, in terms of the common law, be interpreted so as to be reconciled and to exist coherently. This is, however, not always possible.

In this contribution, the author considers the rules of interpretation of statutes with reference to the merger and amalgamation provisions in the Companies Act 71 of 2008, and the Income Tax Act 58 of 1962. Although the aims of the two Acts differ, both may apply to the same transaction. Therefore, in order to ensure certainty for the merger parties, the two Acts should coincide in terms of their provisions governing the merger or amalgamation transaction.

If a narrow interpretation is used to apply the provisions concurrently and the "mischief" is still not resolved (i.e., the provisions remain in conflict with one another), the question of the next step arises. In terms of the examples used, the Companies Act is the "dominant" Act (the prevailing Act), but what does that mean for the irreconcilable provisions in the Income Tax Act? The author attempts to address how best to approach the identified discrepancies where an outright conflict between the provisions has been identified.

KEYWORDS: Income Tax Act, Companies Act, statutory interpretation, merger, amalgamation

1 INTRODUCTION

As a starting point, the South African common-law interpretation rules require that when interpreting legislation that contains an inconsistency or conflict of laws, it must be interpreted in order to be reconciled to co-exist

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with conflicting laws.[1] In the event that such a reconciliation and co-existence is impossible, different rules of interpretation must be applied to resolve this dilemma.[2]

It is of value to consider both historic and current interpretation rules; South African interpretation rules experienced a culmination of the development of the purposive interpretation of fiscal legislation in the 2012 judgment of *Natal Joint Municipal Pension Fund v Endumeni Municipality*[3] (*Endumeni*). As Seligson opined:

> "It seems fair to say that the decision in *Endumeni* has relegated the 'golden rule' of statutory construction to the dustbin of legal history."[4]

Once the differing rules have been identified, the next step is to consider whether the differing rules are inconsistent or in conflict with one another. An inconsistency can, generally speaking, be more easily reconciled by way of interpretation, while an outright conflict of provisions generally proves to be more challenging to reconcile. This is illustrated by way of two examples relating to the Companies Act[5] (Companies Act) and the Income Tax Act[6] (Income Tax Act) regarding mergers and amalgamations. Both Acts govern the same merger transaction, and on this basis one might expect that some form of alignment would have been attempted when a statutory merger was introduced in the Companies Bill, but this was not the case.

After the introduction of the Companies Bill, the Standing Committee on Finance rejected a proposal for an alignment between the Companies Act and the Income Tax Act regarding amalgamation transactions, stating that they are two different Acts serving two different purposes.[7] Although that is correct, and total alignment would, in the author's view, be an impossible feat, it is the author's submission that some form of alignment should have taken place, and could have avoided the existing inconsistencies and conflicts identified in this contribution.

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1 Devenish *Interpretation of Statutes* (1992) 279.

2 *Ibid*.

3 2012 (4) SA 593 (SCA). The Constitutional Court confirmed the interpretation principles established in *Endumeni* in *Airports Company South Africa v Big Five Duty Free (Pty) Ltd* 2019 (5) SA 1 (CC) 29. Also see *AMCU v Chamber of Mines of South Africa* 2017 (3) SA 242 (CC) fn 28.

4 Seligson "Judicial Forays in Statutory Construction: Endumeni and its Impact on the Interpretation of Fiscal Legislation" 2021 12(2) *Business Tax and Company Law Quarterly* 8 10.

5 71 of 2008.

6 68 of 1962.

7 The Standing Committee on Finance ("Report Back Hearings on the Taxation Laws Amendment Bill 2010" https://www.treasury.gov.za/public%20comments/Full%20Response%20 Doc%20Draft%2025%20August%202010.pdf (accessed 2024-01-11)) recorded the following: "Comment: The amalgamation rules have not been amended in line with section 40 of the new Companies Act. Response: Not accepted. The Income Tax Act currently caters for amalgamations of different types (i.e. 'amalgamations, conversions and mergers'). The purposes of the amalgamation rules as contained in the Income Tax Act versus the Companies Act differ as these Acts seek to achieve diverse aims. For instance, amalgamations referred to in the Companies Act seem to include de-mergers while amalgamations within the Income Tax Act are limited to company combinations (with demergers addressed under the unbundling provisions)."

This contribution attempts to apply the existing interpretation rules to the identified inconsistencies and conflicts in order either to find a way to harmonise the inconsistencies in the provisions, or to best address the outright conflicts that exist.

2 GENERAL INTERPRETATION RULES

2 1 Interpretation rules prior to *Endumeni*

It is trite that the benchmark judgment of *Endumeni* significantly clarified certain processes to be followed in statutory interpretation. It is therefore necessary to consider what the statutory interpretation rules were prior to this judgment. In the case of *Venter v Rex*,[8] Innes J stated:

> "[W]hen to give the plain words of the statute their ordinary meaning would lead to [an] absurdity so glaring that it could never have been contemplated by the legislature, or where it would lead to a result contrary to the intention of the legislature, as shown by the context or by such other considerations that the Court is justified in taking into account, the Court may depart from the ordinary effect of the words to the extent necessary to remove the absurdity and to give effect to the true intention of the legislature."[9]

This has in the past been labelled the "golden rule" of statutory interpretation: in order to establish the intention of the legislature, one must first consider if the statutory text is clear and unambiguous. If it is, effect must be given to the ordinary literal meaning of the text (i.e., the dictionary definitions).[10] If the ordinary grammatical meaning of the words used would give rise to an absurdity that would not have been contemplated by the legislature, one may depart from the ordinary grammatical meaning of the words.[11] Only in the event that there is an absurdity would the context of the text be considered to establish the true intention of the legislature.[12]

The "golden rule" provides an extremely narrow approach to statutory interpretation and has been criticised in the past.[13] For example, Schreiner JA in *Jaga v Dönges*[14] highlights the importance of considering context when interpreting statutory provisions:

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8 1907 TS 910.

9 *Venter v Rex supra* 914–5.

10 Botha *Statutory Interpretation: An Introduction for Students* (2022) 100.

11 *Summit Industrial Corporation v Claimants Against the Fund Comprising the Proceeds of the Sale of the MV Jade Transporter* 1987 (2) SA 583 (A) par 596G–H.

12 *Ibid*.

13 Goldswain illustrates the absurdity of the literal interpretation method in light of *Geldenhuys v CIR* 14 SATC 419. In the matter, the court had to consider the meaning of the words "received by" as used in the definition of "gross income" in the Income Tax Act. The court correctly did not attribute the ordinary meaning to the words "received by" as this term bore little relationship to its ordinary grammatical meaning. Goldswain points out that if the court had applied the strict literal meaning to establish the meaning of the words "received by", absurd consequences would have followed. For example, loans would be taxable, or amounts received by an agent on behalf of a principal would be taxable in the hands of the agent. See Goldswain "The Purposive Approach to the Interpretation of Fiscal Legislation – The Winds of Change" 2008 16 *Meditari Accountancy Research* 112.

14 1950 (4) SA 653 (A).

> "Certainly no less important than the oft repeated statement that the words and expressions used in a statute must be interpreted according to their ordinary meaning is the statement that they must be interpreted in the light of their context."[15]

In various court judgments, it has been noted to be a dangerous exercise to speculate on the intention of the legislature[16] as this could lead to crediting the legislature with an objective that was absent from its mind and to interpreting words in a way different from what was intended.[17] Innes J further pointed out that one cannot understand words divorced from the circumstances in which they are used, which includes the statute's scope, purpose, and within limits, the statute's background.[18]

The proverbial interpretational water was further "muddied" by the interpretation applied in *Coopers & Lybrand v Bryant*,[19] where the court held that both text and context must be applied in statutory interpretation, but that one must first consider the text and only thereafter the context.

Wallis gives a fitting example to illustrate that this is an artificial way in which to interpret statutes, as humans do not read and understand documents in such a way.[20] In Wallis's example, if a motorist sees a newspaper poster on a lamppost proclaiming "Bulls gore Sharks", their understanding is not that some male bovine has, by chance, encountered an aquatic animal and that the bull impaled the shark with its horns. Wallis suggests that no motorist would first have to conclude that the literal meaning is so absurd that they would need to gather extrinsic evidence surrounding the circumstances (of which the newspaper poster itself would provide very little context) in order to discern the meaning of the poster's words.[21] He ventures that the vast majority of South Africans would read and instantly understand that the poster is referring to the results of the weekend's rugby match because, from the outset, the motorist would have factored into their understanding of the whole context, factors such as the nature of the poster, the day on which the poster appears and their own knowledge of the local rugby teams.[22]

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15 *Jaga v Dönges supra* 662G–H.

16 See *Summit Industrial Corporation v Claimants Against the Fund Comprising the Proceeds of the Sale of the MV Jade Transporter supra*; *Savage v CIR* 1951 (4) SA 400 409A. In *Endumeni*, it was opined that the intention of the legislator is the incorrect focus (see par 20–21), but should rather be establishing the purpose of the legislation. Also see *Capitec Bank Holdings Limited v Coral Lagoon Investments 194 (Pty) Ltd* [2021] 3 All SA 647 (SCA), 2022 (1) SA 100 (SCA) 25–26, 50. In *Endumeni*, it is clear that the correct way to interpret a statute requires a triad of considerations: the inevitable starting point, the text in the provision itself, the context thereof and the purpose of the provision(s) (par 18). In this regard, also see *Caxton and CTP Publishers and Printers Limited v Novus Holdings Limited* [2022] 2 All SA 299 (SCA) 55–57.

17 *Dadoo Ltd v Krugersdorp Municipal Council* 1920 AD 530 555.

18 *Jaga v Dönges supra* 663.

19 1995 (3) SA 761 (A).

20 Wallis "Interpretation Before and After Natal Joint Municipal Pension Fund v Endumeni Municipality 2012 4 SA 593 (SCA)" 2019 22 *Potchefstroom Electronic Law Journal* 1 6.

21 *Ibid*.

22 *Ibid*.

This is illustrative of the interpretative difficulties presented by the golden rule of statutory interpretation, and specifically the interpretation method proposed in *Coopers & Lybrand v Bryant.*

2 2 Interpretation rules after *Endumeni*

Endumeni has provided some more clarity on the correct approach that must be adopted in interpreting statutory provisions and other documents.

In the unanimous judgment delivered by Wallis JA, context and language must be considered together, with neither dominating the other, and this should be the proper approach adopted by the South African courts.[23] The court further indicated that interpretation should not lead to impractical, "unbusinesslike" or oppressive consequences or ones that would stunt the broader operation of the legislation (or contract) under consideration.[24] The court provided the triad of considerations required when interpreting a provision: the text (the inevitable starting point), the context, and the purpose of the provision.[25] The court further pointed out that the focal point of establishing the "intention of the legislature" is misplaced, the focus in modern statutory construction is the purpose of the statute and identifying "the mischief at which it is aimed".[26]

In *CSARS v United Manganese of Kalahari (Pty) Ltd*,[27] the court set out some aspects that can be taken into context when interpreting a statute:

a) section 39(2) of the Constitution;
b) the context of the entire enactment;
c) when the legislation flows from a commission of enquiry or a special drafting committee, reference to their reports;
d) the legislative history; and
e) the general factual background to the statute, such as the nature of its concerns and the social purpose at which it is directed.

The Constitutional Court has also endorsed the approach presented in *Endumeni,* for example in *KwaZulu-Natal Joint Liaison Committee v MEC Department of Education, KwaZulu-Natal:*[28]

> "The principles applicable to interpreting written documents are now settled. The notice must be read as a whole, having regard to its context and background facts to determine its meaning and purpose. The point of departure is to focus on the words used in the 2008 notice. The words should

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23 *Natal Joint Municipal Pension Fund v Endumeni Municipality supra* 19. Also see *Caxton and CTP Publishers and Printers Limited v Novus Holdings Limited supra* 56; *Capitec Bank Holdings Limited v Coral Lagoon Investments 194 (Pty) Ltd supra* 50.

24 *Natal Joint Municipal Pension Fund v Endumeni Municipality supra* 26.

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

26 *Natal Joint Municipal Pension Fund v Endumeni Municipality supra* 21, 26.

27 2020 (4) SA 428 (SCA) par 17.

28 2013 (4) SA 262 (CC); also see endorsement for the interpretation method set out in *Endumeni* in *Airports Company South Africa v Big Five Duty Free (Pty) Ltd* 2019 (2) BCLR 165 (CC), 2019 (5) SA 1 (CC) 29.

> be given their ordinary meaning unless the context in which they are used indicates that a different meaning was contemplated."[29]

Nevertheless, Perumalsamy points out that the guidance provided in *Endumeni* regarding the new rules of interpretation has not had the hoped-for stabilising effect.[30] It appears that old interpretation rules are still being applied by the courts, while simultaneously referring, in principle, to the new authoritative interpretation principles laid down in *Endumeni.*[31] It is submitted that it is understandable that the principles of *Endumeni* are not yet applied by the courts consistently, as it is a mammoth task to overhaul the previous interpretative practice without a universal methodical guide on how to apply the new interpretation principles.

3 IDENTIFYING A CONFLICT OR INCONSISTENCY

From time to time, two provisions in an Act, or two provisions in separate Acts, may not be aligned with one another. In the interpretation of such identified discrepancies in legislation, one must first establish whether the discrepancy is a conflict in law or merely an inconsistency.[32] It is important to establish whether one is dealing with an outright conflict of provisions, or merely one that can be attributed to an interpretative phenomenon, such as ambiguity, or inconsistency.[33]

What is the difference between a "conflict" and an "inconsistency"? In *Handel v R*,[34] Heever J pointed out that the word conflict applies to a situation where one version says one thing and the other the opposite. Heever J confirms the common-law principle that where the two are reconcilable (by way of interpretation) they must be reconciled; however, where that is not possible, they are mutually destructive, and a conflict arises.[35]

The common-law principle of interpretation is that, as far as possible, legislation must be interpreted to coincide.[36] One must also consider whether there is a dominant Act in these discrepancies, which would mean that that Act is the prevailing Act if an inconsistency arises between it and another Act. If there is no distinct prevailing Act, or the prevailing provision

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29 *KwaZulu-Natal Joint Liaison Committee v MEC Department of Education, KwaZulu-Natal supra* par 128.

30 Perumalsamy "The Life and Times of Textualism in South Africa" 2019 22 *Potchefstroom Electronic Law Journal* 1 3.

31 *Ibid*; for e.g., see *Trinity Asset Management (Pty) Limited v Grindstone Investments 132 (Pty) Limited* 2017 ZACC 32. Also see *CSARS v Daikin Air Conditioning South Africa (Pty) Limited* [2018] ZASCA 66 where the minority judgment rejects the suggestion in *Endumeni* that a unitary interpretation can be applied to all legal documents.

32 Devenish *Interpretation of Statutes* 279.

33 *Ibid*.

34 1933 SWA 37.

35 *Handel v R supra* 40.

36 *Ibid*; *Chotobai v Union Government (Minister of Justice) and Registrar of Asiatics* 1911 AD 33.

does not apply, the relevant maxims (or canons) of interpretation[37] must be applied by the courts in the interpretation process to achieve reconciliation between the two provisions. This article considers discrepancies where there is a prevailing Act,[38] so a detailed discussion of the maxims of interpretation falls outside the scope of this article.

Two discrepancies between the provisions of the Companies Act and the Income Tax Act relating to merger and amalgamation transactions are identified below. So as to ascertain whether, and how, these discrepancies can best be addressed, the discussion under heading 4 applies the rules of interpretation, as well as the prevailing Act.

3 1 Transfer of all the assets in a merger or amalgamation agreement

A conflict arises between the definition of "amalgamation or merger"[39] in the Companies Act and the definition of "amalgamation transaction"[40] in the Income Tax Act. The Companies Act provides statutory requirements for a merger or amalgamation transaction, while the Income Tax Act provides for tax rollover relief for an amalgamation transaction if relevant requirements are met. In other words, merger parties must meet the relevant merger/amalgamation requirements set out in the Companies Act to have a valid merger or amalgamation in place, while the Income Tax Act provides a tax benefit to merger parties if certain requirements are met.

The Companies Act provides that, with an amalgamation or merger, all the assets and liabilities from the amalgamating company or companies must be transferred to the surviving company or companies. If there are no surviving companies (as with a new company merger), all the assets and liabilities must immediately before the implementation of the merger agreement and the dissolution of the amalgamating or merging company or companies, be transferred to the newly formed company. This applies without exception: in terms of the Companies Act, all liabilities and assets of the amalgamating company or companies must be transferred in an amalgamation or merger transaction.[41]

The Income Tax Act also provides in its definition of "amalgamation transaction" that all assets must be transferred, but it provides for an

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37 These maxims include: legislation does not alter the existing law more than necessary; legislation does not contain a *casus omissus*; legislation doesn't not contain invalid or purposeless provisions; legislation does not operate retrospectively, and legislation is not unjust, inequitable or unreasonable. See Van Staden "A Comparative Analysis of Common-Law Presumptions of Statutory Interpretation" 2015 26(3) *Stellenbosch Law Review* 550–582.

38 The Companies Act has a prevailing-Act provision in s 5 of the Companies Act.

39 S 1 of the Companies Act.

40 S 44(1) of the Income Tax Act.

41 See s 116(7) of the Companies Act, which provides that once a merger agreement has been implemented, the property of each amalgamating or merging company becomes the property of the newly amalgamated or surviving merged company, or companies, and the same with the obligations of the amalgamating or merging company.

exception. The definition allows an amalgamated company to retain certain assets identified for use to settle a debt:[42]

a) incurred by the company in the ordinary course of its trade,
b) to satisfy any reasonably anticipated liabilities to any sphere of government of any country, and
c) for administration costs for the liquidation or winding-up of the company.

On the face of it, it appears that the two Acts are in conflict with one another as the one is absolute while the other allows for exceptions. However, one must upon interpretation of these two provisions take into account the relevant context. It is submitted that the statutory merger provision in the Companies Act (section 113 read with sections 115 and 116) does not exclusively apply to amalgamation rollover relief provided in section 44 of the Income Tax Act. In other words, parties may achieve the outcome of a merger by using other fundamental transaction mechanisms in the Companies Act, such as a scheme of arrangement (section 114) or the disposal of all or the greater part of[43] the company's assets or undertakings (section 112). Likewise, section 44 of the Income Tax Act (amalgamation transaction) is not the only section that can be used to obtain a tax-neutral transaction for a merger agreement. Other sections of the Income Tax Act, such as section 42 (asset-for-share transaction), section 45 (intragroup transaction), or even section 47 (liquidation distribution), can be used to obtain tax rollover relief for a statutory merger.

In addition, one need not comply with section 44 of the Income Tax Act in order to effect a statutory merger in terms of the Companies Act. If the requirements of section 44 are not met, the transaction will simply not obtain the tax benefit of having the tax triggered with the transaction being rolled forward. It would be a more serious consideration if the statutory merger requirements in the Companies Act were not met, meaning that the transfer would not take place by operation of law (*ex lege*).[44]

It appears that the two governing provisions for mergers and amalgamations cannot apply concurrently in the event the amalgamating company opts to withhold some of the assets to settle its debts prior to the merger. The parties would, in such a case, have to rely on another rollover provision in the Income Tax Act to maintain a tax-neutral statutory merger.

Conversely, if the parties want to withhold certain assets from the merger, the parties will have to rely on another fundamental transaction mechanism provided for in the Companies Act.[45] This would mean the merger would not

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42 S 44(1)(*a*) of the Income Tax Act.

43 S 1 of the Companies Act defines "all or greater part of the assets or undertaking" in respect of a company as: "In the case of the company's assets, more than 50% of its gross assets at fair market value, irrespective of its liabilities or in terms of the company's undertaking, more than 50% of the value of its entire undertaking, at fair market value."

44 A transfer that is effected by "operation of law" means that it is effected in terms of a statute and not based upon the consensus of transacting parties. As such the transfer occurs automatically. This makes the statutory merger a simple, cost-effective and prompt procedure.

45 See ss 112 and 114 read with ss 115 and 116 of the Companies Act.

take place by operation of law (in terms of the statutory merger provisions), making the transaction, potentially, more administratively burdensome.

It is submitted that there exists a discrepancy between these two provisions. One would expect that the two provisions governing the same merger or amalgamation transaction would at least be aligned with regard to the general outlines of what may or may not occur in a merger transaction. However, section 44 of the Income Tax Act (in order to accommodate various different types of fundamental transactions) permits the withholding of certain identified assets, which if opted for, it is submitted, means the parties would fall foul of the requirements for a statutory merger in the Companies Act.

Note that the withholding of assets in section 44(1) of the Income Tax Act is an option. It permits the amalgamating party to withhold certain assets to settle debt; as such, it permits the withholding, but does not prescribe it. It is suggested that this option in the Income Tax Act constitutes an inconsistency between the two Acts, as interpretation may prove sufficient to resolve the identified issue. One provision does not outrightly contradict the other; the one Act merely offers an option not recognised in the other Act.

3 2 Residency of the parties to the merger or amalgamation transaction

Section 113(1) of the Companies Act provides that two or more profit companies may merge or amalgamate, provided that upon implementation of the merger or amalgamation, each of the amalgamated or merged companies satisfies the solvency and liquidity test. This section affords a limited application of the statutory merger regulations as the section specifically limits the merger to one taking place between two or more "profit companies". The term "profit company" is defined in section 1 of the Companies Act to mean:

> "a company incorporated for the purpose of financial gain for its shareholders".

A "company", in turn, is defined in section 1 of the Companies Act to mean a juristic person incorporated in terms of the Companies Act or a preceding Act, thus limiting it to South African incorporated companies.[46]

This means that the provision only applies to mergers and amalgamations between two or more South African companies. This narrow application of the statutory merger (to mergers between South African companies exclusively) has been criticised by authors in the past; they point out that in the current marketplace, it would be best if South Africa, like many other countries, also allowed for a cross-border merger.[47]

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[46] S 1 defines an "external company" in the Companies Act as: "a foreign company that is carrying on business, or non-profit activities, as the case may be, within the Republic, subject to section 23(2)."

[47] See Cassim "The Introduction of the Statutory Merger in South African Corporate Law: Majority Rule Offset by Appraisal Right (Part 1)" 2008 1 *SA Mercantile Law Journal* 1 8;

Conversely, section 44 of the Income Tax Act was expanded in 2013 not only to provide tax relief for amalgamation transactions where both parties are tax residents in South Africa but also to allow for tax relief for foreign amalgamations. The definition of "amalgamation transaction" was expanded to include paragraphs (*b*) and (*c*) to allow for tax rollover relief where a transaction occurs between a foreign and a resident company[48] or between two foreign companies that form part of the same group of companies, and where, following the merger, the resultant company is a controlled foreign company to any resident that is part of the relevant group of companies.[49]

The definition of a "company" in the Income Tax Act includes, among other things, any association, corporation or company (other than a close corporation) incorporated or deemed to be incorporated in the Republic of South Africa or under the laws of any country other than the Republic.[50] This is notably different from the definition of a company in terms of the Companies Act, which includes only South African companies.

Note that the definition of an "amalgamation transaction" in section 44(1) of the Income Tax Act specifically requires that the disposal between the parties occurs "by means of an amalgamation, conversion or merger". Refer to the discussion below regarding the definitions of these terms.

There is thus a clear discrepancy and even outright conflict between the two Acts, as one provides that a statutory merger may only occur between South African companies, while the other provides tax relief for cross-border mergers. One may initially argue that, as explained in the first example, the scope of section 44 of the Income Tax Act is broader, to accommodate other types of fundamental transaction that may allow for cross-border transactions. A counter-argument to this view is presented below.

4 THE PREVAILING ACT

Where there are inconsistencies identified between two Acts, one must first attempt to interpret the provisions so that they coincide and may be applied concurrently, and avoid "unbusinesslike" and ambiguous interpretations.[51] If this cannot be achieved and the two Acts remain irreconcilable, it must be determined whether there is a prevailing Act (which is the Act that must succeed). In the event there is no prevailing Act, the relevant maxims (canons) of interpretation must be applied by the courts in order to achieve reconciliation.

In the identified examples, the Companies Act is the prevailing Act. Section 5(4)(*a*) of the Companies Act provides that if there is an inconsistency between any provision of the Companies Act and another Act (a provision of national legislation), the provisions of both Acts should, to the

Davids, Norwitz and Yuill "A Microscopic Analysis of the New Merger and Amalgamation Provision in the Companies Act 71 of 2008" 2010 *Acta Juridica* 337 355.

48 S 44(1)(*b*) of the Income Tax Act.

49 S 44(1)(*c*) of the Income Tax Act.

50 S 1 of the Income Tax Act.

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

extent possible, be applied concurrently. This confirms the common-law principle that courts must attempt, as far as possible to "comply with one of the inconsistent provisions without contravening the second".[52]

Where it is not possible to comply with the provision of one Act without contravening the other, as set out in section 5(4)(*b*) of the Companies Act, certain Acts will prevail over the Companies Act. The Income Tax Act does not appear on this list of specific prevailing Acts, and consequently, in terms of section 5(4)(*b*)(ii) if there is an inconsistency in any other case, the Companies Act will prevail.[53] Therefore, if an inconsistency exists between the Companies Act and the Income Tax Act, the Companies Act will be the prevailing Act.

Section 118(4) of the Companies Act provides that if there is a conflict between any provisions of Chapter 5 Part B (Authority of Panel and Takeover Regulations), Chapter 5 Part C (Regulation of affected transactions and offers), the Takeover Regulations, and any provision of another public regulation,[54] the conflicting provisions must be interpreted to apply concurrently to the extent possible. Where it is impossible to apply or comply with one of the inconsistent provisions without contravening the second, the provisions of the other public regulation will prevail. This section specifically does not apply to Part A of Chapter 5 (Approval for certain fundamental transactions), which contains the relevant sections being considered in this article. As such, if one assumes these are not affected transactions as defined, section 118(4) does not find application in the above-mentioned examples.[55] The general prevailing-Act provisions of section 5(4) of the Companies Act remain applicable in the two identified examples.

Having established that the Companies Act is the prevailing Act where there are inconsistencies and conflicts between the two Acts, the impact thereof on the two identified discrepancies discussed above is now considered.

4 1 Application to the transfer of all the assets in a merger or amalgamation agreement

The first step is to determine whether these two definitions can coincide and operate concurrently. Considering both the text and context of the definitions for purposes of this example, it is this article's preliminary submission that they can so coincide. This is based on the fact that parties to the merger agreement need not comply with both definitions in order to effect a valid

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52 S 5(4)(*a*) of the Companies Act.

53 S 5(6) of the Companies Act.

54 "Public regulation" is defined in section of the Companies Act to mean:
"any national, provincial or local government legislation or subordinate legislation, or any licence, tariff, directive or similar authorisation issued by a regulatory authority or pursuant to any statutory authority".

55 A transaction qualifies as an "affected transaction" in terms of an amalgamation or merger (s 113) if it involves at least one regulated company, subject to s 118(3) of the Companies Act.

merger agreement. In order to effect a statutory merger (whereby the transfer of all the assets and liabilities occurs by operation of law), the requirements of section 113 (and sections 115 and 116) of the Companies Act must be complied with. The tax relief provided in terms of section 44 of the Income Tax Act is not prescriptive; it is merely a tax benefit for merger parties if the relevant requirements are met.[56] In other words, section 44 permits the amalgamating parties to withhold certain assets, but it does not prescribe it. Therefore, merger parties still have the option under section 44 to transfer all their assets and liabilities (in order not to fall foul of the requirements in the Companies Act).

Nevertheless, De Koker and Williams opine that if parties want a tax-neutral amalgamation transaction, in order to realise such tax benefit, the amalgamation must *first* be effected in terms of the compliance requirements of the Companies Act. Notably, the authors state the following in this regard:

> "Failing such compliance (or if the process is subsequently taken on judicial review and set aside) there will have been no valid amalgamation or merger and consequently no valid transfer of property between the companies and hence no fiscal benefits – or indeed any fiscal consequences – for the arrangement.'
>
> 'If the parties desire that the arrangement will qualify for the tax benefits made available in terms of the Income Tax Act, the provisions of the latter Act [the Income Tax Act] must be fulfilled, *in addition to the requirements of the Companies Act.*"[57] (Emphasis added)

This view indicates that the provisions of the Income Tax Act are subject to the requirements of the Companies Act being met, or else no fiscal benefit (in the form of tax rollover relief) may be obtained for the merger transaction. As indicated above, in the event the relevant Income Tax Act requirements are not met the transaction would simply not qualify for the relevant tax relief, making it a more costly exercise.

In the event that the amalgamating company or companies decide to withhold certain assets as provided for in section 44(1) of the Income Tax Act, the parties must be aware that they will fall foul of the requirements of a statutory merger as set out in the Companies Act. Nevertheless, the parties may still opt to use one of the other forms of fundamental transaction, such as a simple sale-of-business transaction (disposal of a greater part or all of the assets) in terms of section 112. Section 112 of the Companies Act allows parties to choose which assets are to be transferred and which are to be left behind.

It is evident from this example that if one considers only the text (the option to withhold assets) under the golden rule of interpretation, and given there is no ambiguity surrounding the definitions, one could easily conclude that there is an inconsistency between the Income Tax Act provision and the Companies Act. As a result, since the Companies Act is the prevailing Act,

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[56] If the s 44 requirements are met, the tax relief applies automatically and parties need not "opt in" to the relief.

[57] De Koker and Williams "Companies" in De Koker and Williams *Silke on South African Income Tax* (2024) par 13.34.

the part of the definition in the Income Tax Act that provides for this option would be null and void and would require an amendment. This could be achieved by deleting the relevant option.

However, in following the correct interpretation rules as laid out in *Endumeni*, the context of the two provisions is essential in showing that the two provisions are not mutually exclusive of one another, and therefore, that the option was added to section 44's definition of an "amalgamation transaction" to allow for section 44 rollover relief, even where the statutory merger provision was not applied.

However, there is another part of the "amalgamation transaction" definition that is likely to negate this view that the discrepancies between the definitions may be reconciled by way of interpretation. This is discussed below.

4 2 Application to the residency of the parties to the merger or amalgamation transaction

From the first example, one may deduce that section 44(1) of the Income Tax Act provides a much broader scope of application in order to accommodate other fundamental transactions in the Companies Act. Nevertheless, neither section 112 nor section 114 of the Companies Act makes specific reference to an external company; the sections refer only to a "company", meaning that schemes of arrangement apply only to schemes between South African parties and that disposals of all or a greater part of a company's assets must be made by South African companies. As a result, none of the fundamental transactions would provide the basis for the fiscal benefits provided in section 44(1)(*b*) and (*c*) of the Income Tax Act.

In addition, section 44 provides specifically that a disposal between parties must occur "by means of an amalgamation, conversion or merger".[58] Based on this wording, it may be argued that the other fundamental transactions in the Companies Act (e.g., scheme of arrangement or disposal of all or the greater part of a company's assets) would, in fact, not be applicable as it does not constitute a merger,[59] amalgamation[60] or

[58] S 44(1)(*a*)(i) provides: "Amalgamation transaction" means any transaction—in terms of which any company (amalgamated company) which is a resident *disposes of all of its assets* (other than assets it elects to use to settle any debts incurred by it in the ordinary course of its trade and other than assets required to satisfy any reasonably anticipated liabilities to any sphere of government of any country and costs of administration relating to the liquidation or winding-up) to another company (resultant company) which is a resident, *by means of an amalgamation, conversion or merger*" (emphasis added).

[59] "Merger" is defined in the *Collins Dictionary* as: "The combination or amalgamation of a commercial company, institution, etc., with another, or the consolidation of two or more companies, etc., into one" (https://www.com/dictionary/english/merger (accessed 2024-01-11)); Weinberg, Blank and Greystoke define a "merger" as "a marriage between two companies, usually of roughly equal size" (*Weinberg and Blank on Take-overs and Mergers* (1979) 103–104).

[60] In terms of Claassen's *Dictionary of Legal Words and Phrases*, an "amalgamation" involves the blending of two concerns into one (Claassen *Dictionary of Legal Words and Phrases* (2022)).

conversion.[61] As none of these terms is defined in the Income Tax Act, the ordinary meaning must be assigned to them.[62]

If that is the correct interpretation, the application of section 44 of the Income Tax Act becomes extremely limited. If this interpretation is adopted, then one may argue that the option permitted in section 44 to withhold certain assets in the first example is null and void. This is owing to the fact that if that option is exercised, it would mean the merger parties fall foul of the statutory merger requirements, and further that no other fundamental transactions would be applicable, as the relief is limited to disposals between parties by way of amalgamations, conversions or mergers. Section 44 could then only apply if all the assets and liabilities are transferred in terms of the merger or amalgamation agreement.[63]

The court in *Endumeni* provides that a sensible meaning must be preferred over one that leads to insensible or "unbusinesslike" results, or even undermines the apparent purpose of the document.[64] In the light of *Endumeni*, can one argue that the above interpretation could give rise to an insensible or unbusinesslike result? Potentially, yes. However, the courts are advised further in *Endumeni* against the temptation to substitute what they regard to be sensible, reasonable and businesslike for the words actually used. The inevitable starting point for interpretation must be the language used in the provision itself,[65] read in context and having regard to the purpose of the provision and the background to the preparation and production of the statute.[66] As such, the wording in section 44(1)(*a*) is clear: the disposal of assets must occur *by means of* an amalgamation, conversion or merger (emphasis added).

In terms of the second example, if the rollover relief in section 44 only applies where there is a statutory merger (in terms of section 113), then cross-border mergers would be disallowed. This means that only section 113 of the Companies Act can provide a basis upon which the fiscal benefit in section 44 may be obtained.

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61 "Conversion" is defined in the *Oxford Learner's Dictionaries* as "the act or process of changing something from one form, use, or system to another" (https://www.oxfordlearnersdictionaries.com/definition/american_english/conversion (accessed 2024-01-11)). Also see Rudnicki "Amalgamations and Mergers: Tax and Legal Comparisons and Nuances" 2017 8(3) *Business Tax and Company Law Quarterly* 1 5, where the authors opine that the term "conversion" appears misplaced in section 44 and perhaps even redundant, as a "change" in economic interest, such as holding shares in a company other than the company that is disposed of by that shareholder, is in any event likely to constitute an amalgamation or merger.

62 See discussion under heading 2.

63 It is submitted that retention of assets to settle debt is a futile exercise with a merger, as all the obligations of the amalgamated company become the obligations of the resultant company or companies by operation of law (see s 116(7) of the Companies Act). It is further submitted that the settlement of administrative costs could also be a redundant exercise if the statutory mechanism is used, as all the transfers occur by operation of law, meaning limited, if any, administrative costs regarding the transfer.

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

65 Lord Neuberger in *MR in Re Sigma Finance Corp* [2008] EWCA Civ 1303 (CA) par 98.

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

Consider one of the canons (presumptions) of statutory interpretation: legislation does not alter the existing law more than necessary. This is a presumption that legislation should be interpreted in compliance with existing law, or where not possible, should deviate as little as possible.[67] The statutory merger provision in the Companies Act was in existence when the cross-border tax relief was added to section 44(1) of the Income Tax Act in the form of subparagraphs (*b*) and (*c*). If the presumption is applied here, it would reveal that the two sections cannot be interpreted in compliance with one another and that there is a significant deviation from the existing law (mergers may only occur between resident companies).[68]

Strictly speaking, given the above conflict, it would be impossible to apply both Acts (specifically sections 44(1)(*b*) and (*c*) and section 113) concurrently as suggested in section 5(4)(*a*) of the Companies Act. Therefore, in terms of section 5(4)(*b*) of the Companies Act, where it is impossible to apply or comply with one of the inconsistent provisions without contravening the second, the Companies Act will be the prevailing Act. As such, one may deduce that the provisions of section 44(1)(*b*) and (*c*) of the Income Tax Act (the rollover relief for foreign amalgamations) are null and void. An argument may exist that the rollover relief provided in section 44(1)(*b*) and (*c*) may find application if the transaction meets the statutory amalgamation or merger requirements of a foreign jurisdiction that specifically allows for cross-border mergers. Nevertheless, from a South African perspective, these provisions cannot apply concurrently with the Companies Act.

This means that in the first discrepancy example, one may deduce that the option to withhold assets as provided for in section 44(1) of the Income Tax Act is null and void, and, in the second discrepancy example, that paragraphs (*b*) and (*c*) section 44(1) of the Income Tax Act are also null and void.

5 CONCLUSION

In 2012, the National Treasury noted the following in its annual Budget review:

> "The comprehensive rewrite of the Companies Act (2008) has given rise to a set of anomalies in relation to tax, especially in the case of reorganisations and other share restructurings. *As many of the tax rules relating to company reorganisations have been in place for 10 years, a review is appropriate*. Government will hold a series of workshops to review the nature of company mergers, acquisitions, and other restructurings to better understand their practical use. These workshops will lay the foundation for tax changes (and possibly changes to company law) over a two-year period.".[69] *(emphasis added)*

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67 Van Staden 2015 *Stellenbosch Law Review* 550 558–560.

68 See *Wendywood Development (Pty) Ltd v Rieger* 1971 (3) SA 28 (A) 38, where it is held that the earlier provisions and later provisions must be read together in order to try and reconcile the seemingly contradictory provisions. Also see Van Staden 2015 *Stellenbosch Law Review* 550 559–560.

69 The author's research could find no record of these workshops having taken place.

It is clear from the above examples that there remain discrepancies between the relevant Acts in this regard, specifically in the case of merger and amalgamation transactions. This makes it difficult for legal advisors to advise their clients with certainty on merger transactions, and is a reason that the South African Revenue Service (SARS) seems to be inundated with requests for Binding Private Rulings to confirm that their interpretation of the tax rollover relief provisions is aligned to SARS's interpretation of the same regulations (and to ensure the parties qualify for the tax rollover relief).[70]

The importance of the new rules of statutory interpretation, as set out in *Endumeni,* has been illustrated, given that the previous "golden rule" of interpretation provides an artificial way of establishing the meaning of the relevant provisions, where context is pushed aside and is only considered as and when language in a text is ambiguous. In these two examples, the text is not ambiguous and yet there remain conflicting provisions in the two Acts that cannot be reconciled.

It is clear that if a narrow interpretation is applied to the wording in the definition of an "amalgamation transaction" in section 44(1) of the Income Tax Act, certain parts of the definition in paragraph (*a*) would need to be removed on the basis that they are redundant. This is based on the interpretation that the rollover relief in section 44 only applies where there is a disposal by way of a merger, amalgamation or conversion. By implication, this means the requirements of section 113 of the Companies Act must first be met (as confirmed by De Koker and Williams).[71] If that is the case, in order not to fall foul of the requirements in section 113 of the Companies Act, all the assets and liabilities must be transferred. This renders redundant the "option" provided for in section 44(1)(*a*) (that certain assets may be withheld to settle certain identified debts), and the retraction thereof should be considered.

Alternatively, if the intention of the legislature was to allow for assets to be withheld under section 44 of the Income Tax Act in order to align the section with other fundamental transactions in the Companies Act (or another form of disposal of business transaction), it is argued that section 44(1)(*a*) should be amended to refer rather to a disposal in terms of any of the fundamental transactions in the Companies Act or any similar disposal of business transaction. Alternatively, the words "by means of an amalgamation, conversion or merger" must simply be deleted from the section 44(1)(*a*) definition to allow for various other forms of disposal transaction.

This alternative may prove to be a solution to the inconsistency in the first example, but not the second. This is because none of the fundamental transactions in the Companies Act (sections 112–114) provides that the transaction may occur involving an "external company" as the disposing

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70 Davis Tax Committee "Report on the Efficiency of South Africa's Corporate Income Tax System" (March 2018) chrome-extension://efaidnbmnnnibpcajpcglclefindmkaj/https://www.taxcom.org.za/docs/20180411%20Final%20DTC%20CIT%20Report%20-%20to%20Minister.pdf (accessed 2025-03-11).

71 De Koker and Williams in De Koker and Williams *Silke on South African Income Tax* par 13.34.

company.[72] This implies that the fundamental transactions are all limited to disposals by a South African company. As such, the Companies Act requirements cannot be met if the disposing party of the transaction is a foreign company.[73] As highlighted by De Koker and Williams, in order for there to be a fiscal benefit (in the form of tax rollover relief), there must be compliance with the Companies Act; otherwise, there would be no valid amalgamation or merger and consequently no valid transfer of property between the companies, and thus no fiscal tax rollover relief can be triggered.[74]

It is proposed that this inconsistency can be resolved in two ways: either the Companies Act must be reviewed, and a cross-border statutory merger introduced, subject to certain requirements – for example, requiring that the resultant company must, after the merger, be a South African registered company (to remain within the regulations of the Companies Act). Alternatively, paragraphs (*b*) and (*c*) of section 44(1) of the Income Tax Act may have to be reviewed and removed.

In conclusion, as inconsistencies between provisions remain a reality, legal practitioners should approach these inconsistencies in the correct way to ensure proper statutory interpretation by attempting to find an alignment to allow the provisions to coincide with one another where possible. Where this possibility does not exist and there is an outright conflict between the provisions, a prevailing Act will trump other provisions; and if no prevailing Act exists, the maxims of interpretation must be applied to address the mischief that is causing the irreconcilable conflict between the provisions.

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[72] S 115(2)(*b*) of the Companies Act (read with s 112(2)) requires that with a s 112 transaction, a special resolution of a holding company is required, where the company intends to dispose of all or the greater part of its assets and the disposing company is a subsidiary of a South African company or an external company (where the disposal would effectively also mean a disposal of all or a greater part of the assets or undertakings of that holding company). However, s 112 refers to a "company", meaning that the disposing party must be a resident company.

[73] In both s 44(1)(*b*) and (*c*), the disposing company (the amalgamated company) is a foreign company.

[74] De Koker and Williams in De Koker and Williams *Silke on South African Income Tax* par 13.34.

The Discontinuation of the Zimbabwe Exemption Permit and the Zimbabwean Child's Right to Basic Education: An Analysis

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SUMMARY

In 2008, many Zimbabwean nationals moved to South Africa to flee political and economic hardships. Having overwhelmed the immigration system, a time-limited special dispensation for Zimbabwean nationals to stay lawfully in South Africa was implemented in 2009. The special dispensation was extended over the years until its expiry at the end of 2021. No extension of the dispensation was granted, and South Africa instead issued several notices extending the stay of Zimbabweans until December 2023. Recipients of the permits have been asked to return to Zimbabwe or apply for other ordinary permits provided in the South African immigration system. In the course of the 13 years since 2009, neither South Africa nor Zimbabwe appears to have anticipated the consequences of terminating the special dispensation despite the context of national, regional and international protocols on matters of immigration and the education of children – notably the Southern African Development Community (SADC)'s Protocol on Education and Training. This article investigates the consequences of the termination of the Zimbabwean Exemption Permit (ZEP) on the basic education of child dependants of ZEP holders. Such consequences include,

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among others, challenges associated with integrating and adapting to a new curriculum, linguistic and economic barriers, and other socio-emotional reactions associated with making major life changes. The article makes a comparative analysis of basic curriculum portability between South Africa and Zimbabwe and assesses the general readiness of Zimbabwe to integrate children into its education system. In conclusion, the article highlights the importance of organs of state making decisions that are compliant with the Promotion of Administrative Justice Act 3 of 2000. The article recommends educationally sound interventions to ensure effective transitional arrangements for access to basic education for ZEP dependant children.

KEYWORDS: immigration control, immigration, permit, Zimbabwe Exemption Permit, basic education

1 INTRODUCTION

South Africa is an immigration destination of choice in Africa owing to the country having relatively effective democratic institutions and a relatively industrialised economy.[1] Despite its high unemployment rate,[2] South Africa hosts the largest number of immigrants on the African continent. Official estimates in 2021 revealed that the country was hosting about 2.9 million immigrants, although this number is probably underestimated owing to the presence of large numbers of unauthorised migrants, particularly from neighbouring countries.[3]

In 2008, in response to politically motivated violence arising from the disputed Zimbabwean presidential elections, many Zimbabwean nationals fled their country and sought refuge in South Africa.[4] This marked the start of the issuing of various short-term permits to manage the influx of Zimbabwean nationals into South Africa. In 2009, South Africa announced and implemented a legalising amnesty under the Dispensation of Zimbabwean Project for Zimbabweans who were already in South Africa. The Zimbabwe dispensation amnesty granted migrants the right to stay, work, study and operate businesses in South Africa for four years.[5]

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1 Moyo "South Africa Reckons With Its Status as a Top Immigration Destination, Apartheid History, and Economic Challenges" (18 November 2021) https://www.migrationpolicy.org/article/south-africa-immigration-destination-history (accessed 2025-28-01).

2 Araoye "South Africa, the Global Immigration Crisis and the Challenge of African Solidarity" 2015 65 *The Thinker* 13.

3 Moyo https://www.migrationpolicy.org/article/south-africa-immigration-destination-history.

4 Washinyira "Battle Over Zimbabwe Permits Set for High Court in April" (27 January 2023) https://www.dailymaverick.co.za/article/2023-01-27-battle-over-zimbabwe-permits-set-for-high-court-in-april/ (accessed 2023-07-11).

5 Thebe "'Two Steps Forward, One Step Back': Zimbabwean Migration and South Africa' Regularising Programme (the ZDP)" (28 April 2016) https://repository.up.ac.za/

The ad hoc dispensation for Zimbabwe permits failed to manage the complex migration challenge in that, at the end of four years, only a small fraction of the Zimbabweans were documented.[6] In 2014, a new system, the Zimbabwe Special Permit, replaced the Dispensation of Zimbabwe Project.[7] In 2017, the permit became called the Zimbabwe Exemption Permit (ZEP).[8] In November 2021, the Cabinet announced that South Africa would no longer extend the validity of the ZEP.[9] Initially, the permit was to expire in December 2021, which would leave almost all of the 180 000 permit holders undocumented.[10] Advocacy groups intervened, and the government granted a 12-month grace period until December 2022, which was again extended to June 2023.[11] This was to give people more time to apply to remain in South Africa.[12]

The grace period was interrupted by a judgment against the Minister of the Department of Home Affairs in the case of *Helen Suzman Foundation v Minister of Home Affairs.*[13] The applicants challenged, among other things, the lack of compliance with the consultation requirements prescribed in the Promotion of Administrative Justice Act[14] regarding the decision to end the ZEP.[15] The Minister of Home Affairs applied for leave to appeal, which he lost, meaning that the decision of the Minister remains reviewed and set aside.[16] Since the Minister of Home Affairs is entitled by law to make a decision to terminate the special permit in this instance, the core relief that the applicants got from the courts was only the setting aside of the Minister's decision to terminate the ZEP until the Minister follows a lawful process in making the decision.[17]

This article, written by a practising education expert and an active practitioner in the field of immigration law, draws considerably on real-life client case files to discuss the effect of the ending of the ZEP on dependants' right to basic education. Although there is a widespread tendency in many countries to link a parent's immigration status to that of the

handle/2263/57315 (accessed 2023-07-11) 1.

6 Thebe 2016 *International Migration and Integration* 2.

7 Washinyira https://www.dailymaverick.co.za/article/2023-01-27-battle-over-zimbabwe-permits-set-for-high-court-in-april/.

8 Mdluli "Cabinet Announced That the Zimbabwean Exemption Permits Would Not Be Extended" (25 November 2021) https://www.youtube.com/watch?v=zODYhRU8Hx0 (accessed 2025-28-01).

9 Evans and Ndebele "'This is Going to Cause Chaos in SA': Fears Expressed Over Zimbabwe Exemption Permit Cancellation" (27 June 2022) https://www.News24.Com/New24.Com/News24/SouthAfrican/News/this-is-going-to-cause-chaos-in-SA-fears-expressed-over-Zimbabwe-extension-permit-cancellation-20110626 (accessed 2023-07-11).

10 Mdluli https://www.youtube.com/watch?v=zODYhRU8Hx0.

11 *Ibid*.

12 Washinyira https://www.dailymaverick.co.za/article/2023-01-27-battle-over-zimbabwe-permits-set-for-high-court-in-april/.

13 [2023] ZAGPPHC 490 par 10.

14 3 of 2000.

15 *Ibid*.

16 *Ibid*.

17 *Helen Suzman Foundation v Minister of Home Affairs supra* par 147.4.2.

dependant,[18] this leads to unjust outcomes for the affected dependants. Asking parents to move to mainstream visas as a condition for their children's continued education in South Africa is gambling with the lives of children. The article argues that any suggestion that ZEP child dependants should move to study visas is unrealistic given the condition that their parents keep their employment and then use this as proof of financial stability to secure study visas. It is submitted that the delay in processing visas by the Department of Home Affairs in South Africa leaves room to consider waiving and exempting study visa requirements for ZEP dependant children in school, to allow children to continue to learn pending the regularisation of their parent's legal status. The article proposes that, while a blanket waiver is necessary for ZEP dependants whose parents are in the process of visa applications, concessions must also be made for children with parents who receive rejections on their bid to renew their visas. This article concludes that both Zimbabwe and South Africa, as well as the whole of SADC, have an obligation to protect the right to basic education of the ZEP child dependant.

2 A LOOK AT THE COMPLICATED MIGRATION HISTORY BETWEEN ZIMBABWE AND SOUTH AFRICA

Before one considers the basic education challenges faced by children of the discontinued ZEP, the unique character of migration trends from Zimbabwe to South Africa needs to be properly understood so as to understand that temporary solutions are not fit for the complex nature of the movement of the people concerned.[19] Thebe has provided the context in which we must understand South Africa's continued use of ad hoc measures in migration management, and how that affects downstream issues such as return from South Africa to Zimbabwe in line with permit conditions.[20]

From as far back as 1920, South Africa has sought labour from its neighbouring countries, and the strategies to do so have ranged from solicitation to limited assimilation.[21] Enforcement and exclusion through control and deportations or expulsions were the cornerstones of the immigration system.[22] Although there were regulatory frameworks for the sourcing of cheap labour, such as that of the Witwatersrand Native Labour Association, many other groups of migrants came into South Africa on their own and found work in various informal sectors,[23] including domestic work.[24]

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18 IBZ Federal Public Services Home Affairs "Order to Leave the Belgian Territory and Forced Removal" (17 March 2023) https://ibz.be/en/order-to-leave-the-belgian-territory-and-forced-removal (accessed 2023-07-11).

19 Maunganidze, Fakhry and Rietig "Migration Policy in South Africa: Lessons From South Africa's Migration Magnet for European Policy Makers" (21 September 2021) https://dgap.org/en/research/publications/migration-policy-south-africa (accessed 2025-01-28) 4.

20 Thebe https://repository.up.ac.za/handle/2263/57315.

21 Thebe https://repository.up.ac.za/handle/2263/57315 4.

22 *Ibid*.

23 Thebe https://repository.up.ac.za/handle/2263/57315 4.

As its regulatory framework, the Witwatersrand Native Labour Association adopted a contract labour system where labour was subjected to certain restrictions and controls. Although Zimbabwe did not have a formal labour treaty with South Africa, the recruitment of Zimbabweans continued until the 1986 ban.[25] In 1960, Zimbabweans working in South Africa were estimated at about 30 000, but the recruitment of Zimbabweans peaked in the 1970s and 1980s.[26]

South Africa has always relied on labour from Zimbabwe and other SADC countries in general. Different forms of exclusion and control were used, such as:

- visa systems with monetary conditions [27] that would exclude most migrants from legal entry into South Africa;[28]
- the approval, between 1995 and 1997, of three immigration amnesties for labour in the mines, regularisation of immigrants who came into South Africa before 1990, and Mozambican refugees;[29]
- special dispensation for farm labour supply in the northern parts of Limpopo;[30]
- "corporate permits"[31] in terms of the Immigration Act,[32] granted on proof that no suitable South African candidate could be found for the job, and other skills visas for occupational and professional categories; and
- ad hoc measures culminating in the temporary permits of the Zimbabwean Documentation Project in 2009, the Zimbabwean Special Permit in 2014[33] and the ZEP in 2017 – the subject matter of the current discussion.[34]

The authors of this article are of the view that the approach adopted in *Helen Suzman Foundation v Minister of Home Affairs*[35] does not take into account the above essential history and context. Thus, the solution sought was purely in the context of procedural fairness and not within the substantive context of the South African migration regime.

The *Helen Suzman Foundation* decision reflects the law as it stands currently, and may not be stretched beyond the confines of the law. The applicants raised the issue of the Minister having failed to consult with parents and families in the children's best interests. However, if the Minister

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[24] Mzabamwita "African Migrants' Characteristics and Remittance Behaviour: Empirical Evidence From Cape Town in South Africa" 2018 4(2) *African Human Rights Mobility Review* 1226 1226.
[25] Thebe https://repository.up.ac.za/handle/2263/57315 2.
[26] Thebe https://repository.up.ac.za/handle/2263/57315 4.
[27] *Ibid*.
[28] Thebe https://repository.up.ac.za/handle/2263/57315 5.
[29] *Ibid*.
[30] *Ibid*.
[31] *Ibid*.
[32] 13 of 2002.
[33] Thebe https://repository.up.ac.za/handle/2263/57315 5.
[34] Washinyira https://www.dailymaverick.co.za/article/2023-01-27-battle-over-zimbabwe-permits-set-for-high-court-in-april/.
[35] *Supra*.

were to comply with the consultation requirements and his decision were found to comply with the Promotion of Administrative Justice Act,[36] the Minister's decision will stand. Considering the narrow sense in which South Africa deals with the migration question, affected migrants will not, through a court process, find solutions of a policy and legislative nature that would provide a comprehensive approach to migration. If the Minister's decision is found to have complied with the Promotion of Public Administration Act, the ZEP holders and their children would have to leave and face an uncertain educational future in Zimbabwe.

The next few paragraphs of this article highlight the educational access issues at stake in the Minister's decision.

3 THE RIGHT TO BASIC EDUCATION FOR MIGRANT CHILDREN

International law provides a framework on which African countries should rely for the safeguarding of the right to education for all migrant children. The International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families recognises that migration causes serious problems for migrant workers and their families.[37] Article 30 of the Convention reiterates the importance of access to education for children of migrants. The Convention is clear that access to school or educational institutions for children of migrants should not be affected by the immigration or employment status of the parents.[38] Article 44 further recognises the need for children to be with their parents and that family is a natural and important entity, even to migrants, and should be protected by appropriate measures to ensure the unity of families of migrant workers.[39] Article 45(2) even encourages countries employing migrants to ensure that policies are in place to facilitate integration into the school system of children of migrant workers, especially regarding teaching them the local language.[40] The spirit of brotherhood in migration is further highlighted when the Convention highlights that, where possible, countries employing migrants should also work with their countries of origin to collaborate on the teaching of the mother tongue to children of migrant workers.[41]

The SADC Protocol on Education and Training calls for harmonising education systems within the SADC region.[42] The Protocol also calls for the

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36 3 of 2000.

37 United Nations General Assembly *International Convention on the Protection of the Rights of All Migrant Workers and Members of their Families* A/RES/45/158 (1990). Adopted: 18/12/1990; EIF: 01/07/2003 https://www.ohchr.org/en/instruments-mechanisms/instruments/international-convention-protection-rights-all-migrant-workers (accessed 2025-01-28) Preamble.

38 *Ibid*.

39 *Ibid*.

40 *Ibid*.

41 *Ibid*.

42 *The Southern African Development Community (SADC) Protocol on Education and Training,* (1997) https://www.sadc.int/sites/default/files/2021-08/Protocol_on_Education__Training1997.pdf (accessed 2025-01-28) Art 2-25.

facilitation of movement of students, teachers and other education and training personnel within the SADC region. Such facilitation means that children within SADC should be able to transfer from schools within the region without any obstacles.[43] The Protocol also promotes cooperation and collaboration among SADC member states in the development and implementation of education and training policies and programmes. In relation to non-discrimination, the Universal Declaration of Human Rights states that education is for everyone.[44] The International Covenant on Economic, Social and Cultural Rights (ICESCR) also recognises "the right of everyone to education".[45] The ICESCR states that all grounds of discrimination in the provision of education are prohibited, and there is an immediate obligation on the State to comply.[46]

The Committee on the Convention of the Rights of the Child (CRC) also states that "the principle of non-discrimination extends to all persons of school age residing" in the territory as a state party, including non-nationals, irrespective of their legal status. The CRC is clear that "childhood is entitled to special care and assistance" and acknowledges that "the child, because of their physical and mental immaturity, needs special safeguards and care, including appropriate legal protection, before as well as after birth".[47] What is essential to convey is that the CRC mandates states to take appropriate measures to protect children against discrimination.[48] The CRC also embodies two general principles that provide the context in which the issue of ZEP dependant children must be understood.

First, in all actions that affect children, their best interests must be considered.[49] While the CRC itself does not define the meaning of "best interests of the child", the United Nations High Commissioner for Refugees (UNHCR) states that the concept alludes to the overall well-being of the child, considering the specific situations and risks that children face.[50]

Secondly, children must be protected from any form of discrimination.[51] The African Charter on the Rights and Welfare of the Child[52] (African Charter) provides that, in any matters concerning children, their best

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43 *Ibid*.

44 UN General Assembly *The Universal Declaration of Human Rights* A/RES217(III) (10 December 1948) Art 26.

45 UN General Assembly *International Covenant on Economic, Social and Cultural Rights* 993 UNTS 3 (1966). Adopted: 16/12/1966; EIF: 03/01/1976 (ICESCR) Art 13.

46 Committee on Economic Social and Cultural Rights (CESCR) *General Comment No 13: The Right to Education (Article 13) (1999) E/C.12/1999/10, 8 December 1999)* https://www.ohchr.org/en/resources/educators/human-rights-education-training/d-general-comment-no-13-right-education-article-13-1999 (accessed 2025-01-28) par 1.

47 UN General Assembly *Convention on the Rights of the Child (CRC)* 1577 UNTS 3 (1989). Adopted: 20/11/1989; EIF: 02/09/1990 https://www.ohchr.org/en/instruments-mechanisms/instruments/convention-rights-child (accessed 2025-01-28) Preamble.

48 Art 2(2) of the CRC.

49 Art 3 of the CRC.

50 UNHCR "UNHCR Guidelines on Determining the Best Interests of the Child" (May 2008) http://www.unhcr.org/4566b16b2.pdf (accessed 2018-07-18) 8.

51 Art 2 of the CRC.

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

interests must be of fundamental consideration. The World Declaration, the founding document for Education for All, states that children must be given equal access to basic education services and that all disparities, including discrimination in accessing education opportunities, must be removed.[53] The World Declaration encourages the strengthening of partnerships, even between countries since, while, "[n]ational, regional, and local educational authorities have a unique obligation to provide basic education for all, they cannot be expected to supply every human, financial or organizational requirement for this task. New and revitalized partnerships at all levels will be necessary …"[54] The African Charter also provides that there must be no discrimination on any ground, including "national and social origin" in education provision.[55]

4 CHALLENGES TO THE PROTECTION OF THE RIGHT TO BASIC EDUCATION FOR DEPENDANTS OF ZEP HOLDERS

4 1 Curriculum change and integration challenges

Given that the ZEP visa has been discontinued, and that extensions do not apply to dependant children of ZEP holders, it is essential to note the realistic situation facing such children in moving from South Africa to Zimbabwe. The two education systems are different. In Zimbabwe, basic education spans 13 years, the first seven years being primary education and the following six years being secondary education.[56] At primary levels, it is a policy stipulation that children learn in their mother tongue up to Grade 3 and they transition to reading and writing in English by Grade 3.[57] This means that without integration strategies, a ZEP holder's dependant child who speaks only South African home languages and is between Grades 1 and 3 will face linguistic challenges if they are to attend school in Shona and Ndebele or any local language in Zimbabwe. In Zimbabwe, learners in Grade 7 sit for four nationally set Grade 7 examinations: Mathematics, English, Shona or Ndebele, and Content (combined science).[58] The Grade 7 results are very important as they are the gateway that enables learners to

53 United Nations "World Declaration on Education for All and Framework for Action to Meet Basic Learning Needs" adopted by the World Conference on Education for All: Meeting Basic Learning Needs, Jomtien, Thailand (5–9 March 1990) art 3 par 1 and 4.

54 United Nations "World Declaration on Education for All and Framework for Action to Meet Basic Learning Needs" adopted by the World Conference on Education for All: Meeting Basic Learning Needs, Jomtien, Thailand (5–9 March 1990) art 7.

55 Art 3 of the African Charter.

56 USAP "Education in Zimbabwe" (undated) https://www.usapglobal.org/zimbabwe/education.htm (accessed 2023-09-29).

57 Trudell "The Impact of Language Policy and Practice on Children's Learning: Evidence From Eastern and Southern Africa" (1 March 2016) https://www.unicef.org/esa/sites/unicef.org.esa/files/2018-09/UNICEF-2016-Language-and-Learning-FullReport.pdf (accessed 2025-01-28)

58 USAP https://www.usapglobal.org/zimbabwe/education.htm.

proceed to Form 1.[59] It is the view of the authors of this paper that a child moving from the South African education system and attending Grade 6 or 7 cannot realistically be expected to arrive in Zimbabwe and simply write these national examinations and pass. Secondary school in Zimbabwe has three levels: the Zimbabwe Junior Certificate, which consists of Forms 1 and 2; the "O" level, which includes Forms 3 and 4; and then "A" level, which includes Forms 5 and 6.[60] Students take about eight subjects at O level from a selection of subjects listed below.[61]

Sciences	Biology, Chemistry, Physics, Physics with Chemistry, Integrated Science, Mathematics
Liberal Arts	English Literature, Religious Education, Geography, History
Commercial Subjects	Accounts, Commerce, Economics, Computer Studies
Languages	English, Shona, Ndebele, French, German, Latin
Arts	Art, Music
Practical Subjects	Woodwork, Metalwork, Agriculture, Technical Drawing, Fashion & Fabrics, Food & Nutrition

The O-level examinations allow students to proceed and specialise at A level, and they can choose three subjects from those listed below, depending on their specialisation.[62]

Sciences	Biology, Chemistry, Physics, Mathematics, Further Mathematics
Commercial Subjects	Management of Business/Business Studies, Economics, Accounts, Computer Science
Arts	English Literature, Geography, Shona/Ndebele Language and Literature, Divinity, History, French, Art, Music, Latin, German

In contrast, in South Africa, compulsory basic education comprises the years from Grade 1 to Grade 9 or the period ending at 15 years old, whichever comes first. Grade R, which is the reception year into the schooling system at age 4 turning 5 by 30 June of the year, is not a compulsory grade, and thus, a learner can start Grade 1 without first having gone through Grade R. The phase of learning up to Grade 9 is referred to as the General Education and Training band, and it is further divided into the Foundation Phase, Intermediate Phase and Senior Phase. After completion of Grade 9 (General Education and Training), learners can choose either an academic or a vocational route. An academic route consists of Grades 10, 11 and 12 and is

59 ZimEye "Grade 7 Entrance Test Banned" (4 December 2023) https://www.zimeye.net/2023/12/04/grade-7-entrance-tests-banned/ (accessed 2025-01-28).
60 USAP https://www.usapglobal.org/zimbabwe/education.htm.
61 *Ibid*.
62 *Ibid*.

included in the Further Education and Training (FET) band; it is not compulsory. Education from Grades R to 12 falls under the national Department of Basic Education as well as the provincial departments of education in the nine provinces. Students who choose a vocational curriculum can enter into FET colleges,[63] which fall under the Department of Higher Education and Training under the training aspect of the Department's name.

Below is a table illustrating the various phases of the Basic Education and FET bands in the schooling system:

Phase	**Grades in the phase**	**Language of learning and teaching**	**Subjects/learning areas**
Reception	Grade R	Home language	Home language Mathematics Life skills
Foundation Phase	Grades 1, 2, 3	Home language	1. Home language 2. English (first additional language) is also taught using the home language. 3. Life skills 4. Mathematics
Intermediate Phase	Grades 4, 5, 6	English	1. Home language 2. English (FAL) 3. Mathematics 4. Natural Science & Technology 5. Social Science, History and Geography 6. Life Skills
Senior Phase	Grades 7, 8, 9	English	1. Home language 2. English (FAL) 3. Mathematics 4. Social Sciences 5. Natural Sciences 6. Technology 7. EMS (Economic Management Sciences) 8. Creative Arts 9. Life Orientation

[63] Field, Musset and Álvarez-Galván *A Skills Beyond School Review of South Africa* (18 November 2014) https://www.oecd.org/en/publications/a-skills-beyond-school-review-of-south-africa_9789264223776-en.html (accessed 2025-01-28) 20.

FET band	Grades 10, 11, 12	English	Learners register for 7 subjects consisting of: Home language, a language at first additional level, Life Orientation (compulsory), and 4 content subjects chosen from available streams at the school. The streams range from Mathematics and Natural Sciences to Commercial, Technology, History and Geography, and other combinations of subjects. All learners in the FET band must register for either Mathematics or Mathematical Literacy

A part of the Senior Phase of General Education and Training is offered at the primary school level, which goes up to Grade 7; and Grades 8 and 9 are offered at the secondary school level.[64] The FET band consisting of Grades 10, 11 and 12 is also the national senior certificate qualification, a qualification at level 4 on the National Qualification Framework (NQF).[65] This NQF level is a three-year qualification with an exit level and external national examination at the end of Grade 12. Grades 10 and 11 are internally examined.[66]

The differences between the Zimbabwean and South African systems mean that, without properly planned integration strategies, a ZEP dependant child will face barriers at almost every level of study that will make it difficult for them to navigate and integrate into the Zimbabwean education system.

This article notes that expecting ZEP holders to return to Zimbabwe with their children and find them schools to attend is simply unrealistic. The basic

64 Southern African Association of Educational Assessment (SAAEA) "A Comparative Report on the Education Landscape of the Countries in the Southern African Association for Educational Assessment" (2014) https://www.umalusi.org.za/docs/research/2015/harmonization.pdf (accessed 2025-01-28) 35–36.

65 *Ibid*.

66 *Ibid*.

education systems for Zimbabwe and South Africa are neither the same nor harmonised, and the subjects and pedagogical approaches differ significantly. This undoubtedly makes it difficult, especially for children approaching matriculation, to be assimilated and adjust to the education system in Zimbabwe should their parents fail to get them documented in South Africa. Children are vulnerable and at risk of being school dropouts should South Africa persist in its bid to end the ZEP dispensation. In this context, the article explores whether South Africa has any obligation to continue providing basic education for children of ZEP holders and to provide necessary support to parents and children who may choose to continue within the South African education system to complete their matriculation.

4 2 Visa application challenges

Many current permits for Zimbabweans were for low-skilled persons who could never meet the requirements of any work visa requiring skills.[67] While there are visas such as the critical skills visa, targeting those with skills regarded as critical in South Africa, and the spousal visa, which may allow a spouse of a South African to take up gainful employment, client files from the Chiedza Immigration and Refugee Consultancy show that most ZEP holders who qualified for such visas were encouraged to apply and have already migrated to them over the years. Many existing ZEP holders are, therefore, persons like vendors, domestic workers, gardeners and small, unregistered business owners who cannot meet the visa requirements for any visa, including the general work visa or business visa requirements.[68] To understand their difficulties in qualifying for other visas, it is acknowledged that some aspects of both the general work visa and the business visa are honourable and meant to ensure that South Africans are not deprived of job or business opportunities in favour of low-skilled foreigners. For instance, for a general work visa, the applicant's company needs to approach the labour department for a labour certificate confirming that the company could not find a South African before it opted to employ a foreigner. The VFS website explains that the applicant for a general work visa must submit a certificate by the Department of Labour confirming the following:

1. Despite diligent search, the prospective employer has been unable to find a suitable citizen or permanent resident with qualifications or skills and experience equivalent to those of the applicant.
2. The applicant has qualifications or proven skills and experience in line with the job offer.
3. The salary and benefits of the applicant are not inferior to the average salary and benefits of citizens or employees occupying similar positions in the Republic.

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[67] Mail and Guardian "Editorial: There's a Crisis Coming" (31 March 2022) https://mg.co.za/editorial/2022-03-31-editorial-theres-a-crisis-coming/ (accessed 2023-07-11).

[68] *Ibid*.

4. There is a contract of employment stipulating the conditions of employment and signed by both the employer and the applicant in line with the labour standards in the Republic and that the contract is made conditional upon the general work visa being approved.[69]

To get the labour certificate, the company needs to advertise the job, conduct interviews and satisfy the labour department that a thorough search was done, and that the company could not find a suitable South African or permanent resident.[70] Once a request for a labour certificate is submitted to the labour department, the labour department will also search its database to see if there is a South African who could be considered for employment by the submitting company.[71] Getting a labour certificate has been labelled "a headache" as it is not only a long and uneconomical process for companies, but companies never succeed in convincing the Department of Labour that they cannot find a low-skilled employee.[72] Given the reality that most ZEP holders are low-skilled workers who do not possess any critical skills, most companies are unwilling to go through the process of getting labour certificates, meaning that most ZEP holders have already lost jobs or will become undocumented and unemployed migrants.[73] Some employers of ZEP holders have assisted their employees by applying to the Minister and establishing good causes for the waiver of the labour certificate. For many ZEP holders who are small business owners, the reality is that the business visa requires R5 million in capital, which is a distant dream for many. Business owners who have approached Chiedza Immigration and Refugee Consultancy have also applied to the Minister for waivers of the business visa requirements, which they cannot meet. It is only after the granting of waivers and the successful application for general work visas that a ZEP holder can apply for a visa in support of their dependant. An extract cited below shows that children are at the centre of the ZEP crisis:

> "Amongst the 178 000 ZEP holders, there are at least as many children who either came to South Africa with their Zimbabwean parents or who were born in South Africa after 2010. These families now face a crisis because of the looming cancellation of their legal status in South Africa after living and working here legally for 15 years. Children, who are not in the same position as adults to choose where they live, are at the centre of this crisis, and their rights are affected.
>
> In the four months left before the expiry of the ZEP (on 31 December 2023), all ZEP holders must apply for a different immigration visa. If granted, they will be allowed to remain in South Africa legally, subject to the conditions of their

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69 VFS "General Work Visa" (2023) https://visa.vfsglobal.com/one-pager/dha/southafrica/english/index.html#general-work-visa (accessed 2025-01-28).

70 *Ibid*.

71 Gridadmin "South African General Work Visa – A Tale of Unintended Consequences" (27 October 2015) https://immigrationspecialists.co.za/southafricangeneralworkvisa/ (accessed 2025-01-28).

72 Govender "General Work Visa: Labour Certificate Vs Waiver" (undated) https://www.workpermitsouthafrica.co.za/general-work-visa-labour-certificate-vs-waiver/ (accessed 2025-01-28).

73 Mail and Guardian https://mg.co.za/editorial/2022-03-31-editorial-theres-a-crisis-coming/.

> new visa. Similarly, children of ZEP holders are also required to apply for a visa unless they have acquired citizenship in South Africa."[74]

While there have been massive rejections of waiver applications, there have been some successes after year-long waits,[75] so the hope is that once such waivers are granted, the applicants can apply for the relevant visas.[76] Some employees applied for waivers with support from their employers in 2021 and are still waiting for responses from the Department of Home Affairs.[77] It is only after the granting of waivers and then the successful application for general work visas that the ZEP holder can apply for a visa in support of their dependant.

While parents wait to apply successfully for new visas, the extensions of their stay in South Africa do not yet cover their children, and the Immigration Act[78] is clear that schools are not allowed to enrol foreign children without a visa, making the discussion on their education urgent. While the South African government expects children of ZEP holders to move to mainstream student visas, such decisions depend on what the children's parents can afford; they must fund student visa applications, which require proof of financial means, as well as accommodation and medical aid. Many ZEP holders are low-paid workers whose jobs are in the informal and small business sectors; they are domestic workers, shopkeepers, garden workers and workers in other jobs for which they are often paid on hand and not in the bank. These categories of worker may not be able to provide the bank statements and proof of income required for a successful application for a study visa. The application for a study visa also requires proof of accommodation, but low-income earners on ZEPs are also likely to have their employment contracts terminated upon expiry of the ZEP visa as employers fail to support them with the costs needed to change from ZEP to mainstream visa. An honourable employer may assist an employee to change from a ZEP to a mainstream general work visa, which requires advertising in the newspapers, a valid job offer and a competitive salary. However, a small business owner may fail to provide such assistance to allow the migrant worker then to secure an income and accommodation for their children. The cessation of the ZEP dispensation after over 10 years of various dispensations will undoubtedly affect many children of ZEP holders in the basic education system. Despite other visas, such as the critical skills visa targeting those with skills regarded as critical in South Africa, and the spousal visa, which may allow a spouse of a South African to take up gainful

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74 Chauke "Centre for Child Law & Lawyers for Human Rights Release Guide for Children Affected by Zimbabwean Exemption Permit" (28 August 2018) https://www.lhr.org.za/lhr-news/press-statement-centre-for-child-law-lawyers-for-human-rights-release-guide-for-children-affected-by-zimbabwean-exemption-permit/ (accessed 2025-01-28).

75 Mutandiro "Foreign Tech Workers Hit Hard by South Africa's New Immigration Laws" (14 September 2023) https://restofworld.org/2023/south-african-immigration-laws-labor-pool/ (accessed 2025-01-28).

76 Visa Immigration SA "Department of Home Affairs: Delays and Backlog" (11 April 2022) https://www.visaimmigrationsa.co.za/department-of-home-affairs-delays-and-backlog/ (accessed 2023-08-11).

77 *Ibid*.

78 13 of 2002.

employment, most ZEP holders who qualify for these visas have already migrated to them over the years.

4 3 The challenging provisions of the Immigration Act

The Immigration Act prescribes that South African public schools have no authority to enrol children of a foreign nationality whose stay is not regularised within South Africa.[79] The child's stay in South Africa, therefore, depends on the parents' or guardians' immigration compliance or the possession of a study visa. The challenge is that minor children seeking a study visa in South Africa need to show evidence of a guardian who will take care of them and who is legally documented, and the child must also provide proof of financial security. Undocumented parents cannot legally undertake to be with their children, and nor can they produce proof of employment in a country where they do not have an automatic right to work. As a result, children of Zimbabwean migrants face enormous difficulties in accessing the South African educational system, leading to lower school attendance rates for these children.

4 4 The state of Zimbabwean basic education[80]

A realistic description of the current violations of the right to basic education by Zimbabwe justifies the need for serious consideration to ensure that South Africa does not send children to Zimbabwe by force, thus participating in a reckless, irreversible violation of the right to basic education for children of ZEP holders. Sending children to Zimbabwe under the circumstances described below defies the whole "compassionate argument" advanced when South Africa first issued the dispensation for Zimbabwe permits. Education in Zimbabwe does not exhibit the following interrelated and essential features required of any education by international law – "availability, accessibility, acceptability and adaptability". [81] Zimbabwean education continues to suffer "through the decade(s) of economic collapse and political violence, starved of funding, abandoned by teachers, who left children to fend for themselves without much opportunity for learning."[82] The situation has not improved today, as Zimbabwe still fails to recover from hard economic realities. While children would be moving from better-resourced schools in South Africa, they cannot be expected to transition smoothly in public schools that lack basic infrastructure, like laboratories and libraries, as

79 S 39(1) and (2) of the Immigration Act 13 of 2002.

80 Kanyongo "Zimbabwe's Public Education System Reforms: Successes and Challenges" 2005 6(1) *International Education Journal* 67–69.

81 UNESCO "Right to education: Scope and Implementation; General Comment 13 on the right to education, Art. 13 of the International Covenant on Economic, Social and Cultural Rights" (2003) https://unesdoc.unesco.org/ark:/48223/pf0000133113 (accessed 2025-01-28).

82 Ndlovu "Zimbabwe's Educational Legacy From the 1980s: Was It All So Rosy?" (25 May 2023) http://www.thezimbabwean.co/2013/05/zimbabwes-educational-legacy-from-the/ (accessed 2025-01-28).

well as desks, chairs and textbooks. Some children in Zimbabwe learn under the tree as "Zimbabwe needs an extra 2 056 schools to decongest schools that have the hot-seating system and reduce distances [in excess of 24 km] which pupils are walking to school".[83] The Minister of Education has reported that children learn in tobacco barns and under trees with no furniture, classrooms are in a deplorable state, and 1 500 satellite schools need to be massively rehabilitated.[84] All the above situations mean that basic education in Zimbabwe is not "available" as the Committee on Economic, Social and Cultural Rights regards available education to be where functional education institutions (schools) are of sufficient quantity.[85]

Many employers terminated their ZEP holders' contracts when the Minister announced the termination of the ZEP. The parents are now jobless, but basic education in Zimbabwe is paid for, and there is no provision for no-fee schools or any fee exemption. Access to education is a new challenge facing ZEP dependants of possibly unemployed parents. An evaluation report by the Training and Research Support Centre with the Zimbabwe Teachers Association estimated that of 3.6 million children who were at the age of attending primary and secondary schooling an estimated 1 million needed financial assistance.[86] Of the 2.8 million children who were of primary school-going age, it was estimated that 28 per cent needed financial assistance and only 16 per cent received assistance in 2011.[87] Zimbabwe has openly disregarded General Comment No. 13, which requires accessible education in the form of free education for children who cannot afford it.[88] In 2015, the government of Zimbabwe stated that in addition to the legal requirement that all parents must pay school fees, it was introducing Grade 7 examination fees, which means that children between the ages of 11 and 13 have to pay to write examinations to proceed to secondary school.[89] The Grade 7 examination fees, in addition to being in violation of international law, are a practical obstruction to accessing education for children who are vulnerable to having jobless parents.[90] Evidence shows that Zimbabwe's education of children cannot be acceptable. It has been estimated that about 300 000 children drop out of school each year owing to economic hardships.[91] This translates over a five-year period to 1.5 million dropouts.[92] Tied to the issue of high dropout rates

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83 Staff Reporter "Zimbabwe Needs an Extra 2056 Schools, Minister" (29 September 2014) https://allafrica.com/stories/201409300180.html (accessed 2025-01-28).

84 *Ibid*.

85 Par 6(a) of *General Comment No 13*.

86 Training and Research Support Centre (TARSC) with Zimbabwe Teachers Association (ZIMTA) "Tracking the Governance and Accountability of the Basic Education And Assistance Module (BEAM) in Ten Districts of Zimbabwe" (2012) 2, http://tarsc.org/publications/documents/BEAM%20rep%20final.pdf (accessed 2023-11-08) 2.

87 *Ibid*.

88 *Ibid*.

89 Ncube "Zimbabwean Children's Right To Education Under Serious Threat" (14 April 2015) http://www.davidcoltart.com/2015/04/zimbabwean-childrens-right-to-education-under-serious-threat/ (accessed 2023-08-11).

90 *Ibid*.

91 *Ibid*.

92 *Ibid*.

is the shocking failure rate. In 2021, 33 schools in one province (Manicaland province) reported a 0 per cent pass rate,[93] and the country reported an O-level pass rate of 29,41 per cent in 2023 and 28,96 per cent in 2022.[94] Since 1984, the highest pass rate for O-levels in Zimbabwe has been just 33,19 per cent, achieved in 2024.[95] The deplorable pass rates have affected not only O levels but also Grade 7 pupils, as exemplified by 88 primary schools in Zimbabwe that reportedly recorded a 0 per cent pass rate in 2020 for Grade 7 examinations.[96] Zimbabwe has also suffered a massive brain drain, with South Africa being the biggest beneficiary of qualified teachers. As of 2015, the Ministry of Education estimated that in Zimbabwe, 10 341 teachers were unqualified to teach at the primary school level, while 11 519 teachers were unqualified to teach at the secondary school level.[97] The number of students per qualified teacher was pegged at 42:1 at primary school and 31:1 at secondary school.[98] It is important to recognise that the hailing of Zimbabwe as having high literacy and numeracy rates is a past glory: children cannot be sacrificed by sending them to Zimbabwe without due consideration for their education. There is no indication that education for children in Zimbabwe is acceptable, accessible or available.

5 RECOMMENDATIONS FOR THE PROTECTION OF THE RIGHT TO BASIC EDUCATION FOR ZEP DEPENDANT CHILDREN

5 1 Joint reintegration strategies: South Africa and Zimbabwe

This article suggests that given the realities faced by ZEP dependant children, many parents facing poverty and visa-related challenges may opt to send their children back to Zimbabwe. It is suggested that Zimbabwe and South Africa should be prepared to assist children of ZEP holders in integrating back into the Zimbabwean basic education system. The integration of children of ZEP holders into the Zimbabwean basic education system is a complex issue, with several factors to consider, such as academic challenges, economic challenges, language barriers and social challenges from lessons learned from experiences of how Zimbabwean

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93 ZimEye "33 Schools report 0% Pass Rate", (20 May 2022) https://www.zimeye.net/2022/05/20/33-schools-record-zero-passrate (accessed 2025-01-28).

94 Ndoro "2024 ZIMSEC O-Level Results Hit Highest Pass Rate in 40 Years" (17 January 2025) https://iharare.com/2024-zimsec-o-level-results-hit-highest-pass-rate-in-40-years/ (accessed 2025-01-18).

95 *Ibid.*

96 Staff Reporter "88 Primary Schools Record a 0% Pass Rate" (6 February 2021) https://www.thezimbabwemail.com/education/eighty-eight-88primary-schools-record-0-pass-rate/ (accessed 2023-08-11).

97 Ndlovu "Zim Has 20 000 Unqualified Teachers" (11 March 2015) http://www.herald.co.zw/zim-has-20-000-unqualified-teachers/ (accessed 2023-11-08).

98 *Ibid*.

children cope with a new education system in South Africa.[99] Reintegration also requires resource mobilisation and budget harmonisation to ensure equitable access, and lessons can be drawn from the no-fee school policies of South Africa.[100] Resources can be sourced from the two different governments and civil society in general.[101]

Support for ZEP dependant children by both South Africa and Zimbabwe can be done by providing free or fee-exempted access to education for all children of Zimbabwe. It is suggested that South African schools assist ZEP dependant children with transfer records from their previous schools to new schools in Zimbabwe to ensure smooth governance in the transfer process.[102] When ZEP dependant children are transferred, they should be assisted in adjusting to the new education system through school-feeding programmes, language support, tutoring, and social-emotional support.[103] In addition to integration efforts from both Zimbabwe and South Africa, it is suggested that the government engage with non-governmental organisations (NGOs) that can also support children of ZEP holders. Such NGOs may provide financial assistance, tutoring and other forms of support to help children succeed in school.

This article also suggests some specific ways in which children of ZEP holders can be integrated into the Zimbabwean basic education system. This could be through placement in the appropriate grade level depending on their age and academic skills. This may involve assessing their skills and knowledge through standardised tests or interviews. Children need support in relation to language learning. Many children of ZEP holders, especially young ones between Grades 1 and 3, may not be fluent in the languages of instruction in Zimbabwe. Schools can support these children to help them learn the language of instruction. This may involve providing language classes, bilingual instruction or other forms of support. Since many returning ZEP dependant children may have to return to Zimbabwe without their parents, they may need social-emotional support to adjust to the new education system and to feel welcome and accepted.[104] In addition to

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99 Adebanji, Phatudi and Hartell "Factors Facilitating the Adjustment of Immigrant Children from Zimbabwe on the Foundation Phase to South African Schools" 2014 5 *Mediterranean Journal of Social Sciences* 512 515, 518, 519, 520.

100 Mestry and Ndlovu "The Implications of the National Norms and Standards for School Funding Policy on Equity in South African Public Schools" 2014 34(3) *South African Journal of Education* 1.

101 Gulzar "Mobilizing Support for Inclusive Education" (20 February 2021) https://educarepk.com/mobilizing-support-for-inclusive-education.html (accessed 2025-01-28).

102 SADC "Education & Skills Development" (undated) https://www.sadc.int/pillars/education-skills-development (accessed 2025-01-28).

103 Kristjansson, Osman, Dignam, Labelle, Magwood, Huerta Galicia, Cooke-Hughes, Wells, Krasevec, Enns, Nepton, Janzen, Shea, Liberato, Garner and Welch "School Feeding Programs for Improving the Physical and Psychological Health of School Children Experiencing Socioeconomic Disadvantage (Protocol)" 2022 https://pmc.ncbi.nlm.nih.gov/articles/PMC9400387/pdf/CD014794.pdf (accessed 2025-01-28) 2.

104 Tawodzera and Themane "Schooling Experiences of Children Left Behind in Zimbabwe by Emigrating Parents: Implications for Inclusive Education" 2019 39 *Youth African Journal of Education Supplement* S1 S6–S10.

academic and language challenges, children of ZEP holders may face social challenges when integrating into the Zimbabwean basic education system. For example, they may be teased or bullied by other students because of their different languages. They may also miss their friends and family in South Africa. The Zimbabwean government should be aware of the challenges that children of ZEP holders face and should implement some support mechanisms to help them integrate into the basic education system. The government may also introduce several programmes to help students who are struggling academically, such as remedial classes and tutoring.

The spokesperson [105] for the Zimbabwean Ministry of Primary and Secondary Education indicated to *The Herald* newspaper in Harare on 10 January 2023 that Zimbabwean schools are ready to absorb children of ZEP holders. He further indicated that apart from the fact that the Zimbabwean education sector has always absorbed learners from different countries in various grades, Zimbabwe and South Africa have signed a Memorandum of Understanding to work together on education and other related issues. This official view of the Zimbabwean government on the country's readiness to absorb children into the schooling system is countered by the views of parents and other experts on the ZEP termination that there are no preparations and plans in either country to manage the return migration. In December 2022, parents were raising concerns that there was no information on how the integration would be achieved, particularly for ZEP holders who wanted to move back voluntarily to Zimbabwe with their children.[106] What Jonathan Jansen[107] and John Pape[108] have said about the strong foundations of the Zimbabwean education system cannot be anything to go by since their assertions only speak of past glory of the Zimbabwean education. Any system of integration of children into a new system of education needs to be strong on the aspect of inclusivity to be able to address the difficulties involved.[109]

5 2 Establishment of a ZEP Children's Integration Programme by Zimbabwe

It is suggested that the Zimbabwean government introduce a long-term programme to integrate children of ZEP holders into the country's basic education system. This programme could include measures such as

[105] Ndoro "Zim Schools Are Ready to Absorb Children of ZEPT Permit Holders" (2023-01-10) *The Herald* herald.co.zw/zm-schools-readyto-absorb-children-zep-permit-holders (accessed 2023-08-11).

[106] Chiguvare "Zimbabwean Parents Worried About Learners' Move From Schools in South Africa" (14 December 2022) https://www.groundup.org.za/article/no-clear-plan-for-state-assistance-to-families-voluntarily-returning-to-zimbabwe/ (accessed 2025-01-28).

[107] Jansen "SA Can Learn a Thing or Two From the Zimbabwean Education System" (30 November 2017) https://www.timeslive.co.za/ideas/2017-11-30-sa-can-learn-a-thing-or-two-from-zimbabwes-education-system/ (accessed 2025-01-28).

[108] Pape "Changing Education for Majority Rule in Zimbabwe and South Africa" 1998 *Comparative Education Review* 253.

[109] VVOB "A Step Towards Inclusivity in Zimbabwean Education" (11 August 2016) https://www.vvob.org/en/news/step-towards-inclusivity-zimbabwean-education (accessed 2025-01-28).

exempting children from paying school fees at public schools and providing free textbooks and other learning materials. Children of ZEP holders could be provided with free textbooks and other learning materials by the government. Teachers should also be trained to support children of ZEP holders with different educational needs. The government may also need to provide psychosocial support services to children of ZEP holders through schools and community organisations. In addition, the government could also work to increase the number of schools and classrooms in the country to accommodate the growing number of students. This would help to ensure that all children, including children of ZEP holders, have access to quality education.

5 3 Cooperation with SADC countries to mitigate the challenges of the ZEP dependant child

While SADC countries have agreed through the SADC Protocol on Education and Training that cooperation must take place among member states in areas of "curriculum design and development", and that education systems must be comparable and harmonised, the reality is that the South African and Zimbabwean curriculums are vastly different in form, structure and content.[110] There is no joint development or cooperation in the development of curriculums, national examinations or standardisation of certification.[111] A serious commitment to regional obligations and aspirations should obligate SADC to commit to humane migration and to regional commitments as mandated by the Protocol on the Free Movement of Persons, which guarantees the right to free movement of persons within the SADC region.[112] SADC should work with organisations such as the International Organisation for Migration (IOM), which supports the integration of migrants and their children into communities.[113] A broader goal should be to align and harmonise the curriculums for the entire region and to promote harmonisation and equivalence of education and training qualifications[114] within the SADC region.[115] Facilitating the movement of students, teachers, and other education and training personnel[116] within the SADC region is also important. The Zimbabwean government could develop a system for recognising and validating the education qualifications of ZEP holders'

[110] Kallaway "Education in South Africa and Zimbabwe" 2005 *Journal of Southern African Studies* 673–676.

[111] *Ibid*.

[112] Hirsch "African Countries Are Stuck on the Free Movement of People. How to Break the Logjam" (20 January 2022) https://saiia.org.za/research/african-countries-are-stuck-on-the-free-movement-of-people-how-to-break-the-logjam/ (accessed 2025-01-28).

[113] The International Organization for Migration (IOM) is a United Nations agency that provides services and advice concerning migration to governments and migrants, including internally displaced persons, refugees and migrant workers, and has its headquarters in Geneva, Switzerland.

[114] Alharbi "Implementation of Education 5.0 in Developed and Developing Countries: A Comparative Study" 2023 *Creative Education* 914.

[115] SADC https://www.sadc.int/pillars/education-skills-development.

[116] South African Institute of International Affairs (SAIIA) "A Strategic Consideration of the African Union Free Movement of Persons Protocol and Other Initiatives Towards Free Movement of People in Southern Africa".

children who have completed their primary or secondary education in South Africa. This would allow ZEP holders' children to continue their education in Zimbabwe without repeating any grades. The Zimbabwean government could work with the South African government to develop joint teacher training programmes.[117] This would help to ensure that teachers in each country were familiar with the curriculums and teaching methods of the other. This would make it easier for ZEP holders' children to transfer from the South African to the Zimbabwean education system. The Zimbabwean government could work with the South African government to develop joint student exchange programmes. This would also allow ZEP holders' children to spend time studying in Zimbabwe while they are still completing their primary or secondary education in South Africa. This would also help to prepare ZEP holders' children for transition to the Zimbabwean education system.

6 CONCLUSION

This article, drawing from the study of the files of real experiences and struggles of migrant children, has discussed the effects of discontinuing the ZEP visa regime on children attending school in South Africa, highlighting these effects as a matter for urgent consideration, given the importance of basic education in a child's life. It noted that the readiness of both South Africa and Zimbabwe for the return of ZEP holders to Zimbabwe is a complex issue with no easy answers. It is reasoned that, while South Africa has allowed the ZEP holders to apply for mainstream visas and then join dependants to their applications, such transitional measures pose challenges because education cannot wait for parents to apply for visas, and for processing of applications and only commence when visas are issued. South Africa has not even offered a fast-track application process for affected ZEP holders with dependants, particularly minor dependant children. An analysis of the curriculum templates has shown that Zimbabwe's basic education system differs in both form and content from South Africa's basic education system.[118] With different pedagogical approaches, an entire generation of children of ZEP holders is at risk of being denied a chance to acquire a basic education. Accordingly, there needs to be a focus placed on evaluating both countries' international obligations for the provision of basic education to affected children. South Africa, currently the host country, carries the greater burden of compliance with these international obligations to support the integration project and ensure the success of transitional arrangements.

[117] SADC https://www.sadc.int/pillars/education-skills-development.
[118] USAP https://www.usapglobal.org/zimbabwe/education.htm.

The Legal Implications of South Africa's Grey-Listing for Money Laundering: Analysis and Recommendations

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SUMMARY

This article analyses the legal implications of South Africa's grey-listing by the Financial Action Task Force (FATF) for money laundering in a concise manner. It examines the deficiencies in South Africa's anti-money laundering and counter-terrorism financing (AML/CFT) regime, which led to its grey-listing, and the measures the country has taken to address them. The article evaluates the effectiveness of South Africa's AML/CFT framework in combating money laundering, highlighting areas for improvement. It also considers the impact of South Africa's grey-listing on the country's financial system, including increased scrutiny from international regulators and potential reputational damage. The article recommends specific legal reforms and policy measures South Africa can adopt to strengthen its AML/CFT regime and enhance its compliance with international standards. These Recommendations cover regulatory oversight, law enforcement cooperation, risk assessment, customer due diligence, and sanctions enforcement. The article provides a practical and policy-oriented guide for policymakers and other South African stakeholders to better understand the legal and regulatory challenges of combating money laundering in a grey-listed jurisdiction and identify strategies for improving the country's AML/CFT framework.

1 INTRODUCTION

Money laundering is a process by which individuals and organisations attempt to conceal the proceeds of illegal activities, such as drug trafficking, corruption, and fraud, by disguising them as legitimate funds.[1] This complex and multifaceted phenomenon poses significant challenges to legal systems worldwide, and in recent years, South Africa has been grappling with the scourge of money laundering and the devastating impact it has on the

[1] De Koker "Money Laundering Control: The South African Model" 2003 *Journal of Money Laundering Control* 27 28; see related discussion by Reuter and Truman *Chasing Dirty Money: The Fight Against Money Laundering* (2004) 1; Durrieu *Rethinking Money Laundering & Financing of Terrorism in International Law: Towards a New Global Legal Order* (2013) 1.

https://doi.org/10.17159/vjp23x37

economy, society, and governance.[2] Against this backdrop, the Financial Action Task Force (FATF) has grey-listed South Africa for its perceived weaknesses in combating money laundering and terrorist financing.[3] The grey-listing imposes significant legal and economic consequences for South Africa, including increased regulatory scrutiny, restricted access to international financial markets, and reputational damage.[4] The South African government has, therefore, been under pressure to strengthen its legal and institutional framework for combating money laundering and terrorist financing, which is in line with international standards and norms.

To fully understand the ethical and moral dimensions of money laundering and its impact on society, it is essential to inquire into the principles of justice, fairness, and equity that guide the fight against money laundering and how they can be applied in South Africa. Furthermore, conducting a thorough legal analysis of the grey-listing and its implications for South Africa's legal system is essential. What are the legal ramifications of the grey-listing, and how can South Africa effectively respond to them? What international legal obligations must South Africa fulfil, and how can it balance these obligations with its domestic legal framework? In light of these questions, this article seeks to provide a comprehensive analysis of the legal implications of South Africa's grey-listing for money laundering. Drawing on various legal perspectives, this article provides recommendations for policymakers, legal practitioners, and other stakeholders on strengthening South Africa's legal and institutional framework for combating money laundering and terrorist financing.

2 OVERVIEW OF MONEY LAUNDERING

Money laundering is a criminal activity involving converting proceeds from illegal activities into legitimate funds. This process often involves three stages: placement, layering, and integration.[5] Placement involves the introduction of illegal funds into the financial system, while layering involves the creation of a complex web of transactions to obscure the source and ownership of the funds.[6] Integration involves the use of the laundered funds for legitimate purposes.[7] In South Africa, money laundering takes various forms, including using front companies, shell companies, and nominee accounts to conceal the true ownership and source of funds. Other common

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2 Alford "Anti-Money Laundering Regulations: A Burden on Financial Institutions" 1994 *North Carolina Journal of International Law and Commercial Regulation* 437 454; see related discussion by Levy *Federal Money Laundering Regulation: Banking, Corporate, & Securities Compliance* (2015) 51.

3 Jayasekara "Deficient Regimes of Anti-Money Laundering and Countering the Financing of Terrorism" 2020 *Journal of Money Laundering Control* 663 665.

4 Jayasekara 2020 *Journal of Money Laundering Control* 663 665.

5 Ncube *The Regulation and Use of Artificial Intelligence to Combat Money Laundering in South African Banking Institutions* (doctoral thesis, North West University) 2022 44.

6 Schott *Reference Guide to Anti-money Laundering and Combating the Financing of Terrorism* (2006) 46.

7 Tuba "Prosecuting Money Laundering the FATF Way: An Analysis of Gaps and Challenges in South African Legislation from a Comparative Perspective" 2012 *African Journal of Criminology & Victimology* 103 105.

forms of money laundering in South Africa include trade-based money laundering, bulk cash smuggling, and virtual currency transactions.[8]

Money laundering poses significant harm and risks to the economy, society, and governance of South Africa. It fuels corruption, organised crime, and terrorism, which undermine the rule of law and threaten national security.[9] Money laundering also distorts markets, undermines financial stability, and erodes public trust in the financial system. Furthermore, money laundering can have negative social and economic consequences, such as decreased tax revenues, reduced foreign investment, and increased inequality.[10] It also perpetuates poverty and impedes economic development by diverting resources from productive activities. South Africa has implemented various legal and regulatory measures to combat money laundering and terrorist financing. The primary legislative framework is the Financial Intelligence Centre Act (FICA),[11] which establishes the Financial Intelligence Centre (FIC) as the primary anti-money laundering and counter-terrorist financing (AML/CFT) regulator.[12] FICA imposes reporting obligations on various entities, such as financial institutions, casinos, and real estate agents, to identify and report suspicious transactions.[13]

In addition to FICA, South Africa has also adopted various international AML/CFT standards and norms, such as the Recommendations of the FATF. The South African Reserve Bank (SARB) is responsible for supervising compliance with these standards by financial institutions and other regulated entities.[14] Despite these efforts, South Africa has been criticised for its weak enforcement of AML/CFT laws and regulations. This has led to the country being grey-listed by the FATF, highlighting the need for further reforms to strengthen the AML/CFT framework in South Africa.

3 SOUTH AFRICA'S GREYLISTING BY THE FATF

The FATF has grey-listed South Africa, indicating its AML/CFT regime deficiencies.[15] The FATF's evaluation methodology focuses on the effectiveness of AML/CFT measures, which depends on the judgment of assessors on the risk and context of countries rather than just technical compliance.[16] This listing can have significant implications for the country's financial system and international business transactions, as non-compliance with FATF standards signals to the world that it is not safe to do business in the country.[17] The impact of being grey-listed can tarnish a country's

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8 Cassara *Trade-Based Money Laundering: The Next Frontier in International Money Laundering Enforcement* (2015) 2.

9 Alford 1994 *North Carolina Journal of International Law and Commercial Regulation* 437 454.

10 Diane "Spotting Money Launderers: A Better Way to Fight Organized Crime?" 2000 *Syracuse Journal of International Law and Commerce* 199 201.

11 S 38 of 2003 as amended (FICA).

12 S 2(1)(*a*)-(*c*) of the FICA.

13 S 2(1)(*a*)-(*c*) of the FICA.

14 Wixley and Everingham *Corporate Governance* (2015) 246.

15 Jayasekara 2020 *Journal of Money Laundering Control* 666.

16 Jayasekara 2020 *Journal of Money Laundering Control* 664.

17 Clarke "Is There a Commendable Regime for Combatting Money Laundering in International Business Transactions?" 2020 *Journal of Money Laundering Control* 163 166.

reputation and have immediate detrimental effects on its market and economy.[18]

In June 2019, the FATF grey-listed South Africa for its perceived weaknesses in combating money laundering and terrorist financing.[19] The FATF identified several deficiencies in South Africa's AML/CFT framework, including inadequate supervision of financial institutions, insufficient enforcement of AML/CFT laws, and inadequate measures to identify and freeze terrorist assets.[20] Other factors that contributed to South Africa's grey-listing include the high level of corruption and organised crime in the country, and as the significant amount of illicit financial flows associated with the mining and mineral sectors. Consequently, being grey-listed by the FATF has several consequences for South Africa. First, it makes it harder for South African financial institutions to do business with their international counterparts. Many international banks are reluctant to engage with grey-listed countries as they fear that they may be unwittingly facilitating money laundering or terrorist financing.[21] Secondly, grey-listing can have significant economic consequences for South Africa. It can lead to reduced foreign investment, increased borrowing costs, and decreased access to international financial markets.[22] Grey-listing can also undermine the country's reputation as a safe and stable investment destination, which can further discourage foreign investment. Finally, grey-listing can harm South Africa's national security by allowing terrorist organisations and other criminal networks to exploit the country's weak AML/CFT framework to finance their activities.[23]

Since being grey-listed by the FATF, South Africa has made significant progress in addressing AML/CFT deficiencies.[24] The country has introduced several reforms aimed at strengthening its AML/CFT framework, such as the establishment of a dedicated anti-corruption unit within the National Prosecuting Authority (NPA) and the introduction of new regulations to prevent money laundering in the real estate sector. South Africa has also strengthened its cooperation with international partners to combat money laundering and terrorist financing. For example, South Africa has signed agreements with the United States of America and other countries to share financial intelligence and enhance law enforcement cooperation. Furthermore, South Africa was scheduled to undergo a mutual evaluation in 2019, and the final Mutual Evaluation Report (MER) was completed and

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18 Clarke 2020 *Journal of Money Laundering Control* 166.

19 Jayasekara 2020 *Journal of Money Laundering Control* 664.

20 FATF "Jurisdictions under Increased Monitoring" (24 February 2023) fatf-gafi.org (accessed 2023-07-27).

21 Morse "Blacklists, Market Enforcement, and the Global Regime to Combat Terrorist Financing" 2019 *International Organization* 511 515.

22 Idrees, Naazer and Khan "Pakistan and the FATF: Exploring the Role of Diplomacy in Getting Off the Grey List" 2020 *Liberal Arts and Social Sciences International Journal* 413 420.

23 Nanyun and Nasiri "Role of FATF on Financial Systems of Countries: Successes and Challenges" 2020 *Journal of Money Laundering Control* 234–240.

24 According to the IMF country report, South Africa has made good progress in developing its system for combating money laundering and the financing of terrorism since its last FATF mutual evaluation in 2003; see Fund "South Africa: Report on Observance of Standards and Codes" 2010 10(272) *IMF Staff Country Reports* 1.

made available for public perusal by the end of 2021.[25] This suggests that South Africa has been actively engaging with the evaluation process and taking steps to address the identified issues.

In addition, South Africa has been the subject of critical analysis to assess how it deals with money laundering issues, indicating a willingness to undergo scrutiny and improve its legal and regulatory framework on AML.[26] This demonstrates a commitment to learning from comparative studies and implementing measures to enhance its AML regime. Moreover, South Africa has been exploring the current regulatory aspects of money laundering, with policymakers and relevant persons urged to adopt the recommendations provided in research papers to enhance the curbing of money laundering in the country.[27] This indicates a proactive approach to incorporating research findings into policy and regulatory enhancements.

4 LEGAL ANALYSIS OF SOUTH AFRICA'S AML/CFT FRAMEWORK

South Africa operates under a legal and regulatory structure that oversees AML/CFT. This structure aims to identify, prevent, and address the issues of money laundering and terrorism funding in South Africa. This part of the article explores the effectiveness of existing anti-money laundering measures, such as the Prevention of Organised Crime Act (POCA),[28] Protection of Constitutional Democracy Against Terrorist and Related Activities Act (POCDATARA),[29] and the Financial Intelligence Centre Act (as amended) (FICA),[30] in managing money laundering activities within South African financial institutions. The goal is to uncover any weaknesses present in the FICA and to assess whether these laws have been effective in enhancing the fight against money laundering in the banking sector of South Africa.

4 1 Regulation of Money Laundering under the Prevention of Organised Crime Act

The POCA came into effect in 1999.[31] The POCA was enacted to regulate organised crime in South Africa.[32] In this regard, the POCA prohibits

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25 Bissett, Steenkamp and Aslett "An Analysis of the 2021 South African FATF Mutual Evaluation Report: Terrorist Financing and NPOS" 2023 *Journal of Financial Crime* 1534–1538.

26 Beebeejaun and Dulloo "A Critical Analysis of the Anti-Money Laundering Legal and Regulatory Framework of Mauritius: A Comparative Study With South Africa" 2022 *Journal of Money Laundering Control* 401–407.

27 Chitimira and Munedzi "Historical Aspects of Customer Due Diligence and Related Anti-Money Laundering Measures in South Africa" 2023 *Journal of Money Laundering Control* 138–140.

28 121 of 1998.

29 33 of 2004.

30 38 of 2001.

31 Ncube *The Regulation and Use of Artificial Intelligence to Combat Money Laundering in South African Banking Institutions* 81.

32 Burchell "Organised Crime and Proceeds of Crime Law in South Africa, Albert Kruger: Book Review" 2010 *South African Journal of Criminal Justice* 177.

racketeering activities, criminalises money laundering and requires banks to report certain information.[33] The POCA was also enacted to provide for the recovery of the proceeds of crime.[34] The POCA also criminalises activities related to benefiting from crime and outlines civil proceedings aimed at forfeiting the benefits of crime to the state.[35]

Within the framework of the POCA, money laundering encompasses various offences, including concealment, arrangement, and the handling of proceeds through acquisition, use, or possession.[36] The POCA mandates that any individual who is aware, or ought to be aware, that certain assets are derived from criminal activities and engages in these offences is committing money laundering.[37] The POCA specifically requires knowledge or reasonable suspicion of the illicit nature of the assets for one to be held criminally liable for money laundering.[38] Notably, the accused can also prove that they did not know that the property at issue was part of the proceeds of unlawful activities.[39] It is imperative for individuals to be cognisant of the illegal origins of the assets they handle, with the provision that the defendant can assert ignorance of the assets' illicit origins as a defence. Failure to prove such ignorance, however, results in a conviction for money laundering within South Africa.[40] Consequently, it remains difficult for the prosecuting authorities in South Africa to prove beyond reasonable doubt that the money laundering perpetrator knew that the property at issue was part of the proceeds of unlawful activities. Perhaps this could be the reason why very few money laundering cases have been investigated, and fewer convictions have been made so far.

Moreover, the POCA stipulates that engaging in any activity involving assets known to be the proceeds of crime, whether independently or collaboratively, constitutes money laundering.[41] This includes efforts to conceal or disguise the origins, location, or ownership of such assets, as well as aiding someone involved in these illicit activities.[42] Furthermore, even acquiring, possessing, or using assets known to be from someone else's criminal activities incurs liability under the law. The POCA extends the scope of money laundering offences beyond direct involvement, including those aiding or collaborating in such acts, regardless of the geographical location of the offence.[43]

The POCA marked a significant advancement in the fight against money laundering in South African banks by broadening the scope of what

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33 S 2 and 4 of the POCA; Burchell 2010 *South African Journal of Criminal Justice* 177.

34 Byrnes and Munro *Money Laundering, Asset Forfeiture and Recovery and Compliance – A Global Guide* (2019) 75.

35 See s 37 and 48 of the POCA.

36 See s 6 of the POCA.

37 See s 5(*a*)–(*b*) of the POCA.

38 Van der Linde "The Overlap between the Common Law and Chapter 4 of the Prevention of Organised Crime Act: Is South Africa's Anti-gang Legislation Enough?" 2020 *South African Journal of Criminal Justice* 273 280.

39 *Ibid.*

40 See s 4 of the POCA.

41 See s 4(*b*) of the POCA.

42 See s 5(*a*)–(*b*) of the POCA.

43 Kelly-Louw "Illegality as an Exception to the Autonomy Principle of Bank Demand Guarantees" 2009 *Comparative and International Law Journal of Southern Africa* 339 340.

constitutes money laundering offences beyond drug-related crimes, unlike its predecessors. It criminalises any involvement with assets that are the proceeds of unlawful activities, enhancing the legal framework against money laundering.[44] The POCA's provisions also extend to business conduct and banking employees, obligating them to report suspicious transactions related to the proceeds of illegal activities.[45] Non-compliance with this reporting duty constitutes a money laundering offence, reinforcing the responsibility of individuals and institutions to be vigilant and proactive in identifying and reporting potential money laundering activities. This approach aims to encompass not just direct participants in money laundering but also those who might inadvertently be involved, strengthening the overall regulatory environment against such crimes in South Africa.

4 2 Regulation of Money Laundering under Protection of Constitutional Democracy Against Terrorist and Related Activities Act 33 of 2004

South Africa enacted the POCDATARA to combat terrorism-related activities and the financing of terrorism and related activities and align government action against money laundering.[46] The POCDATARA came into operation in 2005. Furthermore, the POCDATARA was enacted to give effect to international instruments dealing with terrorist and related activities in South Africa.[47] Interestingly, the POCDATARA does not expressly prohibit money laundering. Instead, the POCDATARA prohibits terrorist activities and offences associated with such activities.[48] Consequently, money laundering activities may be outlawed under the POCDATARA if they are used to commit or help offenders to commit terrorism.[49]

Any person who engages in money laundering to support and finance terrorist activities will be liable for an offence under the POCDATARA.[50] Under the POCDATARA, any person who has reason to suspect that any other person intends to commit or has committed terrorism or other offences associated or connected with terrorist activities like money laundering has a duty to report such suspicion to any police official in South Africa as soon as reasonably possible.[51] A person who fails to report any suspicions of terrorism or other offences associated or connected with terrorist activities, like money laundering offences, is guilty of a money laundering offence.[52] However, the prohibition of money laundering under the POCDATARA is not adequate to curb money laundering. For instance, the POCDATARA does not provide for, among other things, customer due diligence, the obligation to

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44 See s 5 of the POCA.

45 Kalule "Uganda Money Laundering Law Gathers Momentum: Africa Uganda" 2016 *Without Prejudice* 28 28–29.

46 S 2 and 3 of the POCDATARA.

47 S 2 and 3 of the POCDATARA.

48 S 3 of the POCDATARA.

49 S 3 of the POCDATARA.

50 Cachalia "Counter-terrorism and International Cooperation against Terrorism – An Elusive Goal: A South African Perspective" 2010 *South African Journal on Human Rights* 510 512.

51 S 12(1)(*a*)(*b*) of the POCDATARA.

52 S 12(2) of the POCDATARA.

keep identity and verification and transaction records, and to provide for a risk-based approach to bank client identification and verification. The author is of the view that different statutes should not regulate money laundering. This combating of money laundering under different pieces of legislation could have contributed to the inconsistent enforcement of money laundering in South Africa.

4 3 Regulation of Money Laundering under the Financial Intelligence Centre Act

The FICA mandates South African financial institutions to identify proceeds from illegal activities to combat money laundering effectively.[53] The FICA requires banks to confirm and establish a client's identity prior to initiating any business dealings or transactions.[54] In this regard, banks that fail to identify their clients properly risk being implicated in money laundering offences.[55] For instance, to identify potential clients, banks must gather information on the individuals they engage with, including verifying their identity and place of residence, a process commonly referred to as "Know Your Customer" (KYC).[56] KYC practices enable banks to evaluate and manage the risks associated with their clients, thereby facilitating more effective monitoring of potential money laundering activities.[57] It is crucial for banks to understand the nature of their client's business activities to mitigate the risks of money laundering, financial fraud, and the support of criminal entities. However, during the COVID-19 Pandemic and Lockdown in South Africa,[58] South African banking institutions and the general public were not permitted to meet in person/contact. This has made it difficult for banks to comply with FICA's client identification process. For instance, FICA's requirements for client verification, which can include fingerprinting and photography, were difficult to adhere to during periods of social distancing, potentially making it easier for money laundering activities to go undetected. This demonstrates that COVID-19 significantly impacted client identification, which may have encouraged illicit money laundering perpetrators to easily penetrate South African banking institutions and commit money laundering activities. Perhaps contributing to South Africa being grey-listed.

The FICA distinguishes between ongoing business relationships and isolated transactions, specifying that transactions below R5000 do not qualify as significant single transactions.[59] Consequently, banks that cannot verify the identities and transactions of their clients are held accountable for

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53 S 21 of the FICA.

54 S 21(1) 21 read with s 21A of the FICA.

55 S 21 of the FICA.

56 S 26 of the FICA; see related discussion by De Koker "Client Identification and Money Laundering Control: Perspectives on the Financial Intelligence Centre Act 38 of 2001" 2004 *Tydskrif vir die Suid-Afrikaanse* 715 716.

57 S 21B (1) of the FICA.

58 Heratha and Herath "Coping with the New Normal Imposed by the COVID-19 Pandemic: Lessons for Technology Management and Governance" 2020 *Information Systems Management* 277 279.

59 S 1A of the FICA; see related discussion by Kersop and Du Toit "Anti-Money Laundering Regulations and the Effective Use of Money in South Africa" 2015 *Potchefstroom Electronic Law Journal* 1603 1620.

money laundering offences.[60] To comply with FICA, banks must discontinue any business relationships or transactions with clients whose identities cannot be verified.[61]

Banks are required to gather detailed information about prospective clients, including the nature of the business relationship, to assess the risk of money laundering.[62] Certain indicators may suggest a higher risk of money laundering, such as clients holding multiple bank accounts within the same region, making cash deposits into foreign banks' general accounts, or requesting credit and debit cards be sent to addresses other than their own.[63] High-risk categories include politically exposed individuals and complex banking arrangements like cross-border correspondent banking. However, FICA does not explicitly outline these risk factors, leaving a gap in the legislation that might warrant future amendments to better identify high-risk clients.[64] This flaw remains unsolved under the FICA. Notably, banks need to understand the intended purpose behind a client's business relationship. There is an implicit suggestion that those inadvertently involved in money laundering could be exempt from penalties if they prove ignorance of their client's motives. This potential loophole suggests that FICA may offer inadvertent protection for those involved in money laundering, underlining a need for clarification within the act. The possibility for banks to argue a lack of knowledge regarding a client's intentions for money laundering further highlights this issue, suggesting that FICA might provide unintended defences for those involved in such illicit activities within the South African banking sector.

The FICA provides for customer due diligence.[65] This involves banks getting to know their clients and understanding the nature of their business dealings, essentially eliminating anonymous banking activities.[66] This initiative under FICA is crucial for identifying and deterring potential money laundering activities by making it difficult for perpetrators to remain anonymous.[67] This was a good effort by the FICA to combat money laundering in South African banking institutions because, for example, illicit money laundering perpetrators will be easy to identify. Furthermore, customer due diligence will deter illicit money laundering perpetrators from committing money laundering offences since their identities will be known. However, FICA currently lacks specific provisions requiring enhanced scrutiny for high-risk individuals, such as politically exposed persons or

60 S 20A of the FICA.

61 S 21E of the FICA.

62 S 10(*a*) if the FICA.

63 Pierre-Laurent, Zerzan, Noor, Dannaoui and De Koker *Protecting Mobile Money against Financial Crimes: Global Policy Challenges and Solutions* (2011) 71.

64 Uford "Electronic Banking Application and Sterling Bank Customers' Adoption: Issues, Challenges and Benefits" 2018 *Business and Social Sciences Journal* 1 8.

65 Henning and Ebersohn "Insider Trading, Money Laundering and Computer Crime" 2001 *Transactions of the Centre for Business Law: Combating Economic Crime* 105 115.

66 Hugo and Spruyt "Money Laundering, Terrorist Financing and Financial Sanctions: South Africa's Response by Means of the Financial Intelligence Centre" 2018 *Journal of South African Law* 227 235.

67 Cox *Handbook of Anti-Money Laundering* (2014) 315.

those involved in international banking relationships.[68] There is a pressing need for FICA to be revised to impose stricter due diligence obligations on banks when dealing with such high-risk categories to safeguard financial institutions from the threats of money laundering.

Customer due diligence encompasses a range of practices, including the identification and ongoing verification of clients, understanding the business and financial activities of clients, and continuous monitoring of their transactions.[69] This includes identifying the true beneficial owners behind legal entities to prevent misuse for money laundering purposes. Banks are expected to implement additional controls to grasp the potential risks posed by their clientele fully.[70] Should a bank fail to identify a client or perform ongoing due diligence adequately, it is prohibited from establishing or continuing a business relationship or conducting transactions with the client.[71] FICA grants banks the autonomy to determine the level of due diligence necessary to meet their objectives of knowing their clients and their business activities.[72] Failure to comply with these due diligence measures results in the termination of the business relationship in alignment with the bank's Risk Management and Compliance Program.[73] Despite these measures, there are challenges in effectively implementing customer due diligence, such as the complex identification and verification processes that can allow money laundering activities to go unnoticed. Expertise is often required to navigate these intricate processes effectively.

For clients that are legal entities, trusts, or partnerships, banks must implement enhanced due diligence, particularly concerning beneficial ownership. Continuous monitoring of customer transactions is essential for detecting suspicious activities. Yet, this strategy has limitations, particularly in monitoring transactions within unregulated sectors, allowing some money laundering activities to evade detection owing to the absence of a formal transaction record in such environments. This gap in FICA's customer due diligence provisions remains a significant challenge in the fight against money laundering.[74]

Under FICA, banks must gather essential customer information, including names, permanent addresses, nationality, dates and places of birth, identity numbers, signatures, occupations, any public positions held, employers' names, and details about the account and banking relationship.[75] Moreover, banks are also required to maintain records of this information, ensuring that they include either copies of or references to the documentation used to verify an individual's identity.[76] For business relationships, these records should also detail the nature and purpose of the relationship and the origin of

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68 Njotini "The Transaction or Activity Monitoring Process: An Analysis of the Customer Due Diligence Systems of the United Kingdom and South Africa" 2000 *Obiter* 556 566–567.

69 S 1 and s 21B of the FICA.

70 S 21A of the FICA.

71 S 21E of the FICA.

72 S 21B of the FICA.

73 S 21(*a*)–(*c*) of the FICA.

74 S 21D of the FICA.

75 S 21–21H of the FICA.

76 S 22(1) of the FICA.

the funds involved.[77] The rationale behind maintaining such comprehensive records is to distinguish between legitimate and suspicious customers, aiding in effective transaction monitoring and preventing money laundering within the South African banking sector.[78] Banks are required to retain these records for a minimum of five years following the termination of a business relationship, the completion of a transaction, or the submission of a report to the FIC.[79] However, the five-year record retention requirement may be considered a limitation, potentially allowing money launderers to escape prosecution if their activities fall outside this timeframe.[80]

Record-keeping serves as a deterrent against money laundering, preserving the integrity of the banking system and aiding in tracing illicit activities. Enhancements such as integrating artificial intelligence could further bolster the effectiveness of these measures.[81] While the FICA's requirements for reporting and whistleblowing are designed to strengthen the fight against money laundering, the effectiveness of these measures may be challenged by the prevailing cash-based economy and the high levels of corruption and fraud in South Africa. Encouraging whistleblowing and providing immunity for informants are crucial steps in bolstering the efforts of the FIC and banks to counteract money laundering within the nation's banking institutions.

5 ANALYSIS OF INTERNATIONAL AML/CFT STANDARDS

The Basel AML Index, Global Standards and Best Practices, and the FATF represent key international frameworks and benchmarks in the fight against money laundering, to which South Africa is committed as part of its global obligation to regulate and prevent financial crimes. The Basel AML Index evaluates countries based on their risk exposure to money laundering and terrorist financing, offering a comprehensive overview that helps in understanding the effectiveness of regulatory measures and the level of risk in different jurisdictions.[82] On the other hand, Global Standards and Best Practices encompass a wide array of protocols and guidelines established by various international bodies aimed at harmonising anti-money laundering (AML) efforts across borders, enhancing the integrity of the global financial system, and facilitating international cooperation.

Despite the significance of these standards in shaping South Africa's AML regulatory landscape, this article will specifically focus on the FATF, owing to its recent actions affecting the country. South Africa's engagement with the FATF is particularly noteworthy, given the organisation's decision to place the country on its grey list owing to deficiencies in compliance with these Recommendations. This designation indicates that South Africa is under increased monitoring by the FATF, with the expectation to address specific

77 S 21(2) of the FICA.
78 S 22(2)(*a*)(i)-(iii) of the FICA.
79 S 22A (1) of the FICA.
80 See s 22A(1) of the FICA.
81 Koh *Suppressing Terrorist Financing and Money Laundering* (2006) 153.
82 Louis and Hočevar *Financial Intelligence Units: An Overview* (2004) 17.

regulatory weaknesses within agreed timelines to strengthen its AML/CFT regime. The implications of this grey-listing for South Africa are profound, affecting not only its international financial relations but also necessitating significant adjustments within its domestic legal and regulatory frameworks to meet the FATF's stringent compliance requirements.

5 1 The Financial Action Task Force's Role in Combating Money Laundering

The FATF is an independent international body established in 1989 at the Organisation for Economic Co-operation and Development (OECD) economic summit held in Paris.[83] The FATF aims to develop and promote national and international strategies to combat money laundering offences.[84] As a policy-making body, the FATF attempts to generate the necessary political will to bring about national legislative and regulatory reforms to combat money laundering.[85] The FATF conducts mutual evaluations of member and non-member countries to assess their compliance with the AML/CFT standards.[86] It identifies countries that are non-compliant or have significant deficiencies in their AML/CFT framework and may issue public statements warning other countries about the risks associated with these jurisdictions. Furthermore, the FATF promotes the implementation of effective AML/CFT measures by providing guidance and assistance to countries. In this regard, the FATF, of which South Africa is a member, has significantly impacted national laws and the global fight against money laundering.[87] In 1998, it was recognised that there was a need to expand the membership of the FATF to a limited number of strategically important countries that could play a significant regional role in combating money laundering.[88] In this regard, Argentina, Brazil, and Mexico were admitted as members in 2002, and then South Africa and Russia were admitted in 2003.[89]

The FATF first published its Recommendations aimed at governments and financial institutions in 1990 to regulate money laundering effectively in banking institutions.[90] The FATF Recommendations aim to provide a

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83 Schiavone *International Organizations: A Dictionary and Directory* (2005) 140.

84 Fondo Monetario Internacional South Africa: Report on the Observance of Standards and Codes – FATF Recommendations for Anti-Money Laundering and Combating the Financing of Terrorism (2004) 2.

85 OECD Global Forum on Transparency and Exchange of Information for Tax Purposes: *Germany 2017 (Second Round) Peer Review Report on the Exchange of Information on Request: Peer Review Report on the Exchange of Information on Request* (2017) 20.

86 Harvey "Evaluation of Money Laundering Policies" 2005 *Journal of Money Laundering Control* 401.

87 Schott *Reference Guide to Anti-money Laundering and Combating the Financing of Terrorism* 8.

88 Hopton *Money Laundering a Concise Guide for All Business* (2016) 17.

89 Argentina, Australia, Austria, Belgium, Brazil, Canada, Denmark, European Commission, France, Finland, Germany, Greece, Hong Kong, Iceland, Ireland, Italy, Japan, Luxembourg, Mexico, Netherlands, New Zealand, Norway, Portugal, Russian Federation, Singapore, South Africa, Spain, Sweden, Switzerland, Turkey, The Gulf Co-operation Council, United Kingdom, United States of America; Hopton *Money Laundering a Concise Guide for All Business* 18.

90 Chamberlin *The Fight against Money Laundering* (2001) 9.

comprehensive regime against money laundering and have been accepted worldwide as one of the most comprehensive bases for tackling money laundering.[91] However, the FATF was limited to drug trafficking offences.[92] In this regard, the Vienna Convention[93] was enacted to limit the retraction of money laundering offences to drug trafficking-related offences.[94] Consequently, the FATF reviewed and extended its Recommendations to cover all crimes.

The FATF sets out a comprehensive set of Recommendations that establish a framework for countries to prevent, detect, and prosecute money laundering and terrorist financing activities. The FATF's Recommendations are divided into 40 different areas, covering topics such as customer due diligence, record-keeping, reporting suspicious transactions, and international cooperation. The Recommendations are designed to be flexible so that they can be implemented in a manner that is appropriate for each country's unique circumstances. The FATF Recommendations stipulate that countries should adopt measures that enable their competent authorities to confiscate property, proceeds from money laundering or predicate offences, instrumentalities used in or intended for use in the commission of these offences, or property of corresponding value without prejudicing the rights of bona fide third parties.[95] The FATF stipulates that such measures should include the authority to identify, trace, and evaluate property that is subject to confiscation;[96] and carry out provisional measures, such as freezing and seizing, to prevent dealing, transferring, or disposal of such property.[97] Furthermore, the FATF Recommendation also provides for steps that will prevent or void actions that prejudice the State's ability to recover property that is subject to confiscation;[98] and take any appropriate investigative measures.[99]

One of the key Recommendations of the FATF is for countries to implement a risk-based approach to AML/CFT measures. This means countries should assess the risks of money laundering and terrorist financing in their jurisdictions and tailor their AML/CFT measures accordingly. A risk-based approach ensures that countries can allocate their resources effectively and efficiently and focus on the highest-risk areas. The FATF also recommends that countries establish a legal and institutional framework to combat money laundering and terrorist financing.[100] This includes the criminalisation of money laundering and terrorist financing, the establishment

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91 Hopton *Money Laundering A Concise Guide for All Business* 19.

92 Hopton *Money Laundering a Concise Guide for All Business* 19.

93 The United Nations Conference for the Adoption of a Convention Against Illicit Traffic in Narcotic Drugs and Psychotropic Substances of 1998, see article 3 and 5.

94 *Ibid*.

95 See Recommendation 3 of the FATF.

96 See Recommendation 13 of the FATF.

97 See Recommendation 3 of the FATF.

98 Gilmore *Dirty Money: The Evolution of International Measures to Counter Money Laundering and the Financing of Terrorism, Volume 599* (2004) 262.

99 Norton and Walker *Banks: Fraud and Crime* (2014) 418.

100 FATF "Anti-money Laundering and Counter-Terrorist Financing Measures – South Africa, Fourth Round Mutual Evaluation Report, FATF" (2021) Paris http://www.fatfgafi.org/publications/mutualevaluations/documents/mer-south-africa-2021.html (accessed 2023-10-16) 24.

of competent authorities to supervise and regulate AML/CFT measures, and the provision of resources and training for law enforcement and other relevant authorities.[101] A risk-based approach ensures that countries can allocate their resources effectively and efficiently and focus on the highest-risk areas. The FATF also recommends that countries establish a legal and institutional framework to combat money laundering and terrorist financing.[102] This includes the criminalisation of money laundering and terrorist financing, the establishment of competent authorities to supervise and regulate AML/CFT measures, and the provision of resources and training for law enforcement and other relevant authorities.

The FATF also provides that banking institutions should not keep anonymous accounts or accounts in obviously fictitious names.[103] In this regard, banking institutions should undertake customer due diligence measures, including identifying and verifying the identity of their customers.[104] Furthermore, the FATF requires financial institutions to perform normal due diligence measures in relation to cross-border correspondent banking and other similar relationships.[105] Furthermore, the FATF mandates banking institutions to pay special attention to any money laundering threats that may arise from new or developing technologies that might favour anonymity and take measures, if needed, to prevent their use in money laundering schemes.[106] However, it should be noted that while the FATF allows for the use of technology that could be used to commit money laundering crimes in financial institutions, it does not explicitly allow for the use of artificial intelligence measures to detect and prevent money laundering in banking institutions.[107]

Another important recommendation of the FATF is for countries to enhance international cooperation and information sharing to combat money laundering and terrorist financing.[108] This includes cooperation between countries, law enforcement agencies, financial institutions, and other relevant stakeholders. The FATF encourages countries to share information on suspicious transactions and to cooperate in investigations and prosecutions of money laundering and terrorist financing activities. In addition to these Recommendations, the FATF also provides guidance on specific topics, such as virtual assets,[109] proliferation financing,[110] and the risk-based approach for casinos and other gambling establishments.[111]

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101 See Recommendation 13 of the FATF.

102 See recommendation 3 of the FATF.

103 OECD *Improving Access to Bank Information for Tax Purposes* (2000) 26.

104 See Recommendation 5 of the FATF.

105 See Recommendation 7 of the FATF.

106 See Recommendation 8 of the FATF.

107 See Recommendation 8 of the FATF.

108 See Recommendation 10 of the FATF.

109 See Recommendation 15 of the FATF which requires countries to regulate virtual asset service providers and apply a risk-based approach to new technologies.

110 See Recommendation 7 (targeted financial sanctions related to proliferation), with additional references to proliferation finance risks in Recommendations 1 and 2 (risk assessment and domestic coordination).

Notably, the FATF's Recommendations provide a comprehensive and adaptable framework for countries to prevent, detect, and prosecute money laundering and terrorist financing activities. Countries that follow the FATF's standards and best practices can better protect their financial systems from abuse and contribute to the global fight against money laundering and terrorist financing. South Africa, like all member countries, is expected to comply with these Recommendations.

In its 2021 Mutual Evaluation Report, the FATF noted that South Africa had made progress in implementing the Recommendations, but there were still significant weaknesses that needed to be addressed.[112] The Report highlighted several areas where South Africa's implementation of the Recommendations fell short of international standards. For example, the FATF noted that South Africa's AML/CFT framework did not adequately cover all types of financial institutions and designated non-financial businesses and professions (DNFBPs).[113] The FATF recommended that South Africa should extend the scope of its AML/CFT framework to cover all financial institutions and DNFBPs.

The FATF also highlighted weaknesses in South Africa's customer due diligence requirements.[114] The FATF recommended that South Africa should require financial institutions to identify and verify the identity of beneficial owners and to conduct ongoing monitoring of customers' transactions and activities.[115] Furthermore, the FATF noted that South Africa's regulatory and supervisory framework needed strengthening to ensure effective enforcement of AML/CFT obligations. The FATF recommended that South Africa should increase its capacity to conduct risk assessments and take enforcement actions against non-compliant institutions.[116]

In light of the FATF's Recommendations, South Africa has taken steps to strengthen its AML/CFT framework. For example, in 2019, South Africa introduced new AML/CFT regulations that provide detailed guidance on implementing AML/CFT obligations under FICA. The regulations set out specific requirements for customer due diligence, record-keeping, and reporting suspicious transactions. Overall, the FATF's Recommendations provide a comprehensive framework for countries to prevent, detect, and prosecute money laundering and terrorist financing activities. While South Africa has made progress in implementing the Recommendations, there is still work to be done to bring its AML/CFT framework in line with international standards.

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111 Casinos and other gambling establishments are treated as "designated non-financial businesses and professions," and the risk-based approach for them appears chiefly under Recommendation 22 (customer due diligence obligations for DNFBPs, including casinos) and Recommendation 28 (regulation/supervision of DNFBPs).

112 FATF http://www.fatfgafi.org/publications/mutualevaluations/documents/mer-south-africa-2021.html 6.

113 FATF http://www.fatfgafi.org/publications/mutualevaluations/documents/mer-south-africa-2021.html 6.

114 FATF http://www.fatfgafi.org/publications/mutualevaluations/documents/mer-south-africa-2021.html 4.

115 FATF http://www.fatfgafi.org/publications/mutualevaluations/documents/mer-south-africa-2021.html 157.

116 *Ibid*.

6 RECOMMENDATIONS

To enhance its (AML/CFT) efforts, South Africa must fortify its regulatory and legal frameworks, addressing the gaps highlighted by the (FATF).[117] This involves not only the development but also the diligent enforcement of comprehensive laws and measures aimed at overcoming the shortcomings identified in the FATF evaluations. Furthermore, South Africa should intensify its participation in international cooperation and diplomatic endeavours to navigate the challenges of its grey-listing effectively. Such diplomatic engagement is crucial for securing support and understanding from the global community and facilitating the resolution of AML/CFT deficiencies.[118] Compliance with the FATF's Recommendations is another critical area for South Africa, necessitating the alignment of its domestic legal and regulatory structures with the FATF's standards. This alignment should particularly focus on enhancing customer due diligence, strengthening enforcement mechanisms, and bolstering law enforcement capabilities, as underscored in the 2021 South African FATF Mutual Evaluation Report.[119]

Learning from international best practices offers significant benefits for South Africa. Examining the successful strategies employed by countries like Mauritius in addressing grey listing challenges can provide valuable insights and practical approaches for South Africa to emulate.[120] Mauritius was placed on the (FATF) grey list in February 2020. The grey-listing was a result of deficiencies in the country's (AML/CFT) framework.[121] This led to increased scrutiny of Mauritius' financial practices and regulatory mechanisms, particularly in relation to financial crimes and money laundering activities. The grey-listing prompted Mauritius to respond through legislative measures and regulatory reforms to address the identified deficiencies. The country's financial sector, including banks and investment companies, faced enhanced due diligence requirements during business dealings, reflecting the impact of the grey-listing on regulatory practices and compliance standards.[122] In response to the grey-listing, Mauritius undertook significant reforms to strengthen its AML/CFT framework.[123]

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117 Jayasekara 2020 *Journal of Money Laundering Control* 665.

118 Idrees, Naazer and Khan 2020 *Liberal Arts and Social Sciences International Journal* 415.

119 Bissett, Steenkamp and Aslett 2023 *Journal of Financial Crime* 1534 1545.

120 Mahadew "Mauritius Responds to its 'Grey-Listing' by the Financial Action Task Force Through Statutes: An Informative Review" 2023 44(3) *Statute Law Review* 2.

121 Beebeejaun and Dulloo 2022 *Journal of Money Laundering Control* 401–407.

122 *Ibid*.

123 This involved enacting new laws and amending existing ones to address the FATF's concerns. Key legislative changes included:

(1) The introduction of the Financial Services (Special Purpose Fund) Rules to enhance the regulatory framework for special purpose funds.

(2) Amendments to the Banking Act and the Financial Intelligence and Anti-Money Laundering Act to strengthen CDD measures and improve the monitoring and reporting of suspicious transactions.

(3) The enactment of the Virtual Asset and Initial Token Offering Services Act to regulate virtual assets and related services, reflecting the global shift towards recognizing and addressing the risks associated with virtual currencies and assets.

The potential impact of grey-listing on South Africa's financial flows and international capital markets cannot be overlooked. It is essential for South Africa to understand these implications and devise targeted legal and regulatory strategies to mitigate any adverse effects on its financial sector.[124]

Lastly, embracing technological advancements, particularly in the context of virtual assets, is also recommended for South Africa. With the FATF placing increased emphasis on virtual asset regulations, South Africa should update its legal frameworks to address emerging money laundering risks associated with these assets.[125] In this regard, the FATF describes cryptocurrencies as a decentralised virtual currency based on mathematical algorithms and secured through cryptography, though it does not offer a uniform definition. In South Africa, the Crypto Assets Regulatory Working Group (CARWG), part of the Intergovernmental Fintech Working Group (IFWG), proposed a definition in their Position Paper on Crypto Assets, viewing them as crypto assets rather than currencies. Hence, this article uses "crypto asset/s" and "cryptocurrency/s" interchangeably, defining a crypto asset as a digital value representation not issued by central banks but tradeable, transferable, or storable electronically, employing cryptographic methods and distributed ledger technology.[126] Subsequently, the Financial Sector Conduct Authority (FSCA) categorised crypto assets as financial products under the FAIS Act, aiming to foster a fair, transparent, and accountable financial services sector in South Africa by incorporating crypto assets under its regulatory scope.[127] In this regard, cryptocurrency exchanges must secure the appropriate licenses and adhere to the FAIS Act enhancing consumer protection and ensuring compliance with conduct, disclosure, and operational standards. Additionally, financial advisors and intermediaries dealing with crypto assets must follow the FAIS Act's mandates, including proper record-keeping, suitability assessments, and fair customer treatment. While the IFWG's classification of cryptocurrencies as crypto assets subjects them to regulation as financial products under the FAIS Act, relying solely on this classification could impede the effective regulation of cryptocurrencies. This is because traditional financial assets, unlike cryptocurrencies, do not utilise innovative blockchain technology, making the current regulatory framework inadequate for addressing the complex technological aspects of cryptocurrencies and combating money laundering effectively.

7 CONCLUSION

The grey-listing of South Africa by the FATF for its perceived weaknesses in combating money laundering and terrorist financing has significant legal implications for the country. This study has provided a comprehensive

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[124] Jonsson, Pettersson, Larson and Artzi "The Impact of Blacklists on External Deposits: One Size Does Not Fit All" 2021 *Journal of Money Laundering Control* 4–8.

[125] Emerald Insight "FATF Will Strengthen Its International Recommendations" (2023) Emerald Expert Briefings https://doi.org/10.1108/oxan-db280226 (accessed 2023-11-30).

[126] Ncube and Kabwe "The Regulation of Cryptocurrencies to Combat Money Laundering Crimes in South African Banking Institutions" 2023 *De Jure Law Journal* 368.

[127] Financial Sector Conduct Authority: Policy Document Supporting the Declaration of a Crypto Asset as a Financial Product under the Financial Advisory and Intermediary Services Act (2022)

analysis of the international AML/CFT standards, including the FATF Recommendations, the Basel AML Index, and global standards and best practices. The study has also examined the legal and regulatory framework for AML/CFT in South Africa and identified key policy Recommendations for strengthening the country's AML/CFT framework.

NOTES / AANTEKENINGE

The Constitutionality of Mandatory COVID-19 Vaccinations

1 Introduction

South Africa is a democratic society founded on the principles provided in the Constitution of the Republic of South Africa, 1996 (refer to the Preamble of the Constitution). The Constitution is the supreme law and any act or conduct that is inconsistent with the provisions and values of the Constitution is invalid (s 2 of the Constitution). The Constitution ensures the protection of 27 constitutional rights specified in Chapter II – that is, the Bill of Rights. The Bill of Rights, as the cornerstone of South Africa's democracy, affirms the democratic values of human dignity, equality, and freedom (ss 1(*a*) and 7(1)). Section 7(2) of the Constitution obliges the State to respect, protect, promote and fulfil the rights in the Bill of Rights. These rights include the right to human dignity (s 10), the right to life (s 11), the right to freedom and security (including the right to bodily and psychological integrity to make decisions about health and treatment) (s 12), the right to privacy (s 14), the right to freedom of religion, belief and opinion (s 15), and the right to fair labour practices (s 23(1)). In *NEHAWU v University of Cape Town* (2003 24 *ILJ* 95 (CC)), the Constitutional Court confirmed that the right to fair labour practices extends to both employers and employees. This right could, for example, impact employers by compelling employees to report for duty despite the possibility of their being infected at the workplace, and despite the right to an environment that is not harmful to their health or well-being (s 24(*a*)). Rights are not absolute: there are instances when the rights guaranteed by the Constitution may be limited on reasonable and justifiable grounds, as is explained below (s 36).

Employers have, in some cases, implemented mandatory vaccination policies against COVID-19. Such measures limit an individual's constitutional rights, as provided for in the Bill of Rights. The question this note seeks to answer is whether dismissing an employee who refuses to be vaccinated against COVID-19 is constitutional. This article does not intend to discuss all the rights provided for in the Constitution, but rather merely the relevant rights raised as a defence by dismissed employees who refuse to be vaccinated against COVID-19.

https://doi.org/10.17159/hz0mxx30

2 The right to freedom of religion, belief and opinion

Dismissed employees who refuse to be vaccinated against COVID-19 often raise in defence the argument that it infringes a critical right – the right to freedom of religion, belief and opinion (s 15(1) of the Constitution). This issue was addressed in the case of *Cecilia Bessick v Baroque Medical (Pty) Ltd* (WECT13083-21), where the commissioner had to determine whether the applicant was wrongfully terminated for refusing vaccination. The respondent, a medical supplier, had implemented a mandatory COVID-19 vaccination policy for its employees, but the applicant refused to comply, based on medical, personal and religious grounds. During the disciplinary enquiry, it was found that the applicant's medical grounds remained unsubstantiated, and the commissioner determined that her personal and religious grounds were without validity. Consequently, she was retrenched, based on operational requirements. The commissioner found that the applicant's refusal to comply with the respondent's mandatory vaccination policy resulted in her being unable to continue performing her duties; the respondent had thus committed no wrongdoing in terminating the applicant's services owing to its operational requirements. Therefore, the commissioner found her dismissal to be substantively fair. It is important to note that section 15(1) of the Constitution protects the right to freedom of religion, belief and opinion. This case thus serves as an example of how this right can be balanced against an employer's operational requirements.

The *Cecilia Bessick* case shows that mandatory vaccinations infringe upon a person's right to freedom of religion, belief and opinion. Since an individual is free to refuse to undergo medical treatment because of their religious beliefs, compulsory vaccination would infringe upon that right (*EWN v Pharmaco Distribution (Pty) Ltd* (LC) (unreported case no JS654/10, 22-9-2015); see also, Ndou "Dismissal for Failure to Submit for Medical Treatment" 2016 *De Jure* 45–46). However, no right is absolute: a right is always capable of being limited if there be a compelling public interest in such limitation.

3 The right to bodily integrity

The employee's right to bodily integrity is guaranteed by the Constitution (s 12(2)). Section 12(2) provides: "Everyone has the right to bodily and psychological integrity, which includes the right– … (*b*) to security in and control over their body." In the case of *Kgomotso Tshutsha v Baroque Medical (Pty) Ltd* ((GABJ 20811-21) dated 2022-06-22), the applicant had been dismissed for raising a defence against vaccination, and claimed that mandatory vaccination was an infringement of her right to bodily integrity. The commissioner decided that the dismissal of the employee who refused vaccination against COVID-19 was unconstitutional, and therefore that the employee had been unfairly dismissed. The respondent had implemented a mandatory vaccination policy requiring all its employees to be vaccinated,

and alleged that the vaccination of its employees was an operational requirement, as the respondent believed that vaccinated persons were less likely to miss work owing to illness. The applicant refused to be vaccinated based on medical grounds, owing to an alleged adverse reaction to the influenza vaccine ten years previously. The applicant was requested to provide proof, which in this instance was a medical certificate confirming the employee's adverse reaction to the influenza vaccine. However, the certificates produced were not accepted by the employer; based on operational requirements, the applicant was dismissed for refusing to be vaccinated, and no severance pay was paid to the applicant by the employer.

The commissioner had to determine whether the respondent's decision to dismiss the applicant in terms of section 189 of the Labour Relations Act (66 of 1995) was fair. In his decision, the commissioner discussed the reasonableness of the respondent's vaccination policy, the issue of severance pay, and whether the dismissal was substantively fair.

The commissioner held that the respondent had failed to show any evidence of the effectiveness of the implementation of a blanket mandatory vaccination policy in any other organisation. It was further held that the Consolidated Direction on Occupational Health and Safety Measures in Certain Workplaces issued on 11 June 2021 by the Minister of Cooperation Governance and Traditional Affairs in South Africa that was still in force at the time of this dispute did not provide for or permit a blanket mandatory vaccination policy. As such, the commissioner held that the respondent's decision was substantively unfair, and that the applicant was entitled to severance pay. The mandatory vaccination policy was declared to be unconstitutional.

Section 12(2) of the Constitution provides that an employee is free to refuse medical treatment or surgery without consent (*EWN v Pharmaco Distribution (Pty) Ltd supra*; see also Ndou 2016 *De Jure* 45–46); the same applies to an employee who refuses to be vaccinated. Section 12(1) and (2) guarantees every worker the right to "freedom of security of person", which includes "control over their body". This is bolstered by the provision that no one may be subjected to medical or scientific experiments without their informed consent.

4 The right to equality

One of the pressing questions that has yet to be answered is whether an employer's directive to an employee to receive the COVID-19 vaccine constitutes an act of unfair discrimination. It is crucial to note that South Africa adheres to the principle of substantive equality, which emphasises the importance of achieving equality in outcomes rather than merely treating individuals equally. Substantive equality acknowledges that it is not the fact of difference that is problematic but rather the harm that flows from such difference. This acknowledgement was reiterated by the court in *President of*

the Republic of South Africa v Hugo (1997 (4) SA 1 (CC)), when it held that the goal of equality in society cannot be achieved by insisting on identical treatment; each case requires a careful, thorough understanding of the impact of discriminatory action upon the particular persons concerned to determine whether or not its overall impact is one that impinges upon the equality clause (*PRSA v Hugo supra* par 41; Loenen "The Equality Clause in the South African Constitution: Some Remarks from a Comparative Perspective" 1997 13 *South African Journal on Human Rights* 401–405). At its core, the equality guarantee protects individuals' human dignity. The Constitutional Court has held that a gross invasion of self-worth constitutes a violation of dignity and therefore of equality (*National Coalition for Gay and Lesbian Equality v Minister of Justice* 1998 (12) BCLR 1517 (CC) par 45–53). The court held that the recognition of the right to dignity is an acknowledgement of the intrinsic worth of human beings, as they are entitled to be treated as worthy of respect and concern (*S v Makwanyane* 1995 (3) SA 391 (CC) par 328). The value of dignity plays a central role in the equality right, as it guides its application. It is through the interpretation and meaning of the values of dignity and equality that the court has developed a context for this right. The meaning ascribed to dignity by the courts in relation to equality is that people are equal in their inherent dignity. When a person is forced to be vaccinated against COVID-19, one may argue that the right to human dignity has been infringed. What then needs to be established is whether such an infringement is based on the justifiable grounds that are recognised by the South African Constitution. Section 9 of the Constitution entrenches the right to equality as follows:

> "(1) Everyone is equal before the law and has the right to equal protection and benefit of the law.
> (2) Equality includes the full and equal enjoyment of all rights and freedoms. To promote the achievement of equality, legislative and other measures designed to protect or advance persons, or categories of persons, disadvantaged by unfair discrimination may be taken.
> (3) The state may not unfairly discriminate directly or indirectly against anyone on one or more grounds, including race, gender, sex, pregnancy, marital status, ethnic or social origin, colour, sexual orientation, age, disability, religion, conscience, belief, culture, language and birth.
> (4) No person may unfairly discriminate directly or indirectly against anyone on one or more grounds in terms of subsection (3) National legislation must be enacted to prevent or prohibit unfair discrimination.
> (5) Discrimination on one or more of the grounds listed in subsection (3) is unfair unless it is established that the discrimination is fair."

It is widely acknowledged that South Africa has developed a comprehensive framework of labour-related legislation, including the Employment Equity Act (55 of 1998) (EEA), to address discrimination in the workplace. This legislation aligns with the overarching objective of section 9(4) of the Constitution. Section 6(1) of the EEA stipulates:

> "No person may unfairly discriminate, directly or indirectly, against an employee in any employment policy or practice on one or more grounds, including race, gender, sex, pregnancy, marital status, family responsibility, ethnic or social origin, colour, sexual orientation, age, disability, religion, HIV

> status, conscience, belief, political opinion, culture, language, birth, or on any other arbitrary ground."

It is essential to note that there must be a clear nexus between the policy or practice and the ground that has been identified to ensure compliance with the legislation.

Different legal tests apply to different situations when unfair discrimination is alleged (De Vos and Freedman *South African Constitutional Law in Context* (2022) 429). Therefore, an equality complaint lodged by a complainant leads to an enquiry in which legal tests are applied (De Vos *et al South African Constitutional Law in Context* 429). A court faced with such a complaint has to identify whether the set of facts deals with different treatment between people or groups of people under section 9(1), (2) or (3) of the Constitution (*Prinsloo v Van der Linde* 1997 (3) SA 1012 par 24; see also Currie and De Waal *The Bill of Rights Handbook* (2013) 218). These three subsections apply in different situations and therefore a court is required to apply a different legal test in each case. The implementation of mandatory vaccination legislation and/or policies may be challenged on grounds that it indirectly discriminates against individuals or groups, in this case, employees who refuse to be vaccinated against COVID-19.

When faced with an enquiry into an alleged violation of the equality clause, the *Harksen* test of the Constitutional Court (*Harksen v Lane NO* 2009 (6) SA 541 (CC)) is applied:

> "(a) Does the provision differentiate between people or categories of people? If so, does the differentiation bear a rational connection to a legitimate government purpose? If it does not, then there is a violation of section 8(1). Even if it does bear a rational connection, it might nevertheless amount to discrimination.
>
> (b) Does the differentiation amount to unfair discrimination? This requires a two-stage analysis:
>
> (i) Firstly, does the differentiation amount to 'discrimination'? If it is on a specified ground, then discrimination will have been established. If it is not on a specified ground, then whether or not there is discrimination will depend upon whether, objectively, the ground is based on attributes and characteristics which have the potential to impair the fundamental human dignity of persons as human beings or to affect them adversely in a comparably serious manner.
>
> (ii) If the differentiation amounts to 'discrimination', does it amount to 'unfair discrimination'? If it has been found to have been on a specified ground, then unfairness will be presumed. If on an unspecified ground, unfairness will have to be established by the complainant. The test of unfairness focuses primarily on the impact of the discrimination on the complainant and others in his or her situation.
>
> If at the end of this stage of the enquiry, the differentiation is found not to be unfair, then there will be no violation of section 8(2).
>
> (c) If the discrimination is found to be unfair then a determination will have to be made as to whether the provision can be justified under the limitations clause." (*Harksen v Lane supra* par 53)

When unfair discrimination is alleged, an initial determination is required as to whether there has been discrimination, and then an enquiry must

investigate whether the discrimination is unfair based on the listed grounds in section 9(3) or on the basis of grounds that are not specified in that subsection (unlisted or analogous grounds) or section 6(1) of the EEA (*Harksen v Lane supra* par 46). Thereafter, if the determination is that the discrimination is unfair, justification in terms of section 36 of the Constitution is still possible, although highly unlikely (Currie and De Waal *The Bill of Rights Handbook* 217–218). The law does not prevent the State or employers from treating some people differently from others (Currie and De Waal *The Bill of Rights Handbook* 218). The court in *Prinsloo* explained that it is impossible for a state to regulate the affairs of its inhabitants without differentiation and making classifications that treat people differently from each other (*Prinsloo v Van der Linde supra* par 24; see also Currie and De Waal *The Bill of Rights Handbook* 218). This is because of the notion of substantive equality discussed above, which does not require everyone to be treated the same. Hence, a law or conduct that differentiates between groups of people will be valid if it does not deny equal protection or benefit of the law. Not all forms of differentiation amount to unequal treatment (*Prinsloo v Van der Linde supra* par 24; see also Currie and De Waal *The Bill of Rights Handbook* 218).

5 The limitation clause

Section 36 of the Constitution provides for the limitation of rights. It provides that rights provided for in the Bill of Rights may be limited in terms of a "law of general application to the extent that the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality, and freedom, considering all relevant factors" (s 36(1)). These factors include: the nature of the right (s 36(1)(*a*)); the importance of the purpose of the limitation (s 36(1)(*b*)); the nature and extent of the limitation (s 36(1)(*c*)); the relation between the limitation and its purpose (s 36(1)(*d*)); and less restrictive means to achieve the purpose (s 36(1)(*e*)). The Constitution's general limitation clause does not imply that any law can limit the provisions of the Constitution at any time (Currie and De Waal *The Bill of Rights Handbook* 151). Section 36 requires that a valid reason for the limitation of an individual's rights as provided by the Bill of Rights must exist (Currie and De Waal *The Bill of Rights Handbook* 151). It is within this context that this article now examines the test used to determine reasonableness and justification in an open and democratic society regarding employees dismissed for refusing to be vaccinated against COVID-19.

Any mandatory vaccination policy introduced by an employer will infringe upon a person's constitutionally protected right. However, mandatory vaccination policies and the Code of Good Practice: Managing Exposure to SARS-COV in the Workplace, 2022 are not laws of general application as envisaged in terms of section 36(1) of the Constitution. That is why section 9 of the Constitution can apply to mandatory vaccination policies. In *Akani Garden Route (Pty) Ltd v Pinnacle Point Casino (Pty) Ltd* ([2001] ZASCA

59), Harms JA distinguished between policies and laws. He stated:

> "The word 'policy' is inherently vague and may bear different meanings. It appears to me to serve little purpose to quote dictionaries defining the word. To draw the distinction between what is policy and what is not with reference to specificity is, in my view, not always very helpful or necessarily correct. For example, a decision that children below the age of six are ineligible for admission to a school can fairly be called a 'policy' and merely because the age is fixed does not make it less of a policy than a decision that young children are ineligible, even though the word 'young' has a measure of elasticity in it. Any course or program of action adopted by a government may consist of general or specific provisions. Because of this I do not consider it prudent to define the word either in general or in the context of the Act. I prefer to begin by stating the obvious, namely that laws, regulations and rules are legislative instruments, whereas policy determinations are not. As a matter of sound government, in order to bind the public, policy should normally be reflected in such instruments. Policy determinations cannot override, amend or be in conflict with laws (including subordinate legislation). Otherwise the separation between Legislature and Executive will disappear." (*Akani Garden Route supra* par 7)

Nonetheless, in light of these findings, there remains a need to discuss the test of when a law of general application that infringes fundamental rights is reasonable and justifiable. If a law of general application is given legal effect, the first step of the test is to determine whether a breach of fundamental rights has been established; and thereafter, whether such a breach is reasonable and justifiable in terms of section 36 of the Constitution (*S v Zuma* [1995] ZACC 1 par 21; *S v Makwanyane* [1995] ZACC 3 par 100). If the offending regulations fail this test, they must be declared to be invalid to the extent of their inconsistency with the Constitution (s 172(1)(*a*) of the Constitution). If it is just and equitable to do so, a court may limit the retrospective effect of the declaration of invalidity or suspend it for a period to allow the competent authority (for example, Parliament) to correct the defect (s 172(1)(*b*) of the Constitution). If the respondents justify the infringement or infringements of fundamental rights, the regulations are valid, their impact on fundamental rights having been sanctioned by the Constitution. It has been held that this approach holds good for the application of section 36(1) as well. In *National Coalition for Gay and Lesbian Equality v Minister of Justice* ([1998] ZACC 15), Ackermann J stated:

> "The relevant considerations in the balancing process are now expressly stated in s 36(1) of the 1996 Constitution to include those itemised in paras (a)–(e) thereof. In my view, this does not in any material respect alter the approach expounded in *Makwanyane*, save that para (e) requires that account be taken in each limitation evaluation of 'less restrictive means to achieve the purpose (of the limitation)'. Although s 36(1) does not expressly mention the importance of the right, this is a factor which must of necessity be taken into account in any proportionality evaluation.
> The balancing of different interests must still take place. On the one hand there is the right infringed; its nature; its importance in an open and democratic society based on human dignity, equality and freedom; and the nature and extent of the limitation. On the other hand there is the importance of the purpose of the limitation. In the balancing process and in the evaluation of proportionality one is enjoined to consider the relation between the

> limitation and its purpose as well as the existence of less restrictive means to achieve this purpose." (*National Coalition for Gay and Lesbian Equality v Minister of Justice supra* par 58)

What is important in this justifiability enquiry is whether the importance of the purpose of the limitation outweighs the interests protected by the right and, if so, whether the limitation is the least restrictive means to achieve that purpose.

6 Conclusion

This article has discussed the constitutionality of mandatory COVID-19 vaccinations for employees and argued that such policies violate fundamental rights enshrined in the Constitution. It has further examined the constitutional rights relevant to the COVID-19 situation, including the right to bodily integrity, the right to equality, and the right to freedom of religion, belief and opinion. It has argued that the constitutionality of mandatory policies in relation to employees who refuse to be vaccinated against COVID-19 is a complex issue. Section 9 of the Constitution prohibits unfair discrimination but allows for fair discrimination. Discrimination based on a listed ground is presumed to be unfair and unconstitutional under section 9(5) of the Constitution, whereas discrimination based on an unlisted ground must be proved to be unfair. In essence, unfair discrimination is defined as unequal treatment of individuals that impairs their dignity as human beings, who are inherently equal with respect to their constitutional rights. In the context of employees who refuse to be vaccinated against COVID-19, the equality clause and section 36 of the Constitution could be applied.

However, what constitutes reasonable and justifiable measures in a democratic society regarding such employees will depend on the specific facts of each case, and the outcomes of applying the equality test, as provided for in the *Harksen* case and section 36 of the Constitution, whichever is applicable. Ultimately, the article argues that mandatory COVID-19 vaccination policies for employees are unconstitutional, as they infringe upon the fundamental rights of employees. The article recommends that employers, rather than mandating vaccination, should consider alternative measures such as education and awareness campaigns to encourage employees to be vaccinated.

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Beyond Policy and Grandiloquence: Africa Continental Free Trade Area (AfCFTA) Protocol as a Vehicle to Accelerate Technology and Innovation

1 Introduction

Technology, innovation, and the law are frequently regarded as adversaries. Technology and innovation signify improving the quality of life and furthering social development (Walsh, Murphy and Horan "The Role of Science, Technology and Innovation in the UN 2023 Agenda" 2020 154 *Technology Forecasting & Social Change* 2–3). Furthermore, they catalyse economic progression, productivity, employment, and attractiveness. Specifically, the United Nations (UN) General Assembly adopted a resolution founded on what it calls "Agenda 2030 for Sustainable Development" (UN "Resolution on Transforming Our World: The Agenda for Sustainable Development" 25 September 2025 (A/RES/70/1)). This resolution identifies several objectives and goals, namely, the Sustainable Development Goals (SDGs), that ought to arouse universal action for the period ending in 2030. Importantly, the resolution accepts that technology and innovation have an inordinate potential to fast-track development and human advancement (A/RES/70/1). Specifically, these novelties improve the social and economic statuses of the most vulnerable (Goal 1 read with Goal 5 of the SDGs), contribute to the creation of inclusive and equitable quality education (Goal 4 of the SDGs), and support the attainment of clean and renewable energy (Goal 7 of the DDGs).

In South Africa, the National Development Plan (NDP) also recognises the strength or ability of technology and innovation to foster development (NDP, 2030). It provides technology and innovation:

> "both deepened and accelerated the world's interconnectedness, enabling higher growth, a leap in trade and a great surge in crossborder investment. The pace is likely to quicken further over the next two decades as information flows and capital movements, trade and migration speed up". (NDP 76. For further interesting reading, see African Union's (AU) Agenda 2063 (The Africa We Want), September 2015)

However, there is the viewpoint that the law (or legal rules) promotes stagnation, bureaucracy, and stringency (Watson *The Nature of Law* (1977) 35). The long-winded nature of the law-making process is consistently attributed to this unavailability of progress and innovation. This is the case because all the law does is direct societal behaviour and sanction or penalise those undermining this authority (Black *Critical Reflections on Regulation* (2002) 2). Accordingly, the positivist posture of the law, that is, it

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is nothing but the multiplicity of commands which are backed by sanctions, gives validity or substantiation to this claim (Watson *The Nature of Law* 35).

Therefore, the question is: What relevance, if any, does the above-mentioned discussion have to the Africa Continental Free Trade Area (AfCFTA) Protocol? The AfCFTA Protocol is a determined or innovative endeavour to accelerate and boost intra-Africa trade. In doing so, it promotes the creation of lucid, translucent, certain, and mutually beneficial norms that regulate trade inside or within the African Continent (Preamble to the AfCFTA Protocol). The Protocol regards technology and innovation as the instruments by which the intra-Africa trade could be expanded, synchronised, and coordinated (Preamble to the AfCFTA Protocol). For example, the AU adopted the Treaty Establishing the African Economic Community on 3 June 1991 (Abuja Treaty). The Treaty sets the scene for formulating and integrating the objectives of the AfCFTA Protocol. In other words, it forecasts the impact that intra-Africa trade will have on Africa. Notably, article 4(2)(e) of the Treaty provides that harmonised national policies are pivotal to promoting Community activities. Community means the organic structure for economic integration established in terms of article 2 of this Treaty and constituting an integral part of the OAU (now, the AU) (see art 1 of the Abuja Treaty). Consequently, it identifies technology and innovation as some of the fundamental community activities to be pursued and endorsed (art 4(2)(e) of the Abuja Treaty). However, the challenge with the law is that legal rules are some of the most perverse barriers to trade (see generally, Handson *Limits to Free Trade: Non-Tariff Barriers in the European Union, Japan and United States* (2010)). Specifically, laws or regulations inhibit entry into the African market or hamper competition. They are likely to be abused by imposing stringent licensing and certification measures, currency controls or transfers, foreign exchange and equity, taxation, and equity of participation regulations (Van Jaarsveld "Legal Barriers to the International Trade in Financial Services" 2001 34 *The Comparative and International Law Journal* 109–110).

Well, there is more that could be learned from the study of the legal barriers to entry. For example, the World Trade Organisation (WTO) established a committee referred to as the "Technical Barriers to Trade (TBT) Committee" (WTO "Committee on Technical Barriers to Trade" https://www.wto.org/english/tratop_e/tbt_e/tbt_com_e.htm (accessed 2023-10-18)). In line with its name, the Committee identifies the existing or potential technical barriers to trade (TBT) and serves as the medium for the member countries to address specific trade concerns regarding, *inter alia*, laws and regulations (WTO https://www.wto.org/english/tratop_e/tbt_e/tbt_com_e.htm). The TBT Committee accepts that laws and regulations are necessary for guaranteeing the protection of "health, safety and the environment" (WTO "Reducing Trade Friction from Standards and Regulations: Technical Barriers to Trade" https://www.wto.org/english/thewto_e/20y_e/tbt_brochure2015_e.pdf (accessed 2023-10-18)). It continues, however, that they can be "burdensome, technical and complex" (WTO https://www.wto.org/english/thewto_e/20y_e/tbt_brochure2015_e.pdf). Because of this, the WTO supports a trade paradigm that circumvents needless or prejudicial impediments to international trade and preserves the

trading country's right to regulate to protect its legitimate interests (WTO "The WTO Agreement Series: Technical Barriers to Trade" https://www.wto.org/english/res_e/booksp_e/tbt3rd_e.pdf (accessed 2023-10-18)).

Given the above, it is enquired whether Africa has the necessary means to achieve the AfCFTA Protocol's objectives and still alleviate the legal barriers to trade in a manner that improves the necessary instruments and capacity for market accessibility. Simply, does Africa have the instruments needed to create legal rules, regulations, and procedures that extinguish the unnecessary obstacles to trade? The investigation flows from the viewpoint that both the *de facto* and *de jure* integration of technology and innovation are pivotal to accomplishing the principles that underlie the AfCFTA Protocol.

Therefore, this article investigates the existing regulatory and technological structures to lessen the trade barriers. In doing so, it examines the extent to which Africa integrates technology and innovation to achieve the objectives of the AfCFTA Protocol. Furthermore, it scrutinises the degree to which the prevailing legal rules, regulations, and procedures decrease the unnecessary obstacles to trade. To achieve the aforesaid, relevant AU legal instruments and AfCFTA provisions are studied and discussed. Where necessary, inter-country examples are identified and explored to enunciate the strengths and limits of these instruments. The last section of this article is the conclusion. In that section, a summary of the facts presented contains a recommended way forward or suggested ways of improving the prevailing African trade paradigm or paradigms.

2 Africa trade framework

2 1 General overview

Attempts to integrate trade in Africa have been a subject of debate for many years. This debate finds validation from the philosophical postulations and teachings of prominent African leaders such as Kwame Nkrumah, Julius Nyerere, Nnamdi Azikiwe, and, quite recently, Thabo Mbeki. For example, Nkrumah published a book titled *Africa Must Unite* in 1963 (Nkrumah *Africa Must Unite* (1963)). In that book, Nkruma chronicles the successes and fluency of trade in Africa prior to the permeation of Western culture and practices (Nkrumah *Africa Must Unite* 2). In doing so, he relied, in part, on an earlier writing by Basil Davidson stating, *inter alia*, that:

> "They (Western traders) anchored in havens that were thick with ocean shipping. They went ashore to cities as fine as all but a few they could have known in Europe. They watched a flourishing maritime trade in gold and iron and ivory and tortoiseshell, beads and copper and cotton cloth, slaves and porcelain; and saw that they had stumbled on a world of commerce even larger, and perhaps wealthier, than anything that Europe knew." (Davidson *Old Africa Rediscovered* (1959) 165)

Nkrumah used some of the writings that were captured in the historical centres, for example, Djenné and Timbuktu, to accentuate the idea that African trade should be allowed to flourish, free of needless trade barriers

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(Nkrumah *Africa Must Unite* 2–3). To him, Africa must harness its human, technical, and economic resources to enhance its raw material and embrace innovations in technology (Nkrumah *Africa Must Unite* 38–40. For further interesting reading, see Murungu "Africa Free Trade Area Foretold: A Reflective Analysis of Kwame Nkrumah's Views for Africa in Line with the Benefits of the Agreement Establishing the African Continental Free Trade Area 2020 13 *International Journal of Sustainable Development* 62). Therefore, these opportunities should, according to Nkrumah, be revived if Africa is to assiduously realise its rightful place as one of the global trade leaders (Murungu 2020 *International Journal of Sustainable Development* 62. See also, Nabudere "The African Renaissance in the Age of Globalization" 2001 6 *African Journal of Political Science* 13–15).

Nkruma's philosophical teachings accord with Mbeki's vision for the African Renaissance. Jana states that the latter is an all-embracing concept founded on Africa's diverse history and cultures (Jana "African Renaissance and the Millenium Action Plan" 2001 XV *Quest* 38). It is ideal to re-energise African development and propel the continent as an essential partner in the global arena (Jana 2001 *Quest* 38). Accordingly, the African Renaissance accelerated, controlled, and sustained the social, cultural, and economic growth of Africa (Mbeki *Africa the Time Has Come: Selected Speeches* (1998) 38).

It is ideas such as those mentioned above that pivoted the establishment and development of, amongst others, the Organization of African Unity (OAU) in 1963 (the OAU (now the African Union or AU) is an inter-governmental structure that was established on 25 May 1963. It serves as a continental body of fifty-five (55) member states, the African Continent's countries. In terms of article 3 of the Constitutive Act of the AU, the objectives of the AU are to: (a) achieve greater unity and solidarity between the African countries and the peoples of Africa; (b) defend the sovereignty, territorial integrity, and independence of its Member States; (c) accelerate the political and socio-economic integration of the continent; (d) promote and defend African common positions on issues of interest to the continent and its peoples; (e) encourage international cooperation, taking due account of the Charter of the UN and the Universal Declaration of Human Rights; (f) promote peace, security, and stability on the continent; (g) promote democratic principles and institutions, popular participation, and good governance; (h) promote and protect human and peoples' rights in accordance with the African Charter on Human and Peoples' Rights and other relevant human rights instruments; (i) establish the necessary conditions which enable the continent to play its rightful role in the global economy and in international negotiations; (j) promote sustainable development at the economic, social, and cultural levels as well as the integration of African economies; (k) promote co-operation in all fields of human activity to raise the living standards of African peoples; (l) coordinate and harmonize the policies between the existing and future regional economic communities for the gradual attainment of the objectives of the Union; (m) advance the development of the continent by promoting research in all fields, in science and technology; (n) work with relevant international partners in the eradication of preventable diseases and the promotion of

good health on the continent), the Monrovia Strategy for the Economic Development of Africa, 1979 (Monrovia Declaration) (the Monrovia Declaration reaffirms, inter alia, the need for the African member states to frameworks that foster the socio-economic transformation of the continent using clear and lucid programmes of "collective self-reliance"), the Lagos Plan of Action for the Economic Development of Africa, 1980 (Lagos Plan of Action) (the Lagos Plan of Action seeks to accelerate the attainment of the measures for rapid self-reliance and self-sustaining development and economic advancement in Africa (see Preamble to the Lagos Plan of Action for the Economic Development of Africa)) and the signing of the Abuja Treaty in 1991 (the Abuja Treaty is referred to as the "Treaty Establishing the African Economic Community"; its objectives are articulated in articles 4(1) and (2) of the Treaty). Specifically, these developments are significant in scaling and improving free African trade and facilitating the creation and subsequent adoption of the African Economic Community in terms of article 2 of the Abuja Treaty.

2 1 1 African Economic Community – Free Trade

The theory for creating an African Economic Community that supports free trade or free-flow of products or goods in the African continent can be traced from the principle of "Pan-Africanism". This principle supports the ideal of collective or shared self-reliance (Okai "Literature as a Tool for National Liberation and Post-Colonial Reconstruction, Anti-Palanquinity and the Pan-Africanist Imperative" in Quist-Adade and Dodoo (eds) *Africa's Many Divides and Africa's Future: Pursuing Nkrumah's Vision of Pan-Africanism in an Era of Globalization* (2015) 8–11). It postulates that solidarity, interrelation, interdependencies, reciprocity, and mutuality are the *sine qua non* for the development and growth of the African continent (Moyo "African Philanthropy, Pan-Africanism, and Africa's Development" 2014 24 *Development in Practice* 656–671). This occurrence subsists because the existence of unity and humanity in Africa equals or must translate to improving the economic, social, and political advancement of the entire continent (Williams *The Pan-African Imperative: Revisiting Kwame Nkrumah's Vision for African Development* (2022) 37–40). Achieving this includes establishing a single African currency, a single African central bank, and an African Monetary Union (art 6(2)(f) of the Abuja Treaty).

Realising the goal of maintaining unity to advance African free trade, the African Union established the Regional Economic Communities (hereinafter referred to as the RECs. They are the Arab Maghreb Union (UMA), Common Market for Eastern and Southern Africa (COMESA), Community of Sahel–Saharan States (CEN–SAD), East African Community (EAC), Economic Community of Central African States (ECCAS), Economic Community of West African States (ECOWAS), Intergovernmental Authority on Development (IGAD) and Southern African Development Community (SADC)). The RECs are the regional groupings consisting of the individual African states that serve as the main pillars of the AU. They support economic integration at regional levels and foster the creation of the "African Common Market". This commitment is evident from the wording of the

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individual treaties of the RECs. For example, the Preamble to the COMESA treaty provides:

> INSPIRED by the objectives of the Treaty for the Establishment of the African Economic Community and in compliance with the provisions of article 28(1) of the said Treaty.
>
> DETERMINED to mark a new stage in the process of economic integration with the establishment of a Common Market for Eastern and Southern Africa and the consolidation of their economic co-operation ...

Furthermore, the EAC treaty states the following:

> CONVINCED that co-operation at the sub-regional and regional levels in all fields of human endeavor will raise the standards of living of African peoples, maintain and enhance the economic stability, foster close and peaceful relations among African states and accelerate the successive stages in the realization of the proposed African Economic Community and Political Union states and accelerate the successive stages in the realization of the proposed African Economic Community and Political Union …

This language is furthermore encapsulated in article 5 of the SADC Treaty. The latter provides that:

> DETERMINED to alleviate poverty, with the ultimate objective of its eradication, through deeper regional integration and sustainable economic growth and development.
>
> FURTHER DETERMINED to meet the challenges of globalization (art 5 of the SADC Treaty).

Overall, the RECs coordinate the efforts of addressing free trade incrementally and gradually within their respective communities (Arts 28(1) and (2) of the Abuja Treaty). They exist following the realisation that the African Economic Community is situated too far from the places or jurisdictions where actual trade happens or is expected to occur.

Realising the necessity to accelerate free trade within the RECs, COMESA, EAC, and SADC developed the Tripartite Free Trade Area (TFTA). This block integrates or seeks to create a common market for Eastern and Southern Africa, East Africa Community, and Southern African Development Community (East African Community "COMESA-EAC-SADC Tripartite Free Trade Area (TFTA) Agreement" https://www.eac.int/trade/international-trade/trade-agreements/comesa-eac-sadc-tripartite-free-trade-area-tfta-agreement#:~:text=The%20Tripartite%20is%20an%20umbrella,the%20Southern%20African%20Development%20Community (accessed 2023-11-07)). Specifically, the TFTA member countries signed the "Agreement Establishing a Tripartite Free Trade Area among the Common Market for Eastern and Southern Africa, the East African Community, and the Southern African Development Community" in June 2015 (TFTA Agreement). This accord liberalises trade in goods and services. It enhances trade cooperation frameworks that promote equality, fair competition, and mutual advances for the Tripartite Member States (Preamble to the TFTA Agreement). Furthermore, it recognises the significance of alleviating both the tariff (trading costs) (Tariff barriers include duties (customs and import duties), tariffs, charges or taxes levied to a

trading country for the importation of its goods or services which have the effect of hindering the trading of goods or services (see Quambusch "Non-Tarriff Barriers to Trade" 1977 12 *Intereconomics* 80–81 and Surbhi "Difference between Tariff and Non-Tariff Barriers" https://keydifferences.com/difference-between-tariff-and-non-tariff-barriers.html (accessed 2023-11-07)) and non-tariff (creating conducive trade environments) barriers (Preamble to the TFTA Agreement. In terms of art 1 of the TFTA Agreement, non-tariff barriers mean any laws, regulations, and administrative and technical requirements other than tariffs imposed by a partner state whose effect is to impede trade).

Having delved into the abovementioned developments, the section below investigates the ways in which Africa inculcates digital technologies to foster intra-Africa trade. First, it explores the measures Africa has adopted in recognition of the essential role digital technologies play or could play in accelerating intra-Africa trade. Secondly, the section examines the strengths and weaknesses of these measures to alleviate the identified barriers to trade. In doing so, it looks at the available data to determine the extent to which Africa has progressed in its use of digital technologies to improve trade within the African continent.

3 Digital technologies for trade

3 1 General overview

The speed with which digital technologies, for example, artificial intelligence (AI), machine learning, blockchain, virtual reality, and 3D Printing (3D printing refers to a manufacturing process that operates through the successive super-imposition of layers of materials (e.g., plastics, metals) to produce goods from 3D model data (computer-aided design (CAD) files) using a 3D printer), cybersecurity, and big data, development cannot be emphasised enough. In April 2023, Stanford University published what the latter called *The AI Index 2023 Annual Report* (see in general, Maslej, Fattorini, Brynjolfsson, Etchemendy, Ligett, Lyons, Manyika, Ngo, Niebles, Parli, Shoham, Wald, Clark and Perrault *The AI Index 2023 Annual Report* (2023)). The Report chronicles the accelerated effects of digital technologies on society, business, or consumers and delves into how these technologies foster (or could foster), *inter alia*, production. Thus, the Report states:

> Increases in the technical capabilities of AI systems have led to greater rates of AI deployment in businesses, governments, and other organizations. The heightening integration of AI and the economy comes with both excitement and concern. Will AI increase productivity or be a dud? Will it boost wages or lead to the widespread replacement of workers? To what degree are businesses embracing new AI technologies and willing to hire AI-skilled workers? How has investment in AI changed over time, and what particular industries, regions, and fields of AI have attracted the greatest amount of investor interest? (Maslej *et al The AI Index 2023 Annual Report* 170)

Flowing from these developments is the ability of digital technologies to perform numerous functions, manipulate and analyse large amounts of data and generate virtual reality images that mimic non-virtual situations. For

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example, 3D Printing is identified as the catalyst for or having the potential to disrupt international trade (Andrenelli and González "3D Printing and International Trade: What is the Evidence to Date?" (2021) https://www.oecd-ilibrary.org/docserver/0de14497-en.pdf?expires=1699535664&id=id&accname=guest&checksum=4343ED6466AADA82009DDC670B0C775F) (accessed 2023-11-07). For example, it is estimated that 3D Printing will replace about 22 per cent of the world's physical trade by 2060 (Freund, Mulabdic and Ruta "Is 3D Printing a Threat to Global Trade? The Trade Affects You Didn't Hear About" 2022 138 *Journal of International Economics* 1–3 and Leering *3D Printing: A Threat to Global Trade* (2017) 7–20). Therefore, products or goods will be digitally printed locally, the worldwide supply of the goods will be lessened, and international trade will be incessantly diminished (Mulabdic and Ruta "Trade Effects of 3D Printing (That You Didn't Hear About)" (2019) https://cepr.org/voxeu/columns/trade-effects-3d-printing-you-didnt-hear-about (accessed 2023-11-09)).

The position mentioned above also applies to AI. For example, the OECD submits that AI could ease trade barriers and ultimately support the creation of an enabling environment for trade (Ferencz, López-González and García *Artificial Intelligence and International Trade: Some Preliminary Implications* (2022) 4–9). This is usually linked to the ability of AI technology to spur innovation, encourage the creation of new products or services, and alleviate the costs of trade. In this manner, AI could drive inclusive growth, sustainable development, respect for the rule of law, transparency, and robustness (Agrawal, Gans and Goldfarb *The Economics of Artificial Intelligence: An Agenda* (2017) 2–3).

Accordingly, the section below delves into the ways in which Africa has embraced digital technologies to transform African trade. The starting point is to elucidate the AfCFTA framework for digital or digitalised African trade. Thereafter, the progress made, including those adopted by the respective regional communities, to respond to the AfCFTA provisions is investigated. This discussion will henceforth result in a clear delineation of the strengths and weaknesses of the measures that Africa adopts in taking advantage of the recent technological developments to improve African trade and remove trade barriers.

3 2 Towards Digitalised Africa Trade

The path towards digitalised African trade has been an incessant and, sometimes, bumpy journey. It draws its existence from, *inter alia*, article 3(2)(i) of the Protocol on Trade in Services. The latter article states that promoting "research and technological advancement in the field of services to accelerate economic and social development" is central to Africa's digitalisation agenda. Doing so marks or should signal a shift from reliance or, *inter alia*, physical commodities to intangible value. Specifically, digitalisation ought to ease the member countries' ability to embrace digital technologies to foster economic expansion, create employment opportunities, and address societal differences.

One of the steps towards realising the above-mentioned is the establishment of the African Union Development Agency-NEPAD (AUDA-NEPAD) in June 2018. AUDA-NEPAD provides knowledge-based advisory support on the development of identified priorities for the AU. Its core functions include incubating "innovative programmes in various fields, including technology, research and development, knowledge management, and data analytics" (Union Development Agency-NEPAD (AUDA-NEPAD) "About Us" add year https://www.nepad.org/microsite/who-we-are-0#about_us (accessed 2023-11-21)). Essential to the work of the AUDA-NEPAD is coordinating and executing the primacies engendered in the AU's Agenda 2063 (Agenda 2063 of the AU serves as "Africa's blueprint and master plan for transforming Africa into the global powerhouse of the future. It is the continent's strategic framework that aims to deliver on its goal for inclusive and sustainable development and is a concrete manifestation of the pan-African drive for unity, self-determination, freedom, progress, and collective prosperity pursued under Pan-Africanism and African Renaissance" (see AU A*genda 2063: The Africa We Want* (2015) 5). For example, the AU's Agenda 2063 provides:

> By 2063, the necessary infrastructure will be in place to support Africa's accelerated integration and growth, technological transformation, trade and development. This will include high-speed railway networks, roads, shipping lines, sea and air transport, as well as well-developed ICT and the digital economy.

It is fair to postulate that the AU has made minimal progress towards responding to the AU's Agenda 2063. For example, AUDA-NEPAD, through its High-Level Panel on Emerging Technologies (APET), convened an expert consultative meeting in May 2022. This meeting examined the possibility of developing an AI strategy for Africa (AUDA-NEPAD "The African Union Artificial Intelligence Continental Strategy For Africa" https://www.nepad.org/news/african-union-artificial-intelligence-continental-strategy-africa (accessed 2024-01-18)). The strategy would particularly "enable African countries to enhance policymaking and implementation and improve stakeholder engagements on AI-related challenges and opportunities". Furthermore, it would assist African countries in developing AI-related technology products and services and safeguard technology through enabling regulatory frameworks (AUDA-NEPAD https://www.nepad.org/news/african-union-artificial-intelligence-continental-strategy-africa).

Culminating from the deliberations of the APET meeting was the introduction of a report titled "AI for Africa: Artificial Intelligence for Africa's Socio-Economic Development" (AUDA-NEPAD *AI for Africa: Artificial Intelligence for Africa's Socio-economic Development* (August 2021) https://www.nepad.org/publication/ai-africa-artificial-intelligence-africas-socio-economic-development (accessed 2023-04-04)). The report promotes the necessity for African countries to harness AI technology in a way that improves African trade. Furthermore, it supports the viewpoint that the amalgamation of AI and trade can improve Africa's socio-economic development and could lead to the reduction of poverty on the continent (see NEDAP's Tweet of 18 February 2023

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https://twitter.com/nepad_agency/status/1626836646778863616?s=48&t=ITg0LNPsgw-4UsF15Zijwg (accessed 2024-01-18)).

The other remarkable step towards establishing a digitalized African trade is through the introduction of the Digital Transformation Strategy for Africa, 2020–2030. The strategy envisions a human community-centric approach to digital transformation (Digital Transformation Strategy for Africa, 2020–2030 https://au.int/sites/default/files/documents/38507-doc-dts-english.pdf (accessed 2023-11-21)). It provides for the establishment of an integrated and inclusive digital society and economy for Africa (Digital Transformation Strategy for Africa, 2020–2030 https://au.int/sites/default/files/documents/38507-doc-dts-english.pdf). In addition, the report states that harmonised policies, regulations, and laws are central to building augmented digital networks for intra-Africa trade. These policies, laws, and regulations should facilitate productive digital trade. Furthermore, they ought to do the following:

> Advance opportunities for digital work, fair competition for digital businesses, and contribute to an advantageous position of Africa in the global digital economy. (Digital Transformation Strategy for Africa, 2020–2030 https://au.int/sites/default/files/documents/38507-doc-dts-english.pdf).

The above-mentioned arises because of the need for Africa to build its digital ecosystem (specifically, the Digital Transformation Strategy for Africa, 2020–2030 https://au.int/sites/default/files/documents/38507-doc-dts-english.pdf 20) states that "[M]ember States will need to continue designing customized interventions to strengthen their specific entrepreneurship ecosystems of mutually reinforcing components that include a digital knowledge base and ICT market; a digital business friendly environment; access to finance; digital skills and e-leadership; and an entrepreneurial culture"). In the latter regard, digital technologies are catalysts for building new value and creating innovative products or services (Digital Transformation Strategy for Africa, 2020–2030 https://au.int/sites/default/files/documents/38507-doc-dts-english.pdf). In addition, they are the tools needed to address interrelated barriers to trade and stimulate digital entrepreneurship in Africa (Digital Transformation Strategy for Africa, 2020–2030 https://au.int/sites/default/files/documents/38507-doc-dts-english.pdf 21–22).

As industrious as the vision of the Digital Transformation Strategy for Africa, 2020–2030 may be, a staggered approach to digitalising trade in Africa persists. This has led to some countries adopting their own respective digital strategies to accelerate digital trade. Two examples, amongst others, illustrate the aforesaid. First, Egypt developed, *inter alia*, the national strategy for AI (Egypt National Artificial Intelligence Strategy, 2021 3–15) and ICT strategy (Egypt ICT Strategy, 2025–2030 4–25) to position the country as a global player in digital technologies and trade. The ICT strategy seeks to create a harmonised system for digital transformation, digital trade, digital infrastructure, and digital innovation in Egypt. Secondly, Kenya introduced what they termed the "Digital Economy Blueprint" (see the Republic of Kenya "Digital Economy Blueprint: Powering Kenya's Transformation" https://www.ict.go.ke/wp-content/uploads/2019/05/Kenya-Digital-Economy-2019.pdf (accessed 2024-01-18)). This policy consolidates digital trade and

integrates society, businesses, and organisations into the country's envisaged digital economy. It defines the digital economy as constituting the following:

> The entirety of sectors that operate using digitally-enabled communications and networks leveraging internet, mobile and other technologies.

Therefore, the Digital Economy Blueprint harnesses the benefits of the digital economy and establishes an ecosystem that facilitates digital trade (see Republic of Kenya https://www.ict.go.ke/wp-content/uploads/2019/05/Kenya-Digital-Economy-2019.pdf).

Given the need to fast-track the creation of an integrated and inclusive digital society and economy for Africa (see Digital Transformation Strategy for Africa, 2020–2030 https://au.int/sites/default/files/ documents/38507-doc-dts-english.pdf), the 5th Ordinary Session of the African Union Specialized Technical Committee on Communication and ICT (STC-CICT) met on 23 November 2023. The theme for the meeting is mostly radical and clear, that is, "Powering Africa's Digital Future" (See AU "Powering Africa's Digital Future: AU Ministerial Meeting Set to Ignite Digital Transformation in Africa" https://au.int/en/pressreleases/20231121/powering-africas-digital-future-au-ministerial-meeting-set-ignite-digital (accessed 2024-01-18)). However, it is not clear whether, despite the incessant efforts and arranged meetings, success will be attained in igniting a consolidated approach to digital trade in Africa.

4 Conclusion

Africa has long recognised or expressed the necessity to promote and support intra-Africa trade. This acceptance led to the establishment of the OAU (now the AU) in 1963 and continued to the signing of the Abuja Treaty in 1991. The principle to encourage the collective and shared self-reliance of the African countries (art 4(1) and (2) of the Abuja Treaty) and improve the essence of harmony, interrelation, interdependencies, mutuality, and affinity is at the forefront of the latter recognition. It postulates that African unity and humanity can be achieved by improving the monetary, communal, and governmental landscape of the African continent. To Africa, establishing the RECs constituted a major step towards synergising the support for intra-Africa trade.

In line with the importance of embracing digital technologies to foster intra-Africa trade, the continent recognises that technology and innovation can accelerate the economic and social development of Africa (art 3(2)(i) of the Protocol on Trade in Services). This includes creating digital infrastructures to fast-track trade and development (see AU Agenda 2063). Doing so requires enhanced policymaking and augmented stakeholder engagements. More specifically, awareness creation detailing the opportunities and challenges emanating from digital technologies is essential. This creation should assist in ensuring the harmonisation or synchronisation of the national policies or regulatory structures that pivot and promote intra-Africa trade (art 1 of the Abuja Treaty).

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As elaborate as the AU regulatory structure is, the latter does not adequately prevent (or eliminate) some of the legal barriers to intra-Africa trade. The framework lacks the necessary capacity for improved and shared accessibility to the African market. In other words, it does not fully address the contestation between technologies, innovation, and legal rules. Using AI and 3D Printing as examples provides an excellent illustration. Adopting these technologies could disrupt African trade and affect the production and supply of goods (Mulabdic and Ruta https://cepr.org/voxeu/columns/trade-effects-3d-printing-you-didnt-hear-about). Furthermore, the technologies could spur innovation, improve the creation of innovative business value, and alleviate the cost of trade (Agrawal, Gans and Goldfarb *The Economics of Artificial Intelligence: An Agenda* 9–13). Despite these realities, Africa's digital transformation agenda remains imprinted in various instruments and treatises. In other words, there is an absence of practical means to adopt AI in a way that eases trade barriers and creates an enabling environment for intra-Africa trade. Given this insufficiency, it comes as no surprise that countries such as Egypt and Kenya have developed their own digital acceleration strategies to pivot digital trade and remove existential trade barriers (see the Egypt National Artificial Intelligence Strategy, 2021 1–70 and Republic of Kenya Digital Economy Blueprint, 2022–2032 20–135).

Therefore, Africa should develop practical measures that encourage the adoption of digital technologies and innovation to enhance, synchronise and coordinate intra-Africa trade. The mechanisms ought to coherently, apparently, and certainly articulate the role of the RECs in using digital technologies to remove trade barriers and foster economic and sustainable development. Furthermore, they must deal with how this technology and innovation could augment the capacity for African market accessibility or accessibilities. Consequently, both the opportunities and challenges that technology and innovation present to the respective developmental needs of African countries should be spelt out. In other words, the measures ought to accept that the individual African countries' development stages differ. Accordingly, the way they respond or will respond to the opportunities and challenges generated by digital technologies and innovation to enhance inclusive growth and sustainable development is likely to be different.

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CASES / VONNISSE

The Appraisal Remedy and Share Buy-Backs

Capital Appreciation Ltd v First National Nominees (Pty) Ltd [2022] ZASCA 85

1 Introduction

The appraisal rights in the Companies Act 71 of 2008 (2008 Act) empower minority shareholders to withdraw from a company, while obtaining a fair value for their shares. The main aim of the appraisal remedy is to achieve some sort of balance between minority and majority shareholders in the company (Cassim "The Appraisal Remedy and the Oppression Remedy Under the Companies Act of 2008, and the Overlap Between Them" 2017 *SA Merc LJ* 305).

Section 48(8)(*b*) of the 2008 Act provides that if a repurchase of shares is considered alone, or together with other transactions in an integrated series of transactions, and involves the acquisition of more than five per cent of the issued shares of any particular class of shares, then the company must comply with the requirements of sections 114 and 115 of the 2008 Act. Section 114(1)(*e*) regulates schemes of arrangement. This includes the acquisition by a company of its own shares pursuant to a shareholder-approved arrangement and requires the preparation and issue of an independent expert report (s 114(2) of the 2008 Act). The procedural requirements applicable to schemes of arrangement are set out in section 115 of the 2008 Act. Section 115 also includes provisions that relate to the approval of the transaction by special resolution and, in addition, provides various other mechanisms aimed at protecting minority shareholders. It is well recognised and trite that if a company were to repurchase its own shares by way of a scheme of arrangement, all the requirements of sections 114 and 115 would apply, including the minority protection provisions mentioned above. However, the law is not as certain in instances where a company wishes to repurchase its own shares other than by way of a scheme of arrangement, in terms of section 48(8)(*b*). There has been a lack of clarity when interpreting section 48 of the 2008 Act (which regulates the acquisition by a company of its own shares) and section 114 (which regulates schemes of arrangement), as both sections apply to situations in which a company seeks to repurchase its own shares.

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The judgment by the Supreme Court of Appeal (SCA) in *Capital Appreciation Ltd v First National Nominees (Pty) Ltd* ([2022] ZASCA 85) is important because it provides much-needed clarity with regard to the interpretation and interaction between sections 48, 114, 115 and 164 of the 2008 Act. The judgment also reinforces the position of our courts and legislation, which is concerned with the protection and preservation of the rights of minority shareholders, as well as with rooting out corruption, abuse and exploitation by majority shareholders. This case note also touches on the impact of the new draft Companies Amendment Bill, 2021 (2021 Bill) on sections 48 and 164 of the 2008 Act and on the requirements to comply with sections 114 and 115.

2 Facts

First National Nominees Ltd (First National), along with Nedbank Ltd (Nedbank) and Rozendal Partners (Pty) Ltd (Rozendal) (the first, second and third respondents respectively in the appeal) brought an application in the Gauteng Local Division of the High Court, Johannesburg (the High Court), in which Rozendal, on behalf of First National, sought an order that an appraiser be appointed in terms of section 164 of the 2008 Act to assist the court in determining the fair value of its shares in Capital Appreciation Ltd (Capital Appreciation) (the appellant), and also, for detailed ancillary relief (par 1).

First National was the registered holder of 18 039 829 ordinary shares in the issued share capital of Capital Appreciation. Although the shares were registered in the name of First National as nominee, they were held on behalf of and for the benefit of Nedbank, the beneficial owner of the shares, as envisaged by section 56 of the 2008 Act. Rozendal is a fund manager that manages a portfolio of assets within a fund scheme in terms of a portfolio management agreement. The shares form a part of the scheme's assets (par 2).

In July 2019, a circular was issued by Capital Appreciation to its shareholders in which it notified them of its intention to repurchase 245 million of its shares from specific shareholders for a total purchase price of R196 million (par 3). The shareholders were advised that because the proposed repurchase would result in the acquisition of more than five per cent of its issued share capital, it was subject to sections 48, 114 and 164 of the 2008 Act (par 3). The shareholders were also informed that, in terms of section 115 of the 2008 Act, the repurchase required their approval by means of a special resolution passed at a general meeting (par 3).

A notice issued by First National objected to the proposed repurchase. First National also indicated that it would vote against the resolution and, at the subsequent general meeting, this transpired. Nonetheless, the special resolution was passed by a large majority of shareholders. First National then made a demand that Capital Appreciation purchase its shares for fair value. An offer of R0.80 per share was made by Capital Appreciation, which was rejected by First National (par 4). An application was then launched in

the High Court for the court to determine the fair value of the shares in terms of section 164(14) of the 2008 Act (par 4).

2 1 Prior proceedings

In the High Court, Capital Appreciation indicated for the first time that, in its view, section 164 of the 2008 Act did not apply, and therefore First National had no right to an appraisal by the court of the fair value of its shares and no right to have its shares bought by Capital Appreciation at the price so determined. Capital Appreciation argued that there was no basis upon which the dissenting shareholder, First National, could rely on section 164, since the proposed buy-back did not constitute a "scheme of arrangement" as envisaged in section 114 of the 2008 Act (*First National Nominees (Pty) Limited v Capital Appreciation Limited* [2021] ZAGPJHC 17; 2021 (4) SA 516 (GJ) (High Court judgment) par 8–9).

Capital Appreciation argued further that the relevant transactions were not a scheme of arrangement as understood by the authorities related to the old Companies Act. It argued that although section 48(8)(*b*) makes the relevant transactions subject to the requirements of sections 114 and 115, this referred only to the procedural requirements of sections 114 and 115. It did not deem a transaction that is not a scheme to be one. Capital Appreciation contended that section 48(8)(*b*) only made reference to sections 114 and 115 and not to section 164. If the legislature had intended to trigger section 164 in the circumstances referred to in section 48(8)(*b*), reference would have been made to it in section 48 (High Court judgment par 19).

Windell J held that "given the legislative history behind the section and given the potential abuses (particularly of minority shareholders) that share repurchases can facilitate, the express wording of section 48(8)(*b*) was clear" (High Court judgment par 27). According to Windell J, the section does not have the effect of deeming a re-acquisition of securities in excess of five per cent to be an arrangement if, by nature, the transaction is not an arrangement, as interpreted in terms of our common law (High Court judgment par 27). The legislature saw fit to impose particular and further conditions on the type of transaction identified in section 48(8)(*b*). It recognised that not all transactions involving a repurchase by the company of its own shares should be subjected to further conditions, but only those involving a significant and substantial repurchase (more than five per cent) (High Court judgment par 27). In transactions of this nature and magnitude, the legislature also recognised that it was minority shareholders who required protection, and this was best achieved by imposing the ready-made protections afforded and provided to minority shareholders in sections 114 and 115 of the Act (High Court judgment par 27).

Windell J held further that by making reference to sections 114 and 115 as a whole, the legislature intended for all the procedural conditions and rights set out in sections 114 and 115 to apply. From a practical procedural perspective, this would, among other things, involve a) the appointment of an independent expert as contemplated in section 114(2), b) the proposing and passing of a special resolution as contemplated in section 115(2)(*a*) and,

c) the entitlement of dissenting shareholders to exercise appraisal rights as contemplated in section 115(8) (High Court judgment par 27).

Accordingly, Windell J held that section 164 applied and that First National had established its entitlement to the appraisal remedy provided by that section. Windell J made a detailed order in which she set out the details relating to the appointment and authority of an appraiser to assist the court in determining the fair value of the shares, and concerning the obligations of the parties in the appraisal process (High Court judgment par 32–33).

3 Issue

The appeal in the SCA concerned whether First National (the first respondent) had a right to an appraisal by the court of the fair value of its shares and a right to have its shares purchased by the appellant, Capital Appreciation, at the price so determined. The court had to provide a proper interpretation of the statutory regime created for the repurchase of shares in terms of sections 48, 114, 115 and 164 of the 2008 Act (par 5).

4 Judgment

Plasket JA (Ponnan and Nicholls JJA, and Tsoka and Phatshoane AJJA concurring) held that the proper starting point was the interpretation of section 48, along with sections 114, 115 and 164 of the 2008 Act. The SCA held that a repurchase of shares by a company above the five per cent threshold mentioned in section 48(8)(*b*) of the 2008 Act was regarded as a fundamental transaction (par 27). According to the court, the status of fundamental transactions is conferred by making those transactions that meet the threshold prescribed in that section subject to sections 114 and 115 (par 27). The SCA held that section 115 prescribes how fundamental transactions such as the share repurchase in issue are to be approved. This, according to the court, permits dissenting shareholders to enjoy the benefit of an appraisal right in terms of section 165 of the 2008 Act (par 28). The SCA accordingly dismissed the appeal with costs (par 30).

5 Discussion

5 1 A company's ability to purchase its own shares

Historically, the principle that a company was not able to purchase its own shares (even if its memorandum or articles of association permitted it to do so) was well recognised and established in company law. The English court in *Trevor v Whitworth* ((1887) 12 AC 409 (HL) 416–417) clearly stated this principle when it held that the purpose of a company was the preservation of its capital and required the prevention of trafficking in its own shares. A company should, said the court, preserve and devote its resources to pursuing its core business, and not extraneous purposes (par 7).

In *Unisec Group Ltd v Sage Holdings Ltd* (1986 (3) SA 259 (T)), Coetzee J described this principle as a common-law rule so fundamental to

company law that, for many years, it was not regarded as necessary to include it in the legislation (264H–265A of the judgment). The rule was aimed at protecting two sets of interests. In S*age Holdings Ltd v Unisec Group Ltd* (1982 (1) SA 337 (W)), Goldstone J explained that a company's capital had to be preserved in the interests of its creditors and to protect shareholders against directors who may have wanted to strengthen their hold on the company (349A of the judgment; par 7).

The Companies Act (61 of 1973) (1973 Act), the predecessor to the 2008 Act, was amended by the Companies Amendment Act (37 of 1999) (Amendment Act). The amendment permitted a company to purchase its own shares by substituting section 85 of the 1973 Act. The amendment provided that, subject to a solvency and liquidity test, a company could "by special resolution ... if authorized thereto by its articles, approve the acquisition of shares issued by the company" (par 7). The amendment to the long-standing principle was in keeping with the position in other jurisdictions such as Britain, other Commonwealth jurisdictions and the United States of America (see Yeats, De la Harpe, Jooste, Stoop, R Cassim, Seligmann, Kent, Bradstreet, Williams, M Cassim, Swanepoel, FHI Cassim and Jarvis *Commentary on the Companies Act of 2008* vol 1 (2018) 2–460; par 7).

Malan J, in *Capitex Bank Ltd v Qorus Holdings Ltd* (2003 (3) SA 302 (W)), commented on the amendment and stated that, while a residue of the capital maintenance principle may have been retained, one aspect of the rule that a company could not purchase its own shares was abolished; the 19th-century concept of capital maintenance was replaced with the contemporary safeguard of a solvency-and-liquidity test (par 10 of the judgment; see also FHI Cassim "The New Statutory Provisions on Company Share Repurchases: Critical Analysis" 1999 *SALJ* 764–767; par 9).

5 2 Section 48 of the 2008 Act

Section 48 of the 2008 Act now enables and regulates the acquisition by a company or its subsidiary of the company's shares. When the Act was first promulgated in 2008, the power to approve a company's acquisition of its own shares was granted to the board of directors, but such power was subjected to the caveats and conditions set out in section 48(1) to 48(7) of the Act. In 2011, subsection 48(8) was introduced into the Act, and it specifically adverted to and circumscribed the board's power in relation to particular types of shares acquisition. It provides as follows:

> "(8) A decision by the board of a company contemplated in subsection (2)(*a*)–
>
> *(a)* must be approved by a special resolution of the shareholders of the company if any shares are to be acquired by the company from a director or prescribed officer of the company, or a person related to a director or prescribed officer of the company; and
>
> *(b)* is subject to the requirements of sections 114 and 115 if, considered alone, or together with other transactions in an integrated series of transactions, it involves the acquisition by the company of more than 5% of the issued shares of any particular class of the company's shares".

In its original form, section 48 consisted of seven subsections. The underlying rationale for the safeguards contained in section 48 flows from the risks inherent in the repurchase of a company's shares. Yeats *et al* summarised the risks:

> "Because a repurchase is (i) a distribution of the company's assets and (ii) a re-organisation of issued share capital (and hence of ownership), achieved by (iii) a transfer to the company of its shares, it invites all the abuses associated with each of these three functions. Indeed, a given repurchase may involve abuses of all three of these functions. Repurchase thus has significance for corporate governance, takeover regulation, creditor protection, discrimination between shareholders, oppression of minorities, and the proper functioning of the securities market." (Yeats *et al Commentary on the Companies Act of 2008* 2–463; par 10)

Section 48(1)(*a*) provides that section 48 does not apply to "the making of a demand, tendering of shares and payment by a company to a shareholder in terms of a shareholder's appraisal rights set out in section 164" (par 12). According to Plasket JA, this means no more than that the exercise by a shareholder of their appraisal right and the payment of the fair value of the shares by the company "is not treated as an acquisition by a company of its own shares requiring compliance with the requirements of section 48" (see FHI Cassim, M Cassim, R Cassim, Jooste, Shev and Yeats *Contemporary Company Law* 3ed (2021) 393; (par 12)). Section 48 also does not apply to the "redemption by the company of any redeemable securities in accordance with the terms and conditions of those securities" (s 48(1)(*b*) of the 2008 Act; par 12).

In terms of section 48(2)(*a*), "the board of a company may determine that the company will acquire a number of its own shares". The power is restricted in three ways. First, it is made subject to compliance with section 46, which requires *inter alia* that the board apply the solvency-and-liquidity test in section 4, and conclude on reasonable grounds that the company will satisfy that test after the proposed transaction (par 13). Secondly, section 48(3) prohibits the acquisition by a company of its shares, despite "any provision of any law, agreement, order or the Memorandum of Incorporation of a company", if, as a result, "there would no longer be any shares of the company in issue other than" shares held by one or more of its subsidiaries or "convertible or redeemable shares" (par 13). Thirdly, in terms of section 48(8)(*b*), a decision by a company's board to acquire its own shares

> "is subject to the requirements of sections 114 and 115 if, considered alone, or together with other transactions in an integrated series of transactions, it involves the acquisition by the company of more than 5% of the issued shares of any particular class of the company's shares." (par 13)

A "series of integrated transactions" is defined in section 1 with reference to section 41(4)(*b*), which provides:

> "a series of transactions is integrated if–
> (i) consummation of one transaction is made contingent on consummation of one or more of the other transactions: or
> (ii) the transactions are entered into within a 12-month period, and involve the same parties, or related persons; and–

> *(aa)* they involve the acquisition or disposal of an interest in one particular company or asset; or
> *(bb)* taken together, they lead to substantial involvement in a business activity that did not previously form part of the company's principal activity."

In this particular case, it was common cause that the repurchase of shares by Capital Appreciation exceeded the threshold provided for in section 48(8)(*b*) of the 2008 Act. In instances where the threshold has been exceeded, sections 114 and 115 apply (par 14).

5 3 Sections 114 and 115 of the 2008 Act

Sections 114 and 115 are found in Chapter 5 of the 2008 Act. This chapter is concerned, *inter alia*, with the approval of what it terms "fundamental transactions". These transactions are disposals by a company of the greater part of its assets or undertaking (s 112); amalgamations or mergers (s 113) and schemes of arrangement (s 114).

Section 114(1) provides:

> "Unless it is in liquidation or in the course of business rescue proceedings in terms of Chapter 6, the board of a company may propose and, subject to subsection (4) and approval in terms of this Part, implement any arrangement between the company and holders of any class of its securities by way of, among other things–
> *(a)* a consolidation of securities of different classes;
> *(b)* a division of securities into different classes;
> *(c)* an expropriation of securities from the holders;
> *(d)* exchanging any of its securities for other securities;
> *(e)* a re-acquisition by the company of its securities; or
> *(f)* a combination of the methods contemplated in this subsection."

Section 114(1) of the Act characterises a scheme of arrangement as "any arrangement between the company and holders of any class of its securities". An "arrangement" is not defined in the 2008 Act. Latsky opines that if one compares an arrangement in terms of the Act with one in terms of a section 311 scheme under the 1973 Act, it is apparent that the objective of an arrangement in terms of section 114 is to affect the respective rights and obligations *inter se* of the company and its holders of securities in a manner that cannot otherwise be conveniently achieved by independent agreement between the company and each holder of securities (see Latsky "The Fundamental Transactions Under the Companies Act: A Report Back From Practice After the First Few Years" 2014 *Stell LR* 361; High Court judgment par 25). Although one cannot use a section 311 scheme to do something that could not have been done by agreement, its function is to take the place of an agreement. The repurchase by agreement from a shareholder is not such an arrangement. It does not legally bind any holder of securities whose agreement has not been obtained (Latsky 2014 *Stell LR* 361; High Court judgment par 25).

According to Cassim *et al*, section 114 is designed to cater for share repurchases of a particular magnitude – that is, those that amount to

"wholesale fundamental changes to the company's capital structure". According to the authors, section 114 "allows the board to propose and if approved to implement a scheme of arrangement which, among other things, might involve a share buy-back" (Cassim *et al Contemporary Company Law* 398; par 16).

Cassim opines that, in terms of section 114(1)(*e*), if a re-acquisition of the securities of a company is effected in terms of a scheme of arrangement, shareholders are entitled to the relief afforded by appraisal rights (Cassim 2017 *SA Merc LJ* 305; High Court judgment par 30).

When any of the transactions listed in section 114(1) are contemplated, the company must, in terms of section 114(2), retain the services of an independent expert to compile a report on the possible consequences of the proposed course of conduct. That report must, in terms of section 114(3), be furnished to the board by the independent expert, who must also "cause it to be distributed to all holders of the company's securities, concerning the proposed arrangement" (par 17). It is required, for instance, to "state all prescribed information relevant to the value of the securities affected by the proposed arrangement". Section 114(3)(*a*) details the "material effects that the proposed arrangement will have on the rights and interests" of those holders of securities likely to be affected by it; section 114(3)(*c*) and (*d*) evaluates the "material adverse effects of the proposed arrangement" and any compensation that may be paid to those adversely affected and if there are any other beneficial effects that accrue. In terms of section 114(3)(*g*), the independent experts must include copies of sections 115 and 164 in their report (par 17).

Section 114(4) provides that section 48 "applies to a proposed arrangement contemplated in this section to the extent that the arrangement would result in any re-acquisition by a company of any of its previously issued securities" (par 18).

Section 115 deals with the required approval for transactions contemplated in Part A of Chapter 5. In terms of section 115(2)(*a*), any of the transactions referred to in section 115(1) must be approved

> "by a special resolution adopted by persons entitled to exercise voting rights on such a matter, at a meeting called for that purpose and at which sufficient persons are present to exercise, in aggregate, at least 25% of all of the voting rights that are entitled to be exercised on that matter, or any higher percentage as may be required by the company's Memorandum of Incorporation, as contemplated in section 64(2)." (par 20)

In terms of section 115(2)(*b*), a similar procedure must be followed by a holding company of a company that contemplates a share repurchase. Section 115(2)(*c*) provides that a transaction contemplated by section 115(1) requires the approval of a court in certain circumstances (see s 115(3)–(7) of the 2008 Act; par 20).

Section 115(8) refers expressly to section 164. It provides:

> "The holder of any voting rights in a company is entitled to seek relief in terms of section 164 if that person–

(a) notified the company in advance of the intention to oppose a special resolution contemplated in this section; and
(b) was present at the meeting and voted against that special resolution."

5 4 Section 164 of the 2008 Act

The appraisal rights for dissenting shareholders are found in section 164 of the 2008 Act. An appraisal right is defined as "the right of dissenting shareholders, on the occurrence of certain events, to have their shares bought out by the company in cash, at a price reflecting the fair value of the shares" (Yeats *et al Commentary on the Companies Act of 2008 Vol 2* 7–24; par 22). According to Van der Linde, the appraisal right is designed to put off not only opportunism but also business decisions taken by the board of directors that may be considered to be ill-advised. In this regard, it may be easier to convince the board of directors to amend or abandon an unwise decision if the number of dissenting shareholders who indicate an intention to use their appraisal rights is considerable. This is in view of the potential loss of capital that the company would endure if it were to purchase the shares of dissenting shareholders at a fair value (Van der Linde "Share Repurchases and the Protection of Shareholders" 2010 *TSAR* 288; High Court judgment par 31). Cassim opines that the appraisal right enables a dissenting shareholder, in certain statutorily prescribed circumstances, to force the company to purchase their shares in cash at a price reflecting the fair value of the shares and to exit the company (Cassim "The Introduction of the Statutory Merger in South African Corporate Law: Majority Rule Offset by the Appraisal Right (Part I)" 2008 *SA Merc LJ* 1 19; High Court judgment par 31).

Section 164(2)*(b)* provides that if a company has given notice to shareholders of a meeting to consider a resolution to approve a transaction contemplated, *inter alia*, by section 114, it must include in that notice "a statement informing shareholders of their rights under this section". Section 164(3) provides that, at any time before the resolution is voted on, "a dissenting shareholder may give the company a written notice objecting to the resolution". In terms of section 164(4) of the 2008 Act, the company must notify dissenting shareholders of the passing of the resolution within 10 business days of its adoption. Dissenting shareholders are those who gave the company notice of their dissent, did not withdraw their notice of objection, and did not vote for the resolution (par 23).

Section 164(5) provides that a

> "shareholder may demand that the company pay the shareholder the fair value for all of the shares of the company held by that person if they had sent a notice of objection to the company; the company had adopted the resolution objected to; and the shareholder had voted against it and had complied with the procedural requirements of the section." (par 24)

Such a shareholder must, in terms of section 164(7), make their demand by delivering a written notice to the company within 20 business days of receiving the notice that the resolution had been passed or, if no such notice was received, within 20 business days of learning of the adoption of the resolution (par 24).

The company is required by section 164(11), within five business days of receiving a demand, to

> "send to each shareholder who has sent such a demand a written offer to pay an amount considered by the company's directors to be the fair value of the relevant shares, subject to subsection (16), accompanied by a statement showing how that value was determined." (par 25)

Section 164(12)(*b*) provides for the lapsing of an offer if it has not been accepted within 30 business days of being made. If, however, the offer is accepted, the company must, in terms of section 164(13)(*b*), pay the shareholder the agreed amount within 10 business days (par 25).

According to Plasket JA, the rights that are in issue in this case arise out of section 164(14) of the 2008 Act (par 25). Section 164(14) provides:

> "A shareholder who has made a demand in terms of subsections (5) to (8) may apply to a court to determine a fair value in respect of the shares that were the subject of that demand, and an order requiring the company to pay the shareholder the fair value so determined, if the company has–
> *(a)* failed to make an offer under subsection (11); or
> *(b)* made an offer that the shareholder considers to be inadequate, and that offer has not lapsed."

Plasket JA stated that, in terms of section 48(8)(*b*), a share repurchase above a particular threshold is regarded as a fundamental transaction. According to Yeats *et al,* this simply means "section 114 and 115 must be complied with" (Yeats *et al Commentary on the Companies Act of 2008 Vol 1* 2–482). Cassim *et al* explain that the "thinking behind section 48(8) appears to be to reconcile the requirements of sections 48 and 114 … why can the board alone make a share buy-back decision in terms of section 48, but a special resolution is required to approve a share buy-back in terms of s 114?" (Cassim *et al Contemporary Company Law* 398; see too Yeats *et al Commentary on the Companies Act of 2008 Vol 1* 2–482; par 27).

The reference in section 48(8)(*b*) to section 114, according to Plasket JA, establishes a direct link between share repurchases envisaged by section 48 and schemes of arrangement as envisaged by section 114(1)(*e*). Section 115 prescribes how the fundamental transactions set out in section 114 are to be approved. As a result, section 115(8) makes provision for dissenting shareholders to enjoy the benefit of an appraisal right in terms of section 164 – that is, the "right of dissenting shareholders, who do not approve of certain triggering events, to withdraw from the company by taking out the fair value of their shares in cash" (Cassim *et al Contemporary Company Law* 945–946; Yeats *et al Commentary on the Companies Act of 2008 Vol 2* 5–33; par 28).

According to Plasket JA, it is apparent that there is a direct connection between section 48(8)(*b*), via sections 114 and 115, and section 164, and the appraisal right contended for by First National. It was common cause that First National complied with the procedural requirements of sections 115 and 164 and was thus entitled to be paid the fair value of its shares by Capital Appreciation (par 29). This approach is in keeping with the recognition that in transactions of this nature, it is the minority shareholders who require some measure of protection. The protections for minority

shareholders are provided for in the 2008 Act in sections 114 and 115; as a result, the appeal in this case was dismissed (par 29).

5 5 The Companies Amendment Bill, 2021

In October 2021, the Department of Trade and Industry published a new draft of the Companies Amendment Bill, 2021 (2021 Bill) for public comment. The new draft of the 2021 Bill proposes to replace section 48(8) with a new subsection (8). The wording in the new subsection does not make reference to sections 114 and 115 of the Act. The result of the proposed amendment, were it to become law, is that there would be no requirement to comply with sections 114 and 115 as it would essentially fall away in respect of such transactions.

6 Conclusion

The SCA in this judgment has provided guidance and much-needed certainty on the repurchase of more than five per cent of the issued shares in a particular class. The court found that a share repurchase of this nature is a scheme of arrangement and is a fundamental transaction. The judgment also provided greater insight into the interpretation of section 48, along with sections 114, 115 and 164 of the 2008 Act with regard to share repurchases. In light of the proposed amendments in the Companies Amendment Bill, 2021, the appraisal rights in section 164 of the 2008 Act will not apply in respect of these transactions. However, until such time as the Amendment Bill becomes law, the judgment in Capital *Appreciation Ltd v First National Nominees (Pty) Ltd* (*supra*) will apply in that a repurchase of more than five per cent of the issued shares of any particular class of a company's shares must be regarded as a fundamental transaction to which the provisions of sections 114, 115 and 164 of the Act will apply.

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Ilobolo for the Oldies? A Critical Discussion of

Peter v Master of the High Court: Bisho [2022] ZAECBHC 22[*]

1 Introduction

After reading the decision in *Peter v Master of the High Court: Bisho* ([2022] ZAECBHC 22), the words of Matlapeng AJ in *Motsoatsoa v Roro* ([2011] 2 All SA 324 (GSJ) par 8) come to mind:

> "It is trite that [a] customary marriage is an age-old institution deeply respected and embedded in the social-cultural fabric of all indigenous people of South Africa. However, over a long period of time during the apartheid era, [a] customary marriage became an object of serious distortions. Regrettably we have now reached a stage where there is a serious and all pervasive confusion regarding the true nature of [a] customary marriage"

At the time of delivering the judgment in *Motsoatsoa v Roro* (*supra*), Matlapeng AJ was addressing perversion coming from litigants in an adversarial system. In this system, each party must make their case before the court. In *Motsoatsoa v Roro* (*supra*), the court intervened to address the perversion of the law relating to customary marriages and corrected the record. Slightly more than a decade later, this perversion emanated from the court in *Peter v Master of the High Court: Bisho* (*supra*). In this decision, the court downplayed the significance of several issues in customary marriages. These include the requirements of a valid customary marriage, the significance of *ilobolo* in the conclusion of a customary marriage by an elderly couple and the role of the family in the conclusion of customary marriages. According to the court, since one of the functions of *ilobolo* was the transfer of a woman's reproductive capacity, the corollary was that *ilobolo* was not necessary for a customary marriage whereby procreation was no longer possible as a result of age (par 34–35). The court went on to insinuate that *ilobolo* was one of the practices that may be waived in a customary marriage (par 37).

This case note is a critical discussion of the decision in *Peter v Master of the High Court: Bisho* (*supra*). At the outset, it must be indicated that this note does not intend to second guess the correctness of the court's decision

[*] The author would like to acknowledge Professor Elmarie Knoetze (Nelson Mandela University, Gqeberha) who drew his attention to this case after it was decided. However, the views and opinion on it are those of the author's.

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but rather to engage in a discussion of some of the thought-provoking aspects of the judgment. The facts and the decision in *Peter v Master of the High Court: Bisho* (*supra*) are set out first. This is followed by a critical discussion of the issues provoked by the judgment, such as *ilobolo* as a general requirement of a valid customary marriage, the significance of *ilobolo* in a marriage involving the elderly, whether *ilobolo* may be waived and the importance of the family in the conclusion of customary marriages. Thereafter, a brief conclusion is drawn.

2 The facts in *Peter v Master of the High Court: Bisho*

The main issue in this case was the question of who was entitled to receive a letter of executorship. However, this question was linked to the validity of the customary marriage between the deceased and the second respondent. The deceased and the second respondent were an elderly couple. (The deceased had been married twice before the customary marriage in question, and both his wives had predeceased him (par 2)). It was common cause that the deceased had died intestate, and according to section 19(a) of the Administration of Estates Act (66 of 1965), the surviving spouse was the preferred executrix (par 15). The first applicant was the eldest daughter of the deceased (par 2). The first respondent was the Master of the High Court in Bisho. The second respondent was the alleged wife of the deceased in terms of a customary marriage (par 1).

Following the deceased's death, the second respondent instructed her attorney to report the deceased estate to the Master for a letter of executorship to be issued to her. The estate was duly reported, but a letter of executorship could not be issued to the second respondent because she did not have proof of her alleged customary marriage as it was not registered (par 3). Unaware that the estate had already been reported, the first applicant (together with some of her siblings) instructed an attorney to report the estate so that a letter of executorship could be issued to her. Upon reporting the estate, the attorney was informed by the Master that the estate had already been reported by the second respondent's attorney. However, a letter of executorship had not been issued because the latter did not have a certificate of registration of her customary marriage (par 3). The second respondent explained that they were unable to register their customary marriage due to the deceased's illness, and after his passing, she could not register the marriage because of the lockdown necessitated by the COVID-19 pandemic (par 10).

The above facts prompted the applicants to approach the court for an order directing the Master to issue a letter of executorship to the first applicant. The second respondent opposed the application on the ground that she was the deceased's surviving spouse and ought to be appointed as the executrix (par 5). The court correctly pointed out that the heart of this dispute was whether there had been a valid customary marriage between the deceased and the second respondent (par 1). The outcome of this question will determine who should receive the letter of executorship.

According to the second respondent, she and the deceased had grown up together and, thereafter, went their separate ways until they met again in 2013 after many years apart (par 5). They then entered into a relationship, and she would visit the deceased at his homestead and spend a few days there (par 5). They did not cohabit because this was contrary to the second respondent's religious beliefs (par 5). They discussed the subject of marriage extensively and eventually agreed to be married in December 2016 by customary rites. Due to the deceased's homestead being dilapidated, the parties arranged to be married at the house of a certain Mr Kututu Joseph, whom the deceased considered a brother as they belonged to the same Mkhuma clan (par 6 and 11).

On the day of the customary marriage, the second respondent further averred that they proceeded to Mr Kututu Joseph's house, where the second respondent was welcomed as the wife-to-be of the deceased (par 6). Customary law ceremonies were performed, and the second respondent was given a bridal name, Nokhuselo, by the sister of the deceased (par 6). The second respondent alleged that both their families witnessed the ceremony. Thereafter, they began living together as husband and wife at the deceased's homestead, which they renovated and refurbished in 2017 (par 6). The second respondent was by the deceased's side when he got ill. Only some of his children visited him, but the first applicant never visited (par 7).

When the deceased passed away, the first applicant assisted her with the funeral arrangements. She was acknowledged as the surviving spouse of the deceased and sat in the place reserved for widows during the church funeral service. Her marriage to the deceased was also acknowledged in the funeral programme and the obituary (par 9). After the burial, the second respondent grieved and wore black for a period of six months. After the mourning period, a cleansing ceremony was held at the deceased's homestead, and none of the applicants attended it (par 8).

A number of the second respondent's averments were confirmed by several people (par 12 to 14). The first applicant argued that the deceased and the second respondent were in a romantic relationship. As such, no marriage existed between them (par 2). She denied that they ever lived together as husband and wife (par 2). She contended that no delegation was sent by the deceased's family to the second respondent's family, no *ilobolo* was negotiated and there was no handing over of the bride to the family of the deceased (par 17).

3 Decision

The court considered section 3(1) of the Recognition of Customary Marriages Act (120 of 1998) (RCMA). According to this provision, a valid customary marriage must comply with these requirements, namely (a) the spouses must both be 18 or above (s 3(1)(*a*)(i) of the RCMA); (b) they must both consent to be married to each other under customary law (s 3(1)(*a*)(ii) of the RCMA, and (c) the marriage must be negotiated and entered into or celebrated in accordance with customary law (s 3(1)(*b*) of the RCMA). The court held that both parties had consented to the marriage (par 17). As it

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was clear that the parties were above the age of 18, the court pointed out that the focus of its enquiry is s 3(1)*(b*) of the RCMA, which requires that the marriage must be negotiated and entered into or celebrated in accordance with customary law.

The court mentioned that in terms of s 3(1)(*b*) of the RCMA, the legislature did not prescribe any specific requirements because "customary law is a dynamic, flexible system, which continuously evolves within the context of its values and norms …" (par 19, citing *Mbungela v Mkabi* [2020] 1 All SA 42 (SCA) 17). Although the court acknowledged that flexibility gives rise to uncertainty, it pointed out that courts have adopted "a pragmatic approach, rooted in the practices and lived experiences of the communities concerned" (par 20).

On the question of the lack of involvement of the deceased's blood family in the alleged marriage, the court first acknowledged the fact that a customary marriage is not just a marriage between the bride and the groom, but it also involves their respective families (par 21; referring to *Mabena v Letsoalo* 1998 (2) SA 1068 (T) 1072C). However, relying on the authority in *Mabena v Letsoalo* (*supra*), the court held that in light of the social realities where men lived on their own and could fend for themselves, there was no reason "an independent, adult man" could not negotiate his own *ilobolo* or required the consent of his parents to marry (*Mabena v Letsoalo supra* 1073C). The court further held that "the agreement to marry in customary law is predicated upon *lobolo* in its various manifestations; the agreement to pay it underpins the customary marriage" (par 23).

The lack of involvement of the deceased's blood family in the marriage did not perturb the court. It found that the presence of people of the same Mkhuma clan as the deceased at the wedding was the same as having close family members (par 30). The court also ruled that there was no reason the practice of the handing over of the bride could be said not to have evolved to accommodate a situation where the groom's family was represented by members of the same clan as him (par 32). To arrive at this decision, the court relied on the fact that both the parties were in their 60s and that there were no remaining elders in the deceased's family – the only surviving elder was mentally ill (par 39). The relationship between the deceased and his children did not allow them to participate in the marriage preparations (par 41). If not the members of the Mkhuma clan, who would have represented the deceased?

Finally, the court acknowledged that the second respondent made no mention of *ilobolo* being negotiated and delivered (par 33). It first considered the definition of *ilobolo* in section 1 of the RCMA, which provides that it is "the property in cash or in kind … which a prospective husband or the head of his family undertakes to give to the head of the prospective wife's family in consideration of a customary marriage". Although the court acknowledged that there was no consensus on the functions of *ilobolo*, but accepted that, among other things, it transfers a woman's reproductive capacity (par 35). Since the parties were in their 60s at the time of the marriage, there was no reproductive capacity to transfer (par 36). In the court's words:

> "the function of *lobolo* would have served little purpose and the couple would have been expected, instead, to have used any available resources to make their lives more comfortable in anticipation of old age." (par 36)

Therefore, the court held that *ilobolo* could be waived and then went on to state that, in this particular case, there had been a tacit waiver of *ilobolo* (par 37). In light of the reasoning above, the court found that there was a valid customary marriage between the deceased and the second respondent.

4 Discussion

As pointed out in the introductory paragraphs, the decision above raises a number of questions. In general, it raises a question on *ilobolo* as a general requirement of a customary marriage, and in particular, it draws attention to its significance in marriages involving elderly women who can no longer procreate. While the waiver of certain customs is a known practice under customary law, there are those customs that are so sacred that they cannot be waived (Sibisi "Is the Requirement of Integration of the Bride Optional in Customary Marriages" 2020 *De Jure* 90 97). Without these customs, the marriage would be considered invalid. Is *ilobolo* one of the customs that may be waived?

The importance of the family in the conclusion of customary marriage also became one of the central issues in the judgment. As a result, the distinction between a family and a clan is also discussed together with the question of whether a clan may substitute a family. It is not the aim of this case note to second guess the correctness of the court's decision in finding that the customary marriage in question was valid, and as such, this aspect of the judgment will not be interrogated.

4 1 Ilobolo as a general requirement of a customary marriage

The question of *ilobolo* as a general requirement of customary marriages must be considered with due regard to the distinction between the official customary law and the living customary law. Official customary law refers to the written version of customary law. This includes the various codes (for example, the Codes of Zulu Law), statutes, case law, regulations in terms of statutes, proclamations, journal articles, and textbooks (*Bhe v Magistrate, Khayelitsha* 2005 (1) SA 580 (CC) par 86 and Diala "The Concept of Living Customary Law: A Critique" 2017 *The Journal of Legal Pluralism and Unofficial Law* 143). Living customary law refers to the lived experiences of those who live according to customary law (*Alexkor v Richtersveld Community* 2005 (5) SA 460 (CC) par 50 and Diala 2017 *The Journal of Legal Pluralism and Unofficial Law* 148). While it is possible for written law to reflect accurately on a rule of living customary law, it is impossible to account for all the different rules that exist as a result of differences in the ways of life between different ethnic groups. Obviously, the official version of customary law is ascertained through reference to the relevant source from the list above.

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Challenges exist when it comes to ascertaining living customary law. Strictly speaking, living customary law can truly be ascertained through reference to the lived experiences of those who are subject to the rule sought to be ascertained. Fortunately, ancillary rules have been developed to deal with the ascertainment of living customary law (see Osman "Ascertainment of Customary Law: Case Note on *MM v MN*" 2016 *SAPL* 240). However, it is interesting to note that in *MM v MN* (2013 (4) SA 415 (CC)), the Constitutional Court was not unanimous on how it should go about ascertaining living customary law. The majority of the court preferred calling for further evidence (*MM v MN supra* 433C). In a minority judgment, Zondo J (as he then was) did not see a need for further evidence. In his view, the matter could be decided based on the record as there was no dispute regarding the content of the rule before court – the appellant had pleaded the rule, and the respondent did not dispute it in pleadings (*MM v MN supra* 433F–H; for a discussion of this aspect of the judgment in *MM v MN*, see Sibisi "Breach of Promise To Marry Under Customary Law" 2019 *Obiter* 340 346–347).

A painstaking discussion of the rules relating to the ascertainment of living customary law is beyond the scope of this case note. It suffices to point out that sometimes, the written version, such as case law, may be consulted to ascertain living customary law. Himonga refers to this as the official living customary law (Himonga "The Dissolution of a Customary Marriage by Divorce" in Heaton (ed) *The Law of Divorce and Dissolution of Life Partnerships* (2014) 233).

Back to the question of *ilobolo* as a general requirement of a customary marriage. The official customary law is the RCMA and there is a plethora of case law on the subject. Section 3(1) of the RCMA does not explicitly list *ilobolo* as a requirement for a customary marriage. However, this is not the end of the road; as seen above, section 3(1)(*b*) of the RCMA provides that a customary marriage must be negotiated and entered into or celebrated in accordance with customary law. It is accepted that this provision makes way for living customary law. Under living customary law, *ilobolo* is a requirement of customary marriage, and therefore, section 3(1)(*b*) implicitly requires *ilobolo* (Himonga in Heaton (ed) *The Law of Divorce and Dissolution of Life Partnerships* 255). Another indication that *ilobolo* is a requirement of a customary marriage appears in section 4(4)(*a*) of the RCMA. According to this section, proof of *ilobolo* may be used to register a customary marriage. In practice, it is impossible to register a customary marriage without *ilobolo*. A party may otherwise have to litigate for an order directing the Department of Home Affairs to register the marriage, and even then, there will be difficulty in proving the existence of a customary marriage without *ilobolo* (Sibisi "Registration of Customary Marriages in South Africa: A Case for Mandatory Registration" 2023 *Obiter* 515 523).

Other than the case under the present discussion, there is one other case where the court did find in favour of a valid marriage in the absence of *ilobolo.* In *Lijane v Kekana* ([2023] ZAGPJHC), the question before the South Gauteng High Court was whether a valid customary marriage had been concluded between an African man and a coloured woman. In this case, there was no *ilobolo per se*; instead, the applicant had simply offered

the bride's family an amount of R10 000 as compensation for the marriage (par 13). The court construed the applicant's offer as *ilobolo*, which, according to the court, was accepted as a contribution to the costs of the wedding (par 13). This analogy by the court is problematic because it implies that any gift may be construed as *ilobolo*. It is submitted that this downplays or compromises the importance of *ilobolo*. The parties must convene and specifically agree on the question of *ilobolo*.

It is appreciated that one of the parties in *Lijane v Kekana* (*supra*) was coloured and may not have lived according to customary law. However, a person who wishes to conclude a customary marriage should comply with the requirements of such marriage irrespective of their race. It is not customary law that must change to accommodate such a person. The same is the case with civil marriages. A person who wishes to conclude a civil marriage must comply with the requirements of a civil marriage. It is also doubtful that customary law is flexible enough to permit the conversion of a compensation or contribution to *ilobolo* without the parties having agreed to this, let alone having envisaged the same at the relevant time.

In the light of what has been said above, clearly, *ilobolo* is the cornerstone of a customary marriage (Manthwa and Ntsoane "The Space for Lobolo in the Post-Constitutional South African Era: Revisiting the Debate" 2022 *THRHR* 509 511 and Dlamini *A Juridical Analysis And Critical Evaluation Of Ilobolo In A Changing Zulu Society* (Unpublished LLD thesis, University of Zululand) 1983 151). This, in turn, brings into question the legislature's decision not to explicitly list *ilobolo* as a requirement for a customary marriage. This decision has its roots in the South African Law Reform Commission (SALRC) (as it is now called) recommendation (SALRC *Project 90: The Harmonisation of the Common Law and Indigenous Law – Report on Customary Marriages* (1998) 61). The SALRC observed that among Africans, *ilobolo* was considered inseparable from a customary marriage (SALRC *Project 90: The Harmonisation of the Common Law and Indigenous Law* 56). It also observed that other ethnic groups seldom focused on the delivery of *ilobolo*; an agreement would suffice (see Montle and Moleke "Exploring the Commercialisation of *lobola* in South Africa" 2021 *PJAEE* 587 592). The BaSotho and Tswana groups regard the delivery of *ilobolo* or *bogadi* as the crux of a customary marriage, whereas in other groups, such as AmaZulu, *ilobolo* alone does not conclude a customary marriage (SALRC *Project 90: The Harmonisation of the Common Law and Indigenous Law* 56–57). As a result of the aforementioned, the SALRC recommended that the delivery of *ilobolo* should be optional and that it should not be an essential requirement of a customary marriage (SALRC *Project 90: The Harmonisation of the Common Law and Indigenous Law* 61).

It is debatable if the legislature really heeded the recommendation of the SALRC. Some may view the omission to explicitly deal with *ilobolo* as heeding the above recommendation, while others may say otherwise, especially when considering the difficulty in registering or proving a customary marriage in the absence of *ilobolo*. Further, as pointed out above, section 3(1)(*b*) of the RCMA provides that a customary marriage *must* be *negotiated* and entered into or celebrated in accordance with customary law.

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It has been accepted that the word "negotiated" refers to *ilobolo* negotiation (Manthwa and Ntsoane 2022 *THRHR* 514 and Himonga and Nhlapo *African Customary Law in South Africa: Post-Apartheid and Living Law Perspectives* (2014) 103). The word "must" indicates that the provision is peremptory and suggests that the legislature intended *ilobolo* to be an essential requirement of a customary marriage. If this were not the case, it would be difficult to assign meaning to the word "negotiated" as used by the legislature. Mofokeng arrives at a similar conclusion but for a different reason. He submits that the words "in accordance with customary law" in the same provision mean that *ilobolo* is a silent requirement of a customary marriage (Mofokeng "The Lobolo Agreement as the Silent Pre-Requisite for the Validity of a Customary Marriage in terms of the Recognition of Customary Marriages Act" 2005 *THRHR* 277 277–278).

4 2 The significance of ilobolo in a marriage involving elderly women

This case note takes the view that *ilobolo* is essential to a customary marriage (Manthwa and Ntsoane 2022 *THRHR* 510). What, then, is the significance of *ilobolo* in a marriage involving elderly women? This question cannot be answered without reference to the general significance of *ilobolo*. It has three broad functions, namely, legal functions, social functions, and economic functions (Sibisi "The juristic nature of *ilobolo* agreements in modern South Africa" 2021 *Obiter* 57 60-62). The legal functions emanate from the role of *ilobolo* as an essential requirement for the validity and registration of the marriage as per section 4(4)(*a*) of the RCMA (Sibisi 2021 *Obiter* 60–61). The social functions encompass the significance of *ilobolo* under living customary law (Sibisi 2021 *Obiter* 61–62). Finally, the economic functions come from the modern role of *ilobolo* in financing the bride's gifts for the in-laws and assisting with the wedding costs (Sibisi 2021 *Obiter* 62–64).

The case note is more concerned with the social significance of *ilobolo*, which is to show love and respect for the bride, her family, and culture (Montle and Moleke 2021 *PJAEE* 589; Dlamini "The Modern Legal Significance of *Ilobolo* in Zulu Society" 1984 *De Jure* 148 151). Ngema submits that *ilobolo* is an indication that the husband values the bride and that he will treat her well (Ngema "Considering the Abolition of *Ilobolo: Quo Vadis* South Africa" 2013 *PELJ* 30 37). However, Dlamini dismisses this submission. He points to a number of civil marriages without *ilobolo* where husbands still treat their wives well (Dlamini 1984 *De Jure* 151).

Although *ilobolo* alone does not cement her status within the new family until the marriage is finalised, it nevertheless establishes it. In many traditional families, there is a difference between a bride whose *ilobolo* has been delivered, a woman who simply cohabits without any *ilobolo,* and the bride who enters into a civil marriage without *ilobolo*. The payment or delivery of *ilobolo* leads to the acceptance of a woman as a bride. (Ngema 2013 *PELJ* 37).

The most crucial function of *ilobolo*, which is directly in line with the case under the present discussion, is the transfer of the bride's reproductive capacity (Montle and Moleke 2021 *PJAEE* 588). As noted above, the court held that since the bride was an elderly woman with no reproductive capacity, *ilobolo* became redundant. The correct proposition is that *ilobolo* facilitates the transfer of the bride to her new family. Her offspring belong wherever she belongs. If she is unmarried, the offspring belong to her maiden family. The offspring will still belong to her maiden family, where only *ilobolo* has been delivered, without ancillary ceremonies that complete a customary marriage (Dlamini *A Juridical Analysis* 353).

Should the relationship between the bride and groom become sour before the finalisation of the marriage, the groom will have to conduct certain ceremonies in order to fully integrate his children into his family (see Moore and Homonga "Living Customary Law and Families in South Africa" in Hall, Richter, Mokomane and Lake *Children, Families and the State: Collaboration and Contestation* (2018) 62). The only children that do not have to be specially integrated are those that are born after a complete customary marriage. The logic behind this is that once a customary marriage is completed, the bride fully belongs to the groom's family, and whatever offspring she begets belongs to her new family. This will be the case even if the other progenitor is not her husband. Therefore, *ilobolo* facilitates the transfer of the bride, and not just her reproductive capacity.

If the bride does not beget any children, she is still a member of her husband's family. She may demonstrate her reproductive capacity in many ways besides bearing children. She may raise children in need within the family. These may be the children of her husband. Sometimes, the family assigns children to her through customs. The Zulu custom in this respect is called *ukufakwa esiwini* (Matiwane "Prince Simakade KaZwelithini Takes Claim to the Throne to the High Court" (16 September 2022) https://www.timeslive.co.za/news/south-africa/2022-09-16-prince-simakade-kazwelithini-takes-claim-to-the-throne-to-the-high-court/ (accessed 2024-03-13)). Children assigned through this custom will be that of the wife for all intent and purposes. As a result of these, as far as the question of *ilobolo* is concerned, subject to what is said below, there is no distinction between the young and old (Matiwane https://www.timeslive.co.za/news/south-africa/2022-09-16-prince-simakade-kazwelithini-takes-claim-to-the-throne-to-the-high-court/). Therefore, the assertions made in the judgment in this regard do not find any support in customary law.

4 3 The waiver of ilobolo

The idea that a practice may be waived is not completely inimical to customary law. However, not all practices may be waived. A customary marriage is not a once-off event but a culmination of a series of events (Osman "The Million Rand Question: Does a Civil Marriage Automatically

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Dissolve the Parties' Customary Marriage?" 2019 *PELJ* 1 8). Among these events, some may be waived and others not (Sibisi 2020 *De Jure* 97). In some South African ethnic groups, it is mandatory to perform the coming-of-age ceremony (*Umemulo* in Zulu) for the eldest daughter. If not performed at the time she came of age, it must be performed just before marriage. However, this coming-of-age ceremony is not necessary if the bride is not the eldest daughter.

With the above said, may *ilobolo* be waived? It is important to consider living law as *ilobolo*, which is the bedrock of customary marriages. It is a strict requirement of a customary marriage (Osman "Precedent, Waiver and the Constitutional Analysis of Handing Over of the Bride [Discussion of *Sengadi v Tsambo* 2018 JDR 2151 (GJ)]" 2020 *Stell LR* 80 86). This is because it distinguishes between marriage and cohabitation on the one hand and civil marriage and a customary marriage on the other hand (Van Niekerk "Some Thoughts on Bridewealth in South Africa and Dowry in Roman Law" 2017 *SUBB Jurisprudentia* 131 134). However, the latter assertion must be treated with caution. This is because Africans have cemented the practice of delivering *ilobolo* even where a civil marriage is intended (Manthwa "*Lobolo*, Consent as Requirements for the Validity of a Customary Marriage and the Proprietary Consequences of a Customary Marriage: *N v D* (2011/3726) [2016] ZAGPJHC 163" 2017 *Obiter* 438 439). Nevertheless, it is a strong indicator that the parties intended a customary marriage. In addition to this, it cements the relations between the respective families and the respective ancestors (Sibisi 2021 *Obiter* 62).

In light of the above discussion, it is impossible to think of a customary marriage without *ilobolo*. Without it, the marriage may never be said to be customary. As such, *ilobolo* cannot be waived. The only flexibility where the parties are old is the amount of *ilobolo* in that a token amount may replace the often-exorbitant prices to accommodate the parties' diminished financial standing. However, Osman asserts that the negotiation of *ilobolo* may evolve in the future to a custom that may be waived (Osman 2020 *Stell LR* 86). It is argued that only time will prove whether *ilobolo* will evolve into a custom that may be waived in a customary marriage. Until such evolution takes place, *ilobolo* cannot be waived. For the sake of completeness, it is important to point out that the reason for a possible reduction in the amount of *ilobolo* has to do with the reduced costs of the marriage. An elderly couple usually have a low-profile wedding. Therefore, in the case under the present discussion, the court misdirected itself in finding that *ilobolo* could be waived.

4 4 The importance of the family in customary marriages

The last issue that requires special attention in light of the facts of the case of *Peter v Master of the High Court: Bisho* (*supra*) is the importance of the family in a customary marriage. In this case, the groom's side is comprised of people from the same clan as him. May a clan replace the family? A clan comprises interrelated families that are distantly related. What makes families a clan is a very distant common ancestor. Some families within the clan are so distant that marriages between them are permitted. Clan names

(*izithakazelo* in Zulu) provide very good assistance in determining who forms part of a particular clan. A family is a close-knit unit that comprises a person's immediate ancestors and descendants. There is a limit to the number of generations that may comprise a family. It all depends on how long the family remains. Some families may remain together for many generations, whereas others may become fragmented within a few years of the departure of the common ancestor. After the fragmentation, the many branches of the once close family form part of a larger and already existing clan (see discussions in Radcliffe-Brown and Forde *African Systems of Kinship and Marriage* (1950) 5–6).

A clan only becomes relevant if a matter in question pertains to the clan. In this case, the chief of that clan will lead the process. If the matter concerns a family, the family must take charge. A customary marriage is a family affair, not a clan affair (Hadfield "Understanding African Marriage and Family Relations from South Africa to the United States" 2017 *Journal of West African History* 102 103). The leader of the family plays a significant role. The fact that in the case of *Peter v Master of the High Court: Bisho* (*supra*), the deceased was the eldest, and the other elder was mentally ill is insignificant. The family does not just become leaderless, and a clan cannot replace a family.

5 Conclusion

This case note has discussed some thought-provoking issues raised in the judgment. It focused on *ilobolo* as a requirement of a customary marriage. In particular, it discussed *ilobolo* as a requirement in a marriage between the elderly. It showed that even in such a case, *ilobolo* must still be delivered. Although *ilobolo* does transfer the reproductive capacity of a woman, this should be interpreted in context. It actually facilitates the transfer of the woman in the sense that wherever she belongs, her offspring will follow her. Therefore, it is not entirely correct to assert that *ilobolo* transfers the reproductive capacity. *Ilobolo* is an important element in customary marriages, and it cannot be waived.

In addition, the importance of the family in customary marriages should be considered. A family is distinguishable from a clan. In the case of *Peter v Master of the High Court: Bisho* (*supra*), the deceased was represented by members of his wider clan and not his family. The court accepted the substitution of the family by the clan. A customary marriage is an affair between the two families. It is the family that plays a central role, not the clan. Therefore, the court misdirected itself in finding that the clan could represent the deceased in the absence of his family.

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A Long Walk to Gender Equality in South African Employment Law –

Van Wyk v Minister of Employment and Labour [2023] ZAGPJHC 1213

1 Introduction

As a point of departure, it is recognised that in past decades, society prescribed gender roles for men and women. In accordance with such roles, the duty of women in a family was limited to primary caregiving. In contrast, traditionally, men have been assigned the role of taking the financial burden of the family as a breadwinner. In principle, the Bible, in 1 Timothy 5:8 ("But if any provideth not for his own, and especially his household, he hath denied the faith, and is worse than an unbeliever") also prescribes the duty of a man to his family. However, the dramatic shift in the socio-economic status of women, the adoption of the Constitution of the Republic of South Africa, 1996 (the Constitution) and modern employment legislation have diminished the traditional roles assigned to fathers and mothers in a family. In modern society, the role of women is no longer confined to primary caregiving; a majority of women have joined the working class to support their families, and they are positively contributing to the economy of South Africa.

With the advent of the Constitution and of labour legislation, women and men in society have been guaranteed equal opportunities and fair treatment in employment through the elimination of unfair discrimination (s 23 of the Constitution and s 2 of the Employment Equity Act 55 of 1998 (EEA)). However, in the past decades, female employees have been afforded maternity leave, which is excluded for male employees (s 25 of the Basic Conditions of Employment Act 75 of 1997 (BCEA)). Section 25 of the BCEA allocates four months' maternity leave to a birth mother employee and section 25A grants 10 days of parental leave to the father. Dupper contends that the exclusion of paternity leave fuels the stigmatised notion of women as homemakers and caregivers ("Maternity Protection in South Africa: An International and Comparative Analysis (Part Two)" 2002 13(1) *Stell LR* 90). The argument is that it leads to the perception that women are provided with maternity leave because the primary responsibility of women is to care for children, whereas men need not be afforded equivalent paternity leave because their primary responsibility is to be breadwinners (Dupper 2002 *Stell LR* 90).

Remarkably, the questionable status of the different duration of employees' leave period for a birth mother and father remained unchallenged until recently when the Van Wyk family raised the issue (*Van Wyk v Minister of Employment and Labour* [2023] ZAGPJHC 1213). The

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landmark judgment by Sutherland DJP may be welcomed by many as a milestone in eradicating the demarcation of gender roles between female and male employees. In pursuit of equality in the workplace, both parents can equally share in the burden of childcare without the mother being deemed and doomed to be the primary caregiver (*Van Wyk v Minister of Employment and Labour supra* par 27). In essence, the landmark judgment can be viewed as a positive step towards achieving a more egalitarian society where the responsibility for childcare is equally shared between parents.

Without a doubt, the judgment by Sutherland DJP has triggered divergent viewpoints on parental leave. Be that as it may, the significance of employment law in advancing equality cannot be taken for granted. Accordingly, this case note calls for a critical analysis of the judgment in *Van Wyk*, its significance and its importance in South African employment law. The authors discuss equality as a constitutional obligation or mandate, the legislative framework on equality and pertinent facts, as well as the judgment and commentary. Finally, the authors endeavour to determine whether Sutherland DJP's judgment leads in the right direction in achieving equality in employment law.

2 Equality as a constitutional obligation

When it comes to the right to equality, a distinction should be drawn between formal and substantive equality on the one hand, and fair and unfair discrimination on the other. Formal equality entails the sameness and likeness of treatment. It merely requires that all people have equal rights. Formal equality extends the same rights and entitlements to all following the same neutral norm and standard or measurement (Currie and De Waal *The Bill of Rights Handbook* (2013) 6ed 262). Formal equality does not take into account actual social and economic disparities between groups and individuals (s 9(1) provides for the right to be treated equally, to be afforded equal protection of the law, and to enjoy equally the benefit of the law).

Substantive equality, on the other hand, requires the law to assure equality of results and is willing to tolerate disparities in treatment to achieve this aim. It is necessary to examine the real social and economic situations of groups and people to establish if the Constitution's promise of equality is being respected. The preferred approach to understanding gender equality is substantive equality. Smith says that substantive equality calls for a consideration of the impact of measures and policies aimed at attaining gender equality, which are said to manifest through legal mechanisms such as affirmative action (Smith "Equality Constitutional Adjudication in South Africa" 2014 14 *African Human Rights Law Journal* 612). It has been submitted that the idea of creating substantive equality in the workplace is based on an understanding that inequality stems from long-established political, social and economic differences between men and women. Consequently, Albertyn and Fredman have described the four aims of substantive equality as follows:

i) redress social and economic disadvantage;

ii) counter stereotyping, stigma, prejudice, humiliation and violence based on protected characteristics;
iii) enhance voice and participation countering political and social exclusion and accommodating and affirming differences, diversity and identity; and
iv) achieve structural changes (Albertyn and Fredman "Equality Beyond Dignity: Multidimensional Equality and Justice Langa's Judgments" 2015 *Acta Juridica* 434).

Fredman states that the above-mentioned four-dimensional framework provides aims and objectives that can be used to assess and assist in modifying policies and initiatives to attain substantive equality (Fredman "Substantive Equality Revisited: A Rejoinder to Catharine MacKinnon" 2016 14 *International Journal of Constitutional Law* 728). In addition, all four dimensions are to be addressed in an interactive manner in order for substantive equality to be attained (Fredman 2016 *International Journal of Constitutional Law* 749).

In the workplace context, it is submitted that the principle of substantive equality is not just about avoiding overt discrimination. In essence, it is about creating an environment where all employees, regardless of gender, race or other factors, have equal opportunities to thrive and advance. This includes *inter alia* addressing patriarchal policies that may implicitly disadvantage women or other marginalised groups, and ensuring that recruitment, retention and promotion practices are fair and inclusive. As Albertyn opines, for equality jurisprudence to be truly transformative, rather than merely inclusionary, the legal application of substantive equality needs to be more conceptually consistent (Albertyn "Substantive Equality and Transformation in South Africa" 2007 *SAHJR* 254).

For instance, patriarchal workplace norms can create challenges for women in balancing professional and family responsibilities, often resulting in higher attrition rates. Achieving substantive equality requires that these norms be addressed, possibly through the implementation of flexible work arrangements or gender-neutral parental-leave policies, thereby ensuring equal opportunities for success. A similar issue is at the core of the case under discussion.

In contrast, unfair discrimination principally means treating people differently in a way that impairs their fundamental dignity. What makes discrimination unfair is the impact of the discrimination on its victims. Unfair discrimination is differential treatment that is hurtful and demeaning. The Constitution provides listed grounds of discrimination such as race, gender, sex, disability, religion, conscience, belief, culture, language and birth. To prove discrimination, an applicant must establish discrimination on a specified ground listed in section 9(3) of the Constitution or an analogous ground (meaning a ground based on characteristics that have the potential to impair the dignity of a person as a human being or to affect them in a comparably serious manner). Different treatment on one or more of these listed grounds is discrimination and will be presumed to be unfair unless it is

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shown that the discrimination is fair (*Pretoria City Council v Walker* 1998 (3) BCLR 257 (CC)). It is, however, worth noting that laws may sometimes justifiably classify people and treat them differently, but there should be a legitimate reason (Currie and De Waal *The Bill of Rights Handbook* 219).

3 Legislative framework on gender equality in the workplace

The Preamble of the EEA clearly states its main objective as follows:

> "To promote the constitutional right to equality and the exercise of true democracy; eliminate unfair discrimination in employment ... to redress the effects of discrimination; and ... give effect to the obligations of the Republic as a member of the International Labour Organisation."

The EEA requires that the Act must be interpreted to give effect to the purpose of the Constitution (s 3 of the EEA provides that the Act must be interpreted: "*(a)* in compliance with the Constitution; *(b)* so as to give effect to its purpose; *(c)* taking into account any relevant code of good practice issued in terms of this Act or any other employment law; and *(d)* in compliance with the international law obligations of the Republic, in particular those contained in the International Labour Organisation Convention (No 111) concerning Discrimination in respect of Employment and Occupation").

The EEA expressly prohibits unfair discrimination in the workplace. Section 6(1) provides:

> "No person may unfairly discriminate, directly or indirectly, against an employee, in any employment policy or practice, on one or more grounds, including race, gender, sex, pregnancy, marital status, family responsibility, ethnic or social origin, colour, sexual orientation, age, disability, religion, HIV status, conscience, belief, political opinion, culture, language, birth or any other arbitrary ground."

From a reading of section 6(1), it can be deduced that HIV status, family responsibilities and political opinion have been added to the 17 grounds listed in section 9 of the Constitution.

The EEA thus imposes a statutory obligation on all employers to take steps to promote equal opportunity in the workplace by eliminating unfair discrimination in any employment policy or practice (s 5 of the EEA). Henrico contends that while the LRA refers specifically to an employer who is prohibited from unfairly discriminating against an employee, the net of liability cast by the EEA is broadened by the term "no person", thereby giving effect to the duty imposed upon the employer to take steps to promote equal opportunity in the workplace by eliminating unfair discrimination (Henrico "South African Constitutional and Legislative Framework on Equality: How Effective Is It in Addressing Religious Discrimination in the Workplace?" 2015 36(2) *Obiter* 281). He further contends that an employer can be held liable for the conduct of one employee against another if it constitutes unfair discrimination (Henrico 2015 *Obiter* 281).

In the event of an unfair discrimination allegation, the burden of proof to refute such allegation rests with the employer on a balance of probabilities

(s 6(11) of the EEA). The employer may rely on the implementation of affirmative action (s 6(2)(*a*) of the EEA), inherent requirements of a job (s 6(2)(*b*) of the EEA), rationality or fairness of the action to disprove a claim for unfair discrimination.

To determine unfair discrimination, our courts have relied on the test in *Harksen v Lane* (1998 (1) SA 300 (CC)). Goldstone J formulated a three-stage enquiry to determine unfair discrimination as follows:

a) Does the legislative provision differentiate between people or categories of people? If so, does the differentiation bear a rational connection to a legitimate government purpose? If it does not, then there is a violation of section 8(1). Even if it does bear a rational connection, it might nevertheless amount to discrimination.
b) Does the differentiation amount to unfair discrimination? This requires a two-stage analysis:
    i First, does the differentiation amount to "discrimination"? If it is on a specified ground, then discrimination will have been established. If it is not on a specified ground, then whether or not there is discrimination will depend upon whether, objectively, the ground is based on attributes and characteristics that have the potential to impair the fundamental human dignity of persons as human beings or to affect them adversely in a comparably serious manner.
    ii If the differentiation amounts to "discrimination", does it amount to "unfair discrimination"? If it has been found to have been on a specified ground, then unfairness will be presumed. If on an unspecified ground, unfairness will have to be established by the complainant. The test of unfairness focuses primarily on the impact of the discrimination on the complainant and others in his or her situation.

    If, at the end of this stage of the enquiry, the differentiation is found not to be unfair, then there will be no violation of section 8(2).
c) If the discrimination is found to be unfair, then a determination will have to be made as to whether the provision can be justified under the limitations clause (*Harksen v Lane supra* par 54).

Remarkably, the case under consideration was also subjected to the *Harksen Lane* test in determining whether section 25 of the BCEA unfairly discriminates between mothers and fathers. How the court applied the *Harksen Lane* test is discussed below. The next section briefly considers pertinent facts and the judgment by Sutherland DJP.

4 Pertinent facts and judgment

This case concerns a constitutional challenge to:

a) section 25 (the right to at least four consecutive months' maternity leave for a birth mother);
b) section 25A (a father's right to 10 days' parental leave from the date of birth of the child);

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c) section 25B (adoption leave for the adoption of a child under the age of two; the section recognises both adoptive parents: one parent is entitled to 10 consecutive weeks' leave and the other to the 10 days' parental leave referred to in s 25A); and

d) section 25C of the BCEA and the corresponding provisions of sections 24, 26A, 27, 29A of the Unemployment Insurance Fund Act (63 of 2001) (UIF Act).

In this case, the applicant contended that these provisions were unconstitutional because they failed to provide valid grounds to distinguish one parent employee from another (*Van Wyk v Minister of Employment and Labour supra* par 13). Secondly, the applicant contended that both parents should be entitled to parental leave in equal measure and the failure to provide equal parental leave amounts to unfair discrimination and violates the dignity of all parents (par 13).

In this case, the applicant, Mr Van Wyk, was a salaried employee, while his wife, Mrs Van Wyk, was in business for her own account (*Van Wyk v Minister of Employment and Labour supra* par 28). When they had a new baby, they chose that Mrs Van Wyk should return to trade as soon as possible because the business might fail were she not to be active (par 28). In turn, Mr Van Wyk would be the primary caregiver during the early infancy of their child (par 28). However, Mr Van Wyk was ineligible for any more than 10 days' paternity leave. In an ad hoc agreement with the employer, he was granted partly unpaid leave (par 28).

In dissecting the issue of paternity leave for fathers, Sutherland DJP reasoned that to grant a paltry 10 days' leave speaks to a mindset that regards a father's involvement in early parenting as marginal (*Van Wyk v Minister of Employment and Labour supra* par 26). The court thus found that the provisions of the BCEA were offensive to the norms of the Constitution as they impaired a father's dignity (par 26). The court further found that a father who chooses to share in the demanding, yet rewarding experience of early child nurturing can indeed complain that the absence of equal recognition in the BCEA is unfair discrimination (par 27). In addition, the court reasoned that a mother can rightly equally complain that assigning her the role of primary caregiver who should bear the rigours of parenthood single-handedly is a choice that she and the father should make, not the legislature, and, in denying parents the right to choose for themselves, impairs her dignity (par 27).

Addressing the issue of commissioning and adoptive mothers, the court found that they ought to be entitled to the same period of leave as birth mothers for child nurture, if inequality, as proscribed by section 9 of the Constitution, is to be avoided (*Van Wyk v Minister of Employment and Labour supra* par 24). The court reasoned that an honourable explanation was absent for why six weeks were subtracted from commissioning and adoptive mothers (par 24). The court reasoned that although they may not have experienced physical childbirth, this was not an acceptable justification for the discrimination (par 24).

5 Commentary

Nationally and globally, there is a constant fight to eradicate and address conduct that results in unequal treatment of human beings in general, and workers or employees specifically (Henrico 2015 *Obiter* 285). Henrico contends that the nexus between notions of equality and discrimination is unavoidable since *prima facie* discrimination is a denunciation of equality (285). He further contends that cross-stitched into this is also the close association between equality and human dignity (285). He argues that every human being has an absolute inner worth, and all human beings are equal concerning this absolute worth, which is dignity (285).

In advocating for equality and dignity in the workplace, Sutherland DJP correctly premised his judgment on the nurture of the child, a factor that both parents can provide, with the exception of breastfeeding (*Van Wyk v Minister of Employment and Labour supra* par 18).

Sutherland DJP remarked:

> "The proper location of the controversial policy choices evident in the BCEA is in respect of child-nurture, not merely a birthmother's experience of pregnancy and childbirth per se and her need for a physiological recovery period. In respect of nurture, save for breast-feeding, both parents can provide comprehensive nurture to their child." *(Van Wyk v Minister of Employment and Labour supra* 18)

The court did not expressly make any pronouncements on the best interests of the child. However, by virtue of highlighting the importance of child nurture, one may safely argue that the court endorsed the spirit and purport of the Constitution. To be more precise, section 28 of the Constitution makes provision for the best interests of the child.

In turn, the court can also be commended for restoring the dignity of fathers. Historically, it remains undisputed that South Africans emerged from a period during which they were denied the right to human dignity. In the case of *Prinsloo v Van der Linde* (1997 3 SA 1012 (CC)), the court recognised that the majority of citizens had not been treated as having inherent worth – but as objects whose identities could be arbitrarily defined by those in power rather than as persons of infinite worth (*Prinsloo v Van der Linde supra* par 32). Unfair discrimination impairs the fundamental dignity of human beings, who are inherently equal in dignity (par 32).

In protecting the dignity of fathers, Sutherland DJP remarked as follows:

> "To accord a paltry 10 days' leave to a father speaks to a mindset that regards the father's involvement in early parenting as marginal. In my view, this is per se offensive to the norms of the Constitution in that it impairs a father's dignity. Long-standing cultural norms which exalt motherhood are not a legitimate platform for a cantilever to distinguish mothers' and fathers' roles." (*Van Wyk v Minister of Employment and Labour supra* par 18)

The judgment can also be lauded for upholding the autonomy of parents, as Sutherland DJP did not prescribe a formula for shared parental leave (*Van Wyk v Minister of Employment and Labour supra* par 18). Notwithstanding that autonomy is not enshrined in the Constitution as a right, it may be

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argued that autonomy is implicated in a number of constitutional rights, including the right to freedom of choice. O'Regan J stated that autonomy is a constitutional value that underlies human dignity, freedom and privacy (*NM v Smith* 2007 (5) SA 250 (CC) par 145–146).

On the downside, it may also be argued that the *Van Wyk* judgment has left employers in limbo as the court did not provide any guidelines to assist them with leave provisions on how to facilitate the integration of fathers into the care of newborn children.

In addition, the judgment created uncertainty on whether a spouse in a civil union (who in terms of a surrogate-motherhood agreement would not be the child's primary caregiver from the moment of birth) would be eligible to be entitled to the shared parental leave. The court in *MIA v State Information Technology Agency (Pty) Ltd* (2015 (6) SA 250 (LC)) granted one commissioning parent in a civil union four months of paid maternity leave. By implication, Sutherland DJP's judgment did not exclude the other commissioning parent from shared parental leave. An interpretation that excludes the other commissioning parent in a civil union from a shared parental leave entitlement would be a major setback to the milestones achieved by the *Van Wyk* and *MIA* cases. It may be tantamount to unfair discrimination between fathers and fathers in a civil union.

Lastly, although it may be new in South African employment law, shared parental leave is not a new phenomenon in international and continental employment law. Sweden has unquestionably already achieved a milestone by promoting and maintaining equality between parents when it comes to equal parental-leave allocations; this in turn promotes gender equality in relation to leave privileges (Field, Bagraim and Rycroft "Parental Leave Rights: Have Fathers Been Forgotten and Does It Matter?" 2012 36(2) *South African Journal of Labour Relations* 30–41). Sweden was in 1974 the first country to introduce paid parental leave for fathers, and this legislation has since been continuously reformed to bring about more equal rights in relation to parenthood. There are two reasons for Sweden's adoption of a shared parental-leave policy. First, it came in response to the increase in the number of women within the workplace and to encourage such continued participation. Secondly, Sweden introduced the shared parental-leave policy to ensure that child-caring responsibilities were equally distributed between parents regardless of sex. In essence, Sweden's motivation behind the implementation of a shared parental-leave policy was to aid the progression of the dual-earner family model (Earles "Swedish Family Policy-Continuity and Change in the Nordic Welfare State Model" 2011 45 *Social Policy and Administration Journal* 180).

Currently, Sweden's parental-leave policy entitles parents to 480 days of paid parental leave when a child is born or adopted. Accordingly, each parent (should there be two) is entitled to 240 of those days. If the child was born in 2016 or later, each parent is entitled to 90 days reserved exclusively for each of them. However, should the parent decide not to take these days, they cannot be transferred to the partner. A single parent is entitled to a full 480 days (Swedish Institute "Sweden Has Made It Easier to Combine Career With Family Life. Here's How" (2015) https://sweden.se/work-business/working-in-sweden/work-life-balance (accessed 2024-01-12)).

Within the African continent, Kenya has been progressive, although there is still more room to improve their legislation. Section 29(8) of the Kenyan Employment Act (7 of 2007) provides fathers with a minimum of two weeks of paid leave after childbirth. However, the Act is ambiguous, as it does not stipulate whether the two-week period is inclusive of public holidays and weekends. Arguably, Kenya's parental leave may be deemed to promote gender inequality, as it is exclusively available to male employees and excludes surrogate and adoptive parents.

6 Is the judgment a step in the right direction?

Although a newborn child is dependent on maternal care for several months, the inclusion of the father as caregiver is also essential (Richter "The Importance of Fathering for Children" in Richter and Morrell (eds) *Baba: Men and Fatherhood in South Africa* (2006) 58). The need to recognise a father's role during the birth and raising of a child in South African employment law is arguably long overdue and has been advocated by academic legal scholars. Such recognition has the potential to promote the caregiving responsibilities of fathers and to address the gender inequalities that exist in the workplace owing to limited legal regulation of postnatal childcare (Richter and Morrell *Baba: Men and Fatherhood in South Africa* 58). Arguably, where leave allocations are evenly distributed and shared, domestic chores and childcare roles are equitably shared between parents, and fathers are more involved in their families (Rycroft and Duffy "Parental Rights: Progress but Some Puzzles" 2019 *Industrial Law Journal* 23–24).

If the judgment of the court stands, it may be argued that this decision has progressively recognised a father's entitlement to equal treatment in employment law. In essence, the judgment of the court has breached the grey area in section 25 of the BCEA that resulted in fathers being afforded a limited opportunity to share the caregiving responsibility of their children. As stated earlier, the landmark judgment can be viewed as a positive step towards achieving a more egalitarian society in which responsibility for childcare is equally shared between parents. The judgment can be commended for eliminating the gender stereotype that sees women as primary caregivers of their child; at the same time, it upholds the need of newborn children for care by both parents. Even though it was not expressly pronounced by Sutherland DJP, it may be argued that the judgment is consonant with protecting the best interests of the child.

Interestingly, the plight of fathers as caregivers has been judicially recognised in two separate cases. First, in the minority judgment of Kriegler J and Mokgoro J in *President of the Republic of South Africa v Hugo* (1997 (6) BCLR 708 (CC)), Kriegler J persuasively contended that accepting as fair discrimination the release from prison of mothers at the expense of fathers with children under the age of 12 only worked to entrench gender stereotypes that subjugate women (*President of the Republic of South Africa v Hugo supra* par 78–82). The Justice remarked:

> "The notion relied upon by the President, namely that women are to be regarded as the primary caregivers of young children, is a root cause of women's inequality in our society. It is both a result and a cause of prejudice;

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> a societal attitude which relegates women to a subservient, occupationally inferior yet unceasingly onerous role." (*President of the Republic of South Africa v Hugo supra* par 80)

Mokgoro J condemned the societal notion that allocates gender stereotypes between men and women:

> "Society should no longer be bound by the notions that a woman's place is in the home, (and conversely, not in the public sphere) and that fathers do not have a significant role to play in the rearing of their young children. Those notions have for too long deprived women of a fair opportunity to participate in public life and deprived society of the valuable contribution women can make. Women have been prevented from gaining economic self-sufficiency or forging identities for themselves independent of their roles as wives and mothers. By the same token, society has denied fathers the opportunity to participate in child rearing, which is detrimental both to fathers and their children." (*President of the Republic of South Africa v Hugo supra* par 93)

Secondly, the case under scrutiny can be compared to the *MIA* case (*supra*) insofar as it concerns eliminating gender stereotypes that perceive women as primary caregivers of a child. In the *MIA* case, the court had to determine whether a policy adopted by an employer had unfairly discriminated against an employee on the grounds listed in section 6 of the EEA. The said policy granted a biological mother of a child four months' paid maternity leave, and two months' paid leave to a permanent employee who was an adoptive mother to a child below 24 months of age (*MIA v State Information Technology Agency (Pty) Ltd supra* par 83). The applicant employee challenged the employer's refusal to grant him maternity leave because he was not the biological mother of his child under a surrogacy agreement; he claimed unfair discrimination on the grounds of gender, sex, family responsibility and sexual orientation, as provided for in section 61 of the EEA (par 6).

In this case, the applicant employee, his spouse and a surrogate mother had concluded a surrogate-motherhood agreement in terms of which the applicant would be the child's primary caregiver from the moment of birth. (*MIA v State Information Technology Agency (Pty) Ltd supra* par 16). In line with the employer's leave policy and anticipation of the birth child, the applicant unsuccessfully applied for four months of paid maternity leave (par 7). The employer rejected the applicant employee's application, citing the fact that he was not the biological mother of the child, and as a result, no maternity leave could be granted. The employer averred that the maternity-leave policy was specifically designed:

> "to cater for employees who give birth … based on an understanding that pregnancy and childbirth create an undeniable physiological effect that prevents biological mothers from working during portions of the pregnancy and the post-partum period". *(MIA v State Information Technology Agency (Pty) Ltd supra* par 12*)*

Consequently, the applicant employee was granted two months' paid adoption leave and two months' unpaid leave (*MIA v State Information Technology Agency (Pty) Ltd supra* par 2). It may be argued that the employer ignored the spirit of the law in applying the maternity-leave policy. In denouncing the employer's approach and upholding the spirit of the law, Gush J expressly remarked as follows:

> "This approach ignores the fact that the right to maternity leave as created in the Basic Conditions of Employment Act … is an entitlement not linked solely to the welfare and health of the child's mother but must of necessity be interpreted to and take into account the best interests of the child. Not to do so would be to ignore the Bill of Rights in the Constitution of the Republic of South Africa and the Children's Act." *(MIA v State Information Technology Agency (Pty) Ltd supra* par 13*)*

Both cases are commended for paving the way towards achieving equality in the workplace by providing adequate leave provisions for fathers and surrogate parents to care for their newborn children. It may also be argued that both cases have reiterated that the best interests of the child are of paramount importance, and as such, must prevail.

7 Conclusion

This landmark case is laudable because both parents, regardless of gender, sex or colour, will now be entitled to equal parental leave. It is no longer only about a birth mother who must heal physiologically. However, it is also about both parents who are capable of nurturing the newborn child. The court's judgment is consistent with section 28(2) of the Constitution, which stipulates that the best interests of the child are of paramount importance in all matters concerning the child.

Sutherland DJP's decision is welcomed because it serves as a wake-up call to the legislature that fathers and gender-binary caregivers of their children should be given the same rights and opportunities to participate in their children's development and growth (*Van Wyk v Minister of Employment and Labour supra* par 45–47). Altering legislative provisions as indicated by the court will arguably allow the South African labour law system to align itself with International Labour Organisation standards (R111 Discrimination (Employment and Occupation) Recommendation, 1958).

It remains to be seen whether Sutherland DJP's judgment will be taken on review, but the prospects of success for such a challenge are next to zero. Arguably, the court elevated the norms of the Constitution by stretching the provisions of the BCEA to accommodate unique, if not all, family models in South Africa. Ideally, the judgment has the potential to transform the conventional allocation of roles between fathers and mothers by redressing gender inequality at home as well as in the workplace.

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Transformative Methodologies for Conflict Resolution

1 Introduction and background

Conflict resolution is embedded with complexities and different theories. In the Western systems, a formalised epistemology of conflict resolution gained traction with various known scholars in the 1950s. However, now in the twenty-first century, having moved past the humble beginnings of Western conflict resolution, it must also be noted that indigenous tribes across the world have for thousands of years used different communal methods to resolve conflict in a participatory manner for the benefit of everyone. Using such methods, we have seen the abolition of apartheid in South Africa for the benefit for all and the avoidance of civil war, upholding the principle of *ubuntu*, and the realisation of democracy. In a world that has moved on from World War II, it is important to use existing knowledge and theory and adapt it to the circumstances of current global conflicts. Consonant with the concept of constitutional axiology, adaptation to changes in social, political and economic circumstances ensures that the law, rule of law, and theory of conflict resolution remain relevant. Moore's five sources of conflict, namely interest conflict, structural conflict, values conflict, information conflict and personal conflict underpin the foundations of conflict. Thomas Kilmann's five conflict-handling styles guide a specific strategy employed such as collaborate, compromise, compete, accommodate and avoid to overcome conflict. These tactics for overcoming conflict are still used in daily relationships to defeat conflict. Using transformative methodologies to resolve conflict is the key to unlocking sustainable eradication of conflict to achieve lasting relationships without conflict impasses. Applying the rational theory and the game theory of problem-solving to the actors in known conflicts such as the war between Russia and Ukraine does not overcome the complexities of social, political and economic issues. Using a critical approach to the war complexities would go beyond the known glass ceilings and conventional paradigms of thinking to reveal infinite possible solutions. Deconstructing the notion of "just institutions" for resolving conflict as well as just being ideally suitable is technically difficult because there is a plethora of challenges that confronts these different institutions on a daily basis, and a handful of solutions also triggers more burdensome challenges to overcome. This note uses an explorative and investigative approach to propose "just" recommendations for institutions to become sustainable in maintaining conflict eradication and management of complex issues in overcoming conflict. The note's recommendations pertain to particular institutions, mobilising private and public organisations to work harmoniously and

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collaboratively in providing mechanisms to overcome conflict through sharing resources and knowledge. The note encourages the upholding of treaties and conventions in the enforcement of foreign arbitral awards, and ensuring that there is no conflict of law or impossibility of enforcement before choosing the arbitral seat for determination of conflict. Compensatory mechanisms to address harm caused should also address emotional loss; compensatory functions for restoration, and reconciliatory methods do not operate in silos and should not be isolated from each other.

For example, companies' carbon emissions have had a direct impact on climate change, causing more natural disasters affecting countries, economies and losses of livelihood. However, mere compensation does not end the violation of carbon emissions regulations. Such violations may be made deliberately for economic gain, which may outweigh the paying of penalties and fines, meaning that more initiatives need to be undertaken to achieve sustainable economies and livelihoods, and not merely maximum profits that disregard expanding inequality between people and multinational companies.

The note explores different types of conflict, conflict theory, and cases from arbitral forums in South Africa, the African region, and the Permanent Court of Arbitration with the aim of enhancing and improving conflict resolution methodologies.

In the 1950s, alternative dispute resolution (ADR) gained momentum in Western systems of knowledge. However this interdisciplinary phenomenon (Hensler "Our Courts, Ourselves: How the Alternative Dispute Resolution Movement Is Re-Shaping Our Legal System" 2003 108 *Penn State Law Review* 165) has existed for centuries within indigenous cultures (Mkhize "Conflict Resolution: An African Style" 1990 28 *Family and Conciliation Courts Review* 71). In a different vernacular, meetings held among different tribes and communities were termed "lekgotla" or "induna", which were translated as community meetings and gatherings (Olowu "Indigenous Approaches to Conflict Resolution in Africa: A Study of the Barolong People of the North-West Province, South Africa" 2017 1(1) *Journal of Law and Judicial System* 10). When any member of the tribe or community had a dispute with other tribal members, the elders would meet with the tribal members to seek a resolution (Kariuki "Conflict Resolution by Elders in Africa: Success, Challenges and Opportunities" (9 July 2015) https://ssrn.com/abstract=3646985 or http://dx.doi.org/10.2139/ssrn.3646985 (accessed 2023-09-01)). There was respect and reverence for authority, wisdom and the ways of their culture (Rammala "Lekgotla and Idiomatic Expressions in Traditional Dispute Resolution: The Case of Makapanstad, North-West Province, South Africa" 2021 16(1) *International Journal of African Renaissance* 220). This meant there was a sacred circle of fostering healing and development to ensure succession and protection of cultural and tribal life (Seng "Restorative Justice: A Model for Conciliating Fair Housing Disputes" 2021 21 *Journal of Law in Society* 63). The concept of "circle justice" was also used by American communities to oust drug abuse and petty crimes taking place in small communities (Seng 2021 *Journal of Law in Society* 63). The community came together to support both victims and perpetrators causing the conflict, and to protect the victims from harm

(Seng 2021 *Journal of Law in Society* 63). The concept of circle justice is thus meant to protect all parties in the community who are involved and affected; to leave any person out of the process or isolated would mean weakening the collective tribe. The weakness of an individual was etched into the soul of the community as the weakness of the collective. This ethos reflects the concept of *ubuntu*, meaning that actions are taken for the collective good and not for individual benefit (Aiyedun and Ordor "Integrating the Traditional With the Contemporary in Dispute Resolution in Africa" 2016 20 *Law, Democracy and Development* 154). These sacred principles were encapsulated in tribal living and living for each other devoid of selfishness. In modern Western civilisations, these sacred principles have been lost, in part owing to social media and living in isolation from each other, which was exacerbated by the COVID-19 pandemic. It is still pertinent to use aspects of circle justice that work both in tribal and urban communities to mend the brokenness within communities and eliminate conflict within families, communities and homes. Using cultural practices of ADR to overcome current barriers to resolution of conflict becomes an important pursuit (Maria "A Re-Assessment of the Impact and Potency of Traditional Dispute Resolution Mechanisms in Post-Conflict Africa" 2017 6 *International Law Journal* 1). The theory of circle justice and community living encapsulates the notion of an African proverb: if you want to "travel fast, then you travel alone" "but if you want to travel further, then you go together". We need to garner the strength of the collective to move towards long-term sustainability and the fostering of goodness, eradicating conflict and living peacefully for the betterment of the collective global community.

The notion that conflicts are part of daily life is an accepted phenomenon in society (Shell "Bargaining Styles and Negotiation: The Thomas-Kilmann Conflict Mode Instrument in Negotiation Training." 2001 17(2) *Negotiation Journal* 157–159. See also Moore "The Mediation Process: Practical Strategies for Resolving Conflict (2014) 143–146). Conflict arises daily and is resolved in different ways through a multitude of ADR mechanisms – from internal squabbles in family households resolved in private forums, to international conflict being facilitated by international organisations (Majinge "Emergence of New States in Africa and Territorial Dispute Resolution: The Role of the International Court of Justice" 2012 13 *Melbourne Journal of International Law* 462). Conflict has become a natural part of daily life as we know it, breathe it, tolerate it and live with it, and people have adapted accordingly. Despite multiple mechanisms to help reduce conflict, we still live in times of persistent conflict within the African region and globally (Price "Alternative Dispute Resolution in Africa: Is ADR the Bridge Between Traditional and Modern Dispute Resolution" 2018 18(3) *Pepperdine Dispute Resolution Law Journal* 393). Although there are more platforms for the resolution of conflict arising in commercial trade agreements, and more advances in technology such as artificial intelligence mechanisms and machine-generated software to filter and reduce conflict, conflict is still present and an obstacle to peace. It becomes necessary to unpack these active barriers to conflict resolution (Ijeoma "Transformation of Dispute Resolution in Africa" 2015 2(2) *International Journal of Online Dispute Resolution* 77).

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Challenges exist to overcoming conflict permanently. These include the fact that each matter is unique and special, so that even when conflict is overcome, disputes do not cease in their entirety but continue and require specialised forums and progressive techniques for complete and sustainable resolution. As mushrooms arise in damp and wet conditions, conflicts keep mushrooming despite idyllic forums and facilitators to resolve them. To treat damp for good, the environment needs to change, so as to foster different conditions of growth and opportunity. Similarly, conflict needs to be removed from the ideal conditions that foster more conflict; the energy of the environment needs to change or be transformed. Private dispute-resolution forums are expensive; they are meant, not for lay people, but for private companies and wealthy elite led by lawyers with impeccable legal education, training and expertise; they need their legal representatives and advisors to explain the rules and procedures of these forums and to broker deals that are ideal for business longevity. Skillful and accurate use of language plays a pivotal role in translation, creating a clear and distinct narrative, an active voice with a particular purpose, and adequate legal or consultative representation. In this manner, it can promote fairness and equity. The importance of accurate language cannot be denied; more positive and active measures to ensure precision in translation and interpretation of foreign languages in particular forums. The question that arises constantly is how the notion of ADR can be extended to community entities, tribal entities and other people who require it but do not have the means to pay for it?

2 The current system and tools in place

When we look at the beginnings of ADR, we must acknowledge that the terminology originated in Western civilisations and gained momentum in the 1950s among American scholars; it gained traction worldwide in multiple schools of thought, fostering a plethora of scholarship. However, the concept of ADR is deeply embedded in various ancient civilisations where it was known by different terms. Ancient Romans, Greeks and Indians had forums for the resolution of disputes that were activated within their hierarchy and tiers of governance. The elements of trust, community growth, well-being and collective needs were the focus of these civilisations with the aim being to foster harmony and sustainable living.

3 Challenges in the South African and African context

In South Africa, a challenging terrain is the area of cybercrimes, which have ballooned as cybersecurity laws are inadequate and there is insufficient cybersecurity to prevent crime. Instead, a plethora of sophisticated cybercriminal activities take place, making banking institutions unsafe for banking as bank accounts and online banking have become a target for criminal penetration (Hoffman “The Contribution Mediation Can Make in Addressing Economic Crime in Corporate and Commercial Relationships in South Africa” (PhD dissertation, Stellenbosch University) 2019 i-456 at 1–9). Despite being in the fourth industrial revolution in which technology is supposed to be at the forefront of development and of the protection of societal needs, moving our civilisation into a future formed by the

advancement of technology, we are still victims of technological manipulation and crime. There is a dire need for the government to do more, and to tighten security measures and laws against hacking by advanced criminals. These crimes lead to disputes and conflicts between users and the banks and with security companies. These are difficult to resolve without monetary compensation as a settlement for losses suffered.

It is apparent in South Africa that the government needs to play a more active role in educating and bringing awareness to communities in resolving conflict for the common good of everyone. Unfortunately, current circumstances include a global recession, economic downturn, rising inflation and an energy crisis on the cusp of total breakdown. It becomes pertinent to create and build a future that is relevant to the changing and challenging circumstances in which we find ourselves. Building a forward-thinking future now by defeating conflict and the metaphorical shackles that bind people has become urgent for the preservation of relationships and humankind.

Conflict can threaten to tear down nations as we have seen in South African unrest during the riots in July 2021, which exposed factions in political parties and uprisings against the government caused by people's growing dissatisfaction with the government's lack of action to redress poverty, unemployment, inflation, the energy crisis, crime, corruption and general displeasure over the mismanagement and misappropriation of public funds. It is essential to emphasise that conflict causes lasting damage to relationships, and territorial land disputes invariably affect nature too. Territorial land disputes are a universal age-old conflict and are prevalent on the African continent. There have been wars between neighbouring States, as well as State conflicts over land in the fight for natural resources, livelihoods and stability (Bosman "The PCA's Contribution to International Dispute Resolution in Africa" 2014 25(2) *Stellenbosch Law Review* 308). Raw natural resources and commodities such as oil, diamonds, gold and iron ore bring wealth and power, causing nations to thrive and inevitably creating jobs, allowing locals to thrive and live off the land. There are no easy solutions to demarcating land and resources; it has been said that fish and animals do not understand territorial boundaries, as they will wander the vast oceans without the limitations or boundaries that have been created by mankind (Okonkwo "Maritime Boundaries Delimitation and Dispute Resolution in Africa" 2017 8 *Beijing Law Review* 55). It has also been stated that there is enough land and resources for every person on earth but insufficient wealth for the greed of man. It is the greed of man (more specifically the greed of nations and the greed of individual men) that one navigates to avoid the shedding of blood over resources that never belonged to one person to begin with and were the reward of the land for everyone. Although we have seen periods of conflict and peace throughout the ages, it is submitted that the greed of man has grown over time. Greed creates animosity, unnecessary harm and destruction to nature and the environment with negative consequences for global warming and the rise of natural disasters and catastrophic phenomena. The only way to transform conflict into peace is to transform the thinking and flaws of man into strengths and virtues by tapping into insights gained.

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4 Transformative methodologies

Transformative methodologies change existing systems into new systems and amend systems to enhance and create effective, improved dispute resolution mechanisms. However, tensions exist in pluralistic societies between indigenous ADR practices and Western practices: how does one bridge the gap? Some have argued for the continuation of separate systems owing to the difference and variation in normative ideals. Choosing attributes of indigenous ADR achieves restorative, retributive, transformative, procedural and participative justice, as elders and communities partake in active discussions. The repercussions and consequences are for both the individual and the tribe; solutions are possible not only for the individual but also the collective, as the community and collective living is paramount to the sustainability and survival of tribal communities and practices. Indigenous communities depend on each other to partake in the community to fulfil their role. It has been stated that a weakness of an individual in a tribe is a weakness of the collective. This means that responsibility and accountability is pursued mercilessly by the collective, prompted by the ethos postulated in the African proverb. A simplistic aspect of tribal inclusivity in overcoming conflict is that individuals actively and meaningfully participate in addressing conflict. The approach is participatory, postulating equality and allowing everyone to be heard. No behaviour that is combative or disrespectful to the tribe or individuals is tolerated. In some instances, the tribe would also pray over the victim and perpetrator when wrongful actions harmed the collective or individual of the tribe.

5 Doing conflict differently

Upon deep reflection, the question posed is how we address or redress the tools of resolving conflict resolution. Do we throw out the current methodologies and tools, or do we reinvent them, or do we change as a nation? What would we design if we had a limitless spectrum of design? What would we keep, what would we improve, and what would we destroy in totality? The quest requires honesty about lasting solutions and how one would go about creating them using a sustainable bridge between the Western, Eastern and African epistemologies of long-term justice achieved through ADR mechanisms that benefit the collective. Slocum-Bradley argues for a "meta-theoretical shift in conflict engagement and transformation" (Slocum-Bradley "Relational Constructionism: Generative Theory and Practice for Conflict Engagement and Resolution" 2013 1 *IJCER* 114). The essential approach is based upon the fostering of relationships including with the self and others and harnessing skills to build "generative relationships" (Slocum-Bradley 2013 *IJCER* 114). The Action Research for Transformation of Conflict [ART-C] is an informative step process and is also cyclical for a transformative, innovative and pragmatic approach to resolution. It is necessary to consider each step as follows: Step 1: Formulate Action-Research Questions and Goals; Step 2: Conflict and Peace Analysis; Step 3: Vision Building; Step 4: Planning; Step 5: Implementation and Monitoring; Step 6: Evaluation and Reflection (Slocum-Bradley 2013 *IJCER* 119). This stepped process is embedded within the human experiential learning of

"personal, relational, structural and cultural" dimensions of human experience (Slocum-Bradley 2013 *IJCER* 121). The aim of the cyclical process is to move away from human relational violence and destruction lived by human experience towards harmony and peace (Slocum-Bradley 2013 *IJCER* 122). Vision building assists parties to reimagine how a problem is to be resolved, motivating for collective community peace and building a new story (Slocum-Bradley 2013 *IJCER* 122). An important ethos is that in our differences we recognise there are similarities, which creates the space for collaborative solutions (Slocum-Bradley 2013 *IJCER* 125). When we analyse polarities, we see that in opposites we appreciate positivity over the negativities. Similarly, in confronting conflict and the infliction of violence and harm – that is, negativity – people appreciate the next positive phase of working towards, peace, harmony and resolution of conflict, by eradicating violence and harm to the community, tribes and global community.

Transitional justice has been used as a method to resolve conflict through the creation of commissions of inquiry, sometimes successfully, and in other instances unsuccessfully (Pincock and Hedeen "Where the Rubber Meets the Clouds: Anticipated Developments in Conflict and Conflict Resolution Theory" 2016 30 *Ohio St J on Disp Resol* 431 438). Pincock and Hedeen postulate that theorists studying conflict resolution should focus on certain salient aspects:

> "[S]eek to comprehend the dynamics of intractable conflict – the nature, number, and characteristics of the parties, as well as their relationship to each other, the number, intensity, and complexity of the issues; the role of context, identities, audiences, intermediaries, and time, among other dimensions – in efforts to explain their origins and offer hopeful prescriptions for their transformation toward tractability." (Pincock and Hedeen 2016 *Ohio St J on Disp Resol* 439)

When parties are fixated on their positions, anti-solution, anti-solving the conflict, they become stubborn about the conflict, and delusional that it is unsolvable. It then becomes necessary to explore these aspects, to understand the fixed positions. It is apparent that parties change their position, when the consequences and impact of the conflict impact negatively on their daily lives, so that it becomes uncomfortable to make simple decisions, owing to the debilitating nature of the conflict that is unresolved. There is a natural progression to restorative justice working hand in hand with transformative justice to ensure the breaking and healing of impasses to overcome barriers to conflict resolution for lasting foreseeable futures.

6 A view of South African cases in the last two years relating to enforcement of arbitral awards and arbitral agreements

It is important to navigate the South African cases dealing with enforcement of arbitral awards and arbitral agreements because they speak to the effectiveness of our courts in aligning to ADR forums and the decisions reached. The courts uphold the sanctity of the principle of party autonomy.

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In the case of *Lukoil Marine Lubricants DMCC v Natal Energy Resources and Commodities (Pty) Ltd* ([2023] ZAKZPHC 31), the applicant was a company registered in terms of the laws of the United Arab Emirates in Dubai, and was a subsidiary of a holding company in Moscow, Russia. The respondent was a South African company. The applicant tried to enforce the contractual agreement between the parties in South Africa, but it was clear that once a dispute arose between the parties, the matter had to be ventilated before an arbitral tribunal in London as the seat of arbitration. Thus, proceedings had to be stayed until the matter in London was finalised and fully completed (*Lukoil Marine Lubricants DMCC v Natal Energy Resources and Commodities (Pty) Ltd supra* par 20). A court would not entertain an issue that was *res judicata*, meaning that a matter already adjudicated in another forum, as set out in the contract. A party cannot be heard at multiple forums as this would defeat the principles of justice as set out by the High Court of South Africa.

In *Momoco International Limited v GFE-MIR Alloys and Minerals SA (Pty) Ltd* ([2023] ZAGPJHC 764), the respondent tried to evade payment due in terms of an arbitral award by fabricating it, without proof or a factual basis, speculations about tax evasion committed by the applicant. The court referred with approval to two previous decisions. In the first, the apex court being the Constitutional Court stated that "public policy demands that contracts freely and consciously entered into must be honoured" (*Beadica 231 CC v Trustees, Oregon Trust* [2020] ZACC 13 par 83). The Constitutional Court further reiterated that parties are bound by their contractual agreements (the principle of *pacta sunt servanda*, which gives effect to the "central constitutional values of freedom and dignity") (*Beadica 231 CC v Trustees, Oregon Trust supra*). The court also referred to the Supreme Court of Appeal decision in *Telcordia Technologies Inc v Telkom SA Ltd* (2006 ZASCA 112 par 48), which upheld the principle of party autonomy, in that parties may choose arbitration as their mode of conflict resolution, and that party autonomy should not be disturbed, as it is akin to a sacrosanct principle in international arbitration model law. The court held that the arbitral award was enforceable and payable and that the respondent could not renege on the basis of mere speculation of criminal tax evasion.

The case of *GR Sutherland and Associates (Pty) Ltd v V&A Waterfront Holdings (Pty) Ltd* ([2023] ZAWCHC 67; 2023 JDR 1102 (WCC)) dealt with the issue of declaring an arbitration agreement void. In terms of the Arbitration Act (42 of 1965; s 3(2) provides: "The court may at any time on the application of any party to an arbitration agreement, on good cause shown– *(a)* set aside the arbitration agreement; or *(b)* order that any particular dispute referred to in the arbitration agreement shall not be referred to arbitration; or *(c)* order that the arbitration agreement shall cease to have effect with reference to any dispute referred."), this is only allowed upon "good cause" shown, which has not been defined but is onerous to prove. Usually, there is some form of duress or illegality involved. Binns-Ward J stated:

> "The provision allows for a negation of the usually hallowed principle of sanctity of contract often expressed by lawyers through the maxim *pacta sunt servanda* (viz. agreements are to be respected). Ordinarily, agreements competently concluded between contracting parties will be upheld and

> enforced by the court according to their tenor provided only that they are lawful and not contrary to public policy. It is for that reason that showing 'good cause' within the meaning of the subsection has been held to be a difficult case to make out." (*GR Sutherland and Associates (Pty) Ltd v V&A Waterfront Holdings (Pty) Ltd supra* par 9. See also *Metallurgical and Commercial Consultants (Pty) Ltd v Metal Sales Co (Pty) Ltd* 1971 (2) SA 388 (W) 391E–F. In *The Rhodesian Railways Ltd v Mackintosh* 1932 AD 359, it was said that "a very strong case" had to be proved (375). See also *Universiteit van Stellenbosch v JA Louw (Edms) Bpk 1*983 (4) SA 321 (A) 334A)

The court endorsed the firm position of upholding contracts that parties have willingly signed and consented to and on which they may not renege owing to a change in strategy or inability to pay what is due to the other party as set out in the agreement. The court referred to the Constitutional Court's dictum in relation to good cause, and reneging upon terms of an arbitration agreement as set out in section 3(2) of the Act as follows:

> "The question remains whether [the applicant] has advanced good cause to escape the agreement. The Act is not particularly helpful on what would make up good cause. Nor have our courts expressly defined good cause. It is, however, clear that the onus to demonstrate good cause is not easily met. A court's discretion to set aside an existing arbitration agreement must be exercised only where a persuasive case has been made out. It is neither possible nor desirable, however, for courts to define precisely what circumstances constitute a persuasive case." (*De Lange v Presiding Bishop of the Methodist Church of Southern Africa for the Time Being* [2015] ZACC 35 par 36)

The court reiterated the position, which is still unclear, about the demarcation of the term "good cause", and stated that courts look at the consequences caused by setting aside an arbitration agreement and the undue prejudice caused. Parties should not easily be able to get out of the contractual obligations of arbitration agreements, as it would destroy the principle of party autonomy.

The Constitutional Court further emphasised "Absent infringement of constitutional norms, courts will hesitate to set aside an arbitration agreement untainted by misconduct or irregularity unless a truly compelling reason exists." (*De Lange v Presiding Bishop of the Methodist Church of Southern Africa for the Time Being supra* par 37; n35 of the judgment cites as examples: "where allegations of fraud are best adjudicated in open court rather than private arbitration proceedings, or where a party's counterclaims affect third parties who were not subject to the arbitration and in respect of which the arbitrator lacks investigative powers." See also *Sera v De Wet* 1974 (2) SA 645 (T) 654fin–655. The factors of consideration were fraudulent conduct of an architect, and his reasonable apprehension that he would be treated fairly, which cannot be applied in the present case.)

This same position was reaffirmed by the Constitutional Court in *Lufuno Mphaphuli & Associates (Pty) Ltd v Andrews* ([2009] ZACC 6 par 219. The court held: "The decision to refer a dispute to private arbitration is a choice which, as long as it is voluntarily made, should be respected by the courts. Parties are entitled to determine what matters are to be arbitrated, the identity of the arbitrator, the process to be followed in the arbitration, whether there will be an appeal to an arbitral body and other similar matters."), where

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the principle of party autonomy was upheld and respected. It is evident from these cases that span over fourteen years that the same issue persists. It is therefore only prudent that the Arbitration Act of 1965 be amended to pronounce more precisely upon the limitations and demarcations of what is "good cause" for the setting aside of an arbitration agreement. Using previous courts' dictums, especially those of the apex court, the decision reached in the case of *GR Sutherland and Associates (Pty) Ltd v V&A Waterfront Holdings (Pty) Ltd* (*supra* par 39) was that the application to set aside the arbitral award did not succeed.

The case of *Industrius DOO v IDS Industry Service and Plant Construction South Africa (Pty) Ltd* ([2021] JOL 51033 (GJ)) dealt with an application to make an arbitral award an order of court. It was opposed on the basis that the dismissal of the counterclaim could not be upheld, and that objection to the dismissal was brought in a whole new application to the courts since the principle of *res judicata* did not apply in this instance. The court held that opposition should have been raised before the arbitral tribunal, and not thereafter. The court referred to the dictums upholding the principle of party autonomy and the contractual terms binding parties to arbitration before a tribunal, and the effect of the final award as being binding upon the parties. The court referred to the dictum in *Phalabora Copper (Pty) Ltd v Motlokwa Transport & Construction (Pty) Ltd* (2008 (3) SA 585 (SCA)):

> "The party alleging the gross irregularity (of the arbitrator) must establish it. Where an arbitrator engages in the correct enquiry but errs either on the facts or the law, that is not an irregularity and is not a basis for setting aside an award. If parties choose arbitration, courts endeavour to uphold their choice and do not lightly disturb it. The attack on the award must be measured against these standards." (par 8)

Interfering with an award requires a higher standard because otherwise contractual obligations would have very little effect and chance of enforcement. Notably, the court mentioned another case asserting that invariably the arbitrator needs to apply their mind to the set of facts and evidence given. (*Wilton v Gatonby* (1994 (4) SA 160 (W) 166H–167B) held as follows: "[The] tribunal should not simply issue an award as though entering judgment under the Rules of Court but rather should proceed to hear such evidence as may be tendered. Short of an express agreement between the parties, any award resolving the dispute between the parties should be made only on the available evidence. The arbitrator's decision to hear no evidence at all resulted in an award being made simply as a procedural consequence of the respondent's wilful absence from the arbitration and without the arbitrator bringing his mind to bear upon the issues between the parties as defined in the pleadings.") An arbitrator has a duty in the proceedings to be impartial and apply their legal aptitude objectively, adopting a rational, common-sense approach.

7 Influential African cases heard in the permanent court of arbitration

Taking a bird's eye view of the landscape of African cooperation, it is noteworthy that Mauritius holds a host agreement with the Permanent Court of Arbitration at Port Louis Waterfront (PCA "Host Country Agreements" (undated) https://pca-cpa.org/en/relations/host-country-agreements/ (accessed 2023-09-01)). There are also numerous cooperative agreements in the African region with different forums located in centres such as Cairo, Lagos, Johannesburg, Cape Town and the African Union (PCA "Cooperation Agreements" (undated) https://pca-cpa.org/en/relations/cooperation-agreements/ (accessed 2023-09-01)). There are a few cases within the African region that are still pending and ongoing.

One case worthy of mention is *The Republic of Mauritius and The United Kingdom of Great Britain* (PCA "Arbitration Award" (18 March 2015) https://files.pca-cpa.org/pcadocs/MU-UK%2020150318%20Award.pdf (accessed 2023-09-01)), which lasted over four years. A few interlocutory applications were brought before the main dispute was ventilated before the tribunal. For example, the parties could not agree on the appointment of the three arbitrators, who were appointed by the President of the Permanent Court of Arbitration. Thereafter, the Republic of Mauritius brought an application to strike the one judge who had been appointed, arguing that he was not impartial, irrespective of his undertaking, but this application did not succeed. Thereafter, the United Kingdom sought to bring an application to not allow certain admissions from previous documents. The redaction on the documents was upheld owing to the prejudice that the admissions would cause. There was also an attempt by the United Kingdom to thwart the matter with the averment that the Permanent Court of Arbitration lacked jurisdiction, but this failed. It is evident that two countries battling for territorial power and access to resources did not stop at the main thrust of the application and attempted every litigious strategy (although they failed) to attempt to sway the judges in their favour at an earlier juncture. However, questions inevitably arise on how this can be just; these delays and tactics increase time and costs and invariably require lengthy awards to be made to sort out innumerable interlocutory issues.

8 4 Rs in the Fourth Industrial Revolution

The fourth industrial revolution embraces technological developments such as artificial intelligence, machine-generated software and online ADR. Employing tools of enhancement to conduct more ADR online, and more streamlined hearings for the convenience of users across continents and different jurisdictions, allows parties to meet in online rooms and take the matter forward to resolution. Adopting a constitutional axiology approach in the context of the constantly changing and developing current needs of society, it becomes pivotal to revisit the manner in which we digest disputes and employ tools and mechanisms for resolution in alignment with the Constitution. In this process, the author proposes the employment of 4 Rs – namely, redesign, recreation, revisiting and revision. This means that when

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we look at the tools that we employ for resolving disputes, we need to analyse, reflect, and consider a redesign to reflect current developments in societal norms aligned to technological advancement for convenience and within the realm of cutting-edge cybersecurity systems. Recreation of software, systems and information technology is a necessary measure to ensure that systems are not hacked, and that personal information is not unlawfully disseminated or confidential information publicised on illicit platforms not duly authorised by the parties. Revisiting what works entails engaging tools of enhancement for streamlined processes, ventilation of disputes, and enhancement of access to justice for the parties, and encouraging restorative and retributive justice measures to ensure sustainability of relationships between parties with long-term e-commerce relations and trade relationships. The sustainable measures address both the SDGS (sustainable development goals: 9, 15, 16 and AU 2023: 1, 7-14) Lastly, revision is an essential measure to weed out tools that are outdated, irrelevant, redundant and not working efficiently or effectively. Revision is an active measure that should not be taken for granted and requires critical engagement of specific allocated focus groups with a mandate to foster innovation and creativity.

9 Conclusion and recommendations

This note has explored and investigated various institutions, courts of law in South Africa, the African region and the Permanent Court of Arbitration and has illustrated the problems and challenges that exist. However, the challenges are not irresoluble, and the impasses that occur while navigating or overcoming conflict can be easily broken for restoration of harmonious relationships and resolution of conflict. Creating a bridge between Western, Eastern, African and indigenous practices employs the values, virtues and ethos that work for the community of the fourth industrial revolution, including communities that are not yet technologically mobilised. The higher courts of South Africa such as the Constitutional Court and the Supreme Court of Appeal have been impeccable in the enforcement and execution of arbitral awards and agreements in upholding the principle of party autonomy. The courts have aligned to the arbitral agreements of enforcement of the arbitral awards as final and binding between the parties.

To secure a sustainable future for just ADR forums, the note makes the following recommendations:

i. Employ the 4Rs in the Fourth Industrial Revolution.
ii. Prioritise language for accurate and precise translation and interpretation.
iii. Bridge the gaps between different cultures, civilisations, customs and norms.
iv. Never leave a system that works behind, as any system and its tools will eventually become outdated.
v. Mobilise people and the community to participate in the change they want to employ in the resolution of conflict.
vi. Create accessibility by reducing the costs of forums.
vii. Aim to create “just” forums and outcomes.

viii. Amend legislation for clearer direction of terms in balancing rights of both parties.

ix. Apply the ART-C approach to conflict embedding a transformative approach.

x. Apply retributive, transformative, restorative, procedural and transitional justice to overcome barriers to conflict.

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EXPANDING ON LEMINE'S "THE EFFICIENCY OF SECTION 2(4)(L) OF THE NATIONAL ENVIRONMENTAL MANAGEMENT ACT IN THE CONTEXT OF COOPERATIVE ENVIRONMENTAL GOVERNANCE"

1 Introduction

This contribution provides further insights into matters raised in a previously published contribution titled "The Efficiency of Section 2(4)(l) of the National Environmental Management Act in the Context of Cooperative Environmental Governance" (Lemine 2021 42(1) *Obiter* 2162). The earlier contribution focused primarily on ascertaining whether the wetland framework, albeit in different pieces of legislation and policies, was in fact uncoordinated. From that perspective, the institutional challenge was based on the action required arising from such a framework. The new insights offered in this contribution provide a broader basis for the interpretation, application and fulfilment of section 2(4)(*l*) of the National Environmental Management Act (107 of 1998) (NEMA) in the context of wetland resources management.

Lemine's earlier contribution offered significant insights into understanding aspects of wetland management issues in relation to section 2(4)(*l*). However, the authors of the current contribution have extended the scope of the interpretation of section 2(4)(*l*) to include wetlands management in South Africa and as applied elsewhere. It is posited that this triangulation of sciences and perspectives addresses omissions in the previous contribution.

In light of the above, this contribution considers wetland management also through the lens of first-generation rights, rather than exclusively as an issue affecting third-generation rights, for instance. Such a focus provides a platform for considering the relationship between persons with disabilities and specific areas (namely wetlands) that are vulnerable to flood disasters. The note considers the impact on this relationship of the realisation of the two-fold meaning of "environment" (built and natural) (Glazewski *Environmental Law in South Africa* (2023) 4), and contributes towards the importance of the wise use of wetlands.

The "harmonisation of policies, legislation and action" relating to wetland management, and persons with disabilities is a fundamental point in this contribution. "Harmonisation" is considered in an extraterritorial context under existing agreements, protocols, conventions, goals and institutions. This consideration casts the net wider than across only a South African context or a purely environmental perspective, as illustrated by Lemine (Lemine 2021 *Obiter* 169–172). Also, "harmonisation of policies, legislation

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and action" is not limited to coordinated South African legislation and policies to promote the improved management of wetlands (Lemine 2021 *Obiter* 169–172). This note gives consideration to regional and international actors, demonstrating the long reach of section 2(4)(*l*).

2 Section 2(4)(*l*) of NEMA and harmonisation

Section 2(4)(*l*) of NEMA states unequivocally that "[t]here must be intergovernmental co-ordination and harmonisation of policies, legislation and actions relating to the environment".

Harmonisation has a multifaceted meaning. Gilreath provides a list of synonyms, including harmony, agreement, compatibility, concordance, consonance and unity (Gilreath "Harmonization of Terminology – An Overview of Principles" 1992 19(3) *International Classification* 135). These synonyms emphasise the importance of harmonisation, which is closely linked to scientific progress and relies on effective cooperation and combined efforts (Gilreath 1992 *International Classification* 135). A preferred perspective on harmonisation and law is that "it may not require legislative similarity, but legislation complementarity" (Boodman "The Myth of Harmonization of Laws" 1991 39(4) *American Journal of Comparative Law* 705), or common rules that can create minimum standards and requirements (Zaphirou "Unification and Harmonisation of Law Relating to Global and Regional Trading" 1994 14 *North Illinois Law Review* 407). Legislative complementarity or commonality in rules makes no sense when applied in a national context only. Thus, harmonisation cannot be limited to South Africa's wetland framework; *inter alia*, international and regional perspectives must be implemented to achieve sustainable goals. Therefore, section 2(4)(*l*) applies to South Africa but also reaches into other jurisdictions or organisations with existing agreements.

It is crucial to give meaning to harmonisation to fulfil the legislature's intention. This is supported by the premise that the "intention of the legislature" and "clear and unambiguous statutory language" are couched peremptorily (Du Plessis *Statute Law and Interpretation* 2ed (2011) 36). Section 2(4)(*l*) of NEMA refers to "policies, legislation and actions relating to the environment". In the argument central to this contribution, the "environment" is not limited only to wetlands within South Africa; nor can "environment" simply be interpreted without reference to other international or regional agreements. Section 24 of the Constitution of the Republic of South Africa, 1996 (Constitution) provides for protection of the environment. With reference to section 24(*b*) of the Constitution, a purposive interpretation of the Constitution would require protecting the environment (wetlands) through reasonable legislation and *other measures* that justify the extension of policies, legislation and action within the borders of South Africa, as posited by Lemine (2021 *Obiter* 169–172).

Botha, quoting *Nyamakazi v President of Bophuthatswana* (1992 (4) SA 540 (BGD)), suggests that a purposive interpretation goes beyond legal rules but, for instance, takes into account the impact and future implications of the construct on future generations (Botha *Statutory Interpretation: An*

Introduction for Students 5ed (2012) 190). As a result, this interpretation lends itself to, for instance, meeting aspirations set for the years 2030 and 2063, as espoused below, to improve lives for present and future (generations).

In light of the above, section 2(4)(*l*) may extend to requiring consideration of agreements, protocols, conventions and plans with states parties and neighbours. The Ramsar Convention (UNESCO *Convention on Wetlands of International Importance Especially as Waterfowl Habitat* 996 UNTS 245 (1971) Adopted 02/02/1971; EIF: 21/12/1975) sets out obligations with which States Parties must comply to meet its objectives. Approaching harmonisation from a complementary legislative perspective may result in lessons on implementation being learned by states through plausible strategies, including gleaning lessons from case studies and their successes and failures. Enhancing national, regional and global cooperation is embedded in the Ramsar Strategic Plan 2016–2024 (Ramsar Convention Secretariat "Ramsar Handbooks for the Wise Use of Wetlands" (2016) https://www.ramsar.org/sites/default/files/documents/library/4th_strategic_plan_2022_update_e.pdf (accessed 2024-01-02)). Using this approach does not disregard or undermine state sovereignty, but could result in achieving unity among States Parties. Furthermore, Chapter 6 of NEMA recognises international obligations and agreements, and states that South Africa should implement such measures. Regarding wetlands, article 2.6 of the Ramsar Convention also emphasises this obligation. This dovetails with and demonstrates the synergies between the sustainable development principles. Section 2(4)(*n*) of NEMA requires that the State discharge its global and international environmental responsibilities in the national interest.

South Africa's national interest is defined as "the protection and promotion of its national sovereignty and constitutional order, the well-being, safety and prosperity of its citizens, and a better Africa and world" (Department: International Relations and Cooperation "Framework Document on South African's National Interest and Its Advancement in a Global Environment" (2022) https://www.dirco.gov.za/wp-content/uploads/2023/01/sa_national_interest.pdf (accessed 2024-09-20)). Such a definition solidifies the synergies between section 2(4)(*l*)'s focus on harmonisation and section 2(4)(*n*) and, potentially, aspirations in the African Union's *Agenda 2063: The Africa We Want* (2014). Interestingly, the Framework Document on South Africa's National Interest identifies wetland degradation (and loss of biodiversity and ecological degradation) as environmental issues that must be addressed in pursuance of the national interest. Thus, section 2(4)(*n*) shines a light on provisions that promote harmony in legislation, policies and actions, as enshrined in section 2(4)(*l*). However appealing this harmonious relationship may appear to be here, there are many barriers that may hinder the achievement of these synergies (some examples of which are discussed under heading 3 1 below).

Applying section 2(4)(*l*) could extend to harmonising the wetland management aspirations of intergovernmental organisations such as BRICS+ (Brazil, Russia, India, China, South Africa, Egypt, Ethiopia, Iran,

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and the United Arab Emirates). For example, Lemine and Chowdhury argue that through its multilateral environmental agreement, BRICS may achieve sustainable wetland management through citizen-science targets (Lemine and Chowdhury "Casting the First BRICS: Towards an Interpretation of the Ramsar Convention Favouring Citizen Science in the Multilateral Environmental Agreement for Wetland Management" 2024 5(1) *South Sustainability* 55). This is critical to understanding how section 2(4)(*l*) promotes intergovernmental organisations through establishing aligned agreements.

On the regional and continental scale, application of section 2(4)(*l*) may promote improved management through the Revised Protocol on Shared Watercourses Protocol in the Southern African Development Community (SADC (7 December 2000)) and attain the goals of soft law, Agenda 2063. The Revised Protocol deals with SADC member states' management, use and protection of shared watercourses (wetlands). Where there is no supporting legislation or policies to achieve harmonisation, a state may agree on action to be taken in strategies that could address this lack and communicate to policymakers and legislative drafters the urgency of making it part of the legislative framework.

Agenda 2063 is a tool that may create continental harmony when applied together with section 2(4)(*l*). One of its goals is to have "[e]nvironmentally sustainable and climate resilient economies and communities" (by) putting in place measures to … manage the content's rich biodiversity, forests, land and waters (The African Union Commission "Agenda 2063: The Africa We Want" (2015) https://au.int/agenda2063/goals (accessed 2023-12-02)). Thus, Agenda 2063 requires action by the 54 African states to promote the improved management of their wetlands. Although Somalia and Ethiopia have not yet signed and ratified the Ramsar Convention (Ramsar Convention Secretariat "Contracting Parties to the Ramsar Convention" (2023) https://www.ramsar.org/sites/default/files/documents/library/annotated_contracting_parties_list_e.pdf (accessed 2024-09-20)), there is some evidence that they are trying to manage their wetlands effectively (Dixon, Wood and Hailu "Wetlands in Ethiopia: Lessons From 20 Years of Research, Policy and Practice" 2021 41(2) *Wetlands* 1–14). Non-state parties whose wetlands management efforts outshine those of states that have signed and ratified the Ramsar Convention are to be commended rather than derided.

3 Application of harmonisation to South Africa

As interpreted in this contribution, harmonisation extends beyond harmonising wetland and ancillary policies, legislation and action within the Republic of South Africa. Rather, this note considers the peremptory nature of South Africa's international, intergovernmental and regional obligations. Instead of merely harmonising national wetland policies and legislation to ensure actions are aligned (Lemine 2021 *Obiter* 163–164), actions that contribute to improved management may be introduced through existing plans and strategies, and their effectiveness can be communicated to relevant lawmaking bodies.

3 1 Some legislative and practical aspects

Harmonisation can be compromised when vague or unclear information or definitions are used. The definition of wetlands to advance their management may thus add to the conundrum of issues resulting from the current legislative framework. The recent (unreported) case of *Valobex 173 CC v MEC for Economic Development, Environment Agriculture and Rural Development Gauteng Provincial Government* ([2024] JOL (GJ)) is exemplary in understanding the statutory meaning of a wetland (par 6) to ensure that thresholds are not exceeded. Wetlands are accordingly read as being included under the NEMA definition of "environment" (see Lemine "Developing a Strategy For Efficient Environmental Authorisation of Activities Affecting Wetlands in South Africa: Towards a Wise-Use Approach" 2020 41(1) *Obiter* 154–167 and Lemine 2021 *Obiter* 162–164): "(i) the land, water and atmosphere of the earth; (ii) micro-organisms, plant and animal life; (iii) any part or combination of (i) and (ii) and the interrelationships among and between them; and (iv) the physical, chemical, aesthetic and cultural properties and conditions of the foregoing that influence human health and well-being"., The National Water Act (36 of 1998) (NWA) defines a wetland as:

> "land which is transitional between terrestrial and aquatic systems where the water table is usually at or near the surface, or the land is periodically covered with shallow water, and which land in normal circumstances supports or would support vegetation typically adapted to life in saturated soil".

Similarly, the wetland-specific Ramsar Convention states,

> "for the purpose of this Convention wetlands are areas of marsh, fen, peatland or water, whether natural or artificial, permanent or temporary, with water that is static or flowing, fresh, brackish or salt, including areas of marine water the depth of which at low tide does not exceed six metres".

It is submitted that the NWA definition is to be preferred because it incorporates wetlands and is broader than the Ramsar Convention but more specific than the broader meaning of "environment" in NEMA.

Regarding the implementation of NEMA and the NWA, the roles and responsibilities of actors are critical to ensure that wetland ecosystems are managed in a more coordinated way (Lemine 2021 *Obiter* 163–164) that considers the best practicable environmental option (see s 1 of NEMA for the definition of "best practicable environmental option"). Based on its aims and tools, NEMA focuses mostly on biodiversity in terms of biotic responses, while the NWA includes the environmental drivers of wetlands that result in abiotic responses among other habitat responses. This management process should be considered to be part of a continuum rather than as operating in a silo; hence, the recommendation of a wetland institution (Lemine, Albertus and Kanyerere "Wading into the Debate on Section 2(4)(*r*) of the National Environmental Management Act 107/1998 and Its Impact on Policy Formulation for the Protection of South African Wetlands*"* 2022 47(1) *Journal for Juridical Science* 77 95). The obligation to consider wetland

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management is not limited to those directly implementing measures of management but also requires others who are drivers of potential loss to engage.

Political pressures and agendas are affected by socio-economic issues and impact intergovernmental relations on wetland management. An example is the de-proclamation of the Driftsands Nature Reserve, which was heavily impacted by the encroachment of informal settlements (Winkler "Reconceptualising Conservation: Towards Updating a Section of the District Plan for Driftsands" 2023 *UCT* 16). This encroachment resulted in the nature reserve being de-proclaimed without submission of proof for an attempt for wetland offsets and losses (Western Cape Provincial Parliament "Report of the Standing Committee on Agriculture, Environmental Affairs and Development Planning on the Withdrawal of the Declaration of the Driftsands Nature Reserve in terms of section 24(1)(b) of the National Environmental Management: Protected Areas Act, 2003 (Act 57 of 2003)" (2022) https://www.wcpp.gov.za/sites/default/files/20220618_SC%20Agri%20and%20Environ%20-%20Report%20Driftsands%2023%20June%202022.pdf (accessed 2023-12-02)). Such measures, without clear consideration for wetlands and for impacts such as flooding, fire and encroachment into wildlife habitats, may lead to further losses and to a reactive management style rather than a proactive one.

3 2 First-generation rights consideration

To ensure protection for wetlands, Lemine defines "environment" to include wetlands, but limits the definition to the natural environment (Lemine 2021 *Obiter* 162), whereas Glazewski identifies the environment as including both the natural and built environment (Glazewski *Environmental Law in South Africa* 2ed (2005) 4). The latter contribution is important as it introduces constructed/artificial wetlands into the conversation. Employing a human-rights perspective, Basson and Lemine considered the built environment within the operation of the natural environment with a view to the rights of persons with disabilities (Basson and Lemine *Wetlands Resources Management and Housing Persons With Disabilities* Paper presented at 11th Annual Disability Rights in Africa Conference: Centre for Human Rights, Johannesburg (2023) 4). The effect has a positive response to Sustainable Development Principle in terms of 2(4)c of NEMA, which advocates for environmental justice and vulnerable groups of persons.

Since persons with disabilities remain among the most marginalised groups in society, they must not be ignored when it comes to matters of climate change, environmental impacts and new building developments that may affect their well-being. The rights of persons with disabilities are integral to the constitutional imperative of rights to equality and dignity, and this extends to matters of environmental law. The constitutional right to environmental protection directly impacts persons with disabilities with regard to their socioeconomic prospects.

There is a clear and well-established link between socio-economic outcomes for persons with disabilities and their immediate surroundings,

including geographical features and their housing. One marginalisation tactic of South Africa's apartheid government involved implementing geographical vulnerability; and persons with disabilities often bore the brunt of discriminatory spatial planning. As a result, persons with disabilities are often resident in geographically vulnerable areas that are prone to damage through natural disasters and climate events (Harrati, Bardin and Mann "Spatial Distributions in Disaster Risk Vulnerability for People With Disabilities in the US" 2023 87 *International Journal of Disaster Risk Reduction* 1). Persons with disabilities from marginalised socio-economic backgrounds are thus often found living near or even on existing wetlands. Sound management of these wetlands in the context of climate change is imperative in reducing the geographical vulnerability of persons with disabilities in their built environment.

3 3 Scope of legislation

Section 2(4)(*l*) of NEMA requires the "harmonisation of policies, legislation and actions". The argument posited by Lemine refers to the link between actions on the one hand and the policies and legislation guiding such actions on the other (Lemine 2021 *Obiter* 163–164). Lemine sought to demonstrate this through a selected sample of legislation and action where harmonisation appears inadequate (Lemine 2021 *Obiter* 168–172). The discussion below focuses on the legislative aspects of managing wetlands of international importance and other wetlands.

Article 3.1 of the Ramsar Convention, in short, makes provision for states to conserve wetlands of international importance, and for the wise use of all other wetlands. The former category creates an obligation on every State Party to designate suitable wetlands for inclusion in a list of wetlands of international importance (art 2.1 of the Ramsar Convention). It further prescribes the factors to be taken into account for selecting such wetlands (art 2.2 of the Ramsar Convention).

Lemine's earlier contribution commences with a discussion on wetlands of international importance without providing the scope of the Ramsar Convention application within the South African context (Lemine 2021 *Obiter* 164). Regarding "all other wetlands", Lemine refers to some (limited) legislation that promotes the protection of wetlands, including NEMA, the NWA, the National Environmental Management: Biodiversity Act (10 of 2004), the Conservation of Agricultural Resources Act (43 of 1983) (CARA), and the National Climate Change Response White Paper of 2011 (Lemine 2021 *Obiter* 168–174). The scope of applying legislation beyond "international wetlands" and "all other wetlands" is expanded on below.

Wetlands of international importance (Ramsar sites) are discussed within the existing legal framework. South Africa boasts 31 wetlands of international importance (https://www.ramsar.org/country-profile/south-africa (accessed 2023-11-10)). These are protected under the National Environmental Management: Protected Areas Act (57 of 2003) (s 2 and 9(*b*)), and South Africa must report on the state of its Ramsar sites (art 3.2 of

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the Ramsar Convention). The reporting must comply with article 8.2 of the Ramsar Convention, which provides:

> "The continuing bureau [International Union for Conservation of Nature and Natural Resources] duties shall be, inter alia:
> a. …
> b. to maintain the List of Wetlands of International Importance and to be informed by the Contracting Parties of any additions, extensions, deletions or restrictions concerning wetlands included in the List provided in accordance with paragraph 5 of Article 2;
> c. to be informed by the Contracting Parties of any changes in the ecological character of wetlands included in the List provided in accordance with paragraph 2 of Article 3;
> d. to forward notification of any alterations to the List, or changes in character of wetlands included therein, to all Contracting Parties and to arrange for these matters to be discussed at the next Conference;
> e. …"

In South Africa's National Report to Ramsar COP14 submitted in 2021 in relation to Goal 2 ("Effectively conserving and managing the Ramsar Site network"), the following submissions were made: there is no strategy established for the further designation of the Ramsar sites using the Strategic Framework for Ramsar list, but Ramsar sites are designated in line with Ramsar criteria; and the (then 26) Ramsar sites all have formal management plans that are being implemented (Ramsar Convention Secretariat "National Report on the Implementation of the Ramsar Convention on Wetlands" (2021) https://www.ramsar.org/sites/default/files/documents/importftp/COP14NR_South%20Africa_e.pdf (accessed 2024-01-03)).

Lemine's assessment of the NWA focused on water resource protection mechanisms (Lemine 2021 *Obiter* 169–170). However, the discussion here concerns the water management strategies in Chapter 2 of the NWA – specifically, the National Water Resource Strategy (NWRS). The Draft NWRS (III) published in March 2023 incorporates citizen science tools to monitor wetlands and recognises the Ramsar Convention as a mechanism for improving water governance and management of wetlands of international importance by the Department of Water and Sanitation (DWS), the Department Forestry, Fisheries and the Environment (DFFE) and the Department of Agriculture, Land Reform and Rural Development (DALRRD) respectively (*National Water Resource Strategy* 3ed (2023) 55). The NWRS addresses fragmentation issues among the institutions, as highlighted (Lemine 2021 *Obiter* 174). However, it is submitted here that the Draft NWRS (III) should not limit the application of the Ramsar Convention to wetlands of international importance, as the wise use of all wetlands is also required – specifically small wetlands (not defined in Ramsar COP13 *Resolution XIII.21 Conservation and Management of Small Wetlands* (October 2018) https://www.ramsar.org/sites/default/files/documents/library/xiii.21_small_wetlands_e.pdf). This should not be omitted from the framework of the Joint National Wetland Policy.

The introduction of the Joint National Wetland Policy is seemingly welcome, considering the current nature of the wetland legislative framework

and its effect on the operation of the institutions. The key departments are identified as the DWS, DFFE and DALRRD (Lemine 2021 *Obiter* 167). However, departments with mandates that may affect wetlands based on ancillary effects must be considered. For instance, they include the Department of Human Settlements (see heading 3 1 *supra*) and the Department of Health (reasoning under heading 3 2 *supra*) (see also Glazewski's argument on the relationship between departments). These must be taken into consideration by the policy, accompanied by plausible strategies that aid in its implementation.

A recent legislative development for wetlands management in South Africa is the passing of the White Paper on Conservation and Sustainable Use of South Africa's Biodiversity 2023 (White Paper Policy). On the face of it, this is a positive step towards improved wetland management. Nevertheless, it is opined here that a wetland-specific policy would be preferable. Objective 2 of the White Paper Policy essentially aims to halt the loss and degradation of wetlands. The realisation of this includes actions like introducing a national framework, addressing the drivers of the loss and degradation of wetlands, and setting up control measures for the protection and use of wetlands. It is posited that the national framework should allow for the flexibility of drivers and loss coupled with control measures, as these may change in the current climate.

On the topic of biodiversity richness, it should be noted that the coastal environment is a vital ecosystem based on both its direct benefits (tourism and food) and indirect benefits (dunes that act as a buffer against storm surges) (Glavovic, Cullinan and Groenink "The Coast" in Strydom, King and Retief *Environmental Management in South Africa* (2018) 3ed 654–655). The coastal environment has various coastal/marine wetlands, including estuaries, coral reefs, mangroves, open coasts and coastal lagoons (Adeeyo, Ndlovu, Ngwagwe, Madau, Alibi and Edokpayi "Wetland Resources in South Africa: Threats and Metadata Study" 2022 11(6) *MDPI Sustainability* 5). The "coastal environment", as defined in the National Environmental Management: Integrated Coastal Management Act (24 of 2008) (NEMICMA), includes wetlands within its definition. As stated in NEMICMA's Preamble, the Act aims to achieve the integrated and coordinated management (ICM) of the coastal zone, which consists of land, water and living resources. A strategy for wise use also requires the integrated management of land, water and living resources (Secretariat of the Convention on Biological Diversity Montreal, 1992). "Water" is not limited only to freshwater resources and can, therefore, include coastal waters. This consequently places the concepts of wise use and ICM within a mutual relationship to the extent that wetlands fall within the coastal zone, which is supported by Everard (Everard "National Wetland Policy: Ghana" in Finlayson, Everard, Irvine, Mclnnes, Middleton, Van Dam and Davidson (eds) *The Wetland Book* 2018). This aspect is not discussed in Lemine 2021 *Obiter*).

The legislation discussed thus far typically provides direct protection. However, ancillary legislation also supports wetland protection – for example, the National Veld and Forest Fire Act (101 of 1998) (NV&FFA).

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However, veldfire (whether replicated by man in a controlled environment or not) has many ecological benefits, such as stimulating new growth in vegetation and improving habitat for wildlife (Green, Roloff, Heath and Holekamp "Temporal Dynamics of the Responses by African Mammals to Prescribed Fire" 2015 79(2) *The Journal of Wildlife Management* 235).

Nevertheless, an uncontrolled veldfire poses an environmental risk to the existence and proper functioning of wetlands. A "veldfire" is defined as "veld, forest, or mountain fire" (s 2(ixi) NV&FFA), and "veld" is defined in the CARA Regulations as "land which is not being or has not been cultivated …" (GN R1048 in *GG* 9238 of 1984-05-25, commencement date 1984-06-01). The relevance of this is that "veld" includes "land", which is critical for the management of wetlands, specifically through the lens of wise use.

Keeping land management as a component of wise use in mind, note that section 3(1) of the NV&FFA makes provision for the establishment of fire protection associations (FPAs), which may be formed by landowners who agree to coordinate and cooperate in their efforts to predict, prevent, manage and extinguish veldfire. FPAs play a critical role in spearheading initiatives for promoting wetland management through the lens of veldfire management.

3 4 Theoretical development

The wise use of wetlands is an international obligation imposed on each State Party (art 3.1 of the Ramsar Convention). As a party to the wetland-specific convention, South Africa must implement the enabling provisions of the Ramsar Convention. Article 3.1 requires the wise use of wetlands, which entails the "maintenance of the ecological character, achieved through the implementation of ecosystems approaches, within the context of sustainable development" (Finlayson, Davidson, Pritchard, Milton and MacKay "The Ramsar Convention and Ecosystem-Based Approaches to the Wise Use and Sustainable Development of Wetlands" 2011 14 (3–4) *Journal of International Wildlife Law & Policy* 176). The "ecosystems approach" is defined by the Convention on Biological Diversity (United Nations Environment Programme 1760 UNTS 79, 31 ILM 818 (1992). Adopted: 05/06/1992; EIF: 29/12/1993) as a "strategy for the integrated management of land, water and living resources that promotes the conservation and sustainable use in an equitable way". The earlier contribution by Lemine extended the boundaries of "wise use" by demonstrating where the gaps are in the legislation without assuming that it goes against the grain of wise use if provisions are in different pieces of legislation. This insight showed the ties between wise use and NEMA's section 2(4)(*l*). However, in the current contribution, an understanding of wise use in South African wetland law is extended through section 2(4)(*l*) in light of regional, continental and international aspirations and obligations. This is due to an interpretation of harmonisation to fulfil the obligation of section 2(4)(*l*) that casts the net broader. This in effect means that strategies about "land", "water", and "living resources" are affected not only by factors within the geographical area of South Africa but include extraterritorial standards.

Moving away from a purely environmental perspective, Basson and Lemine (Paper presented at 11th Annual Disability Rights in Africa Conference: Centre for Human Rights) demonstrate the extension of the theory to focus on wetlands resource management and persons with disabilities. This point has been further developed in this contribution.

4 Conclusion – (trying to) get the octopus into the jar

Understanding the gaps between law and practice is critical for improving the realisation of the requirements of NEMA's section 2(4)(*l*), specifically within a wetlands management context. "Mandate stoppers", which end one wetlands management mandate and initiate another, should be reconsidered in achieving a continuum in the wise use system. For wetlands management, section 2(4)(*l*) is not only about efforts within South Africa, but also about the broader ecosystem: regional, continental and global, balancing rights interests of socio-economic development and legislation that may indirectly affect wetlands. Although there are synergies in the other NEMA principles, alongside section 2(4)(*l*), the trade-offs and other limitations should be known, and case studies could bolster the realisation of successful harmonisation.

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The African Human Rights System's Response to Corporate Conduct that Harms People and the Environment

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SUMMARY

Corporations possess the economic power and resources to contribute positively to the realisation of human rights. However, they have been linked to human rights abuses, frequently affecting the environment and people residing in close proximity to their operations. This state of affairs challenges the traditional state-centric nature of international human rights law that recognises that the state is the sole actor bound by human rights obligations. While the African human rights system does not overhaul international human rights law by expressly holding corporations accountable for human rights violations, it does recognise their complicity. This article explores the African Commission's integral role in holding states accountable for protecting individuals within their jurisdiction from corporate interference with their right to a healthy environment. Drawing insights from the *Social and Economic Rights Action Centre and the Centre for Economic and Social Rights v Nigeria* (*SERAC*), the article reveals the African Commission's guidance to states on measures to safeguard the right to a healthy environment. Also, the Commission's proactive stance in offering soft law guidance applicable to corporations is commended as it encourages a culture of accountability. While the African human rights system has made positive strides, the state remains the primary enforcer of corporate accountability, and there is still a great need for multifaceted efforts to foster accountability among corporations operating on the continent.

KEYWORDS: corporate accountability, African human rights system, right to a healthy environment

1 INTRODUCTION

Historically, human rights have been a bulwark against the state but not against non-state actors.[1] States were the sole actors who could potentially

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be bound by human rights law, and thus, only their conduct could lead to responsibility in international law.[2] However, in this era of globalisation, human rights abuses occur owing to the conduct of a multiplicity of actors.[3] This article focuses on corporations' conduct that causes harm to people and the environment because while any company can violate human rights and resist accountability, corporations are more prone to engaging in a broader range of human rights abuses across different contexts. Additionally, owing to their significant power and influence, corporations are more likely to resist, delay, or evade taking accountability for these violations.[4]

An illustrative example is the subsidiary of a multinational corporation that operates the world's second-largest open-cast mine in a rural community. This subsidiary, also the largest private employer in the host state, allegedly discharged toxic matter from the mine into water courses that serve impoverished rural farming communities that use the water courses as their only source of water for themselves, their livestock, and irrigation for their crops. Consequently, nearly 2000 people allege that the repeated release of toxic substances from the mine over approximately 15 years has adversely impacted both their health and farming activities.[5]

This relationship between corporations in the extractive industry and their host communities, marred by human rights violations, is pervasive across the African continent.[6] These actors and the adverse impact of their conduct

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1 Chirwa and Mbazira "Constitutional Rights, Horizontality, and the Ugandan Constitution: An Example of Emerging Norms and Practices in Africa" 2020 18 *International Journal of Constitutional Law* 1231 1233; see also Steiner *International Law* 3ed (2010) 803. In this article, non-state actors are understood as a heterogeneous crowd that share only the legal fact of not being a state. Papanicolopulu and Rocha "Oceans, Climate Change and Non-State Actors" in McDonald, McGee and Barnes *Research Handbook on Climate Change, Oceans and Coasts* (2020) 196.

2 Reinisch "The Changing International Legal Framework for Dealing with Non-State Actors" in Alston (ed) *Non-State Actors and Human Rights* (2005) 78.

3 Vandenhole "Extraterritorial Human Rights Obligations: Taking Stock, Looking Forward" 2013 5 *European Journal of Human Rights* 808; Bilchitz "Corporations and the Limits of State-based Models for Protecting Fundamental Rights in International Law" 2016 23 *Indiana Journal of Global Legal Studies* 143 144 and 148.

4 Deva *Regulating Corporate Human Rights Violations: Humanising Business* (2012) 13; see also Joseph "Taming the Leviathans: Multinational Enterprises and Human Rights" 1999 46 *Netherlands International Law Review* 171–203 173, who writes "[t]here is no doubt that [multinational enterprises (MNE)] can and do perpetrate human rights abuses, like probably all entities. The effects of MNE abuse, however, amplified by the inherent power of MNEs".

5 *Vedanta Resources PLC v Lungowe* [2019] UKSC 20 par 1.

6 See Pegg and Zabbey "Oil and Water: The Bodo Spills and the Destruction of Traditional Livelihood Structures in the Niger Delta" 2013 48 *Community Development Journal* 391–405 401; Idemudia, Tuokuu and Essah "The Extractive Industry and Human Rights in Africa: Lessons from the Past and Future Directions" 2022 78 1 *Resources Policy* 1–8; Children of Kabwe "Children of Kabwe: Court Filings" (undated) https://www.childrenofkabwe.com/court-filings (accessed 2024-01-02); Business and Human Rights Resource Centre "Zimbabwe: Chinese Mining Companies under the Spotlight for Human Rights Violations of Employees" (21 October 2022) https://www.business-humanrights.org/en/latest-news/zimbabwe-chinese-mining-companies-under-the-spotlight-for-human-rights-violations-of-employees/ (accessed 2024-01-02); RAID "Tanzania Human Rights Victims File First Ever Legal Case in Canada against Barrick Gold" (2022) https://raid-uk.org/tanzanian-human-rights-victims-file-first-ever-legal-case-in-canada-against-barrick-gold/ (accessed 2024-01-02); Amnesty

on people and the environment challenge the traditional view of the role of the state as the sole actor bound by human rights obligations.[7] It presents a dilemma: if the traditional view is correct, then human rights obligations do not apply to these non-state actors.[8] As a result, they can adversely impact human rights and escape legal liability.[9] In an attempt to "square this circle", international human rights law addresses the conduct of non-state actors that may adversely affect human rights indirectly through the obligations of state parties to human rights treaties.[10]

This article analyses the response of the African human rights system towards non-state actors' conduct that infringes upon human rights, using corporations as an example of a non-state actor. There are four major parts to the article. The following section situates the discussion within the broader framework of international human rights law. There is a dearth of cases in which the African Commission on Human and Peoples' Rights (African Commission) has interpreted and applied article 24 of the 1981 African Charter on Human and Peoples' Rights (African Charter), which is a standalone right of "[a]ll peoples … [to] generally satisfactory environment favourable to their development".[11] Therefore, the third section focuses on the most instructive decision to date of the African Commission on this right: the *SERAC* decision.[12] This decision is also noteworthy because it illustrates the African human rights system's approach to human rights violations involving non-state actors. Following an analysis of the impact of the African Commission's jurisprudence, the article concludes that the buck stops with states to prevent corporate perpetrators of environmental harm and other human rights violations from falling through the system's cracks and evading accountability.

International "Mozambique: 'Our Lives Mean Nothing': The Human Cost of Chinese Mining in Nagonha, Mozambique" (2018) https://www.amnesty.org/en/documents/afr41/7851/2018/en/ (accessed 2024-01-02).

7 Vandenhole 2013 *European Journal of Human Rights* 808; Bilchitz 2016 *Indiana Journal of Global Legal Studies* 144 and 148; Deva "Human Rights Violations by Multinational Corporations and International Law: Where from Here?" 2003 19 *Connecticut Journal of International Law* 1 1.

8 Bilchitz 2016 *Indiana Journal of Global Legal Studies* 144–145.

9 Maqakachane "Horizontal Application of the Bill of Rights: Comparative Perspective" 2018 26(2) *Lesotho Law Journal* 7–8.

10 Shelton and Gould "Positive and Negative Obligations" in Shelton (ed) *The Oxford Handbook of International Human Rights Law* (2013) 564; Crawford *Brownlie's Principles of Public International Law* (2019) 630; Kinley and Tadaki "From Talk to Walk: The Emergence of Human Rights Responsibilities for Corporations at International Law" 2003 44 *Virginia Journal of International Law* 937; Steiner "International Protection of Human Rights" in Evans (ed) *International Law* 3ed (2010) 803; Scott "Multinational Enterprises and Emergent Jurisprudence on Violations of Economic, Social and Cultural Rights" in Eide, Krause, Rosas (eds) *Economic, Social and Cultural Rights: A Textbook* 2ed (2001) 568–587.

11 The 1981 African Charter on Human and Peoples' Rights UNTS 1520 245. Adopted 27/06/1981; EIF 21/10/1986.

12 Communication No 155/96 (2001).

2 INTERNATIONAL HUMAN RIGHTS LAW AND NON-STATE ACTORS

International human rights law has become the dominant frame for international debates on corporate accountability.[13] Under the old orthodoxy,[14] international human rights law remains state-centric.[15] Within this system, states are the principal decision-makers who engage in negotiations to willingly assume obligations through various treaties.[16] Since World War II, states have committed themselves to ensuring the realisation of the human rights of individuals in numerous international instruments.[17] International human rights law, however, does not simply regulate the relationship between states but also the relationship between a duty-bearing state and rights-bearing non-state actors under its jurisdiction.[18] As a result, in international human rights law, individuals are rights-holders, and states are the primary duty-bearers who assume the obligations that flow from these entitlements.[19] The sole actors who could be bound by human rights law are states, and thus, only their conduct could lead to responsibility in international law.[20]

The growing power and influence of corporations and their capacity to greatly impact human rights challenge the notion that the state is the sole actor bound by human rights obligations.[21] Consequently, a non-state actor such as a corporation could potentially adversely impact human rights and evade legal responsibility.[22] In some sense, "it would be folly to train our sights only on the traditional target."[23] Nevertheless, international human rights law has sought to reconcile this challenge to the traditional state-centric approach by addressing the conduct of non-state actors that impair or infringe on human rights indirectly through the obligations of State Parties to human rights treaties.[24]

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13 Morgera "Corporate Accountability" in Morgera and Kulovesi (eds) *Research Handbook on International Law and Natural Resources* (2016) 130.

14 Traditionally understood, international law is primarily a corpus of rules binding states in their relations with each other. Jennings and Watts *Oppenheim's International Law* 9ed (2008) 4 par 1.

15 *Ibid*.

16 Vandenhole 2013 *European Journal of Human Rights* 804–835 809; Bilchitz 2016 *Indiana Journal of Global Legal Studies* 143–170 146.

17 Bilchitz 2016 *Indiana Journal of Global Legal Studies* 144.

18 De Schutter *International Human Rights Law: Cases, Materials, Commentary* (2010) 11; Steiner in Evans *International Law* 803.

19 Bilchitz 2016 *Indiana Journal of Global Legal Studies* 144.

20 Reinisch in Alston *Non-State Actors and Human Rights* 78.

21 Bilchitz *Fundamental Rights and the Legal Obligations of Business* (2022) 59; Grossman and Bradlow "Are we being Propelled towards a People-Centred Transnational Legal Order" 1993 9 *American University Journal of International Law and Policy* 1–25 9; Vandenhole 2013 *European Journal of Human Rights* 808; Deva 2003 *Connecticut Journal of International Law* 1–57 1.

22 Maqakachane 2018 26(2) *Lesotho Law Journal* 1–27 7–8.

23 Madlanga "The Human Rights Duties of Companies and Other Private Actors in South Africa" 2018 29 *Stellenbosch Law Review* 359–378 363.

24 Shelton and Gould in Shelton *The Oxford Handbook of International Human Rights Law* 564; Crawford *Brownlie's Principles of Public International Law* 630; Kinley and Tadaki

Through the state's duty to protect, a state must take measures to ensure third parties do not interfere with the enjoyment of guaranteed rights of individuals in its territory and/or within its jurisdiction.[25] Therefore, the state, as the principal duty bearer, is responsible for creating human rights obligations for non-state actors in its domestic legal system.[26] This means that the state establishes direct recourse that individuals can take against non-state actors that violate their human rights and imposes on such actors obligations to either refrain from certain conduct (negative obligations) or to take specific measures to uphold guaranteed human rights (positive obligations).[27] Regarding the spatial application of a state's duty to protect, it applies to individuals in its territory and/or within its jurisdiction. In other words, this duty does not stop at the limits of a state's territorial borders but may apply to individuals and non-state actors beyond that, provided that the sovereignty of another state is not diminished.[28]

Prior to discussing the African human rights framework, it is important to acknowledge that attempts to regulate the conduct of corporations with respect to human rights have ranged between soft law and hard law instrument proposals and initiatives. Consequently, for decades, business and human rights have occupied a prominent position on the international community's agenda.[29] Various standard-setting initiatives have been proposed and, at times, implemented to address corporations' lack of accountability for human rights violations.[30] The first three initiatives were initiated in the 1970s by the United Nations (UN), the Organisation for Economic Co-operation and Development (OECD), and the International Labour Organisation (ILO). However, only the initiatives by the OECD and

"From Talk to Walk: The Emergence of Human Rights Responsibilities for Corporations at International Law" 2003 44 *Virginia Journal of International Law* 931–1023 937.

25 Committee on Economic, Social and Cultural Rights (CESCR) *General Comment No 23: The Right to Just and Favourable Conditions of Work* (*Art 7 of the International Covenant on Economic, Social and Cultural Rights*) (*27 April 2016*) E/C/12/GC/23 par 59; CESCR *General Comment No 24: State Obligations under the International Covenant on Economic, Social and Cultural Rights in the Context of Business Activities* (*10 August 2017*) E/C.12/GC/24 par 26.

26 Bilchitz 2016 *Indiana Journal of Global Legal Studies* 145.

27 CESCR *General Comment No 24* par 4.

28 *Ibid*; CESCR *Statement on the Obligations of States Parties regarding the Corporate Sector and Economic, Social and Cultural Rights* (*20 May 2011*) E/C.12/2011/1 par 5–6.

29 Much ink has been spilled on the debates on business and human rights, some key texts in those debates are Deva and Bilchitz (eds) *Building a Treaty on Business and Human Rights: Context and Contours* (2017); De Schutter "Towards a New Treaty on Business and Human Rights" 2016 1 *Business and Human Rights Journal* 41–67; Jägers "UN Guiding Principles on Business and Human Rights: Making Headway towards Real Corporate Accountability?" 2011 29 *Netherlands Quarterly of Human Rights* 159–163; Kinley and Tadaki 2003 *Virginia Journal of International Law* 931–1023; Muchlinski *Multinational Enterprises and the Law* (2007); Ratner "Corporations and Human Rights: A Theory of Legal Responsibility" 2001 *Yale Law Journal* 443–545; Mutua "Standard Setting in Human Rights: Critique and Prognosis" 2007 29 *Human Rights Quarterly* 547–630; Ramasastry "Corporate Social Responsibility versus Business and Human Rights: Bridging the Gap between Responsibility and Accountability" 2015 14 *Journal of Human Rights* 237–259; Bilchitz *Fundamental Rights and the Legal Obligations of Business*.

30 There are numerous standard-setting initiatives that cut across sectors, and it would be impossible to analyse all of them; see MSI Integrity's Report, which analyses about 40 initiatives. MSI Integrity *Not Fit-for-Purpose: The Grand Experiment of Multi-Stakeholder Initiatives in Corporate Accountability, Human Rights and Global Governance* (2020).

ILO, namely the OECD Guidelines for Multinational Enterprises (OECD Guidelines) and the Tripartite Declaration of Principles concerning Multinational Enterprises and Social Policy (the Tripartite Declaration), were adopted and remain in force.[31] The UN's Draft Code of Conduct,[32] which proposed binding provisions on transnational corporations,[33] was strongly resisted by powerful UN member states and was ultimately never adopted.[34]

In 1999, the UN launched the Global Compact to provide an international framework for companies to develop and promote global value-based management.[35] The Global Compact focuses on cooperation with the business community rather than a confrontational code-of-conduct approach. It encourages best practices and convergence in corporate practices around universally shared values.[36] Two decades after its inception, this voluntary, non-legally binding initiative lauds itself as "the world's largest sustainability initiative".[37] In 2011, the UN Human Rights Council adopted the UN Guiding Principles on Business and Human Rights (UN Guiding Principles), establishing the most authoritative statement adopted at the UN level of human rights duties of states and responsibilities of companies.[38] The principles are widely accepted by business and civil

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31 The latest updates of the guidelines are available at OECD "OECD Responsible Business Conduct: OECD Guidelines for Multinational Enterprises" (undated) https://mneguidelines.oecd.org/mneguidelines/ (accessed 2023-12-01). The Tripartite Declaration was amended in 2000, 2006, 2017 and 2022; see further ILO "Tripartite Declaration of Principles Concerning Multinational Enterprises and Social Policy" (24 March 2023) https://www.ilo.org/empent/Publications/WCMS_094386/lang--en/index.htm (accessed 2023-12-01).

32 Draft United Nations Code of Conduct on Transnational Corporations *International Legal Materials* (1983) 626–640.

33 Clause 13 of the Draft United Nations Code of Conduct on Transnational Corporations *International Legal Materials* 626–628, provided that: "[t]ransnational corporations should/shall respect human rights and fundamental freedoms in the countries they operate … [and] should/shall not discriminate on the basis of race, colour, sex, religion, language, social, national and ethnic origin or political or other opinion."

34 UN General Assembly *Report of the Economic and Social Council: Note by the Secretary General* A/47/446 (*15 September 1992*), *Forty-seventh session* par 2; UN Economic and Social Council Commission on Human Rights *The Realisation of Economic, Social and Cultural Rights: The Impact of the Activities and Working Methods of Transnational Corporations on the Full Enjoyment of All Human Rights, in Particular Economic, Social and Cultural Rights and the Right to Development, Bearing in Mind Existing International Guidelines, Rules and Standards Relating to the Subject-Matter* (*2 July 1996*) E/CN.4/Sub.2/1996/12 par 62; Khoury and Whyte *Corporate Human Rights Violations: Global Prospects for Legal Action* (2017) 29–30.

35 Morgera "The UN and Corporate Environmental Responsibility: Between International Regulation and Partnerships" 2006 15 *Review of European Community and International Environmental Law* 93–109 98.

36 *Ibid*; Kell and Ruggie "Global Markets and Social Legitimacy: The Case for the 'Global Compact'" 1999 8 *Transnational Corporations* 101–120 104.

37 United Nations Global Compact "Who We Are" (undated) https://www.unglobalcompact.org/what-is-gc_9 (accessed 2021-02-26); UN "Guide to the Global Compact: A Practical Understanding of the Vision and Nine Principles" (undated) http://www.mas-business.com/docs/global%20compact%20guide.pdf (accessed 2021-02-25) 4.

38 Human Rights Council for Human Rights and Transnational Corporations and Other Business enterprises A/HRC/RES/17/4 par 1. The UN Guiding Principles are annexed to the Report of the Special Representative of the Secretary-General on the issue of human rights and transnational corporations and other business enterprises. John Ruggie Guiding

society as a practical guide for states and companies to enhance human rights compliance in business activities.[39] There has now been a major move, spearheaded by a UN open-ended intergovernmental working group (OEIGWG), towards the development of a legally binding instrument, with the state still as the principal duty-bearer, to regulate transnational corporations and other business entities' activities in international human rights law.[40] The text of this treaty is still being negotiated.[41] This section outlined the indirect approach of international human rights law in dealing with non-state actors' conduct that threatens or violates guaranteed human rights. The following section examines how this indirect approach is evident in the African human rights system.

3 THE AFRICAN HUMAN RIGHTS SYSTEM

3 1 Overview

The African Charter is the core instrument of the African human rights system. It was adopted under the auspices of the Organisation of African Unity (now the African Union).[42] To date, almost every member of the African Union has ratified the African Charter.[43] In addition to civil and political rights, the Charter recognises economic, social, and cultural rights and collective or group rights.[44] A distinguishing attribute of the African Charter is that it does not bifurcate human rights according to generations, as was a staple of international law at the time of its drafting and adoption.

Principles on Business and Human Rights: Implementing the United Nations "Protect, Respect and Remedy" Framework (21 March 2011) A/HRC/17/31.

39 Deva and Bilchitz *Human Rights Obligations of Business: Beyond the Corporate Responsibility to Respect?* (2013) xxi–xxii.

40 See OHCHR "Open-ended Intergovernmental Working Group on Transnational Corporations and other Business Enterprises with respect to Human Rights" (undated) https://www.ohchr.org/en/hr-bodies/hrc/wg-trans-corp/igwg-on-tnc#:~:text=At%20its%2026th%20session%2C%20on,to%20elaborate%20an%20international%20legally (accessed 2023-11-27).

41 For the process and updates on the legally binding instrument to regulate, in international human rights law, the activities of transnational corporations and other business enterprises from 2015–2023; see OHCHR https://www.ohchr.org/en/hr-bodies/hrc/wg-trans-corp/igwg-on-tnc#:~:text=At%20its%2026th%20session%2C%20on,to%20elaborate%20an%20international%20legally.

42 Organisation for African Unity *Charter for the Organisation of African Unity* UNTS 1963 479 39. Adopted 25/05/1963; EIF 13/09/1963; the 2000 *Constitutive Act of the African Union* UNTS 2158 3. Adopted 11/07/2000; EIF 26/05/2001; Murray *The African Commission on Human and Peoples' Rights and International Law* (2000) 9; Heyns "The African Regional Human Rights System: The African Charter" 2004 108 *Penn State Law Review* 679 681; see Viljoen *International Human Rights Law in Africa* (2012) 152–212, for a discussion on the African Union human rights architecture.

43 With the exception of Morocco. See African Union "List of Countries Which Have Signed, Ratified/Acceded to the African Charter on Human and People's Rights" (2017) https://au.int/sites/default/files/treaties/36390-sl-african_charter_on_human_and_peoples_rights_2.pdf (accessed 2024-01-02).

44 It is beyond the scope of this article to discuss the meaning of peoples' rights. See Dersso "The Jurisprudence of the African Commission on Human and Peoples' Rights with respect to Peoples' Rights" 2006 6 *African Human Rights Law Journal* 358 358–381 and *Centre for Minority Rights Development* (*Kenya*) *and Minority Rights Group International on behalf of Endorois Welfare Council v Kenya* 276/03 (2003) 147–162.

The Charter articulates the guaranteed rights as indivisible and interdependent.[45] Notably, article 24 guarantees a right of "[a]ll peoples to a general satisfactory environment favourable to their development". The formulation of this environment right as a people's or collective right is notable because it allows for claims to be brought by groups rather than individuals. This provision may also have significant economic, social, and cultural implications, especially for communities whose physical and economic security is directly dependent on the environment and natural resources.[46] However, the dearth of case law makes examining the extent of protection that article 24 may offer such communities extremely challenging.

State Parties to the African Charter undertake a composite of negative and positive obligations to respect, protect, promote, and fulfil all of the rights in the instrument.[47] The obligation to respect requires states to refrain from interfering with the enjoyment of all guaranteed rights.[48] The obligation to protect obliges states to take measures to protect right-holders against interference from political, economic, and social sources.[49] In this regard, a state must create and enforce a domestic legal system that protects human rights and adequately responds to claims of violations.[50] Linked to this duty is the obligation to promote, under which states must ensure individuals enjoy all enshrined human rights by, for instance, promoting tolerance, raising awareness, and building infrastructure.[51] Lastly, the obligation to fulfil requires states to take steps "to move its machinery towards the actual realisation of the [guaranteed] rights".[52] This may entail directly providing basic needs like food or resources that can be used to meet basic needs.[53]

The utilisation of this typology by the African Commission implies that the realisation of each right in the African Charter by a state party may involve duties to respect, protect, promote, and fulfil. Simply put, a state party is not limited to only complying with one specific obligation.[54] Furthermore, the disaggregation of obligations benefits states in understanding their treaty

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45 See preambular paragraph 8 of the African Charter.

46 Buys and Lewis "Environmental Protection through European and African Human Rights Frameworks" 2022 26(6) *International Journal of Human Rights* 949 960.

47 *Social and Economic Rights Action Center and the Center for Economic and Social Rights v Nigeria* Communication No 155/96 (2001) par 44. For a different view on the scope of the obligations arising from article 1, see Anyangwe "Obligations of States Parties to the African Charter on Human and Peoples' Rights" 1998 10 *African Journal of International and Comparative Law* 625–659 629–635; for e.g., *George Iyanyori Kajikabi v The Arab Republic of Egypt* African Commission on Human and Peoples' Rights Communication 344/07 (7 August 2020) par 251–252, describes the positive and negative obligations imposed by article 18.

48 *Social and Economic Rights Action Center and the Center for Economic and Social Rights v Nigeria supra* par 45.

49 *Social and Economic Rights Action Center and the Center for Economic and Social Rights v Nigeria supra* par 46.

50 Anyangwe 1998 *African Journal of International and Comparative Law* 630.

51 *Social and Economic Rights Action Center and the Center for Economic and Social Rights v Nigeria supra* par 46.

52 *Social and Economic Rights Action Center and the Center for Economic and Social Rights v Nigeria supra* par 47.

53 *Ibid*.

54 Coomans "The Ogoni Case Before the African Commission on Human and Peoples' Rights" 2003 52(3) *International and Comparative Law Quarterly* 749 753.

obligations. This aids them in assessing whether their actions, policies, and practices conform with the obligations set out in the Charter. State parties must adopt necessary measures to give effect to the rights, duties, and freedoms enshrined in the Charter. If a state fails to ensure the rights in the Charter, this may constitute a violation regardless of whether the state or its agents are not the immediate cause of the violation.[55]

State parties can be held accountable for violations of the African Charter through complaints brought before the African Commission or the African Court on Human and Peoples' Rights (African Court). The African Commission provides mechanisms for inter-state and individual communications and a state reporting procedure.[56] The individual communications procedure provides the clearest possibility of holding state parties accountable for their commitments under the African Charter.[57] Through this procedure, individuals and non-governmental organisations (NGOs) can bring matters against one or more states before the Commission.[58] Without a "victim" requirement, the complainants are not obligated to show that they are directly affected by the alleged breach.[59] Moreover, it is not even necessary for the party filing a complaint to be a citizen of or be registered in a state that is a state party to the Charter or in the state against which the communication is made.[60] Consequently, NGOs based in other states are also permitted to bring matters before the Commission.[61] Generally, the findings of this quasi-judicial body are regarded as recommendatory and thus not legally binding.[62] This may explain the relationship between the African Commission and State Parties, which is mired by defiance, with the latter facing the slightest consequences for non-compliance with the African Commission's recommendations.[63]

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55 *Mouvement Burkinabe des Droits de l'Homme et des Peuples v Burkina Faso* Communication No 207/1997 (2001) par 42.

56 Art 47–54, 55–59, 62 of the African Charter.

57 Viljoen *International Human Rights Law in Africa* 300.

58 Art 55 of the African Charter.

59 Centre for Human Rights *Guide to the African Human Rights System* (2021) 24.

60 Centre for Human Rights *Guide to the African Human Rights System* 25.

61 See *Amnesty International v Zambia* Communication No 212/98 (1999) and *Social and Economic Rights Action Center and the Center for Economic and Social Rights v Nigeria supra.*

62 Viljoen "From a Cat into a Lion? An Overview of the Progress and Challenges of the African Human Right System at the African Commission's 25 Year Mark" 2013 17 *Law, Democracy and Development* 298 301; however, see Viljoen and Louw "The Status of the Findings of the African Commission: From Moral Persuasion to Legal Obligation" 2004 48 *Journal of African Law* 1–22 who argue these findings may be viewed as legally binding; Viljoen *International Human Rights in Africa* 339; Murray *The African Commission on Human and Peoples' Rights and International Law* 54–55.

63 Okoloise "Circumventing Obstacles to the Implementation of Recommendations by the African Commission on Human and Peoples' Rights" 2018 18 *African Human Rights Law Journal* 27 28; Viljoen and Louw "State Compliance with the Recommendations of the African Commission on Human and Peoples' Rights, 1994–2004" 2007 101 *The American Journal of International Law* 1–34 12; see also Viljoen *International Human Rights Law: Six Decades after the UDHR and Beyond* (2010) 411–430; Viljoen *International Human Rights in Africa* 414.

In 1998, a Protocol to the African Charter established the African Court.[64] The relationship between the African Commission and the African Court is not settled as the Protocol establishing the court merely states that the latter body will "complement the protective mandate of the African Commission".[65] An avenue through which the court accomplishes this is when the African Commission concludes a case on the merits and determines that a state party to the Protocol establishing the court has violated the African Charter. If the state fails to comply with the Commission's findings, the African Commission may refer the case to the African Court. This route is only applicable if the individual or NGO has first submitted a communication to the African Commission and the state alleged to be in breach of the Charter has ratified the Protocol establishing the court.[66] Like the African Commission, individuals may submit cases directly to the African Court but only if the state has made a declaration under article 34(6) of the Protocol establishing the court. However, NGOs must have observer status to submit complaints to the African Court.[67]

In 2008, the African Court of Justice and Human Rights was created based on the need for efficiency and cost-effectiveness in the regional judicial system.[68] Once its founding Protocol comes into force, this new court will replace the African Court and the Court of Justice of the African Union.[69] However, it remains to be seen how the African Court of Justice and Human Rights will take up the contentious jurisdiction and advisory functions of the latter two bodies.[70] While the decisions of the African Court are legally binding, this judicial body faces resistance from State Parties, which

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64 Protocol to the African Charter on Human and Peoples' Rights on the Establishment of an African Court on Human and Peoples' Rights (1998/2004). Adopted 10/06/1998; EIF: 25/01/2004; see Fennell and Andoni *The African Court on Human and Peoples: Basic Documents* (2014), for a short history of the court and the basic documents related to the operations of the court.

65 Art 2 of the Protocol to the African Charter on Human and Peoples' Rights on the Establishment of an African Court on Human and Peoples' Rights; Murray *The African Commission on Human and Peoples' Rights and International Law* 28; see Centre for Human Rights *Guide to the African Human Rights System* 64–64 which sets out further aspects of the relationship between the African Court and the African Commission.

66 Art 34(6) of the Protocol to the African Charter on Human and Peoples' Rights on the Establishment of an African Court on Human and Peoples' Rights and Rule 39(1) of the African Court of Human and Peoples' Rights: Rules of Court (2020); Centre for Human Rights *Guide to the African Human Rights System* (2021) 24.

67 Art 5(3) of the Protocol to the African Charter on Human and Peoples' Rights on the Establishment of an African Court on Human and Peoples' Rights.

68 Art 2 of the Protocol on the Statute of the African Court of Justice and Human Rights. Adopted 1/07/2008 EIF: not yet; Ouguergous "The African Court of Justice and Human Rights" in Yusuf and Ouguergous (eds) *The African Union: Legal and Institutional Framework* (2012) 120.

69 Art 2 of the Protocol on the Statute of the African Court of Justice and Human Rights; the Protocol requires 15 ratifications to enter into force and it currently has 8, https://au.int/sites/default/files/treaties/36396-sl-PROTOCOL%20ON%20THE%20STATUTE%20OF%20THE%20AFRICAN%20COURT%20OF%20JUSTICE%20AND%20HUMAN%20RIGHTS.pdf (accessed 2021-08-08); see also Dugard, Du Plessis, Maluwa and Tladi *Dugard's International Law: A South African Law* 5ed (2018) 831, for a discussion on the additional protocol adopted to expand the criminal division of the African Court of Justice and Human Rights.

70 Ouguergous in Yusuf and Ouguergous *The African Union: Legal and Institutional Framework* 120.

dampens any optimism that its judgements will improve states' compliance with treaty obligations.[71] The following section examines how the African Commission dealt with non-state actors implicated in the communications brought before it. As previously stated, the emphasis is on African Commission jurisprudence, which rendered the most significant decision regarding the right to a healthy environment.

3 2 The African Commission and non-state actors

While the African Charter does not impose direct human rights obligations on non-state actors, the African Commission has recognised the fact that non-state actors can commit human rights abuses.[72] In the face of allegations of human rights abuses by non-state actors, the African Commission has emphasised the state's duty to protect. The first complaint considered on the merits that implicated a non-state actor was *Commission nationale des droits de l'Homme et des libertés v Chad*.[73] The complainants argued that government agents committed violations and that "the State had failed to protect the rights in the Charter from violation by other parties".[74] The state claimed that "it had no control over violations committed by other parties".[75] The African Commission held Chad responsible for violations of the African Charter for failing "to provide security and stability in the country, thereby allowing serious and massive violations of human rights".[76] The Commission emphasised that the immediate cause of the violation need not be the state or its agents.[77] This rationale was echoed in *Amnesty International v Sudan*.[78] The Commission held that although thousands of other executions in Sudan were not the work of government forces, the government still bore "a responsibility to protect all people residing under its jurisdiction".[79]

Before turning to the *SERAC* decision, it is worth noting that the African Commission, through its Working Group on Extractive Industries,

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71 Viljoen 2013 *Law, Democracy and Development* 301; Viljoen and Louw *The American Journal of International Law* 32; see Daly and Wiebusch "The African Court on Human and Peoples' Rights: Mapping Resistance Against a Young Court" 2018 14 *International Journal of Law in Context* 294–313.

72 *Sudan Human Rights Organisations, Centre on Housing Rights and Evictions v The Sudan* Communication No 279/03, 296/05 28th Session AAR Annex (Nov 2009–May 2019) par 148; *Zimbabwe Human Rights NGO Forum v Zimbabwe Communication* 245/02 par 141 and 143; *Social and Economic Rights Action Center and the Center for Economic and Social Rights v Nigeria supra* par 55, 58 and 61.

73 Communication 74/92 (1995); SAIFAC "The State Duty to Protect, Corporate Obligations and Extra-territorial Application in the African Regional Human Rights Systems" (2010) https://media.business-humanrights.org/media/documents/f6d9723bf8058ce0ee910577a969a61d3fc88b90.pdf (accessed 2022-09-25) 15.

74 *Commission nationale des droits de l'Homme et des libertés v Chad* (English translation) *supra* par 18.

75 *Commission nationale des droits de l'Homme et des libertés v Chad* (English translation) *supra* par 19.

76 *Commission nationale des droits de l'Homme et des libertés v Chad* (English translation) *supra* par 22.

77 *Commission nationale des droits de l'Homme et des libertés v Chad* (English translation) *supra* par 20.

78 Communication No. 48/90, 50/91, 89/93 (1999).

79 *Amnesty International v Sudan supra* par 50.

Environment and Human Rights in Africa (the Working Group on EIEHR), has asserted that article 27 of the African Charter, which sets out duties of individuals, provides a clear legislative basis for direct obligations of business enterprises towards rights holders.[80] Article 27(2) of the African Charter obligates individuals to exercise rights "with due regard to the rights of others".[81] Therefore, "if this obligation can be imposed on individuals, there is an even stronger moral and legal basis for attributing these obligations to corporations and companies."[82] The Working Group on EIEHR further explains that, on this basis, the State Reporting Guidelines on Articles 21 and 24 clarify the obligations of business enterprises.[83] While recognising that states are the primary duty bearers under the African Charter, business enterprises may also have negative and positive obligations towards rights holders.[84]

Business enterprises have a direct negative obligation based on the principle of "do no harm" or, in its positive formulation, the principle of due diligence.[85] In this regard, business enterprises must be vigilant in clearly understanding the nature and impact of their activities, "take the required measures for preventing their activities from having adverse human rights impacts, and put in place mechanisms for rectifying any negative human rights impacts arising from their activities or actions".[86] To determine the extent of the impact of their activities, these enterprises ought to conduct human rights impact assessments, which consider the rights of vulnerable people and groups and appropriately consult those groups and individuals.[87] If breaches occur because of business enterprises' activities or actions, all administrative, civil, and criminal responsibilities must ensue.[88] In addition, business enterprises must ensure that the activities or actions undertaken on their behalf or for their benefit do not interfere with or cause harm to

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80 African Commission on Human and Peoples' Rights "Advisory Note to the African group in Geneva on the legally binding instrument to regulate in international human rights law, the activities of transnational corporations and other business enterprises" (undated) https://www.achpr.org/public/Document/file/English/Advisory%20note%20Africa%20Group%20UN%20Treaty.ENG.pdf (accessed 2022-10-04) 4.

81 Art 27(2) of the African Charter reads, "[t]he rights and freedoms of each individual shall be exercised with due regard to the rights of others, collective security, morality and common interest."

82 African Commission on Human and Peoples' Rights https://www.achpr.org/public/Document/file/English/Advisory%20note%20Africa%20Group%20UN%20Treaty.ENG.pdf 4.

83 *Ibid*.

84 African Commission on Human and Peoples' Rights "State Reporting Guidelines on Articles 21 and 24 of the African Charter relating to Extractive Industries, Human Rights and the Environment" adopted in May 2018.

85 African Commission on Human and Peoples' Rights "State Reporting Guidelines on Articles 21 and 24 of the African Charter relating to Extractive Industries, Human Rights and the Environment" par 57.

86 African Commission on Human and Peoples' Rights "State Reporting Guidelines on Articles 21 and 24 of the African Charter relating to Extractive Industries, Human Rights and the Environment" par 58.

87 *Ibid*.

88 African Commission on Human and Peoples' Rights "State Reporting Guidelines on Articles 21 and 24 of the African Charter relating to Extractive Industries, Human Rights and the Environment" par 59.

protected rights.[89] This indirect negative obligation means that should these activities or actions result in curtailment or interference with guaranteed rights, there must be repercussions for the business enterprise of an administrative, civil, and or criminal nature.[90]

The Working Group identified two sets of positive obligations that business enterprises may bear. The first set relates to a range of fiscal and transparency requirements arising from business enterprises' operations.[91] For example, business enterprises must disclose the financial terms of agreements relating to license fees, taxes, customs duties, royalties, and shares due to the state in terms of the contract and the applicable laws in that state.[92] The second set of positive obligations arises from the social and economic impacts of the operations of business enterprises on a host community as well as the land and natural resource rights of the affected people.[93] In their business operations, these entities should adequately consult and inform the affected community regarding all activities or decisions that may significantly impact the communities.[94] Additionally, when implementing such activities, people's concerns must be considered, and the requisite cautionary measures must be taken to mitigate such impacts.[95] In this regard, business enterprises must carry out environmental, social, and human rights impact assessments before undertaking any actions that may adversely affect a local community, with the participation and representation of the affected community.[96]

Business entities also have positive obligations to contribute to the development needs of their host communities based on the social and economic impacts of their operations and their power.[97] For an enterprise in the extractive sector, the scope of these obligations may include:

> "supporting community-based employment and economic diversification to reduce reliance on the extractive industries as the sole source of income, educational, health, agricultural or pastoral development projects, as well as providing access to mine facilities and infrastructure. [Also], once the extractive operations have come to an end, to support the transition of affected people to reliance on alternative livelihoods".[98]

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89 African Commission on Human and Peoples' Rights "State Reporting Guidelines on Articles 21 and 24 of the African Charter relating to Extractive Industries, Human Rights and the Environment" par 62.

90 *Ibid.*

91 African Commission on Human and Peoples' Rights "State Reporting Guidelines on Articles 21 and 24 of the African Charter relating to Extractive Industries, Human Rights and the Environment" par 63.

92 *Ibid.*

93 African Commission on Human and Peoples' Rights "State Reporting Guidelines on Articles 21 and 24 of the African Charter relating to Extractive Industries, Human Rights and the Environment" par 64.

94 *Ibid.*

95 *Ibid.*

96 *Ibid.*

97 African Commission on Human and Peoples' Rights "State Reporting Guidelines on Articles 21 and 24 of the African Charter relating to Extractive Industries, Human Rights and the Environment" par 65.

98 *Ibid.*

The Working Group on EIEHR emphasised that the above obligations are legal obligations and not merely a social responsibility of business enterprises.[99] As an example of best practice, the Group cited several provisions of South Africa's Mineral and Petroleum Resources Development Act (MPRDA), which require a mining company to submit a social and labour plan in their application for mining rights.[100] Although the Working Group's elaboration of positive and negative obligations does not bind State Parties to the African Charter, it further disaggregates state obligations into guidance that enables states to implement the necessary measures to safeguard the rights enshrined in articles 21 and 24 for those under their jurisdiction. Furthermore, it is improbable that these obligations are subject to horizontal justiciability before the African Commission. However, complainants may attempt to compel corporations to comply with these obligations by initiating legal proceedings against the state for failing to regulate and enforce compliance with the obligations.

3 3 The *SERAC* decision

In the celebrated *SERAC* decision, the Commission implicated a corporation in the violation of human rights through the state's duty to protect.[101] The complaint in *SERAC* was lodged by two NGOs,[102] on behalf of the Ogoni people; they alleged that through the state oil company, the Nigerian National Petroleum Company (NNPC), the military government of Nigeria was a majority shareholder in a consortium with the Shell Petroleum Development Corporation (SPDC).[103] The communication alleged that this oil consortium exploited oil reserves in Ogoniland in a manner that contaminated the environment, thus causing environmental degradation and health problems for the Ogoni communities.[104]

Specifically, it was alleged that the Nigerian government played a direct role in the air, water, and soil contamination that negatively impacted the health of the Ogoni communities. It also neglected to protect the Ogoni communities against the harm caused by the consortium and instead employed its security forces to facilitate damage. In addition, the government failed to provide or permit studies of potential or actual environmental and health risks caused by the oil consortium.[105] Finally, the government disregarded the concerns of Ogoni communities regarding oil development and prohibited environmental organisations and scientists from entering

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99 *Ibid*.

100 See s 23(h), 24(3), 25(2), 28(2) and 85(3) of the Mineral Resources and Petroleum Development Act 28 of 2002.

101 *Social and Economic Rights Action Center and the Center for Economic and Social Rights v Nigeria supra*.

102 The Social and Economic Rights Action Center (Nigeria) and the Center for Economic and Social Rights (USA). See *Social and Economic Rights Action Center and the Center for Economic and Social Rights v Nigeria supra* par 49.

103 *Social and Economic Rights Action Center and the Center for Economic and Social Rights v Nigeria supra* par 1.

104 *Social and Economic Rights Action Center and the Center for Economic and Social Rights v Nigeria supra* see generally par 1–9.

105 *Social and Economic Rights Action Center and the Center for Economic and Social Rights v Nigeria supra* par 5 and 50.

Ogoniland to conduct such research. In response to the protests, the government resorted to massive violence and executed Ogoni leaders.[106] It was argued that this conduct constituted violations of several rights, including article 16 (right to health), article 21 (right of peoples to dispose of their wealth and natural resources freely), and article 24 (right of people to a satisfactory environment) of the African Charter.[107] The section focuses on the Commission's handling of the right to a healthy environment and the scope of the state's obligation to protect arising from article 21.

The Commission held that the right to a healthy environment enshrined in article 24 of the African Charter obliges states to refrain from directly threatening the environment of their citizens, for instance, through practices, policies, or legal measures.[108] Additionally, states must "take reasonable and other measures to prevent pollution and ecological degradation, to promote conservation and to secure an ecologically sustainable development and use of natural resources."[109] These measures must include

> "ordering or at least permitting independent scientific monitoring of threatened environments, requiring and publicising environment and social impact studies prior to any major industrial development, undertaking appropriate monitoring and providing information to those communities exposed to hazardous materials and activities and providing meaningful opportunities for individuals to be heard and to participate in the development of decisions affecting their communities".[110]

The Commission focused on providing procedural steps that State Parties must take to comply with their obligations under article 24. These measures are supposed to protect the environment and human rights in a mutually reinforcing manner, as evidenced by the fact that a right to a clean and safe environment is closely linked to economic and social rights insofar as the environment affects the quality of life and safety of the individual.[111] The

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106 *Social and Economic Rights Action Center and the Center for Economic and Social Rights v Nigeria supra* par 5.

107 *Social and Economic Rights Action Center and the Center for Economic and Social Rights v Nigeria supra* par 10; art 18 of the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women. Adopted 11/07/2003; EIF: 25/11/2005, entrenches a right for women to live in a healthy and sustainable environment.

108 *Social and Economic Rights Action Center and the Center for Economic and Social Rights v Nigeria supra* par 52. The African Court also confirmed the right to a healthy environment in *African Commission on Human and Peoples' Rights v Republic of Kenya* Application No 006/2012 (26 May 2017) par 199.

109 *Social and Economic Rights Action Center and the Center for Economic and Social Rights v Nigeria supra* par 52; in delimiting the scope of the right to a healthy environment in the Inter-American human rights system, the Inter-American Court quoted the African Commission with approval; see Inter-American Court of Human Rights *Advisory Opinion OC-23/17 The Environment and Human Rights* (*State Obligations in Relations to the Environment in the Context of the Protection and Guarantee of the Rights to Life and Personal Integrity: Interpretation and Scope of Articles 4*(*1*) *and 5*(*1*) *in Relation to Articles 1*(*1*) *and 2 of the American Convention on Human Rights*) (15 November 2019) par 61.

110 *Social and Economic Rights Action Center and the Center for Economic and Social Rights v Nigeria supra* par 53.

111 *Social and Economic Rights Action Center and the Center for Economic and Social Rights v Nigeria supra* par 1, 2 and 52.

Commission found Nigeria in breach of article 24 because, in this case, the measures were not taken, thus leaving the victims with no protection.[112]

Despite the apparent involvement of a non-state actor in the oil consortium, the Commission's decision focused on the state's duty to protect its citizens from damaging acts emanating from private parties. Turning to the violation of article 21, it was found that governments must protect their citizens through appropriate legislation and effective enforcement and protect them from damaging acts that private parties may perpetrate.[113] The Commission then concluded that despite the Nigerian government's obligation to protect, this government had given "the green light to private actors", specifically oil companies, "to devastatingly affect the well-being of Ogonis".[114]

As mentioned earlier, the African Commission, through the Working Group on EIEHR, further elaborates on the obligations of a state party to the Charter in specific relation to business entities arising from article 24 in the State Reporting Guidelines on that article. In a positive sense, the African Commission guides states by further disaggregating their obligations into measures that the state can implement to realise article 24. These measures also provide a yardstick for rights-holders or other interested parties to assess a state's practices, policies, or measures to determine if there is a threat or actual violation of their enshrined right to a healthy environment. In a negative sense, the African Commission's jurisprudence is not binding on states. This reality diminishes the impact of the *SERAC* decision and the subsequent soft law guidance.

Another disheartening conclusion regarding the *SERAC* decision is that the decision was handed down more than two decades ago. The Commission has not dealt with article 24 rights in a similar expansive manner, perhaps lending credence to the view that the right to a healthy environment in the African context is largely aspirational, offering little practical benefit in securing effective environmental protection. This conclusion is alarming because the extractive industry is the backbone of many African economies.[115] Consequently, the interaction between people, corporations, and the environment is inevitable, resulting in devastating effects for people and the environment. Moreover, if states fail to implement and enforce the required measures to uphold the rights articulated in article

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112 *Social and Economic Rights Action Center and the Center for Economic and Social Rights v Nigeria supra* par 54.

113 *Social and Economic Rights Action Center and the Center for Economic and Social Rights v Nigeria supra* par 57. To substantiate its reading of a positive obligation into article 21, the Commission cited itself in *Commission nationale des droits de l'Homme et des libertés v Chad* and the Inter-American Court's decision in *Velasquez-Rodriguez v Honduras* (Forced Disappearance and Death of Individual in Honduras) 1989 28 *International Legal Materials* and the European Court of Human Right's decision in *X and Y v The Netherlands* Application No. 8978/80 European Court of Human Rights (26 March 1985).

114 *Social and Economic Rights Action Center and the Center for Economic and Social Rights v Nigeria supra* par 58; furthermore, the Commission also held that in the context of the right to food, the Nigerian government had allowed private oil companies to destroy food sources and through terror has created significant obstacles for the Ogoni people to try feed themselves. *Social and Economic Rights Action Center and the Center for Economic and Social Rights v Nigeria supra* par 61.

115 Buys and Lewis 2022 *International Journal of Human Rights* 969.

24, corporate perpetrators will continue to act without facing any consequences.

On a more positive note, the African Court can address this compliance issue by fulfilling its mandate to complement the protective mandate of the African Commission. This may occur if a state fails to comply with the African Commission's recommendations; that state may be referred to the African Court for a binding and enforceable decision on the matter. A foreseeable hurdle to this avenue is that not all African Union members are party to the Protocol establishing the Court. As a result, complaints against states that are not party to the Protocol establishing the Court can only end at the African Commission. Furthermore, with few states allowing direct access to the African Court through the article 34(6) declaration, the Court's role is further constrained.

4 CONCLUSION

Globalisation has expanded the capacity of corporations to cause environmental harm and impact the lives of individuals. The African human rights system has recognised this complex relationship between corporations, host communities, and the environment, which has been marred by human rights violations. While historically, states have been the primary duty-bearers, the growing power of corporations necessitates reconsidering this paradigm. But while the debate regarding whether the dominant framework for corporate accountability, international human rights law, needs an overhaul is a topic for another article, this one demonstrated how the African human rights system holds the state responsible for protecting individuals under its jurisdiction against corporate interference with their right to a healthy environment. The *SERAC* decision showed how the African human rights system permits victims to hold the state responsible for violations perpetrated by a corporation. Although the African Commission refrained from imposing direct obligations on the corporation, it did not shy away from acknowledging its complicity in human rights violations.

In *SERAC*, the African Commission also provided guidance on the measures state parties must take to protect individuals' and peoples' right to a healthy environment. These measures include independent scientific monitoring, publicising environmental and social impact studies before major industrial projects, monitoring hazardous activities, providing information to affected communities, and allowing meaningful public participation. At a minimum, victims are left without protection if these measures are not taken. Furthermore, under the auspices of the Working Group, the African Commission proactively provides guidance that applies to corporations on the positive and negative obligations they bear under article 24. Although these obligations are formulated as soft law, states may incorporate them in their domestic law, thus creating binding, direct obligations on corporations. In light of these findings, the African human rights system has taken progressive steps to foster a culture of accountability among corporations operating on the continent. However, the primary enforcer of this accountability remains the state.

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